Decision **PROPOSED DECISION OF ALJ THORSON** **(Mailed 4/15/2004)**

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 Stockton District.	Application 03-10-018 (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 Mid-Peninsula District.	Application 03-10-019 (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 Salinas District.	Application 03-10-020 (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)
Application of California Water Service Company (U 60 W) for an Order Authorizing it to Increase Rates for Water Service in its Salinas District (excluding the service areas of the County Meadows Mutual Water System and the Indian Springs Mutual Water System).	Application 03-10-031 (Filed October 1, 2003)

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PROPOSED INTERIM DECISION CONCERNING WATER QUALITY (TCPA) ISSUES AND DISMISSAL OF CERTAIN APPLICATIONS

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Summary

This interim proposed decision is entered in a general ratesetting proceeding originally involving five districts of the California Water Service Company (CWS). Water quality testing in some company wells indicated that 1,2,3-Trichloropropane (TCPA), reasonably anticipated to be a human carcinogen, was present at levels exceeding the California Department of Health Service's (DHS) Action Level for this contaminant. An expedited evidentiary hearing was held before the Administrative Law Judge (ALJ) to obtain more complete information about the presence of this substance, particularly in the three districts for which CWS seeks to dismiss its applications. In this decision, we determine that no TCPA has been found in the wells of the Salinas, Stockton, and Mid-Peninsula districts; the applications for these districts may be dismissed. We also determine that the presence of TCPA in certain Bakersfield District and South San Francisco District wells does not pose a significant health risk to people ingesting, on a daily basis, the water produced from those wells. On a related matter, we authorize CWS to establish memoranda accounts to record capital expenses being incurred in the Salinas and Stockton districts for other water quality purposes.

Background

On October 1, 2003, CWS filed its general rate case applications (now consolidated) for its South San Francisco, Stockton, Mid-Peninsula, Salinas (two applications), and Bakersfield districts. Except for the Mid-Peninsula application, all applications indicated the possible presence of 1,2,3-

Trichloropropane (TCPA) in some company wells. In these applications, CWS asked the Commission to find that the presence of TCPA, at the tested levels, does not constitute a threat to public health. In the alternative, CWS asked the Commission for authority to establish memoranda accounts for TCPA water treatment expenses and the opportunity to file offsetting applications to recover these treatment costs. Shortly after filing its applications, CWS sought (with Office of Ratepayer Advocates' concurrence) to dismiss the Stockton, Mid-Peninsula, and Salinas applications with permission to re-file them in late 2004. The company also sought permission to establish memoranda accounts to record expenditures for mitigating arsenic in the Stockton and Salinas districts and nitrates, MTBE, and other contaminants in the Salinas District (Motion to Establish Memorandum Accounts Upon Withdrawal of Applications (December 2, 2003).)

In response to these requests, the Scoping Memo required an expedited evidentiary hearing on water quality issues in the South San Francisco, Stockton, Salinas, and Bakersfield districts. Although CWS had requested the dismissal of the Stockton, Salinas, and Mid-Peninsula applications for other reasons, the Scoping Memo indicated that those dismissals would not be approved until additional information was received about the TCPA issues in the Stockton and Salinas districts. CWS's testing has not detected TCPA levels in the Mid-Peninsula water system, and this district was not involved in the expedited evidentiary hearing.

Discussion

Pursuant to the Scoping Memo, CWS filed its Motion for Relief Concerning TCPA Levels in Bakersfield and South San Francisco Districts (January 2, 2004). In the motion, CWS represented that additional testing had confirmed

non-detectable levels of TCPA in the Stockton and Salinas water systems. This additional testing affords the Commission with the information necessary to approve the dismissal of the Stockton and Salinas applications. Having no known TCPA problem, the Mid-Peninsula application should be dismissed in any event. The Office of Ratepayer Advocates (ORA) filed its response indicating that the Commission "has a sound basis to find that continued use of [the South San Francisco and Bakersfield] wells does not pose a threat to public health" and confirming that the Mid-Peninsula, Salinas, and Stockton applications should be dismissed. (Response to Motion for Relief Concerning TCPA Levels in Bakersfield and South San Francisco Districts (February 2, 2004).)

