

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 21, 2008

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

CHIEF CLERK'S OFFICE

2008 NOV 21 PM 4:21

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: Enforcement Action
Mustafa Nadaf dba Discount Mini Mart
TCEQ Docket No. 2007-0609-PST-E; SOAH Docket No. 582-08-1485
Respondent's Exceptions to Administrative Law Judge's Proposal for Decision
"Exceptions")

Dear Ms. Castañuela:

Enclosed please find a copy of the above referenced Exceptions which the Respondent sent to me via facsimile at 5:06 p.m. on November 10, 2008. Also enclosed are eight copies of the Exceptions. Please file the original and return one date-stamped copy to Kari L. Gilbreth, Attorney, Litigation Division, MC 175.

Please contact me at (512) 239-1320 with any questions you may have. Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Kari L. Gilbreth".

Kari L. Gilbreth
Attorney
Litigation Division

\encl.

cc: The Honorable Lilo D. Pomerleau, State Office of Administrative Hearings, Via Facsimile
No. (512) 475-4994 and via Interagency Mail
Elvia Maske, Enforcement Division, TCEQ, MC 128
Sam Barrett, Waste Section Manager, TCEQ, MC R-4
Blas J. Coy, Jr., Attorney, Office of Public Interest Counsel, TCEQ, MC 103
John L. Gamboa, Acuff & Gamboa, LLP, Attorneys at Law, 405 Park Plaza, 2501 Parkview
Dr., Fort Worth, Texas 76102 (Via Facsimile No. 817-885-8504 and Via First Class Mail)

ACUFF & GAMBOA, L.L.P.

2501 Parkview Drive, Suite 405

Fort Worth, Texas 76102-5816

Phone: (817) 885-8500

Fax: (817) 885-8504

DATE: 11-10-08

TO: Kari Gilbreath 512-239-0606
Blas Coyar 512-239-6377

FROM: John L. Gamboa

RE: Mustafa Nadaf d/b/a Discount Mini Mart

NUMBER OF PAGES INCLUDING COVER PAGE: 5

SPECIAL MESSAGE:

- Original will follow via:
- Regular Mail
- Overnight Delivery
- Hand Delivery
- Certified Mail RRR

Original will not follow

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SOAH DOCKET NO. 582-08-1485
TCEQ DOCKET NO. 2007-0609-PST-E

IN THE MATTER OF
AN ENFORCEMENT ACTION
AGAINST MUSTAFA NADAF
d/b/ DISCOUNT MINI MART;
RN102650330

BEFORE THE STATE OFFICE

OF
ADMINISTRATIVE HEARINGS

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
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**RESPONDENT'S EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION**

NOW COMES, Mustafa Nadaf d/b/a Discount Mini Mart and files this his Exceptions to the Administrative Law Judge's Proposal for Decision filed by the Administrative Law Judge (ALJ), and for same would show the following:

I.

Respondent, pursuant to SOAH Rule sec. 155.59(c)(1), files this its exceptions to the Proposal for Decision of Administrative Law Judge (ALJ) of the State Office of Administrative Hearings and asks the Administrator, pursuant to Government Code, sec. 2001.058(e) to change certain findings or conclusions of law made by the Administrative Law Judge (ALJ) and/or vacate or modify the order issued by the ALJ and find:

- (1) that the ALJ did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions, as delineated herein; or
- (2) that a prior administrative decision in which the ALJ relied is incorrect or should be changed; or
- (3) that a technical error in a finding of fact should be changed.

II.

Respondent generally excepts to the proposal for decision on the grounds that the proposed penalty (\$15,875) is excessive and not justified by the facts of the case.

III.

The ALJ recommends a penalty of \$15,875.

A portion of the testimony regarding this case was hearsay and of no probative value.

Considering the reliable and probative evidence in the record as a whole, no factual basis existed for the conclusions of law hereinafter objected.

IV.

Respondent specifically excepts to the proposed legal analysis, proposed findings and proposed conclusion made in the Proposal for Decision as there was no credible evidence that any of the tanks sustained leakage and the bookkeeping problem was procedural and not substantive.

V.

Respondent excepts to Conclusions of Law numbers 7 and 8 for the aforementioned reasons and analysis.

- (a) Conclusion of Law #7 is not based on credible evidence that any of the tanks sustained leakage and the bookkeeping problem was procedural and not substantive. Substantial rights of the Respondent may be prejudiced when administrative findings, inferences, conclusions, or decisions are:
- (1) in violation of constitutional or statutory provisions;
 - (2) in excess of statutory authority of the agency;
 - (3) made upon unlawful procedure;
 - (4) affected by other error of law;
 - (5) not reasonably supported by substantial evidence in view of the reliable and probative evidence in the records as a whole; or
 - (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion

Tex.Rev.Civ.Stat. Ann. art. 6252-13a §19(e).

- (b) Conclusion of Law #8 is based on procedural problems and not substantive evidence. Substantial rights of the Respondent may be prejudiced when administrative findings, inferences, conclusions, or decisions are:
- (1) in violation of constitutional or statutory provisions;
 - (2) in excess of statutory authority of the agency;
 - (3) made upon unlawful procedure;
 - (4) affected by other error of law;

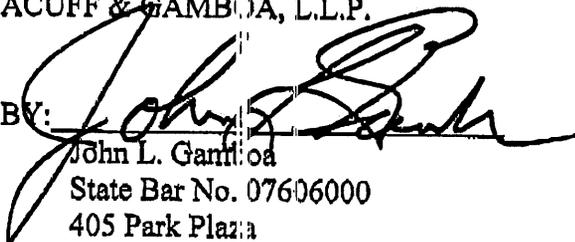
- (5) not reasonably supported by substantial evidence in view of the reliable and probative evidence in the records as a whole; or
- (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion

Tex.Rev.Civ.Stat.Ann. art. 6252-13a §19(e).

WHEREFORE, PREMISES CONSIDERED Respondent prays that the ALJ will review and revise the referenced findings and conclusions as appropriate; that the civil penalty assessed against Respondent be reduced; and all other relief, special or general, in equity or in law that Respondent may be entitled.

Respectfully submitted,

ACUFF & GAMBINO, L.L.P.

BY: 

John L. Gambino
 State Bar No. 07606000
 405 Park Plaza
 2501 Parkview Drive
 Fort Worth, TX 76102
 (817) 885-8500
 FAX (817) 885-8504

ATTORNEY FOR THE RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing instrument has been served on the following in accordance with the applicable rules on this the 21st day of July, 2008:

Via Facsimile **512-239-6377**
 Kari L. Gilbreth, Staff Attorney
 TCEQ

Via Facsimile **512-475-4994**
 Honorable Lilo D. Pomerleu
 State Office of Administrative Hearings

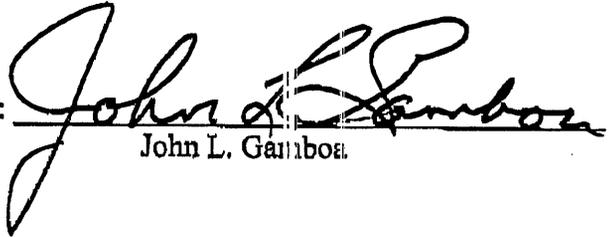
TEXAS
 COMMISSION
 ON ENVIRONMENTAL
 QUALITY
 CHIEF CLERKS OFFICE
 2008 NOV 21 PM 4:21

Via Facsimile 512-239-3311

Blas Coy Jr.

TCEQ

BY: _____



John L. Garibosa

John L. Garibosa