Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

2008 NOV 25 PM 4: 14

CHIEF CLERKS OFFICE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 25, 2008

LaDonna Castañuela, Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087, MC 105
Austin, Texas 78711-3087

Re: Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision
Issa Ahmad dba Houston Mart
SOAH Docket No. 582-07-4067; TCEQ Docket No. 2005-1144-PST-E

Dear Ms. Castañuela:

Enclosed for filing are the originals of 1) the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and 2) the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision.

Enclosed please also find one copy of this letter to you, one copy of the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision, and one copy of the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision. Please file stamp these documents and return them to Anna M. Cox, Attorney, Litigation Division, MC 175. If you have any questions or comments, please call me at (512) 239-0974.

Sincerely,

Anna Cox

Anna M. Cox
Attorney
Litigation Division

Enclosures

cc: Issa Ahmad, 7880 Micron Drive, Apartment 3304, San Antonio, Texas 78251
Jorge Ibarra, Enforcement Division, TCEQ, MC R-4
Joel Anderson, Waste Section Manager, TCEQ, MC R-13
Blas Coy, Public Interest Counsel, TCEQ, MC 103

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

November 25, 2008

Via Interagency Mail, and
Via Facsimile Transmission to: (512) 475-4994

The Honorable Sharon Cloninger
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711

Re: The Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and The Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision;
Issa Ahmad dba Houston Mart
SOAH Docket No. 582-07-4067; TCEQ Docket No. 2005-1144-PST-E

To The Honorable Judge Cloninger:

Please find enclosed a copy of 1) the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision and 2) the Executive Director's Proposed Order to Supplement the Executive Director's Exceptions to the Administrative Law Judge's Proposal for Decision. These pleadings are being filed in response to your Proposal for Decision dated on November 5, 2008. If you have any questions or comments, please call me at (512) 239-0974.

Sincerely,

Anna M. Cox
Attorney
Litigation Division

Enclosures

cc: Office of the Chief Clerk, MC 105
Issa Ahmad, 7880 Micron Drive, Apt 3304, San Antonio, Texas 78251
Bart Huffman, Huffman Hydrocarbon Engineering, L.L.C., 6238 Forest Bend, San Antonio, Texas 78240

SOAH DOCKET NO. 582-07-4067
TCEQ DOCKET NO. 2005-1144-PST-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PETITIONER	§	**BEFORE THE**
	§	
	§	
	§	
	§	**STATE OFFICE OF**
VS.	§	
	§	
ISSA AHMAD DBA HOUSTON MART, RESPONDENT	§	
	§	**ADMINISTRATIVE HEARINGS**

THE EXECUTIVE DIRECTOR'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION

TO THE HONORABLE JUDGE CLONINGER:

COMES NOW the Executive Director of the Texas Commission on Environmental Quality ("TCEQ" or "Commission"), represented by the Litigation Division, and files these Exceptions to the Administrative Law Judge's Proposal for Decision. In support thereof, the Executive Director would show the following:

I. PROPOSED ORDER

The Executive Director ("ED") respectfully requests that the ALJ make the following revisions to the Proposed Order:

INTRODUCTION

The Executive Director respectfully requests that the reference to the Executive Director Petition in the introductory sentence be revised to add a missing word. Currently, the sentence reads, "...considered the Executive Director's Report and Petition (EDPRP)." The sentence should be changed and revised to read, "...considered the Executive Director's Preliminary Report and Petition (EDPRP)."

FINDINGS OF FACT NO. 3

The Executive Director respectfully request that the date of the notice of violations is changed to the actual date the letter was hand-delivered, as indicated by the signature on Bates stamp page 000004 in Exhibit ED-4. Findings of Fact No. 3 should read, "Respondent received notice of the violations via hand-delivery on October 17, 2005."

FINDINGS OF FACT NO. 13

The Executive Director respectfully requests that the penalty amount stated in Findings of Fact No. 13 be changed from $2,500.00 to $2,550.00. This change would allow a typo to be corrected.

