

ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF MUHAMMED ZAMEER)
INDIVIDUALLY AND TRISTATE)
CONTRACTING OF BRINKLEY, LLC)

DOCKET NO. 16-002-NOV
ORDER NO. 7

RECOMMENDED DECISION

Appearances: Ms. Jessica Trail for Mr. Muhammed Zameer and Tristate Contracting of Brinkley, LLC; Ms. Lisa Thompson and for the Arkansas Department of Environmental Quality.

1. PROCEDURAL HISTORY

On June 9, 2016, the Arkansas Department of Environmental Quality ("ADEQ" or "Department") issued a Notice of Violation ("NOV") against Mr. Muhammad Zameer, individually, and TriState Contracting of Brinkley, LLC d/b/a TLC Tires Unlimited (collectively "Respondents"). On July 13, 2016, Respondents filed a Request for Hearing with the Arkansas Pollution Control and Ecology Commission ("Commission"), and on July 5, 2016, Respondents amended their Request for Hearing. On January 27, 2017, ADEQ filed a Motion for Partial Summary Judgment and on February 20, 2017, Respondents filed their Response to ADEQ's Motion. On March 3, 2017, ADEQ filed its Reply.

On September 15, 2017, the Commission's Administrative Law Judge ("ALJ") issued Order No. 6. Order No. 6 granted summary judgment in favor of ADEQ on the issue of Respondents maintaining a waste tire site, Ark. Code Ann. § 8-9-402(13) and granted summary judgment in favor of ADEQ on the issue of whether Respondents operated an unpermitted waste tire

processing facility, Ark. Code Ann. § 8-9-402(12), Reg.14.201. The ALJ held in Order No. 6 that there were material facts in dispute on the remaining issues - whether Respondents violated Ark. Code Ann. § 8-6-205(a)(2) and Reg.22.1502(a) (illegal solid waste disposal site); Ark. Code Ann. § 8-4-310(a)(1), (a)(2), (a)(3) and Reg.18.602 (illegal burn barrel); Ark. Code Ann. § 8-6-205(a)(5) and Reg.14.702 (vectors); and Reg.14.1103 (illegal waste tire transport) and therefore denied ADEQ's motion on these claims.

On October 10, 2017, the ALJ held an evidentiary hearing on the Department's remaining claims. On December 1, 2017, the parties submitted their post-hearing briefs. After reading the parties' respective pleadings, reading the hearing transcript, and examining the entire case file in light of the applicable law, the ALJ finds as follows:

2. JURISDICTION

The Commission has jurisdiction over this matter pursuant to Ark. Code Ann. § 8-1-203(b)(5). Arkansas Code Annotated §8-1-203(b)(5) authorizes an appeal to the Commission of a Department enforcement action.

3. BURDEN OF PROOF

The burden of proof in a Commission administrative hearing is preponderance of the evidence. *Johnson v. Arkansas Board of*

Examiners in Psychology, 305 Ark. 451, 455, 808 S.W.2d 766 (1991); Reg. 8.616(B). ADEQ has the burden of proving, by a preponderance of the evidence, the remaining claims contained in its NOV.

4. FINDINGS OF FACT

1. Respondents had a contract to purchase property located at 705 Industrial Park Road, Cotton Plant, Arkansas ("the Site"). The 705 Industrial Park Road address was the location of TriState's business.

2. The Site has been inspected a number of times by the ADEQ Office of Land Resources ("OLR") inspectors and OLR staff.

3. On March 1, 2016, ADEQ inspector Mr. Charles Stringer conducted an investigation of the Site.

4. As a result of the March 1, 2016, investigation Mr. Stringer issued an illegal dump report that described Respondents' alleged non-compliance at the Site. ADEQ Exhibit 1.

5. Based on his investigation, Mr. Stringer alleged that the Site was in violation of the Arkansas Solid Waste Management Act §§ 8-6-205, the Arkansas Water and Air Pollution Control Act §§ 8-4-301 et seq. and Commission Regulation 18. ADEQ Exhibit 1.

6. On March 7, 2016, Mr. Stringer sent a letter to the Respondents describing his findings at the Site during the March 1, 2016 investigation.

7. The March 7th letter advised Respondents to contact ADEQ in writing within twenty (20) days of the date of the letter with a plan of action for correcting the violations. *ADEQ Exhibit 3.*

8. On March 22, 2016, Mr. Stringer conducted a follow-up investigation of the Site.

9. As a result of this follow-up investigation Mr. Stringer issued another report that described further alleged non-compliance at the Site. *ADEQ Exhibit 4.*

10. In response to Mr. Stringer's letter of March 7, 2016, Respondents submitted a letter dated March 24, 2016, to ADEQ. This letter outlined a plan of action to correct the violations noted in the March 1, 2016, investigation. *ADEQ Exhibit 6.*

11. On May 2, 2016, Mr. Stringer conducted another investigation at the Site. As a result of his May 2, 2016, inspection Mr. Stringer issued a third report alleging continued violations of Ark. Code Ann. § 8-6-205 at the Site. *ADEQ Exhibit 7.*

12. On October 13, 2016, ADEQ inspectors Tobin Baker ("Baker") and Kimberly Davenport ("Davenport") investigated another complaint that was received by ADEQ that referenced the Site.

