

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 10, 2008

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 NOV 10 PM 4:41
CHIEF CLERKS OFFICE

Re: Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Order
Mustafa Nadaf dba Discount Mini Mart
SOAH Docket No. 582-08-1485; TCEQ Docket No. 2007-0609-PST-E

Dear Ms. Castañuela:

Enclosed for filing are the originals of 1) The Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Order and 2) The Executive Director's Proposed Order to Supplement the Executive Director's Suggestions to the Honorable Administrative Law Judge's Order.

Enclosed please also find eight copies of this letter to you, eight copies of the Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Order, eight copies of the Executive Director's Proposed Order to Supplement the Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Proposal for Decision, and eight copies of the letter to the Respondent. Please file stamp one copy of each of these documents and return them to Kari L. Gilbreth, Attorney, Litigation Division, MC 175. If you have any questions or comments, please call me at (512) 239-0974.

Sincerely,

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

Kari L. Gilbreth
Attorney
Litigation Division

Enclosures

Ms. LaDonna Castañuela, Chief Clerk
Re: Mustafa Nadaf dba Discount Mini Mart
November 10, 2008
Page 2

cc: Mr. John L. Gamboa, Via CM/RRR No. 9171082133393523079510
Ms. Elvia Maske, Enforcement Division, TCEQ, MC 128
Mr. Sam Barrett, Waste Section Manager, TCEQ, MC R-4
Mr. Blas Coy, Public Interest Counsel, TCEQ, MC 103

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

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

VS.

MUSTAFA NADAF DBA DISCOUNT
MINI MART,
RESPONDENT

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BEFORE THE
STATE OFFICE
ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE
2009 NOV 10 PM 4:41
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**THE EXECUTIVE DIRECTOR'S SUGGESTED MODIFICATIONS
TO THE HONORABLE ADMINISTRATIVE LAW JUDGE'S ORDER**

TO THE HONORABLE JUDGE POMERLEAU:

NOW COMES the Executive Director of the Texas Commission on Environmental Quality ("Commission" or "TCEQ") and hereby files these Exceptions and Proposed Modifications to the Administrative Law Judge's Order, pursuant to 30 TEX. ADMIN. CODE § 80.257.

The Executive Director agrees with and supports the adoption of all of the Administrative Law Judge's ("ALJ") Findings of Fact and Conclusions of Law, with suggested Modifications to the Order as outlined below.

1. The Executive Director recommends that the proposed order have the title corrected from "DEFAULT ORDER" to "AN ORDER".
2. The Executive Director recommends the following modification of the language contained in Findings of Fact No. 3:

The ALJ's Order currently contains the following language: "On January 23, 2007, the TCEQ issued Respondent a Notice of Violation."

The Executive Director recommends that the language be changed to the following in order to accurately reflect the documentation for this case: "On January 23, 2007, the Respondent received the Notice of Enforcement sent to him via certified mail return receipt requested on January 10, 2007."

3. The Executive Director recommends that under the ordering provisions, paragraph number 4, the initials "OAH" be changed to "OAG" for purposes of accurately reflecting the initials for the Office of the Attorney General.

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: _____
Kari L. Gilbreth
State Bar of Texas No. 24040969
Litigation Division, MC 175
P.O. Box 13087
Austin, Texas 78711-3087
Telephone: (512) 239-1320
Fax: (512) 239-3434

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 NOV 10 PM 4:11
CHIEF CLERKS OFFICE

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2008, the original and seven (7) copies of the foregoing "Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Order" ("Exceptions") was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas.

