

**SOAH DOCKET NO. 582-15-1629**  
**TCEQ DOCKET NO. 2013-1005-PWS-E**

<b>EXECUTIVE DIRECTOR OF THE</b>	§	<b>BEFORE THE</b>
<b>TEXAS COMMISSION ON</b>	§	
<b>ENVIRONMENTAL QUALITY,</b>	§	
<b>Petitioner</b>	§	
	§	
<b>v.</b>	§	<b>STATE OFFICE OF</b>
	§	
<b>HILL TOP CAFE, INC.</b>	§	
<b>Respondent</b>	§	
	§	<b>ADMINISTRATIVE HEARINGS</b>

**THE EXECUTIVE DIRECTOR’S EXCEPTIONS TO THE  
PROPOSAL FOR DECISION AND PROPOSED ORDER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE STEPHANIE FRAZEE (ALJ) AND HONORABLE COMMISSIONERS:

The Executive Director (ED), after reviewing the Administrative Law Judge’s (ALJ’s) Proposal for Decision (PFD) and proposed order (Proposed Order), respectfully files these exceptions for the ALJ’s reconsideration and the Commissioners’ consideration.

This is an enforcement case against HILL TOP CAFE, INC. (Respondent) involving five alleged public water system (PWS) violations. At the evidentiary hearing in this case, the ED provided evidence that the alleged violations occurred. The ED also recommended corrective actions and a penalty of \$3,391, which was calculated in accordance with the TCEQ Penalty Policy (Penalty Policy) as consistently applied, and in consideration of the statutory factors in TEX. HEALTH & SAFETY CODE § 341.049.

The ED agrees with the ALJ’s determination that three of the five violations occurred, and appreciates the ALJ’s time and attention to this enforcement action. With all due respect to the ALJ, the ED disagrees with the ALJ’s remaining determinations. In the ALJ’s PFD, the ALJ determined the ED did not meet his burden of proof in proving that (1) Respondent failed to submit plans and specifications to the ED for review and approval prior to the establishment of a new public water supply, and (2) Respondent failed to submit well-completion data to the ED for review and approval prior to placing a well into service as a public water supply source.<sup>1</sup> The ALJ determined that the ED did not provide sufficient evidence to show Respondent placed the well into service or constructed or modified the public water system. The ED believes evidence exists in the record to prove these occurrences. The ED offers these exceptions and discussion

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<sup>1</sup> Proposal for Decision by the Honorable Stephanie Frazee for Docket No. 582-15-1629 (hereinafter “PFD”).

of the issues in an effort such that the ALJ will reconsider the areas of disagreement and the Commissioners will issue an order that the five violations occurred and include the ED's recommended corrective actions and a penalty of \$3,391.

### **I. Summary<sup>2</sup>**

This is an enforcement case against Respondent involving five alleged PWS violations:

- Failure to provide disinfection for all groundwater supplies<sup>3</sup>;
- Failure to submit plans and specifications prior to creating a new PWS<sup>4</sup>;
- Failure to submit well-completion data prior to placing a well into service as a PWS<sup>5</sup>;
- Failure to collect water samples for coliform analysis and failure to provide public notice regarding the failure<sup>6</sup>; and
- Failure to collect annual nitrate samples<sup>7</sup>.

The ED recommends a penalty of \$3,391 and corrective actions. At the hearing, the ED provided evidence to support the five violations and established that the corrective actions are appropriate in this case. Respondent stipulated that the penalty is appropriate if it is found that the violations occurred. The ED agrees with the ALJ that three of the five violations occurred but disagrees that the evidence does not support two of the violations; the discussion in these exceptions is limited to those areas of disagreement.

### **II. Evidence in the record supports the ED's allegation that Respondent failed to submit well-completion data prior to placing a well into service as a public water supply source.**

Respondent failed to submit well-completion data to the ED for review and approval prior to placing a well into service as a public water supply in 1980<sup>8</sup> when it commenced its restaurant business. Well completion data includes, among other tests and logs, copies of sanitary control easements that ensure no pollution hazards exist near the well and also

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<sup>2</sup> The ED's exhibits in this case will be referred to in this document as "ED" [exhibit no.] at [Bates page xx] ([description if necessary]). The reference to page numbers is a reference to the stamped number in the bottom center of each page.

<sup>3</sup> See 30 TEX. ADMIN. CODE § 290.42(b)(1); see also Ref-A, Bates page 6 (Executive Director's Preliminary Report and Petition (EDPRP), paragraph 6.a.).

<sup>4</sup> See TEX. HEALTH & SAFETY CODE § 341.035(a) and 30 TEX. ADMIN. CODE § 290.39(e)(1) and (h)(1); see also Ref-A, Bates page 6 (EDPRP, paragraph 6.b.).

<sup>5</sup> See 30 TEX. ADMIN. CODE § 290.41(c)(3)(A); see also Ref-A, Bates page 6 (EDPRP, paragraph 6.c.).

<sup>6</sup> See TEX. HEALTH & SAFETY CODE § 341.033(d) and 30 TEX. ADMIN. CODE § 290.109(c)(2)(A)(i) and 30 TEX. ADMIN. CODE § 290.122(c)(2)(A) and (f); see also Ref-A, Bates page 6 (EDPRP, paragraph 7.a.).

<sup>7</sup> See 30 TEX. ADMIN. CODE § 290.106(c)(6); see also Ref-A, Bates page 6 (EDPRP, paragraph 7.c.).

