

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

July 23, 2013

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

Re: **SOAH Docket No. 582-12-5353; TCEQ Docket No. 2011-1647-PWS-E; In Re: Executive Director of the Texas Commission on Environmental Quality v. South Texas Water Authority**

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than August 20, 2013. Any replies to exceptions or briefs must be filed in the same manner no later than August 22, 2013.

This matter has been designated **TCEQ Docket No. 2011-1647-PWS-E; SOAH Docket No. 582-12-5353**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Craig R. Bennett".

Craig R. Bennett
Administrative Law Judge

CRB/lis
Enclosures
cc: Mailing List

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AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: SOUTH TEXAS WATER AUTHORITY
SOAH DOCKET NUMBER: 582-12-5353
REFERRING AGENCY CASE: 2011-1647-PWS-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

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SOUTH TEXAS WATER AUTHORITY

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

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY	§ § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
v. SOUTH TEXAS WATER AUTHORITY		

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EXECUTIVE DIRECTOR OF THE	§	
TEXAS COMMISSION ON	§	BEFORE THE STATE OFFICE
ENVIRONMENTAL QUALITY	§	
	§	
v.	§	OF
	§	
SOUTH TEXAS WATER AUTHORITY	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

I. INTRODUCTION

This enforcement action involves eight alleged drinking water violations by South Texas Water Authority (STWA). The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) requests that STWA pay an administrative penalty of \$2,443 and take certain corrective actions. The violations and requested corrective actions are based on the ED’s contention that STWA is a public water system.

STWA concedes that it was a public water system at the time of the violations, but argues it no longer is.¹ Now, STWA contends it simply provides wholesale water to other public water systems, each of whom are required to ensure the quality of the water before it reaches any end user. STWA argues that, given the nature of its system, it would be prohibitively expensive (costing millions of dollars) to comply with all of the standards applicable to public water systems. So, this case is not about the eight alleged violations or the penalty of \$2,443, but rather it is about the requirements that would be placed upon STWA if it is deemed a public water system going forward. In closing briefing, STWA makes this clear, stating “[STWA] is not contesting past violations, nor is it contesting the amount of the penalty. It contests only the requirements that the TCEQ seeks to impose on it from this day forward.”²

¹ STWA previously provided direct service to a correctional facility with more than 25 individuals, so it concedes it was a public water system during the time period of the alleged violations. It no longer serves that facility, however, and now argues that it does not meet the definitional requirements of a public water system.

² *Brief of South Texas Water Authority* at 1.

This case presents a difficult issue. There is no dispute over the past violations or the penalty amount. Rather, the entire controversy centers on the ED's requested corrective action, which is predicated upon STWA being considered a public water system going forward. The definition contained in the Commission's rules is ambiguous enough that the Commission could reasonably decide the issue either way. There are persuasive legal arguments supporting each side's proposed interpretation. While the Commission has great leeway to decide this case, the ALJ recommends the Commission find that STWA is not currently a public water system. This recommendation is supported by legal arguments, as well as equitable considerations. From a legal standpoint, EPA guidance supports STWA's contention that it is not a public water system. From an equitable standpoint, STWA has made good faith efforts to provide the best service it can, given its current system and the requirements placed on it by the legislature and its public water system customers. If STWA is considered a public water system, it will be required to meet certain standards—standards that appear unattainable by STWA without a prohibitively-expensive investment of millions of dollars in its system, which would be harmful to it and to the customers it serves.

II. BACKGROUND

Before moving to a more detailed discussion and analysis of the applicable law and the ED's alleged violations, the ALJ first lays out the factual background of this case, most of which is not disputed.

STWA was created by the legislature in 1979 as a water conservation and reclamation district designed to provide a wholesale water supply to the cities of Kingsville, Driscoll, Bishop, and Agua Dulce.³ In 1981, STWA entered into a water supply contract with the City of Kingsville, which is the most significant customer of STWA for purposes of the water quality issues presented in this case.

³ Tr. Vol. 2 at 201.

STWA purchases treated water from the City of Corpus Christi and distributes the water to its customers through a 42-inch pipe from Corpus Christi to the City of Kingsville. Currently, STWA sells potable water on a wholesale basis to six customers, which then distribute it to individuals within their communities for human consumption. While STWA does not provide direct water service to any individuals, the water provided by it is used by approximately 37,000 individuals, who receive the water on a retail basis from STWA's six customer systems.

On July 19, 2011, TCEQ investigator Melanie Edwards investigated STWA's facilities and documented the eight violations alleged in this case. One of the violations is for a failure to maintain the required disinfectant residual throughout STWA's pipeline. STWA has had a longstanding problem with maintaining the minimum disinfectant residual level. This violation was documented by the TCEQ during investigations in 2004 and 2008, as well as the 2011 investigation leading to this case. This failure to maintain the minimum disinfectant residual level is at the heart of this case and is the primary dispute between STWA and the ED.

STWA contends—and the ED does not appear to disagree—that STWA has been unable to maintain the disinfectant residual in its system because of two factors: the length and size of its pipeline to Kingsville, coupled with Kingsville not taking as much water as contemplated when the pipeline was first built. When STWA made the decision to build the pipeline, it expected to be the primary water source for Kingsville. However, Kingsville currently uses STWA as a secondary source, taking minimal amounts of water during the winter months, and using higher levels during the summer months.⁴ This means that water can sometimes sit in STWA's 42-inch pipe for up to 100 days before it is drawn out for use by Kingsville. Because the water at the end of STWA's pipeline sometimes remains at the end of the line for extended periods of time, this causes a loss of disinfectant residual.⁵ According to TCEQ records, STWA's ability to maintain a disinfectant residual has been a concern dating back to 1989.

⁴ Tr. Vol. 2 at 157.

⁵ The primary disinfectant in issue is chloramine, which has been used by STWA since 2004.

Because of the ongoing problems with the disinfectant residual, STWA retained a consulting firm to explore its options to correct the problem. The consulting firm estimated that it would cost between \$8.5 million and \$37.5 million to retrofit the system to adequately prevent a loss of disinfectant residual and ensure compliance with TCEQ rules related to public water systems.⁶ Even the TCEQ's own investigator conceded that he was not aware of any method of fixing the problem other than those identified by STWA's consultant. Given the relatively small number of customers served, as well as the fact that many customers come from economically-challenged areas, STWA contends that it would be prohibitively expensive to spend even \$8.5 million to address the problem.

Because STWA's customers are all public water systems, they are required to ensure the quality of the water before it is provided to end users. Thus, STWA contends there is no threat to public health by its failure to meet the disinfectant residual levels required for public water systems. In contrast, the ED contends there still are health-related concerns that may exist, despite the fact that there is always an additional public water system between STWA and the ultimate end users of the water.