The expedited evidentiary hearing on TCPA issues in the South San Francisco and Bakersfield water systems was held on February 10, 2004, and both CWS and ORA participated. CWS offered Chet W. Auckly, its Director of Water Quality and Environmental Affairs, as its sole witness. CWS' motion was submitted on February 10, 2004.

The Commission's inquiry into these water quality issues is appropriate under the holding of the California Supreme Court in *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 272 (the Commission has "the authority to adopt a policy on water quality and to take the appropriate actions, if any, to ensure water safety"). *See also* D.99-06-054 (June 10, 1999) (jurisdiction of the Commission to inquire into the safety of drinking water provided by public utilities).

1,2,3-Trichloropropane (TCPA) is a chemical historically used as a solvent and in the manufacturing of pesticides. The substance has been known to cause cancer in laboratory animals and is reasonably anticipated to be a human carcinogen. (Auckly Prepared Testimony (Ex. No. 1 at 2).) In California, DHS

has not established a Maximum Contaminant Level (MCL) to regulate TCPA. Rather, DHS considers TCPA to be an unregulated contaminant for which monitoring is required. (CAL. CODE REGS. tit. 22, § 12000 (2004); Auckly Prepared Testimony (Ex. No. 1 at Ex. 1).)

In situations where MCLs have not been set, because of ongoing scientific evaluation of the exposure–health risk relationship for a contaminant, DHS may establish Action Levels, which are health-based advisory levels for chemicals in drinking water. An Action Level is the level of a contaminant in drinking water that is considered not to pose a significant health risk to people ingesting that water on a daily basis. DHS considers the risk at this level to be *de minimis.* (Auckly Prepared Testimony (Ex. No. 1 at 2-3).) If the Action Level is exceeded by 100 times, DHS recommends that the water source be taken out of service.

For TCPA, DHS has established an Action Level of 5 parts per trillion (ppt) or 0.005 micrograms per liter (µg/L). Based on risk assessment methods, this Action Level is the level that would result in one additional case of cancer per million people. (Auckly Prepared Testimony (Ex. No. 1 at 2-3).)

Company testing and monitoring have disclosed that certain wells in the Bakersfield and South San Francisco districts have TCPA levels that exceeded the Action Level. Twenty-three of the Bakersfield wells (out of a total of 110 wells) showed contamination in excess of the Action Level. None of the wells exceeded 100 times the Action Level (0.5 µg/L). The four wells with the highest levels were registered at 0.28, 0.25, 0.14, and 0.057 µg/L. (Auckly Prepared Testimony (Ex. No. 1 at 4).)

Three of the South San Francisco wells showed contamination in excess of the Action Level. None of the wells exceeded 100 times the Action Level

(0.5 µg/L). The wells registered levels of 0.150, 0.142, and 0.052 µg/L. (Auckly Prepared Testimony (Ex. No. 1 at 4).)

While the water from the 23 Bakersfield and three South San Francisco wells exceeds the Action Level, this water is intermixed with water from other wells and sources of supply before it is delivered to customers. In the process, the levels of TCPA are diminished by the higher quality sources. (Auckly Testimony (Tr. 22:28-24:2).)

We, therefore, conclude that the presence of TCPA in certain Bakersfield and South San Francisco district wells does not pose a significant health risk to people ingesting water from those wells daily. It is prudent and reasonable for CWS to use these wells as a source of supply.

The testing and monitoring of wells in the Mid-Peninsula, Salinas, and Stockton districts have disclosed no measurable amounts of TCPA. (Auckly Prepared Testimony (Ex. No. 1 at Ex. 3).)

