

February 21, 2011

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

RE: Noortima, Inc. dba Nice N Easy Food Store; RN101833184  
TCEQ Docket No. 2009-1891-PST-E

Dear Ms. Castanuela,

Please find enclosed Noortima, Inc. D/B/A Nice N Easy Food Store's Exceptions to the Administrative Law Judge's Proposal for Decision.

Please contact me at (281) 558-7100 x 107 or on my mobile at (281) 236-4483 if you have any questions.

Sincerely,



Saqib Nooruddin Dhanani, Attorney

Enclosure

cc: Office of the Chief Clerk, MC 105  
Mr. Phillip M. Goodwin, P.G., TCEQ Staff Attorney

1500 S. Dairy Ashford, Suite 240  
Office: (281) 558-7100 x 107  
Mobile: (281) 236-4483  
Fax: (832) 202-0237  
E-Mail: [SDhanani@ParadigmLP.com](mailto:SDhanani@ParadigmLP.com)

**SOAH DOCKET NO. 582-10-4247**

**TCEQ DOCKET NO. 2009-1891-PST-E**

**EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY,  
PETITIONER**

**VS.**

**NOORTIMA, INC. DBA NICE N  
EASY FOOD STORE,  
RESPONDENT**

§  
§  
§  
§  
§  
§  
§  
§  
§  
§  
§

**BEFORE THE**

**STATE OFFICE OF**

**ADMINISTRATIVE HEARINGS**

**NOORTIMA, INC. D/B/A NICE N EASY FOOD STORE'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S PROPOSAL FOR DECISION**

TO THE HONORABLE JUDGE WILFONG:

COMES NOW Noortima, Inc. D/B/A Nice N Easy Food Store (Noortima) and files these exceptions to the Administrative Law Judge's (ALJ) Proposal for Decision and in support thereof shows the following:

**I. Background**

Noortima owns and operates a convenience store with retail sales of gasoline located at 10615 Veterans Memorial Drive, Houston, Harris County, Texas (the "Station"). During an investigation conducted on September 25, 2009, the Texas Commission on Environmental Quality (TCEQ) investigator, Chris Kelim, concluded that Noortima violated several requirements of the Texas Administrative Code, the Texas Water Code, and the Texas Health & Safety Code. In assessing the violations cited by the TCEQ investigator, numerous aspects of the assessment were conducted arbitrarily and the resulting penalty is excessive and unjust in light of the conduct and good faith of Noortima.

On April 5, 2010, the Executive Director (the "ED") issued his Preliminary Report and Petition to Respondent, alleging that Respondent had violated certain statutes and rules relating

to USTs. Specifically, the ED alleged that Respondent violated TEX. WATER CODE §§ 26.3475(C)(1) and (d), TEX., HEALTH & SAFETY CODE § 382.085(b), and 30 TEX. ADMIN. CODE §§ 334.7(d)(3), 334.49(c)(2)(C) and (c)(4), 334.50(b)(1)(A), 334.8(c)(5)(C), 115.242(3) and (3)(C)(iii), and 115.246(6). On March 30, 2010, Respondent filed a request for a contested case hearing.

On May 4, 2010, the ED requested the Commission's Chief Clerk to refer this dispute to the State Office of Administrative Hearings (SOAH) for an evidentiary hearing, which the Chief Clerk did on May 19, 2010. On June 17, 2010, the ED filed an agreed motion to waive the preliminary hearing, and on June 24, 2010, SOAH issued Order No. 1 granting the agreed motion, establishing a procedural schedule, and setting the hearing on the merits.

The hearing convened on December 16, 2010, before ALJ Richard R. Wilfong in the William P. Clements State Office Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas. The ED was represented by Phillip M. Goodwin, Attorney, TCEQ Litigation Division. Respondent appeared and was represented by Saqib Nooruddin Dhanani, Attorney. The record closed upon receipt of the parties written closing arguments on January 18, 2011. The ALJ recommended that the Commission adopt the Proposed Order finding that the alleged violations occurred and imposing a \$8,395.00 penalty on Respondent for them.