13. As a result of the October 13, 2016, investigation Mr. Baker issued a fourth inspection report. This report, like the Stringer inspection reports, alleges continued violations of the Arkansas Solid Waste Management Act § 8-6-205, the Arkansas Waste Tire Act, Ark. Code Ann. § 8-9-403, and Commission Regulation 14 at the Site. *ADEQ Exhibit 10.*

14. On October 10, 2017, the ALJ held an evidentiary hearing. Six witnesses testified during the hearing and the ALJ admitted twenty-five (25) exhibits.

15. During the evidentiary hearing Mr. Stringer testified about his inspections at the Site on March 1, 2016, March 22, 2016, and May 2, 2016.

16. Mr. Stringer stated that he had observed construction and demolition debris at the Site. He admitted that the construction and demolition debris he observed could be used for construction purposes but the debris had never been moved during his site visits and appeared to have been dumped. *Tr. p. 58, p. 65.*

17. Mr. Robert Hunter testified that some of the construction and demolition debris located at the Site could be used, some could not. *Tr. p. 81.*

18. Mr. Stringer also testified that he observed household waste at the site during each of his Site visits. *Tr. pp. 59-60, ADEQ Exhibits 1 and 2, Photos 23, 50, 13.*

19. Mr. Zameer testified that the construction and demolition material present on the Site were intended to be used to add onto an existing warehouse at the Site but he had not started the extension. *Tr. p. 200.*

20. Mr. Zameer testified that neither he nor his employees dumped trash at the Site, and that trash observed by ADEQ inspectors had been dumped on his property by others or had blown in from offsite. *Tr. p. 200.*

21. During his direct testimony Mr. Stringer stated that mosquitoes during his first visit to the Site were "bouncing off the window" of his vehicle as he drove onto the Site. *Tr. p.*

17. Mr. Stringer further testified that he believed he would not have seen as many mosquitoes as he saw during his three Site inspections if someone had been spraying for mosquitoes on a weekly or bi-weekly basis. *Tr. p. 62.*

22. ADEQ inspector Mr. Tobin Baker testified that he observed mosquito larvae in the tires at the Site during his

October 13, 2016, inspection and that he had previously worked at the Arkansas Department of Health where he learned about mosquitoes and mosquito harborage. *Tr. pp. 132-133, ADEQ Ex. 11, Photos 8 and 9.*

23. Mr. Zameer testified that he performed bi-weekly spraying at the Site to control mosquitoes and the Site is located in farmland where mosquitoes are prevalent. *Tr. p. 173.* Mr. Zameer also stated that he filled in about 3/4 of an area where an open pit that collected storm water was once located in an effort to reduce mosquitoes at the Site. *Tr. p. 191.*

24. Mr. Stringer testified that he could identify partially burned solid waste in a burn barrel located at the Site. *Tr. p. 64, ADEQ Exhibits 1 and 2.* Mr. Stringer identified the waste in the burn barrel as unburned paper, plastic bottles, and Styrofoam. *Tr. pp. 45-46.*

25. Mr. Zameer testified that his employee would burn limbs in a burn barrel at the Site in order to keep warm while he worked on equipment prior to the Site being opened for business in the spring. *Tr. p. 176.*

26. ADEQ employee Susan Speake testified regarding the ADEQ waste tire transporter license program. She explained the application process to receive a waste tire transporter license from ADEQ. *Tr. p. 142.*

27. Ms. Speak stated that waste tire transporter licenses expire on February 28th of each year, and the renewal waste tire transporter applications are due to ADEQ by March 1. *Tr. p. 143.* She testified that Mr. Zameer's renewal application for his waste tire transporter license was received by ADEQ on March 4, 2016. *Tr. p. 143.*

28. Ms. Speak testified that ADEQ formally denied Respondents' waste tire transporter renewal application on June 9, 2016. *Tr. p. 149.*

29. Mr. Stringer also provided testimony regarding storage of waste tires in the two warehouses located at the Site. Mr. Stringer stated that the pathway inside one of the warehouses was about three to five feet wide, and that tires were stored in the warehouse almost to the ceiling. *Tr. p. 31.* According to Mr. Stringer there was no separation distance between the tires to meet applicable fire codes and he did not see any sprinklers in the building - another violation of the fire code. *Tr. p. 32, ADEQ Exhibit 5.*

30. Mr. Baker's testimony regarding storage of waste tires in the warehouses at the Site corroborated Mr. Stringer's testimony. Mr. Baker stated that the tire storage in the 120 foot by 60 foot warehouse at the Site was a violation of Commission Regulation 14. *Tr. 135, ADEQ Exhibit 13.* According

to Mr. Baker, this warehouse lacked the requisite eight (8) foot spacing between aisles of tires. *Tr. pp. 136-137, ADEQ Exhibit 13, Photos 27 and 28.*

31. The ALJ incorporates by reference the findings of fact and conclusions of law contained in Order No. 6. As stated above, Order No. 6 granted summary judgment in favor of ADEQ on the issue of Respondents maintaining a waste tire site, *Ark. Code Ann. § 8-9-402(13)* and granted summary judgement in favor of ADEQ on the issue of whether Respondents operated an unpermitted waste tire processing facility, *Ark. Code Ann. § 8-9-402(12), Reg.14.201.*