Because of these concerns, and as a result of his investigation, the ED filed his Preliminary Report and Petition on February 8, 2012, seeking penalties and corrective action against STWA. On March 16, 2012, the ED had the matter referred to the State Office of Administrative Hearings (SOAH) for a hearing. On September 25, 2012, the ED filed a First Amended Preliminary Report and Petition, which is the current live pleading in this case. STWA initially challenged the Commission's jurisdiction in this case on the basis that it was not a public water system. The ALJ concluded this was an issue for hearing and denied the jurisdictional challenge. The hearing was conducted on March 5-6, 2013, and the record closed on May 24, 2013, after written closing arguments were filed. Other than noted above, no other challenges were made to notice or jurisdiction in this case.

⁶ STWA Ex. 1 at Tab 25.

III. DISCUSSION

The \$64,000 question in this case—on which the only real dispute in this case hinges—is whether STWA is a public water system within the meaning of the TCEQ’s rules and statutes. If so, then it is subject to the various requirements the ED relies on in seeking corrective action. If not, then those requirements would not apply to it. So, the ALJ will focus the bulk of the PFD on this issue, with a limited discussion of the violations, which occurred when STWA was indisputably a public water system and which are not contested.

A. Is STWA a Public Water System?

1. TCEQ Definition of a Public Water System

The definition of a public water system is found in the TCEQ’s rules at 30 Texas Administrative Code § 290.38(66):

Public water system--A system for the provision to the public of water for human consumption through pipes or other constructed conveyances, which includes all uses described under the definition for drinking water. **Such a system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year.** This term includes; any collection, treatment, storage, and distribution facilities under the control of the operator of such system and used primarily in connection with such system, and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system. Two or more systems with each having a potential to serve less than 15 connections or less than 25 individuals but owned by the same person, firm, or corporation and located on adjacent land will be considered a public water system when the total potential service connections in the combined systems are 15 or greater or if the total number of individuals served by the combined systems total 25 or greater at least 60 days out of the year. Without excluding other meanings of the terms “individual” or “served,” an individual shall be deemed to be served by a water system if he lives in, uses as his place of employment, or works in a place to which drinking water is supplied from the system.⁷

⁷ 30 Tex. Admin. Code § 290.38(66) (emphasis added) (this rule tracks the definition in federal law).

The highlighted portion of the definition above is the text of greatest significance. The parties disagree whether STWA “serves” at least 25 individuals.

2. The ED’s Arguments

The ED contends that STWA is a public water system because it supplies water directly to a number of other systems, which cumulatively provide water to approximately 37,000 individuals. So, because water supplied by STWA is ultimately provided to more than 25 individuals, the ED contends that STWA is “serving” those customers. In reaching this conclusion, the ED relies on a number of different factors.

First, the ED points out that nothing in the definition of a public water system requires that the system “directly” serve the end-user individuals. In fact, according to the ED, such a requirement would not be consistent with other rules. For example, the definition of “wholesale water system” under the TCEQ’s rules is “a public water system that delivers water to another public water system.”⁸ Thus, even though wholesale water providers often do not have any direct relationship with specific individual customers, the TCEQ’s rules presume them to be “public water systems” by definition. According to the ED, such a conclusion would often only be true if the ultimate end users served by the retail system are imputed to the wholesale water system, because the wholesale system itself might not have a minimum of 15 connections or 25 individuals “directly” served by it.

Moreover, the ED points out that the last sentence of the definition of a public water system indicates that an individual is “served” by a system “if he lives in, uses as his place of employment, or works in a place to which drinking water is supplied from the system.” The ED contends that the residents of Kingsville and the other entities receiving water from STWA do live in a place where their drinking water is ultimately “supplied” by STWA, as STWA

⁸ 30 Tex. Admin. Code § 290.103(37).

maintains the distribution line that brings the water to those residents from the City of Corpus Christi.

The ED further notes that the TCEQ rules do not require that a system be wholly owned by only one entity to qualify as a public water system. For example, the ED points to the definition of a “combined distribution system,” which is defined as “[t]he interconnected distribution system consisting of the distribution systems of wholesale systems and of the consecutive systems that receive finished water.”⁹ So, according to the ED, STWA is part of a combined distribution system that includes the end systems (such as that maintained by Kingsville). According to the ED, the whole system (*i.e.*, from the end system back to the treated water source) is considered a public water system. Therefore, each of the separate parts of the system is subject to the requirements for a public water system.

So, the ED contends that one looks at the entirety of the “system,” from the originating treatment plant (here, the City of Corpus Christi) to the ultimate end users of the water (the residents served by STWA’s customer systems), without regard to ownership of the parts, to determine whether it is a public water system. If it is, then each part of the system is responsible for meeting the public water system standards. As the ED states in closing arguments, “if a supplier provides water to a [public water system], it is necessarily a [public water system].”¹⁰ So, in essence, *every* water supplier to a public water system will, in the ED’s estimation, *always* qualify as a public water system itself. The ED argues this interpretation is supported by the TCEQ rules that require a minimum disinfectant level be maintained throughout the water in the distribution systems for public water systems, which the ED asserts is meaningful only if the entire distribution system is subject to regulation as a public water system.¹¹

⁹ 30 Tex. Admin. Code § 290.103(2).

¹⁰ *ED’s Reply Closing Brief* at 10.

¹¹ 30 Tex. Admin. Code §§ 290.110(b)(4) and 290.46(d)(2)(b).

The ED also presented the testimony of its own personnel, specifically Alicia Diehl and James Weddell, who opined that they have interpreted the TCEQ rules to include the downstream users of water when calculating whether an entity like STWA serves 25 individuals for purposes of being considered a public water system. Their interpretation was also supported by Blake Atkins, the Chief of the Drinking Water Section in Region Six of the Environmental Protection Agency (EPA). Mr. Atkins testified that he applied the same analysis when interpreting the federal rules applying the Safe Drinking Water Act (SDWA). As the ED points out, the definition of a public water system is virtually the same in the federal and state rules. In fact, the state definition must be at least as stringent as the federal definition for Texas to be allowed to administer the SDWA. Thus, the ED contends that the TCEQ definition of a public water system *must* be interpreted consistent with Mr. Atkins's definition.

Moreover, the ED maintains that an enormous loophole would be created if the definition of a public water system requires the system to have a direct relationship with the individual customers. The ED argues that water systems could just splinter into smaller systems prior to reaching the consumer, thus resulting in no public water system existing—and no protection of the water quality for end users. According to the ED, this would be an absurd result and is against the purposes of the SDWA.