CONCLUSION OF LAW NO. 3

The Executive Director respectfully requests that Conclusion of Law No. 3 be revised to add a citation. The ED requests that 30 TEX. ADMIN. CODE § 1.12 is added to this paragraph.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Kathleen C. Decker, Division Director
Litigation Division

By: Anna Cox

Anna M. Cox
State Bar of Texas No. 24053154
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: (512) 239-3400
Fax: (512) 239-3434

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2008, the original and seven (7) copies of the foregoing "Exceptions to Administrative Law Judge's Proposal for Decision" ("Exceptions") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via Certified Mail, return receipt requested (Article No. 91 7108 2133 3935 2309 9976), to:

Issa Ahmad
Houston Mart
7880 Micron Drive, Apartment 3304
San Antonio, Texas 78251

I further certify that on this day a true and correct copy of the foregoing Exceptions was mailed via First Class Mail, postage prepaid, to:

Bart Huffman
Huffman Hydrocarbon Engineering, L.L.C.
6238 Forest Bend
San Antonio, Texas 78240

I further certify that on this day a true and correct copy of the foregoing Exceptions was hand-delivered, to Blas Coy, Jr., Office of the Public Interest Counsel, Texas Commission on Environmental Quality - MC 103.

I further certify that on this day a true and correct copy of the foregoing Exceptions was sent via fax to (512) 475-4994 and mailed via inter agency mail, to:

The Honorable Sharon Cloninger
State Office of Administrative Hearings
William P. Clements Building
300 West 15th Street, Suite 502
P.O. Box 13025
Austin, Texas 78711-3025

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 NOV 25 PM 4: 14
CHIEF CLERKS OFFICE

Anna M. Cox
Attorney
Litigation Division
Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER
ASSESSING ADMINISTRATIVE PENALTIES AGAINST
ISSA AHMAD
SOAH DOCKET NO. 582-07-4067
TCEQ DOCKET NO. 2005-1144-PST-E

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 Issa Ahmad d/b/a Houston Mart (Respondent). Sharon Cloninger, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on October 6, 2008, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent, represented by Bart Huffman, engineer, and the Commission's Executive Director (ED), represented by Anna M. Cox, an attorney in TCEQ's Litigation Division.

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Respondent operated a convenience store with retail sales of gasoline located at 1533 East Houston Street, San Antonio, Bexar County, Texas (the Facility). Respondent's underground storage tanks (USTs) were not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission. Respondent's USTs contained a registered petroleum substance as defined by the rules of the Commission.

2. During an inspection conducted on April 21, 2005, a TCEQ San Antonio Regional Office investigator documented that Respondent failed to equip the UST system with corrosion protection; failed to monitor the USTs tanks and piping system in a manner which would detect a release at a frequency of at least once a month; failed to properly conduct inventory control for all USTs involved in the retail sale of petroleum substances used as motor fuel; failed to renew a previously issued TCEQ Delivery Certificate and failed to post a valid, current TCEQ Delivery Certificate; failed to make available to a common carrier a valid, current TCEQ Delivery Certificate before delivery of a regulated substance on 49 occasions between May 31, 2002, and the date of the inspection; and failed to ensure that a legible tag, label, or marking with the tank number was permanently applied upon, or affixed to, either the top of the fill tube or to a non-removable point in the immediate area of the fill tube according to the UST registration and self-certification form.

3. Respondent received notice of the violations via hand-delivery on October 17, 2005.

4. The USTs at the Facility contained regulated petroleum substances.

5. Respondent is not the owner of the Facility:

   a. Respondent executed a 10-year lease agreement effective September 1, 2000, with the Facility property owner, Edwina H. Forte, legal guardian for Jessie H. Hicks.

   b. A December 20, 2005 query of the TCEQ registration database shows Ms. Hicks as the Facility owner effective April 25, 1986; the operator effective September 1, 1990; and the holder of a UST Delivery Certificate for the Facility from May 7, 2001 to May 2002 (after the lease with Respondent was executed).

   c. A Notice of Storage Tank Registration was issued to Ms. Hicks for the two USTs at the Facility on May 24, 2002.

6. Respondent is the operator of the Facility.

   a. Respondent had day-to-day control of and responsibility for the USTs.

   b. Respondent leased the Facility from Ms. Hicks.

   c. Respondent signed field delivery invoices for fuel on 49 occasions between May 31, 2002 and April 21, 2005.

   d. Respondent provided the fuel dispatch invoices to the TCEQ Environmental Investigator on April 21, 2005.

   e. Respondent signed the exit interview form provided to him by the TCEQ Environmental Investigator on April 21, 2005.

   f. Respondent decided to stop accepting fuel at the Facility as of May 2005.

g. Respondent paid for removal of the USTs some time after April 21, 2005.

