

Bryan W. Shaw, Ph.D., *Chairman*  
Carlos Rubinstein, *Commissioner*  
Toby Baker, *Commissioner*  
Zak Covar, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 29, 2013

### **Via Electronic Filing**

The Honorable Anne Perez  
State Office of Administrative Hearings  
William P. Clements Building  
300 West 15th Street, Room 504  
Austin, Texas 78701

Re: Executive Director's Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order;  
Custom Water Co., L.L.C.; TCEQ Docket No. 2012-0160-PWS-E;  
SOAH Docket No. 582-12-7028

Dear Judge Perez:

Enclosed is a true and correct copy of the Executive Director's Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order (the "Exceptions").

The original of the Exceptions was filed with the Office of the Chief Clerk of the Texas Commission on Environmental Quality on this day.

Sincerely,

A handwritten signature in cursive script that reads "Peipey Tang".

Peipey Tang  
Attorney  
Litigation Division

Enclosure

cc: Mr. Edward A. Fenoglio, President and Director, Custom Water Co., L.L.C., 146 Alamo Road, Montague, Texas 76251  
Mr. John Stephen Fenoglio, Attorney for Custom Water Co., L.L.C., 713 W. 14<sup>th</sup> St., Austin, Texas 78701  
Mr. Scott Humphrey, Public Interest Counsel, TCEQ (via electronic mail)



## **II. Conclusion**

The Executive Director respectfully requests that the Commission adopt the ALJ's Proposal for Decision and enter the Proposed Order with the changes requested by the Executive Director.

WHEREFORE, the Executive Director suggests the incorporation of these modifications into the Proposed Order before its consideration by the Commission. To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with these recommended modifications, the Executive Director excepts to the Proposal for Decision. A copy of the Proposed Order with the recommended modifications is hereby included as Attachment A.

Respectfully submitted,

Texas Commission on Environmental Quality

Zak Covar  
Executive Director

Caroline M. Sweeney, Deputy Director  
Office of Legal Services

Kathleen C. Decker, Division Director  
Litigation Division

by Peipey Tang

Peipey Tang  
State Bar of Texas No. 24060699  
Litigation Division, MC 175  
P.O. Box 13087  
Austin, Texas 78711-3087  
(512) 239-0654  
(512) 239-3434 (FAX)  
[Peipey.Tang@tceq.texas.gov](mailto:Peipey.Tang@tceq.texas.gov)

### CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2013, an original and seven (7) copies of the foregoing "Executive Director's Exceptions and Suggested Modifications to the Administrative Law Judge's Proposed Order" ("Exceptions") were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via Certified Mail, Return Receipt Requested, Article No. 7004 1350 0002 7544 3896, and via First Class Mail, postage prepaid, to:

Edward A. Fenoglio, President and Director  
Custom Water Co., L.L.C.  
146 Alamo Road  
Montague, Texas 76251

I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via Certified Mail, Return Receipt Requested, Article No. 7004 1350 0002 7544 3889, and via First Class Mail, postage prepaid, to:

John Stephen Fenoglio  
Attorney for Custom Water Co., L.L.C.  
713 W. 14<sup>th</sup> St.  
Austin, Texas 78701

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent electronically to:

The Honorable Anne Perez  
State Office of Administrative Hearings  
William P. Clements Building  
300 West 15<sup>th</sup> Street, Room 504  
Austin, Texas 78701

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via electronic mail to Scott Humphrey, Attorney, Office of the Public Interest Counsel, Texas Commission on Environmental Quality.



