

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

February 6, 2009

CHIEF CLERKS OFFICE

2009 FEB - 6 PM 1:08

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. 582-09-0132; TCEQ Docket No. 2007-0766-DIS-E;
Executive Director of the Texas Commission on Environmental Quality v.
Salt Fork Underground Water Conservation District

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 February 26, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than March 9, 2009.

This matter has been designated **TCEQ Docket No. 2007-0766-DIS-E; SOAH Docket No. 582-09-0132**. 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 seven 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,

Tommy L. Broyles
Administrative Law Judge

TLB/lr

Enclosures

xc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

300 West 15th Street Suite 502

Austin, Texas 78701

Phone: (512) 475-4993

Fax: (512) 475-4994

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: SALT FORK UNDERGROUND WATER CONSERVATION DISTRICT
SOAH DOCKET NUMBER: 582-09-0132
REFERRING AGENCY CASE: 2007-0766-DIS-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE

ALJ CAROL WOOD

REPRESENTATIVE / ADDRESS

PARTIES

BLAS J. COY, JR.
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
OFFICE OF PUBLIC INTEREST COUNSEL
P.O. BOX 13087, MC-103
AUSTIN, TX 78711-3087
(512) 239-6363 (PH)
(512) 239-6377 (FAX)
bcoy@tceq.state.tx.us

OFFICE OF PUBLIC INTEREST COUNSEL

JIM SALLANS
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
LITIGATION DIVISION
MC-175 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-2053 (PH)
(512) 239-3434 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

TCEQ CHIEF CLERK
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
MC-173 P.O. BOX 13087
AUSTIN, TX 78711-3087

(512) 239-3311 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

JIM GUESS
PRESIDENT
SALT FORK UNDERGROUND WATER CONSERVATION
DISTRICT
PO BOX 6
JAYTON, TX 79528
(806) 237-2160 (PH)

SALT FORK UNDERGROUND WATER CONSERVATION
DISTRICT

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-09-0132
TCEQ DOCKET NO. 2007-0766-DIS-E

2009 FEB -6 PM 1:08

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

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BEFORE THE STATE OFFICE OF THE CHIEF CLERKS OFFICE

V.

OF

SALT FORK UNDERGROUND
WATER CONSERVATION DISTRICT

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to dissolve the Salt Fork Underground Water Conservation District (Respondent or District) for violating 30 TEX. ADMIN. CODE §§ 293.20(d) and 293.22(a)(5). The ED alleges that the District is non-operational and is not actively engaged in achieving the objectives of its management plan.

Respondent requested a contested case hearing on the ED's allegations and recommendations, so this matter was referred to the State Office of Administrative Hearings (SOAH). However, after being properly notified of the date of the preliminary hearing, Respondent failed to appear. Therefore, as set out below, the Administrative Law Judge (ALJ) recommends that the Commission enter a default judgment against Respondent, deem as true the facts alleged by the ED, and issue an Order dissolving the District.

ALJ Carol Wood presided over the hearing in this case, but she has left SOAH. ALJ Tommy L. Broyles reviewed the record and prepared this Proposal for Decision.

II. NOTICE

On November 7, 2008, the Commission issued the notice of hearing to Respondent by certified mail, return receipt requested, and by first class mail. The notice of hearing included the ED's First Amended Preliminary Report and Petition (EDFARP) and was sent to the President of the District and to each board member of record.¹ All of the notices, except one, were claimed.² On November 6 and 13, 2008, notice of the hearing on the dissolution of the conservation district was published in the *Texas Spur*, a newspaper regularly circulated in Kent County, Texas. The published notice contained language notifying Respondent that a default order would be entered if it failed to attend the hearing.

III. VIOLATIONS

Since its creation under chapter 36 of the Texas Water Code (Water Code), Respondent has operated the conservation district. On May 1, 2006 and July 14, 2006, the TCEQ Groundwater Assessment Team requested documentation from Respondent demonstrating that Respondent's management plan was being implemented and enforced. The documentation was to include: (1) copies of articles published by the local newspaper; (2) signed Board meeting minutes on the consultation of the Palmer Drought Severity Index and the Drought Preparedness Council Situation Report; (3) registration and permit forms for all new wells registered with and permitted by the conservation district; and (4) any groundwater analysis requested by well owners.

¹ The ED his First Amended Report and Petition as required by § 7.054 of the Water Code and recommended that the Commission dissolve the District and transfer all its records and remaining funds to the Commissioners Court of Kent County.

