

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 20, 2011

Via Facsimile to (512) 322-2061 and Via Interagency Mail

The Honorable Penny Wilkov
State Office of Administrative Hearings
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025

Re: Texas Commission on Environmental Quality ("TCEQ") Enforcement Proceeding
Against Arthur Thompson Post No. 8905, Veterans of Foreign Wars of the United
States, Cypress, Texas
TCEQ Docket No. 2010-1241-PWS-E
SOAH Docket No. 582-11-2892

Dear Judge Wilkov:

Enclosed please find the Executive Director's Exceptions to the Administrative Law Judge's Proposed Order regarding the above-referenced matter. If you have any questions, please do not hesitate to call me at (512) 239-3400. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Tammy L. Mitchell".

Tammy L. Mitchell
Attorney
Litigation Division

Enclosure

cc: TCEQ Chief Clerk (original)
Mr. Jack Andrews, Commander, Arthur Thompson Post No. 8905, Veterans of Foreign
Wars of the United States, Cypress, Texas, P.O. Box 2, Cypress, Texas 77410 (Via
Certified Mail, Article No. 7011 0470 0000 2421 0393)
Office of the Public Interest Counsel
Andrea Linson, Enforcement Division

**SOAH DOCKET NO. 582-11-2892
TCEQ DOCKET NO. 2010-1241-PWS-E**

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

VS.

**ARTHUR THOMPSON POST NO.
8905 VETERANS OF FOREIGN
WARS OF THE UNITED STATES,
CYPRESS, TEXAS,
Respondent**

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BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

NOW COMES the Executive Director, by and through his attorney, Tammy L. Mitchell, and submits the following exceptions to the Administrative Law Judge's ("ALJ") Proposed Order:

1. The Executive Director respectfully excepts to the ALJ limiting the "relevant activities" of the VFW Post No. 8905 to operating a water supply corporation and bingo.¹ Although not a part of the ALJ's analysis in the Proposal for Decision,² the record shows that the VFW Post also operates a bar and rental hall for various functions.³ As these activities are likely to result in human consumption of water from the public water system, they should also be considered "relevant." The Executive Director, therefore, respectfully requests that the ALJ's Proposed Order be amended to add operating a bar and rental hall as "relevant activities" to Finding of Fact No. 1.
2. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to correct a minor typographical error in Finding of Fact No. 6.f. Specifically, "Notice of Violations" should be replaced with "Notices of Violation."
3. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to include new Finding of Fact No. 13, describing the Executive Director's First Amended Report and Petition, filed on June 1, 2011, which is the live pleading in the case.
4. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to include a new Finding of Fact No. 19 stating that the Respondent did not provide the Executive Director of the TCEQ with a copy of the public notice for the months of June and October 2008; January, May, July, August, September, November, and December 2009; and January 2010. The Executive Director added this allegation to the EDFARP and provided uncontroverted evidence of this fact during the July 19, 2011 evidentiary

¹ Proposal for Decision [Hereinafter *PFD*] at 2.

² See *PFD* at 9.

³ Ref-B at 15.

hearing, but a Finding of Fact to that effect was not included in the Proposed Order.⁴