7. On September 14, 2006, the ED served the EDPRP on Respondent, proposing a total penalty of $ 34,680 for violations of TEXAS WATER CODE ANN. §§ 26.3467(a), 26.3475(c)(1), and 26.3475(a) and (d), and 30 TEXAS ADMIN. CODE § 334.48(c), 334.49(a), 334.50(b)(1)(A), 334.50(b)(2), 334.8(c), 334.8(c)(4)(A)(iii), 334.8(c)(4)(A)(vii), 334.8(c)(5)(A)(i), and 334.8(c)(5)(C).

8. As established by the stipulation of the ED and Respondent at the October 6, 2008 hearing, Respondent failed to equip the UST system with corrosion protection as required by TEXAS WATER CODE ANN. § 26.3475(d) and 30 TEXAS ADMIN. CODE § 334.49(a).

9. The appropriate and reasonable penalty, considering all statutorily required factors, for Respondent's failure to equip the UST system with corrosion protection in violation of TEXAS WATER CODE ANN. § 26.3475(d) and 30 TEXAS ADMIN. CODE § 334.49(a) is $2,550.

10. As established by the stipulation of the ED and Respondent at the October 6, 2008 hearing, Respondent failed to monitor USTs tanks and piping system in a manner which would detect a release at a frequency of at least once every month as required by TEXAS WATER CODE ANN. § 26.3475(a) and (c)(1) and 30 TEXAS ADMIN. CODE § 334.50(b)(1)(A) and (b)(2).

11. The appropriate and reasonable penalty, considering all statutorily required factors, for Respondent's failure to monitor USTs tanks and piping system in a manner which would

detect a release at a frequency of at least once every month in violation of TEXAS WATER CODE ANN. § 26.3475(a) and (c)(1) and 30 TEXAS ADMIN. CODE § 334.50(b)(1)(A) and (b)(2) is $2,550.

12. As established by the stipulation of the ED and Respondent at the October 6, 2008 hearing, Respondent failed to properly conduct inventory control of all USTs involved in the retail sale of petroleum substances used as motor fuel as required by 30 TEXAS ADMIN. CODE § 334.48(c).

13. The appropriate and reasonable penalty, considering all statutorily required factors, for Respondent's failure to properly conduct inventory control of all USTs involved in the retail sale of petroleum substances used as motor fuel in violation of 30 TEXAS ADMIN. CODE § 334.48(c) is $2,550.

14. As established by the stipulation of the ED and Respondent at the October 6, 2008 hearing, Respondent failed to renew a previously issued TCEQ Delivery Certificate and failed to post a valid Delivery Certificate as required by 30 TEXAS ADMIN. CODE § 334.8(c)(4)(A)(vii) and 334.8(c)(5)(A)(iii).

15. The appropriate and reasonable penalty, considering all statutorily required factors, for Respondent's failure to renew a previously issued TCEQ Delivery Certificate and failure to post a valid Delivery Certificate as required by 30 TEXAS ADMIN. CODE § 334.8(c)(4)(A)(vii) and 334.8(c)(5)(A)(iii) is $1,020.

16. As established by the stipulation of the ED and Respondent at the October 6, 2008 hearing, Respondent failed to make available to a common carrier a valid, current TCEQ delivery certificate before delivery of a regulated substance on 49 occasions from May 31, 2002 through April 21, 2005, in violation of TEXAS WATER CODE ANN. §§ 26.3467(a) and 30 TEXAS ADMIN. CODE § 334.8(c)(5)(A)(i).

17. The appropriate and reasonable penalty, considering all statutorily required factors, for Respondent's failure to make available to a common carrier a valid, current TCEQ delivery certificate before delivery of a regulated substance on 49 occasions from May 31, 2002 through April 21, 2005, in violation of TEXAS WATER CODE ANN. §§ 26.3467(a) and 30 TEXAS ADMIN. CODE § 334.8(c)(5)(A)(i) is $24,990.

18. Respondent failed to ensure that a legible tag, label, or marking with the tank number was permanently applied upon, or affixed to, either the top of the fill tube or to a non-removable point in the immediate area of the fill tube according to the UST registration and self-certification form, as required by 30 TEXAS ADMIN. CODE § 334.8(c)(5)(C).

19. The appropriate and reasonable penalty, considering all statutorily required factors, for Respondent's failure to ensure that a legible tag, label, or marking with the tank number was permanently applied upon, or affixed to, either the top of the fill tube or to a non-removable point in the immediate area of the fill tube according to the UST registration and self-certification form, as required by 30 TEXAS ADMIN. CODE § 334.8(c)(5)(C), is $1,020.