<sup>8</sup> ED-6, Bates page 12; ED-5, Bates page 20.

microbiological and chemical analyses that ensure water quality standards are met.<sup>9</sup> This data is important because the ED relies on it to ensure the PWS is meeting the applicable standards.<sup>10</sup> All public water systems are required to submit this well completion data to the TCEQ prior to placing a well into service as a public water supply source.<sup>11</sup> The ALJ ruled that Respondent “provides water for human consumption and serves at least 25 people per day for at least 60 days per year. As a result, Respondent is a public water system. . . .”<sup>12</sup> Respondent relies on a well to draw groundwater for use in its restaurant and “provides drinking water to its customers as well as water for fountain drinks, preparing food and cooking, and washing dishes and hands.”<sup>13</sup>

Respondent placed the well into service as a public water supply source when it opened its restaurant and began serving the public groundwater for human consumption. It did so without furnishing a copy of its well completion data to the ED and without receiving final approval before operating the well. Because Respondent neither provided this data nor received approval prior to placing the well into service, Respondent violated 30 TEXAS ADMIN. CODE § 290.41(c)(3)(A). This section states that:

Before placing the well into service, a public water system shall furnish a copy of the well completion data, which includes the following items: the Driller's Log (geological log and material setting report); a cementing certificate; the results of a 36-hour pump test; the results of the microbiological and chemical analyses required by subparagraphs (F) and (G) of this paragraph; a legible copy of the recorded deed or deeds for all real property within 150 feet of the well; a legible copy of the sanitary control easement(s) or other documentation demonstrating compliance with paragraph (1)(F) of this subsection; an original or legible copy of a United States Geological Survey 7.5-minute topographic quadrangle showing the accurate well location to the executive director; and a map demonstrating the well location in relation to surrounding property boundaries. All the documents listed in this paragraph must be approved by the executive director before final approval is granted for the use of the well.<sup>14</sup>

Evidence in the record supports that Respondent failed to meet the requirements of the rule. The ALJ determined that, “[t]he ED established that Respondent was operating the well. . . .”<sup>15</sup> The ALJ further determined that “Respondent did not have the documents listed in [30 TEX. ADMIN. CODE § 290.41(c)(3)(A)] and that the documents had never been submitted to the

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<sup>9</sup> See 30 TEX. ADMIN. CODE § 290.41(c)(3)(A); see also 30 TEX. ADMIN. CODE § 290.41(c)(1)(F)(i); see also 30 TEX. ADMIN. CODE § 290.41(c)(3)(F).

<sup>10</sup> See 30 TEX. ADMIN. CODE § 290.41(c)(1)(A).

<sup>11</sup> 30 TEX. ADMIN. CODE § 290.41(c)(3)(A).

<sup>12</sup> PFD at 3.

<sup>13</sup> PFD at 2.

<sup>14</sup> 30 TEX. ADMIN. CODE § 290.41(c)(3)(A).

<sup>15</sup> PFD at 7.

TCEQ.”<sup>16</sup> However, the ALJ concluded that “[n]o evidence was provided to show what constitutes placing a well into service, when the well was placed into service, or who placed the well into service.”<sup>17</sup> The ED respectfully disagrees and contends that evidence does exist in the record that Respondent placed the well into service as a public water supply.

The evidence shows that Respondent placed the well into service when it commenced its business, i.e. when Respondent used its well to provide water for human consumption. Respondent provided documentation that it “commenced business in 1980”<sup>18</sup> and that “[i]t all started in September of 1980.”<sup>19</sup> Furthermore, in its discovery responses, Respondent stated that it has owned and operated the restaurant since September 1, 1980.<sup>20</sup> When Respondent began using its well to serve water to the public through its restaurant in 1980, it placed the well into service. As stated in the rule, “[a]ll the documents listed in this paragraph must be approved by the executive director before final approval is granted for the use of the well.”<sup>21</sup> Because Respondent failed to provide well completion data to the TCEQ and failed to gain approval prior to using the well and placing it into service, Respondent failed to meet the requirement of the rule.<sup>22</sup>

**III. Evidence in the record supports the ED’s allegation that Respondent failed to submit plans and specifications prior to the establishment of a new public water supply source.**

Respondent failed to submit plans and specifications to the ED for review and approval prior to the establishment of its restaurant, which acts in part as a public water supply. The submission of plans and specifications allows, among other things, the ED to determine if a PWS is “financially and technically sound.”<sup>23</sup> The ALJ concluded that “[t]he ED showed that Respondent had not submitted plans and specifications, but that in itself does not establish that Respondent was required to do so.”<sup>24</sup> The ED respectfully disagrees with the ALJ on this point. Respondent’s construction of its restaurant and the modification of its well, including re-drilling and casing of the well, required Respondent to submit plans and specifications to the ED.

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<sup>16</sup> PFD at 7.

<sup>17</sup> PDF at 7; *see also* ED-6 (Negative Certifications).

<sup>18</sup> ED-6, Bates page 12.

<sup>19</sup> ED-5, Bates page 20.

<sup>20</sup> Ref-D, Bates page 1, Request for Admission Response No. 33.

<sup>21</sup> 30 TEX. ADMIN. CODE § 290.41(c)(3)(A).

<sup>22</sup> *See* 30 TEX. ADMIN. CODE § 290.41(c)(3)(A).

<sup>23</sup> *See* 30 TEX. ADMIN. CODE § 290.39(a).

<sup>24</sup> PFD at 10.

Accordingly, sufficient evidence in the record shows that Respondent violated TEXAS HEALTH & SAFETY CODE § 341.035(a) and 30 TEX. ADMIN. CODE § 290.39(h)(1).

When Respondent created its restaurant in 1980, it constructed a new PWS. A PWS in this case is, in part, a well, pumps, and a distribution system. However, a PWS is also the restaurant that distributes water for human consumption by way of preparing and cooking food, washing hands and dishes, and providing water for drinking. Respondent's restaurant draws 300 people per day.<sup>25</sup> It is the combination of the restaurant's activities, its patrons, and its distribution system that incorporates a well that makes Respondent a PWS. When Respondent created its restaurant, and used the well, pumps, and distribution system as part of it, it was at that point the PWS system was constructed.

