

**SOAH DOCKET NO. 582-12-5353  
TCEQ DOCKET NO. 2011-1647-PWS-E**

<b>EXECUTIVE DIRECTOR OF THE</b>	§	<b>BEFORE THE</b>
<b>TEXAS COMMISSION ON</b>	§	
<b>ENVIRONMENTAL QUALITY,</b>	§	
<b>Petitioner</b>	§	
<b>V.</b>	§	<b>STATE OFFICE OF</b>
	§	
<b>SOUTH TEXAS WATER AUTHORITY,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**THE EXECUTIVE DIRECTOR’S MOTION TO REOPEN THE RECORD**

TO THE HONORABLE COMMISSIONERS:

The Executive Director (ED) of the Texas Commission on Environmental Quality (the Commission or TCEQ), files this motion to respectfully request that the Commission reopen the record in this case to allow the ED to present the findings of the study conducted pursuant to the Commission’s directive at the November 20, 2013 agenda meeting. At the November 20, 2013 agenda meeting, the Commission continued this matter to allow ED Staff to do a study to identify cost-effective options to address South Texas Water Authority’s (STWA or Respondent) inability to comply with the TCEQ minimum disinfectant residual rule requirements. The ED has completed the study and requests that this case be remanded to the State Office of Administrative Hearings (SOAH) and the record be reopened for the limited purpose of presenting evidence regarding this study so that it is part of the record in this case.

**I. Introduction<sup>1</sup>**

1. This is a TCEQ enforcement case in which the ED alleges eight drinking water violations against Respondent.<sup>2</sup>
2. The main legal dispute in this case is that Respondent claims it is not a public water system (PWS) and not subject to regulation; Respondent claims that as

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<sup>1</sup> The ED’s exhibits in this case will be referred to in this document as “ED” [exhibit no.] at [page]: [description if necessary]. The reference to page numbers is a reference to the stamped number in the bottom center of each page, beginning with “00”. STWA’s exhibits will be referred to as “STWA” in the same manner as the ED’s exhibits. Audio Tape of Nov. 20, 2013 Commission agenda meeting, New Business Item 1 ([http://www.texasadmin.com/cgi-bin/texas/tceq\\_view.cgi?smil=TCEQ\\_OM112013&part=10](http://www.texasadmin.com/cgi-bin/texas/tceq_view.cgi?smil=TCEQ_OM112013&part=10)) will be referred to as Nov. 20, 2013 agenda meeting, Item 1 at [time start] - [time stop].

<sup>2</sup> ED A: Executive Director’s first amended preliminary report and petition.

strictly a wholesale provider of water for human consumption, it does not come within the definition of "public water system."<sup>3</sup>

3. There is also a pragmatic issue driving this case. One of the violations is for STWA's failure to maintain the minimum disinfectant residual requirement. STWA claims it would cost millions of dollars for it to comply with this requirement and suggests that this is the primary underlying basis for it claiming that it is not a PWS.<sup>4</sup>
4. After an evidentiary hearing at SOAH, this case was set for the November 20, 2013 Commission agenda meeting.<sup>5</sup> At that meeting, the Commission continued the case to allow ED Staff, with Respondent's cooperation, to use its resources and perform a study to develop cost-effective options for addressing Respondent's problem of maintaining the required minimum disinfectant residual level in its distribution line near Kingsville.<sup>6</sup>

## **II. Procedural and Factual Background**

5. On February 8, 2012, the ED filed the preliminary report and petition (Petition) alleging eight drinking water violations against Respondent.<sup>7</sup> The ED recommends a penalty in the case of \$2,443.<sup>8</sup> The ED also recommends corrective action required for Respondent to return to compliance.<sup>9</sup>
6. The evidentiary hearing at SOAH was on March 5 and 6, 2013.<sup>10</sup> Respondent acknowledged being a PWS at the time of the violations, so it did not dispute the violations or penalty.<sup>11</sup> Respondent only disputed that it is currently a PWS.<sup>12</sup> Respondent claimed it is no longer a PWS and therefore, corrective actions are not warranted.<sup>13</sup>
7. On July 23, 2013, Administrative Law Judge Craig Bennett (ALJ) issued the PFD and proposed order (Proposed Order) in this case.<sup>14</sup> In the PFD the ALJ

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<sup>3</sup> See, e.g., Brief of South Texas Water Authority filed May 3, 2013 at 2.