5. The Executive Director respectfully excepts to the ALJ's reference to TEXAS WATER CODE § 7.053 regarding penalty calculation factors. The factors to be considered for an administrative penalty related to public water system violations are found in Texas Health & Safety Code § 341.049. The Executive Director, therefore, respectfully requests that the ALJ's Proposed Order be amended so that original Finding of Fact No. 21 (new No. 23) refers to the factors set forth in Tex. Health & Safety Code § 341.049.
6. The Executive Director respectfully requests that the ALJ's Proposed Order be amended so that Findings of Fact, old statements 13-18 are renumbered 14-17 and old statements 17-23 are renumbered 19-25, respectively.
7. The Executive Director respectfully requests that the ALJ's Proposed Order be amended so that the citation to the TEX. HEALTH & SAFETY CODE in Conclusion of Law No. 1 refers to TEX. HEALTH & SAFETY CODE § 341.031, which is the basis of TCEQ jurisdiction, instead of TEX. HEALTH & SAFETY CODE § 341.049, which is the provision relating to the administrative penalty.
8. Although Conclusion of Law No. 10 provides information relating to the alleged violation of 30 TAC § 290.109(c)(2)(A)(i), Conclusion of Law No. 11 provides information relating to the alleged violation of 30 TAC § 290.122(c)(2)(B), and the Proposal for Decision indicates that the ALJ believes that these violations were substantiated,⁵ no Conclusions of Law are included in the Order related to these violations.
9. Based on exception 8 above, the Executive Director respectfully requests that the ALJ's Proposed Order be amended to include Conclusion of Law 14, which reads "Respondent violated 30 TAC § 290.109(c)(2)(A)(i)."
10. Based on exception 8 above, the Executive Director respectfully requests that the ALJ's Proposed Order be amended to include Conclusion of Law 15, which reads "Respondent violated 30 TAC § 290.122(c)(2)(B)."
11. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to include Conclusion of Law No. 16, which reads "30 TAC § 290.122(f) requires the operator of a PWS that is required to send public notice to provide a copy of that public notice to the executive director within 10 days of the notice's distribution." This violation was alleged in the EDFARP and supported by uncontroverted evidence during the July 19, 2011 evidentiary hearing, but was not included in the Proposed Order.
12. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to include Conclusion of Law No. 17, which reads "Respondent violated 30 TAC § 290.122(f)."
13. The Executive Director respectfully requests that the ALJ's Proposed Order be amended so that Conclusions of Law, old statements 13-16 are renumbered 17-20, respectively.

⁴ July 19, 2011, Testimony of Investigator Sally Paramo at 1:11:15-1:11:27.

⁵ PFD at 6-7.

14. The Executive Director respectfully requests that the ALJ's Proposed Order be amended to delete Ordering Provision No. 2, to conform with original Finding of Fact No. 20 (new No. 22), which states that the Respondent is in compliance with routine monthly samples.

PRAYER

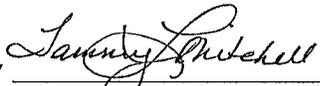
To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these exceptions and recommended modifications, the Executive Director excepts to the Proposal for Decision. Copies of the Proposed Order with the recommended modifications are attached. Attachment "A" is the redline/strikeout version which clearly delineates the recommended modifications. Attachment "B" is a copy of the Proposed Order incorporating the Executive Director's recommended changes.

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, Director
Litigation Division

by  _____

Tammy L. Mitchell
State Bar of Texas No. 24058003
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
(512) 239-3400
(512) 239-3434 (FAX)

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2011, the original of the foregoing "Executive Director's Exceptions 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 true and correct copies of the foregoing Exceptions were sent to the following persons by the method of service indicated:

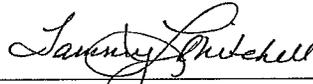
Jack Andrews, Commander
Arthur Thompson Post No. 8905
Veterans of Foreign Wars of the United States,
Cypress, Texas
P.O. Box 2
Cypress, Texas 77410

Via certified mail, Article No. 7011 0470 0000
2421 0393

The Honorable Penny Wilkov
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025

Via Interagency Mail and via facsimile to
(512) 322-2061

I further certify that on this day a true and correct copy of the foregoing Exceptions were electronically submitted to the Office of the Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas



Tammy L. Mitchell
Attorney
Litigation Division
Texas Commission on Environmental Quality

ATTACHMENT A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**Assessing Administrative Penalties against
and Requiring Corrective Action by
ARTHUR THOMPSON POST NO. 8905**

**VETERANS OF FOREIGN WARS OF THE UNITED STATES, CYPRESS, TEXAS
TCEQ DOCKET NO. 2010-1241-PWS-E
SOAH DOCKET NO. 582-11-2892**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring corrective action by Arthur Thompson Post No. 8905 Veterans of Foreign Wars of the United States, Cypress, Texas (Respondent or VFW Post No. 8905). A Proposal for Decision (PFD) was presented by Penny A. Wilkov, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the EDPRP on July 19, 2011.

