

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 26, 2008

CHIEF CLERKS OFFICE

2008 SEP 26 PM 1:05

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-08-1792; TCEQ Docket No.206-1304-PWS-W; In Re: Executive Director of the Texas Commission on Environmental Quality v. Peach Creek Dam and Lake Club

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than Thursday, October 16, 2008. Any replies to exceptions or briefs must be filed in the same manner no later than Monday, October 27, 2008.

This matter has been designated TCEQ Docket No.206-1304-PWS-W; SOAH Docket No. 582-08-1792; All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink that reads "Sarah G. Ramos".

Sarah, G. Ramos
Administrative Law Judge

SGR:cm
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: PEACH CREEK DAM & LAKE CLUB
SOAH DOCKET NUMBER: 582-08-1792
REFERRING AGENCY CASE: 2006-1304-PWS-W

STATE OFFICE OF ADMINISTRATIVE HEARINGS **ADMINISTRATIVE LAW JUDGE**
ALJ SARAH G. RAMOS

REPRESENTATIVE / ADDRESS **PARTIES**

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PEACH CREEK DAM & LAKE CLUB

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-08-1792
TCEQ DOCKET NO. 2006-1304-PWS-E

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 SEP 26 PM 1:05

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Petitioner

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BEFORE THE STATE OFFICE CHIEF CLERKS OFFICE

OF

V.

PEACH CREEK DAM
AND LAKE CLUB,
Respondent

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) alleges that Peach Creek Dam and Lake Club (Peach Creek or Respondent) failed to conduct bacteriological monitoring for 28 months, notify its members of this failure, and pay its public health service fees. The ED asks the Commission to enter an order assessing an administrative penalty of \$8,964 against Peach Creek. Peach Creek argues that the person who previously managed Peach Creek is responsible for the failures, new management is complying with requirements, and Peach Creek does not have funds to pay the recommended penalty.

Based on the evidence, the Administrative Law Judge (ALJ) finds that the allegations have been proven but disagrees with the proposed penalty. The ALJ recommends imposing a lesser penalty, in part because Peach Creek's members were misled by past management. Therefore, the ALJ recommends a penalty of \$1,400. Further, the ALJ recommends that Peach Creek be ordered to take corrective action by paying its outstanding public health service fees.

II. NOTICE, JURISDICTION, AND PROCEDURAL HISTORY

Notice and jurisdiction were not disputed. The proposed order contains the necessary findings of fact and conclusion of law concerning these issues.

An ALJ granted the parties' joint motion to waive appearance at the preliminary hearing and adopted their agreed hearing schedule. The hearing on the merits convened on July 30, 2008, at the State Office of Administrative Hearings, 300 W. 15th St., Austin, Texas. Laurencia N. Fasoyiro, an attorney in the Commission's Litigation Division, represented the ED, and Harold G. Bradham, Peach Creek's president, represented Respondent.

III. BACKGROUND

A non-profit entity, Peach Creek was formed in 1968 to provide water, street, and park services to a 70-lot subdivision located on two streets in Patton Village in southeastern Montgomery County, Texas. Peach Creek has 51 service connections, 45 of which are active. The system serves at least 25 people per day for at least 60 days per year and provides water for human consumption. As such, Peach Creek is a public water system as defined in 30 TAC § 290.38(47). The system has one well with a two-inch line and a five horsepower pump. Mr. Bradham, a long-time homeowner in the area, became Peach Creek's president in January 2006. He obtained an operator's license, purchased a new chlorine pump, and spends significant amounts of time maintaining the system.

IV. THE VIOLATIONS

At least once per month, the owner or manager of a public water system that supplies water to less than 25,000 persons must submit to the Commission a water specimen for

bacteriological analysis.¹ Similarly, Commission rules require a public water system to submit monthly coliform sampling.² When the sampling is not done, the owner or operator must notify the persons served by the system.³

Sally Paramo, a TCEQ Natural Resources Specialist, testified that Peach Creek failed to conduct routine bacteriological monitoring of the public water supply and also failed to provide public notice of the failure to perform the monitoring from September 2003 through December 2005. Further, Ms. Paramo said TCEQ's staff sends a notice of violation letter every month to a system that is not in compliance.

