STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

August 9, 2004 Agenda ID #3821

TO: PARTIES OF RECORD IN APPLICATION (A.) 03-10-017, A.03-10-021

This is the proposed decision of Administrative Law Judge (ALJ) Thorson, previously designated as the principal hearing officer in this proceeding. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. This matter was categorized as ratesetting and is subject to Pub. Util. Code § 1701.3(c). Pursuant to Resolution ALJ-180 a Ratesetting Deliberative Meeting to consider this matter may be held upon the request of any Commissioner. If that occurs, the Commission will prepare and mail an agenda for the Ratesetting Deliberative Meeting 10 days before hand. When an RDM is held, there is a related ex parte communications prohibition period.

The Commission may act at the regular meeting, or it may postpone action until later. If action is postponed, the Commission will announce whether and when there will be a further prohibition on communications.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at http://www.cpuc.ca.gov. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

_/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:jva

Attachment

178062

Decision **PROPOSED DECISION OF ALJ THORSON (Mailed 8/9/2004)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of California Water Service Company (U 60 W) for an Order Authorizing it to Increase Rates for Water Service in its South San Francisco District.	Application 03-10-017 (Filed October 1, 2003)
Application of California Water Service Company (U 60 W) for an Order Authorizing it to Increase Rates for Water Service in its Bakersfield District.	Application 03-10-021 (Filed October 1, 2003)

Bingham, McCutchen, LLP, by Gregory Bowling, Attorney at Law, and Thomas F. Smegal, for California Water Service Company.
Natalie D. Wales, Attorney at Law, for the Office of Ratepayer Advocates.

PROPOSED FINAL DECISION CONCERNING WATER QUALITY TRICHLOROPROPANE AND GENERAL ORDER 103

Summary

In our interim decision, we determined that California Water Service Company (CWS) failed to notify local officials in its Bakersfield and South San Francisco districts within 30 days of the discovery of 1,2,3-Trichloropropane (TCPA) Action Level exceedances, as required by Health and Safety Code § 116455 (see Appendix A). We instructed the assigned Administrative Law Judge (ALJ) to hold an additional hearing to determine whether the findings and conclusions in our interim decision indicate that CWS had violated General Order (GO) 103, *Rules Governing Water Service Including Minimum Standards for Design and Construction*, and, if so, what sanctions would be appropriate.

The assigned ALJ has conducted the additional hearing and, based on additional evidence offered by CWS, determined that no violation of GO 103 has occurred. We approve the ALJ's determination in this final decision.

Background

In October 2003, CWS filed its general rate case applications for South San Francisco, Bakersfield, and three other districts now dismissed. Except for one now dismissed district, all applications indicated the possible presence of TCPA, a chemical reasonably anticipated to be a human carcinogen. Pursuant to the Scoping Memo, the assigned ALJ conducted an expedited evidentiary hearing to obtain more information on the nature and scope of this water quality issue and the risk of TCPA Action Level exceedances for ratepayers.

On May 27, 2004, we approved the assigned ALJ's proposed interim decision and, among others, made the following findings and conclusions:

- In the absence of a maximum contaminant level for TCPA, the California Department of Health Services (DHS) has established an Action Level of 5 parts per trillion (ppt) (0.005 µg/L) for TCPA.
- The TCPA Action Level was exceeded in 23 wells in the Bakersfield district and in three wells in the South San Francisco district. None of these wells exceeded the Action Level by 100 times, a level at which DHS recommends the well be taken out of service. None of the wells in the other districts exceeded the Action Level.
- CWS failed to notify local officials in the Bakersfield and South San Francisco districts within 30 days of the discovery of the TCPA Action Level exceedances, as required by Health and Safety Code § 116455. CWS subsequently satisfied this requirement for both districts.

- Based on the information before the Commission, it is prudent and reasonable for CWS to use the Bakersfield and South San Francisco wells as a source of supply for these districts.

We determined that CWS had failed to timely notify local public officials because of evidence that CWS knew TCPA Action Levels had been exceeded in the Bakersfield and South San Francisco districts when it filed its general rate case applications on October 1, 2003. CWS did not provide the requisite notice to local officials until January 6, 2004 (South San Francisco), and January 29, 2004 (Bakersfield).

The evidentiary hearing on whether these findings and conclusions also establish a violation of GO 103 was held on July 7, 2004. CWS subsequently filed a brief in support of its position that a violation of the general order had not been proven, and the matter was submitted on July 19, 2004.

