

ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

IN THE MATTER OF EDWARD )  
MOTOR CO. INC. )

DOCKET NO. 16-001-NOV  
ORDER NO. 9

ORDER

1. INTRODUCTION

On May 9, 2016, the Arkansas Department of Environmental Quality ("ADEQ" or "Department") issued a Notice of Violation, LIS 16-040 ("NOV") against Edward Motor Company, Inc. d/b/a Star Stop ("Respondent" or "Edward Motor") alleging two (2) violations of the Arkansas Pollution Control and Ecology Commission's ("Commission") Regulation 12. On September 21, 2017, ADEQ filed a Motion for Summary Judgment regarding Respondent's alleged violations of Commission Regulation 12. On October 18, 2017, Edward Motors filed its Response to ADEQ's Motion. On November 8, 2017, the Commission's administrative law judge ("ALJ") held a hearing on ADEQ's Motion. After reading the parties' respective pleadings, listening to the arguments of counsel at the November 8<sup>th</sup> hearing, and reviewing 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)*. But in this instance ADEQ has moved for summary judgment. Rule 56 of the Arkansas Rules of Civil Procedure provides that summary judgment is appropriate where there are no genuine issues of material fact to be litigated and the moving party is entitled to judgment as a matter of law. *Smith v. Rogers Group, Inc.*, 348 Ark. 241, 249, 72 S.W.3d 450, 455 (2002).

### 4. FINDINGS OF FACT

1. Edward Motor owned two (2) underground storage tanks (USTs) that were once located at 2355 East Grand Avenue, Hot Springs, Garland County, Arkansas ("the Site").

2. On August 15, 2013, ADEQ sent a letter to Edward Motor requesting information regarding the USTs at the Site. The USTs had been red-tagged by ADEQ for non-compliance with federal and state regulatory requirements. *ADEQ's MSJ, Exhibit 4*.

3. In response to ADEQ's letter Edward Motor contacted Mr. Walter Slaight, a contractor licensed by ADEQ to perform installation and closure of UST systems. *ADEQ's MSJ, Exhibit 1*.

4. Despite Edward Motor's contacts with Mr. Slaight to potentially close and remove the USTs at the Site, Edward Motor did not hire Mr. Slaight to perform the UST closure work. *ADEQ MSJ, Exhibits 3 and 6*.

5. On September 8, 2015, ADEQ inspector Michael Warren received a telephone complaint that there was a tank closure taking place at the Site by an individual who was unlicensed by the Department to close UST systems. *ADEQ MSJ, Exhibit 3.*

6. Upon arrival at the Site, Mr. Warren confirmed a tank closure was in progress and noted the presence of a strong odor of gasoline. Mr. Warren did not observe any other evidence of spilled gasoline in the area of excavation. *ADEQ MSJ, Exhibit 3.*

7. After leaving the Site, Mr. Warren met with Mr. Edward Tallach, the owner of Edward Motor and the Site. *ADEQ MSJ, Exhibit 3.*

8. Mr. Tallach informed Mr. Warren that he had hired Mr. James E. Burks, owner of TECS LLC, to conduct the UST closures at the Site, and that Mr. Burks had removed the two (2) tanks. *ADEQ MSJ, Exhibits 3 and 6.*

9. ADEQ records demonstrate that Mr. Burks and TECS LLC were not licensed by the Department to close UST systems in the State of Arkansas. *ADEQ MSJ, Exhibit 7.*

10. ADEQ did not receive a thirty (30) day notice of closure for the USTs at the site as required by Regulation 12, 40 C.F.R. § 280.71. *ADEQ MSJ, Exhibits 3, 6, and 9.*

## 5. DISCUSSION AND CONCLUSIONS OF LAW

### **A. Edward Motor closed a UST in violation of Commission Regulation 12.504(A) (1)**

Commission Reg.12.504(A) (1), states that "[n]o person shall

install, repair, upgrade or close underground storage tank systems in Arkansas unless the person is, or employs, an individual who is licensed by the Department to perform such work.”

Based upon the review of the record and the arguments of counsel at the November 8, 2017, hearing, the ALJ finds that there is no factual dispute that Edward Motor contracted with an unlicensed individual, Mr. Burks, on or about September 8, 2015 to close and remove two (2) USTs at the Site. There is also no dispute that Mr. Tallach had a general knowledge of the federal and state regulatory requirements for closing and removing underground storage tank systems. *ADEQ's MSJ, Exhibit 6, pp. 11 and 15.* There is no factual dispute that Mr. Tallach 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. *ADEQ MSJ, Exhibit 6, Page 15.* ADEQ asserts that, upon review of all of the evidence presented, there is no genuine issue of material fact left to be litigated regarding Edward Motor's violation of Reg.12.504(A)(1).

