

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

May 9, 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 Response to Respondent's Exceptions to the Administrative Law Judge's Proposed Order; Custom Water Co., L.L.C.;
TCEQ Docket Nos. 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 Response to Respondent's Exceptions to the Administrative Law Judge's Proposed Order (the "Response").

The original of the Response 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. 14th St., Austin, Texas 78701
Mr. Scott Humphrey, Public Interest Counsel, TCEQ (via electronic mail)

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

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY;	§	
Petitioner	§	BEFORE THE
	§	
VS.	§	STATE OFFICE OF
	§	
CUSTOM WATER CO., L.L.C.;	§	
Respondent	§	ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR’S RESPONSE TO RESPONDENT’S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE’S PROPOSED ORDER**

The Executive Director of the Texas Commission on Environmental Quality (“Commission” or “TCEQ”) files his Response to Respondent’s Exceptions to the Administrative Law Judge’s (“ALJ’s”) Proposed Order, pursuant to 30 TEX. ADMIN. CODE § 80.257 and 1 TEX. ADMIN. CODE § 155.507.

If support of his Response, the Executive Director shall show that Respondent has not provided any legal or factual justification for any changes to the Proposed Order nor did Respondent provide any arguments to refute evidence presented at the evidentiary hearing. In addition, Respondent restates arguments that were presented at the evidentiary hearing. The Executive Director respectfully disagrees with Respondent’s Exceptions to the ALJ’s Proposed Order and requests that the ALJ’s Proposed Order be adopted as written with the incorporation of the Executive Director’s Exceptions.

I. Introduction

Custom Water, L.L.C. (“Respondent”) owns and operates a public water system located at 146 Alamo Road in Montague, Montague County, Texas (the “Facility”). On November 9, 2011, a TCEQ Abilene Regional Office investigator documented that Respondent violated 30 TEX. ADMIN. CODE § 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 American Water Works Association (“AWWA”) standards. Specifically, the six ground storage tanks at the Facility were not designed and fabricated in strict accordance with current AWWA standards. The Executive Director is seeking an administrative penalty of twelve thousand four hundred two dollars (\$12,402.00) and the corrective action that Respondent replace the ground storage tanks with tanks that meet AWWA standards, in accordance with 30 TEX. ADMIN. CODE § 290.43, and submit written certification of compliance.

The ALJ concluded that the Executive Director established that Respondent violated 30 TEX. ADMIN. CODE § 290.43(c) and Agreed Order, Ordering Provision No. 2.e.ii., recommended that Respondent pay the twelve thousand four hundred two dollars (\$12,402.00) administrative penalty, and ordered that Respondent perform the requested corrective action.

II. Procedural Background

The evidentiary hearing for this case was held on February 7, 2013. The ALJ filed her PFD on April 8, 2013. In her letter conveying the PFD, the ALJ notes that the deadline for filing exceptions to the PFD is April 29, 2013, and the deadline to reply to exceptions is May 9, 2013.

III. Discussion of Respondent's Exceptions

1. *Respondent's Exception Regarding Public Harm by the Ground Storage Tanks*

In its Exceptions, Respondent argues that Respondent should not be required to replace the ground storage tanks because the existing tanks do not present harm to the public health or safety. Ms. Jennelle Crane, the TCEQ Abilene Region Investigator, testified that AWWA standards are standards utilized across the state so that all public water systems adhere to the same minimum standards for construction and operation in order to provide facilities and water quality that are protective of public health. Evidentiary Hearing at 00:17:20. Ms. Crane further testified that it is important to comply with AWWA standards to ensure safe drinking water. Evidentiary Hearing at 00:17:55. AWWA standards set the minimum standards for public water systems to prevent health effects from the equipment utilized by the Facility, for tank integrity, and for operator safety. Evidentiary Hearing at 00:18:00.

Specifically, the tanks at the Facility fail to comply with AWWA standards because the manhole on the bottom rung of the ground storage tanks is not 30 inches in diameter. Ms. Crane explained that the purpose of this particular standard is because:

you want to make sure the manhole on the bottom is large enough that someone can get in the tank during the regular tank maintenance and get all the sediments, any debris, anything possible that's in the bottom of the tank when they drain it. And then also you want to make sure that if somebody falls in the tank, that you can get them out, that it's fully safe. Evidentiary Hearing at 00:19:30.

