

II. PARTIES

5. ADEQ is an agency of the State of Arkansas, which is charged with administering and enforcing all laws, rules, and regulations relating to Ark. Code Ann. § 8-7-801 *et seq.* and APC&EC Regulation 12.
6. ADEQ's principal place of business is located at 5301 Northshore Drive, North Little Rock, Arkansas 72118.
7. ADEQ has authority under Ark. Code Ann. § 8-7-806 (e) to institute a civil action in any court of competent jurisdiction to accomplish any of the following: to compel compliance with the provisions of this subchapter or of any rule, regulation, permit, certification, license, plan, or order issued pursuant to this subchapter; to order that remedial measures be taken as may be necessary or appropriate to implement or effectuate the purposes and intent of this subchapter; and, to recover all costs, expenses, and damages to the Department and any other agency in enforcing or effectuating the provisions of this subchapter.
8. Defendant Edward Motor Company, Inc. ("Edward Motor") is a company registered with the Arkansas Secretary of State and in good standing, with a principal place of business at 306 Airport Road, Hot Springs, Garland County, Arkansas 71913.

III. JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this matter under Ark. Code Ann. § 16-13-201, which states that circuit courts shall have original jurisdiction of all justiciable matters not otherwise assigned pursuant to the Arkansas Constitution.
10. Venue is proper in Garland County, Arkansas, pursuant to Ark. Code Ann. § 16-60-101 (a)(1), in that the events giving rise to this action occurred at 2355 East Grand Avenue, Hot Springs, Garland County, Arkansas.

IV. FACTUAL ALLEGATIONS

11. Defendant hired an unlicensed contractor to close a UST system in violation of 40 C.F.R. § 280.71, as incorporated in Commission Regulation 12.104(A)(1).
12. On May 9, 2016, ADEQ issued a Notice of Violation, LIS 16-040 (NOV) to Defendant alleging two (2) violations of the Commission's Regulation 12. Pursuant to APC&EC Regulation 8, Defendant filed a Request for Hearing with the Commission on June 1, 2016 and an Amended Request for Hearing with the Commission on June 30, 2016. This administrative review was docketed in APC&EC Docket No. 16-001-NOV. A copy of the NOV is attached to this complaint and labeled Exhibit A.
13. On September 21, 2017, ADEQ filed a Motion for Summary Judgment regarding Defendant's alleged violations of APC&EC Regulation 12 as stated in the NOV. On October 18, 2017, Defendant filed a Response to ADEQ's Motion. The Commission's Administrative Law Judge (ALJ) held a hearing on ADEQ's Motion for Summary Judgment on November 8, 2017.
14. On November 15, 2017, the ALJ issued Order No. 9, which found Defendant liable for violating APC&EC Reg.12.504(A)(1) by hiring an unlicensed contractor to close and remove two (2) USTs at the Site. Order No. 9 further found that "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." Pg. 4 of Exhibit B. A copy of Order No. 9 is attached to this complaint and labeled Exhibit B.
15. Order No. 9 also held that Defendant, as an owner or operator at the site, failed to provide ADEQ a thirty (30) day notice of UST closure in violation of APC&EC Reg.12.104(A)(1). Pg. 5 of Exhibit B.

16. On December 12, 2017, the ALJ held an evidentiary hearing on the issue of the civil penalty.

17. The ALJ for APC&EC issued a recommended decision on February 2, 2018. A copy of the recommended decision is attached to this complaint and labeled Exhibit C. The ALJ found that ADEQ proved, by a preponderance of the evidence, that a \$450.00 civil penalty against the Defendant for failure to provide a thirty (30) day notice of closure was appropriate. The ALJ further found that Defendant should be assessed an economic benefit penalty in the amount of \$5,535.00 for violating Commission Reg.12.504(A)(1). Pgs. 13-14 of Exhibit C.

18. The ALJ also discussed that additional work at the Site may become necessary in the future, should sampling from the Site demonstrate that corrective action work would be required. Pg. 10 of Exhibit C.

19. The APC&EC adopted the ALJ's recommended decision on March 2, 2018 by Minute Order No. 18. The minute order listed the following findings of law:

- a. That Defendant failed to provide ADEQ with a thirty (30) day notice of closure in violation of APC&EC Reg.12.104(A)(1), 40 C.F.R. § 280.71;
- b. That Defendant hired an unlicensed contractor to close a UST system in violation of Commission Regulation 12.504(A)(1);
- c. That Defendant should be assessed a civil penalty in the amount of \$450.00 for violating Commission Regulation 12.104(A)(1), § 280.71; and,
- d. That Defendant should be assessed an economic benefit penalty in the amount of \$5,535.00 for violating Commission Regulation 12.504(A)(1).

