

Jon Niermann, *Chairman*  
Emily Lindley, *Commissioner*  
Bobby Janecka, *Commissioner*  
Erin Chancellor, *Interim Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

June 6, 2023

Via Electronic Filing

The Honorable Andrew Lutostanski  
State Office of Administrative Hearings  
P.O. Box 13025  
Austin, Texas 78711-3025

Re: Antonina LLC dba Food & Fuel Express  
SOAH Docket No. 582-22-2669;  
TCEQ Docket No. 2021-0064-PST-E;  
Exception to Proposal for Decision

Dear Judge Lutostanski:

Enclosed please find the Executive Director's Exception to the proposed order in the abovecaptioned matter. If you have any questions, please do not hesitate to call me at (512) 239-3923. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "David C. Keagle".

David Keagle, Staff Attorney  
Office of Legal Services, Litigation  
Texas Commission on Environmental Quality  
[David.Keagle@tceq.texas.gov](mailto:David.Keagle@tceq.texas.gov)

Enclosure

cc: Pierre El Bayeh, Respondent  
Courtney Gooris, Enforcement  
Jennifer Jameson, Public Interest Counsel

SOAH DOCKET NO. 582-22-2669  
TCEQ DOCKET NO. 2021-0064-PST-E

IN THE MATTER OF  
AN ENFORCEMENT ACTION AGAINST  
ANTONINA, LLC DBA  
FOOD & FUEL EXPRESS;  
RN109282343

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§  
§  
§

BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S EXCEPTION TO THE  
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE ANDREW LUTOSTANSKI:

The Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ") respectfully files this exception to the Proposed Order in this matter pursuant to 30 Tex. Admin. Code § 80.257. The Executive Director agrees with the substance of the Proposed Order, and this recommended modification is intended to clarify the provisions of the Order.

1. The Executive Director recommends that Finding of Fact No. 13(a) be modified to reflect that the violation is appropriately analyzed under the Environmental, Property, and Human Health matrix.

To the extent that the Administrative Law Judge's Proposal for Decision is inconsistent with this recommended modification, the Executive Director excepts to the Proposal for Decision. A copy of the Proposed Order with the recommended modification is attached.

Respectfully submitted, 6<sup>th</sup> day of June, 2023.

Texas Commission on Environmental Quality

Erin Chancellor  
Executive Director

Charmaine Backens  
Acting Director, Office of Legal Services

Gitanjali Yadav  
Deputy Director, Litigation Division



By: \_\_\_\_\_  
David C. Keagle  
State Bar of Texas No. 24120397  
Texas Commission on Environmental Quality  
Litigation Division, MC 175  
P.O. Box 13087  
Austin, Texas 78711-3087  
(512) 239-3923 (Phone)  
[David.Keagle@tceq.texas.gov](mailto:David.Keagle@tceq.texas.gov)

## CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June 2023, the foregoing original Exception to the Administrative Law Judge's Proposed Order was filed with the Chief Clerk, Texas Commission on Environmental Quality, Austin, Texas, and with the State Office of Administrative Hearings, Austin, Texas.

I further certify that on this day a true and correct copy of the foregoing Exception to the Administrative Law Judge's Proposed Order was sent to the following via the methods indicated below:

Pierre El Bayeh  
Antonina LLC dba Food & Fuel Express  
4302 Callaghan Road  
San Antonio, Texas 78228  
[bayehsc@sbcglobal.net](mailto:bayehsc@sbcglobal.net)

Via email

Jennifer Jamison  
Office of Public Interest Counsel, MC 103  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087  
Jennifer.jamison@tceq.texas.gov

Via email and efile

The Honorable Andrew Lutostanski  
State Office of Administrative Hearings  
P.O. Box 13025  
Austin, Texas 78711-3025

Via efile



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David Keagle, Staff Attorney  
Texas Commission on Environmental Quality  
Office of Legal Services, Litigation