² Commission rules permit service of the notice of hearing by mail to the party's last known address. 30 TEX. ADMIN. CODE § 293.20. Districts are required to submit to the ED written notification of the name, mailing address, and date of expiration of term of office of any elected or appointed director within 30 days after the date of the election or appointment according to § 36.054(e) of the Texas Water Code.

Respondent failed to produce the requested documentation, thus confirming the State Auditor's determination that the District was "not operational" in accordance with the goals of its management plan and § 36.302 of the Water Code. Moreover, by failing to respond to the ED and demonstrate that the groundwater management plan was being implemented, Respondent violated 30 TEX. ADMIN. CODE §§ 293.20(d) and 293.22(a)(5)³. The Commission is thus authorized to take action, including dissolving the conservation district, pursuant to § 36.303 of the Water Code.

IV. DEFAULT JUDGMENT

On December 9, 2008, the preliminary hearing was convened. The ED appeared and was represented by Counsel. Respondent did not appear and did not file a request for continuance or reason for its failure to participate.

The ALJ concludes that, pursuant to the applicable rules of the TCEQ and SOAH, default judgment is appropriate.⁴ The rules specify that default judgment may be entered upon adequate proof that proper notice was provided to the defaulting party. As set forth above, requisite notice was provided. Accordingly, the ALJ recommends that the Commission deem the allegations of the ED as true and issue the Findings of Fact and Conclusions of Law set forth in the attached Order.

SIGNED February 6, 2009.



TOMMY A. BROYLES
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

³ TEX. ADMIN. CODE §§ 293.20(d) concerns a violation of failing to respond to the ED's request for documentation and 293.22(a)(5) lays out the grounds for a noncompliance review with Ch. 36 of the Water Code and establishes the associated enforcement action.

⁴ See 30 TEX. ADMIN. CODE § 70.106 and 1 TEX. ADMIN. CODE § 155.55

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**Granting Dissolution of Salt Fork Underground Water Conservation District
TCEQ Docket No. 2007-0766-DIS-E
SOAH Docket No. 582-09-0132**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Report and Petition (First Amended EDRP) recommending that the Commission enter an order dissolving the Salt Fork Underground Water Conservation District (Respondent or District). The Executive Director (ED) of TCEQ, Represented by James W. Sallans of the Litigation Division appeared at the hearing. Respondent did not appear at the hearing and did not file for a continuance or otherwise explain its lack of participation. The ED requested that a default order be entered against Respondent and a proposal for decision (PFD) was prepared by an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), after a public hearing on this matter that convened on December 9, 2008 in Austin, Texas. After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. At the time of the violations, Respondent operated a ground water conservation district in Kent County, Texas).
2. The District was created under chapter 36 of the TEXAS WATER CODE.
3. On May 1, 2006 and July 14, 2006, the TCEQ Groundwater Assessment Team requested the following documentation to demonstrate that Respondent's Management Plan was being implemented and enforced:
 - a. Copies of the articles published by the local newspaper and the date of Publication;
 - b. Copies of the signed Board meeting minutes on the results of consultation of the Palmer Drought Severity Index and Drought Preparedness Council Situation Report;
 - c. A copy of registration and permit forms for all new wells registered with and permitted by the District; and
 - d. Copies of any groundwater analysis requested by well owners.
4. Respondent did not supply documentation to demonstrate that its groundwater management plan was being implemented.
5. The District is not operational and is not engaged in achieving the objectives of its ground water management plan.
6. Respondent received notice of the ED's findings and alleged violations on February 16, 2007.
7. On May 29, 2008, the ED filed his First Amended Report and Petition (EDFARP) and mailed a copy of it via first class mail and certified mail to Respondent.
8. On July 7, 2008, Respondent filed an answer to the EDFARP disputing the violations and requesting that the matter be referred to SOAH.
9. On September 10, 2008, the TCEQ referred the case to SOAH.

