

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

Environmental Quality
Board

J.C. BAKER & SON, INC.
and BAKER OIL COMPANY,

Appellants,

v.

Appeal No. 22-03-EQB

KATHERYN D. EMERY, DIRECTOR,
DIVISION OF WATER AND WASTE
MANAGEMENT, WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Appellee.

APPELLEE'S MOTION TO DISMISS FOR UNTIMELY FILING

The Appellee, Katheryn D. Emery, Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection ("WVDEP"), by counsel, hereby moves the Board for entry of an order dismissing the above-styled matter with prejudice, striking it from the docket of the Board. WVDEP so moves pursuant to W. Va. Code § 22B-1-7 and the Board's procedural rule at 46 CSR 4-2.2.b, per which the Appellants' Notice of Appeal was untimely filed and therefore must be dismissed. In support of its motion, WVDEP states as follows:

FACTS AND PROCEDURAL HISTORY

The Notice of Appeal alleges that the Appellants are aggrieved by the issuance by WVDEP of Order No. UST-22-005¹ issued under the authority of the Underground Storage Act, W. Va. Code § 22-17-1 *et seq.* This Order was issued on April 26, 2022, and included a notice of the Appellants' right to appeal the Order to the Board within 30 days after receipt of the Order.

¹ As a certified record has not yet been prepared, a courtesy copy of the Order at issue, along with its cover letter indicating the certified mail number, is attached as Exhibit A.

On April 29, 2022, a hard copy of the Order addressed to the Appellants was picked up at the United States Post Office location in Gassaway, West Virginia. The certified mail receipt confirms that the Order was accepted. See Exhibit B.

On May 31, 2022 at the earliest², as stated by counsel on page 6 of the Notice of Appeal, the Appellants filed their appeal. The Notice specifically represents that the Appellant is aggrieved by the issuance of the Order. No extension of time for filing was requested.

APPLICABLE LAW AND ARGUMENT

Appeals to the Board are foremost governed by W. Va. Code § 22B-1-7, which states in relevant part as follows:

(c) An appeal filed with a board by a person subject to an order, permit, or official action *shall be perfected by filing a notice of appeal with the board within thirty days after the date upon which such order, permit or official action was received by such person as demonstrated by the date of receipt of registered or certified mail or of personal service. . . . For purposes of this subsection, service is complete upon tendering a copy to the designated agent or to the individual who, upon reasonable inquiry, appears to be in charge of the facility or activity involved, or to the permittee; or by tendering a copy by registered or certified mail, return receipt requested to the last known address of the person on record with the agency.* [Emphasis added.]

The Code is specific and explicit in stating that a notice of a appeal must be filed within 30 days of receipt of the order complained of, and that service of such order was completed by tendering a copy by certified mail to the Appellants' last known address. It makes no allowance for an extension of time and, in any event, no explanation of the untimely filing was given and no extension was requested.

The procedural rule to which the Code refers is the Procedural Rule Governing Appeals Before the Environmental Quality Board, 46 CSR 4-2.2.b, which states in relevant part:

b. When to file. An appeal filed by a person authorized by statute to seek review of an order, permit or official action by *filing a notice of appeal with the board within thirty*

² WVDEP does not yet have a time-stamped copy indicating the date of receipt by the Board and is accordingly relying on counsel's representation of the date of filing.

(30) days after the date upon which service of such order, permit or official action was complete. [Emphasis added.]

Again, the rule is specific and explicit in stating that a notice of appeal must be filed within 30 days of receipt of the order complained of. It similarly makes no allowance for an extension of time.

Per both the statute and the procedural rule, the Appellants' Notice of Appeal was untimely filed and must be dismissed, as the Board lacks subject matter jurisdiction to hear an appeal outside of the jurisdiction granted by law. The length of time by which the filing deadline was missed is irrelevant, as the applicable law makes no allowance for extension of time.

Additionally, this Board's ruling in *Elkem Metals Co. v. Taylor*, 1995 WL 770822 (W.Va. Env'tl Quality Bd. 1995)³, states that "[w]hether a party is one day or thirty days late in filing an appeal has no bearing on whether the Board should dismiss the appeal."). The Board further states that "[t]he thirty-day limitation is clear, unambiguous and recognizes no exceptions" and that "[t]he Environmental Quality Board has no basis or foundation for judicial action in this matter." This further reinforces the Board's lack of subject matter jurisdiction.

CONCLUSION AND PRAYER FOR RELIEF

The West Virginia Code and the Procedural Rule Governing Appeals Before the Environmental Quality Board are unambiguous in their mandate regarding the time for filing appeals before the Board. The duration of the untimeliness is irrelevant. As the appeal was filed out of time, it falls outside of the Board's subject matter jurisdiction.


Neither the statute nor the procedural rule make any allowance for special circumstances or excusable neglect. Even if they did, no reason was given for the untimely filing and no extension of time was requested by the Appellants. The Appellants are represented by counsel

³ A courtesy copy of the Order Granting Appellee's Motion to Dismiss in *Elkem* is attached as Exhibit C.

and were notified of their statutory right to appeal by the Order itself and are therefore without excuse.

Accordingly, WVDEP hereby moves the Board for entry of an order dismissing the above-styled matter with prejudice, striking it from the docket of the Board, and for such other relief as may be deemed just and appropriate.