5. DISCUSSION AND CONCLUSIONS OF LAW

A. Violations Of The Solid Waste Management Act

ADEQ has cited Respondents for violations of *Ark. Code Ann. § 8-6-205(a)(1), (a)(2), (a)(3)* and *Reg.22.1502(a)*. Mr. Stringers' March 1, 2016, investigation noted household waste, including paper, bottles, and cans present at the Site. Mr. Stringer also noted the presence of construction/demolition waste with metal roofing/siding at the Site. *ADEQ Exhibit 1.* According to ADEQ the presence of construction and household waste at the Site is evidence that Respondents have violated *Ark. Code Ann. § 8-6-205* and *Reg.22.1502(a)* by operating a solid waste disposal facility without a permit. *ADEQ Post-Hearing Brief at p. 2.*

Respondents contend that ADEQ failed to meet its burden regarding their alleged violation of Ark. Code Ann. § 8-6-205 and Reg.22.1502(a). They note, correctly, that the testimony provided by ADEQ indicated that the trash seen on the Site was primarily food containers, bags, cans, bottles, but there was no evidence that connected the trash on Site to the Respondents. *Tr. p. 60.* They maintain that ADEQ admitted that there is no security or gates limiting access to the Site; the Site is open and accessible to anyone; and that the household waste present at the Site could have been dumped at the Site by someone other than Respondents or Respondents' employees. *Tr. p 83.* Mr. Zameer testified that trash accumulates in the winter at the Site because the Site is closed for business for a couple of months and trash is dumped there. *Tr. p. 173-174.* Mr. Zammer stated that trash had possibly blown onto the Site from surrounding areas and illegal dumping was taking place at the Site, but admitted that he never reported this illegal dumping to the police or to ADEQ. *Tr. pp. 174, 198-199.*

The ALJ agrees with ADEQ that the theory that household trash blew in from offsite onto the Site is far-fetched. Mr. Stringer stated that this scenario was not possible because of the way the Site is situated and that blowing trash would have had to have gotten past the tens of thousands of stacked tires

on Site. Tr. pp. 59-60, ADEQ Ex. 1- 2, Photos 23, 50, 13. But the ALJ is also compelled by Mr. Stringer's other testimony regarding the presence of household trash at the Site and the possibility that it was illegally dumped there.

Judge Moulton: Did you ever dig into any of this household trash to establish some sort of nexus between the trash and Tristate operations? In other words, look for any bills of lading and any documents that have Tristate letterhead or was it just -- what was it that you were seeing?

Mr. Stringer: Generally when I'm looking at waste, like this stuff in the water, I wasn't going to mess with. You know, I'm not going to get in there and get wet.

Judge Moulton: Right.

Mr. Stringer: But the other material, I didn't see anything that stood out like letterhead or -- or anything, receipts or anything much. It just all looked like food containers and, you know, oil change, like, you know, motor oil and plates. You know, you could see styrofoam plates floating, cans, bottles, that type of material.

Judge Moulton: Looking through the exhibits -- photographs that have already been admitted, I didn't see any photographs of actual trash bags unless I'm missing them. I saw them in other pleadings.

Mr. Stringer: Uh-huh.

Judge Moulton: Could you describe for me where those were located in terms of trash bags?

Mr. Stringer: In one of these, you can see there's some plastic bags, but, again, these aren't contained. You know, if I went out and saw those plastic bags on the site, I'd call that illegal dumping -

Judge Moulton: All right. So -

Mr. Stringer: -- and illegal disposal (Tr. pp. 60-61)

Mr. Stringer's testimony regarding the possibility that the household trash at the Site was illegally dumped was verified by ADEQ employee Mr. Robert Hunter.

Judge Moulton: Let me ask you about security, excuse me, around this site. What type of security does the site have? Does it have fences? Does it have gates?

Mr. Hunter: None at all.

Judge Moulton: Okay.

Mr. Hunter: Very open to anybody.

Judge Moulton: Based on that, and, again, this is going to be based on your experience, how do you know for certain that the household trash that you've seen wasn't -- wasn't driven up and dumped there in the middle of the night by somebody from the housing complex or somebody down the road? Is -- is that a possibility?

Mr. Hunter: Very possible, yes, sir, it is.

Judge Moulton: All right. And I'm going to ask you the same thing as Mr. Stringer. You didn't go digging through the household trash, did you, to determine whether or not there was a connection or a nexus to Mr. Zameer or Tristate?

Mr. Hunter: No, sir, I did not. (Tr. pp. 82-83)

The ALJ believes that presence of the construction and demolition material at the Site is a closer call because of the way it has been stored and the fact that it has not been used to date, but Mr. Stringer and Mr. Hunter both agreed that this material still could have a beneficial purpose.

Judge Moulton: Now, do you have -- I gather -- I have what's been marked and admitted as Exhibit Number 2, and

photographs 23 and 24, does that depict the demolition or what you described as demolition material?

Mr. Stringer: Correct.

Judge Moulton: Okay. In your experience in your six and a half years -

Mr. Stringer: Uh-huh.

Judge Moulton: -- based on what you observed, could that be used for any construction purpose?

Mr. Stringer: It could. (Tr. p. 58)

* * *

Judge Moulton: All right. I'm going to ask you the same question I asked Mr. Stringer. Based on your experience, does that -- in your experience, does that demolition debris have any useful repurposing to it?

Mr. Hunter: I think there is always a possibility, not knowing the intent of what it was being stored for, it could be looked at several different ways. (Tr. p. 81)

After reviewing the testimony and evidence on this issue the ALJ finds that ADEQ has failed to prove, by a preponderance of the evidence, that Respondents have violated Ark. Code Ann. § 8-6-205(a)(1), (a)(2), (a)(3) and Reg. 22.1502(a) regarding the presence of household trash and construction/demolition material at the Site.