Peach Creek also failed to pay its public health service fees for 2004-2006. Rebecca Clausewitz, TCEQ Enforcement Coordinator, testified that, as of July 1, 2008, Peach Creek owed fees of \$793.26.⁴ The fees are required from every public water system, and late fees are assessed when the fees are not timely paid.⁵

Mr. Bradham's testimony shed light on the reasons Peach Creek failed to comply with statutory and regulatory requirements. He said another person, Vickie Pamela Munoz, was handling and controlling Peach Creek in 2003-2005. She did not call for a directors meeting and told the members that all problems were taken care of. Yet, Ms. Munoz neither sent statements to members nor kept records. A water company was maintaining the system and charged Peach Creek \$300 a month for its services.

In January 2006, Peach Creek's electricity was turned off because it had not paid its electric bill. That month, Mr. Bradham accepted responsibility for Peach Creek; since then, all

¹ TEX. HEALTH & SAFETY CODE ANN. (Health & Safety Code) § 341.033(d).

² 30 TEX. ADMIN. CODE (TAC) § 290.109(c)(2)(A)(ii).

³ 30 TAC § 290.122(c)(2)(A).

⁴ ED Ex. H.

⁵ 30 TAC § 290.51(a)(3) and TEX. WATER CODE ANN. (Water Code) § 5.702.

required monitoring has been performed. He was unaware that public health service fees had not been paid and said some records had not been changed to show his address.

The ED acknowledged that Peach Creek has different leadership and now complies with bacteriological monitoring requirements. Nevertheless, the ED argued that Peach Creek, as an entity, remains responsible for the past failures.

V. THE PENALTY

To determine an appropriate penalty, which can be as high as \$10,000 a day for each violation, various factors are to be considered, as outlined in Health & Safety Code § 341.049 and Water Code § 7.053. To implement the statutory requirements, the Commission adopted a penalty policy in September 2002 (Penalty Policy).

The Water Code § 7.053 factors to consider in determining the penalty amount are:

- (1) the nature, circumstances, extent, duration, and gravity of the prohibited act, with special emphasis on the impairment of existing water rights or the hazard or potential hazard created to the health or safety of the public;
- (2) the impact of the violation on . . . (D) affected persons;
- (3) with respect to the alleged violator:
 - (A) the history and extent of previous violations;
 - (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
 - (C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
 - (D) economic benefit gained through the violation; and
 - (E) the amount necessary to deter future violations; and
- (4) any other matters that justice may require.

Applying the Penalty Policy, the ED determined that Peach Creek should pay a \$16,800 penalty for failing to conduct bacteriological monitoring. The ED did not recommend a separate penalty for the failure to give public notice about the monitoring. Also, the health service fees include late fees, so the ED did not request a penalty for that violation.

As Ms. Clausewitz testified, the proposed penalty assumes:

- Peach Creek's failure to conduct bacteriological monitoring is a potentially major violation; there was no evidence of actual contamination, but customers could have become ill from bacteria because of the failure to perform monitoring;
- Peach Creek failed to perform required monitoring for 28 months (from September 2003 through December 2005);
- Peach Creek experienced an economic benefit by saving the cost of bacteriological monitoring; and
- Justice does not require a further penalty adjustment.

Paige Seidenberger, TCEQ Financial Analyst, reviewed Peach Creek's tax returns, bank statements, and profit and loss statements to determine whether Peach Creek would be able to pay the penalty. Initially, Ms. Seidenberger determined that Peach Creek could pay the entire penalty of \$16,800 based on the 2002 Penalty Policy. However, after she reviewed additional information, including data regarding the median household income (MHI) in the area, she changed her determination and found that:

- homeowners can pay up to 2% of their MHI for water service;
- Peach Creek can pay a \$8,964 penalty over three years with \$100 payable in months 1-12, \$275 payable in months 13-24, and \$372 payable in months 25-36; and
- even though 28% of Peach Creek's members do not pay their dues each month, that delinquency rate will improve because Mr. Bradham has begun terminating service to non-paying households. The facility will have a 15% delinquency rate in the first year, a 10% rate in the second year, and a 5% rate in the third year.