Respectfully Submitted,
KATHERYN D. EMERY
By Counsel



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West Virginia Department of
Environmental Protection
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Charleston WV 25304
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EXHIBIT A



west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304
Phone: 304-926-0470 Fax: 304-926-0488

Harold D. Ward, Cabinet Secretary
dep.wv.gov

April 26, 2022

J. C. Baker & Son, Inc.
601 Elk Street
Gassaway, WV 26624

CERTIFIED RETURN RECEIPT REQUESTED
7489 0090 0027 6402 6081 23

And

**WV IDENTIFICATION NOs.: 4905543, 0100014,
4905541, 5105713, 2102658, 0800440, 0407923, 5105709,
2006691, 2102661, 3404188, 3405499, and 1108011**

Baker Oil Company
P. O. Box 369
Gassaway, WV 26624

Mr. Baker:

Enclosed is Order No. UST-22-005. This Order is issued to J. C. Baker & Son, Inc. and Baker Oil Company by the director of the Division of Water and Waste Management under the authority of Chapter 22, Article 17, Section 15 of the Code of West Virginia. This Order contains notification of the right of appeal under the provisions of Chapter 22, Article 17, Section 18.


Jeremy W. Bandy
Chief Inspector

cc: Katheryn Emery, P.E., Director, DWWM (e-mail)
Scott G. Mandirola, Deputy Secretary for External Affairs, WVDEP (e-mail)
Harold D. Ward, Cabinet Secretary, WVDEP (e-mail)
Joseph Sizemore, Assistant Chief Inspector, EE/HW, Tanks (e-mail)
David C. Simmons, Assistant Chief Inspector, EE (e-mail)
Laura McGee, Environmental Resources Program Manager, EE (e-mail)
Cindy Blugerman, Environmental Resources Specialist, EE (e-mail)
Amaris Elliott, Environmental Resources Associate, EE (e-mail)
Ruth M. Porter, Program Manager, EE/Tanks (e-mail)
Melissa McCune, Program Manager, EE/Tanks Corrective Action (e-mail)
Randal Lemons, Environmental Resources Analyst, EE/Tanks Corrective Action (e-mail)
Andrew Dinsmore, US EPA, Region III (e-mail)



west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street SE
Charleston, WV 25304
Phone: 304-926-0470 Fax: 304-926-0488

Harold D. Ward, Cabinet Secretary
dep.wv.gov

**ORDER
ISSUED UNDER THE
UNDERGROUND STORAGE TANK ACT
WEST VIRGINIA CODE, CHAPTER 22, ARTICLE 17**

TO: J. C. Baker & Son, Inc.
601 Elk Street
Gassaway, WV 26624

DATE: April 26, 2022

ORDER NO.: UST-22-005

And

Baker Oil Company
P.O. Box 369
Gassaway, WV 26624

INTRODUCTION

The following findings are made and Order issued to J. C. Baker & Son, Inc. and Baker Oil Company (hereinafter "Baker") pursuant to the authority vested in the Director of the Division of Water and Waste Management under Chapter 22, Article 17, Section 1 et seq. of the Code of West Virginia.

FINDINGS OF FACT

In support of this Order, the Director hereby finds the following:

1. As the owner and/or operator of Underground Storage Tanks (USTs) at the time of releases from the USTs, Baker is the responsible party for confirmed releases at the following thirteen (13) facilities. The USTs at these sites are permanently out of service (POS) and were removed by Baker.
 - a. Linger's Service Station located in Upshur County, WV was issued Leak No. 92-289-L49 on December 14, 1992. The Facility ID is 4905543.
 - b. Paul's Service Station located in Barbour County, WV was issued Leak No. 92-306-L01 on December 12, 1992. The Facility ID is 0100014.
 - c. Coastal Lumber Company located in Upshur County, WV was issued Leak No. 95-021 on February 7, 1995. The Facility ID is 4905541.

Promoting a healthy environment.

- d. Hamrick Service Station located in Webster County, WV was issued Leak No. 93-034 on February 5, 1993. The Facility ID is 5105713.
- e. W. J. Princes Store located in Lewis County, WV was issued Leak No. 93-378 on December 8, 1993. The Facility ID is 2102658.
- f. Sample's Service Station located in Clay County, WV was issued Leak No. 92-074-L08 on April 7, 1992. The Facility ID is 0800440.
- g. Steve White Service Station located in Braxton County, WV was issued Leak No. 91-036-L04 on June 17, 1991. The Facility ID is 0407923.
- h. Coastal Lumber Company located in Webster County, WV was issued Leak No. 91-075-L51 on August 20, 1991. The Facility ID is 5105709.
- i. Clendenin Service Station located in Kanawha County, WV was issued Leak No. 91-008-L20 on February 28, 1991. The Facility ID is 2006691.
- j. Point C Mart located in Lewis County, WV was issued Leak No. 94-035 on March 1, 1994. The Facility ID is 2102661.
- k. Young's Service Station located in Nicholas County, WV was issued Leak No. 94-066 on April 13, 1994. The Facility ID is 3404188.
- l. C Adam Toney Tire located in Nicholas County, WV was issued Leak No. 94-056 on March 30, 1994. The Facility ID is 3405499.
- m. Glenville Sunoco located in Gilmer County, WV was issued Leak No. 17-034 on October 11, 2017. The Facility ID is 1108011.