The Texas Health and Safety Code mandates, "a person may not begin construction of a public drinking water supply system unless the executive director of the commission approves: (1) a business plan for the system; and (2) the plans and specifications for the system."<sup>26</sup> As alleged in his EDPRP, Respondent "[f]ailed to submit plans and specifications to the Executive Director for review and approval prior to the establishment of a new public water supply . . . Specifically, Respondent was operating a business which meets the definition of a transient non-community water supply without first obtaining approval."<sup>27</sup>

The evidence shows Respondent created (constructed) a new public water supply without first submitting plans and specifications for approval. Respondent stated the well was dug "sometime around 1915."<sup>28</sup> However, the well alone does not constitute or establish a PWS. The evidence available shows Respondent created a new PWS when it commenced business in 1980 as a new restaurant.<sup>29</sup> Respondent's website states that the restaurant grew from a "two-burner hot plate" operation to one with a "grill and broiler" and that the "building quickly grew" and that "this is how Hill Top Café evolved, piece-by-piece, board-by-board."<sup>30</sup> Respondent constructed a restaurant that relies on a well and in turn it created a new PWS.

The ED interprets "construction of a public drinking water supply system"<sup>31</sup> as the creation of a new entity that will serve water for human consumption. This interpretation is

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<sup>25</sup> PFD at 2.

<sup>26</sup> TEX. HEALTH & SAFETY CODE § 341.035(a).

<sup>27</sup> Ref-A, Bates page 6.

<sup>28</sup> Ref-D, Bates page 3.

<sup>29</sup> ED-12, Bates page 12.

<sup>30</sup> ED-5, Bates pages 20-21.

<sup>31</sup> TEX. HEALTH & SAFETY CODE § 341.035(a); *see also* 30 TEX. ADMIN. CODE § 290.39(h)(1).

supported by (1) the statute's requirements that "a business plan for the system"<sup>32</sup> must be submitted, and (2) by the rule's requirement that engineering reports shall be submitted as part of plans and specifications, including "present and future areas to be served, with population data."<sup>33</sup>

First, until Respondent designed its restaurant, the submission of business plans for the PWS was not possible because this specific PWS was not contemplated and did not exist. The TCEQ rule regarding the submission of business plans states, "[t]he prospective owner of the system or the person responsible for managing and operating the stem must submit a business plan to the executive director that demonstrates that the owner or operator of the system has available the financial, managerial, and technical capability to ensure future operation of the system in accordance with applicable laws and rules."<sup>34</sup> Demonstrating financial, managerial, and technical capability, in a case such as this, would not be possible until the restaurant was planned or created; the well on its own here is not a PWS. Rather, it is Respondent's creation of its restaurant that uses the well and serves the public that results in the construction of the PWS.

Second, in terms of the required submission of population data<sup>35</sup>, this information likewise would not be available until Respondent designed its restaurant. One reason population data is required is so that, among other things, monitoring and sampling requirements of microbial contaminants can be established.<sup>36</sup> A well on its own does not warrant the designation of a PWS, instead, the construction of this PWS occurred when Respondent built its restaurant and incorporated the well.

Additionally, the record shows that Respondent failed to notify the ED prior to making significant modifications and changes to its PWS production and treatment facilities.<sup>37</sup> The Texas Administrative Code requires that "[n]o person may begin construction of modifications to a public water system without providing notification to the executive director and submitting and receiving approval of plans and specifications if requested in accordance with subsection (j)

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<sup>32</sup> TEX. HEALTH & SAFETY CODE § 341.035(a)(1).

<sup>33</sup> 30 TEX. ADMIN. CODE § 290.(e)(1)(B).

<sup>34</sup> 30 TEX. ADMIN. CODE § 290.39(f).

<sup>35</sup> See TEX. HEALTH & SAFETY CODE § 341.035(a); see also 30 TEX. ADMIN. CODE § 290.39(e)(1) and (h)(1).

<sup>36</sup> For example, as related to this case, see Ref-R, Bates page 6 (Figure for 30 TEX. ADMIN. CODE § 290.109(c)(2)(A)(iii)).

<sup>37</sup> See 30 TEX. ADMIN. CODE § 290.39(j)(1)(A) ("The following changes are considered to be significant: proposed changes to existing systems which result in an increase or decrease in production, treatment, storage, or pressure maintenance capacity.").

of this section.”<sup>38</sup> Subsection (j) states, “[p]ublic water systems shall notify the executive director prior to making any significant change or addition to the system’s **production, treatment, pressure maintenance, or distribution facilities**. Significant changes in existing systems or supplies shall not be instituted without prior approval of the executive director.”<sup>39</sup>

Respondent re-drilled and cased its well at some time between 1995 and 1997,<sup>40</sup> which constitute significant changes to the PWS’s production facilities.<sup>41</sup> Respondent stated in its discovery responses that it does not “know when it was originally drilled. Sometime around 1915” but that “[w]e re-drilled and cased the well around 1995 . . . exact dates and specs will be provided”. Respondent submitted a drilling log through an exception request that documents construction and modifications to the well in 1997.<sup>42</sup> The re-drilling and casing of the well amount to significant modifications to the PWS’s production facilities. Respondent should have submitted notification to the ED prior to making these substantial changes and modifications to its PWS, however, it did not.<sup>43</sup> Furthermore, Respondent modified its PWS when it installed a ultra-violet disinfection system in January 2013.<sup>44</sup> Respondent should have notified the ED of this modification to its treatment facilities at the PWS prior to making such a change.<sup>45</sup> Because Respondent made this modification without notifying the ED, Respondent failed to meet the requirements of the rule on this occasion as well.<sup>46</sup>

Because Respondent constructed its PWS without notifying the ED, and because Respondent modified its production and treatment facilities without notifying the ED; evidence exists in the record to support a violation of the statute and rule.

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<sup>38</sup> 30 TEX. ADMIN. CODE § 290.39(h)(1).

<sup>39</sup> 30 TEX. ADMIN. CODE § 290.39(j) (emphasis added).