<sup>4</sup> See, e.g., *Id.* at 12; Nov. 20, 2013 agenda meeting, Item 1 at 1:16:03 – 1:16:44.

<sup>5</sup> See Commission's marked agenda for November 20, 2013 at 2 (New Business Item 1).

<sup>6</sup> *Id.*; Nov. 20, 2013 agenda meeting, Item 1 at 1:27:42 – 1:29:33.

<sup>7</sup> ED A.

<sup>8</sup> ED 2: Penalty Calculation Worksheet.

<sup>9</sup> ED A at 4-5.

<sup>10</sup> See, e.g., Proposal For Decision for this case (PFD) signed July 23, 2013 at 4.

<sup>11</sup> See, e.g., Brief of South Texas Water Authority at 1 (filed May 3, 2013); PFD at 1-2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., PFD at 25.

recommends that the Commission find that STWA does not meet the definition of a PWS<sup>15</sup>; the ALJ based this determination on the fact that STWA does not directly have either 15 connections or serve at least 25 individuals.<sup>16</sup> The ALJ recommended the Commission determine the eight violations alleged occurred and the recommended penalty of \$2,443 is appropriate.<sup>17</sup> The ALJ recommended that there be no corrective action based on the ALJ's determination that STWA is no longer a PWS.<sup>18</sup> In discussing the Commission's discretion on this issue, the ALJ states:

As an initial matter, the ALJ stresses that the determination of whether STWA is a public water system is, in this case, solely a legal determination. As such, the Commission has the final authority to make such a determination, particularly because the determination hinges upon the Commission's interpretation of its own rules. Put bluntly, while the ALJ is presenting a recommendation, the Commission may decide this issue either way.<sup>19</sup>

8. After the ED and STWA filed exception briefing, the ALJ continued to recommend that STWA is not a PWS, but stated:

Despite the fact that I have recommended an interpretation different from the ED's, I believe it would be legally acceptable for the Commission to adopt the ED's interpretation.<sup>20</sup>

9. The PFD and Proposed Order were set for the November 20, 2013 Commission agenda meeting.<sup>21</sup> At the agenda meeting, STWA acknowledged that the main reason that it is contesting that it is a PWS is because STWA believes it is cost-prohibitive for STWA to maintain the required minimum disinfectant residual levels throughout its distribution line.<sup>22</sup> STWA maintains that the water at the end of its distribution line, near Kingsville, becomes stagnant and unused due to the fact that Kingsville does not take as much water as needed to keep the water moving in the line.<sup>23</sup> STWA maintains that the water sits for long periods of time

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<sup>15</sup> The definition of PWS states the PWS "must have at least 15 service connections or serve at least 25 individuals . . ." 30 TEX. ADMIN. CODE § 290.38(66).

<sup>16</sup> PFD at 11.

<sup>17</sup> PFD at 25.

<sup>18</sup> *Id.*

<sup>19</sup> PFD at 10.

<sup>20</sup> ALJ's Exception Letter filed September 24, 2013 at 2.

<sup>21</sup> Commission's marked agenda for November 20, 2013 at 2.

<sup>22</sup> Cite to transcript; *see also* PFD at 3.

<sup>23</sup> *See, e.g.*, PFD at 3-4; *see also* Brief of South Texas Water Authority filed May 3, 2013 at 12.

at the end of the line and this causes the disinfectant residual to decrease below minimum required levels due to water age.<sup>24</sup> STWA maintains it will cost between \$8,500,000 and \$37,500,000 to comply with the ED's recommended corrective actions.<sup>25</sup>

10. In response to concerns over cost-effectiveness and public health, the Commission continued this matter to allow the ED to conduct a study, in cooperation with Respondent, to find more cost-effective options.<sup>26</sup> The Commission directed the parties to balance public health concerns and cost-effectiveness in conducting the study.<sup>27</sup>
11. ED Staff has worked with Respondent and completed its study and is prepared to present the study to the Commission.
12. So that the Commission can consider the study results, the ED asks that the Commission reopen the record, and remand this case back to SOAH for the ALJ to hear evidence regarding the study. Afterwards, the ED then anticipates the matter being reset on a future Commission agenda meeting so the Commission can consider the information from the study.

