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Arkansas Department of Energy & Environment - Division of Environmental Quality/Emergency Order Addressing Pope County Fueling Station: Administrative Law Judge Addresses Res Judicata Question

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Administrative Law Judge (“ALJ”) Charles Moulton addressed in an August 16th Amended Recommended Decision (“ARD”) an issue arising out of the administrative litigation associated with Mena Short Stop, LLC (“Mena Short Stop”). See Docket No. 22-001-EO/Order No. 3.

Mena Short Stop is described as a fueling station and convenience store in Mena, Arkansas.

A description of the Arkansas Department of Energy & Environment – Division of Environmental Quality’s (“DEQ”) issuance of the EO can be found in a previous blog post [here](#). Mena Short Stop’s Request for a Hearing on the EO before the Arkansas Pollution Control & Ecology Commission (“Commission”) can be found in a previous blog post [here](#).

The EO described petroleum odors found in a structure approximately 200 feet south of the Mena Short Stop. A confirmed underground storage tank (“UST”) release is stated to have been identified at the Mena Short Stop.

Mena Short Stop had argued that additional investigation of the source of the free gasoline product was needed to determine whether there were other leaking USTs in the area. As a result, it asked the ALJ to, among other things, order DEQ and its contractors to cease and desist from further excavation of USTs at the Mena Short Stop until a hearing was held and determined whether it was or was not the source of the gasoline contamination located off the Mena Short Stop property.

ALJ Moulton’s August 16th ARD indicates that Mena Short Stop’s counsel withdrew on June 29th his Request for a Hearing on the EO.

Counsel for DEQ filed a motion on July 7th requesting that the ALJ dismiss Mena Short Stop’s Request for Hearing.

The ALJ’s ARD provides that there is no Commission rule directly addressing a Motion to Dismiss. As a result, he states that pursuant to Commission Rule 8.611, the Arkansas Rules of Civil Procedure (“ARCP”)

apply. Consequently, he granted DEQ's Motion to Dismiss. Further, Mena Short Stop's appeal was stated to have been dismissed with prejudice:

. . . because DEQ , not MSS , filed the Motion to Dismiss.

Mena Short Stop filed a Motion for Relief from Order. Rules 41(a) and Rule 60 of the ARCP were cited as authority for the motion.

The ALJ acknowledged that Rule 41 allows a party to dismiss a case, without prejudice, before submission of a case.

Counsel for Mena Short Stop argued that:

. . . a dismissal with prejudice could be construed as res judicata regarding future litigation that MSS might choose to file in the future.

As a result, Mena Short Stop requested that the prior Recommended Decision be amended to provide for dismissal without prejudice.

Res Judicata is the general principle that a cause of action may not be relitigated once it has been judged on the merits.

DEQ submitted in response that Ark. Code Ann. § 8-7-809 addressed an "expedited review process" of emergency orders. It was therefore argued there was no provision in the statute or rule allowing a party to toll an administrative review of emergency orders. Dismissal with prejudice was argued to be "appropriate and correct."

ALJ Moulton in his ARD concluded that the Motion to Dismiss was with prejudice because:

. . . the removal of MSS 's UST system by DEQ's contractor and the contractor's concurrent implementation of corrective action to address the gasoline contamination at the site and off- site properties pursuant to the EO have already occurred.

Therefore, the challenge to the EO's orders was deemed moot.

Nevertheless, the ALJ concluded that the doctrine of res judicata does not apply. Therefore, Mena Short Stop was not estopped or barred from litigating a claim it may have regarding its eligibility for reimbursement pursuant to the Arkansas Regulated Storage Tank Trust Fund Act. See Ark. Code Ann. §§ 8-7-905 et seq.

Further, the ARD provides that res judicata does not apply and Mena Short Stop is not estopped or barred from litigating a claim that Mena Short Stop is not the responsible party for the petroleum release that resulted in the issuance of the EO.

A copy of the ARD can be downloaded [here](#).