<sup>40</sup> See ED-6, Bates pages 6-7.

<sup>41</sup> See 30 TEX. ADMIN. CODE § 290.39(j).

<sup>42</sup> ED-6, Bates page 7.

<sup>43</sup> See 30 TEX. ADMIN. CODE § 290.39(h) and (j).

<sup>44</sup> ED-6, Bates page 6. To note, Respondent said during the hearing that the instillation came after the investigation, which occurred March 22, 2013, however in the exception it submitted it stated that the installation occurred, and operation began, in January 2013. See PFD at 5.

<sup>45</sup> See 30 TEX. ADMIN. CODE § 290.39(h)(1) and (j).

<sup>46</sup> See 30 TEX. ADMIN. CODE § 290.39(h) and (j).

**IV. Requiring Respondent to submit well completion data and plans and specifications to the ED for review is consistent with public policy and ensuring the public's health and safety.**

Despite it being the ED's position that evidence exists to hold Respondent accountable for submitting well-completion data and plans and specifications, it is the policy of the TCEQ to hold the current owner or operator accountable to meet the requirements of these rules, regardless of whether the current operator originally drilled the well or constructed the PWS. The Texas Health & Safety Code and Chapter 290 of the TCEQ rules exist, in part, to protect human health and the condition of public drinking water. Owners and operators of public water systems are required to abide by these rules in order to ensure that the public has safe drinking water.

The submission of well completion data and plans and specifications is not just for keeping paperwork on file, but rather it enables the ED to determine if Respondent's PWS and well are safe and secure for public use. The submission of well-completion data, in part, allows the ED to determine if Respondent's well is too close to existing or potential pollution hazards, including those such as "a concrete sanitary sewer, sewerage appurtenance, septic tank, [or] storm sewer"<sup>47</sup> or "a sewage wet well, sewage pumping station, or a drainage ditch which contains industrial waste discharges or the wastes from sewage treatment plants"<sup>48</sup> or a "landfill and dump sites, animal feedlots, military facilities, industrial facilities, [or] wood-treatment facilities. . . ."<sup>49</sup> All of these pollution hazards pose a risk to the public's health and safety. The most effective way to ensure none of these hazards are too close to Respondent's well is through the submission of well-completion data. As Respondent was responsible for placing the well into service as a public water supply source, it should be responsible for submitting the well-completion data. However, current owners<sup>50</sup> that are not originally responsible must be compelled to submit this information as well because otherwise pollution hazards will remain unknown.

Furthermore, the submission of plans and specifications allows the ED to determine if certain properties of the PWS are adequate, including those related to the "type of treatment,

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<sup>47</sup> See 30 TEX. ADMIN. CODE § 290.41(c)(1)(A).

<sup>48</sup> See 30 TEX. ADMIN. CODE § 290.41(c)(1)(B).

<sup>49</sup> See 30 TEX. ADMIN. CODE § 290.41(c)(1)(E).

<sup>50</sup> See TEX. HEALTH & SAFETY CODE § 341.035(b) ("The prospective owner or operator of the system must submit a business plan that demonstrates that the owner or operator of the proposed system has the available financial, managerial, and technical capability to ensure future operation of the system in accordance with applicable laws and rules."); See also 30 TEX. ADMIN. CODE § 290.39(f).

equipment, and capacity of facilities”<sup>51</sup> and the “pumping capacities, water storage and flexibility of system operation under normal and emergency conditions”<sup>52</sup> and the “delivery capacity and pressure.”<sup>53</sup> Also, as described above, the submission of “population data”<sup>54</sup> ensures that the appropriate monitoring of microbial contaminants occurs<sup>55</sup> and, additionally, that disinfectant residuals are monitored at the correct frequency<sup>56</sup>. Because Respondent created the PWS at issue, it should be held responsible for submitting the plans and specifications for the PWS. However, it is the policy of the ED to hold current owners accountable for this information even when there is no evidence that those owners created the facility. Without this information, the TCEQ is unable to ensure the public’s health and safety.

To analogize to another area of regulations, under the air rules, before work begins on a stationary source, any person who plans on constructing a new facility and elects to obtain a permit under 30 TEX. ADMIN. CODE § 116.111 must obtain a permit<sup>57</sup> by submitting an application that includes information demonstrating that emissions from the facility are not so great that the protection of the public health and welfare is compromised.<sup>58</sup> Part of this information includes the evaluation of best available control technology (BACT).<sup>59</sup> BACT is “[a]n air pollution control method for a new or modified facility . . . capable of reducing or eliminating emissions from the facility. . . .”<sup>60</sup> If the facility is constructed without submitting information on BACT and the facility is transferred to a new owner, it would be harmful to the public to preclude the TCEQ from obtaining BACT information from the new owner or operator. If the TCEQ is precluded from seeking such information, then it cannot ensure that the facility is meeting the requirements of the air rules, but more importantly, TCEQ cannot ensure the public’s protection is not compromised. Likewise, if the TCEQ is precluded from seeking well-completion data and plans and specifications from Respondent, it is precluded from ensuring

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<sup>51</sup> See 30 TEX. ADMIN. CODE § 290.39(e)(1)(F); *see also* 30 Tex. Admin. Code § 290.42(b)(2) (The rules require that “[t]reatment facilities shall be provided for groundwater if the water does not meet the drinking water standards.” Without background data, there is no way to ensure the appropriate treatment facilities are being provided.).

<sup>52</sup> See 30 TEX. ADMIN. CODE § 290.39(e)(1)(G).

<sup>53</sup> See 30 TEX. ADMIN. CODE § 290.39(e)(1)(H).

<sup>54</sup> See 30 TEX. ADMIN. CODE § 290.39(e)(1)(B).

<sup>55</sup> See Ref-R, Bates page 6 (Figure for 30 TEX. ADMIN. CODE § 290.109(c)(2)(A)(iii).