## **II. Compliance History Penalty Enhancement**

In the Proposal for Decision, the ALJ found that due to Mr. Dhanani's compliance history, the penalty against him should be enhanced by the full \$1,600. Based on the fact that the current alleged violations were cited within the five year period, the ALJ proposes to enforce the full \$1,600. Noortima excepts to this addition to the penalty.

Mr. Dhanani constantly works to conduct regular investigations at his Station and produce detailed daily logs. However, nearly five years ago on or about June, 2005, Mr. Dhanani was alleged to have failed to demonstrate acceptable financial assurance. Mr. Dhanani was ordered by the TCEQ to pay an administrative penalty of \$2,400 in settlement of these allegations though he generally denies them. However, upon assessing the amounts for the current alleged violations, the TCEQ has enhanced the penalty for having occurred within five years of the previous alleged violation. The compliance period for the previous penalty was set from November 10, 2004 to November 10, 2009. Throughout these years, Mr. Dhanani has paid

the penalty for this alleged violation in full. He never missed a payment and he has completely taken care of the issue. Nevertheless, the current investigation was conducted on or about September 2009, only two months short of the end of the five year compliance period. Although Mr. Dhanani had complied with the previous settlement by paying in full without issue for nearly five years, the matter was introduced into the calculation as a means to enhance the penalty. In citing this instance, the TCEQ proceeded to enhance the current penalty by a full 20%, thereby adjusting the base by an increase of \$1,600.

In the Proposal for Decision, the ALJ found that due to Mr. Dhanani's compliance history, the penalty against him should be enhanced by the full \$1,600. Based on the fact that the current alleged violations were cited within the five year period, the ALJ proposes to enforce the full \$1,600. However, the ALJ should also consider that Mr. Dhanani had complied with the previous settlement by paying in full without issue for nearly five years. This enhancement represents a harsh and unnecessary double penalization for a matter that has already been diligently dealt with for the simple fact that the current, unrelated matter occurred only two months before the end of the compliance period. As such, this excessive penalty enhancement should be dismissed.

### **III. SIR Requirements**

In the Proposal for Decision, the ALJ endorses the penalty that Noortima was alleged to have failed to monitor USTs and maintain regular records of inspections. Noortima excepts to the penalty calculation as it is increased by \$2,500 for this alleged violation.

Noortima was alleged to have failed to monitor USTs pursuant to an SIR process, 30 TEX. ADMIN. CODE § 334.50(b)(1)(A), and TEX. WATER CODE § 26.3475(c)(1). Though Mr. Dhanani was unaware and never informed of the SIR process, he nevertheless kept a daily log of all inspections and showed these logs to Mr. Kelim. Mr. Dhanani intends to keep a detailed, daily record of the inspections for all of his USTs and although he did not record them according to a specific SIR process, the purpose of the requirement was still being met on a daily basis. Even so, Mr. Dhanani immediately retained Baxter Environmental professional consultants to handle the particular SIR requirements once he had been informed of the issue by Mr. Kelim in a good faith effort to ensure he was within compliance. By maintaining the records in daily and in detail, Mr. Dhanani met the purpose of the SIR requirements of 30 TEX. ADMIN. CODE §

334.50(b)(1)(A), and TEX. WATER CODE § 26.3475(c)(1), and has hired professional consultants to meet the particulars of the process. As such, this penalty should not even apply.

In the Proposal for Decision, the ALJ found that Mr. Dhanani had failed to meet the SIR requirements of 30 TEX. ADMIN. CODE § 334.50(b)(1)(A), and TEX. WATER CODE § 26.3475(c)(1), and as such included the \$2,500 penalty. Since Mr. Dhanani maintained records daily, he met the purpose of the SIR requirements. As such, Noortima excepts to the ALJ's imposition of the penalty under 30 TEX. ADMIN. CODE § 334.50(b)(1)(A), and TEX. WATER CODE § 26.3475(c)(1).

#### **IV. Pump Quality**

In the Proposal for Decision, the ALJ finds that Noortima was alleged to have violated 30 TEX. ADMIN. CODE § 115.242(3) and (3)(C)(iii) and TEX. HEALTH & SAFETY CODE § 382.085(b) and endorses the \$1,000 penalty assessed. Noortima excepts to this finding and the \$1,000 addition to the penalty.