Leak No. 92-289-L49-Linger's Service Station

- 2. An April 1, 1986 UST notification form shows the USTs as currently in use (CIU) and the UST owner as J. C. Baker & Sons, Inc. The notification form was signed by Michael C. Baker.
- 3. A May 23, 1990 letter from Baker Oil Company indicated the purchase of several USTs from J. C. Baker & Sons. The enclosed UST notification form showed the USTs as CIU and the UST owner as Baker Oil Company. The notification form was signed by Michael C. Baker.
- 4. On December 14, 1992, West Virginia Department of Environmental Protection (WVDEP) personnel were notified of a release at Linger's Service Station. In response to the release, WVDEP issued a Confirmed Release Notice to Comply (CRNC) to Baker, which assigned Leak No. 92-289-L49 to the release and required that a Site Assessment be performed.
- 5. A March 10, 1993 UST notification shows the USTs as permanently out of service (POS) and the UST owner as Baker Oil Company. The notification was signed by Michael C. Baker.
- 6. On April 27, 1995, Order USTA-193-94 became effective. The Order required Baker, as the owner of the USTs, to implement corrective action in accordance with Code of Federal Regulations 40CFR280.
- 7. On February 11, 2008, WVDEP sent a Review of Confirmed Release (RCR) to Baker, which required submittal of a Corrective Action Plan (CAP) on or before April 15, 2008. Baker failed to submit the CAP.

8. On July 15, 2015, Baker's consultant provided a remediation schedule, progress update, and request for extension.
9. On October 14, 2015, WVDEP provided an extension to Baker, which required the performance of a Site Assessment and submittal of a Supplemental Site Assessment Report on or before September 30, 2016. Baker failed to submit the SSAR.
10. On April 12, 2018, WVDEP sent an RCR to Baker, which required submittal of a Supplemental Site Assessment by June 11, 2018. Baker failed to submit the required report.
11. On March 26, 2019, WVDEP sent an RCR to Baker, which required the submittal of a Site Assessment Work Plan (SAWP) by April 26, 2019. Baker failed to submit the SAWP.
12. On May 3, 2019, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, Notice of Violation (NOV) No. 2019-01452 was issued to Baker.

13. On June 4, 2021, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, Inspection of Violation (IOV) No. 2019-01452 was issued to Baker.

Leak No. 92-306-L01 Paul's Service Station

14. An April 25, 1986 UST notification form shows the USTs as CIU and the UST owner as J. C. Baker & Sons, Inc. The notification form was signed by Michael C. Baker.
15. On December 12, 1992, WVDEP personnel were notified of a release at Paul's Service Station. In response to the release, WVDEP issued a CRNC to Baker, which assigned Leak No. 92-306-L01 to the release and required that a Site Assessment be performed.
16. A February 5, 1993 UST notification form shows the USTs as POS and the UST owner as Baker Oil Company. The notification form was signed by Michael C. Baker.
17. On June 8, 2011, WVDEP sent an RCR to Baker, which required submittal of a CAP on or before August 30, 2011. Baker failed to submit the CAP

18. On July 15, 2015, Baker's consultant provided a remediation schedule, progress update, and request for extension.
19. On October 14, 2015, WVDEP provided an extension to Baker, which required the performance of a Site Assessment and submittal of an SAR and CAP on or before December 31, 2016. Baker failed to submit the SAR or CAP.
20. On March 26, 2019, WVDEP sent an RCR to Baker, which required submittal of a SAWP by April 26, 2019. Baker failed to submit the SAWP.
21. On May 3, 2019, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, NOV, No. 2019-01449 was issued to Baker.

22. On June 4, 2021, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR 280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, IOV No. 2019-01449 was issued to Baker.

Leak No. 95-021 Coastal Lumber Company; Buckhannon

23. A May 1, 1986 UST notification form shows the USTs as CIU and the UST owner as J. C. Baker & Sons, Inc. The notification form was signed by Michael C. Baker.
24. A May 23, 1990 letter from Baker Oil Company indicated the purchase of several USTs from J. C. Baker & Sons. The enclosed UST notification form showed the USTs as CIU and the UST owner as Baker Oil Company. The notification form was signed by Michael C. Baker.
25. On May 6, 1992 and August 11, 1992, WVDEP personnel received UST closure requests.
26. On February 7, 1995, WVDEP personnel were notified of a release at Coastal Lumber Company. In response to the release, WVDEP issued a CRNC to Baker, which assigned Leak No. 95-021 to the release and required that a Site Assessment be performed.
27. On June 8, 2011, WVDEP sent an RCR to Baker, which required submittal of a CAP on or before August 30, 2011. Baker failed to submit the CAP.
28. On July 15, 2015, Baker's consultant provided a remediation schedule, progress update, and request for extension.

29. On October 14, 2015, WVDEP provided an extension to Baker, which required the performance of a Site Assessment and submittal of an SAR on or before December 31, 2016. Baker failed to submit the SAR.
30. On March 12, 2018, WVDEP sent an RCR to Baker, which required the submittal of a Supplemental SAR by May 11, 2018. Baker failed to submit the Supplemental SAR.
31. On May 17, 2018, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.34 - Baker failed to cooperate with requests for document submission, testing, and/or monitoring.

As a result of this violation, NOV No. 1805-3400 was issued to Baker.

32. On January 31, 2019, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR 280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, NOV No. 2019-00483 was issued to Baker.