Peipey Tang  
Attorney  
Litigation Division  
Texas Commission on Environmental Quality

**Attachment A**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**



**AN ORDER**

**Assessing Administrative Penalties  
And Requiring Corrective Action  
By Custom Water Co., L.L.C.,  
SOAH DOCKET NO. 582-12-7028  
TCEQ DOCKET NO. 2012-0160-PWS-E**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's First Amended Report and Petition (EDFARP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Custom Water Co., L.L.C. (CWC). A Proposal for Decision (PFD) was presented by Anne K. Perez, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

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

**I. FINDINGS OF FACT**

**Jurisdiction**

1. CWC owns and operates a public water system (PWS) located at 146 Alamo Road in Montague, Montague County, Texas (Facility).
2. The Facility has approximately 171 service connections and serves at least 25 people per day for at least 60 days per year and provides water for human consumption.

3. During an investigation conducted on November 9, 2011, Jennelle Crane, a TCEQ Abilene Regional Office investigator, concluded that CWC violated Texas Administrative Code title 30, § 290.43(c) and TCEQ Agreed Order Docket No. 2008-0417-PWS-E ([Agreed Order](#)), Ordering Provision No. 2.e.ii., by failing to replace the ground—storage tanks at the Facility with ground-storage tanks that meet current American Water Works Association (AWWA) standards.
4. On January 10, 2012, CWC received notice of the alleged violation and the initiation of formal enforcement action by TCEQ’s Executive Director (ED).
5. On March 20, 2012, the ED filed the Preliminary Report and Petition (EDPRP) with the Commission’s Chief Clerk, alleging that CWC violated ~~TCEQ Agreed Order Docket No. 2008-0417-PWS-E (Agreed Order)~~ [Agreed Order](#), Ordering Provision No. 2.e.ii. and Texas Administrative Code title 30, § 290.43(c)(8), requiring that ground storage tanks be painted, disinfected, and maintained in strict accordance with current AWWA standards.
6. The EDPRP recommended that the Commission enter an order assessing administrative penalties of \$12,402 against CWC for the alleged violations and requiring CWC to take certain corrective actions.
7. The EDPRP’s reference to Texas Administrative Code title 30, § 290.43(c)(8), is incorrect. Because the ED concluded that CWC failed to replace the Facility’s ground storage tanks with storage tanks that meet current AWWA standards, the EDPRP should have alleged a violation of Texas Administrative Code title 30, § 290.43(c).
8. On March 20, 2012, the ED mailed the EDPRP to Edward Fenoglio, CWC’s President and the Facility’s owner-operator, by certified mail return receipt requested and by first class mail postage prepaid.
9. On May 4, 2012, CWC filed an answer to the EDPRP requesting a hearing.
10. On July 3, 2012, the Commission’s Chief Clerk referred this case to SOAH for hearing.
11. On August 13, 2012, the Commission’s Chief Clerk mailed notice of a preliminary hearing to CWC that was scheduled for September 13, 2012. The notice of hearing:
  - a. indicated the time, date, place, and nature of the hearing;
  - b. stated the legal authority and jurisdiction for the hearing;
  - c. indicated the statutes and rules the ED alleged CWC violated;
  - d. referred to the EDPRP, a copy of which was attached, which described the matters asserted by the ED; and
  - e. included a copy of the ED’s penalty calculation worksheet, which showed how the penalty was calculated for the alleged violation.

12. On September 12, 2012, the ED filed an agreed motion to waive the preliminary hearing, admit exhibits that proved jurisdiction, set a case schedule on which the parties had agreed, and hold a hearing on the merits of the case on February 7, 2013. The motion was granted by written order, which was faxed to each party on September 14, 2012.
13. On January 8, 2013, the ED corrected the error in the EDPRP by filing the First Amended Report and Petition (EDFARP) with the Commission's Chief Clerk. The EDFARP alleged that CWC violated Texas Administrative Code title 30, § 290.43(c) and Agreed Order, Ordering Provision No. 2.e.ii., by failing to replace the ground-storage tanks at the Facility with ground-storage tanks that meet current AWWA standards.
14. The EDFARP proposed sanctions identical to those suggested in the EDPRP. The EDFARP recommended that the Commission enter an order assessing administrative penalties of \$12,402 against CWC for the alleged violations and requiring CWC to take certain corrective actions, including those set out below in this Order.
15. The EDFARP included a copy of the ED's penalty calculation worksheet, which was identical to the penalty calculation worksheet that accompanied the EDPRP.
16. On January 8, 2013, the EDFARP was mailed by certified mail return receipt requested and by first class mail postage prepaid to:
  - a. Edward Fenoglio, CWC's corporate principal and owner-operator, 146 Alamo Road, Montague, Texas 76251; and
  - b. John Stephen Fenoglio, Attorney for CWC, 713 W. 14<sup>th</sup> St., Austin, Texas 78701.
17. On February 7, 2013, the ALJ convened the hearing on the merits as indicated in the previously issued order. The hearing was concluded and the record was closed on that same date.
18. The ED appeared at the hearing through his attorneys of record, Peipey Tang and Rudy Calderon.
19. CWC appeared at the hearing and was represented by attorney John Stephen Fenoglio.