When the Action Level is exceeded for a drinking water source, certain mandatory and recommended steps are imposed on the system operator. First, water quality monitoring is required. Second, California Health and Safety Code § 116455 (2004) requires the drinking water system operator to notify the governing body of the local agency in which users of the drinking water reside. This notification is to occur within 30 days of the discovery of the Action Level exceedance. Third, DHS recommends that the utility inform its customers about the presence of the contaminant and its potential for adverse health effects at high levels of exposure. Fourth, as previously mentioned, if the Action Level is based on cancer risk (as is the case for TCPA), DHS recommends that the source of water be taken out of service if the contaminant is present at 100 times or more of the Action Level. For TCPA, 100 times the Action Level is 0.5 µg/L. (Auckly

Prepared Testimony (Ex. No. 1 at 3); Letter to City of South San Francisco (Ex. No. 2 at 1).) Since test results indicate that TCPA registers at levels far below 100 times the Action Level, this recommendation is not applicable and will not be discussed further.

CWS has performed two of the three remaining steps. The company does have an ongoing quarterly monitoring program for any well where TCPA has been detected above the Action Level. (Auckly Testimony (Transcript (Tr.) 6:27-7:1).) Also, CWS represented that it intends to notify its customers in any district where the presence of TCPA has exceeded the Action Level. This notification will be sent by July 1, 2004, as part of the utility's annual Consumer Confidence Report. DHS recognizes the use of the Consumer Confidence Report as an appropriate method for notifying customers. (Auckly Testimony (Tr. 7:15-8; 26:11).)

The preponderance of the evidence, however, indicates that CWS failed to notify the local officials of South San Francisco and Bakersfield within 30 days of discovering that TCPA was present in excess of the Action Level in some of the districts' wells, as required by Health and Safety Code § 116455. CWS began unregulated contaminant monitoring (UCMR) in its water systems in May 2002, followed by additional testing five to seven months later. Monitoring was not completed until 2003. (Auckly Testimony (Tr. 4:16-22).) CWS also had knowledge of the presence of TCPA in wells in the Bakersfield and South San Francisco districts when it filed it ratesetting applications on October 1, 2003. (A.03-10-017, A.03-10-018, A.03-10-020, A.03-10-021 and A.03-10-031.) In the proposed final decision on the South San Francisco and Bakersfield applications, the ALJ will recommend whether any sanction should be imposed against the company for failing to timely notify local officials.

Thus, CWS was aware of Action Level exceedances by the beginning of 2003, but the company did not notify local officials until January 2004. ((A.03-10-017, A.03-10-018, A.03-10-020, A.03-10-021 and A.03-10-031; Letter to City of South San Francisco (Ex. No. 2); Letter to City of Bakersfield (Ex. No. 2).)

Throughout this proceeding, CWS has been forthcoming in providing information about the presence of TCPA in district wells. (CWS, Motion for Relief Concerning TCPA Levels in Bakersfield and South San Francisco Districts (January 2, 2004); Auckly Prepared Testimony (Ex. No. 1).)

TCPA can be treated by the use of Granular Activated Carbon technologies. The cost of GAC treatment likely would be $300,000-350,000 per well. The cost per well can be reduced if the supply from two or more wells is combined before treatment. (Auckly Prepared Testimony (Ex. No. 1 at 5).) ORA indicated in its response that, "[i]f CWS had proposed treatment of these wells . . . , it is unlikely that the Commission would have found . . . that such costs were reasonable in light of the low levels of contamination." (Response to Motion for Relief Concerning TCPA Levels in Bakersfield and South San Francisco Districts at 6 (February 2, 2004).

Although we dismiss the applications concerning the Salinas and Stockton districts, the company has asked for permission to maintain memoranda accounts for capital expenses related to other water quality problems including the presence of arsenic, nitrates, MTBE, and other contaminants. In the Stockton District, these capital costs are estimated at $6.1 million in 2004 and $11.2 million in 2005, a total of $17.3 million. In the Salinas District, these capital costs are estimated at $3.2 million in 2004 and $2.7 million in 2005, a total of $5.9 million. We agree that such accounts should be created although we will later review these expenditures for need and reasonableness.