33. On March 26, 2019; May 3, 2019; and June 4, 2021; WVDEP personnel reviewed the facility file. During the reviews, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, IOV No. 2019-00483 was issued to Baker.

Leak No. 93-034 Hamrick Service Station

34. An April 23, 1986 UST notification form shows the USTs as CIU and the UST owner as J. C. Baker & Sons, Inc. The notification form was signed by Michael C. Baker.
35. On February 11, 1993, WVDEP personnel were notified of a release at Hamrick Service Station. In response to the release, WVDEP issued a CRNC to Baker, which assigned Leak No. 93-034 to the release and required that a Site Assessment be performed.
36. An April 30, 1993 UST notification form shows the USTs as POS and the UST owner as Baker Oil Company. The notification form was signed by Michael C. Baker.
37. On March 24 1997, a consent order issued to Baker Oil Company by the Environmental Protection Agency became effective. The consent order identifies Baker Oil Company as the respondent and responsible for applicable UST compliance activities.

38. On April 21, 2008, WVDEP sent an RCR to Baker, which required submittal of a Groundwater Monitoring Report (GMR) on or before May 21, 2008. Baker failed to submit the GMR.
39. On July 15, 2015, Baker's consultant provided a remediation schedule, progress update, and request for extension.
40. On October 14, 2015, WVDEP provided an extension to Baker, which required the performance of a Site Assessment and submittal of a SAR on or before June 30, 2016. Baker failed to submit the SAR.
41. On August 8, 2018, WVDEP sent an RCR to Baker, which required the submittal of an Initial Site Characterization Report (ISCR) by October 2, 2018. Baker failed to submit the ISCR.
42. On November 11, 2018, WVDEP personnel reviewed the facility file. During the review, the following violations of the Code of Federal Regulations were observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).
 - b. 40CFR280.63(b) - Baker failed to submit a report on initial site characterization that met the minimum requirements of 280.63(a)(1) through 280.63(a)(4).

As a result of these violations, NOV Nos. 1811-3808 and 1811-3809 were issued to Baker.

43. On June 2, 2021, WVDEP sent an RCR to Baker, which required submittal of a Site Investigation Report by June 30, 2021. Subsequently, Baker requested a forty-five (45) day extension, which was granted until August 16, 2021. However, Baker failed to submit the required report.
44. On August 22, 2021, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site and the surrounding area possibly affected by the release as per requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, IOV No. 2018-00094 was issued to Baker.

Leak No. 93-378 W J Prince's Store

45. An April 21, 1986 UST notification form shows the USTs as CIU and the UST owner as J. C. Baker & Sons, Inc. The notification form was signed by Michael C. Baker.
46. A May 23, 1990 letter from Baker Oil Company indicated the purchase of several USTs from J. C. Baker & Sons. The enclosed UST notification form showed the USTs as CIU

and the UST owner as Baker Oil Company. The notification form was signed by Michael C. Baker.

47. On December 8, 1993, WVDEP personnel were notified of a release at W J Prince's Store. In response to the release, WVDEP issued a CRNC, which assigned Leak No. 93-378 to the release and required that a Site Assessment be performed.
48. A February 2, 1994 UST notification form shows the USTs as POS and the UST owner as Baker Oil Company. The notification form was signed by Michael C. Baker.
49. On July 15, 2015, Baker's consultant provided a remediation schedule, progress update, and request for extension.
50. On October 14, 2015, WVDEP provided an extension to Baker, which required the performance of a Site Assessment and submittal of an SAR on or before December 31, 2016. Baker failed to submit the SAR.
51. On March 26, 2019, WVDEP sent an RCR to Baker, which required submittal of a SAWP by April 26, 2019. Baker failed to submit the SAWP.
52. On May 3, 2019, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, NOV No. 2019-01450 was issued to Baker.

53. On June 4, 2021, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, IOV No. 2019-01450 was issued to Baker.

Leak No. 92-074-L08-Sample's Service Station

54. An April 17, 1986 UST notification form shows the USTs as CIU and the UST owner as J. C. Baker & Sons, Inc. The notification form was signed by Michael C. Baker.
55. A May 23, 1990 letter from Baker Oil Company indicated the purchase of several USTs from J. C. Baker & Sons. The enclosed UST notification form showed the USTs as CIU and the UST owner as Baker Oil Company. The notification form was signed by Michael C. Baker.
56. On April 7, 1992, WVDEP personnel were notified of a release at Sample's Service Station. In response to the release, WVDEP issued a CRNC to Baker, which assigned Leak No. 92-074-L08 to the release and required that a Site Assessment be performed.

57. A May 5, 1992 UST notification form shows the USTs as POS and the UST owner as J.C. Baker & Son, Inc. The notification form was signed by Michael C. Baker.
58. On October 24, 2002, WVDEP sent an RCR to Baker, which required submittal of an SAR on or before December 23, 2002. Baker failed to submit the SAR.
59. On July 15, 2015, Baker's consultant provided a remediation schedule, progress update, and request for extension.
60. On October 14, 2015, WVDEP provided an extension to Baker, which required the performance of a Site Assessment and submittal of a Supplemental SAR on or before June 30, 2016. Baker failed to submit the SAR.
61. On June 2, 2021, WVDEP sent an RCR to Baker, which required submittal of a Site Investigation Report (SIR) by June 30, 2021. Baker requested a forty-five (45) day extension, which was granted until August 16, 2021. Baker failed to submit the required report.
62. On August 22, 2021, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, NOV, No. 2021-01437 was issued to Baker.