Thus, because the ground storage tanks at the Facility do not comply with AWWA standards, they do present a potential harm to the public. Accordingly, the administrative penalty for this violation was calculated based on a potential release. ED-4 at 3.

2. *Respondent's Exception Regarding Existing Regulations When the Ground Storage Tank Were Installed*

Respondent also argues that the AWWA standards were implemented after the installation of the ground storage tanks. Respondent, however, signed the Agreed Order on July 27, 2008, agreeing to Ordering Provision No. 2.e.ii., to replace the ground storage tanks with tanks that meet AWWA standards, as required by 30 TEX. ADMIN. CODE § 290.43. ED-3 at 16. The signature page of the Agreed Order states, "I, the undersigned, have read and understand the attached Agreed Order. I am authorized to agree to the attached Agreed Order on behalf of the entity indicated below my signature, and I do agree to the terms and conditions specified therein." ED-3 at 16. The Commission approved the Agreed Order on December 10, 2008, effective December 20, 2008. ED-3 at 11. Consequently, the date of the installation of the ground storage tanks has no bearing on the validity of the violation. Respondent agreed to replace the ground storage tanks with tanks that meet AWWA standards in the Agreed Order and failed to comply with this ordering provision.

3. *Respondent's Exception Regarding Financial Resources for the Requested Corrective Action*

Respondent also argues that Respondent does not have the financial resources to replace the tanks. TCEQ Financial Analyst, Paige Seidenberger, testified that TCEQ would continue to seek the requested corrective action regardless of Respondent's financial situation. Evidentiary Hearing at 02:59:00. Further, Respondent committed to the replacement of the ground storage tanks with AWWA tanks by signing the Agreed Order.

ED-3 at 16. The Executive Director did asked Edward Fenoglio, President and Director of Custom Water Co., L.L.C., if he signed the Agreed Order without any intention of following the Agreed Order, and Mr. Fenoglio stated, "Sure I did." Evidentiary Hearing at 02:51:40. Respondent should not have sign the Agreed Order if it had no intention of performing the requested corrective actions.

4. *Respondent's Exception Regarding a Replacement Well at the Facility*

Respondent argues that Respondent's obligation to replace a water well at the Facility outweighs the request to replace the ground storage tanks at the Facility with AWWA tanks. Respondent's other environmental obligations at the Facility has no bearing on the requested corrective action to replace the water tanks with AWWA tanks. Further, Respondent failed to take any corrective measures with Agreed Order, Ordering Provision No. 2.e.ii. for approximately three years before the Facility needed to replace a water well. Instead, Respondent chose inaction for approximately three years and then raises its present water well obligation as an excuse to avert its past Agreed Order obligations.

5. *Respondent's Exception Regarding the Recommended Penalty*

Respondent argues that it should not pay the recommended penalty because of the dire financial straits of Respondent. However, Respondent states that they can pay the penalty. Evidentiary Hearing at 02:57:27. Respondent stipulates "that we can pay the twelve thousand, the company or Mr. Fenoglio out of his own pocket, has that money." Evidentiary Hearing at 02:58:22. Because Respondent did not argue a financial inability to pay and also stipulated that Respondent had the ability to pay the administrative penalty, this exception is improper and contrary to the testimony of Respondent.

IV. Prayer

Accordingly, the Executive Director submits his Response to the Respondent's Exceptions to the ALJ's Proposed Order and respectfully requests that Respondent's Exceptions be denied. The Executive Director respectfully requests that the Proposed Order, amended by the Executive Director's Exceptions, be adopted.

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
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2013, an original and seven (7) copies of the foregoing "Executive Director's Response to Respondent's Exceptions to the Administrative Law Judge's Proposed Order" ("Response") 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 Response was mailed via Certified Mail, Return Receipt Requested, Article No. 7012 3460 0001 7518 2573, 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 Response was mailed via Certified Mail, Return Receipt Requested, Article No. 7012 3460 0001 7518 2580, and via First Class Mail, postage prepaid, to:

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

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

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

I further certify that on this day a true and correct copy of the foregoing Response 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