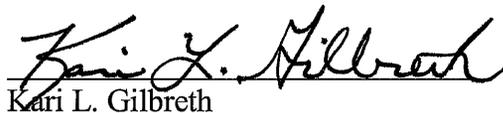
I further certify that on this day a true and correct copy of the foregoing Exceptions was sent mailed via Certified Mail, return receipt requested (Article No. 9171082133393523079510), to:

John L. Gamboa, Attorney
Acuff & Gamboa, LLP
405 Park Plaza
2501 Parkview Drive
Fort Worth, Texas 76102

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 facsimile to (512) 475-4994 and mailed via interagency mail, to:

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



Kari L. Gilbreth
Attorney
Litigation Division
Texas Commission on Environmental Quality

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



ORDER

**Assessing Administrative Penalties Against and Requiring Certain Actions of
Mustafa Nadaf d/b/a Discount Mini Mart
SOAH DOCKET NO. 582-08-1485
TCEQ DOCKET NO. 2007-0609-PST-E**

On _____, 2008, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing administrative penalties against and requiring corrective action by Mustafa Nadaf d/b/a Discount Mini Mart (collectively Respondent). A Proposal for Decision (PFD) was presented by Lilo D. Pomerleau, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who conducted a public hearing concerning the EDPRP on August 21, 2008, in Austin, Texas.

The Executive Director, represented by Kari L. Gilbreth, appeared at the hearing. Respondent was represented by John L. Gamboa. The Executive Director requested that an administrative penalty be assessed on the Respondent and that he be ordered to take certain corrective actions. The ALJ agreed with the Executive Director's request.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Respondent owns and operates a convenience store with retail sales of gasoline, located at 2424 Azle Avenue, Fort Worth, Tarrant County, Texas.
2. On December 4, 2006, Jurandir Felipe-Ortega, a TCEQ Dallas/Fort Worth Regional Office investigator, conducted an inspection of Respondent's facility and found that Respondent failed to conduct effective inventory control procedures for three underground storage tanks (USTs) involved in the retail sale of petroleum substances and was not complying with the TCEQ's Agreed Order in Docket No. 2002-1355-PST-E.
3. On January 23, 2007, the Respondent received the Notice of Enforcement sent to him via certified mail return receipt requested on January 10, 2007.
4. On July 30, 2007, the Executive Director filed and served Respondent with the EDPRP, in accordance with TEX. WATER CODE ANN. § 7.054, alleging Respondent failed to comply with the Commission rule's at 30 TEX. ADMIN. CODE § 334.48(c) and the Agreed Order in Docket No. 2000-1355-PST-E by failing to conduct effective manual or automatic inventory control procedures for all three USTs.
5. During the inspection, the facility did not have any tank gauge test records for Mr. Felipe-Ortega to review because the print outs from the automatic tank gauge had been thrown away. Respondent subsequently provided the TCEQ with automatic tank gauge records.
6. Respondent's inventory control records for the years 2003 through 2008 lack entries allowing the facility to determine whether a leak has occurred. For example, the record for September 2005 lacks the facility's name or identification, tank capacity, tank

dimensions, and some daily records such as daily gallons dispensed, book inventory, daily over/short, and the initials of the record keeper. It has the date, fuel type (unleaded), and some daily records, which included date, initial stick reading, gallons delivered, and closing stick reading.

7. Many of the inventory control records contain a daily over/short calculation of zero, which is unlikely given the contraction and expansion of gasoline.
8. Some of the inventory control records contain the exact same figures for the same tanks in different years, with similar corrections to certain entries.
9. All of the inventory control records omit required information.
10. The Executive Director proposed a total base penalty of \$12,500.00, which is comprised of a base penalty of \$2,500.00 per year for the five years from 2002 through 2007 for a petroleum storage tank violation that had the potential to result in the exposure of a significant amount of contaminants to human health and environment.
11. The Executive Director also proposed a 27 percent penalty enhancement of \$3,375.00 because Respondent had received one previous notice of violation (NOV) for the same or a similar violation, for a second NOV, and for violating an agreed order concerning the same violation.
12. The Executive Director recommended that the Commission enter an enforcement order assessing a total administrative penalty of \$15,875.00 against Respondent and that the Commission order Respondent to take certain corrective actions.
13. An administrative penalty of \$15,875.00 takes into account the factors set forth in TEX. WATER CODE ANN. § 7.053 and the Commission's 2002 Penalty Policy.

