

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 20 PM 3: 59

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

CHIEF CLERKS OFFICE

November 20, 2008

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

Re: The Executive Director's Responses to Respondent's Exceptions 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 Ms. Castañuela:

Enclosed for filing is the original "Executive Director's Responses to Respondent's Exceptions to the Honorable Administrative Law Judge's Proposal for Decision" ("Response").

Also enclosed please also find eight copies of this letter to you and eight copies of the Response. 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) 239-1320.

Sincerely,

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

Kari L. Gilbreth
Attorney
Litigation Division

Enclosures

cc: Mr. John L. Gamboa, Attorney for Respondent, Via CM/RRR No. 91 7108 2133 3935 2309
9921, and Via Facsimile No. (817) 885-8504
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

7:08 NOV 20 PM 3: 59

EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

VS.

MUSTAFA NADAF DBA DISCOUNT
MINI MART,
RESPONDENT

§
§
§
§
§
§
§
§

BEFORE THE CHIEF CLERKS OFFICE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

**THE EXECUTIVE DIRECTOR'S RESPONSES TO RESPONDENT'S EXCEPTIONS TO
THE HONORABLE ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION**

TO THE HONORABLE JUDGE POMERLEAU:

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

The Executive Director respectfully disagrees with the Respondent's Exceptions to the Honorable Administrative Law Judge's Proposal for Decision as outlined below.

EXECUTIVE DIRECTOR'S RESPONSE TO RESPONDENT'S SECTION I.

In Respondent's Section I., page one, the Respondent asks the "Administrator", pursuant to TEX. GOV'T. CODE § 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 administrative law judge did not properly apply or interpret applicable law, agency rules, written policies provided under Subsection (c), or prior administrative decisions; or
- (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
- (3) that a technical error in a finding of fact should be changed."

Pursuant to TEX. GOV'T. CODE § 2001.058(e), a state agency may change a finding of fact or conclusion of law made by the administrative law judge, or may vacate or modify an order issued by the administrative judge, only if the agency determines that one or more of the above criteria existed.

As further discussed below, the Respondent raises the following five exceptions to the ALJ's proposal for decision:

- (1) Respondent generally excepts to the proposal for decision on the grounds that the proposed penalty (\$15,875.00) is excessive and not justified by the facts of the case.
- (2) A portion of the testimony regarding this case was hearsay and of no probative value.
- (3) Respondent specifically excepts to the proposed legal analysis, proposed findings and proposed conclusion (sic) 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.
- (4) Conclusion of Law #7 is not based on credible evidence that any of the tanks sustained leakage and the bookkeeping (sic) problem was procedural and not substantive.
- (5) Conclusion of Law #8 is based on procedural problems and not substantive evidence.

The Executive Director respectfully disagrees with the Respondent's exceptions for the following reasons:

The proposed penalty is not excessive and is consistent with the statutory factors in the Texas Water Code

Respondent states that he "generally excepts to the Proposal for Decision ("PFD") on the grounds that the proposed penalty (\$15,875) is excessive and not justified by the facts of the case."¹ This statement is inaccurate. The evidence and testimony presented at the evidentiary hearing clearly show that the ED evaluated the assessed penalty in this case based on statutory factors and the penalty policy to ensure that there is consistency in penalty calculations for similar violations. In determining the amount of the administrative penalty in this case, the ED considered all the statutory

¹ See Respondent's Exceptions to Administrative Law Judge's Proposal for Decision ("hereinafter Respondent's Exceptions"), Section II., page 1.

factors such as, the nature of the violation, the impact of the violation, culpability, economic benefit, good faith effort to comply, compliance history and other factors as justice may require.² As a result, the ED recommended that the Commission assess an administrative penalty of fifteen thousand eight hundred seventy-five dollars (\$15,875.00), which is consistent with the statutory administrative penalty amount of up to \$10,000 for each day of each violation.³

At the hearing, Ms. Elvia Maske, a TCEQ Enforcement Coordinator, testified about the method used to calculate the proposed penalty. Ms. Maske's testimony demonstrated that the penalty was consistent with the statutory factors of the Texas Water Code.⁴ First, Ms. Maske testified that the penalty was calculated based on a \$10,000 per day base penalty allowed in a petroleum storage tank ("PST") case.⁵ Second, the calculation of the proposed penalty was based in part on the Respondent's compliance history for the past five years.⁶ An examination of the Respondent's compliance history revealed two previous notice of violation issued on April 20, 2005 and July 28, 2006 for the same or similar violation as was alleged in this case.⁷ These previous notices of violation resulted in a five percent enhancement of the proposed penalty and an additional 27 percent enhancement for culpability.⁸ Third, Ms. Maske, in calculating the penalty, considered the Respondent's good faith effort to comply. The Respondent did not receive a penalty reduction for good faith effort to comply because the Respondent failed to undertake corrective actions for the violations.⁹

