

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF UNDERGROUND
)	STORAGE TANKS
JOHNSON AND CLAYTON, INC)	
)	CASE NO. FDA22-0014
RESPONDENT)	FACILITY: JOHNSON AND CLAYTON, INC

ORDER AND ASSESSMENT

David W. Salyers, P.E., Commissioner of the Department of Environment and Conservation (the "Commissioner") states:

PARTIES

I.

David W. Salyers, P.E., is the duly appointed Commissioner of the Department of Environment and Conservation ("Department") and is charged with administering and enforcing the Tennessee Petroleum Underground Storage Tank Act ("Act"), Tenn. Code Ann. §§ 68-215-101 to -129. Stanley R. Boyd is the duly appointed Director ("Director") of the Division of Underground Storage Tanks ("Division") and has received written delegation from the Commissioner to administer and enforce the Act.

II.

Johnson and Clayton, Inc. ("Respondent") is a corporation created in Tennessee and is properly registered to conduct business in Tennessee. The Respondent is the registered owner of six underground storage tank (UST) systems located at 112 South Church Street, Henderson, Tennessee 38340. Service of process may be made on the Respondent's Registered Agent, Gerald Ferguson, at 530 West Main Street, Henderson, Tennessee 38340.

JURISDICTION

III.

When the Commissioner finds upon investigation that any provision of the Act is not being carried out, and that effective measures are not being taken to comply with the provisions of the Act, the Commissioner may issue an Order for correction to the responsible party, and this Order shall be complied with within the time limit specified in the Order. Tenn. Code Ann. § 68-215-114. If this Order becomes final, the Commissioner may affix a notice of petroleum delivery prohibition ("red tag") to the facility fill ports and/or dispensers and give notice on the Department's website of petroleum delivery prohibition. Tenn.

Code Ann. § 68-215-106(c). Further, the Commissioner is authorized to assess civil penalties against any person who violates or fails to comply with the Act. Tenn. Code Ann. § 68-215-121. Rules governing USTs have been promulgated pursuant to Tenn. Code Ann. § 68-215-107(f) and are effective as Tenn. Comp. R. & Regs. 0400-18-01-.01 to -.17 (“Rules”).

IV.

The Respondent is a person, Tenn. Code Ann. § 68-215-103(11), and a responsible party, Tenn. Code Ann. §§ 68-215-103(17)(A)(i) and (ii), and has violated the Act.

FACTS

V.

On December 21, 2011, the Division received a Notification for Underground Storage Tanks form, signed by the Respondent, listing Johnson and Clayton, Inc. as the owner of the six UST systems located at 112 South Church Street, Henderson, Tennessee 38340. The facility ID number is 8-120027.

VI.

On January 11, 2022, Division personnel performed an inspection at the facility. During the inspection, the following violations were discovered:

- Violation #1: Failure to test spill prevention equipment at least once every three years in accordance with Rule 0400-18-01-.02(3)(c)1. Specifically, at the time of the inspection, no spill bucket integrity testing results were available for review for all six spill buckets.
- Violation #2: Failure to inspect overfill prevention equipment at least once every three years in accordance with Rule 0400-18-01-.02(3)(c)2. Specifically, at the time of the inspection, overfill inspection results were not available for review.
- Violation #3: Failure to ensure that cathodic protection is functioning as designed and is effectively preventing corrosion in accordance with Rule 0400-18-01-.02(4)(c)1. Specifically, at the time of the inspection, the rectifier was reading one amp when the “as left” reading was five amps. This is a variance of 20%.

Also, on this day, Division personnel discovered the highway diesel dispenser was dripping into the uncontained sump. This is considered a suspected release by the Division.

VII.

On January 20, 2022, Division personnel sent a Modified Site Check – Dispenser Leak letter to the Respondent which required the Respondent to investigate the suspected release discovered at the site during the January 11, 2022, inspection.

VIII.

On February 24, 2022, Division personnel received passing hydrostatic test results for all six spill buckets. This documentation confirmed violation #1 discovered at the time of the inspection had been corrected.

IX.

On March 10, 2022, Division personnel received an Application for Fund Eligibility from the Respondent for the January 11, 2022, release at the facility.

X.

On March 21, 2022, Division personnel received passing overfill inspection results for all overfill devices. This documentation confirmed violation #2 discovered at the time of the inspection had been corrected.

XI.

Based on information contained in the site check dated April 6, 2022, the test results for the UST site did not indicate that a release occurred, further investigation was not required, and the project was closed on April 8, 2022.

XII.

To date, the Respondent has not corrected all the violations discovered at the time of the inspection and the facility remains in operational non-compliance.