Finally, the ED disputes STWA's position that there is no threat to public health if STWA is not considered a public water system. While the ED acknowledges that STWA's customers are themselves public water systems and are required to maintain the quality of the water in their systems, the ED's experts testified that there still is a public health concern if STWA is not maintaining the quality of the water in its system. Specifically, three witnesses testified that if STWA did not maintain the required residual disinfectant level, that could compromise the water provided and even later treatment by Kingsville or other public water systems might be insufficient to prevent bacterial growth, nitrification, and other health concerns. Thus, according to the ED, it is important to ensure that the treated water is kept safe throughout the whole distribution process.

3. STWA's Arguments

STWA disagrees with the ED's interpretation of the rule defining a public water system, and asserts that the plain language of the TCEQ's rule requires that STWA "directly" serve at least 25 individuals or have 15 connections before it can be considered a public water system. STWA argues that it has no relationship whatsoever with the end-user customers and does not provide service to them. It has no contracts with them, has no direct service connections to any residences, and does not have any interaction with them. Moreover, when asked directly at the hearing how STWA actually "serves" residential customers in Kingsville, the ED's principal testifying engineer, James Weddell, testified "I cannot answer that."¹² Thus, STWA contends that the ED's interpretation of the rule strains common sense and the plain language of the rule.

Further, STWA points out the ED is inconsistent in his interpretation of the applicable rule, because he did not impute Kingsville's service connections to STWA but does impute its individual customers.¹³ STWA contends this has no logical basis, for if the individuals are imputed to STWA, then the service connections should as well. But, at the hearing, the ED's witnesses indicated that they did not believe STWA was a public water system on the basis of its connections because it had less than 15.¹⁴

STWA also relies on EPA guidance as to the meaning of the word "serve." Although neither EPA nor TCEQ rules define the word "serve," EPA has provided the following guidance from the Federal Register:

In describing a public water system, EPA's regulations and guidance use such terms as 'serves' and 'delivers' — often though not always in the context of

¹² Tr. Vol. 2 at 21.

¹³ As noted previously, to qualify as a public water system, the entity must have either 15 service connections or serve 25 individuals. So, it is the quantification of either service connections or individuals that determines whether the system is a public water system. 30 Tex. Admin. Code § 290.38(66).

¹⁴ Tr. Vol. 1 at 141-142 and 163-166.

‘customers’ (see, e. g. , 40 CFR § 141.2). For the supplier to be providing water to users, there must be an explicit or implied arrangement or agreement of some kind between a supplier and individuals using water. A contractual, operating or service arrangement is the most obvious example of an explicit agreement or arrangement to provide water.¹⁵

STWA points out it has no explicit or implied arrangements—including contracts, agreements, or service arrangements—with any residential customers. STWA does not take service applications, make connections, read meters, make repairs, or send bills to any residential customers. Therefore, it argues it cannot be held to be “serving” them under any reasonable reading of the term. In fact, STWA contends it is *legally prohibited* from rendering service to retail customers without a certificate of convenience of necessity for the specified area—which it does not have.¹⁶

STWA also argues that the ED’s interpretation violates due process. Specifically, STWA cites to case law which provides that due process is violated “[w]hen persons of common intelligence are compelled to guess at a law’s meaning and applicability.”¹⁷ STWA asserts that no common person of ordinary intelligence would imagine that STWA is “serving” residential customers in Kingsville. Thus, according to STWA, an interpretation that reaches that result violates due process and is invalid.

4. The ALJ’s Analysis

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.

¹⁵ STWA Ex. 1 at Tab 11; 63 Fed. Reg. 150 at 41940-41946 (August 5, 1998).

¹⁶ See Tex. Water Code § 13.242.

¹⁷ *City of Webster v. Signad, Inc.*, 682 S.W.2d 644 (Tex.App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.).

After considering the various arguments and authorities presented, the ALJ recommends that STWA not be considered a public water system because it does not directly have either 15 service connections or directly serve at least 25 individuals. In reaching this conclusion, the ALJ finds one piece of evidence particularly persuasive—an EPA guidance document that is entitled “Guidance on Public Water System Definition.”¹⁸ In that document, EPA addresses what counts as a “service connection.” EPA states:

It does not count as a “service connection” where a water supplier indirectly provides water for human consumption to a municipality or pass-through entity which actually provides the water to end users, and which itself is a [public water system] that must meet [Safe Drinking Water Act] requirements.¹⁹

Although that document addresses service connections only, the ALJ believes that the rationale behind such guidance applies equally to the separate requirement regarding the number of individuals served. There, EPA (essentially at the direction of Congress) concluded that a municipality’s service connections should not be imputed to a wholesale system providing service to the municipality. This is consistent with the testimony of EPA witness Blake Atkins, who indicated that EPA does not count a municipality’s service connections against the wholesale water provider for purposes of determining whether the wholesale water provider is a public water system.²⁰ ED witness Alicia Diehl testified similarly.²¹ The testimony of ED witness James Weddell was inconsistent on this issue, varying between indicating that only the wholesaler’s direct service connections were counted against it but other times saying it might be appropriate to impute the service connections of the municipality to the wholesale water supplier.²² While it appeared that Mr. Weddell applied a different standard than EPA witness Blake Atkins and ED witness Alicia Diehl, it was not entirely clear.

¹⁸ STWA Ex. 1 at Tab 10.

¹⁹ STWA Ex. 1 at Tab 10, p. 1 of 2.

²⁰ Tr. Vol. 1 at 163-166.

²¹ Tr. Vol. 1 at 141-142.

²² Tr. Vol. 2 at 15-16 and 21-30.

Applying the EPA guidance and the testimony of witnesses Blake Atkins and Alicia Diehl, it appears a municipality's service connections are not to be counted against the wholesaler for purposes of determining whether it is a public water system. It logically follows, then, that the municipality's customers also are not to be counted against the wholesaler when attempting to determine whether the wholesaler is a public water system. There is certainly no clear basis for making a distinction between the two in the rules or the applicable statutes.

The ED argues the EPA guidance document should apply only to constructed conveyances (such as canals) and not pipes, because the guidance came about after congress changed the SDWA to include constructed conveyances as a method of delivery of water that could qualify a system as a public water system. Prior to that congressional change, the definition of a public water system included only pipes as the method of conveyance. However, the ED's limitation on the document does not appear logically supported. Although the document was prepared in light of the congressional change to the definition of a public water system, the guidance document itself notes the definition was changed only in regard to including constructed conveyances, along with pipes, as the method of conveyance of the water. As EPA notes in the document, the second element of the definition of a public water system—the part that relates to the number of service connections or customers served—is unchanged. In providing the guidance cited above, EPA's analysis comes in the context of determining whether the exceptions/requirements of the congressional changes to the SDWA even come into play. Because the part of the definition that relates to service connections or customers served is unchanged, EPA's analysis of how to apply that provision should be similarly unchanged by the congressional amendments and should be applied uniformly. It is untenable to argue that two different "analyses" are used when applying the element when the SDWA itself makes no such distinction based on the factors EPA discusses (however, the congressional changes do make a distinction for connections "if the water is used exclusively for purposes other than residential uses").²³

²³ See SDWA § 1401(4)(B)(i)(I). The SDWA is found in 42 U.S.C. Chapter 6A, Subchapter XII.