Leak No. 91-036-L04 -Steve White Service Station

63. On June 17, 1991, WVDEP personnel were notified of a release at Steve White Service Station. In response to the release, WVDEP issued a CRNC to Baker, which assigned Leak No. 91-036-L04 to the release and required that Tank Closure and Site Assessment be performed.
64. On November 19, 1991, WVDEP issued Order No. USTA-116-91, which required that Baker pay past due fees and submit a Closure Report and SAR on or before January 18, 1992. Baker subsequently submitted the required documents.
65. A March 15, 1992 UST notification form shows the USTs as POS and the UST owner as J.C. Baker & Son, Inc. The notification form was signed by Michael C. Baker.
66. On March 31, 1992, WVDEP sent an RCR to Baker, which required an additional SAR on or before May 29, 1992. Baker failed to submit the additional SAR.
67. On October 17, 2013, WVDEP responded to Baker's plan to move forward systematically in regard to the remaining leaking UST sites and required submittal of a full site investigation by March 31, 2014.
68. On July 15, 2015, Baker's consultant provided a remediation schedule, progress update, and request for extension.

69. On October 14, 2015, WVDEP provided an extension to Baker, which required the performance of a Site Assessment and submittal of Supplemental SAR on or before December 31, 2016. Baker failed to submit the SAR.
70. On June 2, 2021, WVDEP sent an RCR to Baker, which required submittal of a Site Investigation Report by June 30, 2021. Baker requested a forty-five (45) day extension, which was granted until August 16, 2021. Baker failed to submit the required report.
71. On August 22, 2021, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, NOV No. 2021-01436 was issued to Baker.

Leak No. 91-075-L51-Coastal Lumber Company: Hackers Valley

72. An April 15, 1986 UST notification form shows the USTs as CIU and the UST owner as J. C. Baker & Sons, Inc. The notification form was signed by Michael C. Baker.
73. A May 23, 1990 letter from Baker Oil Company indicated the purchase of several USTs from J. C. Baker & Sons. The enclosed UST notification form showed the USTs as CIU and the UST owner as Baker Oil Company. The notification form was signed by Michael C. Baker.
74. On August 20, 1991, WVDEP personnel were notified of a release at Coastal Lumber Company. In response to the release, WVDEP issued a CRNC to Baker, which assigned Leak No. 91-075-L51 to the release and required that a Site Assessment be performed.
75. On July 15, 2015, Baker's consultant provided a remediation schedule, progress update, and request for extension.
76. On October 14, 2015, WVDEP provided an extension to Baker, which required the performance of a Site Assessment and submittal of a Supplemental SAR on or before March 31, 2016. Baker failed to submit the SAR.
77. On August 3, 2018, WVDEP sent an RCR to Baker, which required the submittal of an ISCR by October 2, 2018. Baker failed to submit the ISCR.
78. On November 14, 2018, WVDEP personnel reviewed the facility file. During the review, the following violations of the Code of Federal Regulations were observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).
 - b. 40CFR280.63(b) - Baker failed to submit a report on initial site characterization that met the minimum requirements of 280.63(a)(1) through 280.63(a)(4).

As a result of these violations, NOV Nos. 1811-3806 and 1811-3807 were issued to Baker.

79. On June 2, 2021, WVDEP sent an RCR to Baker, which required submittal of a Site Investigation Report by June 30, 2021. Baker requested a forty-five (45) day extension, which was granted until August 16, 2021. Baker failed to submit the required report.
80. On August 22, 2021, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, NOV No. 2018-00095 was issued to Baker.

Leak No. 91-008-L20-Clendenin Service Station

81. A June 9, 1989 UST notification form shows the USTs as CIU and the UST owner as J. C. Baker & Sons, Inc. The notification form was signed by Mike Baker.
82. On February 28, 1991, WVDEP personnel were notified of a release at Clendenin Service Station. In response to the release, WVDEP issued a CRNC to Baker, which assigned Leak No. 91-008-L20 to the release and required that a Site Assessment be performed.
83. On October 24, 2002, WVDEP sent an RCR to Baker, which required submittal of an SAR on or before December 23, 2002. Baker failed to submit the report.
84. On March 26, 2003, WVDEP sent a Notice of Non-Compliance for failure to submit the SAR. The Notice required submittal of the report on or before April 25, 2003. Baker failed to submit the report.
85. On July 15, 2015, Baker's consultant provided a remediation schedule, progress update, and request for extension.
86. On October 14, 2015, WVDEP provided an extension to Baker, which required the performance of a Site Assessment and submittal of a Supplemental SAR on or before December 31, 2015. Baker failed to submit the SAR.
87. On June 2, 2021, WVDEP sent an RCR to Baker, which required submittal of an SIR by June 30, 2021. Baker requested a forty-five (45) day extension, which was granted until August 16, 2021. Baker failed to submit the required report.
88. On August 22, 2021, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, NOV No. 2021-01172 was issued to Baker.