20. A copy of the minute order is attached to this complaint and labeled Exhibit D.

21. No appeal was taken from the APC&EC minute order. Ark. Code Ann. § 8-4-213(a) provides that if no appeal is taken from an APC&EC order, then the action of the APC&EC in the matter shall be deemed conclusive and the validity and reasonableness thereof shall not be questioned in any other action or proceeding.

22. Defendant has paid the total civil penalty in this matter.

23. As of the present date, the Defendant has not completed the closure requirements at the Site mandated in APC&EC Regulation 12, which is consistent with federal law.

V. CAUSE OF ACTION

FAILURE TO COMPLY WITH PROPER SITE ASSESSMENT FOR CLOSURE OF UNDERGROUND STORAGE TANK SYSTEMS

24. Plaintiff incorporates by reference the allegations set forth in paragraphs 1 through 23.

25. APC&EC Regulation 12 was promulgated pursuant to the authority of Ark. Code Ann. § 8-7-801 *et seq.* and Ark. Code Ann. § 8-7-901 *et seq.*

26. APC&EC Reg.12.104 incorporates the Code of Federal Regulations (C.F.R.), Title 40, section 280.72.

27. 40 C.F.R. § 280.72 states the following:

- (a) Before permanent closure or a change-in-service is completed, owners and operators must measure for the presence of a release where contamination is most likely to be present at the UST site. In selecting sample types, sample locations, and measurement methods, owners and operators must consider the method of closure, the nature of the stored substance, the type of backfill, the depth to groundwater, and other factors appropriate for identifying the presence of a release[.]
- (b) If contaminated soils, contaminated groundwater, or free product as a liquid or vapor is discovered under paragraph (a) of this section, or by any other manner, owners and operators must begin corrective action in accordance with subpart F of this part.

28. Pursuant to Ark. Code Ann. § 8-7-806(a)(1), it shall be unlawful for any person to violate any regulation adopted under this subchapter.

29. The ALJ states in paragraph twenty-four (24) of the recommended decision the following:

Finally, Mr. Tallach [owner of Edward Motor] stated during cross-examination that he received an additional bid from the Southern Company in an amount close to \$52,000.00. This additional work may become necessary in the future should sampling from the Site demonstrate that additional corrective action work will be required.

Pg. 6 of Exhibit C.

28. At the time of this Complaint, ADEQ has not received any sampling from the Site to confirm the presence or absence of any environmental contamination that would require additional corrective action work.

29. Defendant has not measured, since the entrance of the APC&EC minute order and pursuant to 40 C.F.R. § 280.72 and APC&EC Regulation 12.504(A)(1), for the presence of a release where contamination is most likely to be present at the UST site. Such omission is a violation of APC&EC Regulation 12.104, 40 C.F.R. § 280.72, APC&EC Regulation 12.504(A)(1), and Ark. Code Ann. § 8-7-806(a)(1).

30. ADEQ moves the Court to enter an Order compelling the Defendant to comply with the requirements of 40 C.F.R. § 280.72 and APC&EC Regulation 12.504(A)(1), including required measurements to determine contamination at the UST site and any required corrective action mandated in 40 C.F.R. § 280.72(b).

PRAYER FOR RELIEF

WHEREFORE, ADEQ respectfully requests this Honorable Court order the following:

- A. That the Defendant shall comply with APC&EC Regulation 12.504(A)(1) wherein it will hire a contractor licensed by the Department to perform proper closure sampling and submit a closure report assessment to certify closure in accordance with 40 C.F.R. § 280.72, as incorporated by reference in APC&EC Regulation 12.104;
- B. That Defendant shall provide notice of scheduled closure sampling to the Department prior to the sampling being performed;
- C. That Defendant shall provide the closure assessment report, including the closure sampling results, to ADEQ within sixty (60) days of this Court's order;
- D. That if contaminated soils, contaminated groundwater, or free product is discovered in the closure report assessment, Defendant shall begin corrective action to remediate in accordance with 40 C.F.R. § 280.60 *et seq.*, which is incorporated by reference into APC&EC Regulation 12;
- E. Defendant shall submit to ADEQ one (1) electronic and one (1) hard copy of all reports, documents, plans or specifications required under the terms of this Court's order;
- F. Award costs and attorneys' fees to ADEQ; and,
- G. For all other relief to which it may be entitled.

