



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

# Polk County, Fuel Station/Arkansas Petroleum Storage Tank Trust Fund: Request for Adjudicatory Hearing and Arkansas Pollution Control & Ecology Commission Review of Reimbursement Method

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Mena Short Stop, LLC (“Mena Short Stop”) filed a pleading before the Arkansas Pollution Control & Ecology Commission (“Commission”) addressing an issue arising under the Arkansas Department of Energy & Environment – Division of Environmental Quality’s (“DEQ”) administration of the Arkansas Petroleum Storage Tank Trust Fund (“Trust Fund”) styled:

*Request for Adjudicatory Hearing and Commission Review and for a Declaratory Order (“Request”)*

The *Request* addresses DEQ’s requirement that a regulated storage tank (“Tank”) owner or operator provide evidence that the cost of corrective action for a petroleum release have been paid in full before a claim for reimbursement for the Trust Fund will be considered.

The United States Congress in the 1980s enacted a financial responsibility program to supplement the underground storage tank (“UST”) technical standards. The United States Environmental Protection Agency subsequently promulgated federal UST financial responsibility regulations to implement these requirements. The purpose of these regulations was to ensure owners and operators of USTs can demonstrate their ability to cover the cost of corrective action and compensation to third parties if there is a petroleum release.

Concern about whether small owners and operators of facilities with USTs would be able to comply with the strict federal requirements led Arkansas to develop a petroleum storage tank Trust Fund. Without access to the Trust Fund, many owners and operators of USTs would probably not have been able to meet the federal requirements of financial responsibility.

The key aspects of the Trust Fund are outlined in Commission Rule 12.

The Trust Fund is administered by DEQ staff. The staff makes the initial decision regarding payment for corrective action and/or third-party claims which is then reviewed by an Arkansas Petroleum Storage Tank Advisory Committee (“Committee”). The DEQ Director can then accept or reject the Committee’s recommendation for payment.

Mena Short Stop has been described as a fueling station and convenience store in Mena, Arkansas. DEQ had previously been contacted by Polk County, Arkansas, Department of Emergency Management on April 20th concerning petroleum odors in a structure south of the Mena Short Stop. A confirmed UST release was stated to have been identified at the facility.

DEQ subsequently issued an Emergency Order (“EO”) requiring certain actions by Mena Short Stop. Mena Short Stop challenged the EO before the Commission. This Request for Hearing before the Commission was resolved by the voluntary dismissal of Mena Short Stop.

Mena Short Stop’s *Request* outlines various actions that it has taken since the discovery of a release. These actions are stated to have included remediation efforts to determine the source and extent of the petroleum contamination. They included the removal of all USTs from Mena Short Stop’s property. Further, the facility is stated to have hired an environmental consultant to undertake actions which included:

- Assess the extent of the contamination
- Conduct physical investigation of the off-site free product
- Undertake oil and water samples
- Obtain analysis of such samples
- Develop reports and proposals to DEQ for site investigation/remediation
- Develop a response and remediation plan to minimize the spread of the contamination or remove free product

Mena Short Stop’s *Request* states that it paid the environmental contractor \$7,500 (i.e., the Trust Fund deductible) and then submitted to DEQ an application for reimbursement for the Trust Fund of the additional costs of remediation incurred by it to the date of the application. The *Request* states that DEQ responded in part:

... without documented proof of payment for each invoice included in this application, we are unable to complete the review of this application.

DEQ is then stated to have requested canceled checks or receipts from vendors showing proof of payment of their invoices.

Mena Short Stop’s Counsel previously argued in correspondence to DEQ and subsequently in the *Request* that requiring proof of payment to vendors as a condition precedent for filing an application for reimbursement from the Trust Fund after the owner/operator satisfies the \$7,500 deductible is not legally justifiable nor practical in application.

DEQ Counsel, in responding to Mena Short Stop’s Counsel’s correspondence, stated that DEQ disagrees with such an interpretation as Commission Rule 12.308(C)(5) and (6) requires that an application for reimbursement contain:

... evidence that the amounts shown on the invoices for which reimbursement is requested have been paid in full by the applicant.

The Mena Short Stop *Request* argues in part that:

- DEQ exceeded its legal authority by requiring proof of payment of remediation costs as a condition of receiving reimbursement from the Trust Fund
- The controlling Arkansas statute specifically does not require payment in full of remediation costs prior to reimbursement from the Trust Fund

The *Request* asks that the Commission determine and declare the following:

1. That the requirement of Rule 12.308(C)(5), requiring that the UST owner/operator’s remediation costs must be paid in full before submitting claims for reimbursement to the Fund, is void and of no further effect;

2. That Rule 12.308(C)(5) is discriminatory against small, independent owners and operators and in favor of large national owners/operators, and is a violation of the Equal Protection provisions of the United States and Arkansas Constitutions, as well as federal laws regulating interstate commerce.
3. That DEQ be ordered to review, approve and pay the Reimbursement Application No. 1 submitted by Mena SS's consultant, EPC; and henceforth allow claims for reimbursement, supported by invoices from vendors for remediation work, but without proof of payment of those invoices.

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