

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

November 19, 2008

Les Trobman, General Counsel
Texas Commission on Environmental Quality
PO Box 13087
Austin Texas 78711-3087

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 NOV 19 PM 1:24
CHIEF CLERKS OFFICE

**Re: SOAH Docket No. 582-08-4453; TCEQ Docket No. 2007-1653-PST-E; In Re:
In the Matter of an Enforcement Action Against Lupe Mercado;
RN101866036**

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the original documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than **December 9, 2008**. Any replies to exceptions or briefs must be filed in the same manner no later than **December 19, 2008**.

This matter has been designated **TCEQ Docket No. 2007-1653-PST-E; SOAH Docket No. 582-08-4453**. All documents to be filed must clearly reference these assigned docket numbers. Copies of all exceptions, briefs and replies must be served promptly on the State Office of Administrative Hearings and all parties. Certification of service to the above parties and an **original and eleven copies** shall be furnished to the Chief Clerk of the Commission. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink that reads "William G. Newchurch".

William G. Newchurch
Administrative Law Judge

WGN:nl
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
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SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: LUPE MERCADO
SOAH DOCKET NUMBER: 582-08-4453
REFERRING AGENCY CASE: 2007-1653-PST-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE
ALJ WILLIAM G. NEWCHURCH

REPRESENTATIVE / ADDRESS

PARTIES

BLAS J. COY, JR.
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

ANNA M. COX
ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
LITIGATION DIVISION
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EXECUTIVE DIRECTOR

LUPE MERCADO
P.O. BOX 223
WEESATCHE, TX 77993

LUPE MERCADO

xc: Docket Clerk, State Office of Administrative Hearings

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

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IN THE MATTER OF
AN ENFORCEMENT ACTION
AGAINST LUPE MERCADO;
RN101866036

§ BEFORE THE
§
§ STATE OFFICE OF
§
§ ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ) alleges that Lupe Mercado has violated 30 Tex. Admin. Code §§ 334.47(a)(2) and 334.54(b), which apply to underground storage tanks. For these violations, the ED recommends that the Commission enter an order assessing a \$15,750 administrative penalty against Mr. Mercado. He also recommends that the Commission order Mr. Mercado to undertake corrective actions necessary to bring his operations into compliance. Mr. Mercado filed a response to the Executive Director's Preliminary Report and Petition (EDPRP) and asked for a contested case hearing. The case was transferred to the State Office of Administrative Hearings (SOAH) for hearing.

Although the required notice of hearing was sent to him, neither Mr. Mercado nor anyone on his behalf appeared at the hearing or sought a continuance. Anna M. Cox, attorney, appeared at the hearing on behalf of the ED and moved for the issuance of a default order deeming as true the facts that were alleged in the EDPRP, imposing the proposed penalty, and ordering Mr. Mercado to take the proposed corrective action. The Administrative Law Judge recommends that the Commission grant the ED's motion and issue the attached default order granting the relief requested by the ED.

SIGNED November 19, 2008.



WILLIAM G. NEWCHURCH
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN ORDER

**ASSESSING ADMINISTRATIVE PENALTIES AGAINST AND
ORDERING CORRECTIVE ACTION BY
LUPE MERCADO
SOAH DOCKET NO. 582-08-4453
TCEQ DOCKET NO. 2007-1653-PST-E**

On _____, 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 Lupe Mercado. A Proposal for Decision (PFD) was presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

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

I. FINDINGS OF FACT

1. Mr. Mercado owns a former retail gasoline service station located on State Highway 72, Nordheim, DeWitt County, Texas (Facility).
2. Mr. Mercado owns two underground storage tanks (USTs) at the Facility that are not exempt or excluded from regulation under the TEX. WATER CODE ANN. (Water Code) or the rules of the Commission.

3. Mr. Mercado's USTs contain a regulated petroleum substance as defined in the rules of the Commission.
4. During an investigation conducted on July 19, 2007, a TCEQ Corpus Christi Regional Office investigator documented that Mr. Mercado violated 30 TEX. ADMIN. CODE (TAC) §§ 334.47(a)(2) and 334.54(b), by failing to:
 - a. permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, two USTs for which any applicable component of the system was not brought into timely compliance with the upgrade requirements; and
 - b. maintain all piping, pumps, manways, tank access points, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner to prevent access, tampering, or vandalism by unauthorized persons.
5. Mr. Mercado received notice of the violations on or about September 22, 2007.
6. On January 11, 2008, the ED filed the EDPRP with the Commission's Chief Clerk and mailed a copy of it to Mr. Mercado at his last address of record with the Commission, P.O. Box 223, Weesatche, Texas 77993.
7. In the EDPRP, the Executive Director:
 - a. alleged facts that, if true, would show that Mr. Mercado committed the alleged violations;
 - b. proposed that the Commission order Mr. Mercado to pay a penalty of \$15,750 for the violations;
 - c. followed the Penalty Policy approved by the Commission on September 1, 2002, to calculate the proposed penalty;
 - d. included a penalty calculation worksheet that showed the details of the ED's calculation of the proposed penalty; and
 - e. recommended that the Commission direct Mr. Mercado to take the corrective actions listed in the Ordering Provisions below to bring his Facility into compliance with the statutes and rules that the Commission administers.