XIII.

Division personnel reviewed the Application for Fund Eligibility along with the documentation required by Rule 0400-18-01-.09. Based upon this review, Division personnel determined that this facility did not meet the requirements for the minimum deductible for the release due to the following:

- Failure to test spill prevention equipment at least once every three years in accordance with Rule 0400-18-01-.02(3)(c)1.
- Failure to inspect overfill prevention equipment at least once every three years in accordance with Rule 0400-18-01-.02(3)(c)2.
- Failure to comply with requirements concerning design, construction, utilization and/or upgrade of corrosion protection for tanks in accordance with Rule 0400-18-01-.02(4)(c)1.

The deductible for the release is \$10,000.00.

VIOLATIONS

XIV.

By failing to operate a petroleum underground storage tank system in compliance with the Act, the Respondent has violated Tenn. Code Ann. § 68-215-104(2), which states:

It is unlawful to: Construct, alter or operate a petroleum underground storage tank in violation of this chapter or the rules or regulations established pursuant thereto[.]

XV.

By failing to test spill prevention equipment at least once every three years, the Respondent violated Rule 0400-18-01-.02(3)(c)1.

0400-18-01-.02 UST SYSTEMS: INSTALLATION AND OPERATION.

(3) Spill and overfill prevention.

(c) Periodic testing of spill prevention equipment and periodic inspection of overfill prevention equipment.

1. Monitoring. Spill prevention equipment (such as a catchment basin, spill bucket, or other spill containment device) must prevent releases to the environment by meeting one of the following:

(ii) The spill prevention equipment is tested at least once every three years to ensure the equipment is liquid tight by using vacuum, pressure, or liquid testing[.]

XVI.

By failing to perform overfill prevention system inspections every three years, the Respondent violated Rule 0400-18-01-.02(3)(c)2.

0400-18-01-.02 UST SYSTEMS: INSTALLATION AND OPERATION.

- (3) Spill and overfill prevention.
 - (c) Periodic testing of spill prevention equipment and periodic inspection of overfill prevention equipment.
 - 2. Inspections. Overfill prevention equipment must be inspected at least once every three years. At a minimum, the inspection must ensure that overfill prevention equipment is set to activate at the correct level specified in subpart (a)1.(ii) of this paragraph and will activate when petroleum reaches that level. Inspections must be conducted in accordance with one of the criteria in items 1.(ii)(I) through (IV) of this subparagraph.

XVII.

By failing to operate and maintain a corrosion protection system to provide continuous protection, the Respondent has violated Rule 0400-18-01-.02(4)(c)1.

0400-18-01-.02 UST SYSTEMS: INSTALLATION AND OPERATION.

- (4) Corrosion Protection.
 - c. Operation and maintenance of corrosion protection.

All owners and/or operators of metal UST systems with corrosion protection shall comply with the following requirements to ensure that releases due to corrosion are prevented until the UST system is permanently closed or undergoes a change-in-service in accordance with paragraph (4) of Rule 0400-18-01-.07:

 - 1. All corrosion protection systems shall be operated and maintained in accordance with a corrosion expert's design to continuously provide corrosion protection to the metal components of that portion of the tank, piping and underground ancillary equipment that routinely contains petroleum and is in contact with the ground.

ORDER AND ASSESSMENT

XVIII.

Pursuant to the authority vested by Tenn. Code Ann. §§ 68-215-107, -114, and -121 of the Act, the Respondent is issued the following Order:

1. The Application for Fund Eligibility for the January 11, 2022, release is approved with a deductible of \$10,000.00.
2. If the Respondent fails to comply with this order and/or file an appeal within the timeframes stated below, **the above-referenced facility will be placed on the Delivery Prohibition List and the fill ports and dispensers will be red tagged until compliance is achieved.** Tenn. Code Ann. § 68-215-106(c)
2. The Respondent shall perform all actions necessary to correct the outstanding violation and to bring the facility into full compliance with regulatory requirements. The Respondent shall provide the Division with documentation of the corrective action performed; the documentation shall be sufficient to establish a return to full compliance.
 - (i) On or before the thirty-first day after receipt of this Order, the Respondent shall visit the following link and register to attend Underground Storage Tank Operator Training:
<https://www.tn.gov/content/tn/environment/program-areas/ust-underground-storage-tanks/operator-training/tank-school.html>.
 - (ii) On or before **three months** after receiving this Order, the Respondent shall successfully attend Underground Storage Tank Training.
 - (iii) On or before the thirty-first day after receipt of this Order, the Respondent shall submit documentation of an investigation and, if necessary, a repair and retest of the corrosion protection system.
3. On or before the thirty-first day after receipt of this Order, the Respondent shall pay a total civil penalty in the amount of \$26,000.00. This amount consists of the following:
 - (i) Six violations assessed at \$2,000.00 per tank compartment for a total of \$12,000.00 for failing to test spill prevention equipment at least once every three years.
 - (ii) Six violations assessed at \$2,000.00 per tank compartment for a total of \$12,000.00 for failing to perform overfill prevention system inspections every three years.
 - (iii) One violation assessed at \$2,000.00 per corrosion protection system for failing to operate and maintain corrosion protection system to provide continuous protection.