<sup>56</sup> See 30 TEX. ADMIN. CODE § 290.110(c)(4).

<sup>57</sup> See 30 TEX. ADMIN. CODE § 116.110(a).

<sup>58</sup> 30 TEX. ADMIN. CODE § 116.111(a)(2)(A).

<sup>59</sup> 30 TEX. ADMIN. CODE § 116.111(a)(2)(C).

that Respondent's PWS is meeting the requirements of the PWS rules necessary to protect public health.

Analogizing to impounding water, similarly, "no person may appropriate water or begin construction of any work designed for the storage, taking, or diversion of water without first obtaining a permit from the commission to make the appropriation."<sup>61</sup> If the impoundment of water involves a dam, "[t]he owner shall submit final construction plans and specifications . . . for review and approval before commencing construction of a proposed dam or the reconstruction, modification, enlargement, rehabilitation, alteration, or repair of an existing dam."<sup>62</sup> The construction plans required by the rule include maps of the location of nearby structures, streams, pipelines and other potential hazards<sup>63</sup> and the specifications must include "the requirements for the various types of materials to be used in the construction or reconstruction. . . ."<sup>64</sup> If this information is not submitted to the TCEQ prior to the building of the dam, and then the dam is transferred to another person, to preclude the TCEQ from seeking out this information from the new owner would be putting the public's safety at risk. Without having this information, the TCEQ cannot determine if the dam meets the applicable requirements, and therefore cannot ensure the public is protected.

While it is the ED's position that evidence exists to hold Respondent accountable for submitting well-completion data and plans and specifications, because the record shows he constructed the PWS when it created its restaurant that utilizes groundwater, it is the broader policy of the TCEQ to hold current (even prospective) owners of facilities responsible for construction data and plans and specifications when the original owners have submitted nothing. To do so differently would be putting the public at risk in many environmental arenas.

**V. The recommended penalty and corrective actions are appropriate.**

The ED respectfully requests that the ALJ reconsider, and that the Commissioners order, the administrative penalty amount and corrective actions associated with the violations discussed above. Respondent stipulated that "if a penalty is imposed, the ED's recommended penalty was calculated properly and is the correct penalty amount for the alleged violations."<sup>65</sup>

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<sup>61</sup> TEX. WATER CODE § 11.121.

<sup>62</sup> 30 TEX. ADMIN. CODE § 299.22(a)(1).

<sup>63</sup> 30 TEX. ADMIN. CODE § 299.22(b)(1)(A).

<sup>64</sup> 30 TEX. ADMIN. CODE § 299.22(c)(1).

<sup>65</sup> PFD at 1.

In the ED's penalty calculation worksheet for this case, the administrative penalty for each violation discussed above is fifty dollars (\$50.00).<sup>66</sup> The ED respectfully requests that these two penalties be administered and the total administrative penalty be made three thousand three hundred ninety-one dollars (\$3,391.00). Moreover, the ED respectfully requests that Respondent be required to complete the corrective actions associated with the two violations discussed above. The corrective actions, as laid out in the redlined Proposed Order (attached hereto as "Attachment A"), will ensure that Respondent submits the well-completion data and the plans and specifications for its PWS, thus safeguarding the public.

**VI. The ED's exceptions to specific provisions in the ALJ's Proposed Order.**

The ED submits the following exceptions to the language in the Proposed Order. As Attachment A, the ED provides a red-lined version of the proposed order reflecting the proposed order including the ED's exceptions.

**A. REVISION OF FINDING OF FACT NO. 4**

The ED respectfully recommends that this Finding of Fact be revised as follows:

Respondent owns and operates a public water system.

The ED makes this recommendation to change "operate" to "operates."

**B. ADDITION OF PROPOSED FINDING OF FACT NO. 9.**

The ED respectfully recommends that this Finding of Fact be added as follows:

Respondent failed to submit well completion data to the Executive Director for review and approval prior to placing a well into service as a public water supply source.

The ED makes this recommendation based on the discussion of the well completion data violation above in section II. To note, the addition of this Finding of Fact and those subsequent, as well as additional Conclusions of Law, will change the numbering in the Order.

**C. ADDITION OF PROPOSED FINDING OF FACT NO. 10.**

The ED respectfully recommends that this Finding of Fact be added as follows:

Respondent failed to submit plans and specifications to the Executive Director for review and approval prior to the establishment of a new water supply.

The ED makes this recommendation based on the discussion of the plans and

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<sup>66</sup> ED-16, Bates pages 5 and 7.

specifications violation above in section III.

**D. REVISION OF CONCLUSION OF LAW NO. 6.**

The ED respectfully recommends that this Conclusion of Law be revised as follows:

As shown by the findings of fact, ~~The evidence does not show~~ Respondent violated Texas Health and Safety Code § 341.035(a) and 30 Texas Administrative Code §§ 290.39(e)(1) and (h)(1) and 290.41(c)(3)(A), as alleged by the ED.

The ED makes this recommendation based on the addition of Findings of Fact Nos. 9 and 10.

**E. REVISION OF CONCLUSION OF LAW NO. 10.**

The ED respectfully recommends that this Conclusion of Law be revised as follows:

Based on consideration of the above findings of fact and conclusions of law, the factors set out in Texas Health and Safety Code § 341.049 and the Commission's Penalty Policy, a total administrative penalty of \$3,3291 is justified and should be assessed against Respondent, and Respondent should be required to implement the corrective actions set out below.

The ED makes this recommendation to add \$100 to the administrative penalty to account for adding the two violations discussed above which carry a penalty of \$50 apiece.

