

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

August 12, 2008

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

CHIEF CLERKS OFFICE

2008 AUG 12 PM 1:15

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: SOAH Docket No. 582-08-2960; TCEQ Docket No.2007-1805-PWS-E; In
Re:The Executive Director of the Texas Commission on Environmental Quality,
Petitioner v. Mark Stewart and Dona Stewart d/b/a Stewart Water

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 **September 2, 2008**. Any replies to exceptions or briefs must be filed in the same manner no later than **September 12, 2008**.

This matter has been designated **TCEQ Docket No. 2007-1805-PWS-E; SOAH Docket No.582-08-2960**. 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 "Thomas H. Walston".

Thomas H. Walston
Administrative Law Judge

THW/nl
Enclosures
cc: Mailing List

William P. Clements Building
Post Office Box 13025 ◆ 300 West 15th Street, Suite 502 ◆ Austin Texas 78711-3025
(512) 475-4993 Docket (512) 475-3445 Fax (512) 475-4994
<http://www.soah.state.tx.us>

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

**300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: MARK STEWART AND DONA STEWARD / STEWART WATER
SOAH DOCKET NUMBER: 582-08-2960
REFERRING AGENCY CASE: 2007-1805-PWS-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ WILLIAM G. NEWCHURCH**

REPRESENTATIVE / ADDRESS

PARTIES

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EXECUTIVE DIRECTOR

MARK AND DONA STEWART
D/B/A STEWART WATER
4432 EARLY MORN DR.
PLANO, TX 75093

D/B/A STEWART WATER

xc: Docket Clerk, State Office of Administrative Hearings

SOAH DOCKET NO. 582-08-2960
TCEQ DOCKET NO. 2007-1805-PWS-E

THE EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
Petitioner

V.

MARK STEWART AND DONA STEWART
D/B/A STEWART WATER,
Respondents

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARING

CHIEF CLERKS OFFICE

2008 AUG 12 PM 1:55

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) brought this enforcement action alleging that Mark Stewart and Dona Stewart d/b/a Stewart Water (Respondents) violated the environmental laws and regulations that apply to the state's public water suppliers, as well as a previous order issued by the Commission. The ED requests assessment of an administrative penalty of \$8,601.00 and requests that the Commission order Respondents to undertake corrective actions as are necessary to bring their community public water supply system (Facility) into compliance with the TEX. HEALTH & SAFETY CODE ANN. and applicable Commission rules.

As set out below, the Administrative Law Judge (ALJ) recommends that the Commission issue a default order against Respondents, deem as true the facts alleged by the ED, find that Respondents committed the alleged violations, assess the penalty requested by the ED, and require Respondents to take specified corrective actions.

II. PROCEDURAL HISTORY AND JURISDICTION

The ED's Preliminary Report and Petition (EDPRP) was sent to Respondents on February 20, 2008. By letter dated March 10, 2008, Respondents requested an administrative hearing on the EDPRP. The ED made a formal request to refer the matter to the State Office of Administrative Hearings (SOAH) on April 30, 2008. Pursuant to proper notice, a public hearing on the ED's petition was convened on June 12, 2008, before ALJ Thomas H. Walston. Respondents did not appear at the hearing and were not represented at the hearing, nor did Respondents provide the ALJ with any explanation for their absence. Kathleen Decker, Staff Attorney, appeared for the ED and moved for a default due to Respondents' unexplained failure to appear at the hearing. The ALJ granted the ED's motion.

III. NOTICE

The recommendation for a default order in this case is made pursuant to SOAH's procedural rule found at 1 TEX. ADMIN. CODE (TAC) § 155.55. The rule specifies that any default granted under this rule shall be issued only upon adequate proof that notice has been provided to the defaulting party. As set forth in the Findings of Fact and Conclusions of Law in the attached Default Order, the ALJ finds that the requisite notice has been provided to Respondents in this proceeding, in accordance with TEX. GOV'T CODE ANN. § 2001.052, TEX. WATER CODE ANN. § 7.058; 1 TAC § 155.27; and 30 TAC §§ 1.11 and 39.25.

IV. VIOLATIONS

Based on the above circumstances and the provision of adequate notice, default is proper against Respondent pursuant to 1 TAC § 155.55 and 30 TAC §§ 70.106(b) and 80.113(d). Accordingly, the factual allegations contained in the EDPRP are deemed admitted against Respondents without need for further proof. Thus, the following facts, as set forth more fully in the attached Default Order, have been established.