10. On November 7, 2008, notice of a December 9, 2008 hearing and of the EDFARP was sent to the President of Salt Fork Underground Water Conservation District and to each of the members of the Board by U.S. mail, first class and by certified mail, return receipt requested.
11. A preliminary hearing was held at 10:00 am on December 9, 2008. Neither Respondent nor a representative of Respondent appeared.
12. After the hearing, the ALJ who had presided left employment at SOAH. This case was reassigned to another SOAH ALJ who reviewed the record and prepared the PFD.
13. The notice of hearing:
 - a. Indicated the time, date, place, and nature of the hearing;
 - b. Stated the legal authority and jurisdiction for the hearing;
 - c. Indicated the statutes and rules the ED alleged Respondent violated;
 - d. Referred to the EDFARP, a copy of which was attached, which indicated the matters asserted by the ED; and
 - e. Advised Respondent, in at least 12-point bold-faced type, that failure to appear would result in the factual allegations contained in the notice and EDFARP being deemed as true and the relief sought in the notice possibly being granted by default.
14. All copies of the Notice and EDFARP sent via certified mail were claimed, except that sent to Roy Chism, Board Director, Salt Fork Underground Water Conservation District. None of the "wrappers" sent via first class mail was returned.
15. Kassi Atkinson, Advertising Director for the *Texas Spur*, provided an Affidavit of Publication stating that the Notice of Hearing and the Dissolution of the Salt Fork Underground Water Conservation District was published for two consecutive weeks in a publication regularly published or circulated in Kent County. The dates of publication were November 6, 2008 and November 13, 2008.
16. On December 9, 2008, the ALJ convened the preliminary hearing and jurisdiction was taken. The ED appeared through counsel of record, but Respondent did not appear.

17. Based on Respondent's failure to appear and proof of appropriate notice of the proceeding, the ED moved for a default judgment against Respondent.
18. The District is non operational and is not actively engaged in achieving the objectives of its management plan, as alleged by the ED.

II. CONCLUSIONS OF LAW

1. Respondent is subject to the enforcement jurisdiction of the TCEQ pursuant to TEX. WATER CODE § 7.002 because the violations alleged are within the TCEQ's general jurisdiction pursuant to TEX. WATER CODE § 5.013, as they involve violations of the state's water district program.
2. Under TEX. WATER CODE §§ 36.302 and 36.303, the Commission may take certain actions, including dissolving the District, when a District has been deemed non-operational.
3. The Commission is required to take action if a district fails to be actively engaged and operational in achieving objectives of its ground water management plan, 30 TEX. ADMIN. CODE § 293.22(a).
4. As required by TEX. GOVT. CODE § 2001.052 and 30 TEX. ADMIN. CODE §§ 1.11, 70.104 and 80.6. Respondent was notified of the EDFARP and the opportunity to request a hearing on the alleged violations.
5. Proper notice was provided specifically related to the dissolution of the District as required by 30 TEX. ADMIN. CODE § 293.22(d)(1) and (d)(2) and TEX. WATER CODE § 36.305.

6. Additionally, Respondent was notified, in accordance with 1 TEX. ADMIN. CODE § 155.55 and 30 TEX. ADMIN. CODE § 70.106(b) and 80.113(d) that if it failed to appear at the hearing, a default judgment could be rendered against Respondent in which all the Allegations contained in the notice of hearing would be deemed admitted as true.
7. As required by TEX. GOVT. CODE § 201.052, TEX. WATER CODE § 36.305, 1 TEX. ADMIN. CODE § 155.401 and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations, and the proposed dissolution of the District.
8. 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 TEX. GOVT. CODE ch. 2003.
9. Based on the above Findings of Fact and Conclusions of Law, a default judgment should be entered against Respondent in accordance with 1 TEX. ADMIN. CODE § 155.501 and 30 TEX. ADMIN. CODE § 70.106(b).
10. Based on the above Findings of Fact and Conclusions of Law, the allegations contained in the notice of the hearing, including those in the EDFARP attached thereto, are admitted as true.
11. Based on the above Findings of Fact and Conclusions of Law, Respondent violated 30 TEX. ADMIN. CODE §§ 293.20(d) and 293.22(a)(5).
12. The appropriate remedy is the dissolution of the District for alleged violations under 30 TEX. ADMIN. CODE §§ 293.20(d) and 22(a)(5).

13. Based on the above Findings of Fact and as set out in TEX. WATER CODE § 36.302, the District is non operational and is not actively engaged in achieving the objectives of the District's management plan and should be dissolved pursuant to TEX. WATER CODE § 36.303.

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. On the effective date of this Commission Order, the Salt Fork Underground Water Conservation District is dissolved
2. Within 90 days after the effective date of this Commission Order, Respondent shall take any action necessary to comply with the dissolution of the District and transfer all records and any remaining funds to the Commissioners Court of Kent County.
3. Within 120 days after the effective date of this Commission Order, Salt Fork Underground Water Conservation District shall submit certification of the dissolution and transfer to:

Mr. Kelly Mills
Team Leader
Ground Water Planning and Assessment Team, MC 147
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

4. 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 the Respondent if the ED determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
5. 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.
6. The effective date of this Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOVT. CODE § 2001.144
7. As required by TEX. WATER CODE § 36.308, the commission's Chief Clerk shall forward a certified copy of this Order to Respondent.
8. 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