After considering the PFD, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. VFW Post No. 8905 is a social/fraternal hall located in Cypress, Texas and has ~~two~~four relevant activities related to its non-profit operations: owning and operating a water supply corporation, ~~and~~ conducting charitable bingo, operating a bar, and operating a rental hall.

2. Respondent's water supply corporation uses groundwater from a well, has one active service connection, and serves 50 people daily, and as such, qualifies as a public water system as defined in 30 TEX. ADMIN. CODE (TAC) § 290.38(66).
3. During a record review investigation, a TCEQ Natural Resource Specialist documented that Respondent failed to collect routine distribution samples for coliform analysis and failed to provide public notice of the failure to sample for the months of June and October 2008; January, May, July, August, September, November, and December 2009; and January 2010.
4. On December 3, 2010, the Executive Director (ED) filed the EDPRP in accordance with TEX. HEALTH & SAFETY CODE ANN. § 341.049(c), alleging that Respondent failed to collect routine distribution samples for coliform analysis and failed to provide public notice of the failure to sample for the months of June and October 2008; January, May, July, August, September, November, and December 2009; and January 2010, in violation of TEX. HEALTH & SAFETY CODE ANN. § 341.033(d) and 30 TAC §§ 290.109(c)(2)(A)(i) and 290.122(c)(2)(B).
5. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$4,375.00 against Respondent and requiring corrective action by Respondent.
6. The total proposed administrative penalty of \$4,375.00 was calculated as follows:
 - a. The base penalty began as \$1,000.00, the maximum penalty provided for each day of violation;
 - b. Respondent's failure to monitor had the potential, but did not actually, cause major harm to human health, which resulted in a 25% reduction of the base penalty or \$250.00 per event (\$1,000.00 x 25%);

- c. Respondent failed to perform required monitoring for 10 different months (from June 2008 through January 2010), resulting in a \$2,500.00 base penalty (\$250.00 x 10 events);
 - d. Good faith efforts to comply were not applicable because Respondent could not provide retroactive monthly samples;
 - e. Respondent had a prior agreed order entered on August 23, 2006, for similar monitoring and public notification violations, resulting in a 25% enhancement to the base penalty of \$2,500.00 or \$625.00 in additional penalties;
 - f. Respondent had 10 Notices of Violations (NOVs), resulting in a 50% enhancement to the base penalty of \$2,500.00 or \$1,250.00 in additional penalties;
 - g. Respondent's total adjusted penalty was \$4,375.00 (\$2,500.00 base penalty + \$1,875.00 additional penalties); and
 - h. Justice does not require a further penalty adjustment.
7. The ED recommended that Respondent be required to implement corrective measures to begin complying with applicable coliform monitoring requirements; to implement procedures to ensure that all necessary public notifications are provided in a timely manner to customers of the water system; and to submit written certification and supporting documentation to demonstrate compliance.
 8. On December 3, 2010, the ED mailed a copy of the EDPRP to Respondent at its last address of record with the Commission.
 9. On December 13, 2010, Respondent requested a hearing on the ED's allegations.
 10. On January 21, 2011, the ED asked the Commission's Chief Clerk to refer this case to SOAH for hearing, which she did.

11. On February 3, 2011, the Chief Clerk mailed a notice of hearing to Respondent, the ED, and the Office of Public Interest Counsel.

12. 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.

~~12-13.~~ On June 1, 2011, the ED filed the Executive Director's First Amended Report and Petition (EDFARP), adding an allegation to those in the EDPRP that the Respondent failed to provide proof of public notification of the failure to sample for the months of June and October 2008; January, May, July, August, September, November, and December 2009; and January 2010, in violation of 30 TAC § 290.122(f).

~~13-14.~~ On July 19, 2011, ALJ Penny A. Wilkov convened a hearing at the SOAH hearing facilities, William P. Clements Building, 300 West Fifteenth Street, Austin, Texas. The ED was represented by TCEQ Litigation Division Attorneys Tammy L. Mitchell and Steven M. Fishburn. Respondent was represented by Jack K. Andrews, Commander of VFW Post No. 8905. The Office of Public Interest Counsel did not participate in the hearing. The ALJ closed the record at the conclusion of the hearing.