B. Burn Barrel

Arkansas Code Annotated § 8-4-310(a)(2) states "[i]t shall be unlawful and constitute a misdemeanor to construct, install, use or operate any source capable of emitting air contaminants

without having first obtained a permit to do so.." Commission Reg.18.602 further provides that "[n]o person shall cause or permit the open burning of refuse, garbage, trade waste, or other waste material, or shall conduct a salvage operation by open burning."

Mr. Stringer testified that he could identify partially burned "plastics, papers, [and] styrofoam" in a burn barrel located at the Site. *Tr. p. 64.* When asked during cross-examination what had been burned in the barrel, Mr. Stringer stated that "a lot of it was burned beyond recognition" but that he "could see that there was also waste that had been burned similar to paper and plastic bottles. *Tr. pp. 45-46.*

Mr. Zameer admitted that a burn barrel was used at the Site and that the burn barrel was used by one of his employees for warmth. But he maintained that the employee only burned wood in the barrel.

Mr. Zameer: That one basically one of my mechanic, he was fixing my forklift back in February, and he got kind of cold, and he burnt some wood actually to keep it warm, you know, to make him.

Ms. Trail: While he was working outside?

Mr. Zameer: Correct.

Ms. Trail: Did you or your employees ever burn trash in the barrel?

Mr. Zameer: No, not in that barrel. (Tr. 176)

After reviewing the testimony and evidence on this issue the ALJ is persuaded by the testimony of Mr. Stringer and the photographic evidence that more than just tree limbs were burned in a burn barrel located at the Site. ADEQ Ex. 1 and 2, Photo 14. The ALJ finds that ADEQ has proven, by a preponderance of the evidence, that Respondents violated Ark. Code Ann. § 8-4-310(a)(2) and Reg.18.602.

C. Vectors

ADEQ alleges that Respondents violated Ark. Code Ann. § 8-6-205(a)(5) and Reg.14.702 by storing tires in a manner that allowed for the accumulation of water, thereby providing a harborage area for mosquito breeding. Arkansas Code Annotated §8-6-205(a)(5) states that "it shall be illegal for any person to sort, collect, transport, process, or dispose of solid waste contrary to the rules, regulations, or orders of the department or in such a manner or place as to create or be likely to create a public nuisance or a public health hazard or to cause or be likely to cause water or air pollution within the meaning of the Arkansas Water and Air Pollution Control Act, § 8-4-101 et seq." Commission Reg. 14.702 also states the following:

A person shall not transport, transfer, store, collect, recycle, or otherwise manage processed, used, or waste tires in any manner that may:

- (A) Create a nuisance;

(B) Breed or harbor mosquitoes, snakes, insects, rodents, and/or other vectors;

(C) Cause a discharge of any constituents derived from waste tires into the air or waters unless otherwise permitted by the Department; or

(D) Create other hazards to the public health, safety, or environment as may be determined by the Department.

During his direct testimony Mr. Stringer stated that the mosquitoes at the Site during his initial visit were so thick that they were bouncing off the windows of his vehicle as drove onto the Site. *Tr. p. 17.* Mr. Stringer further testified that he observed water in many tires with a lot of algal growth and that he would not have seen as many mosquitoes as he saw during his Site inspections if someone had been spraying for mosquitoes on a weekly or bi-weekly basis. *Tr. pp. 22, 62.* According to his testimony Mr. Tobin Baker observed mosquito larvae in many of the tires at the Site during his October 13, 2016 inspection. Mr. Baker took some photographs of the mosquito larva that he saw in the tires. *ADEQ Ex. 11, Photos 8 and 9.* Mr. Baker previously worked at the Arkansas Department of Health where he learned about mosquitoes and mosquito harborage. *Tr. pp. 132-133.* In contrast, Mr. Zameer testified that he purchased many gallons of a red-bottled mosquito insecticide from Kroger and Dollar General and sprayed for mosquitoes on a bi-weekly basis at the Site, but admitted he could not remember the name of the product he used and did not provide any receipts to ADEQ or

submit receipts of his mosquito insecticide purchases as evidence at the hearing. *Tr. pp. 189, 197-198.*

After careful consideration the ALJ is convinced by the testimony of Mr. Stringer and Mr. Baker, and the ADEQ photographs depicting mosquito larva in tires, that the conditions at the Site constituted a public nuisance and public health hazard. Tires stored outside, as they are at the Site, are notorious for their propensity to breed mosquitos if they are not properly managed. If, as Mr. Zameer maintained, he was spraying for mosquitoes on a bi-weekly basis at the Site the ALJ believes Mr. Baker would not have observed mosquito larva in numerous tires, and Mr. Stringer would not have had mosquitoes "bouncing off" his vehicle windshield when he drove onto the Site. *Tr. p. 17; Tr. pp. 189, 197-198; ADEQ Ex. 11, Photos 8 and 9; ADEQ Exhibit 18.* The ALJ finds that ADEQ has proven, by a preponderance of the evidence, that Respondents violated Ark. Code Ann. §§8-4-101 *et seq.* and Commission Reg. 14.702 as it relates to vectors and a public nuisance.

D. Waste Tire Transport

ADEQ claims that Respondents transported waste tires without a valid license in violation of Reg.14.1103. Regulation 14.1103 specifically states:

Waste tire transporters shall obtain a license and shall meet the requirements contained in this regulation for waste tire transporters.