Further, the ED's arguments appear inconsistent with other language in the definition of a public water system. For example, part of the definition of a public water system states:

This term includes; any collection, treatment, storage, and distribution facilities under the control of the operator of such system and used primarily in connection with such system, and any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system.

If, as the ED contends, the definition of a public water system does not depend on ownership, but rather encompasses different entities operating in connection with each other, the sentence above seems unnecessary and somewhat illogical. If a system can include different entities, each with control over a part of the system, then why would the rule reference "the operator of such system" as if there is only *one* operator of the system? Similarly, if a system can include parts owned by different entities, then why does the sentence above limit the definition to certain parts "under the control" of the operator but include collection and pretreatment storage facilities not under the control of the operator? It seems odd that the ED contends that ownership and control are essentially irrelevant in the determination of whether a total system is a public water system, when the very definition focuses on "control" of the system's components in determining what may be considered a public water system.

Regardless of the meaning of the language cited above, what is clear is that the rule provides only two types of facilities that are not under the control of the operator that may be considered as part of "the system": collection or pretreatment storage facilities which are used primarily in connection with such system. The rule does not indicate that distribution connections to end users that are not controlled by the operator of the system should be considered part of the system. As such, it seems an odd result to contend that the end users served by the City of Kingsville or any of STWA's other customers should be considered under STWA's system in determining whether it is a public water system, when the definition of a public water system focuses only on including those components actually under the control of the system operator.

Moreover, the definition of a public water system also provides that:

Two or more systems with each having a potential to serve less than 15 connections or less than 25 individuals but owned by the same person, firm, or corporation and located on adjacent land will be considered a public water system when the total potential service connections in the combined systems are 15 or greater or if the total number of individuals served by the combined systems total 25 or greater at least 60 days out of the year.

Thus, the rule recognizes and addresses the “loophole” the ED expresses concern over. Namely, the ED has said that adopting STWA’s interpretation would allow entities to split up their systems to avoid regulation. However, when such systems are located on adjacent land (as they certainly would be if they are interconnected), then one looks at whether the same person, firm, or corporation has ownership of the systems. If so, then they are consolidated together for purposes of determining if they are a public water system. While it might be argued that separate companies could be set up to avoid this, the ALJ does not believe that such an effort would succeed, as the definition clearly contemplates ultimate ownership. So, even if a company created separate entities to operate different components, if the ultimate ownership of those different companies rested in the same person or entity, then the definition would likely be triggered, and they would be consolidated together for purposes of determining if they are a public water system.²⁴

The ALJ is also unconvinced that the other definitions within the TCEQ rules discussing distribution systems, wholesale systems, or combined distribution systems should be read as making STWA a public water system. The definition of a wholesale system is simply “a public water system that delivers water to another public water system.”²⁵ This definition does not make every wholesale water provider a wholesale system but simply indicates that, under the rules, the term wholesale system will only encompass those systems that otherwise meet the

²⁴ The ALJ recognizes that this definition requirement also applies to unconnected systems that are simply located on adjacent land and held by the same owner.

²⁵ 30 Tex. Admin. Code § 290.103(37).

definition of a public water system. The definition of a “distribution system” does not even reference public water systems.²⁶

The ED’s argument that STWA is part of a “combined distribution system,” thus establishing it is a public water system, is also unpersuasive because it is essentially circular. A “combined distribution system” (CDS) includes “wholesale systems” and “consecutive systems” (both of which are defined to include only public water systems). STWA must first be a public water system before it can meet the requirements for being part of a CDS—not the other way around. If STWA is not a public water system, then it is not part of a CDS under the TCEQ rules. Moreover, the rule regarding a CDS has provisions that discuss when the populations of each of the individual systems may be accumulated for purposes of applying certain water quality rules, providing:

(B) A public water system may be determined to be in a different CDS for the purposes of compliance with regulations based on the Stage 2 Disinfection Byproducts Rule (DBP2) and the Long Term Stage 2 Enhanced Surface Water Treatment Rule (LT2).

(i) For the purposes of raw water monitoring under LT2, the CDS shall be based on the retail and wholesale population served by each surface water treatment plant or plant treating groundwater under the direct influence of surface water.

(ii) For the purposes of DBP2, the CDS shall be determined based on the retail population served within each individual system’s distribution system.²⁷

Since the TCEQ’s rules provide scenarios when the customers or connections of other systems may be counted to the system on the whole, it seems unusual that the TCEQ has not taken the step to clarify that this occurs when determining what constitutes a public water system, as the ED alleges the definition should be interpreted.

²⁶ 30 Tex. Admin. Code § 290.38(21).

²⁷ 30 Tex. Admin. Code § 290.103(2).

The ED's interpretation of these various rules would result in the conclusion that every entity that provides water to a public water system is to be treated as a public water system itself. This is a broad and far-reaching conclusion. It would greatly nullify the language regarding "control" and "operator of the system" as contained in the definition of a public water system, and it would also contravene the EPA guidance document that says you do not consider the connections of a municipality when evaluating its wholesale supplier to determine whether it is a public water system. The ED's approach seems overreaching to the ALJ, especially when the definition of "public water system" does not specifically indicate that the customers of a different system are to be imputed to an upstream water provider. From a legal standpoint, there is enough ambiguity in the rules and statutes for the Commission to adopt the ED's proposed interpretation if it so chooses. However, the ALJ declines to do so in light of the EPA guidance and the definitional requirements which seem to focus on operation and control in determining what constitutes a public water system.

Moreover, from an equitable standpoint, the ED's proposed interpretation would have significant deleterious results. By all accounts, STWA was created by the legislature to serve areas that had a need for access to water. The entities that receive such water are all public water systems themselves and are required to ensure the quality of the water to be received by their retail customers. If the Commission determines that STWA is a public water system, then it will be forced to implement very costly changes (estimated to be at least \$8.5 million) to address its current inability to consistently maintain the disinfectant residual level of chloramine in its pipeline. This cost will have to be passed on to customers, which will cause significant increases in the cost of service to an area that is already economically challenged.²⁸ In fact, STWA's customers oppose the ED's proposed regulation of STWA. Specifically, spokespersons for Nueces Water Supply Corporation and the City of Bishop filed statements opposing the ED's proposed regulation of STWA as a public water system.²⁹ Similarly, the mayors of the cities of

²⁸ See, e.g., testimony of William Staff on behalf of Nueces Water Supply Corporation, Tr. Vol. 2 at 42.