Discussion

GO 103 was first adopted in 1956 and has been amended many times. Its stated purpose is "to promote good public utility practices, to encourage efficiency and economy and to establish minimum standards to be . . . observed in the design, construction and operation" of public utilities providing water. (GO 103 at ¶ I(1)(a).) The General Order sets forth standards for a range of water utility functions from construction and service requirements to billing and fire protection. One standard concerning the quality of service is pertinent here: "Any utility supplying water for human consumption . . . shall comply with the laws and regulations of the state or local Department of Health Services." (GO 103 at ¶ II(1)(a).)

Arguably, a violation of Health and Safety Code § 116455, as in this case, would invariably result in a violation of paragraph II(1)(a) of GO 103. CWS urges a narrower interpretation of the general order, both suggesting that a notice requirement is "not implicated or included in the general order's water quality standards" and that no prior Commission decision has approved such an application of GO 103. (CWS, Brief Addressing Issues Identified in Decision (D.) 04-05-060 (July 19, 2004).)

We decline to adopt CWS's narrow reading of the general order. California's Safe Drinking Water Act (SDWA) is a comprehensive regulatory program authorizing DHS to promulgate primary and secondary drinking water standards, specifying state and local departmental responsibilities, providing for public notification, setting forth enforcement procedures, and providing for judicial review. (CAL. HEALTH & SAFETY CODE §§ 116270 to 116751 (2004).) Notification of DHS and water users when drinking water standards or Action Levels have been violated is an integral component of the SDWA. (*See id.* §§ 116450 to 116485.) For purposes of GO 103, we believe no useful distinction can be made between water quality standards themselves and other requirements of the SDWA. Notification requirements help reduce human exposure to tainted water; provide consumers with choices about their health; and, due to improved public scrutiny, reinforce the other requirements of the law. While we may not have explicitly applied GO 103 to SDWA notification requirements in the past does not bar us from doing so today. We have plenary authority to interpret the scope and requirements of the general order. (*See Hartwell Corp. v. Superior Court*, 27 Cal.4th 256, 272 (2002) (the Commission has "the authority to adopt a policy on water quality and to take the appropriate actions, if any, to ensure water safety").)

At the recent evidentiary hearing, CWS offered evidence, admitted without opposition as Exhibit No. 69, indicating that CWS had been told by DHS staff that, the language of section 116455 notwithstanding, public officials did not have to be notified of Action Level exceedances. Exhibit No. 69 is the declaration of David P. Spath, Chief of DHS's Division of Drinking Water and Environmental Management. Basing his declaration on his recollection and official departmental records, Spath makes the following crucial admission: In 2002, his Los Angeles staff notified CWS "that compliance with H&S § 116455 required that *CWS notify its own governing body*. CWS, acting on the advice and direction of [Los Angeles DHS staff], notified its board of directors." (Exhibit No. 69 at ¶ 5 (July 1, 2004) (emphasis added).)

In December 2003, DHS staff discovered this erroneous legal interpretation. On December 15, 2003, Spath sent an e-mail to many of his staff clarifying that "[r]egardless of whether the [water] system is private or public, 'local agency' means the city council and/or board of supervisors." (*Id.* at p. 3 (attachment).) CWS was apparently notified of this new interpretation in late December 2003. Thereafter, on January 6, 2004, CWS notified by mail the mayor and city council of the City of South San Francisco about the presence of TCPA in amounts exceeding the Action Level in certain district wells. The company sent a similar notice to the mayor and city council of Bakersfield on January 29, 2004.

Under these unique circumstances, we do not believe CWS has violated GO 103. Paragraph II(1)(a) of the general order also provides, "compliance by a utility with the regulations of the State Department of Health Services on a particular subject matter shall constitute a compliance with such of these rules as relate to the same subject matter except as otherwise ordered by the Commission." While DHS's erroneous 2002 interpretation of section 116455 was

never formally adopted as a departmental administrative rule, CWS reasonably relied on this advice as the definitive interpretation of the section's requirements, coming as it did from the very agency staff charged with administration of the SDWA. Having complied with DHS's 2002 regulatory interpretation of section 116455, under the language quoted previously, CWS is deemed to have complied with GO 103. We caution, however, that our conclusion is based on the unique facts of this case. We can envision circumstances where an agency's patently incorrect interpretation of state law would not excuse a utility of its requirements under GO 103.

