Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*
Mark R. Vickery, P.G., *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 14, 2011

The Honorable Henry D. Card
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Room 504
Austin, Texas 78701

Re: Executive Director's Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order;
TCEQ Docket No. 2010-0222-PWS-E; SOAH Docket No. 582-10-5983

Dear Judge Card:

Enclosed is a true and correct copy of the Executive Director's Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order (the "Exceptions").

The original of the Exceptions was filed with the Office of the Chief Clerk of the Texas Commission on Environmental Quality on this day.

Sincerely,

Jeffrey J. Huhn
Attorney
Litigation Division

Enclosure

cc: Mostafa Solimon, 15628 Ginger Lane, Houston, Texas 77040
Mr. Blas Coy, Public Interest Counsel, TCEQ (via electronic mail)

SOAH DOCKET NO. 582-10-5983
TCEQ DOCKET NO. 2010-0222-PWS-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; PETITIONER	§	**BEFORE THE**
	§	**TEXAS COMMISSION ON**
VS.	§	
MOSTAFA SOLIMON D/B/A WILLOWBROOK SUBDIVISION; RESPONDENT	§	**ENVIRONMENTAL QUALITY**

THE EXECUTIVE DIRECTOR'S EXCEPTIONS AND SUGGESTED MODIFICATIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

NOW COMES, the Executive Director of the Texas Commission on Environmental Quality ("Executive Director" or "ED") and hereby files these Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

INTRODUCTION

Mostafa Solimon ("Respondent" or "Dr. Solimon") owns and operates a public water system located at 31902 Willowbrook St., Waller County, Texas (the "Facility"). The Facility has approximately 22 service connections and serves at least 25 people per day for at least 60 days per year. At the evidentiary hearing the Executive Director pursued 12 violations that were documented by a TCEQ Regional Investigator on December 14, 2009 and sought an administrative penalty of four thousand ninety-five dollars ($4,095.00) and corrective actions.

I. Exceptions

The Executive Director agrees with and supports the adoption of the majority of the Administrative Law Judge's ("ALJ") findings and conclusions. The ALJ concluded that the Executive Director established that Respondent committed nine violations and recommended the corrective actions and penalty amount outlined in the EDPRP for each of these nine violations. The ALJ disagreed with the ED on three of the violations. The ED respectfully disagrees with the ALJ on the following two violations:

<u>Well Production Capacity:</u>

The ALJ erred in finding that the preponderance of the evidence shows that the Facility has a well production capacity of 1.5 gallons per minute ("gpm"). He concludes that the Facility did not violate 30 TEX. ADMIN. CODE §290.45(b)(1)(A)(i) or TCEQ Agreed Order Docket No. 2005-0150-MLM-E, Ordering Provision 2.c.i. However, the evidence clearly supports a finding that the Facility did violate 30 TEX. ADMIN. CODE §290.45(b)(1)(A)(i) and TCEQ Agreed Order Docket No. 2005-0150-MLM-E. The ED proved that the well capacity had a last known production rate of 25 gpm (ED 2). Since the ED could not access the Facility to measure a well production rate, the investigators had no other choice but to rely on the most recent data available. Specifically, at the time of the investigation, it was documented

that the Facility was required to provide 33 gpm of well capacity for its 22 active connections. However, according to the investigation report, the Facility was at that time providing 25 gpm, which would be a 24% deficiency. Although Dr. Solimon stated the well has a capacity of 50 gpm and provided an invoice from 1994 showing a well capacity of 50 gpm, the greater weight of the evidence substantiates a violation. On cross-examination, TCEQ investigator Mr. Barry Price testified that he and TCEQ investigator Stacy Marhofer did not examine the well because Dr. Solimon was not present to allow them complete access to the Facility. Instead, the investigators used the last rating that had been performed by the Commission. If every regulated entity in the State disallowed access to their facilities (either through wanton refusal or simply through inaction) without consequence, the TCEQ would not be able ensure that the environment and/or human health is adequately protected. Second, although the Respondent produced evidence showing that in 1994 the well pump had a capacity of 50 gpm, Mr. Price testified that well pumps wear down over time and will gradually lose pumping capacity. His testimony is supported by the fact that in 2005, the well pump capacity was measured to be 25 gpm (an efficiency loss of 50% over 11 years). The Respondent did not offer any evidence to demonstrate that between 2005 and December 14, 2009, any maintenance (or even a pumping test) had occurred on the well to show that the pump capacity had increased above the last documented production rate of 25 gpm. Also, Respondent was required to provide a well production capacity of 1.5 gpm as ordered in TCEQ Agreed Order Docket No. 2005-0150-MLM-E (ED Exhibit 3). Dr. Solimon never submitted compliance documents to the TCEQ, as required by TCEQ Agreed Order Docket No. 2005-0150-MLM-E, and introduced no documents at the hearing to show compliance.