**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

**AN ORDER  
ASSESSING ADMINISTRATIVE PENALTIES AGAINST ANTONINA LLC  
DBA FOOD & FUEL EXPRESS  
TCEQ DOCKET NO. 2021-0064-PST-E; SOAH  
DOCKET NO. 582-22-2669**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's (ED) Preliminary Report and Petition recommending that TCEQ enter an enforcement order assessing an administrative penalty against Antonina LLC dba Food & Fuel Express (Antonina). After a hearing, a Proposal for Decision (PFD) was issued by Andrew Lutostanski, an Administrative Law Judge with the State Office of Administrative Hearings (SOAH). After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

**I. FINDINGS OF FACT**

1. Antonina owns and operates an underground storage tank system and a convenience store with retail sales of gasoline located at 1350 Old Bastrop Highway in San Marcos, Hays County, Texas.

2. The underground storage tanks are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission.
3. The underground storage tanks contained a regulated petroleum substance.
4. Hays County is a covered attainment county in the Texas Stage I program.
5. Antonina's gas station has a monthly gasoline throughput greater than 50,000 gallons per month.
6. Antonina bought the gas station in 2020. Its TCEQ tank registration was updated to reflect Antonina's new ownership in June 2020.
7. Previously, TCEQ investigators visited the gas station only once in the prior five years and found the station was operating in compliance with law.
8. In December 2020, a TCEQ investigator inspected the gas station to evaluate compliance.
9. Antonina failed to perform and pass the annual Stage I testing, which includes a pressure vacuum vent cap test and a pressure decay test.
10. The factors in section 7.053 of the Texas Water Code apply as follows:
  - a. Annual Stage I tests are required to protect air quality;
  - b. Failure to perform annual Stage I tests has the potential to negatively affect air quality in the region;
  - c. Antonina has no prior violations and falls in the "high performer" classification;
  - d. Antonina is culpable for the violation because it should have known that it was responsible for annual Stage I testing and should have known when the tests were due;

- e. Antonina could have done the Stage I tests during 2020, as evidenced by the fact that nearly all of the other gas stations in the area who were investigated had done their annual tests that year;
  - f. Antonina took ordinary compliance measures after being notified of the violation: it conducted and passed the Stage I tests;
  - g. Antonina did not profit from its violation other than by deferring the approximately \$500 cost of annual testing for a short time; and
  - h. A \$3,000 penalty is significant and should deter future violations.
11. TCEQ has adopted a penalty policy setting forth how it computes and assesses administrative penalties.
12. Under the penalty policy, Antonina's underground storage system is a major source.
13. Under the penalty policy, Antonina's violation for failing to conduct annual Stage I testing:
- a. is appropriately analyzed under the ~~health-and-safety~~environmental, property, and human health matrix;
  - b. created the potential for a release of contaminants in the environment that could cause moderate harm;
  - c. is an occurrence that is reasonably categorized as a single event;
  - d. is subject to a base penalty of \$3,750.
14. Antonina has no prior violations and falls in the "high performer" classification, resulting in a 10% penalty reduction.
15. Antonina took ordinary compliance measures after being notified of the violation: it conducted and passed the Stage I tests. This good faith effort to comply results in another 10% reduction in the penalty.

16. Under TCEQ's penalty policy, the total payable penalty for the violation is \$3,000.
17. In March 2021, the ED filed a preliminary report and petition, which alleged that Antonina failed to comply with annual Stage I vapor recovery testing requirements in violation of Texas Health & Safety Code § 382.085(b) and 30 Texas Administrative Code § 115.225 by failing to conduct annual pressure vacuum (P/V) vent cap and pressure decay tests.
18. In April 2021, Antonina filed an answer and requested a hearing.
19. In May 2022, the ED referred the matter to SOAH for a hearing.
20. The parties waived the preliminary hearing.
21. In January 2023, SOAH sent the parties an order setting the hearing on the merits on March 29, 2023.
22. Together, the order setting the hearing and the ED's preliminary report and petition contained a notice 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 factual matters asserted in the complaint or petition filed with the state agency.
23. On March 29, 2023, a hearing was held before Administrative Law Judge Andrew Lutostanski with SOAH. David Keagle represented the ED; Jennifer Jameson represented the Office of Public Interest Counsel; and Pierre Elbayeh represented Antonina. The record closed the next day.

