

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

RECEIVED

SEP 9 2024

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

Environmental Quality
Board

Appellants,

v.

Appeal No. 22-03-EQB

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

Appellee.

**APPELLANTS' MOTION, PURSUANT TO RULE 15(b) OF THE WEST VIRGINIA
RULES OF CIVIL PROCEDURE AND THE INHERENT POWER OF THIS BOARD
TO AMEND ITS INTERLOCUTORY ORDERS, TO AMEND APPELLANTS'
"NOTICE OF APPEAL" TO CONFORM TO THE EVIDENCE ON THE ISSUE OF
FIXTURES AND/OR TRADE FIXTURES, AND TO CONTINUE THE HEARING
NOW SET FOR OCTOBER 10, 2024 SHOULD APPELLEE DEEM IT NECESSARY
IN ORDER TO ADEQUATELY PREPARE TO ADDRESS SAID AMENDMENT,
AND FOR THIS BOARD TO THEREAFTER AMEND ITS INTERLOCUTORY
ORDER ON THE ISSUE OF OWNERSHIP UPON ITS PROPER CONSIDERATION
OF WHETHER THE USTs AT ISSUE IN THIS APPEAL WERE FIXTURES
AND/OR TRADE FIXTURES**

Come now appellants J. C. Baker & Son, Inc. ("J. C. Baker, Inc.") and Baker Oil Company ("Baker Oil") (J.C. Baker, Inc. and Baker Oil are collectively "Appellants" or "Baker Companies"), by their counsel, R. Terrance Rodgers, of Kay Casto & Chaney PLLC, and hereby move the West Virginia Environmental Quality Board ("Board"), pursuant to this Board's inherent authority and in keeping with Rule 1.1 of the Procedural Rules Governing Appeals Before The Environmental Quality Board ("Procedural Rules"), pursuant to Rule 15(b) of the West Virginia Rules of Civil Procedure ("WVRCP"), made applicable to this appeal pursuant to Rule 6.13 of the Procedural Rules, and pursuant to the purpose of the Procedural Rules as stated in Rule 1.1 thereof,

and, in light of this Board's concern, as stated in the *Final Order (Owner of Subject USTs)* it entered on March 4, 2024 ("*Final Order*"), that it was refusing/declining to address whether West Virginia law on fixture and trade fixtures required a finding that the underground storage tanks ("USTs") at issue in this appeal were non-owned fixtures or trade fixtures because appellee Katheryn Emery, P.E., Director, Division Of Water And Waste Management, Department Of Environmental Protection ("Appellee" or "Ms. Emery" or "DEP"),¹ supposedly did not have adequate notice of Appellants' position even though Appellants denied ownership of the USTs at issue in this appeal based upon all state law, which clearly would include fixture and trade fixture law:

- (a) to permit Appellants to amend their *Notice Of Appeal* to conform to the evidence on their non-ownership of the USTs at issue in this appeal as they were non-owned fixtures or trade fixtures, which evidence was adduced at the Hearing, said amendment to include reference to one of the Appellants' legal grounds for denying ownership of the USTs, namely that, under West Virginia law, they were either landowner-owned USTs or tenant-owned USTs, and, thus fixtures or trade fixtures not owned by either of the Appellants²;
- (b) to permit Appellee to introduce evidence at the hearing on this appeal now set for October 10, 2024 on the issue of whether the USTs at issue in this appeal were fixtures or trade fixtures and so not owned by either of the Appellants ("Fixture Issue"), with the

¹ Ms. Emery is the named appellee in this appeal; however, throughout the hearing held on February 9 and 10, 2023 ("Hearing"), reference was made to the West Virginia Department Of Environmental Protection or DEP ("DEP"). Thus, for ease of reference, "DEP" will be utilized in this *Motion*.

² That Appellants were relying on West Virginia law, which would include West Virginia fixture and trade fixture law, in denying ownership in their *Notice Of Appeal*, is clear from their denial of ownership and their very specific denial on page 2 of their *Notice Of Appeal* that neither of the Appellants was the owner of any of the USTs at issue in this appeal "within the meaning of state and/or federal law governing the USTs." Clearly, fixture and trade fixture law is state law governing ownership or non-ownership of USTs.

Appellants being allowed to offer rebuttal evidence on the Fixture Issue should the DEP desire to offer evidence on the Fixture Issue at the October 10, 2024 hearing;

(c) to continue said October 10, 2024 hearing should the DEP deem it necessary to address the Fixture Issue; and

(d) to amend this Board's *Final Order* to address the Fixture Issue under the law of West Virginia on the Fixture Issue.