²⁹ See STWA Exs. 3 and 6.

Kingsville and Driscoll also filed statements opposing the ED's regulation of STWA as a public water system.³⁰ Each of these individuals noted the financially-challenged nature of their retail customers and the detrimental impact the ED's interpretation would have on those customers.³¹

While the ALJ generally agrees that public health concerns trump economic concerns, this current situation does not appear to present a significant public health concern. The water is initially treated by the City of Corpus Christi before going into STWA's pipeline and is then treated again by the retail public water systems that receive it from STWA. There has been no recorded harm to any individuals from STWA's inability to maintain the residual disinfectant levels, even though this has been a recurring problem for more than 20 years. In this scenario, there do not appear to be sufficiently serious public health concerns warranting STWA to spend \$8.5 million to address the residual disinfectant issue—especially when the public water systems that receive such water are required to take steps to ensure its compliance with SDWA standards.

A possible resolution might be to construe STWA as a public water system and then grant it an exception or variance from the residual disinfectant requirements. In fact, STWA requested an exception, but the ED denied this request on the basis that such an exception may not be granted under existing law.³² STWA also requested a variance on October 3, 2012,³³ but such request has not been decided yet by the ED. At the hearing, ED witness James Weddell testified that such a variance would not be permissible for the same reasons an exception is not permissible.³⁴ The ED reiterated this position in closing briefing. So, at this point, it does not appear that a variance or exception could be granted to STWA.

³⁰ See STWA Exs. 5 and 7.

³¹ The estimated cost of \$8.5 million is about five times STWA's expected revenues for fiscal year 2013, which are approximately \$1.6 million for its whole system. See STWA Ex. 1 at Tab 28.

³² See ED Ex. 34 at 0002 (noting that exceptions can be granted only to requirements found in Subchapter D of Chapter 290 of the TCEQ rules, but the minimum disinfectant residual level requirement is found in Subchapter F of Chapter 290, for which exceptions are not allowed).

³³ STWA Ex. 1 at Tab 9.

³⁴ Tr. Vol. 1 at 222.

Ultimately, then, the ALJ concludes that legal and equitable considerations would justify finding that STWA is not currently a public water system because it does not directly have at least 15 service connections nor does it directly provide service to at least 25 individuals. As such, it does not appear to meet the requirements to be considered a public water system.

B. Is STWA Subject to Minimum Disinfectant Residuals as a Distribution System?

Even if STWA is not considered a public water system, the ED contends it is subject to the minimum disinfectant residual requirements because it is a distribution system. He relies on 30 Texas Administrative Code §§ 290.46(d)(2)(B) and 290.110(b)(4). Those provisions require that minimum disinfectant residuals be maintained throughout a distribution system, which is defined as “[a] system of pipes that conveys potable water from a treatment plant to the consumers. The term includes pump stations, ground and elevated storage tanks, potable water mains, and potable water service lines and all associated valves, fittings, and meters, but excludes potable water customer service lines.”³⁵ As noted previously, the definition of a distribution system does not reference “public water systems” or arguably require that a distribution system be a public water system. Accordingly, the ED contends that STWA, as a distribution system, is required to maintain the residual disinfectant levels of chloramine throughout its system.

The ALJ agrees that STWA could be considered a distribution system. However, the requirements for maintaining minimum disinfectant levels in a distribution system appear to apply only to public water systems. Specifically, 30 Texas Administrative Code § 290.110 is part of Subchapter F of the Commission’s public drinking water rules. That Subchapter is entitled “Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for *Public Water Systems*.” (Emphasis added.) Thus, the title itself shows that the subchapter is clearly intended to provide requirements for “public water systems.”

³⁵ 30 Tex. Admin. Code § 290.38(21).

The language of Section 290.110(a) also demonstrates this same point. Specifically, the rule states: “Applicability. All *public water systems* shall properly disinfect water before it is distributed to any customer and shall maintain acceptable disinfectant residuals within the distribution system.” (Emphasis added.) Thus, the rule is applicable to “public water systems.” If STWA is not a public water system, the disinfectant residual requirements of 30 Texas Administrative Code § 290.110 do not apply to it.

Similarly, 30 Texas Administrative Code § 290.46 is titled “Minimum Acceptable Operating Practices for *Public Drinking Water Systems*.” (Emphasis added.) All throughout the rule, it is clear that it is stating requirements for public water systems, as that phrase is used constantly in regard to the requirements identified. Although section (d) merely states “[a] disinfectant residual must be continuously maintained during the treatment process and throughout the distribution system” and contains no reference to a “public water system,” both the title and all of the surrounding language (including the constant references to “public water system” in the rule) make it clear the requirements are intended for public water systems. Therefore, even if STWA is considered a “distribution system,” the ALJ finds the disinfectant residual requirements contained in 30 Texas Administrative Code §§ 290.46(d)(2)(B) and 290.110(b)(4) would not apply to it unless it is also a public water system.

C. The Violations in Issue

If STWA is not a public water system, then it is not subject to the corrective action the ED seeks to apply to it. Regardless, it is undisputed it was a public water system at the time of the violations in 2011 because it served the LCS Detention Center directly. The ED has asserted eight separate violations for a total administrative penalty of \$2,443.³⁶ STWA has not presented evidence challenging the facts of the violations nor the penalty amount. As noted previously,

³⁶ For purposes of counting the number of violations, similar violations are grouped together into a single violation. Thus, for example, although chloramine levels were out of compliance on numerous dates in 2011, they are discussed together simply as “Violation 1.”

STWA concedes as much in its briefing. So, the ALJ's discussion of the asserted violations and the accompanying penalty amount is very brief, with the violations being treated as uncontested.

1. Violation 1 – Failing to Maintain a Minimum Chloramine Residual

STWA uses chloramine as a disinfectant in its water system. The TCEQ's rules require the residual disinfectant concentration of the water within a public water system's distribution system to be at least 0.5 mg/L of chloramine (if chloramine is used instead of free chlorine).³⁷ Field tests conducted on STWA's pipeline showed chloramine levels below 0.5 mg/L on numerous occasions in 2011. Specifically, the following chloramine levels (expressed in mg/L) were observed at different locations along the pipeline: 0.27, 0.20, 0.28, 0.40, 0.25, 0.31, and 0.21.³⁸ Although STWA boosts the chloramine to the required levels prior to distribution to its customers, the ED notes this is not sufficient, as the rules require the chloramine levels to be maintained continuously throughout the system. The evidence on this issue is undisputed and it is clear that minimum chloramine levels were not maintained throughout the system as required by 30 Texas Administrative Code §§ 290.110(b)(4) and 290.46(d)(2)(B).

