

**SOAH DOCKET NO. 582-11-9415
TCEQ DOCKET NO. 2011-2253-PWS-E**

EXECUTIVE DIRECTOR OF THE	§	BEFORE THE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY,	§	
Petitioner	§	
	§	
V.	§	STATE OFFICE OF
	§	
OLD TYMER ENTERPRISES, INC.;	§	
RN102404399	§	
Respondent	§	ADMINISTRATIVE HEARINGS

EXECUTIVE DIRECTOR'S REPLY TO EXCEPTIONS

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE SARAH G. RAMOS (ALJ):

The Executive Director (ED) of the Texas Commission on Environmental Quality files this reply to the Respondent's exceptions to the ALJ's Proposal for Decision.

The penalty recommended by the ED is consistent with the TCEQ's penalty policy and complies with all constitutional requirements. Assessing the recommended compliance history enhancement is not a violation of due process. The Respondent has been given notice and an opportunity for hearing before any assessment of a penalty in this case. The Respondent relies solely on a standard of "responsible relationship". However, the Respondent misapplies the "responsible relationship" standard; it is not a standard used to determine whether a violation of procedural due process occurred. Furthermore, the Respondent could have done its due diligence, chosen not to become the owner and/or operator, and avoided the site's compliance history; the Respondent is not powerless in this situation, as claimed.

Additionally, the ED offered substantial evidence that the Respondent was a public water system at the time of the violations. The Respondent offered no evidence in this case, and consequently, no evidence that it was not a public water system during the pertinent time period.

I. The Respondent's claim that the compliance history enhancement violates procedural due process is without merit.

The ED's recommended penalty is \$7,370.¹ Of that amount, \$4,550 represents an enhancement to the penalty due to the Respondent's compliance history. The Respondent's compliance history contains 26 similar NOVs, 1 dissimilar NOV, 1 prior default order, and 1 prior agreed order without denial of liability.² The recommended compliance history enhancement was calculated in accordance with the TCEQ's 2002 penalty policy (Penalty Policy).

The Penalty Policy provides that a respondent's compliance history is determined based on the format in 30 TEX. ADMIN. CODE § 60.1.³ Section 60.1(b) provides that the compliance history period is five years. Section 60.1(c) identifies the components of a compliance history. The compliance history consists of information about the site under review, as well as information about other sites owned or operated by the same person as the owner or operator subject to the compliance history review.⁴ If there is a change in ownership during the compliance history period, the compliance history still contains information about the site under review for the entire compliance history period; for any part of the compliance period that involves a previous owner, the compliance history contains only information about the site under review. Thus, the compliance history is based on information about the site under review for the entire compliance history period, even if there were a change in ownership/operator during the compliance period.⁵

The recommended compliance history enhancement meets all statutory and constitutional requirements. The recommended compliance history enhancement is within the Commission's statutory authority to assess. Procedural due process has been provided to the Respondent regarding the recommended enhancement. The Commission has consistently issued orders with compliance history enhancements like the one recommended in this case.⁶

¹ (See, e.g., ED 3 at 0001: Penalty Calculation Worksheet).

² (Test. of Stephen Thompson; ED 3 at 2; ED 5: Respondent's compliance history.)

³ (*Id.* at 0016.)

⁴ 30 TEX. ADMIN. CODE § 60.1(c).

⁵ The Respondent offered no evidence that the Respondent was not an operator or owner of the public water system at issue in this case during part of the compliance period; the Respondent offered no evidence in this case.

⁶ (Test. of Stephen Thompson.)

