

SOAH DOCKET NO. 582-07-0105
TCEQ DOCKET NO. 2005-2018-MWD-E

2007 JUL 26 PM 1:12

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

§
§
§
§
§
§
§
§
§

BEFORE THE STATE OFFICE
OF THE ATTORNEY GENERAL

vs.

CLEAR LAKE CITY WATER
AUTHORITY D/B/A ROBERT T.
SAVELY WATER RECLAMATION
FACILITY

OF

ADMINISTRATIVE HEARINGS

RECEIVED
STATE OFFICE OF
ADMINISTRATIVE HEARINGS
2007 JUL 26 10:55 AM

**BRIEF OF CLEAR LAKE CITY WATER AUTHORITY
TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

TO THE HONORABLE COMMISSION:

The Clear Lake City Water Authority ("CLCWA" or "Water Authority") files this Brief in response to the July 6, 2007, Proposal for Decision of the Honorable Administrative Law Judge in the above-captioned proceeding.

SUMMARY OF PROPOSAL FOR DECISION

1. After initially addressing the procedural history involving the self-reporting obligations being fulfilled by the Water Authority and the Permit effluent limitations being exceeded in its self-reporting forms, in the well-written Proposal for Decision, the Administrative Law Judge ("ALJ"), with infrequent exception, points out the unique situation in which Respondent Water Authority found itself as a result of fulfilling its self-reporting obligations. The ALJ ably and accurately noted that

The testimony was clear and uncontradicted that Respondent Water Authority initially took samples from every lift station in the system in an effort to identify the source of the problem and prevent future discharges in excess of the permit limit. (PFD pg. 9)

2. Further, at the same point in its argument and analysis, the ALJ correctly points out that,

. . .the Commission can consider the impossibility of compliance in this case to be one of those “other matters as justice may require” for purposes of reducing or ***eliminating the penalty***. The evidence establishes that there were no reasonable corrective measures that Respondent could have taken to prevent the discharges in question, which were only slightly higher than the Permit limit and well below the standard limits for potable and nonpotable water sources. Furthermore, Respondent remains unable to prevent future discharges above the current copper limit. (PDF pg. 9) [emphasis supplied]

3. Finally, in the Conclusion,

The ALJ suggests that the Commissioners consider an exercise of discretion to mitigate the penalty calculated by the ED, due to the impossibility of compliance by Respondent. (PDF pg. 10)

Thereafter, the ALJ provides Proposed Findings of Fact and Conclusions of Law in its Proposed Order for the Commission.

FINDINGS OF FACT

4. The permit exceedances self-reported by Respondent were, albeit in excess of the permit limitations, of quite modest proportions. (FOF 3, 4) There was no demonstration of actual harm shown to have resulted from either of the violations. (FOF 12) The Water Authority attempted to take corrective action to prevent further violations, but was unable to determine the source of the pollutant. (FOF 13) Perhaps, most crucially of all of the Findings of Fact by the ALJ were those included in Findings of Fact 14 through 17.

5. In summary, the ALJ found that the Water Authority cannot comply with the permit's copper limit since it does not have heavy metal treatment capability and, furthermore, that it is not economically feasible for the Water Authority to obtain such capability. (FOF 14) The cited violations were not intentional and Respondent was unable to prevent them from occurring. (FOF 15) The discharges were below standards for potable and nonpotable water sources. (FOF 16)

CONCLUSIONS OF LAW

6. In the Conclusions of Law, the ALJ carefully notes that the Commission may exercise its discretion to reduce the administrative penalty assessed against Respondent. Implicit in such discretion is the discretion to eliminate the administrative penalty. (COL 11) Perhaps even more crucial than any of the Conclusions of Law of the ALJ is that contained in Conclusion of Law 12, wherein the ALJ provides that,

Because Respondent remains incapable of compliance with the permit's copper limit, ***no corrective action should be required*** until Respondent has had a reasonable opportunity to complete its WER study and have its copper limit reviewed by the Commission. [Emphasis added]

PROPOSED ORDER

7. Under the well-written Proposal for Decision of the ALJ, Respondent CLCWA respectfully submits that the assessment of any administrative penalty under the circumstances and situations highlighted by the ALJ is unwarranted. It is hard to imagine a more compelling circumstance facing the Commission in its statutory and regulatory authority to consider the reduction or elimination of the penalty as suggested by the ALJ at page 9 of the Proposal for Decision. Respondent Water Authority respectfully submits that, under the circumstances presented, elimination of the penalty

is the only appropriate action that the Commission should consider. Otherwise, the message which would be sent, should a penalty be assessed, even in a reduced amount, can only engender a sense of hopelessness and despair on the part of any party discharging into the waters of the State of Texas. Such message would not be one to generate pride on the part of the Texas Commission on Environmental Quality.

PRAYER

8. It is for these reasons that the Clear Lake City Water Authority respectfully urges that the assessment of any administrative penalty against it under the circumstances is unwarranted and, furthermore, that the Respondent CLCWA be allowed a reasonable amount of time to potentially establish its entitlement to a permit effluent limitation modification for copper.

Respectfully submitted,

SCHWEINLE & PARISH, P.C.

By: 

William E. Schweinle, Jr.
TBA No. 17876000
440 Louisiana Ste 1400
Houston, Texas 77002
713-654-4111
713-655-9485

ATTORNEYS FOR CLEAR LAKE CITY
WATER AUTHORITY D/B/A ROBERT
SAVELY WATER RECLAMATION
FACILITY

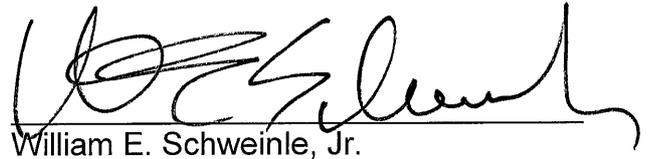
CERTIFICATE OF SERVICE

I certify that the Brief of Clear Lake City Water Authority was served via overnight delivery or facsimile on the 25th day of July, as follows:

Office of the Chief Clerk
SOAH Docket Clerk
P. O. Box 13087, MC 105
Austin, Texas 78711-3087
512-475-4994 (fax)

Lena Roberts
TCEQ Office of Executive Director
P. O. Box 13087, MC 175
Austin, Texas 78711-3087
512-239-3434 (fax)

Blas Coy
Office of Public Interest Counsel
P. O. Box 13087, MC 103
Austin, Texas 78711-3087
512-239-6377 (fax)



William E. Schweinle, Jr.

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2007 JUL 26 PM 1:12
CHIEF CLERKS OFFICE