### **III. Motion**

13. 30 TEX. ADMIN. CODE § 80.265 authorizes the Commission to reopen the record, post-hearing, for further proceedings in contested cases. 30 TEX. ADMIN. CODE § 80.265 states:

The commission, on the motion of any party or on its own motion, may order the judge to reopen the record for further proceedings on specific issues in dispute. The commission's order shall include instructions as to the subject matter of further proceedings and the judge's duties in preparing supplemental materials or revised orders based upon those proceedings for the commission's adoption.

Pursuant to 30 TEX. ADMIN. CODE § 80.265,<sup>28</sup> the ED requests the Commission to reopen the record in this case for the limited purpose of obtaining evidence regarding the study performed at the request of the Commission at the November

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., Nov. 20, 2013 agenda meeting, Item 1 at 1:31:11 – 1:31:39; 1:32:27 – 1:32:57.

<sup>27</sup> *Id.*

<sup>28</sup> See also *Lake Medina Conservation Soc., Inc./Bexar-Medina Atascosa Counties WCID No. 1 v. Texas Natural Resource Conservation Com'n*, 980 S.W.2d 511, 518-19 (Tex.App.-Austin 1998).

20, 2013 Commission agenda meeting. The ED requests that the record be reopened for the limited purpose of including the study in the record so that the Commission can consider it.

14. At the Commission agenda meeting, the Commission continued the case specifically for the purpose of the ED Staff, with Respondent's cooperation, to conduct a study to determine if there are more cost-effective options of ensuring public health and safety regarding this issue.<sup>29</sup> The following excerpts of the discussion of this case on the November 20, 2013 agenda are provided to demonstrate the request for a study in this case, and the scope of that study. At the first part of the discussion about the study, Chairman Shaw states the following regarding finding a cost-effective resolution:

I think the challenge that we have moving forward is recognizing that this cost is exorbitant and that it would make sense to try to find some solution to resolve that, but the solution is not to risk the health and safety of those consumers of water in the retail connections downstream . . .<sup>30</sup>

That doesn't mean that staff can't look at and work with the Respondent to try to find ways to provide for more cost-effective approaches . . .<sup>31</sup>

Then, Commissioner Baker<sup>32</sup> adds:

I want to find a way to move forward where we don't have to put that cost on the people down there, and so what I'm asking for is some help in sort of what is the right path forward . . .<sup>33</sup>

I'd at least like to try to build in some time now . . . try to figure out a way forward, where South Texas Water's not gonna have to spend that money. And then, and maybe get a clear answer as to there is not, if there's not a clear path forward after that. You know, if we hear that no, there's no other way to do this, I'd like to at least look into that before we make a final decision, if that makes sense.<sup>34</sup>

To provide a possible solution, TCEQ Water Supply Division Director Linda Brookins states:

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<sup>29</sup> Nov. 20, 2013 agenda meeting, Item 1 at 1:27:42 – 1:29:33.

<sup>30</sup> *Id.* at 1:18:43 – 1:19:01.

<sup>31</sup> *Id.* at 1:19:23 – 1:19:31.

<sup>32</sup> At the November 20, 2013 agenda meeting, there were only two commissioners on the Commission at that time.

<sup>33</sup> Nov. 20, 2013 agenda meeting, Item 1 at 1:20:59 – 1:21:12.

<sup>34</sup> *Id.* at 1:23:12 – 1:23:45.

We have some resources in our division, some experts that could go out to the site and evaluate the data. . . .<sup>35</sup>

I think our staff can take a stab at going out there, looking at all the potential options with our engineers, trying to come back and work with the applicant and look at our best options . . .<sup>36</sup>

So we can definitely do a special study, and I can commit some of my resources in the division to get a start looking at that and bring that back for consideration. The main thing here is protection of public health and I think that's the goal of everyone here, but try to do it in a reasonable cost, so there might be a combination of things we need to do here. . . .<sup>37</sup>

Shaw: I think the key thing is as you laid out, Ms. Brookins, that we want to try to make sure we have a partnership and try to identify the best solutions going forward . . .<sup>38</sup>

This is about making sure we're protecting human health and doing so in a way that's the most cost-effective. . . .<sup>39</sup>

Before continuing this matter to allow time for the study, Chairman Shaw confirmed with Respondent's counsel that Respondent was agreeable to this

Chairman Shaw: I think the key that I need to confirm is that Mr. Willatt is comfortable and would be willing to be an active participant in that process should we continue this . . .