~~14-15.~~ The Houston Department of Health and Human Services (Houston Health Department) obtained water samples from Respondent during the months of January and May 2009, and January 2010, as part of a food establishment safety inspection.

~~15.16.~~ The Houston Health Department samples for January and May 2009, and January 2010, however, failed to show a disinfectant residual (chlorine) level. As such, the samples were rendered unsuitable for analysis by the Houston Health Department lab and unacceptable to TCEQ to satisfy the requirement to collect monthly routine distribution samples for coliform analysis.

~~16.17.~~ Respondent failed to collect suitable routine distribution samples for coliform analysis for the months of June and October 2008; January, May, July, August, September, November, and December 2009; and January 2010.

18. Respondent did not provide public notice of its failure to sample for coliform analysis for the months of June and October 2008; January, May, July, August, September, November, and December 2009; and January 2010.

~~17.19.~~ Respondent did not provide the executive director with a copy of the public notice for the months of June and October 2008; January, May, July, August, September, November, and December 2009; and January 2010.

~~18.20.~~ Respondent received NOV letters for each of the same ten months.

~~19.21.~~ Respondent had a prior agreed order entered on August 23, 2006, for similar monitoring and public notification violations.

~~20.22.~~ Respondent has returned to full compliance with routine monthly samples.

~~21.23.~~ An administrative penalty of \$4,375.00 is reasonable and takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in ~~TEX. WATER CODE ANN~~HEALTH & SAFETY CODE, § 7.053341.049 and in the Commission's 2002 Penalty Policy.

~~22.24.~~ The corrective actions required are reasonable.

~~23-25.~~ Respondent has the financial ability to pay the full amount of the penalty, despite the charitable work performed by Respondent for the community of Cypress, Texas.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. WATER CODE ANN. § 5.013 and TEX. HEALTH & SAFETY CODE ANN. § 341.049031.
2. 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.
3. Under TEX. HEALTH & SAFETY CODE ANN. § 341.049, the Commission may assess an administrative penalty against a person who violates a provision of Subchapter C of the Texas Health and Safety Code, or a rule or order adopted thereunder.
4. Under TEX. HEALTH & SAFETY CODE ANN. § 341.049, the penalty may not exceed \$1,000.00 per violation, and each day of a continuing violation may be considered a separate violation.
5. As required by TEX. HEALTH & SAFETY CODE ANN. § 341.049(d) and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties proposed therein.
6. As required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052; TEX. HEALTH & SAFETY CODE ANN. § 341.049(g); 1 TAC §§ 155.401 and 155.501; and 30 TAC §§ 1.11 and 39.25, Respondent was notified of the hearing on the alleged violations and the proposed penalties.
7. 30 TAC § 290.38(66) defines "public water system" as a system for providing the public water for human consumption through pipes or other conveyances. The system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year.

8. TEX. HEALTH & SAFETY CODE § 341.033(d) provides that the owner or manager of a water supply system that furnishes drinking water to less than 25,000 people shall submit to the Commission during each month of the system's operation at least one specimen of water taken from the supply for bacteriological analysis.
9. TEX. HEALTH & SAFETY CODE ANN. § 341.031 authorizes the Commission to adopt and enforce rules to implement the federal Safe Drinking Water Act.
10. 30 TAC § 290.109(c)(2)(A)(i) requires a public water system serving a population of less than 1,000 to perform routine distribution coliform sampling at least once per month.
11. 30 TAC 290.122(c)(2)(B) requires the operator of a public water system who fails to perform required water monitoring to notify persons served by the system of the failure to perform the required monitoring in a manner reasonably calculated to reach such persons for at least seven days or as long as the violation exists.
12. Respondent's system qualified as a public water system pursuant to the definition at 30 TAC § 290.38(66).
13. Respondent violated TEX. HEALTH & SAFETY CODE ANN. § 341.033(d).
14. Respondent violated 30 TAC § 290.109(c)(2)(A)(i).
15. Respondent violated 30 TAC § 290.122(c)(2)(B).
16. 30 TAC § 290.122(f) requires the operator of a public water system that is required to provide public notice to send a copy of that notice to the executive director within 10 days of the notice's distribution.
- ~~13.~~17. Respondent violated 30 TAC § 290.122(f).
- ~~14.~~18. 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 acts;
- 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.