4. The Respondent shall perform the release investigation and remediation activities of Rule 0400-18-01-.06 within the timeframes determined by the Division.
5. Failure to comply with any of the requirements of this Order could lead to further enforcement actions which may include civil penalties, assessment of damages, and recovery of costs.
6. With the exception of the deadline for filing the appeal of this Order, the Director may extend the compliance dates contained within this Order for a fixed time period for good cause shown by the Respondent. To be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay. The Director will reply to the Respondent's request in writing, establishing a new deadline for compliance with this Order. Should the Respondent fail to meet the requirements of this Order by the new deadline, then any associated civil penalty shall be due within 30 days after that deadline. The request for an extension of time does not change the deadline to submit an appeal. See Notice of Rights.

RESERVATION OF RIGHTS

In issuing this Order and Assessment, the Department does not implicitly or expressly waive any provision of the Act or the regulations promulgated thereunder or the authority to assess costs, civil penalties, and/or damages incurred by the State against the Respondent. The Department expressly reserves all rights it has at law and in equity to order further corrective action, assess civil penalties and/or damages, and to pursue further enforcement action including, but not limited to, monetary and injunctive relief. Compliance with this order will be considered as a mitigating factor in determining the need for future enforcement action.

NOTICE OF RIGHTS

The Respondent may appeal this Order and Assessment. Tenn. Code Ann. § 68-215-119. To do so, a written petition setting forth the reasons for requesting a hearing must be received by the Commissioner within 30 days of the date the Respondent received this Order and Assessment or this Order and Assessment will become final.

If an appeal is filed, an initial hearing of this matter will be conducted by an Administrative Law Judge (ALJ) as a contested case hearing. Tenn. Code Ann. § 68-215-119; Tenn. Code Ann. §§ 4-5-301 to -325 (the Uniform Administrative Procedures Act); Tenn. Comp. R. & Regs. 1360-04-01 (the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies). Such hearings are legal proceedings in the nature of a trial. Individual Respondents may represent themselves or be represented by an attorney licensed to practice law in Tennessee. Artificial Respondents (corporations, limited partnerships, limited liability companies, etc.) cannot engage in the practice of law and therefore may only pursue an appeal through an attorney licensed to practice law in Tennessee. Low-income individuals may be eligible for representation at reduced or no cost through a local bar association or legal aid organization.

At the conclusion of any initial hearing, the ALJ has the authority to affirm, modify, or deny the Order and Assessment. Furthermore, the ALJ on behalf of the Board has the authority to assess additional damages incurred by the Department including, but not limited to, all docketing expenses associated with the setting of the matter for a hearing and the hourly fees incurred due to the presence of the ALJ and a court reporter. Any petition for review (appeal) must be directed to the Commissioner of the Department of Environment and Conservation, c/o Jenny L. Howard, General Counsel, Department of Environment and Conservation, William R. Snodgrass Tennessee Tower, 312 Rosa L. Parks Avenue 2nd FL, Nashville, TN 37243-1548. The petition may be mailed or delivered to this address, or it may be sent to TDEC.Appeals@tn.gov. Payments of the civil penalty and/or damages shall be made payable to the "Treasurer, State of Tennessee" and sent to the Division of Fiscal Services – Consolidated Fees Section, Department of Environment and Conservation,

William R. Snodgrass Tennessee Tower, 312 Rosa L. Parks Avenue 10th FL, Nashville, TN 37243. Technical questions and other correspondence involving compliance issues should be sent to Paige Ottenfeld, Nashville Environmental Field Office, Division of Underground Storage Tanks, 711 R. S. Gass Boulevard, Nashville, TN 37216. Attorneys should contact the undersigned counsel of record. **The case number, FDA22-0014, should be written on all correspondence regarding this matter.**

Issued by the Director of the Division of Underground Storage Tanks, Department of Environment and Conservation, on this 19th day of July, 2022.



Stanley R. Boyd, Director
Division of Underground Storage Tanks
Department of Environment and Conservation

Reviewed by:



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