The ED respectfully agrees with the ALJ's findings that "The ED's Penalty Calculation Worksheet generally documents that the required statutory factors set for in Water Code § 7.053 were considered by the ED in calculating the proposed penalty. Pursuant to Water Code § 7.051, the Commission has authority to impose penalties of up to \$10,000 per day for the violation discussed above. The ED has offered reasoned explanations for seeking assessment of a total administrative penalty of \$15,875 against Respondent for a repeated violation of the state's petroleum storage tank requirements."¹⁰

2 TEX. WATER CODE § 7.053.

3 TEX. WATER CODE § 7.052.

4 See the Hearing Transcript for the evidentiary hearing conducted on August 21, 2008, Testimony of Elvia Maske ("Hereinafter, Maske's testimony"), page 183, line 5.

5 Id. at page 186, lines 20-24.

6 Id. at page 187, lines 3-4.

7 Id. at page 189, line 23-25 and page 190, lines 1-3.

8 Id. at pages 188-189, lines 24-25, 1-2, respectively; and page 188, lines 12-18.

9 Id. at page 197, lines 17-23.

10 See PFD, page 6, Section B, Judge's Penalty Recommendation.

The ALJ's findings further contains extensive analysis of the penalty calculation method stating that "Ms. Manske (sic) calculated the penalty using the penalty calculation worksheet, which was developed to ensure that violations under Texas Water Code § 7.053 are properly and consistently applied."¹¹ The ALJ accurately concludes that the Executive Director properly calculated the proposed penalty for this case pursuant to the Penalty Policy and applicable provisions of the Texas Water Code.

The ALJ's Conclusions of Law were not based on hearsay

Respondent's Exceptions state "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." This statement is inaccurate. During the hearing, the Respondent's attorney objected on the grounds of hearsay on four occasions regarding the admission of three documents.¹² The ALJ overruled the attorney's objections on all four occasions. The three documents admitted were:

- (1) Exhibit ED-1, transcript page 44, line 22 (Agreed Order approved in 2002; Docket No. 2001-1355-PST-E);
- (2) Exhibit ED-2, transcript page 46, line 18 (July 24, 2006 Investigation Report)
- (3) Exhibit ED-22, transcript page 197, line 2 (April 20, 2005 Notice of Violation)

The ALJ properly admitted Exhibit ED-1 ("Agreed Order") into evidence because the previously issued Agreed Order was appropriately taken into consideration by the ED when calculating the proposed administrative penalty due to its effect on the Respondent's compliance history. The compliance history was properly incorporated into the penalty calculation worksheet (PCW) in accordance with the September 1, 2002 Penalty Policy ("Penalty Policy"), the compliance history requirements in 30 TAC § 60.3(c) and the statutory factors in the Texas Water Code. The notice of violation was also properly incorporated into the PCW in accordance with the Penalty Policy and due to its effect on the Respondent's compliance history. The investigation report was properly admitted into evidence because it provided documentation regarding the alleged violations which were included in the PCW for purposes of calculating the appropriate administrative penalty amount.

¹¹ PFD, pages 5, Section IV, Administrative Penalty and Corrective Action, paragraph A.

¹² See the Hearing Transcript for the evidentiary Hearing conducted on August 21, 2008 ("Herein Hearing Transcript"), page 28, line 20; page 46, line 12; page 190, line 16, and; page 194, line 3.

The ALJ's findings and conclusions of law were based on credible evidence

Respondent's Exception states: "Respondent specifically excepts to the proposed legal analysis, proposed findings and proposed conclusion (sic) 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."¹³ The ED did not allege in his case in chief that the three underground storage tanks at the Respondent's facility "sustained leakage". Instead, the ED alleged violation of 30 TAC § 334.48(c) and TCEQ Agreed Order, Docket No. 2000-13550-PST-E, Ordering Provision No. 2.a. by failing to conduct effective manual or automatic inventory control procedures for all three underground storage tanks ("USTs") at the Facility.¹⁴

The Respondent further argues that the alleged violation was a "bookkeeping problem" which was "procedural and not substantive".¹⁵ The evidence at the hearing showed that the violations were properly categorized under the "Environmental, Property and Human Health Matrix as a "potential major" in accordance with the Penalty Policy.¹⁶ In addition, the matrix notes on the PCW contain the following language: "Failure to monitor USTs for releases can result in the exposure of a significant amount of contaminants which may exceed levels that are protective of human health and the environment."¹⁷ The fact that the failure to monitor the USTs for releases could result in a harmful release of contaminants shows that the violation is more serious than a "bookkeeping violation" as the Respondent argues. The ED respectfully agrees with the ALJ's findings and conclusion that:

"The ALJ is not persuaded that a lesser penalty should be assessed because the violations are only 'paperwork' violations or that the Staff's periodic monitoring of facilities with prior violations somehow infers leniency in this matter. The facility chose to comply with the rules by using manually-filled out forms, rather than software and printouts, but either way, the forms must be completed, included the calculations, as a means of conducting a monthly leakage check. The records required by the Commission (the paperwork) are designed to prevent leaks. Accordingly, the violation was appropriately evaluated and categorized (for penalty purposes) on the basis that there was a *potential* for, not an actual, release of petroleum. Thus, the ED has already accounted for the fact that this was only a 'paperwork' violation."¹⁸

13 See Respondent's Exceptions, Section IV., page 3.

14 See Executive Director's Preliminary Report and Petition, Exhibit ED-A, page 2, paragraph 7.

15 See Respondent's Exceptions, Section IV, page 3.

16 See Hearing Transcript, page 200, lines 16-25; page 201, lines 1-15.

17 See Exhibit ED-A, Attachment A, page 3.

18 See PFD, pages 7-8.

Moreover, there was evidence that the partially-completed forms are suspect. Many, many entries contain daily over/short entries with zero. Further, there were a significant number of matching entries submitted for different dates. Such evidence strongly suggests that Respondent or employees of the facility have been fabricating forms. Such actions should not be rewarded by any reduction in the ED's proposed penalty."¹⁹

The ALJ properly recommends that the Commission assess an administrative penalty in the amount of \$15,875.00 for the reasons stated above, and through consideration of the record in its entirety.

Respondents' statements in paragraph V of the exceptions are conclusions that are not supported by facts

Respondent states:²⁰

"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 bookeeping (sic) 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 or discretion or clearly unwarranted exercise of discretion.

TEX. REV. CIV. STAT. ANN. ART. 6252-13a §19(e)."

¹⁹ See PFD, pages 7-8.

²⁰ See Respondent's Exceptions, Section V., pages 2-3.

- (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 or discretion or clearly unwarranted exercise of discretion.

TEX. REV. CIV. STAT. ANN. ART. 6252-13a §19(e).”

The Respondent's statements that Conclusion of Law No. 7 is not based on credible evidence, and that Conclusion of Law No. 8 is based on procedural problems and not substantive evidence are merely conclusions not supported by facts. However, the ED notes that “TEX. REV. CIV. STAT. ANN. ART. 6252-13a §19(e)” referenced by the Respondent in his statements was repealed by Acts 1993, 73rd Leg., ch. 268 § 1, eff. Sept. 1, 1993. However, TEX. GOV'T. CODE § 2001.174 was added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993, which contains the same language.

Standard for Reversal

The ED respectfully requests that the Commission adopt the ALJ's order attached to the PFD. The law specifies that the Commission may reject the ALJ's proposed order, and approve its own order, but the Commission's order must be based solely on the record made before the ALJ, and the Commission must explain the basis of its order.²¹ The ED is required to prove the occurrence of the violations and the appropriateness of the proposed remedial ordering provisions by a preponderance of the evidence.²² The evidence and testimony presented at the evidentiary hearing clearly show that the ED has met his burden.

21 TEX. GOV'T. CODE § 2003.047(m).

22 30 TEX. ADMIN. CODE § 80.17(d).

Prayer

For the reasons set forth above, the ED respectfully requests that the ALJ deny the Respondent's exceptions to the PFD and Proposed Order to take into consideration the arguments presented herein.

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: 
Karl 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

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2008, the original and seven (7) copies of the foregoing "Executive Director's Suggested Responses to Respondent's Exceptions to the Honorable Administrative Law Judge's Proposal for Decision" ("Response") 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 Response was sent mailed via Certified Mail, return receipt requested (Article No. 91 7108 2133 3935 2309 9921), and Via Facsimile No. (817) 885-8504:

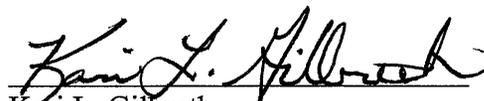
John L. Gamboa, Attorney
Acuff & Gamboa, LLP
405 Park Plaza
2501 Parkview Drive
Fort Worth, Texas 76102

I further certify that on this day a true and correct copy of the foregoing Response 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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 NOV 20 PM 3: 59
CHIEF CLERKS OFFICE


Kari L. Gilbreth

Attorney
Litigation Division
Texas Commission on Environmental Quality

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 20, 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 Responses to Respondent's Exceptions 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 one copy of The Executive Director's Responses to Respondent's Exceptions to the Honorable Administrative Law Judge's Proposal for Decision ("Response"), and a copy of the cover letter to the Office of the Chief Clerk. The original Response was filed with the TCEQ's Office of the Chief Clerk.

Sincerely,

A handwritten signature in black ink, appearing to read "Kari L. Gilbreth".

Kari L. Gilbreth
Attorney
Litigation Division

Enclosures

cc: Office of the Chief Clerk, MC 105
Mr. John L. Gamboa, Attorney for Respondent, Via CM/RRR No. 91 7108 2133 3935 2309
9921 and Via Facsimile No. (817) 885-8504