In 2006, Peach Creek collected \$8,686 in dues and had \$12,575 in expenses. Based on data provided for the first eight months in 2007, it appeared to Ms. Seidenberger that collections and expenses would be about the same in 2007. Citing a 1999 survey made by a community resource group, Ms. Seidenberger noted that the MHI for Patton Village residents is only 60% of the MHI in Texas.

Presently, Peach Creek's monthly dues of \$20 a month are used to pay not only for water but also for street and park services. About \$5.50 per month of each club member's dues is apportioned for water. Assuming the full \$20 a month was collected from the 45 active service connections and allotted exclusively to water service, total revenue would be \$10,800 ($\$20 \times 45 = \$10,800$). Mr. Bradham has been acting without compensation. For her analysis, Ms. Seidenberger assumed the water company was rehired to operate the club and expenses were annually increased for inflation. Based on these assumptions, Ms. Seidenberger projected annual expenses for the next three years to be \$16,175, \$16,547, \$16,928. In order for Peach Creek to have sufficient funds to pay the penalty while maintaining operations, it would have to increase the portion attributable to water services to \$42 in the first year, \$49 in the second year, and \$52 in the third year, Ms. Seidenberger stated. The Commission has typically considered water and sewer rates of up to 2% of medical household income (MHI) as affordable. The ED's requested minimum penalty would be 2.1% of MHI for the first year and 2.0% for the second and third years.

Peach Creek did not dispute the more specific penalty factors. However, Mr. Bradham argued that it is unfair to require Peach Creek to pay the penalty which is based solely on the failure of past leadership. Several times when Peach Creek's bank account was overdrawn or equipment failed and there were no funds to pay for repairs, Mr. Bradham has used his personal funds to maintain the system. Peach Creek now owes him about \$1,500. In addition, the system has had trouble collecting from its customers, about one-third of whom are renters. Mr. Bradham asked that the case be dismissed so that Peach Creek will have operating funds available until it can get a rate increase. Mr. Bradham has been told that it will take 60-90 days

to get new rates approved. Peach Creek also needs to pay the health services fees and upgrade its system.

In response, the ED argued that the proposed penalty is to be assessed against the entity, not the individual members. Accordingly, the penalty was properly calculated and reviewed in light of Peach Creek's ability to pay. Under these circumstances, the ED asserted it is just to levy the proposed penalty against Peach Creek.

VI. ALJ'S RECOMMENDATION

The evidence clearly established the violations, but the ALJ recommends a significantly lower penalty because justice requires it. Peach Creek's prior management misled members about the failure to correctly manage the system. The Health and Safety Code places the burden of bacteriological monitoring on the "owner *or manager* of a water supply system." There was no evidence that Peach Creek's members were negligent in relying on its manager who told them the water system was taken care of and who hired a water company to operate the system.

Moreover, the reason for monitoring requirements is to protect the public – the same persons who are now being asked to pay a penalty. While it is legally correct that, as a non-profit corporation, Peach Creek remains responsible for its conduct, Peach Creek's only income comes from its members. There was no evidence that the system's users were culpable or that they could have anticipated and avoided the failure to monitor the water. As soon as the problems became known, *i.e.*, when Peach Creek's electricity was turned off, Mr. Bradham acted to rectify the situation and also began complying with monitoring requirements.

In addition, since Peach Creek is now terminating service to those members who do not pay their monthly dues, the ED's calculations assumed that the payment delinquency rate will improve. But it is also possible that some users whose accounts are delinquent will not pay to reinstate their service, particularly as rates increase. This would place an increased burden of

paying a penalty on the remaining water users, which could increase the payment per household to more than 2% of MHI if the ED's recommended penalty were imposed.

There was ample evidence of Peach Creek's weak financial position; its expenses in 2006 and 2007 exceeded its income by almost \$4,000. Without a rate increase, Peach Creek cannot pay any penalty, and it will take some time for Peach Creek to secure a rate increase. If a rate increase is approved, a significant portion of the increased payments would be used to pay the penalty rather than to improve the drinking water system.