14. On August 20, 2007, Respondent requested a contested case hearing on the allegations in the EDPRP.
15. On January 10, 2008, the Executive Director requested the matter be referred to SOAH for hearing.
16. On January 10, 2008, the Commission's Chief Clerk mailed a notice of hearing to Respondent and the Executive Director. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
17. On February 13 2008, the Executive Director and Respondent filed a request to waive the preliminary hearing.
18. On February 15, 2008, the request to waive the preliminary hearing was granted and jurisdictional documents were admitted into the record.
19. On August 21, 2008, ALJ Lilo D. Pomerleau convened the hearing, and the record closed that day. Respondent was represented by John L. Gamboa and the Executive Director was represented by Kari L. Gilbreth.

II. CONCLUSIONS OF LAW

1. Respondent is subject to the Commission's enforcement authority pursuant to TEX. WATER CODE ANN. § 7.051 *et seq.*
2. In addition to imposing an administrative penalty, the Commission may order the violator to take corrective action, as provided by TEX. WATER CODE ANN. § 7.073.

3. Respondent was notified of the alleged violations, the proposed penalties, and the opportunity to request a hearing, as required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104.
4. Respondent was notified of the hearing on the alleged violations and the proposed penalties, as required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.27; and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 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, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
6. Respondent, as owner and operator of the facility at the time the violations occurred, was liable for compliance with all regulations governing its operation, pursuant to 30 TEX. ADMIN. CODE ch. 334.
7. Based on the Findings of Fact and Conclusions of Law, Respondent violated TCEQ Agreed Order Docket No. 2002-1355-PST-E, Ordering Provision No. 2.a, and 30 TEX. ADMIN. CODE § 334.48(c) by failing to conduct effective manual or automatic inventory control procedures for three USTs.
8. Based on the Findings of Fact and Conclusions of Law, the Commission should assess Respondent an administrative penalty of \$15,875.00.
9. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures that the ED recommends.

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. Mustafa Nadaf d/b/a Discount Mini Mart is assessed an administrative penalty in the amount of \$15,875.00 for violations of TCEQ Agreed Order Docket No. 2000-1355-PST-E, Order Provision No. 2.a and 30 TEX. ADMIN. CODE § 334.48(c). The payment of this administrative penalty and Mr. Nadaf's compliance with all the terms and conditions set forth in this Order completely resolve the violations set forth by this Order in this action. However, the Commission shall not be constrained in any manner from requiring corrective action or assessing penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Mustafa Nadaf d/b/a Discount Mini Mart; Docket No. 2007-0609-PST-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. Immediately upon the effective date of the Commission Order, Mustafa Nadaf d/b/a Discount Mini Mart shall begin conducting effective manual or automatic inventory control procedures for all USTs, in accordance with 30 TEX. ADMIN. CODE § 334.48(c).
3. Within 15 days after the effective date of the Commission Order, Mustafa Nadaf shall submit written certification as described below, and include detailed supporting

documentation and/or records to demonstrate compliance with Ordering Provision 2a. The certification shall be notarized by a State of Texas Notary Public and 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.”

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

with a copy to:

Sam Barrett, Waste Section Manager
Texas Commission on Environmental Quality
Dallas/Fort Worth Regional Office
2309 Gravel Drive
Fort Worth, Texas 76118-6951

4. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) 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.
5. 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, are denied.

6. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
7. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
8. 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.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Buddy Garcia, Chairman
For the Commission

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 10, 2008

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

The Honorable Lilo D. Pomerleau
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 Proposed Modifications to the Honorable Administrative Law Judge's Order and The Executive Director's Proposed Order to Supplement the Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Proposal for Decision;
Mustafa Nadaf dba Discount Mini Mart
SOAH Docket No. 582-08-1485; TCEQ Docket No. 2007-0609-PST-E

Dear Judge Pomerleau:

Please find enclosed a copy of 1) the Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Order and 2) the Executive Director's Proposed Order to Supplement the Executive Director's Suggested Modifications to the Honorable Administrative Law Judge's Order. These pleadings are being filed in response to your Proposal for Decision dated on October 21, 2008. If you have any questions or comments, please call me at (512) 239-1320.

Sincerely,

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

Kari L. Gilbreth
Attorney
Litigation Division

Enclosures

cc: Office of the Chief Clerk, MC 105
Mr. John L. Gamboa, Via CM/RRR No. 9171082133393523079510