In fact, both the Commission and SOAH ALJ Catherine C. Egan have decided that the Respondent's claim is without merit in a prior case against the Respondent.⁷

A. The compliance history enhancement complies with all statutory requirements.

A state agency has only the authority granted by the Legislature and any implied powers reasonably necessary to carry out the responsibilities given to it.⁸ The Commission has statutory authority to assess the recommended penalty enhancement in this case.⁹ TEX. HEALTH & SAFETY CODE § 341.049(b) lists the factors the Commission must consider when assessing a penalty. According to TEX. HEALTH & SAFETY CODE § 341.049(b):

In determining the amount of the penalty, the commission shall consider:

- (1) the nature of the circumstances and the extent, duration, and gravity of the prohibited acts or omissions;
- (2) with respect to the alleged violator:
 - (A) the history and extent of previous violations;
 - (B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
 - (C) the person's demonstrated good faith, including actions taken by the person to correct the cause of the violation;
 - (D) any economic benefit gained through the violation; and
 - (E) the amount necessary to deter future violation; and
- (3) any other matters that justice requires.

The recommended compliance history enhancement is in consideration of these statutory factors.

When construing a statute, the primary goal is to determine and give effect to the Legislature's intent.¹⁰ Statutory construction begins with looking at the plain language of the statute at issue.¹¹ Where the statutory text is unambiguous, courts adopt a construction supported by the statute's plain language unless that construction would lead to an absurd result.¹² Courts uphold a state agency's interpretation of a statute it is charged by the

⁷ See TCEQ, *An Order Assessing Administrative Penalties Against and Requiring Corrective Action by Old Tymer Enterprises, Inc.*, TCEQ Docket No. 2009-1991-PST-E, SOAH Docket No. 582-10-5555 (Oct. 10, 2011); and *Proposal for Decision in the Matter of an Enforcement Action Against Old Tymer Enterprises, Inc.*, SOAH Docket No. 582-10-5555, TCEQ Docket No. 2009-1991-PST-E at 11.

⁸ *SWEPI LP v. Railroad Com'n of Texas*, 314 S.W.3d 253, 259 (Tex. App.—Austin 2010, pet. denied).

⁹ TEX. HEALTH & SAFETY CODE § 341.049.

¹⁰ *SWEPI LP v. Railroad Com'n of Texas*, 314 S.W.3d at 259-260.

¹¹ *Id.*

¹² *Id.*

Legislature with enforcing so long as the construction is reasonable and does not contradict the plain language of the statute.¹³

According to section 341.049(b), the Commission has authority to consider the history and extent of previous violations, the amount necessary to deter future violations, and any other matters that justice requires. Consideration of past compliance issues for the site in question comes within the factors in section 341.049(b). According to the preamble of 30 Tex. Admin. Code § 60.1, the Commission explained that the components of a compliance history should include the compliance information of the site for the entire compliance period even if there is a change in owner.¹⁴ According to the preamble, the Commission reasoned that looking at the entire five year period for a site will provide an accurate compliance history, regardless of change in ownership.¹⁵ This is an area within the Commission's expertise, and the Commission's interpretation is reasonable. Because the Commission's use of site compliance components is reasonable and is in consideration of the factors in TEX. HEALTH & SAFETY CODE § 341.049(b), the recommended penalty complies with statutory requirements.

B. The compliance history enhancement complies with procedural due process.

The Respondent asserts that the recommended compliance history enhancement violates the Respondent's due process rights. However, this assertion is without merit.

Texas's due course of law clause and the federal due process clause are textually different, but courts construe the due course clause in the same way as its federal counterpart.¹⁶ A deprivation of personal property without due process violates the United States and Texas Constitutions.¹⁷ Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner.¹⁸

The Respondent's claim that an assessment of the recommended penalty would be a violation of the Respondent's procedural due process rights is without merit because the Respondent has been provided notice, an opportunity for hearing, and a hearing regarding the recommended penalty.

¹³ *Railroad Com'n of Texas v. Texas Citizens for a Safe Future and Clean Water*, 336 S.W.3d 619, 624-625 (Tex. 2011).

¹⁴ 27 TEX. REG. 191 at 257-261 (2002) (found at Exhibit ED O at 0067-0071).