## II. CONCLUSIONS OF LAW

1. Under Texas Water Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code within the Commission's jurisdiction or any rule, order, or permit adopted or issued thereunder.

2. Under Texas Water Code § 7.002, Antonina is subject to the Commission's enforcement authority.
3. The administrative penalty may not exceed \$25,000 per violation, per day, for the violations at issue in this case. Tex. Water Code § 7.052(c).
4. In determining the amount of an administrative penalty, the Commission must consider several factors. Tex. Water Code § 7.053.
5. SOAH has jurisdiction over matters related to the hearing in this case, including the authority to issue a PFD with findings of fact and conclusions of law. Tex. Gov't Code ch. 2003.
6. The ED has the burden of proving the violations in this case by a preponderance of the evidence. 30 Tex. Admin. Code § 80.17(b).
7. As required by Texas Water Code §§ 7.054, .055 and 30 Texas Administrative Code §§ 1.11 and 70.104, Antonina was notified of the preliminary report and petition and of the opportunity to request a hearing on the alleged violations and penalties proposed therein.
8. As required by Texas Government Code §§ 2001.051(1) and .052; Texas Water Code § 7.058; 1 Texas Administrative Code § 155.401; and 30 Texas Administrative Code §§ 1.11, 1.12, 39.425, 70.104, and 80.6(b)(3), Antonina was notified of the hearing on the alleged violation and the proposed penalties.
9. Antonina violated Texas Health & Safety Code § 382.085(b) and 30 Texas Administrative Code § 115.225.
10. The penalty that the ED proposed for Antonina's violations in this case conforms to the requirements of Texas Water Code chapter 7 and to TCEQ's penalty policy.
11. Antonina should be assessed a \$3,000 administrative penalty for its violations.



III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OFF ACT AND CONCLUSIONS OF LAW, THAT:

1. Within 30 days after the effective date of this Order, Antonina shall pay an administrative penalty in the amount of \$3,000.00 for its violations of Texas Health & Safety Code § 382.085(b) and 30 Texas Administrative Code § 115.225.
2. 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: Antonina LLC dba Food & Fuel Express, TCEQ Docket No. 2021- 0064-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

3. The payment of the administrative penalty will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective action or penalties for other violations that are not raised here.
4. 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 Antonina if the Executive Director determines that Antonina has not complied with one or more of the terms or conditions in this 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 herein, are hereby denied.
6. The effective date of this Order is the date the Order is final. Tex. Gov't Code § 2001.144; 30 Tex. Admin. Code § 80.273.

7. The Commission's Chief Clerk shall forward a copy of this Order to Antonina.
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**

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**Jon Niermann, Chairman, For the Commission**



**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

**AN ORDER  
ASSESSING ADMINISTRATIVE PENALTIES AGAINST ANTONINA LLC  
DBA FOOD & FUEL EXPRESS  
TCEQ DOCKET NO. 2021-0064-PST-E; SOAH  
DOCKET NO. 582-22-2669**

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6. The ED has the burden of proving the violations in this case by a preponderance of the evidence. 30 Tex. Admin. Code § 80.17(b).
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8. As required by Texas Government Code §§ 2001.051(1) and .052; Texas Water Code § 7.058; 1 Texas Administrative Code § 155.401; and 30 Texas Administrative Code §§ 1.11, 1.12, 39.425, 70.104, and 80.6(b)(3), Antonina was notified of the hearing on the alleged violation and the proposed penalties.
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10. The penalty that the ED proposed for Antonina's violations in this case conforms to the requirements of Texas Water Code chapter 7 and to TCEQ's penalty policy.
11. Antonina should be assessed a \$3,000 administrative penalty for its violations.

**III. ORDERING PROVISIONS**

**NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OFF ACT AND CONCLUSIONS OF LAW, THAT:**

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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 herein, are hereby denied.
6. The effective date of this Order is the date the Order is final. Tex. Gov't Code § 2001.144; 30 Tex. Admin. Code§ 80.273.



7. The Commission's Chief Clerk shall forward a copy of this Order to Antonina.
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**

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**Jon Niermann, Chairman, For the Commission**