For these reasons, the ALJ recommends that a much smaller penalty of \$1,400 be imposed on Peach Creek. This amount recognizes the 28 violations at \$50 each but also accounts for the minimal culpability of Peach Creek's current members and the fact that they are the ones the monitoring requirements were designed to protect. The smaller penalty will allow the facility to use some of its funds to improve its system. Given Peach Creek's income and fairly small number of active connections, payment of the penalty will act as a deterrent against future violations. In addition, the ALJ recommends that Peach Creek be ordered to pay its public health service fees, which Peach Creek has committed to do.

SIGNED September 26, 2008.



SARAH G. RAMOS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER
Assessing Administrative Penalties Against
PEACH CREEK DAM AND LAKE CLUB
TCEQ DOCKET NO. 2006-1304-PWS-E
SOAH DOCKET NO. 582-08-1792

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Peach Creek Dam and Lake Club (Peach Creek). A Proposal for Decision (PFD) was presented by Sarah G. Ramos, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. A non-profit entity, Peach Creek was formed in 1968 to provide water, street, and park services to a 70-lot subdivision located on two streets in Patton Village in southeastern Montgomery County, Texas.
2. Peach Creek has 51 service connections, 45 of which are active.

3. Peach Creek serves at least 25 people per day for at least 60 days per year and provides water for human consumption.
4. Peach Creek is a public water system as defined in 30 TAC § 290.38(47).
5. During the 28 months from September 2003 through December 2005, Peach Creek failed to submit to the Commission a public water supply specimen for bacteriological analysis, as required by TEX. HEALTH & SAFETY CODE ANN. (Health & Safety Code) § 341.033(d) and 30 TEX. ADMIN. CODE (TAC) § 290.109(c)(2)(A)(ii).
6. During the same 28 months in which Peach Creek failed to conduct routine bacteriological monitoring, it also failed to provide public notice of the failure to perform the monitoring, which is required by 30 TAC § 290.122(c)(2)(A).
7. Peach Creek failed to pay its public health service fees for 2004-2006, as required by 30 TAC § 290.51(a)(3) and TEX. WATER CODE ANN. (Water Code) § 5.702.
8. As of July 1, 2008, Peach Creek owed public health service fees of \$793.26.
9. The Commission adopted a penalty policy in September 2002 (Penalty Policy). Under the Penalty Policy, the ED determined that:
 - a. Peach Creek's failure to conduct routine bacteriological monitoring is a potentially major violation;
 - b. using a base penalty of \$1,000 multiplied by 25% to account for the potential, major nature of the violation, the base penalty for each violation should be \$250;
 - c. Peach Creek committed 28 violations, and 28 times \$250 is \$7,000;
 - d. the base penalty should be increased by 140% (\$9,800) because Peach Creek committed the same violation numerous times;

- e. the economic benefit of non-compliance was \$1,610, but no enhancement is required based on this factor;
 - f. no penalty for the failure to pay public health service fees is required because late fees are charged when those fees are not timely paid; and
 - g. a penalty of \$16,800 is reasonable and appropriate under the Penalty Policy.
10. Peach Creek does not have the financial ability to pay the full amount of the penalty.
 11. Homeowners can pay up to 2% of their median household income for water service.
 12. Based on the median household income in Peach Creek's area and assuming that none of the 45 active service connections are terminated, Peach Creek could pay a penalty of \$8,964 over three years if Peach Creek increased its water rates to \$42 in the first year, \$49 in second year, and \$52 in the third year.
 13. It will take 60-90 days for Peach Creek to secure a rate increase.
 14. At present, 28% of households that are supplied water by Peach Creek do not pay their dues each month.
 15. If some users whose services are terminated because of non-payment do not pay to have service reinstated, the remaining Peach Creek members would bear an increased burden of paying the penalty, and this, in turn, could increase the payment per household to more than 2% of median household income.
 16. Peach Creek was unaware that its public health service fees were not paid, and it has committed to paying those fees.