~~15.19.~~ The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.

~~16.20.~~ 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 the alleged violations and a total administrative penalty of \$4,375.00 is justified and should be assessed against Respondent.

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. Arthur Thompson Post No. 8905 Veterans of Foreign Wars of the United States, Cypress, Texas (Respondent) is assessed an administrative penalty of \$4,375.00 for its violations of TEX. HEALTH & SAFETY CODE ANN. § 341.033(d) and 30 TAC §§ 290.109(c)(2)(A)(i) and 290.122(c)(2)(B). The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order will 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: Arthur Thompson Post No. 8905 Veterans of Foreign Wars of the United States, Cypress, Texas, Docket No. 2010-1241-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. Within 10 days after the effective date of this Order, Respondent shall begin complying with applicable coliform monitoring requirements by collecting routine coliform distribution samples and providing water that meets the provisions regarding microbial contaminants, in accordance with 30 TAC § 290.109. This provision will be satisfied upon six consecutive months of compliance monitoring and reporting.~~

~~3.2.~~ Within 10 days after the effective date of this Order, Respondent shall implement procedures to ensure that all necessary public notifications are provided in a timely manner to the customers of the water system, in accordance with 30 TAC § 290.122.

~~4.3.~~ Within 195 days after the effective date of this Order, Respondent shall submit written certifications as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions No. 2 and 3. 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 fines and imprisonment for knowing

violations.”

The certification shall be sent to:

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

with a copy to:

Water Section Manager
Houston Regional Office
Texas Commission on Environmental Quality
5425 Polk Avenue, Suite H
Houston, Texas 77023-1486

~~5.4.~~ 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.

~~6.5.~~ 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.

~~7.6.~~ The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.

~~8.7.~~ As required by TEX. HEALTH & SAFETY CODE ANN. § 341.049(h), the Commission's Chief Clerk shall forward a copy of this Order to Respondent.

~~9.8.~~ 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

Bryan W. Shaw, Ph.D., Chairman
For the Commission

ATTACHMENT B

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**Assessing Administrative Penalties against
and Requiring Corrective Action by
ARTHUR THOMPSON POST NO. 8905**

**VETERANS OF FOREIGN WARS OF THE UNITED STATES, CYPRESS, TEXAS
TCEQ DOCKET NO. 2010-1241-PWS-E
SOAH DOCKET NO. 582-11-2892**

On _____, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring corrective action by Arthur Thompson Post No. 8905 Veterans of Foreign Wars of the United States, Cypress, Texas (Respondent or VFW Post No. 8905). A Proposal for Decision (PFD) was presented by Penny A. Wilkov, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the EDPRP on July 19, 2011.

After considering the PFD, the Commission makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. VFW Post No. 8905 is a social/fraternal hall located in Cypress, Texas and has four relevant activities related to its non-profit operations: owning and operating a water supply corporation, conducting charitable bingo, operating a bar, and operating a rental hall.