Respectfully submitted,

Arkansas Department of Environmental Quality

By: Lisa Thompson
Lisa M. Thompson, Ark. Bar No. 2007061
Arkansas Department of Environmental Quality
5301 Northshore Drive
North Little Rock, Arkansas 72118
(501) 682-0030

ADEQ

ARKANSAS
Department of Environmental Quality

May 10, 2016

Mr. Ed Tallach
Edward Motor Company, Inc.
306 Airport Road
Hot Springs, AR 71913

CERTIFIED MAIL#7006 3450 0003 4067 8384
RETURN RECEIPT REQUESTED

IN RE: Notice of Violation, LIS No. 16-040; AFIN #26-00365

Dear Sir:

Enclosed is a Notice of Violation issued to Edward Motor Co Inc. dba Star Stop, on May 9, 2016, by the Director of the Arkansas Department of Environmental Quality.

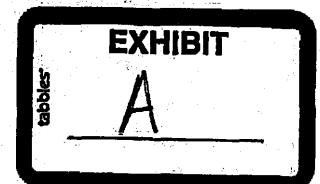
Also enclosed is a copy of Regulation 8, Administrative Procedures. Regulation 8 establishes the right of a party to receive an administrative hearing on the alleged violations.

If you want to appeal the Notice of Violation, you must file a written Request for Hearing that must be received by the Arkansas Pollution Control and Ecology Commission, 101 East Capitol, Suite 205, Little Rock, AR 72201, or by facsimile to 501-682-7891, or by sending a PDF version of the filing by electronic mail to goffpatti@adeq.state.ar.us within twenty (20) calendar days of your receipt of this letter.

Filing a request for hearing only with ADEQ is not sufficient to preserve your right to appeal.

The penalties and corrective actions called for in the Notice of Violation are at this stage only proposed penalties and actions. This Notice of Violation is subject to public review and comment in accordance with Ark. Code Ann. § 8-4-103(d). The public notice date will be on or about May 25, 2016. ADEQ retains the right and discretion to rescind this Notice of Violation based on public comments received within the thirty-day comment period.

Resolution of the Notice of Violation will be by means of a Consent Administrative Order if you decide to pay the proposed penalty to settle the matter.



Mr. Ed Tallach
Edward Motor Company, Inc.
306 Airport Road
Hot Springs, Arkansas 71913
Page 2 of 2

The Department is willing to discuss settlement of any or all matters described in the Notice of Violation. If you or your legal counsel desire to discuss settlement of this matter, please feel free to contact me.

Sincerely,



Lisa Thompson
General Counsel, Office of Land Resources
501-682-0030
Thompsonl@adeq.state.ar.us

Enclosures

cc: Pat Goff, Commission Secretary
Alberta Hires, Enforcement Coordinator, Office of Land Resources

ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:

EDWARD MOTOR CO INC.
dba STAR STOP

LIS 16 - 040
AFIN: 26-00365

NOTICE OF VIOLATION

TO: MR. ED TALLACH
EDWARD MOTOR COMPANY, INC.
306 AIRPORT ROAD
HOT SPRINGS, AR 71913

NOTICE is hereby given that the Director of the Arkansas Department of Environmental Quality (hereinafter "ADEQ or Department") has determined that there are reasonable grounds to believe that Edward Motor Company, Inc., dba Star Stop, (hereinafter "Respondent"), has committed the following violations of the Arkansas Pollution Control and Ecology Commission (hereinafter "APC&EC") Regulation 12: Storage Tanks. (All Code of Federal Regulations [hereinafter "C.F.R."] references contained herein are incorporated by reference in APC&EC Reg.12.104.) This Notice of Violation (hereinafter "NOV") is issued pursuant to the authority of Ark. Code Ann. § 8-7-801 *et seq.* and in accordance with the requirements of APC&EC Regulation 7 and APC&EC Regulation 8.

PROPOSED FINDINGS OF FACT

1. Respondent owns two (2) underground storage tanks (hereinafter "USTs") located at Star Stop, 2355 E. Grand Ave, Hot Springs, Garland County, Arkansas (hereinafter "the site").

2. On September 8, 2015, a Department inspector received a telephone complaint. The complainant stated that there was a tank closure taking place at the site by an individual who was unlicensed by the Department to close UST systems.
3. The Department inspector drove to the site. Upon arrival, the inspector confirmed a tank closure was in progress and there was a strong odor of gasoline at the site, but no evidence of spilled liquid in the area of the excavation.
4. After leaving the site, the inspector met with Mr. Edward Tallach, owner/operator of the facility. Mr. Tallach informed the inspector that he had hired a Mr. James E. Burkes to conduct the UST closure at the site.
5. The Department inspector received a phone call from Mr. Burkes, stating that he did not perform the closure for Mr. Tallach. The inspector was informed by Mr. Burkes that Mr. Harris Gates had been hired to close the tanks.
6. A review of Department records indicates that neither Mr. Burkes nor Mr. Gates is licensed by the Department to close UST systems in the state of Arkansas. It is a violation of APC&EC Regulation 12.504(A)(1) for a person to close a UST unless the person is, or employs, an individual licensed by the Department to perform such work.
7. A review of Department records revealed the Respondent did not provide a thirty (30) day notice of closure for the UST. It is a violation of 40 C.F.R. § 280.71, as incorporated by APC&EC Reg. 12.104(A)(1), for owners/operators to fail to provide a thirty (30) day notice of closure to the Department of their intent to permanently close a UST.
8. Further review of Department records revealed written correspondence between Respondent and the Department occurred during August, 2013. The correspondence revealed Respondent was informed by a Department inspector that statutory and regulatory procedures

require a contractor licensed by the Department to close the UST system, and the Department must receive a thirty (30) day notice of closure.