1. Respondents operate a community public water supply system (Facility) located at 20 Timber Ridge Drive in Atlanta, Cass County, Texas.
2. The Facility has approximately 35 service connections and serves at least 25 people per day for at least 60 days per year.
3. On July 17 and 31, 2007, a TCEQ Tyler Regional Office investigator conducted an investigation of the Facility owned by Respondents. The investigator documented that Respondents violated TCEQ Default Order Docket No. 2005-0073-PWS-E, Ordering Provision No. 2 by violating the following requirements:
 - a. Respondents failed to keep operating records and make them available for Commission review.
 - b. Respondents failed to ensure that the water system was under the direct supervision of a water works operator who held a minimum of a Class "D" license.
 - c. Respondents failed to provide a pressure tank capacity of 50 gallons per connection, for a community with fewer than 50 connections without ground storage.
 - d. Respondents failed to keep records of Customer Service Inspection Certificates and make them available for Commission review.
 - e. Respondents failed to provide a flow measuring device for each well to measure the production yields and provide for the accumulation of water production data.
4. During the investigation conducted on July 17, 2007, a TCEQ Tyler Regional Office investigator documented that Respondents violated TCEQ Default Order Docket No. 2005-0073-PWS-E by failing to maintain the disinfectant residual concentration within the water supply distribution system at a minimum of 0.2 milligrams per liter (mg/L) free chlorine. The free chlorine residual on that date was 0.0 mg/L.
5. During the investigation conducted on July 31, 2007, a TCEQ Tyler Regional Office investigator documented that Respondents violated TCEQ Default Order Docket No. 2005-0073-PWS-E by failing to maintain the disinfectant residual concentration within the water supply distribution system at a minimum of 0.2 mg/L free chlorine. The free chlorine residual on that date was 0.06 mg/L.
6. Respondents received notice of the violations on or about September 5, 2007.

V. PENALTY AND REQUIRED CORRECTIVE ACTION

The evidence indicates that issuance of a default order assessing the requested administrative penalty is warranted on the grounds that Respondents violated the order noted above, as well as the environmental laws and regulations. The evidence establishes that the ED considered the factors set forth in TEX. WATER CODE ANN. §§ 7.053 and 13.4151 and followed the Commission's September 1, 2002 Penalty Policy in calculating the total proposed penalty in the amount of \$8,601.00. Further, the Commission has authority to order corrective action, pursuant to TEX. HEALTH & SAFETY CODE ch. 341.

VI. CONCLUSION

The ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law set forth in the attached Default Order, concluding that the alleged violations occurred, assessing an administrative penalty of \$8,601.00 against Respondents for the violations alleged and established in this proceeding, and requiring corrective actions by Respondents.

SIGNED August 12, 2008.



**THOMAS H. WALSTON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



DEFAULT ORDER Assessing Administrative Penalties Against and Ordering Corrective Action by Mark Stewart and Dona Stewart d/b/a Stewart Water; TCEQ Docket No. 2007-1805-PWS-E; SOAH Docket No. 582-08-2960

On _____, 2008, 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 Mark Stewart and Dona Stewart d/b/a Stewart Water (collectively Respondents). A Proposal for Decision (PFD) was presented by Tom Walston, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the EDPRP on June 12, 2008, in Austin, Texas.

The Executive Director, represented by Kathleen Decker, appeared at the hearing. Respondents were not present at the hearing nor represented by counsel and did not file for a continuance. The Executive Director requested that a default be entered against the Respondents. The ALJ agreed with the Executive Director's request.

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

I. FINDINGS OF FACT

1. Mark Stewart and Dona Stewart d/b/a Stewart Water (Respondents) operate a community public water supply system (Facility) that provides water to approximately 25 people per day for at least 60 days per year. The Facility has approximately 35 service connections.
2. The Facility is located at 20 Timber Ridge Drive in Atlanta, Cass County, Texas, approximately 2.2 miles south of Highway 79.
3. On July 17 and 31, 2007, a TCEQ Tyler Regional Office investigator conducted an investigation of the Facility.
4. During the investigation, the TCEQ Tyler Regional Office investigator documented that Respondents violated the following requirements of TCEQ Default Order Docket No. 2005-0073-PWS-E, Ordering Provision No. 2:
 - a. Respondents failed to keep operating records and make them available for Commission review. Specifically, at the time of the investigation, the Facility's monthly reports and operating records were not available for review.
 - b. Respondents failed to ensure that the water system was under the direct supervision of a water works operator who holds a minimum of a Class "D" license. Specifically, it was documented that the system did not have a certified water works operator.
 - c. Respondents failed to provide a pressure tank capacity of 50 gallons per connection, for a community with fewer than 50 connections without ground storage. Specifically, the combined capacity of the three pressure tanks in place