### **The Violation**

20. CWC does not dispute that it violated Texas Administrative Code title 30, § 290.43(c); Agreed Order, Ordering Provision No. 2.e.ii.; and Texas Health and Safety Code § 341.0315(c).

## Penalties

21. CWC has never had an outage or even a customer complaint due to the alleged violations.
22. In the EDFARP, the ED proposed a total of \$12,402 in penalties for CWC's alleged violations.
23. The Commission has adopted a Penalty Policy, effective September 1, 2002, setting forth its policy regarding the computation and assessment of administrative penalties.
24. The ED used the Commission's September 2002 penalty policy to calculate the penalties proposed in this case.
25. Because it has less than 1,100 connections, the Penalty Policy treats CWC as a minor source.
26. Before certain adjustments, the base penalty under the Penalty Policy would total \$1,000 for the violations alleged in this case.
  - a. The violation of Texas Administrative Code title 30, § 290.453(c) did not cause actual harm to the environment or human health.
  - b. The violations presented a risk of moderate potential harm because the use of ground-storage tanks that do not meet AWWA standards could compromise the sanitary nature of the drinking water, exposing CWC's customers to significant amounts of contaminants that would not exceed levels protective of human health. Under the Penalty Policy, the base penalty of \$1,000 would be reduced to 10%, or \$100.
  - c. The violations continued for at least 1,119 days, from the date of the Agreed Order until January 13, 2012, when the ED screened this case for formal enforcement action.
  - d. Under the Penalty Policy, the number of violation events for a continuing violation that poses a risk of moderate potential harm is calculated by dividing the duration of the violation (1,119 days) by a quarterly period (90 days), thus CWC had 13 violation events.
  - e. Because CWC's continuing violations involved six ground storage tanks with 13 events per tank, CWC had 78 quarterly violation events between the effective date of the Agreed Order and the date that the case was screened for formal enforcement action.
  - f. The application of 78 quarterly violation events to the adjusted base penalty of \$100, results in a \$7,800 base penalty for the violation.

- g. Because the economic benefit that CWC gained by failing to comply with the Commission rule and Agreed Order, Ordering Provision No. 2.e.ii., was less than \$15,000, no adjustment was made to the base penalty for economic benefit.
  
- 27. Under the Penalty Policy, the \$7,800 base penalty was adjusted upward by 59 percent, or \$4,602, due to CWC's compliance history, which included a prior agreed order; a default order; two notices of violation with the same or similar violations alleged in the current enforcement action; and two notices of violation involving violations dissimilar to the violation alleged in the current enforcement action.
  
- 28. The \$4,602 enhancement for CWC's compliance history, when applied to the total base penalty of \$7,800, results in a final penalty amount of \$12,402. This amount was not adjusted for culpability, good faith effort to comply, or other factors that justice may require.

### **Corrective Actions**

- 29. In the EDFARP, the ED proposed two corrective actions, which are set out below in this Order.

## **II. CONCLUSIONS OF LAW**

- 1. The Commission has jurisdiction over this matter pursuant to Texas Water Code § 5.013 and Texas Health and Safety Code § 341.049.
  