Leak No. 94-035, Point C Mart

89. An April 10, 1986 UST notification form shows the USTs as CIU and the UST owner as J. C. Baker & Sons, Inc. The notification form was signed by Michael C. Baker.
90. On March 1, 1994, WVDEP personnel were notified of a release at Point C Mart. In response to the release, WVDEP issued a CRNC to Baker, which assigned Leak No. 94-035 to the release and required that a Site Assessment be performed.
100. An August 11, 1995 UST notification form shows the USTs as POS and the UST owner as Baker Oil Company. The notification form was signed by Michael C. Baker.
101. On July 15, 2015, Baker's consultant provided a remediation schedule, progress update, and request for extension.
102. On October 14, 2015, WVDEP provided an extension to Baker, which required the performance of Free Product Recovery, Site Assessment, and submittal of an SAR on or before December 31, 2015. Baker failed to submit the SAR.
103. On May 17, 2018, WVDEP sent an RCR to Baker, which required the submittal of a Supplemental SAR by July 16, 2018. Baker failed to submit the Supplemental SAR.
104. On January 31, 2019 and March 15, 2019, WVDEP personnel reviewed the facility file. During the reviews, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, NOV No. 2019-00484 was issued to Baker.

105. On April 26, 2019, WVDEP personnel received an SAR for the site. As a result, IOV No. 2019-00484 was issued to Baker, which abated NOV No. 2019-00484.
106. On May 2, 2019, WVDEP sent an RCR to Baker, which required submittal of a GMR and/or a CAP by July 26, 2019. Baker failed to submit the required report or CAP.
107. On June 2, 2021, WVDEP sent an RCR to Baker, which required submittal of a Site Investigation Report by June 30, 2021. Baker requested a forty-five (45) day extension, which was granted until August 16, 2021. Baker failed to submit the required report.
108. On August 22, 2021, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:

- a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, NOV No. 2019-00484 was issued to Baker.

Leak No. 94-066-Young's Service Station

109. An April 12, 1986 UST notification form shows the USTs as CIU and the UST owner as J. C. Baker & Sons, Inc. The notification form was signed by Michael C. Baker.
110. An April 10, 1987 UST notification form shows the USTs as CIU and the UST owner as J. C. Baker & Sons, Inc. The notification form was signed by Michael C. Baker.
111. A May 23, 1990 letter from Baker Oil Company indicated the purchase of several USTs from J. C. Baker & Sons. The enclosed UST notification form showed the USTs as CIU and the UST owner as Baker Oil Company. The notification form was signed by Michael C. Baker.
112. An October 25, 1991 UST notification form shows the USTs as CIU and the UST owner as Baker Oil Company. The notification form was signed by Michael C. Baker.
113. On April 13, 1994, WVDEP personnel were notified of a release at Young's Service Station. In response to the release, WVDEP issued a CRNC to Baker, which assigned Leak No. 94-066 to the release and required that a Site Assessment be performed.
114. On July 15, 2015, Baker's consultant provided a remediation schedule, progress update, and request for extension
115. On October 14, 2015, WVDEP provided an extension to Baker, which required the performance of a Site Assessment and submittal of a Supplemental SAR on or before March 31, 2016. Baker failed to submit the SAR.
116. On June 2, 2021, WVDEP sent an RCR to Baker, which required submittal of a Site Investigation Report by June 30, 2021. Baker requested a forty-five (45) day extension, which was granted until August 16, 2021. Baker failed to submit the required report.
117. On August 22, 2021, WVDEP personnel reviewed the facility file. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, NOV No. 2021-01438 was issued to Baker.

Leak No. 94-056-C Adam Toney Tire

118. A June 28, 1993 UST notification form shows two (2) USTs as CIU and one (1) UST as POS and the UST owner as J.C. Baker & Sons, Inc. The notification form was signed by Michael C. Baker.

119. On March 30, 1994, WVDEP personnel were notified of a release at C Adam Toney Tire. In response to the release, WVDEP issued a CRNC to Baker, which assigned Leak No. 94-056 to the release and required that a Site Assessment be performed.
120. On July 15, 2015, Baker's consultant provided a remediation schedule, progress update, and request for extension.
121. On October 14, 2015, WVDEP provided an extension to Baker, which required the performance of Groundwater Monitoring and submittal of a GMR on or before June 30, 2016. Baker did submit the GMR.
122. On October 22, 2020, WVDEP sent an RCR to Baker, which required submittal of a GMR by November 30, 2020. Baker replied that the site had been transferred to Go-Mart but did not provide documentation of the transfer.
123. On June 2, 2021 and September 22, 2021, WVDEP personnel reviewed the facility file. During the reviews, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, NOV No. 2021-00871 was issued to Baker.

Leak No. 17-034- Glenville Sunoco

124. A December 2, 1991 UST notification form shows seven (7) USTs as CIU and the UST owner as J.C. Baker & Sons, Inc. The notification form was signed by Michael C. Baker.
125. On October 11, 2017, WVDEP personnel were notified of a release at Glenville Sunoco. In response to the release, WVDEP issued a CRNC to J C Baker & Sons, which assigned Leak No. 17-034 to the release and required that a Site Assessment be performed.
126. On May 21, 2018, WVDEP personnel reviewed the facility file and determined that two (2) extensions had been granted to Baker to perform the Site Assessment, which had not been completed. During the review, the following violation of the Code of Federal Regulations was observed and documented:
 - a. 40CFR280.65(a) - Baker failed to appropriately conduct investigations of the release, the site, and the surrounding area possibly affected by the release, as per the requirements of 280.65(a)(1) through 280.65(a)(5).