- at the time of the investigation was 1,575 gallons, representing a 12.5% deficiency.
- d. Respondents failed to keep records of Customer Service Inspection Certificates and make them available for Commission review. Specifically, Customer Service Inspection Certificates were not available for review at the time of the investigation.
 - e. Respondents failed to provide a flow measuring device for each well to measure the production yields and provide for the accumulation of water production data. Specifically, it was documented that the three wells did not have a flow metering device attached to the well discharge lines.
 - f. Respondents failed to maintain the disinfectant residual concentration within the water supply distribution system at a minimum of 0.2 milligrams per liter (mg/L) free chlorine. Specifically, on July 17, 2007, a field test at 12 County Road 4116 in Cass County, Texas, documented a free chlorine residual of 0.00 mg/L; and on July 31, 2007, a field test conducted at a home located at 3830 County Road 4115 in Cass County, Texas, documented a free chlorine residual of 0.06 mg/L.
5. On February 20, 2008, the Executive Director filed the Executive Director's Preliminary Report and Petition (EDPRP), in accordance with TEX. WATER CODE ANN. (Water Code) § 7.054, alleging that, based on findings made during the investigation, Respondents violated certain Commission rules, as well as the previous default order noted above. The EDPRP recommended that the Commission issue an enforcement order assessing a total administrative penalty of \$8,601.00 against Respondents and requiring certain corrective actions.

6. The Executive Director mailed a copy of the EDPRP to Respondents at 4432 Early Morn Drive, Plano, Texas 75093, by both certified mail, return receipt requested, and by regular mail, on the same date that the EDPRP was filed.
7. Respondents filed an answer to the EDPRP by letter dated March 10, 2008, and requested a hearing.
8. On April 30, 2008, the Executive Director requested the matter be referred to SOAH for hearing.
9. On May 14, 2008, the TCEQ Chief Clerk mailed notice of the scheduled preliminary hearing to Respondents at their address of record.
10. The notice of hearing:
 - Indicated the time, date, place, and nature of the hearing;
 - Stated the legal authority and jurisdiction for the hearing;
 - Indicated the statutes, rules, and previous order the Executive Director alleged Respondents violated.
 - Advised Respondents, in at least twelve-point bold-faced type, that failure to appear at the preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice and EDPRP being deemed as true and the relief sought in the notice possibly being granted by default; and
 - Included a copy of the Executive Director's penalty calculation worksheet, which showed how the penalty was calculated for the alleged violations.
11. On June 12, 2008, the ALJ convened the preliminary hearing. Respondents did not appear, nor did a representative of Respondents appear.
12. Based on Respondents' failure to appear at the hearing, the Executive Director moved for a default against Respondents in which all of the Executive Director's allegations would be deemed admitted as true, the penalties the Executive Director seeks would be assessed against Respondents, and Respondents would be ordered to take the corrective action recommended by the Executive Director. The ALJ granted the motion.

II. CONCLUSIONS OF LAW

1. Under TEX. HEALTH & SAFETY CODE ANN. § 341.049, the Commission may assess an administrative penalty against any person who violates Subchapter C of Chapter 341 of the TEX. HEALTH & SAFETY CODE ANN. or any rule or order adopted or issued thereunder.
2. Under TEX. HEALTH & SAFETY CODE ANN. § 341.049, a penalty may not be less than \$50 nor more than \$1,000 for each violation of TEX. HEALTH & SAFETY CODE ANN., Subchapter C, or a rule or order adopted or issued thereunder.
3. Additionally, the Commission may order the violator to take corrective action to ensure that public drinking water systems supply safe drinking water and are technically sound, in accordance with TEX. HEALTH & SAFETY CODE ANN. § 341.0315.
4. As required by TEX. HEALTH & SAFETY CODE ANN. § 341.049 and 30 TEX. ADMIN. CODE (TAC) §§ 1.11 and 70.104, Respondents were properly notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, the proposed penalties, and the corrective actions proposed therein.
5. Respondents were appropriately notified of the hearing on the alleged violations, the proposed penalties, and proposed corrective actions, as required by TEX. GOV'T CODE ANN. § 2001.052; TEX. HEALTH & SAFETY CODE ANN. § 341.049; 1 TAC § 155.27; and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6. Additionally, Respondents were notified, in accordance with 1 TAC § 155.55, that if Respondents failed to appear at the hearing, a default order could be rendered against Respondents by which all the allegations contained in the notice of hearing would be deemed admitted as true.