ADEQ employee Susan Speake testified regarding the ADEQ waste tire transporter license program and explained the application process to receive a waste tire transporter license from ADEQ. *Tr. p. 142.* Waste tire transporter licenses expire February 28th of each year, and the renewal application for waste tire transporter licenses are due to ADEQ by March 1. *Tr. p. 143.* Respondent Zameer's renewal application for his waste tire transporter license was received by ADEQ on March 4, 2016. *ADEQ Exhibit 21.* ADEQ notified Respondents, via letter dated June 9, 2016, that the Department was denying their waste tire transporter license based on the violations noted in ADEQ inspection reports. *Respondents' Exhibit 1; ADEQ Exhibits 1, 4, 10,*

ADEQ inspector Tobin Baker testified that during his Site inspection on February 23, 2017, a Penske truck arrived at the Site full of waste tires and he photographed the contents of the truck at time. *ADEQ Exhibit 16.*

Mr. Baker: Photo number 36 shows the Penske truck that I observed pulling into Industrial Park Drive, which, you know, parked right there by the property and that was the driver walking back to the back of the truck. Photo 39 was a photo taken whenever the driver opened the back of the Penske truck, which show the waste tires that were contained within the truck.

Ms. Thompson: Now, can you tell from that photo whether those are used tires or waste tires?

Mr. Baker: They were -- they were waste tires.

Ms. Thompson: How could you tell?

Mr. Baker: There were, you know, cuts and, you know, the treads were worn on the tires and things of that nature.
(Tr. p. 107)

In its post-hearing brief ADEQ focuses on the March-May, 2016 time-frame to argue that Respondents violated Reg.14.1103 by transporting waste tires without a license. But the ALJ knows that ADEQ has a "grace" policy relating to permit renewal applications that have been filed with Department. This grace period allows a permit renewal applicant to continue to operate while a final permitting decision on a renewal application is pending, even though Ms. Speak was unable to testify about that policy. *Tr. pp. 151-152.* Under that grace policy, Mr. Zameer could have theoretically transported waste tires until the Department's denial letter of June 9, 2016. *Respondents' Exhibit 1.* Nevertheless, there is no dispute that on February 23, 2017, Respondents did not possess a waste tire transporter license when a Penske truck full of tires drove onto the Site. *Tr. p. 152.* In rebuttal Respondents maintain that there is no evidence that they were transporting waste tires to, or from, the Site after receiving formal notice that their waste tire

transporter permit renewal had been denied on June 22, 2016. *Tr.*

pp. 107, 126. According to Mr. Zameer's testimony:

Mr. Zameer: Basically as a wholesaler, I buy in bulk, and a lot of them are junk. They always come with the bad tires. You discard sidewall, broken, bead broken. So in order to reduce and take out what was there, we cut the sidewalls and then cut the tire, and it ships sidewall actually to New York. And the tread, we cut them and that's going to -- basically ship to West Memphis. So that's the way I've been trying to get rid of all these spare tires.

Ms. Trail: Now, when you say get rid of them, do you transport them yourself?

Mr. Zameer: No.

Ms. Trail: Okay. Does a company come in and get those?

Mr. Zameer: Correct. They send a truck, and we just load for them. (*Tr.* p. 178)

While the ALJ finds that there is little doubt that *someone* likely delivered, and removed, used/waste tires from the Site during March-June of 2016, the only evidence submitted was employee hearsay testimony memorialized in ADEQ's Exhibit 4 inspection report that a "crew" was out that day picking up tires. *ADEQ Exhibit 4.* The ALJ also finds that there is no doubt that *someone* attempted to deliver used/waste tires to the Site on February 23, 2017. But aside from one line of hearsay testimony contained in an inspection report, there is no solid evidence, just conjecture, that Respondents were transporting waste tires during this time. Mr. Zameer testified that he purchased used/waste tires in bulk. *Tr.* p. 178. It is entirely

possible that the entity he was purchasing tires from was also shipping its tires to the Site too. *Tr. p. 178.* ADEQ supplied no evidence in the form of documents or testimony that demonstrably linked Respondents to the transport of waste tires during the time period in question. The ALJ finds that ADEQ has not proven, by a preponderance of the evidence, that Respondents violated Reg.14.1103 by transporting waste tires without a license.

E. Improperly Stored Waste Tires

Commission Reg.14.1401 states that "[W]aste tires stored indoors shall be stored under conditions that meet the most current standards published by the National Fire Protection Association." ADEQ maintains that the Respondents violated Reg.14.1401 by improperly storing used and waste tires indoors at two warehouses located on the Site - a 120 ft. by 60 ft. building, and a 100 ft. by 60 ft. building. *Tr. p. 135.* Mr. Stringer noted during his March 22, 2016, inspection that the pathway inside one the warehouses at the Site was about three to five feet wide, and that tires were stored in the warehouse almost to the ceiling. *Tr. p. 31.* According to Mr. Stringer there was no separation distance between the tires to meet the fire code, and he did not see any sprinklers in the building,

which is also required by the fire code. *Tr. p. 32; ADEQ Exhibit 5, Photo 2 and 5.*

Mr. Hunter testified that he observed there was no fire prevention system in one of the warehouses during his March 22, 2016, Site visit. *Tr. pp. 74-75; ADEQ Exhibit 9.* Finally, Mr. Baker testified that during his February 2, 2017, Site visit, he observed that the tire storage in the 120 foot by 60 foot warehouse was a violation of Regulation 14 because the warehouse lacked the requisite eight (8) foot spacing between aisles of tires and the warehouse lacked sprinkler systems. *Tr. pp. 131, 135-137; ADEQ Exhibits 13 and 19.*

During the hearing Mr. Zameer expressed his opinion that Reg.14.1401 was inapplicable to his business.

