

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Glenn Shankle, *Executive Director*



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 21, 2008

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC 105
Austin, Texas 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 MAR 21 AM 11:18
CHIEF CLERKS OFFICE

Re: Executive Director's Response to Exceptions
Double Diamond Utilities Co. dba White Bluff Community Water System;
RN101233120; TCEQ Docket No. 2006-1730-PWS-E; SOAH Docket No. 582-07-3289

Dear Ms. Castañuela:

Enclosed for filing is the original and eleven copies of the Executive Director's Response to Double Diamond Utilities Co. dba White Bluff Community Water System's Exceptions to Proposal for Decision ("Response to Exceptions").

Enclosed please also find one copy of this letter to you, one copy of the Executive Director's Response to Exceptions, and one copy of the letter to the Administrative Law Judge. Please file stamp these documents and return them to Benjamin Thompson, Attorney, Litigation Division, MC 175. If you have any questions or comments, please call me at (512) 239-1297.

Sincerely,

A handwritten signature in black ink, appearing to read "B. O. Thompson".

Benjamin O. Thompson
Attorney
Litigation Division

Enclosures

cc: Mr. Ali Abazari, Jackson Walker, LLP, 100 Congress Ave., Austin, Texas 78701
Mr. Marlin Bullard, Enforcement Division, TCEQ, MC R-9
Mr. Frank Burleson, Waco Regional Office, TCEQ, MC R-9
Blas Coy, Public Interest Counsel, TCEQ, MC 103

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 21, 2008

**Via Interagency mail, and
Via Facsimile Transmission to: (512) 475-4994**

The Honorable Thomas H. Walston
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
Austin, Texas 78701

Re: The Executive Director's Response to Double Diamond Utilities Co. dba White Bluff Community Water System's Exceptions to Proposal for Decision;
Double Diamond Utilities Co. dba White Bluff Community Water System;
TCEQ Docket No. 2006-1730-PWST-E; SOAH Docket No. 582-07-3289

To The Honorable Judge Walston:

Please find enclosed a copy of the Executive Director's Response to Double Diamond Utilities Co. dba White Bluff Community Water System's Exceptions to Proposal for Decision. These pleadings are being filed in response to your Proposal for Decision signed on February 26, 2008. If you have any questions or comments, please call me at (512) 239-1297.

Sincerely,

A handwritten signature in black ink, appearing to be "B. O. Thompson".

Benjamin O. Thompson
Attorney
Litigation Division

Enclosures

cc: Office of the Chief Clerk, MC 105
Blas Coy, Public Interest Counsel, TCEQ, MC 103
Mr. Ali Abazari, Jackson Walker, LLP, 100 Congress Ave., Austin, Texas 78701

TEXAS
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**SOAH DOCKET NO. 582-07-3289
TCEQ DOCKET NO. 2006-1730-PWS-E**

**EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER**

VS.

**DOUBLE DIAMOND UTILITIES CO.
DBA WHITE BLUFF COMMUNITY
WATER SYSTEM,
RESPONDENT**

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S RESPONSE TO DOUBLE DIAMOND UTILITIES
CO. DBA WHITE BLUFF COMMUNITY WATER SYSTEM'S EXCEPTIONS TO
PROPOSAL FOR DECISION**

COMES NOW the Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or "Commission"), represented by the Litigation Division, and files this Response to Double Diamond Utilities Co. dba White Bluff Community Water System's Exceptions to Proposal for Decision. In support thereof, the Executive Director would show the following:

STATEMENT OF THE CASE

The Respondent owns and operates a public water system subject to TCEQ jurisdiction located at 16 White Bluff Drive, in Whitney, Hill County, Texas. At the time of the violation, the Respondent's system served approximately 446 customers, all residents of the White Bluff Resort, an upscale gated community operated by the Respondent's parent company.

TCEQ rules require the operator of a public water system to issue a boil water notification to its customers within 24 hours of the pressure in any part of the distribution system falling below 20 pounds per square inch ("psi"). 30 TEX. ADMIN. CODE § 290.46(q). The Executive Director has proven by a preponderance of the evidence that on June 9, 2006, the pressure in at least a portion of the Respondent's distribution system fell significantly below 20 psi, yet the respondent failed to issue a boil water notice until June 13 or 14, 2006. This conclusion is supported by the sworn affidavits and testimony of two of the Respondent's customers, as well as the sworn testimony of a TCEQ investigator.

The Executive Director and the Administrative Law Judge ("ALJ") have recommended an administrative penalty of two hundred fifty dollars (\$250) and that the Commission order the Respondent to implement procedures to ensure future compliance with 30 Tex. Admin. Code § 290.46(q). The TCEQ enforcement coordinator who developed this case provided detailed testimony under direct and cross examination supporting the suggested penalty and corrective action.

RESPONSE TO EXCEPTIONS

In its exceptions, the Respondent has attempted to summarize the testimony of Milton Bergman and John Weatherman. *See* Respondent's Exceptions to Proposal for Decision at p. 3. However, the Respondent has conveniently omitted significant details to bolster its contention that the Executive Director has not met the burden of proof.