8. On January 29, 2008, Mr. Mercado filed an answer to the EDPRP and requested a contested case hearing.
9. On August 21, 2008, the ED asked the Commission's Chief Clerk to refer this case to SOAH for hearing, which she did.
10. On September 2, 2008, the Chief Clerk mailed a notice of hearing to Mr. Mercado at his last address of record with the Commission, P.O. Box 223, Weesatche, Texas 77993.
11. On September 5, 2008, Mr. Mercado accepted delivery of that notice of hearing.
12. The Chief Clerk also sent the notice of hearing to the ED and the Office of Public Interest Counsel (OPIC).
13. The notice of hearing included a copy of the EDPRP and 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.
14. The notice of hearing indicated in 12-point boldface type that if Mr. Mercado failed to appear at the hearing, a default judgment could be rendered against him in which all the allegations contained in the notice of hearing would be deemed admitted as true.
15. On September 25, 2008, ALJ Newchurch convened the hearing as indicated in the notice. Anna M. Cox, attorney, appeared on behalf of the ED.
16. Neither Mr. Mercado nor anyone on his behalf appeared at the hearing or sought a continuance.
17. Anna M. Cox, attorney, appeared at the hearing on behalf of the ED and moved for the issuance of a default order deeming the facts true that were alleged in the EDPRP,

imposing the proposed penalty, and ordering Mr. Mercado to take the proposed corrective action.

II. CONCLUSIONS OF LAW

1. Lupe Mercado is subject to the enforcement authority of the Commission pursuant to Water Code § 7.002 because the violations alleged herein are within the Commission's general jurisdiction, pursuant to Water Code § 5.013, as they involve violations of the state's petroleum storage tank program.
2. According to Water Code § 7.056 and the TCEQ's procedural rules, Mr. Mercado has a right to a hearing on the occurrence of the violations, the amount of the proposed penalty, or both.
3. Additionally, Mr. Mercado was notified, in accordance with 1 TAC § 155.55, that if he failed to appear at the hearing, a default judgment could be rendered against him in which all the allegations contained in the notice of hearing would be deemed admitted as true.
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. (GOV'T CODE) ch. 2003.
5. Based on the above Findings of Fact and Conclusions of Law:
 - a. A default judgment should be entered against Respondent in accordance with 1 TAC § 155.55 and 30 TAC §§ 70.106(b) and 80.113(d); and
 - b. The allegations contained in the notice of the hearing, including those in the EDPRP attached thereto, are deemed admitted as true.
6. In determining the amount of an administrative penalty, Water Code § 7.053 requires the Commission to consider several factors including:

- a. The nature, circumstances, extent, duration, and gravity of the prohibited act;
 - b. The history and extent of previous violations by the violator;
 - c. The violator's degree of culpability, good faith, and economic benefit gained through the violation;
 - d. The amount necessary to deter future violations; and
 - e. Any other matters that justice may require.
7. Based on the above Findings of Fact and Conclusions of Law, Mr. Mercado should pay an administrative penalty in the amount of \$15,750 for the violations found above.
 8. The Commission may order any person who violates any statute or rule within the Commission's jurisdiction to take corrective action. Water Code § 7.073.
 9. Based on the above Findings of Fact and Conclusions of Law, Mr. Mercado should take the corrective actions listed in the Ordering Provisions below to bring his Facility into compliance with the Water Code and the Commission's rules.

III. ORDERING PROVISIONS

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 Order, Lupe Mercado shall pay an administrative penalty in the amount of \$15,750 for the violations of 30 TAC §§ 334.47(a)(2) and 334.54(b).
2. The payment of this administrative penalty and taking the corrective actions described below in this Order will completely resolve the violations set forth by this Order.

However, the Commission shall not be constrained in any manner from requiring corrective actions or assessing penalties for other violations that are not raised here.

3. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: Lupe Mercado, TCEQ DOCKET NO. 2007-1653-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

4. Mr. Mercado shall implement the following corrective action measures:
 - a. Immediately upon the effective date of this Order, Mr. Mercado shall maintain all piping, pumps, manways, tank access points, and ancillary equipment in a capped, plugged, locked, and/or otherwise secured manner, in accordance with 30 Tex. Admin. Code § 334.54.
 - b. Within 45 days after the effective date of this Order, Mr. Mercado shall permanently remove the UST system from service, in accordance with 30 Tex. Admin. Code § 334.55.
 - c. Within 60 days after the effective date of this Order, Mr. Mercado shall submit written certification and detailed supporting documentation, including photographs, receipts, and /or other records, to demonstrate compliance with the above Ordering Provisions Nos. 4(a) and (b). 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."

d. Mr. Mercado shall submit the written certification and copies of documentation 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:

Brad Genzer, Waste Section Manager
Texas Commission on Environmental Quality
Corpus Christi Regional Office
NRC Building, Ste. 1200
6300 Ocean Drive, Unit 5839
Corpus Christi, Texas 78412-5839

5. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Mr. Mercado if the Executive Director determines that Mr. Mercado has not complied with one or more of the terms or conditions in this Order.
6. 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 hereby denied.
7. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code § 2001.144.
8. As required by Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Mr. Mercado.

9. 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