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 TEX. GOV'T CODE ANN. ch. 2003.
7. Based on the above Findings of Fact and Conclusions of Law:
 - a. A default judgment should be entered against Respondents in accordance with 1 TEX. ADMIN. CODE § 155.55 and 30 TEX. ADMIN. CODE §§ 70.106(b) and 80.113(d); and
 - b. The allegations contained in the notice of hearing, including those in the EDPRP attached thereto, are deemed admitted as true.
8. Respondents violated TCEQ Agreed Order Docket No. 2005-0073-PWS-E, Ordering Provision No. 2; 30 TEX. ADMIN. CODE §§ 290.41(c)(3)(N), 290.45(b)(1), 290.46(d)(2)(A) and (B), 290.46(e)(4)(A), 290.46(f)(2), and 290.46(j).
9. In determining the amount of an administrative penalty, TEX. HEALTH & SAFETY CODE ANN. § 341.049(b) requires the Commission to consider several factors including:
 - The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - The history and extent of previous violations by the violator;
 - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - The amount necessary to deter future violations; and
 - Any other matters that justice may require.
10. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
11. Based on consideration of the above Findings of Fact, the factors set out in TEX. HEALTH & SAFETY CODE ANN. § 341.049(b), and the Commission's Penalty Policy, the Executive

Director correctly calculated the penalties for each of the alleged violations and a total administrative penalty of \$8,601.00 is justified and should be assessed against Respondents.

12. The corrective actions sought by the Executive Director are authorized by TEX. HEALTH & SAFETY CODE ANN. § 341.0315.
13. Respondents should be required to take the corrective action measures that the Executive Director recommends.

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

1. Mark Stewart and Dona Stewart d/b/a Stewart Water are assessed an administrative penalty in the amount of \$8,601.00 for violations of TCEQ Agreed Order Docket No. 2005-0073-PWS-E, Order Provision No. 2; 30 TEX. ADMIN. CODE §§ 290.41(c)(3)(N), 290.45(b)(1), 290.46(d)(2)(A) and (B), 290.46(e)(4)(A), 290.46(f)(2), and 290.46(j). The payment of this administrative penalty and Mark and Dona Stewart's compliance with all the terms and conditions set forth in this Order completely resolve the matters set forth by this Order. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Mark Stewart and Dona Stewart d/b/a Stewart Water; Docket No. 2007-1805-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

2. Immediately upon the effective date of the Commission Order, Mark and Dona Stewart shall:
 - a) Begin maintaining a record of Monthly Reports of water works operations that include the following: weekly chemical usage; the volume of water treated each week; the date, location and nature of water quality, pressure or outage complaints and any subsequent complaint investigations; the date dead-end mains were flushed; the dates that ground storage tanks and other facilities were cleaned; and the maintenance records for water system equipment, as required by 30 TEX. ADMIN. CODE § 290.46;
 - b) Begin operating the public water system at all times under the direct supervision of a water works operator who holds a Class "D" or higher license, as required by 30 TEX. ADMIN. CODE § 290.46; and
 - c) Begin maintaining a free chlorine residual of 0.2 mg/L throughout the distribution system at all times, as required by 30 TEX. ADMIN. CODE § 290.46.

3. Within 30 days after the effective date of the Commission Order, Mark and Dona Stewart shall :
 - a) Submit written documentation, as detailed in Ordering Provision No. 6., that certifies compliance with Ordering Provision No. 2.a. through 2.c.; and
 - b) Begin completing customer service inspection certifications prior to providing continuous water service to new construction, on any existing service when the water purveyor has reason to believe that cross-connections or other unacceptable plumbing practices exist, or after any material improvement, correction, or addition to the private plumbing facilities, as required by 30 TEX. ADMIN. CODE § 290.46.

4. Within 60 days after the effective date of the Commission Order, Mark and Dona Stewart shall:
 - a) Submit written documentation, as detailed in Ordering Provision No. 6, that certifies compliance with Ordering Provision No. 3.b; and

- b) Provide an operable flow measuring device on the well pump discharge line, as required by 30 TEX. ADMIN. CODE § 290.41.
5. Within 90 days after the effective date of the Commission Order, Mark and Dona Stewart shall:
- a) Submit written documentation, as detailed in Ordering Provision No. 6 below, that certifies compliance with Ordering Provision No. 4.b.; and
 - b) Provide a pressure tank capacity of 50 gallons per connection, as required by 30 TEX. ADMIN. CODE § 290.45.
6. Within 105 days after the effective date of the Commission Order, Mark and Dona Stewart shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision No. 5.b. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

With a copy to:

Noel Luper
Manager, Water Section
Tyler Regional Office
Texas Commission on Environmental Quality
2916 Teague Drive
Tyler, Texas 75701-3756

7. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAH) for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
8. 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.
9. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
10. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
11. 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**