- 2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to Texas Government Code chapter 2003.
  
- 3. 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.
  
- 4. Under Texas Health and Safety Code § 341.049, the penalty may not exceed \$1,000 per violation, and each day of a continuing violation may be considered a separate violation.
  
- 5. As required by Texas Health and Safety Code § 341.049 and Texas Administrative Code title 30, §§ 1.11 and 70.104, CWC was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, the penalties, and the corrective actions proposed therein.
  
- 6. As required by Texas Government Code §§ 2001.051 and 2001.052; Texas Health and Safety Code § 341.049; Texas Administrative Code title 1, §§ 155.401 and 155.501; and

Texas Administrative Code title 30, §§ 1.11 and 39.25, CWC was notified of the hearing on the alleged violations, the proposed penalties, and the proposed corrective actions.

7. Texas Administrative Code title 30, § 290.38(66) defines “public water system” as a system for providing the public water for human consumption through pipes or other conveyances. The system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year.
8. CWC’s system qualifies as a PWS under the definition at 30 TAC § 290.38(66).
9. Texas Health and Safety Code § 341.031 authorizes the Commission to adopt and enforce rules to implement the federal Safe Drinking Water Act.
10. Texas Health and Safety Code § 341.0315(c) requires the Commission to ensure public drinking water systems supply adequate amounts of safe drinking that meet the requirements of Commission rules.
11. Based on the above Findings of Fact, CWC violated Texas Administrative Code title 30, § 290.43(c), as in effect on the date of the inspection; Agreed Order, Ordering Provision No. 2.e.ii.; and Texas Health and Safety Code § 341.0315(c).
12. In determining the amount of an administrative penalty, Texas Health and Safety Code § 341.049(b) requires the Commission to consider several factors including:
  - a. the nature, circumstances, extent, duration, and gravity of the prohibited act;
  - b. the history and extent of previous violations by the violator;
  - c. the violator’s degree of culpability, good faith, and economic benefit gained through the violation;
  - d. the amount necessary to deter future violations; and
  - e. any other matters that justice may require.
13. Based on consideration of the above Findings of Fact, the factors set out in Texas Health and Safety Code § 341.049(b), and the Commission’s Penalty Policy, the Executive Director correctly calculated the penalties for the alleged violation and a total administrative penalty of \$12,402 is justified and should be assessed against CWC.
14. Based on the above Findings of Fact and Conclusions of Law, CWC should be required to take the corrective action measures set out below in this Order.

**NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Custom Water Co., L.L.C. (Respondent) is assessed an administrative penalty of \$12,402 for its violation of Texas Health and Safety Code § 341.0315(c), Texas Administrative Code title 30, § 290.43(c), and Agreed Order, Ordering Provision No. 2.e.ii. All checks submitted to pay the penalty assessed by this Order shall be made out to “Texas Commission on Environmental Quality.” Administrative penalty payments shall be sent with the notation “Re: Custom Water Co., L.L.C., Docket No. 2012-0160-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

2. Within 180 days after the effective date of this Commission Order, Respondent shall replace the ground storage tanks with tanks that meet current AWWA standards.
3. Within 195 days after the effective date of this Commission Order, Respondent shall submit written certifications as described below, and include detailed supporting documentation such as photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions No. 2. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.”

The certification shall be sent to:

Order Compliance Team  
Enforcement Division, MC 149A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087

with a copy to:

Water Section Manager  
Abilene Regional Office  
Texas Commission on Environmental Quality  
1977 Industrial Boulevard  
Abilene, Texas 79602

4. The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here.
5. 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 Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Order.
6. 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.
7. The effective date of this Order is the date the Order is final, as provided by Texas Government Code § 2001.144 and Texas Administrative Code title 30, § 80.273.
8. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
9. 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

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**Bryan W. Shaw, Chairman**  
**For the Commission**