Ms. Trail: Do you - are you aware of what the National Fire Protection Association standards are?

Mr. Zameer: I'm - I heard it, but I don't think we need it.

Ms. Trail: Did you have a sprinkler system in your building

Mr. Zameer: I don't believe it was required for used tires for a warehouse.

Based on the testimony of Mr. Stringer, Mr. Hunter, Mr. Baker, and Mr. Zameer, along with the photographs contained in ADEQ Exhibits 5, 9 and 19, the ALJ finds that ADEQ has proven, by a preponderance of the evidence, that Respondents violated Reg.14.1401.

F. Civil Penalty Calculation

Arkansas Code Annotated § 8-6-204(c) states that any person found liable for violating the provisions of the Arkansas Solid Waste Management Act:

[M]ay be assessed an administrative civil penalty not to exceed ten (10) thousand dollars (\$10,000) per violation. Each day of a continuing violation may be deemed a separate violation for purposes of penalty assessment.

The Commission has provided ADEQ with the discretion to calculate and propose civil penalties within the limits of state law and Commission Regulation No. 7. ADEQ has followed the authorization contained in Regulation No. 7, Section 9, and developed a penalty calculation worksheet that incorporates Regulation No. 7, Section 9's civil penalty calculation factors.

Those factors are:

- (a) The seriousness of the noncompliance and its effect on the environment, including the degree of potential or actual risk or harm to the public health caused by the violation.
- (b) Whether the cause of the noncompliance was an unavoidable accident.
- (c) The violator's cooperativeness and expeditious efforts to correct the violation.
- (d) The history of a violator in taking all reasonable steps or procedures necessary or appropriate to correct any noncompliance.
- (e) The violator's history of previous documented violations regardless of whether or not any administrative, civil, or criminal proceeding was commenced therefore.

(f) Whether the cause of the violation was an intentional act or omission on the part of the violator.

(g) Whether the noncompliance has resulted in economic benefit or pecuniary gain to the violator, including but not limited to cost avoidance.

(h) Whether the pursuit and the execution of the enforcement action has resulted in unusual or extraordinary costs to the Department or the public.

(i) Whether any part of the noncompliance is attributable to the action or inaction of the state government.

(j) Whether the violator has delayed corrective action.

ADEQ solicited the testimony of Josh Hesselbein, an enforcement coordinator with the Office of Land Resources, to testify about ADEQ's proposed civil penalty assessments in this case. After applying Regulation 7's factors to the facts at issue, Mr. Hesselbein determined that:

a. Maintaining an unpermitted waste tire site, a violation of Ark. Code Ann. § 8-9-403(c)(1), was assessed a civil penalty of \$6400.00

b. Disposing of used or waste tires without a permit, a violation of Ark. Code Ann. § 8-9-403(c)(2), was assessed a civil penalty of \$1600.00

c. Sorting, collecting, transporting or disposing of solid waste contrary to regulations or to create a public nuisance (vectors/mosquitoes), a violation of Ark. Code Ann. § 8-6-205(a)(5), and Reg.14.70, was assessed a civil penalty of \$6400.00

d. Open burning of solid waste without a permit (burn barrel), a violation of Ark. Code Ann. §§ 8-4-

310(a)(1), (a)(2), (a)(3), and Reg.18.602, was assessed a civil penalty of \$350.00

e. Processing waste tires without a permit, a violation of Reg.14.1201, was assessed a civil penalty of \$6400.00

f. Storing waste tires improperly indoors, a violation of Reg.14.1401, was assessed a civil penalty of \$1400.00

g. Operating a solid waste processing/disposal facility without a permit (presence of household waste and construction/demolition debris), a violation of Ark. Code Ann. § 8-6-205(a)(2), was assessed a civil penalty of \$1400.00

h. Transporting waste tires without a license, a violation of Reg.14.1103, was assessed a civil penalty of \$1600.00 (ADEQ Exhibit 22)

The ALJ has previously found that ADEQ failed to meet its burden on the allegations that Respondents violated "g" (presence of household waste and construction/demolition debris) and "h" (transporting waste tires without a license), and therefore deducts \$3000.00 from the proposed civil penalty calculation. Furthermore, the ALJ finds, after carefully studying the language in Ark. Code Ann. § 8-9-403(c)(1) and Ark. Code Ann. § 8-9-403(c)(2), a dichotomy between these two statutory provisions. Arkansas Code Annotated § 8-9-403(c)(1) prohibits a person from maintaining an unpermitted waste tire site. Arkansas Code Annotated § 8-9-403(c)(1) prohibits a person from disposing of waste tires at an unpermitted site. While the record is replete with evidence that Respondents maintained an unpermitted waste tire site, there was little evidence that

Respondents' intended to dispose of the tires at the Site. Reviewing ADEQ's NOV the ALJ finds that the Department pled, in paragraph 3(a), the inspector's findings from the first visit to the Site. During the March 1, 2016, investigation the ADEQ inspector observed the following:

An estimated sixty thousand (60,000) to one-hundred thousand (100,000) tires and partial tires were being stored on at the Site. This condition is a violation of Ark. Code Ann. § 8-9-403(c)(1) which states, "A person shall not maintain a waste tire site." ADEQ NOV p. 2.