20. The proposed total administrative penalty of $34,680 took into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in TEX. WATER CODE ANN. § 7.053 and in the Commission's 2002 Penalty Policy.

21. Respondent requested a contested case hearing on the allegations in the EDPRP.

22. On August 17, 2007, the case was referred to SOAH for a hearing.

23. On September 5, 2007, the Commission's Chief Clerk issued notice of the 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.

24. On September 27, 2007, a preliminary hearing was held at the offices of SOAH, William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas, before ALJ Paul Keeper. Respondent was represented by Bart A. Huffman, engineer. Staff attorney Kari Gilbreth appeared for the ED.

25. The hearing was convened on October 6, 2008, by ALJ Sharon Cloninger at SOAH, William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. The ED was represented by TCEQ Litigation Division Attorney Anna M. Cox. Respondent was represented by Mr. Huffman. The record closed on October 6, 2008.

II. CONCLUSIONS OF LAW

1. Respondent is subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE ANN. §§ 5.013 and 7.002.

2. Respondent was notified of its alleged violations, the proposed penalties, and of the opportunity to request a hearing on the alleged violations or the penalties, as required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104.

3. Respondent was notified of the hearing on the alleged violations and the proposed penalties, as required by TEX. GOV'T CODE ANN. § 2001.052, TEX. WATER CODE ANN. § 7.058, 1 TEX. ADMIN. CODE § 155.27, and 30 TEX. ADMIN. CODE §§ 1.12, 39.25, and 80.6.

4. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a proposal for decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

5. Respondent violated TEXAS WATER CODE ANN. § 26.3475(d) and 30 TEXAS ADMIN. CODE § 334.49(a) by failing to equip the UST system with corrosion protection.

6. Respondent violated TEXAS WATER CODE ANN. § 26.3475(a) and (c)(1) and 30 TEXAS ADMIN. CODE § 334.50(b)(1)(A) and (b)(2) by failing to monitor USTs tanks and piping system in a manner which would detect a release at a frequency of at least once every month.

7. Respondent violated 30 TEXAS ADMIN. CODE § 334.48(c) by failing to properly conduct inventory control of all USTs involved in the retail sale of petroleum substances used as motor fuel.

8. Respondent violated 30 TEXAS ADMIN. CODE § 334.8(c)(4)(A)(vii) and 334.8(c)(5)(A)(iii) by failing to renew a previously issued TCEQ Delivery Certificate and failing to post a valid Delivery Certificate.

9. Respondent violated TEXAS WATER CODE ANN. §§ 26.3467(a) and 30 TEXAS ADMIN. CODE § 334.8(c)(5)(A)(i) by failing to make available to a common carrier a valid, current TCEQ delivery certificate before delivery of a regulated substance on 49 occasions from May 31, 2002 through April 21, 2005.

10. Respondent violated 30 TEXAS ADMIN. CODE § 334.8(c)(5)(C) by failing to ensure that a legible tag, label, or marking with the tank number was permanently applied upon, or affixed to, either the top of the fill tube or to a non-removable point in the immediate area of the fill tube according to the UST registration and self-certification form.

11. Based on the above Findings of Fact and Conclusions of Law, an administrative penalty of $34,680 is a reasonable exercise of the Commission's authority under TEX. WATER CODE ANN. § 7.051 and takes account of all factors set out in TEX. WATER CODE ANN. § 7.053.

12. Based on the above Findings of Facts and Conclusions of Law, the Commission should assess Respondent an administrative penalty of $34,680.

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

1. Within 30 days after the effective date of this Commission Order, Respondent shall pay an administrative penalty in the amount of $34,680 for violations of TEX. WATER CODE ANN. ch. 26 and rules of the TCEQ.

2. The imposition of this administrative penalty set forth in this Order resolves only the violations that are the subject of the Order. The Commission shall not be constrained in any manner from requiring corrective action 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: Issa Ahmad, Docket No. 2005-1144-PST-E" to:

Financial Administration Division, Revenues
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

3. The ED 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 ED determines Respondent has not complied with one or more of the terms or conditions of this Order.

4. The Chief Clerk shall provide a copy of this Order to all of the parties.

5. The effective date of this Order is the date the order is final, as provided by TEX. GOV'T. CODE ANN § 2001.144 and 30 TEX. ADMIN. CODE § 80.273.

6. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

7. 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 denied for want of merit.

Issued:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

_____

Buddy Garcia, Chairman
For the Commission