PROPOSED CIVIL PENALTY ASSESSMENT

1. For the violation hereinabove described in paragraph six of the proposed findings of fact, a civil penalty in the amount of Fifteen Thousand Four Hundred Dollars and Zero Cents (\$15,400.00) is proposed to be assessed against Respondent.
2. For the violation described in paragraph seven of the proposed findings of fact, a civil penalty in the amount of Four Hundred Fifty Dollars and Zero Cents (\$450.00) is proposed to be assessed against Respondent.
3. For all the violations hereinabove described, Respondent shall pay a civil penalty in the total amount of Fifteen Thousand Eight Hundred Fifty Dollars (\$15,850.00) as provided by Ark. Code Ann. § 8-7-806 and Chapter Nine of APC&EC Regulation 12.
4. Payment of the proposed civil penalty shall be due within the timeframe specified in the final order, shall be made payable to the Arkansas Department of Environmental Quality, and mailed to the attention of the Fiscal Division, Arkansas Department of Environmental Quality, 5301 Northshore Drive, North Little Rock, Arkansas 72118-5317.2.

PROPOSED CORRECTIVE ACTION

1. Respondent will comply with APC&EC Reg. 12.504(1) wherein he will hire a contractor licensed by the Department to perform proper closure sampling and submit a closure excavation assessment in accordance with 40 C.F.R. § 280.72. Respondent will also provide notice of scheduled closure sampling to ADEQ prior to the sampling being performed. The closure

assessment must be provided to ADEQ within 30 days of the effective date of the final order in this matter.

2. This NOV does not purport in any way to relieve Respondent of its responsibilities for obtaining any necessary permits; nor does it exonerate any past, present, or future conduct except as expressly addressed herein.

3. Nothing in this NOV shall be construed as a waiver by ADEQ of its authority to recover from any responsible party costs incurred for undertaking corrective action in connection with the sites described herein, nor of its authority over violations not specifically addressed herein.

THEREFORE, TAKE NOTICE THAT:

If Respondent wishes to dispute the allegations or the proposed civil penalty assessment or corrective action, Respondent must file a written request for a hearing with the Secretary of the Arkansas Pollution Control and Ecology Commission, 101 E. Capitol, Suite 205, Little Rock, Arkansas 72201, **within twenty (20) calendar days** of the receipt of this NOV or the allegations herein will be deemed proven. Upon timely filing a written response that is compliant with APC&EC Regulation 8, Respondent will be entitled to an adjudicatory hearing upon the allegations and other matters stated in the Notice of Violation. If no timely request for a hearing is filed with the Secretary of the APC&EC, the Director may issue an Administrative Order affirming the allegations as Findings of Fact, assessing the civil penalty, and ordering the corrective action as stated herein.



BECKY W. KEOGH, DIRECTOR
ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY

5-09-2014

DATE

ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

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

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

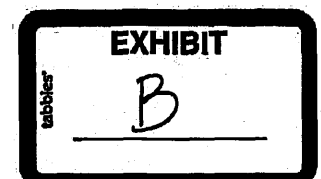
ORDER

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 8th 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 (UST's) 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 UST's at the Site. The UST's 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 UST's 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

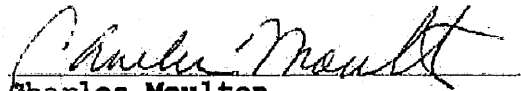
In assessing civil penalties ADEQ utilizes Commission Regulation 7 factors to determine penalty calculations. A civil penalty of \$1,800.00 was originally assessed against Edward Motor for the violation of Commission Reg.12.504(A). However, the Department also calculated an economic benefit for the violation 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 15th day of November 2017

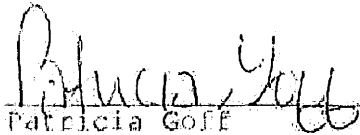

Charles Moulton
Administrative Law Judge

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 15th day of November 2017.

