

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD  
CHARLESTON, WEST VIRGINIA

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

Appellants,

v.

Appeal No. 22-03-EQB

KATHERYN D. EMERY, P.E., DIRECTOR,  
DIVISION OF WATER AND WASTE  
MANAGEMENT, DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,

Appellee.

**APPELLANTS' MOTION TO BIFURCATE HEARING TO DETERMINE FIRST  
WHETHER APPELLANTS ARE OR WERE THE OWNER OR OPERATOR OF THE  
UNDERGROUND STORAGE TANKS (USTs) AT ISSUE IN THIS APPEAL**

Come now appellants J. C. Baker & Son, Inc. ("J. C. Baker") and Baker Oil Company ("Baker Oil") (J.C. Baker and Baker Oil are collectively "Appellants"), by their counsel, R. Terrance Rodgers, of Kay Casto & Chaney PLLC, pursuant to W.Va. Code R. 46 CSR § 4-6.13 and Rule 42(c) of the West Virginia Rules of Civil Procedure, and move that the West Virginia Environmental Quality Board ("Board") enter an order bifurcating the hearing on Appellants' appeal of the *Order Issued Under The Underground Storage Act West Virginia Code Chapter 22, Article 17*, Order No. UST-22-005 ("*Order*").

In the *Order*, appellee Katheryn D. Emery, P.E., Director, Division Of Water And Waste Management, Department of Environmental Protection ("Appellee"), is demanding certain remedial action by taken by Appellants as supposed "owner/operator" of the underground storage tanks ("USTs") which are the subject of the *Order*. Appellants have denied being the owner or operator of a significant majority of the USTs which are the subject of the *Order*. Therefore, a

key initial issue to be determined, before Appellants may be held responsible as provided in the *Order*, is whether either of them is, or has been, the owner or operator of the specific USTs at issue. Appellants have, therefore, filed this *Motion*.

Judicial economy will plainly be served if this *Motion* is granted by this Board, the hearing before this Board is bifurcated, and a conclusion first reached on the critical issue of ownership/operator status. If neither Appellant is determined to be an owner or operator of the particular UST at issue, then it will be unnecessary for this Board to consider the numerous alleged violations covering two decades, nor for this Board to examine what may well be hundreds, if not thousands, of pages of the nearly eight thousand pages of documents Appellee has made part of the "certified record" in this appeal, which documents supposedly support Appellee's position regarding the *Order*. At the very least, even if, for some reason, Appellants were found to be the owner or operator of a small number of the USTs at issue in this appeal, plainly the breadth of the issues to be tried at the hearing before this Board would be drastically reduced.

The *Order* requires submission of a plan of corrective action for USTs at the following thirteen (13) different sites for which Appellants are alleged to be the owners and/or operators of the USTs at those sites, supposedly triggering responsibility under W.Va. Code §§ 22-17-1 et seq.:

1. Linger's service station site in Buckhannon (Leak No. 92-289-L49);
2. Paul's service station site in Phillippi (Leak No. 92-306-L01);
3. Coastal Lumber Company site in Buckhannon (Leak No. 95-021);
4. Hamrick's service station site in Webster Springs (Leak No. 93-034);
5. W.J. Prince's service station site in Jane Lew (Leak No. 93-378);

6. Sample's service station site in Prociuous (Leak No. 92-074-L08);
7. Steve White's service station site in Gassaway (Leak No. 91-036-L04);
8. Coastal Lumber Company site in Hacker Valley (Leak No. 91-075-L51);
9. Clendenin service station site in Clendenin (Leak No. 91-008-L20);
10. Point C Mart located in Weston (Leak No. 94-035);
11. Young's service station site in Dille (Leak No. 94-066);
12. C. Adam Toney Discount Tires site in Summersville (Leak No. 94-056); and
13. Glenville service station site in Glenville (Leak No. 17-034).

On or about June 22, 2022, Appellee submitted the "certified record" with approximately 8,000 pages of documents which she contends supports the findings made in the *Order* with respect to the issues in dispute regarding those sites.