Pressure Tank Capacity:.

The ALJ erred in finding that the preponderance of the evidence shows that the pressure tank has a capacity of 50 gpm. Again, the ED had to use the "last known" count of 22 connections from 2005 in determining if the Facility was in compliance with 30 TEX. ADMIN. CODE § 290.45(b)(1)(A)(ii) and TCEQ Agreed Order Docket No. 2005-0150-MLM-E, Ordering Provision No. 2.c.ii. Respondent's lack of cooperation with the TCEQ led to this violation being cited. Respondent was given numerous opportunities both before and after the investigation to meet in person and/or provide essential water system information to TCEQ officials to aid in their efforts to fairly and thoroughly determine the Respondent's compliance with public water supply rules and regulations. Also, Respondent was required to provide a pressure tank capacity of 50 gpm as ordered in TCEQ Agreed Order Docket No. 2005-0150-MLM-E (ED Exhibit 3). Dr. Solimon never submitted compliance documents to the TCEQ, as required by TCEQ Agreed Order Docket No. 2005-0150-MLM-E, and introduced no documents at the hearing to show compliance.

II. Other Suggested Modifications

The Executive Director suggests the following changes be made to the ALJ's Proposed Order:

1. The Executive Director recommends that Finding of Fact No. 19 be modified by replacing "50" with "25".

2. The Executive Director recommends that Finding of Fact No. 20 be modified by changing "has a capacity greater than 1.5 gpm per connection" to "failed to have a capacity greater than 1.5 gpm per connection".

3. The Executive Director recommends that Finding of Fact No. 21 be modified by replacing "20" with "22".

4. The Executive Director recommends that Finding of Fact No. 23 be modified by changing "provided a pressure tank capacity of at least 50 gallons per connection" to "failed to provide a pressure tank capacity of at least 50 gallons per connection."

5. The Executive Director recommends that Conclusion of Law No. 8 be modified by changing "did not violate" to "violated".

6. The Executive Director recommends that Conclusion of Law No. 9 be modified by changing "did not violate" to "violated".

7. The Executive Director recommends that Conclusion of Law No. 16 be modified by replacing "$1,249" with "$3,820."

8. The Executive Director recommends that Ordering Provision No. 1.i.i be modified by adding "Provide a total pressure tank capacity of at least 50 gallons per connection, in accordance with 30 TEX. ADMIN. CODE § 290.45."

9. The Executive Director recommends that Ordering Provision No. 1.l be modified by changing "The certification" to "The certifications required in Ordering Provisions 1.b., 1.d., 1.f., 1.h., and 1.j."

10. The Executive Director recommends that Ordering Provision No. 2 be modified by replacing "$1,249" with "$3,820."

III Conclusion

The Executive Director respectfully requests that the Commission adopt the ALJ's proposal for Decision and enter the Proposed Order with the changes requested by the Executive Director.

WHEREFORE, the Executive Director suggests the incorporation of these modifications into the Proposed Order before its approval by the Commission. To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these recommended modifications, the Executive Director excepts to the Proposal for Decision. A copy of the Proposed Order with the recommended modifications is hereby included as Attachment A.