**F. REVISION OF ORDERING PROVISION NO. 1.**

The ED respectfully recommends that this Ordering Provision be revised as follows:

Hill Top Cafe, Inc. is assessed an administrative penalty of \$3,3291 for the violations of state statutes and rules of the TCEQ considered in this case. The payment of this administrative penalty and Hill Top Cafe, Inc.'s compliance with all the terms and conditions set forth in this Order resolve only the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from considering or requiring corrective actions or penalties for violations that are not raised here. Administrative penalty payments shall be made payable to "Texas Commission on Environmental Quality" and shall be sent with the notation "Re: HILL TOP CAFE, INC., Docket No. 2013-1005-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

This recommended change adds \$100 to the ordered administrative penalty, reflecting the revision in Conclusion of Law No. 10.

**G. REVISION OF ORDERING PROVISION NO. 3.**

The ED respectfully recommends that this Ordering Provision be revised as follows:

Within 25 days after the effective date of this Order, Respondent shall submit written certification, in accordance with Ordering Provision No. 117, below, to demonstrate compliance with Order Provision No. 2.

This recommended change reflects adding other ordering provisions which will change the numbering of the previous Ordering Provision No. 7 to Ordering Provision No. 11.

**H. REVISION OF ORDERING PROVISION NO. 5.**

The ED respectfully recommends that this Ordering Provision be revised as follows:

Within 45 days after the effective date of this Order, Respondent shall submit written certification, in accordance with Ordering Provision No. 117, below, to demonstrate compliance with Order Provision Nos. 4.b. and 4.c.

This recommended change reflects adding other ordering provisions which will change the numbering of the previous Ordering Provision No. 7 to Ordering Provision No. 11.

**I. ADDITION OF ORDERING PROVISION NO. 6.**

The ED respectfully recommends that the following Ordering Provision be added:

Within 180 days after the effective date of this Agreed Order, Respondent shall:

Submit accurate, up-to-date, and detailed as-built plans, specifications, and engineering reports to the Executive Director for review and approval, in accordance with 30 Texas Administrative Code § 290.39. The plans, specifications, and reports shall be submitted to:

Utilities Technical Review Team  
Water Supply Division, MC 159  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

Submit well completion data to the Executive Director for review and approval, in accordance with 30 Texas Administrative Code § 290.41. The well completion data shall be submitted to the address listed in Ordering Provision 6.a., above.

Respondent shall respond completely and adequately, as determined by the TCEQ, to all requests for information concerning as-built plans and well completion data within 15 days after the date of such request, or by any other deadline specified in writing by the TCEQ.

This recommended addition accounts for the corrective actions associated with the added violations as discussed above.

**J. ADDITION OF ORDERING PROVISION NO. 7.**

The ED respectfully recommends that the following Ordering Provision be added:

Within 195 days after the effective date of this Order, Respondent shall submit written certification, in accordance with Ordering Provision No. 11, below, to demonstrate compliance with Ordering Provisions 6.a. and 6.b.

This recommended ordering provision accounts for the additional corrective actions associated with the added violations as discussed above.

**K. REVISION OF ORDERING PROVISION NO. 8**

The ED respectfully recommends that this Ordering Provision be revised as follows:

Within 225 days after the effective date of this Order, Respondent shall submit written certification, in accordance with Ordering Provision No. 11, below, to demonstrate compliance with Ordering Provision No. 4.a.

This recommended change reflects changing "Order" to "Ordering" and adding other ordering provisions which will change the numbering of the previous Ordering Provision No. 7 to Ordering Provision No. 11.

**L. ADDITION OF ORDERING PROVISION NO. 9.**

The ED respectfully recommends that the following Ordering Provision be added:

Within 270 days after the effective date of this Order, Respondent shall obtain approval of the as-built plans and specifications and the well completion data submitted to the Executive Director pursuant to Ordering Provision 6, above.

This recommended ordering provision accounts for the additional corrective actions associated with the added violations as discussed above.

**M. ADDITION OF ORDERING PROVISION NO. 10.**

The ED respectfully recommends that the following Ordering Provision be added:

Within 285 days after the effective date of this Order, Respondent shall submit written certification, in accordance with Ordering Provision 11, below, to demonstrate compliance with Ordering Provision 9.

This recommended ordering provision accounts for the additional corrective actions associated with the added violations as discussed above.

**VII. Conclusion**

For these reasons and based on the evidence in the record, the ED respectfully requests the ALJ reconsider and the Commission issue an order determining the five alleged violations occurred UbXrecommending the corrective actions and a penalty of \$3,391, by adopting the ED's exceptions.

Respectfully submitted,

Texas Commission on Environmental Quality

Richard A. Hyde, P.E.  
Executive Director

Caroline M. Sweeney, Deputy Director  
Office of Legal Services

Kathleen C. Decker, Division Director  
Litigation Division



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Jake Marx, Staff Attorney  
State Bar of Texas No. 24087989

Colleen Lenahan, Staff Attorney  
State Bar of Texas No. 24087914

James Sallans, Staff Attorney  
State Bar of Texas No. 785413

Litigation Division, MC 175  
P.O. Box 13087  
Austin, Texas 78711-3087  
(512) 239-3400  
(512) 239-3434 (FAX)  
[Jake.Marx@tceq.texas.gov](mailto:Jake.Marx@tceq.texas.gov)

**CERTIFICATE OF SERVICE**

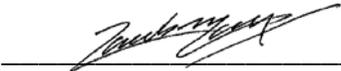
I hereby certify that on September 2, 2015, the foregoing original document and seven (7) copies were filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas; the document was electronically filed with the Chief Clerk as well.