2. Violation 2 – Failing to Provide the Required Monitoring Plan

The TCEQ's rules require that all public water systems maintain an up-to-date chemical and microbiological monitoring plan.³⁹ The monitoring plan rule has numerous requirements for such plans, including requirements that the monitoring plan provide information on the sampling frequency, the analytical procedures used, and a written description of the methods used to calculate compliance. During the ED's investigation in 2011, STWA's monitoring plan was missing this required data.⁴⁰ After the investigation, the monitoring plan was updated to include

³⁷ 30 Tex. Admin. Code §§ 290.110(b)(4) and 290.46(d)(2)(B).

³⁸ ED Ex. 1 at 0032 and 0036-38.

³⁹ 30 Tex. Admin. Code § 290.121.

⁴⁰ Tr. Vol. 2 at 112-117; ED Ex. 1 at 0007; ED Ex. 24.

the missing information. The evidence on this issue is undisputed, and it is clear that STWA violated 30 Texas Administrative Code § 290.121.

3. Violation 3 – Failure to Use an Approved Laboratory to Analyze Samples

The TCEQ's rules require that an approved laboratory be used to analyze samples to determine compliance with maximum residual disinfectant levels.⁴¹ The ED's evidence establishes that (1) STWA failed to have the required paperwork showing it was using an approved laboratory for analyzing its samples for the maximum residual disinfectant levels, and (2) STWA employees were running their own samples to determine compliance with the maximum residual disinfectant levels.⁴² The evidence on this issue is undisputed, and it is clear that STWA's practices, as shown during the investigation, did not fully comply with 30 Texas Administrative Code § 290.119.

4. Violation 4 – Failing to Include All Samples in Compliance Calculations

The TCEQ's rules require that public water systems provide Disinfectant Level Quarterly Operating Reports (DLQORs) showing samples taken to demonstrate compliance with the TCEQ's disinfectant level requirements.⁴³ The rules require that all samples be included in the compliance analysis.⁴⁴ When the investigation was conducted, STWA was sampling six pump stations, five times per week, which would result in a monthly total of approximately 120 samples (*i.e.*, 30 per week); however, STWA had less than 40 samples per month included in its DLQORs.⁴⁵ STWA subsequently revised its monitoring plan to clarify which sites would be used for sampling and to ensure that all samples would be included in the DLQORs.⁴⁶ The

⁴¹ 30 Tex. Admin. Code § 290.119(a)(2)(D).

⁴² Tr. Vol. 2 at 117-119; ED Ex. 1 at 0007.

⁴³ 30 Tex. Admin. Code § 290.110(f)(1).

⁴⁴ 30 Tex. Admin. Code § 290.110(f)(1)(A).

⁴⁵ ED Ex. 1 at 0007-8; ED Ex. 24 at 0002-4; ED Ex. 27 at 0004-9.

⁴⁶ ED Ex. 29 at 0001-2.

evidence on this issue is undisputed, and it is clear that STWA's practices, as shown during the investigation, did not fully comply with 30 Texas Administrative Code § 290.110.

5. Violation 5 – Failing to Comply with Site-Specific Requirements for Facilities Issued an Exception

The TCEQ's rules allow the ED to grant exceptions to certain requirements, provided that the water system complies with the requirements imposed by the ED in the exception.⁴⁷ In this case, STWA was previously granted an exception to convert from the use of a chlorine disinfectant to a chloramine disinfectant.⁴⁸ As part of that exception, the ED required that STWA monitor and record free ammonia levels.⁴⁹ The ED's investigation in 2011 revealed that STWA was not monitoring or recording free ammonia levels as required by the ED's exception.⁵⁰ Although STWA has provided evidence that it has purchased an ammonia re-agent to monitor free ammonia, the ED contends there is no evidence of such monitoring taking place and, thus, the violation is considered ongoing. The evidence on this issue is undisputed and it is clear that STWA's practices, as shown during the investigation, did not comply with the exception granted by the ED and, thus, did not comply with 30 Texas Administrative Code § 290.39(l)(4).

6. Violation 6 – Failing to Properly Calibrate the Continuous Disinfectant Residual Analyzers

The TCEQ's rules require that continuous disinfectant residual analyzers be calibrated every 90 days using chlorine solutions of known concentrations.⁵¹ During the investigation in 2011, the ED discovered that STWA's continuous disinfectant residual analyzers were not being

⁴⁷ 30 Tex. Admin. Code § 290.39(l).

⁴⁸ ED Exs. 30 and 31.

⁴⁹ ED Ex. 31 at 1-2.

⁵⁰ Tr. Vol. 2 at 126-128; ED Ex. 1 at 0005-6.

⁵¹ 30 Tex. Admin. Code § 290.46(s)(2)(C)(ii).

calibrated.⁵² After the investigation, STWA purchased calibration kits, but there is still no evidence the kits are being used as required. Thus, the ED contends this violation is ongoing. The evidence on this issue is undisputed, and it is clear that STWA's practices, as shown during the investigation, did not comply with the calibration requirements of 30 Texas Administrative Code § 290.46(s)(2)(C)(ii).

7. Violation 7 – Failing to Properly Fit Pressure Tank

The TCEQ's rules require that all pressure tanks with a capacity greater than 1,000 gallons must be fitted with a device to readily determine the air-water-volume.⁵³ At STWA's Bishop Eastside Pump Station, a "sight glass" was used on its 2,500-gallon tank to comply with this requirement. However, during the investigation, the sight glass was found to be inoperative.⁵⁴ STWA subsequently repaired the sight glass. However, it is undisputed the sight glass was not operating properly during the investigation, and the 2,500-gallon tank did not have the device required by 30 Texas Administrative Code § 290.43(d)(3).

8. Violation 8 – Failing to Monitor Disinfectant Residual at Representative Locations

The TCEQ's rules require that public water systems monitor the disinfectant residual at various "representative" locations throughout the distribution system.⁵⁵ STWA was monitoring the chloramine disinfectant residual after booster disinfection at the pump stations. The ED contends that monitoring after the residual was boosted does not provide a representative sample of the disinfectant residual throughout the 42-inch pipe from the water treatment plant to the City of Kingsville's pump station. When samples were collected from locations prior to the booster locations, these samples reflected disinfectant levels below the required minimum residual

⁵² Tr. Vol. 2 at 128-130; ED Ex. 1 at 0004 and 0006.

⁵³ 30 Tex. Admin. Code § 290.43(d)(3).

⁵⁴ Tr. Vol. 2 at 130-131; ED Ex. 1 at 0008.

