

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

<p style="text-align:center">EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Petitioner</p> <p style="text-align:center">V.</p> <p style="text-align:center">SOUTH TEXAS WATER AUTHORITY, Respondent</p>	§ § § § § § § § § §	<p style="text-align:center">BEFORE THE</p> <p style="text-align:center">STATE OFFICE OF</p> <p style="text-align:center">ADMINISTRATIVE HEARINGS</p>
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**THE EXECUTIVE DIRECTOR’S REPLY
TO
THE RESPONDENT’S OPPOSITION TO REOPENING THE RECORD**

TO THE HONORABLE COMMISSIONERS:

The Executive Director (ED) of the Texas Commission on Environmental Quality (the Commission or TCEQ), files this reply to South Texas Water Authority’s (STWA or Respondent) response in opposition (the Response) to the ED’s motion to reopen the record filed April 15, 2015 (the Motion).

STWA’s Response contains at least three reasons why the record should be reopened as requested by the ED:

1. In the Response, STWA acknowledges there are cost-effective options available to STWA to achieve compliance; since the underlying basis for the November 20, 2013 continuance (STWA’s compliance is cost prohibitive) is moot, reopening the record will allow the Commission to consider the fact that cost-effective options have been identified, conclude this matter, and thus end further unnecessary delay through any additional continuance.
2. Ironically, STWA’s Response relies on facts currently outside the record to claim that the record should not be reopened; if the record is reopened it would allow both parties to present evidence of facts currently outside the record to be considered by the Commission. Consequently, STWA’s Response demonstrates that even STWA is requesting that additional facts be considered necessitating a reopening of the record.
3. The Response is telling in that it reveals STWA’s primary goal: to maintain the status quo of continued assertion of a meritless claim to avoid compliance. STWA claims that the continuance has been unnecessarily long and the ED’s Staff has failed to be of assistance and actually thwarted forward progress. It would appear that STWA would be eager to get this matter back in front of the Commission and end such an alleged unproductive continuance. On the contrary, STWA requests the Commission not reopen the record and instead maintain the status quo; this makes no sense except

for the obvious fact that STWA wants to maintain its current position that it does not have to comply with drinking water regulations.

I. Introduction

First, the ED completely disagrees with STWA's mischaracterization of facts occurring after the continuance at the November 20, 2013 Commission agenda meeting. It is important to note that the facts alleged in the Response are not in the record. The ED's position is that the record needs to be reopened so that a reliable record can be made regarding facts occurring after the November 20, 2013 Commission agenda meeting. One of the purposes of making a record in accordance with the law is to prevent a party from asserting unsubstantiated facts and mischaracterizing them in support of a position before the Commission, such as in STWA's Response.

II. STWA's Response actually supports a reopening of the record as requested by the ED.

In the Response, STWA requests the Commission to consider facts occurring after this matter was continued on November 20, 2015; this is the same request the ED makes in the Motion. STWA acknowledges that the parties have met, the ED has provided a presentation, and that STWA has a cost-effective plan in place. Moreover, STWA no longer claims that compliance is cost-prohibitive; since the purpose for the continuance was to identify cost-effective options, which has now been accomplished, there is no longer a basis for the continuance. STWA's unsupportable request to continue this case so that it can continue its claim that it is not subject to safe drinking water regulations is contrary to the goals of ensuring that STWA is in compliance with the rules designed to ensure safety and that STWA's customers are provided safe drinking water.

A. STWA acknowledges there was a study that ED's Staff presented to STWA which has led to cost-effective options that STWA has claimed it is willing to do; as such, STWA's Response supports that the ED's request to reopen the record is timely.

In the Response, STWA acknowledges that parties have had discussions and meetings to work on this matter, that ED staff has studied this matter and provided a presentation to STWA on March 11, 2015, and that cost-effective solutions have been identified that STWA is pursuing.¹ STWA conveniently omits stating that ED Staff in the TCEQ drinking water program provided substantial resources to this task. Technical

¹ See Response at 3-4.

experts within this program, in collaboration with each other, gathered and evaluated all available data and ultimately took a team to STWA's facilities to gather additional information, including additional sampling and monitoring data. After this huge endeavor, ED Staff met with and communicated its findings to STWA—which was that there are a variety of cost-effective operational measures, as opposed to only cost prohibitive large capital outlays, that STWA could undertake to address its disinfectant residual problem.² Of course, ED Staff did not dictate to STWA which exact operational measures STWA should take; it is appropriately within STWA's discretion to ultimately determine which operational measures are the best option considering STWA's business and operational needs.

Glaringly missing from the Response is any continued claim by STWA that there are no cost-effective options for STWA to take in order to get into compliance. In fact, STWA acknowledges that it has a new cost-effective plan: a free chlorine burn to remove the nitrification (that was actually identified by ED staff in their study), improvements to the Driscoll disinfection injection system, and continued collaboration with Kingsville such that Kingsville takes water pursuant to a bell-shaped curve.³ The main purpose of the November 20, 2013 continuance was for the parties to work together to come up with cost-effective options. As demonstrated by STWA's own Response, that has been accomplished. Consequently, the need for further continuance is over and STWA's request for such is unwarranted.

