

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

September 24, 2013

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

VIA FACSIMILE NO. 512/239-5533

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:

I have reviewed the exceptions to the proposal for decision (PFD) issued in this case on July 23, 2013. At this time, I do not have any changes to my ultimate recommendation. However, I would like to make some clarifying remarks for the benefit of the Commissioners.

Correction

I agree that Finding of Fact No. 17 should be modified to correct the spelling of Peipey Tang. Otherwise, I have no other changes to make to the findings of fact or conclusions of law as contained in the proposed order accompanying my PFD in this case.

Interpretation of Public Water System

The Executive Director (ED) excepts to my conclusion that South Texas Water Authority is not a "public water system" under the applicable definition contained in the Commission's rules. I agree with the ED that the agency's interpretation of the definition of "public water system" is entitled to deference, but I disagree it is the ED's interpretation that is given deference. Rather, only interpretations provided by the Commission—through final orders or rules, for example—are entitled to deference, because the Commission is the agency decisionmaker. So, if the Commission adopts a specific interpretation through this case, the ALJ agrees it should be given deference. But, to my knowledge, the Commission has not addressed this issue or rendered a decision on it previously. Accordingly, the ED's current interpretation is not a final agency interpretation and is accorded no deference under the law.

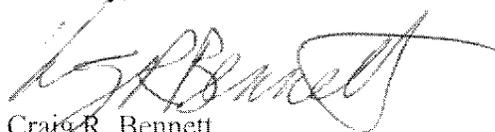
In his exceptions, the ED also for the first time raises Texas Health & Safety Code § 341.033(e), arguing that it prohibits STWA from being connected to the retail public water systems it serves if it is not a public water system itself. The ED did not raise this statute during the hearing or in closing arguments, so the ALJ did not analyze it in the PFD. However, the ALJ would note that it does not obviously support the ED's contention. In fact, it could be read as supporting STWA's interpretation of the statutes.

Specifically, that statute provides that "The distribution system of a public drinking water supply and that of any other water supply may not be physically connected unless the other water is of a safe and sanitary quality and the commission approves the connection." So, the statute actually recognizes that public water systems and other systems may be interconnected, provided that certain requirements are met—namely, the other water system is safe and sanitary and the Commission approves the connection. If the ED's interpretation of a "public water system" is correct, then arguably this Health and Safety Code provision is nullified, as all components of the interconnected systems would be deemed a public water system under the ED's interpretation and would be required to meet all applicable standards for a public water system. But, this statute does not establish such a requirement, but merely indicates that certain preconditions must be met before a non-public water system can be connected to a public water system.

Ultimately, I recognize this is a difficult issue for the Commission to decide. Any interpretation decided by the Commission will have some troubling effects. A preferable outcome would be for the Commission's rules to sufficiently clarify these issues and provide corollary standards applicable to the different components of the system involved in this case. I disagree with STWA that the Commission could not adopt the ED's interpretation. 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.

In conclusion, I continue to stand by the recommendations contained in my PFD. I will plan on attending the Commission's open meeting and will be available to answer any questions you might have at that time.

Sincerely,



Craig R. Bennett
Administrative Law Judge

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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**

**ADMINISTRATIVE LAW JUDGE
ALJ CRAIG R. BENNETT**

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SOUTH TEXAS WATER AUTHORITY