2. Respondent's water supply corporation uses groundwater from a well, has one active service connection, and serves 50 people daily, and as such, qualifies as a public water system as defined in 30 TEX. ADMIN. CODE (TAC) § 290.38(66).
3. During a record review investigation, a TCEQ Natural Resource Specialist documented that Respondent failed to collect routine distribution samples for coliform analysis and failed to provide public notice of the failure to sample for the months of June and October 2008; January, May, July, August, September, November, and December 2009; and January 2010.
4. On December 3, 2010, the Executive Director (ED) filed the EDPRP in accordance with TEX. HEALTH & SAFETY CODE ANN. § 341.049(c), alleging that Respondent failed to collect routine distribution samples for coliform analysis and failed to provide public notice of the failure to sample for the months of June and October 2008; January, May, July, August, September, November, and December 2009; and January 2010, in violation of TEX. HEALTH & SAFETY CODE ANN. § 341.033(d) and 30 TAC §§ 290.109(c)(2)(A)(i) and 290.122(c)(2)(B).
5. The ED recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$4,375.00 against Respondent and requiring corrective action by Respondent.
6. The total proposed administrative penalty of \$4,375.00 was calculated as follows:
 - a. The base penalty began as \$1,000.00, the maximum penalty provided for each day of violation;
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- c. Respondent failed to perform required monitoring for 10 different months (from June 2008 through January 2010), resulting in a \$2,500.00 base penalty (\$250.00 x 10 events);
 - d. Good faith efforts to comply were not applicable because Respondent could not provide retroactive monthly samples;
 - e. Respondent had a prior agreed order entered on August 23, 2006, for similar monitoring and public notification violations, resulting in a 25% enhancement to the base penalty of \$2,500.00 or \$625.00 in additional penalties;
 - f. Respondent had 10 Notices of Violation (NOVs), resulting in a 50% enhancement to the base penalty of \$2,500.00 or \$1,250.00 in additional penalties;
 - g. Respondent's total adjusted penalty was \$4,375.00 (\$2,500.00 base penalty + \$1,875.00 additional penalties); and
 - h. Justice does not require a further penalty adjustment.
7. The ED recommended that Respondent be required to implement corrective measures to begin complying with applicable coliform monitoring requirements; to implement procedures to ensure that all necessary public notifications are provided in a timely manner to customers of the water system; and to submit written certification and supporting documentation to demonstrate compliance.
8. On December 3, 2010, the ED mailed a copy of the EDPRP to Respondent at its last address of record with the Commission.
9. On December 13, 2010, Respondent requested a hearing on the ED's allegations.
10. On January 21, 2011, the ED asked the Commission's Chief Clerk to refer this case to SOAH for hearing, which she did.

11. On February 3, 2011, the Chief Clerk mailed a notice of hearing to Respondent, the ED, and the Office of Public Interest Counsel.
12. 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.
13. On June 1, 2011, the ED filed the Executive Director's First Amended Report and Petition (EDFARP), adding an allegation to those in the EDPRP that the Respondent failed to provide proof of public notification of the failure to sample for the months of June and October 2008; January, May, July, August, September, November, and December 2009; and January 2010, in violation of 30 TAC § 290.122(f).
14. On July 19, 2011, ALJ Penny A. Wilkov convened a hearing at the SOAH hearing facilities, William P. Clements Building, 300 West Fifteenth Street, Austin, Texas. The ED was represented by TCEQ Litigation Division Attorneys Tammy L. Mitchell and Steven M. Fishburn. Respondent was represented by Jack K. Andrews, Commander of VFW Post No. 8905. The Office of Public Interest Counsel did not participate in the hearing. The ALJ closed the record at the conclusion of the hearing.
15. The Houston Department of Health and Human Services (Houston Health Department) obtained water samples from Respondent during the months of January and May 2009, and January 2010, as part of a food establishment safety inspection.

16. The Houston Health Department samples for January and May 2009, and January 2010, however, failed to show a disinfectant residual (chlorine) level. As such, the samples were rendered unsuitable for analysis by the Houston Health Department lab and unacceptable to TCEQ to satisfy the requirement to collect monthly routine distribution samples for coliform analysis.
17. Respondent failed to collect suitable routine distribution samples for coliform analysis for the months of June and October 2008; January, May, July, August, September, November, and December 2009; and January 2010.
18. Respondent did not provide public notice of its failure to sample for coliform analysis for the months of June and October 2008; January, May, July, August, September, November, and December 2009; and January 2010.
19. Respondent did not provide the executive director with a copy of the public notice for the months of June and October 2008; January, May, July, August, September, November, and December 2009; and January 2010.
20. Respondent received NOV letters for each of the same ten months.
21. Respondent had a prior agreed order entered on August 23, 2006, for similar monitoring and public notification violations.
22. Respondent has returned to full compliance with routine monthly samples.
23. An administrative penalty of \$4,375.00 is reasonable and takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in TEX. HEALTH & SAFETY CODE § 341.049 and in the Commission's 2002 Penalty Policy.
24. The corrective actions required are reasonable.