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

The Honorable Administrative Law Judge Stephanie Frazee  
State Office of Administrative Hearings  
300 W. 15<sup>th</sup> Street, Suite 504  
Austin, Texas 78701-1649  
512-322-2061  
**Via Electronic Filing**

John J. Nicolas, President  
HILL TOP CAFE, INC.  
10661 North United States Highway 87  
Doss, Texas 78618  
**Via First Class Mail and Certified Mail Art. No. 7013 3020 0001 1906 1419**

Rudy Calderon  
Office of Public Interest Counsel, MC 103  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087  
Email: [rudy.calderon@tceq.texas.gov](mailto:rudy.calderon@tceq.texas.gov)  
**Via Electronic Mail**

  
\_\_\_\_\_  
Jake Marx

# **ATTACHMENT A**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**



**AN ORDER ASSESSING ADMINISTRATIVE PENALTIES AGAINST  
HILL TOP CAFE, INC.  
TCEQ DOCKET NO. 2013-1005-PWS-E  
SOAH DOCKET NO. 582-15-1629**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against Hill Top Cafe, Inc. (Respondent). Stephanie Frazee, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted an evidentiary hearing on this matter on June 25, 2015, in Austin, Texas, and presented the proposal for decision.

The following are parties to the proceeding: Respondent, the Commission's Executive Director (ED), and the Office of Public Interest Counsel.

After considering the ALJ's proposal for decision, the Commission adopts the following findings of fact and conclusions of law.

## I. FINDINGS OF FACT

1. Respondent operates a restaurant with a well that provides water for drinking, food preparation and cooking, and washing dishes and hands located at 10661 North U.S. Highway 87, Doss, Gillespie County, Texas.
2. Respondent serves approximately 300 people per day.
3. Respondent provides water for human consumption and serves at least 25 people per day for at least 60 days per year.
4. Respondent owns and operates a public water system.
5. The ED conducted an on-site investigation on March 22, 2013, and a record review investigation from April 27 through May 9, 2014, and documented violations.
6. Respondent failed to provide disinfection facilities for all groundwater supplies for the purpose of microbiological control and distribution protection.
7. Respondent failed to collect routine distribution water samples for coliform analysis for the months of June 2013 through February 2014 and failed to provide public notification and submit a copy of the public notification to the ED regarding the failure to sample for June 2013 through December 2013.
8. Respondent failed to collect annual nitrate samples and provide the results to the ED for the 2013 monitoring period.
9. Respondent failed to submit plans and specifications to the Executive Director for review and approval prior to the establishment of a new water supply.
- 8:10. Respondent failed to submit well completion data to the Executive Director for review and approval prior to placing a well into service as a public water supply source.
- 9:11. On May 8, 2013, the ED issued a Notice of Enforcement.
- 10:12. On October 6, 2014, the ED issued the EDPRP alleging Respondent committed the following violations:
  - a. Failure to provide disinfection facilities for all groundwater supplies for the purpose of microbiological control and distribution protection, in violation of 30 Texas Administrative Code § 290.42(b)(1);
  - b. Failure to submit plans and specifications to the ED for review and approval prior to the establishment of a new public water supply, in violation of Texas Health

and Safety Code § 341.035(a) and 30 Texas Administrative Code § 290.39(e)(1) and (h)(1);

- c. Failure to submit well completion data to the ED for review and approval prior to placing a well into service as a public water supply source, in violation of 30 Texas Administrative Code § 290.41(c)(3)(A);
- d. Failure to collect routine distribution water samples for coliform analysis for the months of June 2013 through February 2014 and failure to provide public notification and submit a copy of the public notification to the ED regarding the failure to sample for June 2013 through December 2013, in violation of Texas Health and Safety Code § 341.033(d) and 30 Texas Administrative Code §§ 290.109(c)(2)(A)(i) and 290.122(c)(2)(A) and (f); and
- e. Failure to collect annual nitrate samples and provide the results to the ED for the 2013 monitoring report, in violation of 30 Texas Administrative Code § 290.106(c)(6).

| ~~11.13.~~ The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2011.

| ~~12.14.~~ The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective April 1, 2014.

| ~~13.15.~~ The ED recommends the imposition of an administrative penalty in the amount of \$3,391 and corrective action to bring Respondent into compliance.

| ~~14.16.~~ Respondent stipulated that, if the alleged violations occurred, the ED's proposed penalty was calculated accurately and correctly.

| ~~15.17.~~ On October 27, 2014, Respondent requested a contested case hearing on the allegations in the EDPRP.

| ~~16.18.~~ On December 9, 2014, the case was referred to SOAH for a hearing.

| ~~17.19.~~ On December 18, 2014, the Commission's Chief Clerk issued notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.

| ~~18.20.~~ ALJ Stephanie Frazee convened the hearing on the merits on June 25, 2015, in SOAH's hearing rooms in Austin, Texas.

| ~~19.21.~~ The ED was represented by staff attorney Jake Marx, and John Nicholas, Respondent's President and Director, appeared on behalf of Respondent. The Office of Public Interest Counsel did not appear.

~~20.22.~~ The record closed at the end of the hearing on June 25, 2015.

## II. CONCLUSIONS OF LAW

1. The Commission may assess an administrative penalty against a person who violates a provision of the Texas Health and Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder. Tex. Health & Safety Code § 341.049.
2. Respondent is subject to the Commission's enforcement authority. Tex. Water Code § 7.002.
3. Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations and the penalties and the corrective action proposed therein. Tex. Water Code § 7.055; 30 Tex. Admin. Code §§ 1.11, 70.104.
4. Respondent was properly notified of the hearing on the alleged violations and the proposed penalties and corrective action. Tex. Gov't Code §§ 2001.051-.052; Tex. Water Code § 7.058; 1 Tex. Admin. Code § 155.401; 30 Tex. Admin. Code §§ 1.11-.12, 39.25, 70.104, 80.6.
5. 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. Tex. Gov't Code ch. 2003.
6. The ED has the burden of proof by a preponderance of the evidence in an enforcement proceeding. 30 Tex. Admin. Code § 80.17(d).
7. As shown by the findings of fact, Respondent violated 30 Texas Administrative Code § 290.42(b)(1) by failing to provide disinfection facilities for all groundwater supplies for the purpose of microbiological control and distribution protection.
8. As shown by the findings of fact, Respondent violated Texas Health and Safety Code § 341.033(d) and 30 Texas Administrative Code §§ 290.109(c)(2)(A)(i) and 290.122(c)(2)(A) and (f) by failing to collect routine distribution water samples for coliform analysis for the months of June 2013 through February 2014 and failing to provide public notification and submit a copy of the public notification to the ED regarding the failure to sample for June 2013 through December 2013.