John Howard
John Howard and Sherry L. Daves
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5301 Northshore Drive
North Little Rock, AR 72118
(501) 682-0030
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thompsonl@adeq.state.ar.us



Patricia Goff

Commission Secretary
Arkansas Pollution Control and Ecology Commission
101 East Capitol, Suite 205
Little Rock, Arkansas 72201
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ARKANSAS POLLUTION CONTROL AND ECOLOGY COMMISSION

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

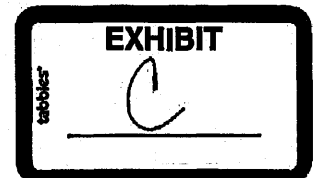
DOCKET NO. 16-001-NOV
ORDER NO. 10

RECOMMENDED DECISION

Appearances: Mr. John Howard for Edward Motor Co. Inc.; Ms. Lisa Thompson and Mr. Michael Bynum for the Arkansas Department of Environmental Quality.

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 for Summary Judgment. After reading the parties' respective pleadings and listening to the arguments of counsel the ALJ issued Order No. 9. Order No. 9 found in favor of ADEQ regarding Edward Motor's liability. The ALJ found there were material facts in dispute regarding the appropriate penalty Edward Motor should be required to pay. On December 12, 2017, the ALJ held an evidentiary hearing on the issue of ADEQ's proposed penalty



against Edward Motor. Three (3) witnesses testified at the hearing and eleven (11) exhibits were introduced. After reviewing the entire record in this case, including the testimony of witnesses, the pleadings, and the arguments of counsel, 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, that its proposed penalties are appropriate.

4. FINDINGS OF FACT

1. Edward Motor once owned two (2) underground storage tanks (USTs) that were 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 closures of UST systems. ADEQ's MSJ, Exhibit 1. Mr. Slaight provided a bid to Edward Motor of \$7450.00 to conduct a closure of the UST systems at the Site. Respondent's Exhibit 2.

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

5. Two years after ADEQ sent its August, 2013 letter to Edward Motor, 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 aside from the odor of gasoline. ADEQ MSJ, Exhibit 3.

7. After leaving the Site, Mr. Warren immediately 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 (TECS), to conduct the UST closures at the Site, and that Mr. Burks had removed the two (2) underground storage tanks. ADEQ MSJ, Exhibits 3 and 6.

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

10. The ALJ found, in Order No. 9, that ADEQ did not receive a thirty (30) day notice of closure for the USTs from Edward Motor as required by Reg.12.104(A)(1), 40 C.F.R. § 280.71. *ADEQ MSJ, Exhibits 3, 6, and 9.*

11. The ALJ found, in Order No. 9, that Edward Motor closed a UST in violation of Commission Regulation 12.504(A)(1) by hiring an unlicensed contractor to perform a closure of a UST system. *ADEQ MSJ, Exhibit 7.*

12. Ms. Alberta Hires, enforcement supervisor with the Regulation Storage Tank and Mining divisions, testified during the December 12, 2017, hearing about her penalty calculations.

13. Ms. Hires stated that her civil penalty calculation for Edward Motor's failure to provide a thirty (30) day notice prior to the closure of the UST systems was \$450.00. *ADEQ Exhibit 2; Tr. pp. 37-38.*

14. Ms. Hires testified that her civil penalty calculation for Edward Motor's employing an unlicensed contractor to close a UST system was \$1800.00. *ADEQ Exhibit 2; Tr. p. 38.*

15. Ms. Hires confirmed that in addition to a civil penalty calculation for Edward Motor's employing an unlicensed contractor to perform the UST closure she also calculated an economic benefit penalty calculation. According to Ms. Hires, Edward Motor's

economic benefit for using an unlicensed contractor to close Edward Motor's UST systems was valued at \$15,400.00. *ADEQ Exhibit 2; Tr. p. 38.*

16. Ms. Hires derived her economic benefit value by contacting two of ADEQ's on-call contractors. According to Ms. Hires, the cost estimates from the ADEQ on-call contractors quoted the total price for closure of JST systems and, rather than averaging the two bids to derive an economic benefit penalty, the lower of the two estimates was used to derive the economic benefit calculation. *ADEQ MSJ, Exhibit 8; Tr. p. 38.*

17. Ms. Hires testified that the \$15,400.00 amount is the cost Edward Motor's avoided by hiring an unlicensed contractor, Burks and TECS, to perform the JST closure at the Site. *Tr. p. 80.*

18. When she calculated her economic benefit amount of \$15,400.00, Ms. Hires was aware of another bid to close the UST system at the Site that had originally been solicited by Edward Motor from Mr. Walter Slaight for \$7,450.00. *Respondent's Exhibit 2, Tr. pp. 38-39.*

19. Ms. Hires testified that she did not rely on Mr. Slaight's bid to close the UST systems because in her opinion Mr. Slaight's bid was not all inclusive, and because it was dated 2011 and she performed her economic benefit calculation in 2015. *Tr. pp. 38-39.*