Comments on Proposed Interim Proposed Decision

The interim proposed decision of the ALJ 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. CWS filed its comments on May 5, 2004; no reply comments were filed.

CWS generally supports the interim proposed decision, but the company asks the Commission to delete any language (including Finding of Fact 15, Conclusion of Law 5, and Ordering Paragraph 8) concerning a violation of Health & Safety Code § 116455. In making this request, CWS argues that the Commission lacks jurisdiction to enforce the section. The company also argues that it has been deprived of due process because it was not afforded an opportunity to respond to the allegation that it failed to notify local public officials in a timely manner of the TCPA exceedances. The company also indicates that it will be deprived of the ex parte benefits of the ratesetting categorization of this proceeding if an adjudicatory issue is now introduced.

As we recognize earlier, the California Supreme Court's *Hartwell* decision recognizes our jurisdiction to take appropriate actions to ensure water safety. In its own motion (under the heading "The Commission has authority to make water quality findings"), CWS acknowledges that *Hartwell* recognized the Commission's authority to "decide[ ] what constitutes compliance with applicable water quality standards." (CWS Motion at 7.)

CWS refers to the 1996 Memorandum of Understanding [MOU] . . . on Maintaining Safe and Reliable Water Supplies for Regulated Water Companies in California," entered into between this Commission and DHS. CWS argues that this MOU vests DHS with authority for the enforcement of the safe drinking

water provisions of the Health & Safety Code. This argument is wrong for two reasons. First, the MOU assigns the initiation of enforcement actions under Sections 116650 and 116655 to DHS. We do not initiate an enforcement action under either of these sections; DHS remains free to initiate such actions on its own. Second, the MOU precedes *Hartwell*, which is a more authoritative explanation of our water quality responsibilities.

CWS' due process complaints are also without merit. The Scoping Memo specified a series of water quality-related issues that are sufficient to encompass CWS' notice obligation under Health & Safety Code § 116455. (*See* Scoping Memo § 8(d)-(f) (December 5, 2003).) An expedited hearing was held specifically on the TCPA water quality issues. CWS' January 2004, motion provided the specific basis for the hearing and asked the Commission to determine that the company's operation of the TCPA-tainted wells is reasonable and prudent. Asked to make this decision, the Commission may well consider whether the company has acted reasonably and prudently in complying with existing state law including the required notification of local public officials. CWS' own motion, which states "DHS requires that notice be given to local government officials whenever an action level is exceeded" (page 4, *citing* Health & Safety Code § 116455), further demonstrates that compliance with this particular requirement was well within the scope of the expedited hearing and the company was aware of the scope of issues. CWS itself introduced the uncontested testimony and other evidence upon which the ALJ made the factual and legal determinations about CWS' failure to notify local public officials in the Bakersfield and South San Francisco districts within the specified period. CWS had sufficient notice that its compliance with the Health & Safety Code notice

requirement was one of the water quality issues to be addressed in this proceeding.

We also reject CWS' argument that these Health & Safety Code issues transform this ratesetting into an adjudicatory proceeding, thereby limiting the company's ex parte opportunities concerning the ratesetting issues. This proceeding was categorized as ratesetting, it remains a ratesetting proceeding, and the ex parte rules pertaining to ratesetting continue to apply. (*See* Rules of Practice and Procedure 6.1(c) (indicating that ratesetting is the default category in mixed proceedings) and 6.1(d) (recognizing Commission discretion in categorization "to achieve a full, timely, and effective resolution of the substantive issues" in the proceeding).)