The Respondent disregards that Mr. Weatherman testified that on the morning of June 9, 2006, he observed zero water pressure at his residence. *See* Proposal For Decision at p. 4. On its own, this fact strongly indicates that a portion of the distribution system dropped below 20 psi on the morning of June 9, 2006.

The Respondent also seeks to limit the discussion of this incident only to the system pressure on June 9, and disregard the system pressure on June 10 – 13. The Respondent pointed out at the hearing that the Executive Director did not specifically state in the pleadings an allegation of the system pressure falling below 20 psi on any specific date other than June 9. However, comparing Mr. Bergman's and Mr. Weatherman's documented observations over this period of time substantially bolsters the credibility of Mr. Weatherman's testimony and affidavit. The ALJ commented that the complete loss of water pressure at both Mr. Bergman's and Mr. Weatherman's residences on the morning of June 10 indicates a problem with the distribution system, and not with Mr. Weatherman's plumbing, as suggested by the Respondent. *See* Proposal for Decision p. 9. In comparing Mr. Bergman's and Mr. Weatherman's independent observations of low pressure patterns over this four day period, it is clear that this was a problem affecting a significant portion of the system, and not confined solely to Mr. Weatherman's residence.

The Respondent then suggests that since no other complaints were received from residents in the immediate vicinity of Mr. Bergman's and Mr. Weatherman's residences, the Commission should conclude that the water pressure at all of these residences was above 20 psi.

The Executive Director should not be expected to speculate on the numerous possible explanations for why any particular person might *not* submit a complaint. It defies all reasonable logic to interpret the absence of a complaint for low water pressure from a particular residence as conclusive proof of adequate water pressure at that residence. Therefore, Respondent's argument that since five of the Respondent's 446 customers complained and two testified at the hearing, the Executive Director has not met the burden of proof is without merit.

The Respondent also complains that the Executive Director relies too heavily on observations of water pressure at the complainants' residences. Mike Angel, the TCEQ investigator, testified in detail about the reasons why TCEQ relies on pressure readings at the complainant's residence, rather than making a direct measurement on the service line.

Mr. Angel testified that if there is no other water running at the residence, and there is no equipment (such as a filter) in the supply line which might affect water pressure, there should be no significant difference between the water pressure at a residence, and the water pressure in the main leading into that residence. Mr. Angel testified that when he conducted his investigation at Mr. Weatherman's residence on June 13, 2006, there was no other water running at the residence, and no indication of any conditions at Mr. Weatherman's residence that would contribute to lower pressure observed at the residence than what would be present in the distribution system. At the hearing, Mr. Weatherman testified that when he measured the water pressure at his house, there was no other water running, and that he had no filters or any other equipment installed that would diminish his water pressure. Mr. Bergman also testified that he

has no filters or other equipment installed in his water line, and that there was no other water running at his residence when he documented the low water pressure and water outages.

Mr. Angel also testified that it is impractical for TCEQ investigators to take pressure readings directly off the distribution system. Mr. Angel stated that there usually is not a valve in the actual water main accessible to TCEQ investigators and close enough to the complainant's residence to accurately verify a complaint of low water pressure. Also, Mr. Angel testified that it is the TCEQ's policy to keep the identity of a complainant confidential. Even if there might be an accessible valve close enough to the complainant's residence, gaining access to that valve would almost certainly require identifying the complainant to the water system operator, in violation of TCEQ policy.

PRAYER

WHEREFORE, the Executive Director submits his Response to Double Diamond Utilities Co. dba White Bluff Community Water System' Exceptions, as set forth above, and respectfully requests that each of the Respondent's exceptions be denied and that the Commission adopt the Proposal for Decision and Order as recommended by the ALJ.

Respectfully submitted,

Texas Commission on Environmental Quality

Glenn Shankle
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Mary R. Risner, Division Director
Litigation Division

By: 
Benjamin O. Thompson
State Bar of Texas No. 24056429
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: (512) 239-3400
Fax: (512) 239-3434

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2008, the original and eleven (11) copies of the foregoing "Executive Director's Response to Double Diamond Utilities Co. dba White Bluff Community Water System' Exceptions to Proposal for Decision" ("Response to Exceptions") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

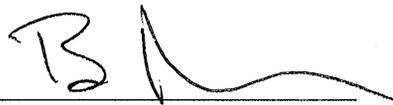
I further certify that on this day a true and correct copy of the foregoing Response to Exceptions was sent via fax to (512) 391-2197 and mailed via Certified Mail, return receipt requested (Article No. 7000 0520 0022 7534 4344), to:

Ali Abazari
Jackson Walker, LLP
100 Congress, Ave. Suite 1100
Austin, Texas 78701

I further certify that on this day a true and correct copy of the foregoing Response to Exceptions was hand-delivered, to Blas Coy, Jr., Office of the Public Interest Counsel, Texas Commission on Environmental Quality - MC 103.

I further certify that on this day a true and correct copy of the foregoing Response to Exceptions was sent via fax to 512/475-4994 and mailed via inter agency mail, to:

The Honorable Thomas H. Walston
Administrative Law Judge
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
Austin, Texas 78701



Benjamin O. Thompson
Attorney
Litigation Division
Texas Commission on Environmental Quality