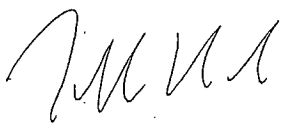
Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division



by _____
Jeffrey J. Huhn
State Bar of Texas No. 10249100
Litigation Division, R-13
14250 Judson Road
San Antonio, Texas 78233-4480
(210) 403-4023
(210) 545-4329 (FAX)
Jeffrey.Huhn@tceq.texas.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2011, an original and seven (7) copies of the foregoing "Executive Director's Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order" ("Exceptions") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

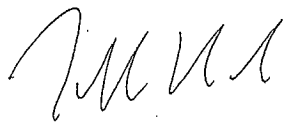
I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via Certified Mail, Return Receipt Requested, Article No. 7002 2030 0005 7059 2532, and via First Class Mail, postage prepaid, to:

Mostafa Solimon
15628 Ginger Lane
Houston, Texas 77040

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via Facsimile Transmission (512) 322-2061, to:

The Honorable Henry D. Card
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Room 504
Austin, Texas 78701

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via electronic mail to Mr. Blas Coy, Jr., Attorney, Office of the Public Interest Counsel, Texas Commission on Environmental Quality.



Jeffrey J. Huhn
Attorney
Litigation Division
Texas Commission on Environmental Quality

Attachment A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

An ORDER Assessing Administrative Penalties and Requiring Corrective
Action Against Mostafa Solimon dba Willowbrook Subdivision; TCEQ
Docket No. 2010-0222-PWS-E and SOAR Docket No. 582-10-5983

On _____ , the Texas Commission on Environmental Quality (TCEQ or the 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 Mostafa Solimon dba Willowbrook Subdivision (Respondent). A Proposal for Decision (PFD) was presented by Henry D. Card, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the EDPRP on June 30, 2011, in Austin, Texas.

FINDINGS OF FACT

1. Respondent owns and operates a public water system (the Facility) located at 31902 Willowbrook Street, Waller, Texas, serving the Willowbrook Subdivision.

2. The Facility has approximately 19-22 active service connections and serves at least 25 people per day for at least 60 days per year.

3. On December 14, 2009, TCEQ Investigators Stacy Marhofer and Barry Price conducted an inspection of the Facility.

4. Ms. Marhofer called Respondent's home number three times and his work number once before the inspection and left messages each time.

5. Respondent was not present at the inspection.

6. The investigation was to determine if the Facility was in compliance with Agreed Order No. 2005-0150-MLM-E, issued on November 6, 2006.

7. At the inspection, Ms. Marhofer and Mr. Price found 18 alleged violations of the Commission's rules, the Texas Health and Safety Code, and/or the previous Agreed Order. The EDPRP recommended a total administrative penalty of $8,059 against Respondent for those violations. Ultimately, the Executive Director dropped some violations and consolidated others, reducing the number of alleged violations to 12 and the proposed administrative penalty to $4,095.

8. The Executive Director sent Respondent his Preliminary Report and Petition (EDPRP) on April 19, 2010. The Commission received Respondent's one-page reply to the EDPRP, denying any violations, on July 16, 2010, followed by a more detailed response on September 11, 2010.

9. Notice of the State Office of Administrative Hearings (SOAH) hearing was sent August 25, 2010, which was more than ten days before the hearing.

10. The notice 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.

11. After some continuances, the hearing on the merits was convened June 30, 2011, before ALJ Henry D. Card. The Executive Director and Respondent participated in the hearing and offered testimony, documentary evidence, and arguments. The hearing was adjourned and the record closed the same day, June 30, 2011.

12. Respondent's class D operator's license was expired at the time of the investigation and remains expired.

13. The Facility was not operated under the direct supervision of a water works operator who held a valid class "D" or higher license (Alleged Violation No. 1).

14. At the time of the investigation, a field test conducted at a system service connection across the street from the Facility revealed a chlorine residual of 0.0 mg/L.

15. The Facility failed to maintain a residual disinfectant concentration in the water within the distribution system of at least 0.2 milligrams per liter ("mg/L") free chlorine (Alleged Violation No. 2).

16. At the time of the investigation, there was excessive vegetation growing within the Facility and there was a large pile of debris in a corner as well as scattered throughout the well site.

17. Respondent failed to initiate maintenance and housekeeping practices to ensure a good general appearance of the Facility (Alleged Violation No. 3).

18. Respondent failed to secure a sanitary control easement covering all property within 150 feet of the well or an exemption from that requirement (Alleged Violation No. 4).