¹⁵ *Id.*

¹⁶ *Texas Workers' Compensation Com'n v. Patient Advocates of Texas*, 136 S.W.3d 643, 658-659 (Tex. 2004).

¹⁷ *Id.*

¹⁸ *Id.*

C. The Respondent misapplies the “responsible relationship” standard; it is not a legal standard for procedural due process.

The Respondent relies on the concept that due process requires the Respondent to have a “responsible relationship” to the compliance history and the components on compliance history. The Respondent claims that it was powerless to prevent the compliance history components and therefore it does not have a “responsible relationship” to them. Yet the “responsible relationship” standard is not applicable to due process. It is a standard of mental culpability in criminal proceedings against corporate officers for violations of the Federal Food, Drug and Cosmetic Act. The “responsible relationship” standard has no bearing on a procedural due process evaluation. Moreover, the Respondent was not powerless to prevent the compliance history of the site—the Respondent chose to be the operator/owner of the site.

The Respondent relies on one case, *United States v. Park*,¹⁹ discussing the standard of “responsible relationship”. “Responsible relationship” is not a due process standard. Instead, it represents a standard of mental culpability for corporate officers under the Federal Food, Drug and Cosmetic Act for violations involving the introduction of misbranded and adulterated food into interstate commerce.²⁰ The Supreme Court held that, because of the risk to public health for these violations, corporate officers can be held liable without a showing of consciousness of wrongdoing if the corporate officer had oversight or responsibility in the business process resulting in the violation.²¹

The due process issue in the *Park* case was whether due process was violated in a criminal proceeding due to an improper jury charge. The criminal defendant complained of the process he was given—namely, an improper jury charge—and argued that the due process to which he was entitled included a jury charge with a requirement of awareness of wrongful conduct. The Supreme Court did not agree and upheld the conviction based on a jury charge with the language “responsible relationship” for this type of violation. Because there is no “responsible relationship” standard in due process evaluations—it is, instead, a standard of culpability for criminal prosecution of the Federal Food, Drug and Cosmetic Act—it is improper to impose one for this case.

¹⁹ 421 U.S. 658 (1975).

²⁰ *Park*, 421 U.S. at 667-668.

²¹ *Id.*

D. Even if there were a “reasonable relationship” requirement, the Respondent’s claim would fail.

Even assuming a “reasonable relationship” standard exists in procedural due process, assessment of the recommended compliance history enhancement meets the standard. The Respondent claims that he had no opportunity to prevent the compliance history enhancement. That is not the case. The compliance history rules, the TCEQ Penalty Policy and regulated entities’ compliance history reports are matters of public record. This information was available to the Respondent before the Respondent chose to become the owner and/or operator of the public water system at issue in this case. It is not unlike a “buyer beware” scenario in that before a person assumes the responsibility of a public water system, it is incumbent on the potential owner/operator to research and become informed about the regulatory requirements and implications so that the person can make an informed decision. The Respondent could have chosen not to become the owner and/or operator and avoided the recommended enhancement; the Respondent is not powerless in this situation, as claimed.

For these reasons, the Respondent’s claim that assessment of the recommended compliance history enhancement violates due process is without merit.

II. The evidence in the record establishes that the Respondent operates and owns a PWS currently and at the time of the violations.

The Respondent argues there is no proof in the record that the Respondent is a public water system. The opposite is true. The only evidence in the record is that the Respondent is a public water system. TCEQ records, including investigation reports and the TCEQ PWS database records, demonstrate that the Respondent has been a public water system since at least 2003. The Respondent offered no evidence to the contrary. In fact, the Respondent’s discovery responses made part of the record in this case also support the fact that the Respondent owns and operates a public water system.

III. Prayer

For these reasons and based on the evidence in the record, the ED respectfully requests the ALJ not recommend and the Commission not adopt the Respondent’s exceptions.

Respectfully submitted,

Texas Commission on Environmental Quality

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2012, the foregoing document was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

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

Via Electronic Filing

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