20. Ms. Hires also stated during her direct testimony that she had seen checks Mr. Tallach made out to TECS, Mr. Burks, and

Mr. Gates, the individual who ran the backhoe to remove the tanks, but did not deduct these checks from her \$15,400.00 economic benefit calculation because the checks were not cancelled and did not adequately demonstrate to her what the payments were for. *Tr. pp. 45-46.*

21. Ms. Hires also stated that she did not deduct what appeared to be in-kind services owed to Mr. Tallach in the amount of \$1,948.16 from her economic benefit calculation. *Tr. p 46.*

22. Mr. Tallach testified that the total disbursement paid by Edward Motor, in cash and credit, to Mr. Burks, TECS, and Mr. Gates was \$5890.46. *Tr. pp. 117-118.*

23. Mr. Tallach stated during his direct testimony that he paid an additional \$1,160.00 to the Southern Company to finish the UST closure at the Site. According to Mr. Tallach his total expenditure to date at the Site for the UST closure is \$7,050.46. *Tr. pp. 119-120.*

24. Finally, Mr. Tallach stated during cross-examination that he received an additional bid from the Southern Company in an amount close to \$52,000.00. This additional work may become necessary in the future should sampling from the Site demonstrate that additional corrective action work will be required. *Tr. pp. 139-140.*

25. The ALJ incorporates by reference the findings of fact, discussion, and conclusions of law set forth in Order No. 9.

5. DISCUSSION AND CONCLUSIONS OF LAW

A. Penalty Amount For Violation Of Reg.12.104(A) (1)

As stated above the ALJ found, in Order No. 9, that ADEQ did not receive a thirty (30) day notice of closure for the USTs at the Site as required by Reg.12.104(A) (1), 40 C.F.R. § 280.71. *ADEQ MSJ, Exhibits 3, 6, and 9.* This violation was deemed minor by Ms. Hires pursuant to Commission Regulation 7 factors. *ADEQ MSJ, Exhibit 8.*

Ms. Hires stated that her civil penalty calculation for Edward Motor's failure to provide a thirty (30) day notice prior to the closure of the UST system was \$450.00. *ADEQ Exhibit 2; Tr. pp. 37-38.* The ALJ finds that Edward Motor did not offer evidence during the December 12, 2017, hearing to rebut Ms. Hires' \$450.00 civil penalty calculation for the violation of Reg.12.104(A) (1).

After reviewing the testimony and exhibits regarding this violation, the ALJ finds that ADEQ has proven, by a preponderance of the evidence, that a \$450.00 civil penalty for failure to provide a thirty (30) day notice of closure is appropriate.

B. Penalty Amount For Violating Reg.12.504(A) (1)

i. Payment To Burks, TECS, And Gates

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." The ALJ held in Order No. 9 that Edward Motor closed UST systems in violation of Commission Regulation 12.504(A) (1) by hiring an unlicensed

contractor to perform the UST closure work.

Ms. Hires stated during her direct testimony that she had seen checks from Mr. Tallach made out to TECS, Mr. Burks, and Mr. Gates in the total amount of \$2,942.30, but did not deduct these checks from her \$15,400.00 economic benefit calculation because the checks were not cancelled and did not adequately demonstrate to her what the payments were for. *Tr. pp. 45-46.* According to Ms. Hires:

I didn't see any evidentiary documents to convince me that the amount of these checks were written for the closure of an underground storage tank. There's no invoices that accompanied the checks. The checks don't indicate that they're for closure of an underground storage tank. So I have no idea what these checks are for. *Tr. pp. 46-47*

Ms. Hires was also asked about the in-kind services that Mr. Tallach claimed he paid. According to Ms. Hires testimony, it appeared that "it's an amount that Mr. Burks possibly had owed Mr. Tallach for some merchandise or something, and it was in the amount of \$1,948.16." *Tr. p. 46.* Ms. Hires was also questioned about the impact documentation providing support for tank removal costs at the Site would have had on her economic benefit calculation. She responded:

Mr. Howard: And assuming they were in a form you liked, what would you have done with them?

Ms. Hires: Well, assuming they were in a form not that I like, but what would be presentable as to what they were proposed to be, I mean, we all know that things sometimes aren't what they look like or appear.

Mr. Howard: Did you understand -

Ms. Hires: We'd like to have those additional documents.

Mr. Howard: Did you understand the question ma'am?

Mr. Hires: I did understand the question.

Mr. Howard: Can you answer it, please? What would you have done with them?

Ms. Hires: I would have considered them if I thought they were for underground storage tanks.

Mr. Howard: And how would you have considered them?

Ms. Hires: As some - some of the expenses that he paid.