Satisfying the notification requirement of section 116455 is an important ongoing obligation of the water utilities we regulate; but, in this case, our concern is lessened by our previous findings that the Action Level was exceeded only modestly and the presence of TCPA in certain district wells "does not pose a significant health risk to people ingesting water produced from those wells on a daily basis." (D.04-05-060 at 15 (May 27, 2004).) Also, CWS has been forthright and cooperative throughout this evidentiary process to learn more about the nature and extent of the TCPA issue in its districts. Finally, we have previously determined that "CWS has compiled, or has represented that it will comply, with all of DHS's recommendations for wells producing water exceeding the Action Level including periodic monitoring and notice to customers . . . ." (*Id.)*

Comments on the Proposed Decision

The proposed decision of ALJ Thorson in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(d) and Rule 77.1 of the Rules of Practice and Procedure. Comments were filed on _____ and reply comments were filed on _____.

Assignment of Proceeding

Susan P. Kennedy is the Assigned Commissioner and John E. Thorson is the assigned ALJ in this proceeding.

Findings of Fact

1. Findings of Fact Nos. 1-21 of the Interim Decision (May 27, 2004) are incorporated in this decision as if fully set forth herein.

2. At all times relevant to this proceeding, David P. Spath was Chief of the Division of Drinking Water and Environmental Management, California State DHS.

3. DHS is charged with enforcement of the California SDWA, Health and Safety Code §§ 116270 to 116751 (2004).

4. In 2002, DHS's Los Angeles staff notified CWS that compliance with section 116455 required that CWS notify only its own governing body.

5. CWS, acting on the advice and direction of the Los Angeles DHS staff, notified its board of directors of Action Level exceedances in certain of its districts.

6. In December 2003, DHS staff discovered that its 2002 interpretation of the requirements of section 116455 was erroneous. On December 15, 2003, Spath sent an e-mail to many of his staff clarifying that "[r]egardless of whether the [water] system is private or public, 'local agency' means the city council and/or board of supervisors."

7. CWS was notified of DHS's new interpretation of section 116455 subsequent to December 15, 2003.

8. On January 6, 2004, CWS notified by mail the mayor and city council of the City of South San Francisco about the presence of TCPA in amounts exceeding the Action Level in certain district wells.

9. On January 29, 2004, CWS notified by mail the mayor and city council of the City of Bakersfield about the presence of TCPA in amounts exceeding the Action Level in certain district wells.

Conclusions of Law

1. Conclusions of Law Nos. 1-9 of the Interim Decision (May 27, 2004) are incorporated in this decision as if fully set forth herein.

2. GO 103, ¶ II(1)(a), requires: "Any utility supplying water for human consumption . . . shall comply with the laws and regulations of the state or local Department of Health Services."

3. California's Safe Drinking Water Act is a comprehensive regulatory program authorizing DHS to promulgate primary and secondary drinking water standards, specifying state and local departmental responsibilities, providing for public notification, setting forth enforcement procedures, and providing for judicial review. Notification of DHS and water users when drinking water standards have been violated or Action Levels have been exceeded is an integral component of the act.

4. The Commission has plenary authority to interpret the scope and requirements of GO 103 to require notification of local public officials, as required by section 116455.

5. GO 103 also indicates that "compliance by a utility with the regulations of the State DHS on a particular subject matter shall constitute a compliance with such of these rules as relate to the same subject matter . . . ."

6. Having complied with DHS's 2002 erroneous regulatory interpretation of section 116455, CWS is deemed under these unique circumstances to have complied with GO 103.

7. Having been advised by DHS of the correct interpretation of section 116455, CWS complied with that interpretation by providing notice within approximately 30 days to local public officials in the City of South San Francisco and the City of Bakersfield.

8. Today's order should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. No violation of General Order (GO) 103 has occurred under the circumstances set forth in the foregoing opinion, findings, and conclusions..
2. No violation of GO 103 having been determined, no sanctions are warranted.
3. The procedural requirements of the Interim Decision (May 27, 2004) are satisfied.
4. This proceeding is closed.

This order is effective today.

Dated September __, 2004, at San Francisco, California.

Appendix A
Health and Safety Code § 116455 (2004)

(a) When a well, that is used as a source of drinking water for a public water system, is discovered to include, or is closed due to the presence of, a contaminant in excess of a maximum contaminant level or an action level established by the department, the person operating the public water system shall notify the governing body of the local agency in which users of the drinking water reside within 30 days of the discovery or closure.

(b) The notification required by subdivision (a) shall include the location of any affected well, its name, its type, the origin, if known, of the contaminant, the maximum contaminant level or action level for the contaminant detected and the operational status of the well immediately prior to its closure.

(c) For purposes of this section, the following terms have the following meanings:

(1) "Action level" means the concentration level of a contaminant in potable water that the department has determined, based on available scientific information, provides an adequate margin of safety to prevent potential risks to human health.

(2) "Local agency" means a city or county, or a city and county.

(END OF APPENDIX A)