17. Peach Creek's prior management hired a water company to manage the system, misled its members by assuring them that everything pertaining to the water system was being taken care of, and did not call director's meetings.
18. There was no evidence that Peach Creek's members were negligent in relying on Peach Creek's prior management.
19. The failure of Peach Creek's prior management to conduct bacteriological monitoring could have caused significant health problems for those who use the system.
20. In January 2006, when the problems with prior management became apparent, Peach Creek's members acted to rectify the situation and began complying with bacteriological monitoring requirements.
21. In 2006, Peach Creek collected \$8,686 in dues and had \$12,575 in expenses, and based on projections, its income and expenses would have been about the same in 2007.
22. The median household income for Patton Village residents is only 60% of that in Texas.
23. Justice requires a further penalty adjustment.
24. A \$1,400 penalty amounts to \$50 for each of the 28 months when monitoring was not conducted.
25. A \$1,400 penalty would deter future violations, given the small size of Peach Creek's water system and its limited resources.
26. On January 24, 2007, the ED issued the EDPRP and mailed it to Peach Creek at its last address of record with the Commission.

27. On March 21, 2007, Peach Creek requested a hearing on the ED's allegations.
28. On February 5, 2008, the ED asked the Commission's Chief Clerk to refer this case to SOAH for hearing, which she did.
29. On February 21, 2008, the Chief Clerk mailed a notice of hearing to Peach Creek, the ED, and the Office of Public Interest Counsel.
30. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
31. On March 20, 2008, an ALJ issued Order No. 1, setting to case for hearing on July 30, 2008.
32. On July 30, 2008, the ALJ convened the hearing as indicated in the notice. Laurencia N. Fasoyiro, an attorney in the Commission's Litigation Division, represented the ED, and Harold G. Bradham, Peach Creek's president, represented Respondent. The hearing concluded and the record closed on that date.

II. CONCLUSIONS OF LAW

1. As authorized by Health & Safety Code § 341.049 and Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of those Codes within the Commission's jurisdiction or of any rule, order, or permit adopted or issued under those Codes.
2. Under Water Code § 7.052, the penalty may not exceed \$10,000 a day for each violation.

3. Peach Creek has come into compliance with its bacteriological monitoring but should be ordered to pay its outstanding public health service fees.
4. As required by Water Code § 7.055 and the Commissions rules, Peach Creek was notified of the EDPRP and of the opportunity to request a hearing on the alleged violation, the penalty, and the corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. (Gov't Code) §§ 2001.051 and 2001.052, Water Code § 7.058, and the Commission's rules, Peach Creek was notified of the hearing on the alleged violations and the proposed penalties.
6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to Gov't Code ch. 2003.
7. Based on the Findings of Fact and Conclusions of Law, Peach Creek violated Health & Safety Code § 341.033(d) and 30 TAC §§ 290.109(c)(2)(A)(ii) and 290.122(c)(2)(A) by failing to conduct bacteriological monitoring of its public water supply for 28 months and failing to give public notice of that fact.
8. Based on the Findings of Fact and Conclusions of Law, Peach Creek violated 30 TAC § 290.51(a)(3) and Water Code § 5.702 by failing to pay its public health service fees.
9. Based on the above Findings of Fact and Conclusions of Law, Peach Creek should pay a \$1,400 penalty.

III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Peach Creek shall pay an administrative penalty in the amount of \$1,400 by paying \$100 a month for 14 months.
2. Within 120 days after the effective date of this Order, Peach Creek shall submit documentation to the TCEQ showing that it has paid its outstanding public health service fees.
3. Payment of the administrative penalty and compliance with the required corrective action will resolve the violations set forth by this Order.
4. Checks rendered to pay penalties imposed by this Order shall be made out to TCEQ. Administrative penalty payments shall be sent with the notation Re: *Peach Creek Dam and Lake Club*; TCEQ Docket No. 2006-1304-PWS-E to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

5. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Peach Creek if the ED determines that Peach Creek has not complied with one or more of the terms or conditions in this Commission Order.

6. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
7. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code § 2001.144.
8. As required by Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Peach Creek.
9. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Buddy Garcia, Chairman
For the Commission