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Underground Storage Tank Enforcement: Arkansas Pollution Control and Ecology Commission Administrative Law Judge Order Addressing Alleged Hot Springs, Arkansas Facility Violations

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Arkansas Pollution Control and Ecology Commission Administrative Law Judge (“ALJ”) Charles Moulton issued a November 15th Order addressing a Notice of Violation (“NOV”) by the Arkansas Department of Environmental Quality (“ADEQ”) against Edward Motor Co., Inc. d/b/a Star Stop (“EMC”) alleging violations of Regulation 12 (Regulated Storage Tanks).

EMC is a facility (“Site”) located in Hot Springs, Arkansas.

ADEQ issued an NOV on May 9, 2016 to EMC alleging two violations of Regulation 12. See LIS 16-040. The alleged violations included:

1. Closure of an underground storage tank (“UST”) in violation of Regulation 12.504(A)(1)
2. Failure to provide ADEQ a 30-day notice of UST closure in violation of Regulation 12.104(A)(1)

ADEQ subsequently filed a Motion for Summary Judgment regarding EMC’s alleged violations.

The ALJ held a hearing on ADEQ’s Motion on November 8.

The ALJ’s Order’s Findings of Fact (“FOF”) included a determination that EMC owned two USTs at the Site. ADEQ is stated to have sent a letter to EMC on August 15, 2013 requesting information regarding the USTs. They had been red-tagged by the agency for non-compliance with federal and state regulatory requirements.

The FOF provides that in response to the ADEQ correspondence EMC contacted a licensed UST contractor (i.e., licensed to perform installation and closure of UST systems). The company ultimately did not hire this contractor to perform the UST closure work.

An ADEQ inspector was stated to have received a telephone complaint on September 8, 2015, that there was a UST closure occurring at the EMC site by an individual unlicensed by the agency to close UST systems. The ALJ’s FOF states that the ADEQ inspector confirmed that a UST closure was in progress and

“noted the presence of a strong odor of gasoline.” However, no other evidence of spilled gasoline in the area of excavation was observed.

The ADEQ inspector is stated to have subsequently met with EMC’s owner. He informed the ADEQ inspector that the owner of TECS LLC (“TECS”) had been hired to conduct the UST closures. TECS had in fact removed the two USTs.

ADEQ records are stated to have demonstrated that neither TECS LLC nor its owner were licensed by ADEQ to close UST systems. Further, EMS is stated to have failed to have provided a 30-day notice of closure for the USTs as required by Regulation 12.

The ALJ’s Order addresses both alleged violations in the Conclusions of Law.

Alleged Closure of UST in Violation of Regulation of 12.504(A)(1)

Reg. 12.504(A)(1).

The ALJ concludes, based on a review of the record and arguments of Counsel at the November 8th hearing that there is no factual dispute that:

- EMC contracted with an unlicensed individual that closed and removed two USTs at the site
- EMC’s owner had general knowledge of the federal and state regulatory requirements for closing and removing UST systems
- EMC’s owner never contacted ADEQ or “looked up Mr. Burks or his company, TECS LLC, on the ADEQ website to determine whether either was properly licensed to remove and close USTs.”

EMC argued that its owner was “misled” by TECS’s owner (i.e., TECS’s owner claimed that the company was licensed by ADEQ to remove and close UST systems). As a result, EMC argued that ADEQ should focus its enforcement efforts on TECS as opposed to EMC.

While the ALJ finds no reason to dispute EMS’s argument that it was misled by TECS’s owner, he concludes as a matter of law:

. . . ultimate responsibility for the legal closure of the UST system rests with Edward Motor, not Edward Motor’s contractor. Therefore the ALJ grants summary judgment in favor of ADEQ and finds that Edward Motor violated Reg. 12.504(A)(1).

Failure to Provide ADEQ a 30-Day Notice of UST Closure in Violation of Reg. 12.104(A)(1).

Reg. 12.104(A)(1) incorporates 40 C.F.R. § 280.71 which states:

At least 30 days before beginning either permanent closure or change-in-service under paragraphs (b) and (c) of this section, or within another reasonable time period determined by the implementing agency, owners and operators must notify the implementing agency of their intent to permanently close or make the change-in-service, unless such action is in response to corrective action.

The ALJ notes that this provision requiring 30 days notification to ADEQ is “significant because it allows a Department inspector to be present during a tank closure.” He concludes there is no dispute that EMC and its contractor did not provide the required 30-day notification to ADEQ. As a result, EMC is found to have violated Reg. 12.104(A)(1).

\$15,850.00 Civil Penalty Assessment

The ALJ addresses in the remainder of the Order ADEQ’s proposed assessment of civil penalties in the amount of \$15,850. It is noted that the agency utilizes the Arkansas Pollution Control and Ecology Commission Regulation 7 factors to determine penalty calculations.

ADEQ is stated to have initially calculated a civil penalty of \$1800 but also alleged an economic benefit for the violation of Reg. 12.504(A)(1) in the amount of \$15,400. As a result, ADEQ assessed the economic benefit of \$15, 400 as opposed to \$1800.

ADEQ's calculation of the economic benefit was stated to have been derived from the acquisition of two cost estimates from licensed contracting companies. The cost estimates were for the total price for a closure of a UST system. The agency is stated to have used the lower of the two estimates.

The Order notes that the ALJ questioned ADEQ counsel during the November 8th hearing regarding the methodology employed to determine the economic benefit figure of \$15,400. The Order states in part:

. . .the ALJ believes that ADEQ failed to account for the amount Edwards Motors paid, and/or taken in trade, to and from Mr. Burks and TECS LLC to arrive at its economic benefit sum. *See, In the Matter of Pinnacle Biofuels, Inc., Docket No. 10-016-NOV.*

The ALJ therefore concludes that there are material facts in dispute on the civil penalty calculations and denies ADEQ's motion for summary judgment on the issue of civil penalties.

The ALJ's decision constitutes a recommendation to the Arkansas Pollution Control and Ecology Commission which can affirm, revise, or reverse.

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