We will clarify, however, the procedure to be followed for the duration of this proceeding. The ALJ will hold an additional hearing to determine whether the findings and conclusions approved in this decision constitute a violation of General Order 103. If they do, the ALJ will recommend, either in the proposed decision concerning the settlement of the rate issues or in a separate proposed decision, whether sanctions should be imposed against the company and, if so, what the sanctions should be. Ordering Paragraph 8 is so modified.

Assignment of Proceeding

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

Findings of Fact

1. 1,2,3-Trichloropropane (TCPA) is a chemical historically used as a solvent and in the manufacturing of pesticides. The substance has been known to cause cancer in laboratory animals and is reasonably anticipated to be a human carcinogen.

2. In California, DHS does not regulate TCPA by establishing a Maximum Contaminant Level (MCL). Rather, DHS considers TCPA to be an unregulated contaminant for which monitoring is required.

3. DHS has issued Action Levels, which are health-based advisory levels, for chemicals in drinking water for which MCLs have not been established (such as TCPA).

4. For TCPA, DHS has established an Action Level of 5 parts per trillion (ppt) or 0.005 micrograms per liter (µg/L).

5. If the Action Level is exceeded for a drinking water source, California Health and Safety Code § 116455 (2004) requires the drinking water system operator to notify the governing body of the local agency in which users of the drinking water reside. This notification is to occur within 30 days of the discovery of the Action Level exceedance.

6. If the Action Level is exceeded for a drinking water source, DHS recommends that the utility inform its customers about the presence of the contaminant and its potential for adverse health effects at high levels of exposure.

7. If the Action Level is based, as here, on cancer risk, DHS recommends that the source of water be taken out of service if the contaminant is present at 100 times or more of the Action Level. For TCPA, 100 times the Action Level is 0.5 µg/L.

8. CWS has an ongoing quarterly monitoring program for any well where TCPA has been detected above the Action Level.

9. CWS intends to notify its customers in any district where the presence of TCPA has exceeded the Action Level. This notification will be sent by July 1, 2004, and thereafter as necessary, as part of the utility's annual Consumer

Confidence Report, recognized by DHS as an appropriate method for notifying customers.

10. CWS began unregulated contaminant monitoring (UCMR) in its water systems in May 2002, followed by additional testing five to seven months later. Monitoring was not completed until 2003.

11. CWS had knowledge of the presence of TCPA in wells in the Bakersfield and South San Francisco districts when it filed its ratesetting applications on October 1, 2003.

12. The testing and monitoring disclosed that certain wells in the Bakersfield and South San Francisco districts had TCPA levels that exceeded the Action Level. The testing and monitoring of wells in the Mid-Peninsula, Salinas, and Stockton districts disclosed no measurable amounts of TCPA.

13. 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.

14. 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.

15. CWS failed to notify the local officials of South San Francisco and Bakersfield within 30 days of discovering that TCPA was present in excess of the Action Level in some of the districts' wells, as required by Health and Safety Code § 116455.

16. Twenty-three of the Bakersfield wells (out of a total of 110 wells) showed contamination in excess of the Action Level. None of the wells exceeded 100 times the Action Level (0.5 µg/L). The four wells with the highest levels were registered at 0.28, 0.25, 0.14, and 0.057 µg/L.

17. Three of the South San Francisco wells showed contamination in excess of the Action Level. None of the wells exceeded 100 times the Action Level (0.5 µg/L). The wells registered levels of 0.150, 0.142, and 0.052 µg/L.

18. While the water from certain Bakersfield and South San Francisco wells exceeds the Action Level, this water is intermixed with water from other wells and sources of supply before it is delivered to customers, thereby diluting the levels of TCPA.

19. In the Stockton District, facilities are being constructed to mitigate arsenic so that the District's finished water supply meets the new federal contaminant level of ten parts per billion, effective in January 2006. These capital costs are estimated at $6.1 million in 2004 and $11.2 million in 2005, a total of $17.3 million.

20. In the Salinas District, facilities are being constructed to mitigate groundwater contamination from nitrates, MTBE, arsenic, and other contaminants. These capital costs are estimated at $3.2 million 2004 and $2.7 million in 2005, a total of $5.9 million.