Respondent's Attorney: Absolutely.<sup>40</sup>

With the ED and Respondent in agreement, Chairman Shaw, in concluding the discussion about the study, stated:

Chairman Shaw: I think the key thing that I'd be looking for when you come back is your best analysis of the key options that we have that would move forward to resolving this and balancing those issues that we laid out, the importance of protecting the public drinking water and the need to minimize the bureaucratic burden and the economic cost associated with addressing this issue.<sup>41</sup>

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<sup>35</sup> *Id.* at 1:24:40 – 1:24:47.

<sup>36</sup> *Id.* at 1:25:26 – 1:26:38.

<sup>37</sup> *Id.* at 1:25:51 – 1:26:19.

<sup>38</sup> *Id.* at 1:28:06 – 1:28:15.

<sup>39</sup> *Id.* at 1:28:28 – 1:28:32.

<sup>40</sup> *Id.* at 1:29:23 – 1:29:33.

<sup>41</sup> *Id.* at 1:31:11 – 1:31:39.

Then, the Commission continued this matter to allow for the study of cost-effective options for addressing Respondent's ability to maintain the required disinfectant residual toward the end of its distribution pipe near Kingsville, Texas. Specifically, this item was continued and concluded as follows:

Chairman Shaw: That'd be the idea to continue, for up to six months<sup>42</sup>,

Commissioner Baker: For up to six months?

Chairman Shaw: And I would move that we do that.

Commissioner Baker: I'll second.

Chairman Shaw: Motion has been made and seconded. All in favor? Aye.

Commissioner Baker: Aye.

Chairman Shaw: Motion carries. Thank you staff so much; thank you and please let the staff . . .

Respondent's attorney: Chairman and Commissioner, we deeply appreciate your sincere consideration of this matter.

Chairman Shaw: Thank you. Thank you all and let's see if we can't find a solution that helps not only this case, but helps guide us through others...Judge, thank you so much for your input and look forward to working with you again.<sup>43</sup>

15. ED Staff has completed the study requested at the November 20, 2013 agenda and is ready to provide the results to the Commission. In order to be able to do so, the ED requests that the Commission reopen the record, pursuant to 30 TEX. ADMIN. CODE § 80.265, and remand this matter to SOAH to allow evidence of the study. The ED requests that the record be opened for the limited purpose of providing evidence of the study, analysis, and results.

#### **IV. Conclusion**

For these reasons, the ED respectfully requests the Commission remand this case to SOAH to reopen the record for the limited purpose of the parties providing results of the studies done and information gathered as to the cost of compliance and options for

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<sup>42</sup> The matter has not yet been reset for agenda after this continuance.

<sup>43</sup> Nov. 20, 2013 agenda meeting, Item 1 at 1:32:27 – 1:32:57.

compliance that the parties have obtained after the directive to do so at the November 20, 2013 Commission agenda meeting.

Respectfully submitted,

Texas Commission on Environmental  
Quality

Richard A. Hyde, P.E.  
Executive Director

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**CERTIFICATE OF CONFERENCE**

I hereby certify that I have conferred with Respondent's attorney, who has indicated that he probably will oppose this motion but had not provided ED's counsel his final determination at the time of filing. Additionally, I have conferred with the Office of Public Interest Counsel, who does not oppose this motion.

   
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Jennifer Cook

**CERTIFICATE OF SERVICE**

I hereby certify that on April 15, 2015, the foregoing original document and seven (7) copies were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas; the document was electronically filed with the Chief Clerk as well.

I further certify that on this day the foregoing document was served as indicated:

The Honorable Administrative Law Judge Craig Bennett  
State Office of Administrative Hearings  
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Austin, Texas 78701-1649  
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