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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 DEC 18 AM 11: 37
CHIEF CLERKS OFFICE

December 18, 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
Lupe Mercado
SOAH Docket No. 582-08-4453; TCEQ Docket No. 2007-1653-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 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 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: Mr. Alex Luna, Attorney for Respondent, Via CM/RRR No. 91 7108 2133 3934 8953 3651, and Via Facsimile No. (361) 553-4702
Mr. Wallace Myers, Enforcement Division, TCEQ, MC 128
Mr. Brad Genzer, Waste Section Manager, TCEQ, MC R-14
Mr. 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

December 18, 2008

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

The Honorable William G. Newchurch
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
Lupe Mercado
SOAH Docket No. 582-08-4453; TCEQ Docket No. 2007-1653-PST-E

Dear Judge Newchurch:

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,

Anna Cox

Anna M. Cox
Attorney
Litigation Division

Enclosures

cc: Office of the Chief Clerk, MC 105
Mr. Alex Luna, Attorney for Respondent, Via CM/RRR No. 91 7108 2133 3934 8953 3651 and Via Facsimile No. (361) 553-4702

SOAH DOCKET NO. 582-08-4453
TCEQ DOCKET NO. 2007-1653-PST-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, PETITIONER	§	**BEFORE THE**
	§	
	§	
	§	
	§	**STATE OFFICE OF**
VS.	§	
	§	
LUPE MERCADO, RESPONDENT	§	
	§	**ADMINISTRATIVE HEARINGS**

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
2008 DEC 18 AM 11:38
CHIEF CLERKS OFFICE

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

TO THE HONORABLE JUDGE NEWCHURCH:

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 EXCEPTIONS.

I. Response to Respondent's Exception 1

In Respondent's Exception 1, page one, the Respondent states, "Respondent was unable to attend the September 25, 2008 hearing due to bad health and not able to retain counsel to represent him at this hearing." The ALJ attempted to call Mr. Mercado on September 25, 2008 at 10:00 am. The ALJ attempted to call Mr. Mercado at (361) 564-2635, this was the telephone number provided to the TCEQ in a letter from the Respondent dated August 15, 2008. In addition, the Respondent originally filed his answer in January 29, 2008, he had months to retain counsel to represent himself.

II. Response to Respondent's Exception 2

In Respondent's Exception 2, the Respondent provides facts not admitted into evidence.

III. Response to Respondent's Exception 3

In Respondent's Exception 3, the Respondent provides facts not admitted into evidence.

IV. Response to Respondent's Exception 4

In Respondent's Exception 4, the Respondent states that he is the property owner. This supports the ALJ's Findings of Fact Nos. 1 and 2. Whether or not Mr. Mercado was informed about the existence of underground storage tanks ("USTs") on the property is not a matter of material importance. It is the responsibility of the buyer to determine the status of the property in which the buyer intends to purchase. "Caveat emptor" is a long held legal premise regarding the purchase of property. Mr. Mercado's lack of notice of the USTs has no impact on this case. This is an invalid defense to the violations found in the July 19, 2007 investigation. Mr. Mercado is the property owner and is responsible for the UST system on his property.

V. Response to Respondent's Exception 5

In Respondent's Exception 5, the Respondent provides facts not admitted into evidence.

VI. Response to Respondent's Exception 6

In Respondent's Exception 6, the Respondent states that he "has no history or previous violations." This is incorrect and fails to account for the Notice of Violation ("NOV") issued to the Respondent on November 21, 2006. The Respondent's compliance history was taken into account for the calculation of the penalty amount on the penalty calculation worksheet ("PCW"). The NOV was issued for failing to remove the USTs from the ground within 60 days of the prescribed implementation date found on October 25, 2006. Mr. Mercado was given 30 days to remove the USTs from the date of the NOV to avoid formal enforcement proceedings. This is the same violation in Findings of Fact No. 4 in the ALJ's proposed order.

VII. Response to Respondent's Exception 7

In Respondent's Exception 7, the Respondent states that he "is in the process of removing the tanks and complying with State Requirements. He will have this done no later than February 1, 2009." Ordering Provision No. 1, in the ALJ's proposed order requires the USTs to be removed from the ground no later than 30 days after the approval of the order. The Respondent is merely stating his intention to comply with the ordering provision.

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 and adopt the ALJ's order attached to the PFD.

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) 239-1320
Fax: (512) 239-3434

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 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 mailed via Certified Mail, return receipt requested (Article No. 91 7108 2133 3934 8953 3651), and Via Facsimile No. (361) 553-4702 to:

Alex Luna, Attorney
Law Office of Alex Luna
P.O. Box 3634
Victoria, Texas 77903

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 William G. Newchurch
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
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CHIEF CLERKS OFFICE

Anna Cox

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