Edward Motors counters ADEQ's claims by contending that Mr. Tallach was misled by Mr. Burks; that Mr. Burks falsely claimed he and/or TECS LLC were licensed by ADEQ to remove and close UST systems; and that ADEQ should focus its enforcement efforts on Mr. Burks, not Edward Motor. *Edward Motor Response at p. 3.* The ALJ has no reason to dispute Mr. Tallach's claims that he was misled by Mr. Burks. But Commission Reg.12.504(A)(1), clearly states that



"[n]o person shall install, repair, upgrade or close underground storage tank systems in Arkansas unless the person is, *or employs,* an individual who is licensed by the Department to perform such work." *Emphasis added.* Because it is undisputed that the USTs at issue were owned by Edward Motor when they were removed by Mr. Burks and TECS LLC, the ALJ finds that, 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).

**B. Respondent failed to provide ADEQ a thirty (30) day notice of UST closure in violation Reg.12.104(A)(1)**

Commission Reg.12.104(A)(1) has incorporated 40 C.F.R. § 280.71. 40 C.F.R. § 280.71 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 30 Day Notice for UST permanent closure is on an ADEQ form that is completed by the owner or operator of a UST system and submitted to ADEQ. *ADEQ MSJ Exhibits 3 and 9.* The 30 day notification is significant because it allows a Department inspector to be present during a tank closure. *ADEQ MSJ, Exhibits 3 and 9.*

There is no dispute that Edward Motor, and its contractor Mr. Burks and TECS LLC, did not provide a 30 Day Notice to ADEQ for the

September 8, 2015, UST closure at the Site. *ADEQ MSJ, Exhibit 9.* The ALJ finds there are no facts in dispute regarding ADEQ's claim that Edward Motor violated Commission Reg.12.104(A)(1) (40 C.F.R. § 280.71). The ALJ grants summary judgment in favor of ADEQ on this issue.

**C. Civil penalties in the amount of \$15,850.00**

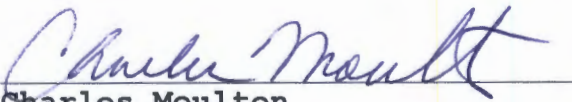
In assessing civil penalties ADEQ utilizes Commission Regulation 7 factors to determine penalty calculations. A civil penalty of \$1,800.00 was originally assessed against Edward Motor for the violation of Commission Reg.12.504(A). However, the Department also calculated an economic benefit for the violation of Reg.12.504(A)(1) in the amount of \$15,400.00. Instead of a \$1,800.00 civil penalty the Department assessed the economic benefit of \$15,400.00 in lieu of the \$1,800.00. *ADEQ MSJ, Exhibit 8.* Two cost estimates from licensed contracting companies in the state of Arkansas were used to determine the amount of economic benefit. These cost estimates quoted the total price for closure of a UST system. The lower of the two estimates was used to derive the economic benefit penalty calculation. *ADEQ MSJ, Exhibit 8.*

A civil penalty of \$450.00 was assessed for the violation of 40 C.F.R. § 280.71, as incorporated by Commission Reg.12.104(A)(1). This violation was deemed minor pursuant to Commission Regulation 7 factors. *ADEQ MSJ, Exhibit 8.* ADEQ asks that a total civil penalty in the amount of \$15,850.00 be imposed against Edward Motor (\$15,400.00 + \$450.00).

During the November 8, 2017, hearing the ALJ questioned counsel for ADEQ regarding the methodology employed to determine the economic benefit figure of \$15,400.00. In short, the ALJ believes that ADEQ failed to account for the amount Edward 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. For the reasons stated at the November 8, 2017, hearing, the ALJ finds 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.

**IT IS SO ORDERED**

**This 15<sup>th</sup> day of November 2017**

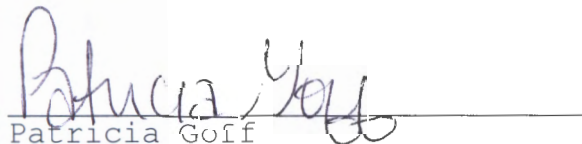
  
**Charles Moulton**  
**Administrative Law Judge**

**CERTIFICATE OF SERVICE**

I, Patricia Goff, Commission Secretary, hereby certify that a copy of the foregoing Order No. 8, In the Matter of Edward Motor Co. Inc.; Docket No. 16-001-NOV has been mailed by certified mail or by first class mail, postage prepaid to the following parties of record, this 15<sup>th</sup> day of November 2017.

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