The Department did not plead that there was a finding during the March 1, 2016, Site visit that the Site also constituted the illegal disposal of waste tires. But the Department did plead, in paragraph 6(a) of its NOV, the inspector's findings from his March 22, 2016, follow-up investigation of the Site constituted the illegal disposal of waste tires. According to the NOV, the inspector observed:

Additional accumulation of tires at the Site since the initial complaint investigation of March 1, 2016. The number of tires on the exterior portion of the Site was now estimated to be greater than one hundred thousand (100,000). This is a violation of Ark. Code Ann. § 8-9-403(c)(2).

The ALJ could find nothing in the waste tire code or Regulation 14 that supports the contention that adding additional tires to a location that already contains 60,000-100,000 tires tips that site from an unpermitted waste tire site into an unpermitted

waste tire site and an illegal disposal of waste tires site. The ALJ finds that an intent to dispose must also be demonstrated to establish a violation of Ark. Code Ann. § 8-9-403(c)(2). Because there was no evidence solicited regarding Respondents' intent to dispose of tires at the Site, the ALJ deducts \$1600.00 - the amount assessed for disposing of used or waste tires without a permit, Ark. Code Ann. § 8-9-403(c)(2) - from the Department's proposed civil penalty assessment. After examining all the testimony, exhibits, and pleadings in this case, the ALJ believes an appropriate civil penalty for the violations ADEQ has proven is \$20,950.00.

G. Apportionment

The Department's NOV names Muhammed Zameer, individually, and TriState Contracting of Brinkley, LLC, as Respondents in this case. The Department's penalty calculation worksheet, ADEQ Exhibit 22, lists Mr. Zameer and TriState as the parties being assessed the proposed civil penalties. During the hearing the ALJ queried Mr. Hesselbein about apportionment. Mr. Hesselbein testified that when he worked his penalty calculation he viewed Mr. Zameer as the individual he was assessing the civil penalty against, not TriState. *Tr. pp. 162-163.* He stated that he usually checked with the Secretary of State's office to see if a legal entity was in good standing when he initially begins

penalty calculation in an enforcement matter, but could not remember if TriState was in good standing when he undertook the penalty calculation. *Tr. p. 167.* Mr. Zameer testified that he is the sole officer of TriState, describing himself as the president. *Tr. p. 181.* Mr. Zameer also testified that TriState's status with the Secretary of State's office was not current at the time of deposition in January 2017. *Tr. p. 181.* According to Mr. Zameer, TriState was also not current with the Secretary of State for its LLC fees at the time of the ALJ's evidentiary hearing. *Tr. p. 182, ADEQ Exhibit. 23.*

At the close of the hearing the ALJ requested counsel for both parties to brief the issue of apportionment. ADEQ maintains that although the NOV named both Mr. Zameer individually and his single-member LLC as Respondents, the evidence and testimony presented at the hearing demonstrate that TriState Contracting of Brinkley, LLC is the alter ego of Mr. Zameer. *ADEQ post-hearing brief at p. 8.* According to ADEQ, the evidence demonstrated that Mr. Zameer did not observe the required formalities of maintaining his business as a separate legal entity in good standing, essentially failing to respect the legal existence of the business as separate from himself. *ADEQ post-hearing brief at p. 8.* ADEQ argues that the testimony showed that the penalty was not calculated with any intent to

apportion it between Mr. Zameer and his business, and that the ALJ does not need to apportion the civil penalty between Mr. Zameer and TriState because Mr. Zameer is TriState. *ADEQ post-hearing brief at p. 8.*

In response, Respondents assert that the Commission should assess any civil penalty in this case against TriState Contracting of Brinkley, LLC and not Mr. Zameer individually. *Respondents' post-hearing brief at p. 9.* They claim that at the time of the violation, the property on which the Site is located was being purchased in the name of TriState Contracting of Brinkley, LLC and the waste tire transport license was applied for in the name of TriState Contracting of Brinkley, LLC. *Respondents post-hearing brief at p. 9, ADEQ Exhibit 20.* Respondents argue that the truck formerly used to transport tires was titled and insured in the name of TriState Contracting of Brinkley, Inc.; the owner of the site was TriState Contracting of Brinkley, LLC.; the business on the Site was being run in the name of TriState Contracting of Brinkley, LLC.; and Mr. Zameer was a member of TriState Contracting of Brinkley, LLC. *Respondents at post-hearing brief p. 9, ADEQ Exhibit 20.* Respondents contend that Mr. Zameer may have been a member of TriState Contracting of Brinkley, LLC but to make him personally, civilly, or criminally responsible for the acts of

the business, would violate Ark. Code Ann. §4-32-304. Arkansas Code Annotated § 4-32-304 states:

Except for the personal liability for acts or omissions of those providing professional service as set forth in § 4-32-308, a person who is a member, manager, agent or employee of a limited liability company is not liable for a debt, obligation, or liability of the limited liability company, whether arising in contract, tort, or otherwise or for the act or omissions of any member, manager, agent, or employee of the limited liability company.