9. As shown by the findings of fact, Respondent violated 30 Texas Administrative Code § 290.106(c)(6) by failing to collect annual nitrate samples and provide the results to the ED for the 2013 monitoring period.
10. ~~As shown by the findings of fact, The evidence does not show that~~ Respondent violated Texas Health and Safety Code § 341.035(a) and 30 Texas Administrative Code §§ 290.39(e)(1) and (h)(1) and 290.41(c)(3)(A), as alleged by the ED.
11. In determining the amount of an administrative penalty, Texas Health and Safety Code § 341.049 requires the Commission to consider several factors, including the history and extent of previous violations by the violator; the violator's degree of culpability, good faith, and economic benefit gained through the violation; the amount necessary to deter future violations; and any other matters that justice may require.
12. Based on consideration of the above findings of fact and conclusions of law, the factors set out in Texas Health and Safety Code § 341.049 and the Commission's Penalty Policy, a total administrative penalty of \$3,2391 is justified and should be assessed against Respondent, and Respondent should be required to implement the corrective actions set out below.

**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. Hill Top Cafe, Inc. is assessed an administrative penalty of \$3,2391 for the violations of state statutes and rules of the TCEQ considered in this case. The payment of this administrative penalty and Hill Top Cafe, Inc.'s compliance with all the terms and conditions set forth in this Order resolve only the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from considering or requiring corrective actions or penalties for violations that are not raised here. Administrative penalty payments shall be made payable to "Texas Commission on Environmental Quality" and shall be sent with the notation "Re: HILL TOP CAFE, INC., Docket No. 2013-1005-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 10 days after the effective date of this Order, Respondent shall install and begin operating disinfection facilities to continuously maintain an adequate disinfection residual throughout the distribution system for the purpose of microbiological control and

distribution protection, in accordance with 30 Texas Administrative Code § 290.42.

3. Within 25 days after the effective date of this Order, Respondent shall submit written certification, in accordance with Ordering Provision No. 117, below, to demonstrate compliance with Order Provision No. 2.
4. Within 30 days after the effective date of this Order, Respondent shall:
  - a. Begin complying with applicable coliform monitoring requirements by collecting routine distribution samples and providing water that meets the provisions regarding microbial contaminants, in accordance with 30 Texas Administrative Code § 290.109. This provision will be satisfied upon six consecutive months of compliant monitoring and reporting.
  - b. Implement procedures to ensure that all necessary public notifications are provided in a timely manner to persons served by Respondent and a copy of the public notification is submitted to the ED, including providing public notification regarding the failure to conduct routine coliform monitoring during the months of June 2013 through December 2013, in accordance with 30 Texas Administrative Code § 290.122; and
  - c. Implement improvements to Respondent's process, procedures, guidance, training, and/or oversight to ensure that all future nitrate samples are collected, analyzed by an approved laboratory, and the results reported to the ED within ten days following the end of each monitoring period, in accordance with 30 Texas Administrative Code § 290.106 (Inorganic Contaminants).
5. Within 45 days after the effective date of this Order, Respondent shall submit written certification, in accordance with Ordering Provision No. 117, below, to demonstrate compliance with Order Provision Nos. 4.b. and 4.c.
6. Within 180 days after the effective date of this Agreed Order, Respondent shall:
  - a. Submit accurate, up-to-date, and detailed as-built plans, specifications, and engineering reports to the Executive Director for review and approval, in accordance with 30 Texas Administrative Code § 290.39. The plans, specifications, and reports shall be submitted to:

Utilities Technical Review Team  
Water Supply Division, MC 159  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087
  - b. Submit well completion data to the Executive Director for review and approval, in accordance with 30 Texas Administrative Code § 290.41. The well completion

data shall be submitted to the address listed in Ordering Provision 6.a., above.

Respondent shall respond completely and adequately, as determined by the TCEQ, to all requests for information concerning as-built plans and well completion data within 15 days after the date of such request, or by any other deadline specified in writing by the TCEQ.

7. Within 195 days after the effective date of this Order, Respondent shall submit written certification, in accordance with Ordering Provision No. 11, below, to demonstrative compliance with Ordering Provisions 6.a. and 6.b.
8. Within 225 days after the effective date of this Order, Respondent shall submit written certification, in accordance with Ordering Provision No. 117, below, to demonstrate compliance with Ordering Provision No. 4.a.
9. Within 270 days after the effective date of this Order, Respondent shall obtain approval of the as-built plans and specifications and the well completion data submitted to the Executive Director pursuant to Ordering Provision 6, above.
- 5.10. Within 285 days after the effective date of this Order, Respondent shall submit written certification, in accordance with Ordering Provision 11, below, to demonstrate compliance with Ordering Provision 9.
- 6.11. The certifications required by these Ordering Provisions shall be accompanied by detailed supporting documentation, including photographs, receipts, and/or other records, shall be notarized by a State of Texas Notary Public, and shall 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 fine and imprisonment for knowing violations.

Respondent shall submit the written certifications and copies of documentation necessary to demonstrate compliance with these Ordering Provisions to:

Order Compliance Team  
Enforcement Division, MC 148A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

and:

Section Manager  
Public Drinking Water Section, MC 155  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

- | ~~7.12.~~ 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 Commission Order.
- | ~~8.13.~~ 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.
- | ~~9.14.~~ The effective date of this Order is the date the Order is final, as provided by 30 Texas Administrative Code § 80.273 and Texas Government Code § 2001.144.
- | ~~10.15.~~ The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
- | ~~11.16.~~ 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.

Issue Date:

**TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, Ph.D., Chairman for the Commission**