Mr. Howard: And what would the effect of that have been?

Ms. Hires: I would have considered that that's what he's already paid out to close the tanks. *Tr. p. 64.*

The ALJ agrees with Ms. Hires that a better "paper trail" of cancelled checks-against-invoices would be beneficial to document costs spent in this case. But it is undisputed that checks made out to Burks, TECS and Gates are in the record. *ADEQ's Exhibit 3.*

And ADEQ's case sits on the foundation that Edward Motor hired Burks and TECS, contractors unlicensed by the State of Arkansas to perform UST closure, to remove the USTs at the Site. ADEQ cannot honestly believe that Mr. Burks and TECS were hired by Edward Motor and performed the work that they did, albeit unlicensed, for Edward Motor gratuitously. Furthermore, the total costs Edward Motor paid to Gates, Burks and TECS appear to be in line with, and are in fact lower, than other UST closure bids in the record. Of course, a case could be made that payments to Burks, Gates and TECS were lower because they were unlicensed, but the ALJ is also persuaded

by the testimony of Mr. Tallach. The ALJ finds that Mr. Tallach's testimony fills in the documentary shortfalls regarding payments to Mr. Burks, Mr. Gates, and TECS. According to Mr. Tallach's sworn testimony:

Mr. Howard: The question for the Court that I have for you today is how much did you spend regarding this project? There's a document in front of you, Exhibit 3, that purports to set that out from your viewpoint. Could you explain that for us, please?

Mr. Tallach: Okay. Well, the disbursements were both in cash and one credit that was due the dealership and the total was \$5,890.46.

Mr. Howard: Can you break it down --

Mr. Tallach: Sure.

Mr. Howard: -- as to how that works?

Mr. Tallach: The TECS LLC, Mr. Burks, he received one check for \$2,742.30 and another one for \$200, and Mr. Gates received a check for \$1,000 plus a credit to his account, which he owned the company, \$1,948.16.

Mr. Howard: Can you look on the documents that are attached to Exhibit 3 there? Flip back through there and see if the checks and evidence of those charges are attached.

Mr. Tallach: Yes. There's check numbers and dates on all the documents, plus a copy of ledger on the receivable we had from Mr. Gates. *Tr. pp. 117-118.*

The ALJ finds that ADEQ did not prove, by a preponderance of the evidence, that Edward Motor did not reimburse \$5,890.46 to Burks, TECS and Gates, and that this amount should be deducted from an economic benefit calculation.

There was also evidence that Edward Motor expended \$1,160.00 paid to the Southern Company for an additional visit to the Site to

assess further closure requirements at the Site. The ALJ is not deducting the \$1,160.00 paid to the Southern Company from the economic benefit calculation because this amount is linked to future cleanup work at the Site, not the initial UST closure costs which formed the basis of ADEQ's economic benefit calculation. *Respondent's Exhibit 7, Tr. pp. 119-120.*

ii. Economic Benefit Starting Point

As set forth in the findings of fact above, 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 penalty calculation. *ADEQ MSJ, Exhibit 8; Tr. p. 38.* Ms. Hires testified that the \$15,400.00 amount is the cost Edward Motor's avoided by hiring Burks and TECS to perform the UST closure at the Site. *Tr. p. 80.* Ms. Hires initially stated she was aware Edward Motor had originally solicited a bid for the UST closure from Mr. Walter Slaight in 2011 for \$7,450.00, but she did not rely on Mr. Slaight's bid to close the UST systems at the Site because in her opinion Mr. Slaight's bid was not all inclusive, and because it was dated 2011 and she performed her economic benefit calculation in 2015. *Respondent's Exhibit 2, Tr. pp. 38-39.* However, upon cross-examination Ms. Hires conceded that there was little difference in the scope of work between the bid she relied on for her economic

benefit calculation, and Mr. Slaight's bid.

Mr. Howard: What's the difference in the work?

Ms. Hires: Well, one is dated 2011 and other is dated 2015. There's four years difference in those two estimates.

Mr. Howard: That's not a difference in the scope of work, ma'am. That's a difference in the date.

Ms. Hires: Difference in the date and also in pricing for removal of the underground storage tank.

Mr. Howard: I'm asking you, ma'am, what is the difference in the scope of work that's outline on those two documents.

Ms. Hires: I don't really know that there is a whole lot of difference. Tr. pp. 58-59.

Edward Motor introduced another bid from Mr. Slaight for closure of the Site dated September 18, 2016. *Respondent's Exhibit 8.* Although there are some differences in the scope of work in the Slaight 2016 bid, for example disposal of tank contents has been removed, and some prices have increased slightly from the 2011 bid to the 2016 bid, the total price of the 2016 bid is comparable to Mr. Slaight's 2011 bid - \$7450.00 in 2011 versus \$7000.00 in 2016.