⁵⁵ 30 Tex. Admin. Code § 290.110(c)(4).

level.⁵⁶ The ALJ agrees that monitoring immediately after the residual is boosted does not provide a representative sample of the residual disinfectant levels throughout the distribution system. Accordingly, the decision to monitor the disinfectant residual after the booster location was not consistent with the requirements of 30 Texas Administrative Code § 290.110(c)(4) and constituted a violation for which STWA may be sanctioned.

D. The Recommended Penalty

The ED seeks a total administrative penalty of \$2,443 for the eight violations identified above.⁵⁷ STWA does not contest either the violations or the penalty amount, and the ALJ finds the recommended penalty warranted by the evidence. Therefore, the ALJ recommends that the Commission impose this administrative penalty against STWA.

E. The Recommended Corrective Action

The ED seeks numerous elements of corrective action going forward. If STWA is determined to be a public water system, then all of the recommended corrective actions are appropriate (as all relate to correcting the violations found above and ensuring they do not continue or recur).⁵⁸ However, because the ALJ has recommended the Commission find that STWA is not currently a public water system, the ALJ also recommends that no corrective action be ordered.

⁵⁶ ED Exs. 44-46.

⁵⁷ The ED originally sought a penalty of \$2,580 in the First Amended Preliminary Report and Petition but subsequently lowered it to \$2,443 in its closing arguments. *See* ED's *Initial Closing Brief* at 19.

⁵⁸ The full list of the ED's requested corrective actions may be found in the ED's *Initial Closing Brief* at 19-20.

IV. CONCLUSION

In conclusion, the ALJ finds that the ED has demonstrated that STWA committed eight violations for which it is subject to administrative penalties and that a total administrative penalty of \$2,443 for the violations is warranted. However, the ALJ recommends that STWA not be considered a public water system at this time and that no corrective action be required of it going forward. Consistent with these conclusions and recommendations, the ALJ will provide, along with this PFD, a proposed order with findings of fact and conclusions of law for the Commission's consideration.

SIGNED July 23, 2013.



**CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER
IN REGARD TO THE ENFORCEMENT ACTION
AGAINST SOUTH TEXAS WATER AUTHORITY
TCEQ DOCKET NO. 2011-1647-PWS-E,
SOAH DOCKET NO. 582-12-5353**

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Report and Petition recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by South Texas Water Authority (STWA). A Proposal for Decision (PFD) was presented by Craig R. Bennett, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a hearing concerning the First Amended Report and Petition on March 5 and 6, 2013, in Austin, Texas.

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

I. FINDINGS OF FACT

A. Background

1. STWA was created by the Texas legislature in 1979 as a water conservation and reclamation district designed to provide a wholesale water supply to the cities of Kingsville, Driscoll, Bishop, and Agua Dulce.
2. STWA owns and operates a wholesale water supply system located 1/2 mile west of United States Highway 77 on East County Road 2010 in Kingsville, Kleberg County, Texas.

3. STWA purchases treated water from the City of Corpus Christi and distributes the water to its customers through a 42-inch pipe that runs from Corpus Christi to the City of Kingsville.
4. Currently, STWA sells potable water on a wholesale basis to six customers: Nueces Water Supply Corporation; City of Kingsville; Nueces County Water Control and Improvement District No. 5; City of Bishop; City of Driscoll; and City of Agua Dulce. These six customers of STWA then distribute the water to individuals within their communities for human consumption.
5. Each of STWA's six current customers is a public water system, as defined by the Commission's rules.
6. STWA does not currently provide direct water service to any individuals, but the water provided by it is used by approximately 37,000 individuals, who receive the water on a retail basis from STWA's six customer systems.
7. Until November 2012, STWA also served the LCS Detention Center in addition to the customers identified above. The LCS Detention Center is a private correctional facility that housed individuals. At all times STWA provided service to the LCS Detention Center, the facility had at least 25 individuals who were served directly by STWA.
8. STWA no longer provides service to the LCS Detention Center, as such service is now provided by Nueces Water Supply Corporation.

B. Procedural History, Notice, and Jurisdiction

9. On July 19, 2011, the TCEQ investigator Melanie Edwards investigated STWA's facilities and documented the eight violations alleged in this case.
10. On February 8, 2012, the Executive Director (ED) of the TCEQ filed his Preliminary Report and Petition, seeking penalties and corrective action against STWA.
11. On February 13, 2012, STWA filed an answer to the Preliminary Report and Petition and requested a hearing.
12. On March 16, 2012, the ED filed a letter asking the Commission's Chief Clerk to refer this case to SOAH for hearing, and the Chief Clerk referred it to SOAH on March 22, 2012.
13. On March 26, 2012, the Chief Clerk mailed a notice of hearing to STWA, the ED, and the Office of Public Interest Counsel.

14. 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.
15. A preliminary hearing convened before SOAH ALJ Penny Wilkov on April 26, 2012.
16. On September 25, 2012, the ED filed a First Amended Preliminary Report and Petition, which is the current live pleading in this case.
17. An evidentiary hearing on the merits was conducted on March 5-6, 2013, with ALJ Craig R. Bennett presiding. The ED appeared through attorneys Jennifer Cook and Peipay Tang. STWA appeared through attorneys Mike Willatt and Bill Flickinger. The record closed on May 24, 2013, after written closing arguments were filed.

C. The Violations

18. STWA uses chloramine as a disinfectant in its water system.
19. Field tests conducted on STWA's pipeline in 2011 showed chloramine levels below 0.5 mg/L on numerous occasions in 2011. Specifically, the following chloramine levels (expressed in mg/L) were observed at different locations along the pipeline: 0.27, 0.20, 0.28, 0.40, 0.25, 0.31, and 0.21.
20. In 2011, STWA's chemical and microbiological monitoring plan was missing required data, including information on the sampling frequency, the analytical procedures used, and a written description of the methods used to calculate compliance. After the ED's investigation, the monitoring plan was updated to include the missing information.
21. In 2011, STWA failed to have required paperwork showing it was using an approved laboratory for analyzing its samples for the maximum residual disinfectant levels.
22. In 2011, STWA employees were running their own samples to determine compliance with the maximum residual disinfectant levels.
23. In 2011, STWA was sampling six pump stations, five times per week, which would have resulted in a monthly total of approximately 120 samples (*i.e.*, 30 per week); however, STWA had less than 40 samples per month included in its Disinfectant Level Quarterly Operating Reports (DLQORs).
24. STWA was previously granted an exception by the ED to convert from the use of a chlorine disinfectant to a chloramine disinfectant. As part of that exception, the ED required that STWA monitor and record free ammonia levels.