During the TCEQ's investigation of Mr. Dhanani's station, Mr. Kelim noted that Noortima had failed to maintain the Stage II vapor recovery system in properly operating condition in violation of 30 TEX. ADMIN. CODE § 115.242(3) and (3)(C)(iii) and TEX. HEALTH & SAFETY CODE § 382.085(b). He noted that the hose at pump number 4 was damaged and the nozzle boot was slit. Mr. Dhanani informed Mr. Kelim that pumps are routinely damaged by customers in the ordinary course of doing business at a gas station. The pump cited had been damaged not more than one or two days prior, and Mr. Dhanani had already contacted repair personnel to correct the problem. Additionally, an OUT OF ORDER sign was clearly displayed on the pump, and a plastic bag covered the pump nozzle to prevent customers from using the pump. However, Mr. Kelim insisted the pump be repaired immediately, despite the fact that a repair order had already been requested by Mr. Dhanani. Even so, Mr. Dhanani sought to comply with Mr. Kelim's request and incurred the additional cost of expediting the pump repair order, resulting in at least \$2000 in cost. Mr. Dhanani sought only to comply with TCEQ requirements and Mr. Kelim's recommendations as timely as possible in his continued good faith effort to avoid TCEQ issues. In doing so, Mr. Dhanani incurred additional expense in expediting the repair on top of the pre-existing order. Despite his diligence, Mr. Dhanani was nevertheless

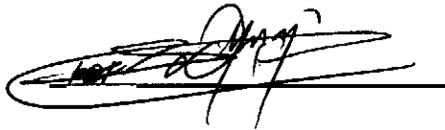
fined for this issue by TCEQ. Effectively, Mr. Dhanani is being required to pay twice for an issue that he had already and timely sought to address in the ordinary course of conducting his business.

In the Proposal for Decision, the ALJ states that Mr. Dhanani failed to maintain the Stage II vapor recovery system in proper operation. Thus, the ALJ proposes the penalty of \$1,000 for this alleged violation. However, Mr. Dhanani had maintained this pump as any regular owner would in the regular course of business. When Mr. Kelim requested he repair it immediately, he complied at additional cost. Mr. Dhanani complied with Mr. Kelim's request and is being penalized excessively for an issue that has been swiftly dealt with. As such, Noortima excepts to the \$1,000 addition in the penalty calculation for this matter.

**V. Conclusion**

As outlined above, the ALJ has proposed a penalty calculation that should be lowered. These are all issues within the Commission's discretion for consideration and ultimate determination. Noortima offers these exceptions to the ALJ's conclusions and recommends that the penalty be reduced.

Respectfully submitted,



Saqib Dhanani, Attorney  
State Bar of Texas No. 24065148  
1500 S. Dairy Ashford, Suite 240  
Office: (281) 558-7100 x 107  
Mobile: (281) 236-4483  
Fax: (832) 202-0237

**CERTIFICATE OF SERVICE**

I certify that on February 21, 2011, a true and correct copy of the foregoing exceptions were sent via e-mail, and via facsimile at 512-239-0606 to:

Phillip M. Goodwin, P.G., Staff Attorney  
Texas Commission on Environmental Quality  
P.O. Box 13087, MC 175  
Austin, Texas 78711-3087

I further certify that on February 21, 2011, a true and correct copy of the foregoing motion was sent via facsimile at 512-475-4994 to:

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

I further certify that on February 21, 2011, a true and correct copy of the foregoing motion was filed via electronic filing and sent via facsimile at **512-475-4994** to:

The Honorable Judge Wilfong  
State Office of Administrative Hearings  
300 West 15th Street, Suite 502  
Austin, Texas 78701  
Telephone: (512) 475-4993  
Fax: 512-475-4994



Saqib Dhanani, Attorney  
State Bar of Texas No. 24065148  
1500 S. Dairy Ashford, Suite 240  
Office: (281) 558-7100 x 107  
Mobile: (281) 236-4483  
Fax: 281-558-7900