21. CWS is expected to re-file its general rate cases for the Stockton, Salinas, and Mid-Peninsula districts later in 2004.

Conclusions of Law

1. Under California law, TCPA is an unregulated contaminant for which monitoring is required.

2. Under California law, there is no maximum contaminant level (MCL) for TCPA in drinking water supplies. Rather, DHS has established an Action Level of 5 parts per trillion (ppt) (0.005 µg/L) for TCPA. If the Action Level is exceeded, DHS specifies certain required and recommended actions. If the exceedance is 100 times the Action Level, DHS recommends that the source be taken out of service.

3. The TCPA Action Level has been exceeded in 23 wells in the Bakersfield District and three wells in the South San Francisco District. None of these wells exceed the Action Level by 100 times.

4. None of the wells reported to the Commission in the Salinas, Stockton, and Mid-Peninsula districts produce water exceeding the TCPA Action Level.

5. CWS failed to notify local officials in the Bakersfield and South San Francisco districts within 30 days of the discovery of TCPA Action Level exceedances, as required by Health and Safety Code § 116455. CWS has now satisfied this requirement by notifying the mayor and council in both cities.

6. CWS has complied, 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 using the annual Consumer Confidence Reports.

7. Based on the representations, reports, and evidence provided by CWS to the Commission, the presence of TCPA in certain wells of the Bakersfield and South San Francisco districts does not pose a significant health risk to people ingesting the water produced from those wells on a daily basis. This finding, however, does not preclude some health risk since the action level has been set pending further scientific evaluation by DHS.

8. It is prudent and reasonable for CWS to use these Bakersfield and South San Francisco wells as a source of water supply for these districts.

9. The anticipated costs of water quality treatment capital expenditures in 2004 and 2005 in the Salinas and Stockton districts are significant. Memoranda accounts are appropriate to record these expenditures, subject to later ratemaking review by the Commission for justification of the need for the expenditures and their reasonableness.

INTERIM ORDER

IT IS ORDERED that:

1. While complying with any other requirement imposed by the Department of Health Services (DHS), any well in the Bakersfield or South San Francisco districts, previously removed because of water containing TCPA at levels exceeding the Action Level, may be returned to active service.

2. In its operation and management of the districts originally involved in this proceeding, California Water Service Company (CWS) shall comply with those recommended actions (as of the date of this decision) and required actions set forth by the California Health and Safety Code or DHS for drinking water supplies exceeding the TCPA Action Level.

3. CWS shall notify its customers of the Bakersfield and South San Francisco districts of the TCPA Action Level exceedances in the company's 2004 Consumer Confidence Report and, depending on test results, in subsequent years as well.

4. In the event water from any well exceeds 100 times the TCPA Action Level, CWS shall notify the Water Division within five business days of the confirmed test result.

5. Application (A.) 03-10-018 (Stockton), A.03-10-019 (Mid-Peninsula), A.03-10-020 (Salinas), and A.03-10-031 (Salinas) are dismissed, under the terms and conditions of this decision, without prejudice.

6. CWS is authorized to establish memoranda accounts to record water quality capital expenditures during 2004 and 2005 in the Salinas and Stockton districts. The Commission will review these expenditures for need and reasonableness either during these districts' next general rate cases or upon specific application by the company.

7. Proceedings concerning A.03-10-017 (South San Francisco) and A.03-10-021 (Bakersfield) shall continue as specified in the Scoping Memo.

8. The Administrative Law Judge (ALJ) will hold an additional hearing to determine whether the findings and conclusions approved in this decision constitute a violation of General Order 103. If they do, the ALJ will recommend, either in the proposed decision concerning the settlement of the rate issues or in a separate proposed decision, whether sanctions should be imposed against the company and, if so, what the sanctions should be.

This order is effective today.

Dated _____, at San Francisco, California.