

**SOAH DOCKET NO. 582-12-7028  
TCEQ DOCKET NO. 2012-0160-PWS-E**

<b>EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY</b>	§ § § § § § §	<b>BEFORE THE STATE OFFICE       OF       ADMINISTRATIVE HEARINGS</b>
<b>VS.</b>		
<b>CUSTOM WATER CO., L.L.C.</b>		

**RESPONDENT'S EXCEPTIONS TO  
THE PROPOSAL FOR DECISION**

TO THE HONORABLE STATE OFFICE OF ADMINISTRATIVE HEARINGS:

COMES NOW, CUSTOM WATER CO., L.L.C. ("Respondent"), and files this its Exceptions to the Proposal for Decision, and in support thereof would show the following:

**I.**

**Introduction**

The Honorable Administrative Law Judge (the "ALJ") got the basic facts correct, but has glossed over or ignored the punitive impact of the Texas Commission on Environmental Quality (the "Commission") Staff's recommendation. If the recommendation is put into effect, the Commission's action will have the effect of bankrupting Respondent. These matters will be addressed below.

**II.**

**Replacement of Ground Storage Tanks Is Not Required**

At the present time, Respondent should not be required to replace the ground storage tanks, as the existing tanks do not present harm to the public health or safety.

First, it is important to point out that at no time has the public health or safety been compromised by Respondent's utilization of grandfathered ground storage tanks. *See*, Respondent's Exhibit No. 2 at pp. 11-13. In fact, the Commission staff did not even attempt to question, much less prove, that the existing ground storage tanks (of which four (4) have been in

operation since 1982 and of which two (2) have been in operation since 1998 or 1990) are unsafe or present any harm to the public. At the time of installation, all tanks were approved by the Department of Health Services, the regulator of the facility. The Commission's existing regulation that requires ground storage tanks to be built to AWWA standards came after the tanks were put in place.

The only credible testimony on the cost to replace the tanks came from Respondent's expert witness, Mr. Kerry Maroney, P.E. Mr. Maroney, who has vast experience in the design of water systems, testified that the cost is approximately \$200,000, which far exceeds the current revenues of Respondent, a company that has not made a profit in many years. *See*, PFD at p. 8; Respondent's Exhibit No. 5. Indeed, Respondent has suffered **operating losses** of over: 1) \$5,400 for the quarter ending March 31, 2012; 2) \$57,000 for calendar year 2011; 3) \$102,000 for calendar year 2010; 4) \$16,000 for calendar year 2009; and 5) \$76,000 for calendar year 2008. *Id.* Thus, Respondent does not currently have the financial resources to replace the storage tanks, and no one in the hearing suggested that replacement of the tanks was necessary to protect the public's health and safety, only that tank replacement was required by an administrative rule. The Commission Staff and the Honorable ALJ have elevated form over substance in requiring Respondent to engage in a course of action that will have the effect of bankrupting Respondent, just so the Staff can say that Respondent has complied with a bureaucratic rule.

There is another reason why the Staff's recommendation to replace the ground storage tanks should not be followed and that is because Respondent has an additional requirement of drilling and completing a replacement water well at a cost of \$225,000. Respondent's Exhibit No. 2 at p. 16. Mr. Maroney and Mr. Edward Fenoglio, Respondent's owner, explained why the replacement well is necessary. This testimony was not challenged or refuted in any way by Staff. Respondent has secured loans and will utilize Mr. Edward Fenoglio's other funds

(unrelated to Respondent) to fund this capital improvement. Which does the Commission want – Respondents’ customers without a water supply rule? Or brand new ground storage tanks when the existing ground storage tanks are adequate for water storage and have never presented a harm to the public health and safety? The answer should be obvious – Respondent should be required to replace the ground storage tanks when they either present a harm to the public health and safety or during the next major renovation of Respondent’s facilities. Accordingly, Respondent excepts to the ALJ’s recommendation that it be required to replace the ground storage tanks within 180 days of the entry of the Order.

### **III.**

#### **Recommended Penalty**

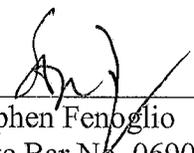
Respondent should not be required to pay a monetary penalty given the dire financial straits of Respondent. It was uncontroverted at the hearing that Respondent has never made profit as noted above in the PFD at p. 8. The losses have ranged from a low of \$16,496 per year (calendar year 2009) to a high of \$102,900 per year (calendar year 2010). Respondent successfully instituted a rate increase in 2012, the first one since 1989, Testimony of Edward Fenoglio and PFD at p. 8. Importantly, Respondent’s sole owner, Edward Fenoglio, draws no salary from Respondent, although Respondent pays his expenses, which range from \$800 to \$1,200 per month to run the water company. The reality is that Respondent does not have the money to pay for an administrative penalty, the \$200,000 necessary to replace the ground storage tanks, and the \$225,000 necessary to drill and complete a replacement water well. (Respondent has only 171 service connections on its system.) Respondent submits that if the Commission was serious about working with small water companies, it would be enforcing requirements that present a clear and present danger to the public health and safety. In this case, the Commission is imposing arbitrary, capricious, and punitive penalties on a small water company that is

providing a reasonable and safe service to the public at a time when the utility is in dire financial straits.

WHEREFORE, PREMISES CONSIDERED, Custom Water Co., L.L.C. respectfully requests: 1) that it not be required to replace the existing ground storage tanks until the tanks present a clear and documented threat to the public health and safety or during the next major renovation of the system; 2) that it be relieved of any penalty; and 3) such other and further relief to which Respondent is justly entitled.

Respectfully submitted,

STEPHEN FENOGLIO  
713 W. 14<sup>th</sup> Street  
Austin, Texas 78701-1707  
Telephone: 512.347.9944  
Facsimile: 512.482.8095

By:   
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Stephen Fenoglio  
State Bar No. 06904600

ATTORNEY FOR RESPONDENT  
CUSTOM WATER CO., L.L.C.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been served pursuant to the Texas Rules of Civil Procedure and the Texas Administrative Code on this the 29<sup>th</sup> day of April, 2013 in the manner described to the persons listed below:

Texas Commission on Environmental Quality  
Chief Clerk  
300 W. 15<sup>th</sup> Street, Suite 502  
Austin, Texas 78701

*Via E-mail*  
[www10.tceq.state.tx.us/epic/efilings](http://www10.tceq.state.tx.us/epic/efilings)

Peipey Tang  
Texas Commission on Environmental Quality  
Litigation Division, MC 175  
P. O. Box 13087  
Austin, Texas 78711-3087

*Via Facsimile*  
239.3434

  
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STEPHEN FENOGLIO