19. The well at the Facility has a capacity of 25 gallons per minute (gpm).

20. The well at the Facility failed to have a capacity greater than 1.5 gpm per connection (Alleged Violation No. 5).

21. At the time of the investigation, the Facility had 22 active connections.

22. At the time of the investigation, the Facility was providing 1,050 gallons of pressure tank capacity.

23. At the time of the investigation, the Facility failed to provide a pressure tank capacity of at least 50 gallons per connection (Alleged Violation No. 6).

24. At the time of the investigation, the following records were not available for review: an up-to-date chemical and microbiological monitoring plan; a map of the distribution system; the amount of chemicals used each week; the amount of water treated each week; the date, location, and nature of water quality; pressure or outage complaints received by the system and the results of any subsequent complaint investigation; the dates that dead-end mains were flushed; and maintenance records for the Facility and its equipment (Alleged Violation No. 7).

25. At the time of the investigation, Respondent had failed to post a legible sign at the Facility that contained the name of the water supply and the emergency telephone numbers where a responsible official could be contacted (Alleged Violation No. 8).

26. The Facility failed to compile and maintain a thorough plant operations manual for operator review and reference (Alleged Violation No. 9).

27. Respondent did not fail to conduct annual inspections of the Facility's two pressure tanks (Alleged Violation No. 10).

28. At the time of the investigation, the Facility's hypochlorination system solution and pump were in plain sight behind a chain link fence that did not provide adequate security.

29. The Facility failed to house the bypochlorination solution container and pump in a secure enclosure to protect them from adverse weather conditions and vandalism (Alleged Violation No. II).

30. Respondent failed to provide an all-weather access road to the Facility well site (Alleged Violation No. 12).

31. Respondent is able to pay the assessed administrative penalty.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter under TEX. HEALTH & SAFETY CODE ch. 341.

2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. Gov CODE ANN. Chapter 2003.

3. Adequate and timely notice of the proceeding was provided in accordance with TEX. Gov CODE ANN. §§ 200l.051 and 2001.052.

4. The Facility violated 30 TAC § 290.46(e)(3)(A) and TEX. HEALTH & SAFETY CODE §341.033 (Alleged Violation No. 1).

5. The Facility violated 30 TAC § 290.110(b)(4) and TEX. HEALTH & SAFETY CODE § 341.031S(c) (Alleged Violation No. 2).

6. The Facility violated 30 TAC § 290.46(m) (Alleged Violation No. 3).

7. The Facility violated 30 TAC § 290.41(c)(1)(F)and TCEQ Agreed Order Docket No. 2005-0150-MLM-E, Ordering Provision No. 2.b.i (Alleged Violation No. 4).

8. The Facility violated 30 TAC §290.4S(b)(1)(A)(i) or TCEQ Agreed Order Docket No. 2005-0150-MLM-E, Ordering Provision No. 2.c.i (Alleged Violation No. 5).

9. The Facility violated 30 TAC §290.4S(b)(l)(A)(ii) or TCEQ Agreed Order Docket No. 2005-0150-MLM-E, Ordering Provision No. 2.c.ii (Alleged Violation No. 6).

10. The Facility violated 30 TAC §§ 290.46(f)(3)(A)(i)(III), (ii)(III), (iii), (iv), (vi), (n)(2), 290.l21(a) and (b), and TCEQ Agreed Order Docket No. 2005-0150-MLM-E,Ordering Provision No. 2.a.vi (Alleged Violation No. 7).

1l. The Facility violated 30 TAC § 290.46(t) (Alleged Violation No. 8).

12. The Facility violated 30 TAC §290.42(1) (Alleged Violation No. 9).

13. The Facility did not violate 30 TAC § 290.46(m)(1)(B) (Alleged Violation No. 10).

14. The Facility violated 30 TAC §290.42(e)(5) (Alleged Violation No. 11).

15. The Facility violated 30 TAC §290.41(c)(3)(P) (Alleged Violation No. 12).

16. Respondent should be assessed an administrative penalty of $3,820 for the violations committed.

17. Respondent should be ordered to take the requisite actions to correct the violations committed, as recommended by the Executive Director.