As a result of this violation, NOV No. 1805-3601 was issued to Baker.

127. On November 2, 2018, Baker submitted a Site Assessment Report.
128. On February 28, 2019, WVDEP sent an RCR to Baker, which required submittal of an additional Supplemental SIR by April 15, 2019. Baker submitted the Supplemental SIR on September 9, 2019.

129. On September 20, 2019, WVDEP sent an RCR to Baker, which required quarterly monitoring at the site. Subsequent quarterly monitoring reports were received on December 9, 2019; February 10, 2020; May 29, 2020; and September 8, 2020.
130. An August 20, 2020 UST closure authorization was issued to J C Baker & Son, Inc. to permanently close four (4) USTs at the site
131. On December 20, 2021, WVDEP sent an RCR to Baker, which required submittal of an additional Supplemental SIR by April 1, 2022.
132. On January 20, 2022, a meeting was held between WVDEP and Baker. During the meeting, Baker representatives stated that Baker was not responsible for remediation at twelve (12) of the thirteen (13) leak sites, because it was not and had never been the owner and/or operator of the USTs. Furthermore, the representatives stated that Baker had registered the USTs only to comply with initial UST registration requirements and to gain access to the properties. In response, WVDEP stated that, based upon an extensive review of the files, Baker was the owner of the USTs and is the responsible party for each of the thirteen (13) releases.
133. On January 25, 2022, WVDEP sent an email to Baker, which summarized the aforementioned January 20, 2022 meeting and requested that Baker provide a Plan of Corrective Action (POCA) to address the open leak sites.
134. On February 24, 2022, Baker's representative responded to WVDEP via email indicating that the USTs had been registered in an effort to be a good corporate citizen, and Baker did not register the USTs because it was the owner or operator.

ORDER FOR COMPLIANCE

And now, this day of April 26, 2022, Baker is hereby ORDERED by the Director as follows:

1. Baker shall immediately take measures to initiate compliance with all pertinent laws and rules.
2. Within thirty (30) days of the effective date of this Order, Baker shall submit for approval a proposed plan of corrective action and schedule, outlining action items and completion dates for remedial activities on how and when Baker will achieve compliance with all pertinent laws and rules. The plan of corrective action shall make reference to WV Leak ID Nos. 92-289-L49, 92-306-L01, 95-021, 93-034, 93-378, 92-074-L08, 91-036-L04, 91-075-L51, 91-008-L20, 94-035, 94-066, 94-056, and 17-034, and Order No. UST-22-005. The plan of corrective action shall be submitted to:

**Chief Inspector
Environmental Enforcement - Mail Code #031328
WVDEP
601 57th Street SE
Charleston, WV 25304**

Upon approval, the plan of corrective action and schedule shall be incorporated into and become part of this Order, as if fully set forth herein. Failure to submit an approvable plan of corrective action and schedule or failure to adhere to the approved schedule is a violation of this Order.

OTHER PROVISIONS

1. Compliance with the terms and conditions of this Order shall not in any way be construed as relieving Baker of the obligation to comply with any applicable law, permit, other order, or any other requirement otherwise applicable. Violations of the terms and conditions of this Order may subject Baker to additional enforcement action in accordance with the applicable law.
2. The provisions of this Order are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.
3. This Order is binding on Baker, its successors and assigns.
4. This Order shall terminate upon Baker's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.

RIGHT OF APPEAL

Notice is hereby given of your right to appeal the terms and conditions of this Order which you are aggrieved to the Environmental Quality Board by filing a NOTICE of APPEAL on the form prescribed by such Board, in accordance with the provisions of Chapter 22, Article 17, Section 18 of the Code of West Virginia within thirty (30) days after receipt of this Order.

This Order shall become effective upon receipt.



Katheryn Emery, P.E., Director
Division of Water and Waste Management

EXHIBIT B

Track Another Package +

Tracking Number: 9489009000276402608123

[Remove X](#)

Your item was picked up at the post office at 8:41 am on April 29, 2022 in GASSAWAY, WV 26624.

USPS Tracking Plus® Available 

Delivered, Individual Picked Up at Post Office

April 29, 2022 at 8:41 am
GASSAWAY, WV 26624

Get Updates 

Text & Email Updates



Return Receipt Electronic



Tracking History



USPS Tracking Plus®



Product Information



See Less 

Can't find what you're looking for?

Go to our FAQs section to find answers to your tracking questions.

FAQs

EXHIBIT C

1995 WL 770822 (W.Va.Env.Quality.Bd.)

Environmental Quality Board

State of West Virginia

ELKEM METALS COMPANY, APPELLANT

v.

BARBARA S. TAYLOR, CHIEF OFFICE OF WATER RESOURCES,
DIVISION OF ENVIRONMENTAL PROTECTION, APPELLEE

Appeal No. 622
November 21, 1995

ORDER GRANTING APPELLEE'S MOTION TO DISMISS

*1 This case was brought before the West Virginia Environmental Quality Board (the Board) on an appeal by Elkem Metals Company filed, through counsel, on September 15, 1995. The Appellee, through counsel, filed a Motion to Dismiss on the basis that the Board lacked jurisdiction due to the Appellant's failure to perfect its appeal within thirty days of receipt of its SW/NPDES Permit No. WV0111732.