Admittedly, Mr. Slaight's 2016 bid is not exactly apples to apples with ADEQ's 2015 economic benefit bid. Nevertheless, the ALJ believes it is fair and equitable to rely on Mr. Slaight's bids because, if the focus of economic benefit penalty is cost avoidance, the only bids Edward Motor had in 2015 was from Mr. Slaight and TECS. The ALJ finds that fairness and equity dictate that Mr. Slaight's bid of \$7450.00 be added to ADEQ's bid of \$15,400.00 and divided by two (2) for an economic benefit starting

point of \$11,425.00.

iii. Final Economic Benefit Penalty

At the summary judgment stage of this proceeding Edward Motor's argued that Mr. Tallach was misled by Mr. Burks in this matter and that Mr. Burks falsely claimed to Mr. Tallach that he and/or TECS LLC were licensed by ADEQ to remove and close UST systems. As noted by the ALJ in Order No. 9, the ALJ had no reason to dispute Mr. Tallach's claims that he was misled by Mr. Burks but as the owner of the Site and UST system Edward Motor bore the ultimate responsibility to ensure compliance with Commission Reg.12.504(A)(1). Moreover, the fact that the Burk / TECS bid was significantly lower than Mr. Slaughter's bid should have been an alarm to Mr. Tallach that something was amiss. Nevertheless, Mr. Tallach's claim that he was misled, coupled with the Mr. Tallach's admission that he is responsible for ultimately closing the Site in a manner consistent with applicable law and regulations, has factored into the ALJ's recommendation. *Tr. p. 147.* The ALJ finds that, given the facts of this case, an economic benefit penalty supported by the preponderance of the evidence is:

\$11,425.00 - \$5,890.00 = \$5535.00 economic benefit penalty

IT IS THEREFORE ORDERED:

1. That, as found in Order No. 9, Edward Motor failed to provide ADEQ with a thirty (30) day notice of closure thereby violating Reg.12.104(A)(1), 40 C.F.R. § 280.71.

2. That, as found in Order No. 9, Edward Motor hired an

unlicensed contractor to close a UST system in violation of Commission Regulation 12.504(A)(1).


3. That Edward Motor should be assessed a civil penalty in the amount of \$450.00 for violating Reg.12.104(A)(1), 40 C.F.R. § 280.71.

4. That Edward Motor should be assessed an economic benefit penalty in the amount of \$5535.00 for violating Commission Regulation 12.504(A)(1).

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 2nd day of February 2018


Charles Moulton
Administrative Law Judge

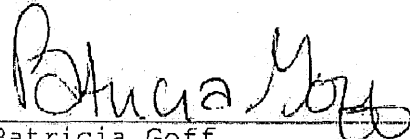
CERTIFICATE OF SERVICE

I, Patricia Goff, Commission Secretary, hereby certify that a copy of the foregoing Order No. 10, 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 2nd day of February 2018.

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**ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION**

**SUBJECT - Edward Motor Company,
Inc.**

MINUTE ORDER NO. 18-01

PAGE 1 OF 1

On February 2, 2018, Charles Moulton, Administrative Law Judge, issued Order No. 10 (Recommended Decision) in Docket No. 16-001-NOV, which is a case styled: In the Matter of Edward Motor Company, Inc.

Order No. 10 finds the following:

That, as found in Order No. 9, Edward Motor failed to provide ADEQ with a thirty (30) day notice of closure thereby violating Reg.12.104(A) (1), 40 C.F.R. § 280.71.

That, as found in Order No. 9, Edward Motor hired an unlicensed contractor to close a UST system in violation of Commission Regulation 12.504(A) (1).

That Edward Motor should be assessed an civil penalty in the amount of \$450.00 for violating Commission Regulation 12.104(A) (1), 40 C.F.R. § 280.71.

That Edward Motor should be assessed an economic benefit penalty in the amount of \$5535.00 for violating Commission Regulation 12.504(A) (1).

The record compiled in this docket by the Administrative Law Judge and Order No. 10 came before the Commission at its March 2, 2018 meeting. After considering the matter, the Commission adopts and affirms, without modification, Order No. 10 (Recommended Decision) entered on February 2, 2018, and closes this docket.

COMMISSIONERS:

AD L. Bengal
CC C. Colclasure
JF J. Fox
MJF M. Freeze
CG C. Gardner
BH B. Holland

DM D. Melton
SM S. Moss, Jr.
RR R. Reynolds
WS W. Stites
GW G. Wheeler
BW B. White

M. Goggans - Chair SUBMITTED BY: Charles Moulton

PASSED: 03/02/18

EXHIBIT

D