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. Respondent shall implement the following corrective measures:

   a. Immediately upon the effective date of the Commission Order:

      i. Employ a water works operator that holds a valid class "D" or higher license, in accordance with 30 Tex. Admin. Code § 290.46;

      ii. Begin operating the disinfection equipment to maintain a disinfectant residual concentration of at least 0.2 mg/L free

chlorine throughout the distribution system at all times, In accordance with 30 Tex. Admin. Code §290.110;

iii. Begin recording the amount of water treated each week, In accordance with 30 Tex. Admin. Code §290.46; [and]

iv. [Not required]

b. Within 15 days after the effective date of the Commission Order, submit written certification, as described in Ordering Provision No. 1.1 below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision No. 1.a.

c. Within 30 days after the effective date of the Commission Order:

i. Initiate maintenance and housekeeping practices to ensure a good general appearance of the Facility, including but not limited to, removing all excessive vegetation and debris from within the Facility, in accordance with 30 Tex. Admin. Code §290.46;

ii. Submit and begin maintaining on file copies of the Facility's operating records, including but not limited to, the amount of chemicals used each week, the date, location, and nature of water quality, pressure, or outage complaints received by the system and the results of any subsequent complaint investigation, the dates that dead-end mains were flushed and maintenance records for the Facility and its equipment, In accordance with 30 Tex. Admin. Code §290.46; and

iii. Post a legible sign at the Facility that provides the name of the water supply and an emergency telephone number where a responsible official can be contacted, in accordance with 30 Tex. Admin. Code § 290.46.

d. Within 45 days after the effective date of the Commission Order, submit written certification, as described in Ordering Provision No. 1.1 below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision No. 1.c.

e. Within 60 days after the effective date of the Commission Order:

i. [Not required];

ii. Provide an up-to-date map of the distribution system showing the location of all valves and mains, as required by 30 Tex. Admin. Code §290.46;

iii. Compile and maintain an up-to-date chemical and microbiological monitoring plan, in accordance with 30 Tex. Admin. Code § 290.121;

iv. Compile and keep on file for operator review and reference a thorough plant operations manual, In accordance with 30 Tex. Admin. Code § 290.42; and provide a secure enclosure for the hypochlorination solution container and pump to protect them from adverse weather conditions and vandalism, in accordance with 30 Tex. Admin. Code § 290.42.

f. Within 75 days after the effective date of the Commission Order, submit written certification, as described in Ordering Provision No. 1.1 below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision No. l .e.

g. Within 90 days after the effective date of the Commission Order:

1. Secure a sanitary control easement that covers all property within

150 feet of the well, in accordance with 30 Tex. Admin. Code § 290.41; [and]

2. [Not required]

h. Within 105 days after the effective date of the Commission Order, submit written certification, as described in Ordering Provision No. 1.1 below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision No. l.g.

i. Within 120 days after the effective date of the Commission Order:

i. Provide a total pressure tank capacity of at least 50 gallons per connection, in accordance with 30 TEX. ADMIN. CODE § 290.45; [and]

ii. Provide an all-weather access road to the well site, in accordance with 30 Tex. Admin. Code §290.41.

j. Within 135 days after the effective date of the Commission Order, submit written certification, as described in Ordering Provision No. 1.l below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision No. 1.i.

k. [Not Required]

l. The certifications required in Ordering Provisions 1.b., 1.d., 1.f., 1.h., and 1.j. 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 fines 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:

Water Section Manager
Houston Regional Office
Texas Commission on Environmental Quality
5425 Polk Ave., Ste. H
Houston, Texas 77023-1452

2. Within 60 days after the effective date of this Order, Respondent shall pay an administrative penalty in the amount of $3,820 for the violations set forth above. The check rendered to pay the penalty imposed by this Order shall be made out to "TCEQ" and shall be sent with the notation "Re: Mostafa Solimon TCEQ Docket No. 2010-0222-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

3. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas 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.

4. 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.

5. The effective date of this Order is the date the Order is final, as provided by 30 T AC § 80.273 and Texas Government Code § 2001.144.

6. As required by Texas Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.

7. 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

Bryan W. Shaw, Ph D., Chairman

For the Commission