B. STWA's Response relies on claimed facts outside the record which ironically cannot be considered unless the record is reopened as the ED requests.

In the Response, STWA relies on facts that are outside the record and that have allegedly occurred after the Commission continued this matter.⁴ In fact, STWA provides its own summary and characterization of all facts that have occurred after the continuance of this matter.⁵ STWA asks the Commission to consider these facts which occurred after the November 20, 2013 Commission meeting. The purpose for reopening

² Contrary to STWA's assertion in the Response, there is no requirement that the ED provide a written report to STWA. The Commission directed the ED to work with STWA to identify cost-effective options, which is exactly what ED Staff did. Furthermore, as ED's counsel communicated to STWA's counsel, the issue regarding what format the study will be entered into the record and STWA's opportunity to preview and offer its own evidence can be addressed with the administrative law judge after the record is reopened.

³ See, e.g., *Id.*

⁴ See, e.g., Response at 3-6.

⁵ *Id.*

the record is to allow the parties to provide evidence of facts that are currently outside the record. As such, STWA's request actually supports a reopening of the record.

If the record is reopened, both parties will have the opportunity to present evidence of facts occurring after the November 20, 2013 Commission meeting in response to the Commission's directive at that meeting. The evidence of the facts that will comprise the record will be admitted in accordance with the Administrative Procedures Act (APA), TCEQ rules and the rules of the State Office of Administrative Hearings. The APA and these rules are designed to promote fairness to all parties and reliability of the information contained in the record.

Because in the Response STWA asks the Commission to also consider activities occurring after the November 20, 2013 Commission meeting (which is in essence the same request by the ED in the Motion), STWA's opposition to the Motion is without merit.

C. It is clear by the Response, which supports additional continuance, that STWA's goal is to continue the status quo of non-compliance for as long as possible.

In the Response, STWA requests that this matter remain in continuance. This would maintain the status quo. Currently, the status quo is that STWA continues to supply drinking water to its customers, is not complying with drinking water regulations, and is claiming it does not have to comply with any drinking water regulations because of the erroneous claim that it is not a public water system.

In the Response, STWA asks that this case be continued indefinitely; STWA provides no time-line or plan of action.⁶ On the one hand, STWA claims that the continuance has been ineffective, stating the ED's Staff has "failed to come up with any suggestions,"⁷ "contributed nothing,"⁸ "thwarted the Respondent's efforts to move forward,"⁹ and that STWA has proceeded without "any help from the ED staff."¹⁰ On the other hand, STWA requests that this allegedly ineffective continuance remain in effect.¹¹ This inconsistency is telling. It reveals that STWA's goal is to continue to claim inability

⁶ Response at 6.

⁷ Response at 4.

⁸ Response at 6.

⁹ Response at 4. Respondent inaccurately claims the ED will not approve plans until STWA signs an agreed order. That is not true. ED Staff has explained to STWA the challenge presented by requests for approval of an infrastructure that includes a non-PWS and potential untreated water as part of the distribution system; STWA is part of the distribution system in these in-house requests and maintains it is not a PWS and does not have to comply with regulations.

¹⁰ Response at 5.

¹¹ Response at 6.

to comply and/or that it does not have to comply for as long as possible. In fact, in discussing the timeframe for resolution of this case, STWA actually states: "This agreed order may be years away."¹² "Years away" is unacceptably vague and long in duration. It demonstrates that STWA has no interest in timely addressing this matter, and an additional continuance would serve this interest. As long as this matter remains in continuance, STWA has no real deadline to get into compliance or accomplish anything. Notably, STWA states it has a "program"¹³ and "proposal"¹⁴ to address the matter, but has not actually implemented that program. For example, STWA states it plans to do a chlorine burn to remove nitrification, but it has not done so and has given no time-frame as to when this might be accomplished; and STWA states it will improve the Driscoll disinfection injection system which will require Board approval, but there is no indication as to when this will be done.¹⁵ These operational measures are within STWA's complete control. Both parties agree that there are cost-effective options available for STWA, and thus, the need for additional delays and continuances is over. STWA's lack of action in implementing known operational cost-effective options supports the ED's request to reopen the record as the next step toward moving forward in this matter. At the November 20, 2013 Commission agenda meeting, the Commission discussed balancing cost-effectiveness with public health and safety concerns. Moving this case forward, via reopening the record, addresses public health and safety concerns; resolving this issue "years away," as STWA suggests, does not.

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

¹² Response at 5.

¹³ Response at 3 and 5.

¹⁴ Response at 4.

¹⁵ See Response at 3.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 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:

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