25. Respondent has the financial ability to pay the full amount of the penalty, despite the charitable work performed by Respondent for the community of Cypress, Texas.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to TEX. WATER CODE ANN. § 5.013 and TEX. HEALTH & SAFETY CODE ANN. § 341.031.
2. 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.
3. Under TEX. HEALTH & SAFETY CODE ANN. § 341.049, the Commission may assess an administrative penalty against a person who violates a provision of Subchapter C of the Texas Health and Safety Code, or a rule or order adopted thereunder.
4. Under TEX. HEALTH & SAFETY CODE ANN. § 341.049, the penalty may not exceed \$1,000.00 per violation, and each day of a continuing violation may be considered a separate violation.
5. As required by TEX. HEALTH & SAFETY CODE ANN. § 341.049(d) and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties proposed therein.
6. As required by TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052; TEX. HEALTH & SAFETY CODE ANN. § 341.049(g); 1 TAC §§ 155.401 and 155.501; and 30 TAC §§ 1.11 and 39.25, Respondent was notified of the hearing on the alleged violations and the proposed penalties.
7. 30 TAC § 290.38(66) defines "public water system" as a system for providing the public water for human consumption through pipes or other conveyances. The system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year.

8. TEX. HEALTH & SAFETY CODE § 341.033(d) provides that the owner or manager of a water supply system that furnishes drinking water to less than 25,000 people shall submit to the Commission during each month of the system's operation at least one specimen of water taken from the supply for bacteriological analysis.
9. TEX. HEALTH & SAFETY CODE ANN. § 341.031 authorizes the Commission to adopt and enforce rules to implement the federal Safe Drinking Water Act.
10. 30 TAC § 290.109(c)(2)(A)(i) requires a public water system serving a population of less than 1,000 to perform routine distribution coliform sampling at least once per month.
11. 30 TAC 290.122(c)(2)(B) requires the operator of a public water system who fails to perform required water monitoring to notify persons served by the system of the failure to perform the required monitoring in a manner reasonably calculated to reach such persons for at least seven days or as long as the violation exists.
12. Respondent's system qualified as a public water system pursuant to the definition at 30 TAC § 290.38(66).
13. Respondent violated TEX. HEALTH & SAFETY CODE ANN. § 341.033(d).
14. Respondent violated 30 TAC § 290.109(c)(2)(A)(i).
15. Respondent violated 30 TAC § 290.122(c)(2)(B).
16. 30 TAC § 290.122(f) requires the operator of a public water system that is required to provide public notice to send a copy of that notice to the executive director within 10 days of the notice's distribution.
17. Respondent violated 30 TAC § 290.122(f).
18. 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 acts;
 - 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.
19. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
20. 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 the alleged violations and a total administrative penalty of \$4,375.00 is justified and should be assessed against Respondent.

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. Arthur Thompson Post No. 8905 Veterans of Foreign Wars of the United States, Cypress, Texas (Respondent) is assessed an administrative penalty of \$4,375.00 for its violations of TEX. HEALTH & SAFETY CODE ANN. § 341.033(d) and 30 TAC §§ 290.109(c)(2)(A)(i) and 290.122(c)(2)(B). The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order will 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: Arthur Thompson Post No. 8905 Veterans of Foreign Wars of the United States, Cypress, Texas, Docket No. 2010-1241-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. Within 10 days after the effective date of this Order, Respondent shall implement procedures to ensure that all necessary public notifications are provided in a timely manner to the customers of the water system, in accordance with 30 TAC § 290.122.
3. Within 195 days after the effective date of this Order, Respondent shall submit written certifications as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions No. 2 and 3. 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 fines and imprisonment for knowing violations.”

The certification shall be sent to:

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

with a copy to:

Water Section Manager
Houston Regional Office
Texas Commission on Environmental Quality
5425 Polk Avenue, Suite H
Houston, Texas 77023-1486

4. 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.
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 the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
7. As required by TEX. HEALTH & SAFETY CODE ANN. § 341.049(h), the Commission's Chief Clerk shall forward a 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

Bryan W. Shaw, Ph.D., Chairman
For the Commission