25. In 2011, STWA was not monitoring or recording free ammonia levels as required by the ED's exception.
26. In 2011, STWA's continuous disinfectant residual analyzers were not being calibrated.
27. In 2011, STWA used a sight glass on the 2,500-gallon tank at its Bishop Eastside Pump Station to comply with the TCEQ's requirement that all pressure tanks with a capacity greater than 1,000 gallons must be fitted with a device to readily determine the air-water-volume.
28. In 2011, the sight glass on the 2,500-gallon tank at STWA's Bishop Eastside Pump Station was inoperable.
29. In 2011, STWA was monitoring the chloramine disinfectant residual after booster disinfection at pump stations, which did not provide a representative sample of the disinfectant residual throughout the 42-inch pipe from the water treatment plant to the City of Kingsville's pump station.
30. When samples were collected in 2011 from locations prior to STWA's booster locations, these samples reflected disinfectant levels below the required minimum residual level.

II. CONCLUSIONS OF LAW

A. Procedural History, Notice, and Jurisdiction

1. The Commission has jurisdiction in this case pursuant to Texas Water Code chapter 7 and Texas Health & Safety Code chapter 341.
2. Under Texas Health and Safety Code § 341.049, the Commission may assess an administrative penalty against any person who violates chapter 341, subchapter C of the Texas Health and Safety Code, or of any rule or order adopted or issued thereunder.
3. Under Texas Health and Safety Code § 341.049, the penalty may not exceed \$1,000 per violation, per day, for each of the violations at issue in this case.
4. In determining the administrative penalty, Texas Health and Safety Code § 341.049 requires the Commission to consider several factors, and the Commission's Penalty Policy implements those factors.
5. SOAH has jurisdiction over matters related to the hearing in this case, including the authority to issue a PFD with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003.

6. The ED has the burden of proof in this case by a preponderance of the evidence. 30 Tex. Admin. Code § 80.17(d).
7. STWA was notified of the First Amended Report and Petition and of the opportunity to request a hearing on the alleged violations, penalties, and corrective actions proposed therein. 30 Tex. Admin. Code §§ 1.11 and 70.104.
8. STWA was adequately notified of the hearing on the alleged violations and the proposed penalties and corrective actions. Tex. Gov't Code §§ 2001.051(1) and 2001.052; 1 Tex. Admin. Code § 155.401; and 30 Tex. Admin. Code §§ 1.11, 1.12, 39.25, 70.104, and 80.6(b)(3).

B. STWA's Status as a Public Water System

9. In 2011, STWA was a public water system because it provided direct potable water service to the LCS Detention Center, which housed more than 25 individuals, all of whom were served by STWA through the water it provided. 30 Tex. Admin. Code § 290.38(66).
10. STWA is not currently a public water system because it does not have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year. 30 Tex. Admin. Code § 290.38(66).

C. The Violations

11. The TCEQ's rules require the residual disinfectant concentration of the water within a public water system's distribution system to be at least 0.5 mg/L of chloramine (if chloramine is used instead of free chlorine). 30 Tex. Admin. Code §§ 290.110(b)(4) and 290.46(d)(2)(B).
12. In 2011, STWA violated 30 Texas Administrative Code §§ 290.110(b)(4) and 290.46(d)(2)(B) because it failed to maintain minimum chloramine levels throughout the system.
13. The TCEQ's rules require that all public water systems maintain an up-to-date chemical and microbiological monitoring plan. 30 Tex. Admin. Code § 290.121.
14. In 2011, STWA violated 30 Texas Administrative Code § 290.121 because its monitoring plan data was missing some of the required information.

15. The TCEQ's rules require that an approved laboratory be used to analyze samples to determine compliance with maximum residual disinfectant levels. 30 Tex. Admin. Code § 290.119(a)(2)(D).
16. In 2011, STWA violated 30 Texas Administrative Code § 290.119(a)(2)(D) by failing to use an approved laboratory to analyze samples to determine compliance with maximum residual disinfectant levels.
17. The TCEQ's rules require that public water systems submit DLQORs showing samples taken to demonstrate compliance with the TCEQ's disinfectant level requirements, and that all samples taken must be included in the analysis. 30 Tex. Admin. Code § 290.110(f)(1).
18. In 2011, STWA violated 30 Texas Administrative Code § 290.110(f)(1) by failing to include all samples in its compliance analysis.
19. The TCEQ's rules allow the ED to grant exceptions to certain requirements of the Commission's rules provided that the water system complies with all requirements imposed by the ED in the exception. 30 Tex. Admin. Code § 290.39(l).
20. In 2011, STWA violated 30 Texas Administrative Code § 290.39(l) by failing to comply with a requirement of the ED to monitor and record free ammonia levels as a condition of the exception granted to STWA to convert from the use of a chlorine disinfectant to a chloramine disinfectant.
21. The TCEQ's rules require that continuous disinfectant residual analyzers be calibrated every 90 days using chlorine solutions of known concentrations. 30 Tex. Admin. Code § 290.46(s)(2)(C)(ii).
22. In 2011, STWA violated 30 Texas Administrative Code § 290.46(s)(2)(C)(ii) by failing to calibrate its continuous disinfectant residual analyzers every 90 days.
23. The TCEQ's rules require that all pressure tanks with a capacity greater than 1,000 gallons must be fitted with a device to readily determine the air-water-volume. 30 Tex. Admin. Code § 290.43(d)(3).
24. In 2011, STWA violated 30 Texas Administrative Code § 290.43(d)(3) by failing to have an operable device on its 2,500-gallon storage tank at the Bishop Eastside Pump Station that could readily determine the air-water-volume.
25. The TCEQ's rules require that public water systems monitor the disinfectant residual at various representative locations throughout the distribution system. 30 Tex. Admin. Code § 290.110(c)(4).

26. In 2011, STWA violated 30 Texas Administrative Code § 290.110(c)(4) because it was not monitoring the disinfectant residual levels at representative locations throughout its distribution system.
27. The penalty that the ED proposes for STWA's violations considered in this case conform to the requirements of the Texas Health and Safety Code § 341.049 and the Commission's Penalty Policy.
28. STWA should be assessed a total administrative penalty of \$2,443 for the violations considered in this case.

III. 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. Within 30 days after the effective date of this Commission Order, South Texas Water Authority shall pay an administrative penalty in the amount of \$2,443 for its violations of the Commission's rules as noted above and considered in this case.
2. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: South Texas Water Authority, TCEQ Docket No. 2011-1647-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 payment of the administrative penalty listed herein will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.
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 South Texas Water Authority if the Executive Director determines that South Texas Water Authority has not complied with one or more of the terms or conditions in this 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. Tex. Gov't Code § 2001.144 and 30 Tex. Admin. Code § 80.273.
7. The Commission's Chief Clerk shall forward a copy of this Order to South Texas Water Authority.
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