W. Va. Code R. 46 CSR § 4-6.13 incorporates appropriate rules of the West Virginia Rules of Civil Procedure into the proceedings before this Board. Rule 42(c) of the West Virginia Rules of Civil Procedure grants discretion to the court/tribunal to order "a separate trial of . . . any separate issue" in a proceeding "in furtherance of convenience . . . or when separate trials will be conducive to expedition and economy."

Here, bifurcation will further convenience, be conducive to expedition and economy, and conserve this Board's time and resources with respect to the need to consider many, if not all, of the alleged violations, regarding the USTs, if it is determined Appellants are not responsible

because they are not the owner(s) and/or operator(s) of the USTs as alleged in the *Order*. A determination by the Board on the issue of ownership or operation of the USTs will eliminate the need for this Board to consider any evidence, let alone the potential of hundreds if not thousands of pages of documents, on whether the leaks were caused by either or both Appellants if this Board determines that neither Appellants was or is the owner or operator of the USTs in question nor will this Board need to consider whether appropriate remediation has already been accomplished or is in the process of being accomplished.<sup>1</sup>

Appellee delayed over two decades before entering the *Order* regarding the supposed leaks, a delay most assuredly causing a loss of critical evidence as to the ownership/operator status of the USTs as most of the sites on which these USTs are located have changed hands since the installation of the USTs and the leaks supposedly occurred. Thus, there clearly is no compelling reason for Appellee to claim she would be prejudice by the granting of this *Motion*.

**WHEREFORE**, Appellants respectfully request that this Board grant this *Motion* and first determine the issue of which USTs are proven by Appellee to be, or to have been, owned and/or operated by one or the other of the Appellants.

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<sup>1</sup> For example, with respect to Steve White's service station site, Appellee was notified in 1991 that there had been previous USTs on that site owned by a prior owner, that J. C. Baker did not acquire that site until 1969, that J. C. Baker had never used these old USTs, and that use of that site as a gas station dated back to the 1930s. With respect to the Paul's service station site in Philippi, it too has a history of prior ownership and use as a gas station with older USTs once located on that site and, in addition, with other potential sources of contamination, such as a spill by the West Virginia Department of Highways in 1991 of apparently 2,000 gallons of diesel fuel that directed impacted that site, notice of which issues was given to Appellee. Thus, a critical issue is whether any contamination/leak at these sites are attributable to Appellants even apart from the ownership/operator issues. A resolution of the ownership/operator issue in favor of Appellants would obviate the need to address these other thorny issues. Obviously, before responsibility is to be assigned, it is critical that ownership or operation of the USTs must be established with respect to each UST. Moreover, not all violations alleged in the *Order* are the responsibility of Appellants and a narrowing of those for which each may be responsible will effectively further convenience, be conducive to expedition and economy, and conserve this Board's time and resources. Finally, the USTs and contaminated soil at the Glenville site has already been removed and the required remediation is currently on-going; accordingly, there is no justification for including any now-removed USTs on that site in this appeal.

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

Appellants,

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Appellee.

**CERTIFICATE OF SERVICE**

I, R. Terrance Rodgers, do hereby certify that, on this 22<sup>nd</sup> day of August, 2022, I served the forgoing *Appellants' Motion To Bifurcate Hearing To Determine First Whether Appellants Are Or Were The Owner Or Operator Of The Underground Storage Tanks (USTs) At Issue In This Appeal*, via electronic email to the Honorable Kenna M. DeRaimo, Clerk of the West Virginia Environmental Quality Board at [kenna.m.deraimo@wv.gov](mailto:kenna.m.deraimo@wv.gov), via email to Charles S. Driver, counsel for Kathryn D. Emery, P. E. , Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection, at [Charles.s.driver@wv.gov](mailto:Charles.s.driver@wv.gov), and via regular United States mail, postage prepaid, in envelopes addressed as follows:

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