After evaluating the testimony, exhibits, and law on this issue the ALJ finds that ADEQ is not legally obligated to assess a civil penalty against TriState. The ALJ is persuaded by the testimony of Mr. Hesselbein who stated that when he worked his penalty calculation he viewed Mr. Zameer as the individual he was assessing the civil penalty against, not TriState. *Tr. pp. 162-163.* The ALJ finds the Department has the discretion to impose a civil penalty against any "person" as that term is defined under Ark. Code Ann. §8-6-203(6). Moreover, the evidence in this case demonstrates that Mr. Zameer was an active, not passive, participant in the creation of a waste tire site; that he improperly processed waste tires at an unpermitted site; that he was involved in the improper storage of waste tires on the Site; and that he failed to negate a public nuisance. Furthermore, although Ark. Code Ann. §4-32-304 holds that the debt, liability, or obligation of an LLC is not the

liability of its members, the ALJ believes a civil penalty is not a debt, obligation, or liability. A civil penalty is a fine assessed for the violation of a statute or regulation. If Respondents' assertions are correct, Mr. Zameer could avoid paying a speeding ticket, another type of fine, simply because he drives a vehicle that is titled and insured in the name of TriState Contracting of Brinkley, Inc. The ALJ does not believe that is the intent behind the General Assembly's passage of Ark. Code Ann. §4-32-304.

H. Closure Plan

The Department's NOV demanded Respondents submit a closure plan for remediation of the Site. *ADEQ NOV at p. 5.* During the hearing, Respondents submitted evidence that Respondents no longer have possession or ownership of the Site due to the actions of third parties. *Respondent's Exhibit 2.* According to Respondents the White River Planning and Development District, whom Respondents were purchasing the Site from, sold the property to a third party and ejected Respondents off the Site. *Respondent's Exhibit 2.* Based on this evidence the ALJ asked the parties to brief the issue of whether the Commission had the authority to grant the relief ADEQ requested requiring a closure plan, and ultimate remediation of the Site, from Respondents.

ADEQ's response is that an administrative adjudicative hearing that makes findings of fact and law related to the violations asserted in the NOV provides a record of those administrative findings. Those findings can include the violations supported by the evidence presented in the evidentiary hearing, and a finding that compliance with the applicable law requires proper closure of a waste tire site according to Reg.14.1501 *et seq.* According to ADEQ, it can take the administrative finding that the law requires proper closure of the Site and institute a civil proceeding in a court of competent jurisdiction to compel compliance, seek appropriate remedial measures, and seek other statutory relief against Mr. Zameer based on the administrative record in this matter, as well as any other relevant party who may exercise control of ownership over the Site. *ADEQ post-hearing brief at p. 10.*

The ALJ is somewhat perplexed about what the Department wants at this juncture. It appears the Department is perilously close to requesting an advisory opinion from the ALJ and the Commission, rather than actual relief. The ALJ believes the provisions of Reg.14.1501 *et seq.* are sufficiently clear on what the law requires, and there are ample findings of fact and conclusions of law contained in this recommended decision that would allow ADEQ to seek whatever relief it deems appropriate in

circuit court without the Commission making another express finding.

IT IS THEREFORE FOUND AND ORDERED

a. ADEQ has proven, by a preponderance of the evidence, that Respondent Zameer maintained an unpermitted waste tire site, a violation of Ark. Code Ann. § 8-9-403(c)(1), and is assessed a civil penalty of \$6400.00

b. ADEQ has proven, by a preponderance of the evidence, that Respondent Zameer collected solid waste contrary to law and regulation and thereby created a public nuisance (vectors/mosquitoes), a violation of Ark. Code Ann. § 8-6-205(a)(5), and Reg.14.70, and is assessed a civil penalty of \$6400.00

c. ADEQ has proven, by a preponderance of the evidence, that Respondent Zameer allowed the open burning of solid waste without a permit (burn barrel), a violation of Ark. Code Ann. §§ 8-4-310(a)(1), (a)(2), (a)(3), and Reg.18.602, and is assessed a civil penalty of \$350.00

d. ADEQ has proven, by a preponderance of the evidence, that Respondent Zameer processed waste tires without a permit, a violation of Reg.14.1201, and is assessed a civil penalty of \$6400.00

e. ADEQ has proven, by a preponderance of the evidence, that Respondent Zameer stored waste tires improperly indoors, a violation of Reg.14.1401, and is assessed a civil penalty of \$1400.00

f. ADEQ has not proven, by a preponderance of the evidence, that Respondent Zameer operated a solid waste disposal facility without a permit (presence of household waste and construction/demolition debris)

g. ADEQ has not proven, by a preponderance of the evidence, that Respondent Zameer transported waste tires without a license


h. ADEQ has not proven, by a preponderance of the evidence, that Respondent Zameer disposed of used or waste tires without a permit

i. Respondent Mr. Muhammed Zameer is assessed a total civil penalty in the amount of \$20,950.00

RECOMMENDATION

It is the recommendation of the administrative law judge that the Arkansas Pollution Control and Ecology Commission adopt and affirm, without modifications, the findings of fact and conclusions of law set out in this Recommended Decision.

This 21st day of December 2017


Charles Moulton
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Patricia Goff, Commission Secretary, hereby certify that a copy of the foregoing Order No. 7, In the Matter of Muhammed Zameer Individually and Tristate Contracting of Brinkley, LLC; Docket No. 16-002-NOV has been mailed by certified mail or by first class mail, postage prepaid to the following parties of record, this 21st day of December 2017.

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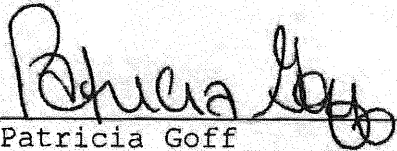
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