This appeal was decided by a quorum of the Board on November 20, 1995. The parties requested that this appeal be decided by the Board on brief without oral arguments. The Appellant was represented by counsel, Mr. Patrick W. Pearlman of Jackson & Kelly, Charleston, West Virginia. The Appellee was represented by counsel, Mr. Scott D. Goldman of the West Virginia Division of Environmental Protection's Office of Legal Services, Charleston, West Virginia.

The Board, having carefully reviewed the certified file, relevant law and regulations, the Notice of Appeal, all written filings and memoranda, and being duly advised in the premises, by a unanimous vote, hereby

DISMISSES this action for lack of jurisdiction due to the Appellant's failure to perfect its appeal within thirty days of receipt of its SW/NPDES Permit No. WV0111732.

DISCUSSION

It is uncontroverted that the Appellant filed appeal no. 622 on September 15, 1995. It is also uncontroverted that the Appellant received the permit, which is the basis of this appeal, on August 15, 1995 (a copy of the Domestic Return Receipt is found at page 42 of the Certified File). West Virginia Code § 22B - 1-7(1994) states that: "[a]n appeal filed with a board by a person subject to an order, permit for official action shall be perfected by filing a notice of appeal with the board within thirty days after the date upon which such order, permit or official action was received by such person as demonstrated by the date of receipt of registered or certified mail or of personal service." This provision is clear, unambiguous and recognizes no exceptions.

Relevant case law indicates that "statutes of limitations are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception." *Johnson v. Nedeff*, 452 S.E. 2d 63, 66 (W.Va. 1994). Strictly speaking, the above statute may not be a statute of limitations. Relevant cases have held that where a time limitation in the bringing of an action is an integral part of the statute itself and creates a condition precedent to the bringing of the action, the time bar is not strictly speaking a statute of limitations." *Rosier v. Garron, Inc.*, 199 S.E. 2d 50, 53 (W.Va. 1973). When this is the case, the "time fixed by the statute creating the right is one of the components entering into the plaintiff's right of recovery. *Huggins v.*

Hospital Bd. of Monongalia County, 270 S.E. 2d 160, 162 (W.Va. 1980). Once the statutory period expires, there remains no foundation for judicial action". Id. at 162. Whether a party is one day or thirty days late in filing an appeal has no bearing on whether the Board should dismiss the appeal. The Board must enforce the legislatively prescribed period for filing appeals.

RULINGS ON PROPOSED FINDINGS OF FACT

*2 After due consideration of each and every Finding of Fact proposed by the parties, the Board hereby rejects, accepts, incorporates, or modifies each such proposed Finding of Fact by adoption of the Board's own Findings of Fact as they are set forth below:

FINDINGS OF FACT

1. On or about September 28, 1992, Appellant requested that Appellee modify SW/NPDES Permit No. WV0076074.
2. On August 15, 1995, Appellee mailed SW/NPDES Permit No. WV0111732, via certified mail, to Appellant at its plant address.
3. On August 15, 1995, Thomas W. Cole, agent for Appellant, accepted receipt of SW/NPDES Permit No. WV0111732 on behalf of Appellant.
4. On September 15, 1995, Appellant, through its counsel filed a Notice of Appeal with the Board regarding the terms and conditions of the permit. Attached to the Notice of Appeal is a Certificate of Service stating that the Notice of Appeal was filed on September 15, 1995. The appeal was hand delivered to the Environmental Quality Board where it was stamped "Received September 15, 1995".

RULINGS ON PROPOSED CONCLUSIONS OF LAW

After due consideration of each and every Conclusion of Law proposed by the parties, the Board hereby rejects, accepts, incorporates, or modifies each such proposed Conclusion of Law by adoption of the Board's own Conclusions of Law as they are set forth below:

CONCLUSIONS OF LAW

1. West Virginia Code § 22B -1-7 (1994) states that: "[a]n appeal filed with a board by a person subject to an order, permit for official action shall be perfected by filing a notice of appeal with the board within thirty days after the date upon which such order, permit or official action was received by such person as demonstrated by the date of receipt of registered or certified mail or of personal service."
2. The thirty-day limitation is clear, unambiguous and recognizes no exceptions.
3. Appellant did not perfect its appeal within the thirty-day time period.
4. The Environmental Quality Board has no basis or foundation for judicial action in this matter.

ORDERED this 21st day of November 1995.

Environmental Quality Board

Rebecca S. Charles for

Charles R. Jenkins
Chair

1995 WL 770822 (W.Va.Env.Quality.Bd.)

End of Document

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WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

**J.C. BAKER & SON, INC.
and BAKER OIL COMPANY,**

Appellants,

v.

Appeal No. 22-__-EQB

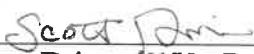
**KATHERYN D. EMERY, DIRECTOR,
DIVISION OF WATER AND WASTE
MANAGEMENT, WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**

Appellee.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the attached Appellee's Motion to Dismiss for Untimely Filing was served on the following persons by electronic mail on May 24, 2022, with hard copies served by United States Postal Service mail, first class, on the same date.

R. Terrance Rodgers, Esq.
Kay Casto & Chaney PLLC
Post Office Box 2031
Charleston WV 25327
trodgers@kaycasto.com



Scott Driver, W.Va. Bar ID #9846
West Virginia Department of
Environmental Protection
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