In support of this *Motion*, the Appellants state as follows.

1. Courts and other adjudicative tribunals have inherent authority to amend interlocutory orders at any time prior to the entry of a final order disposing of a litigated matter. The Supreme Court of Appeals of West Virginia ("Supreme Court") has held that as long as a tribunal has jurisdiction over a case, it continues to have the inherent procedural power to reconsider, rescind, or modify an interlocutory order. Syl. Pt. 4, Hubbard v. State Farm Indem. Co., 213 W.Va. 542, 584 S.E.2d 176 (2003); Vaughn v. Flanigan, No. 22-0183, 2023 WL 6012575 at fn. 1 (W.Va. Sept. 15, 2023); Farley v. Shook, 218 W.Va. 680, 629 S.E.2d 739, at fn. 2 (2006).

2. The Supreme Court and the Intermediate Court Of Appeals Of West Virginia have both declared the *Final Order* to be an interlocutory order, an order which, as stated above, this Board may, at any time, reconsider, rescind, or modify. See Exhibit A which is attached hereto and made a part hereof.

3. Rule 5.3 of the Procedural Rules clearly permits an appellant to an appeal to move to amend its notice of appeal.

4. Rule 1.1 of the Procedural Rules states the purpose of the Procedural Rules is to "provide a fair and orderly ascertainment of the facts and to promote the ends of justice and

fairness.” Thus, the goal is threefold – to ascertain the facts, to promote justice and to promote fairness, all in a fair and orderly manner.

5. In its *Final Order*, this Board refused to consider Appellants’ position that the USTs were non-owned fixtures or trade fixtures based on its conclusion, despite the Baker Companies’ clear denial based on all state law,³ that there had been no notice that Appellants were denying ownership of the USTs on the grounds they were either landowner-owned USTs or tenant-owned USTs, which mean neither of the Appellants owned them, and that the DEP, therefore, was supposedly denied the opportunity to prepare a defense regarding that denial.

6. Rule 15(b) of the WVRCP provides that

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

WVRCP, Rule 15(b) (emphasis added).

7. The DEP’s April 26, 2022 *Order Issued Under The Underground Storage Tank Act West Virginia Code, Chapter 22, Article 17* (“UST Order”), the order which is the subject of this appeal, specifically recites as its first Finding Of Fact in its charge against the Baker Companies that “[a]s owner and/or operator of the Underground Storage Tanks (USTs) at the time of releases

³ See footnote 1, *supra*.

from the USTs, [the] Baker [Companies] [are] the responsible party for confirmed releases at the following thirteen (13) facilities.” See Exhibit B which is attached hereto and made a part hereof.

8. In their *Notice Of Appeal*, Appellants clearly stated that “[n]either J.C. Baker nor Baker Oil is, or was, at any relevant time, the owner . . . of any of those certain underground storage tanks (“UST”) within the meaning of state . . . law governing the USTs located at” the named thirteen (13) sites. (Emphasis added). In addition, they asserted a specific objection to “Finding Of Fact No. 1 – that J.C. Baker and/or Baker Oil were found to be the owner . . . of the” USTs at issue in this appeal.⁴ See Exhibit C which is attached hereto and made a part hereof.

9. At the Hearing, the Fixture Issue was adequately raised and tried with the consent of the DEP. First, the DEP voluntarily entered into certain *Stipulations* which were the subject of numerous exchanged emails to get them into final form, with the DEP “balking” at times at the way some of the *Stipulations* were worded (See Exhibit D which is attached hereto and made a part hereof);⁵ ultimately the *Stipulations* were finalized, agreed to by both parties, and submitted to this Board on January 25, 2023. The *Stipulations* clearly established certain facts germane only to the issue of whether the USTs were fixtures or trade fixtures or neither, including facts establishing the ownership of the real property at certain sites, and the fact that neither of the Appellants ever owned or operated any of the gas stations or businesses on any of the site locations except one.⁶ Those facts stipulated to in the *Stipulations* clearly have relevance only to the Fixture Issue under West Virginia real property law regarding fixtures and trade fixtures.⁷

⁴ Furthermore, in the exhibits attached to their *Notice Of Appeal*, Appellants denied ownership of the USTs at issue in this appeal, and did so well before the DEP’s *UST Order* was ever entered and an appeal of that order filed. *See, e.g.,* Exhibit B to Appellants’ *Notice Of Appeal*.

⁵ Exhibit D consists of selected emails demonstrating the several month negotiation to reach the stipulations which were agreeable to both parties to this appeal.

⁶ Ownership of that site and its USTs was effectively admitted, but, as that site was currently being cleaned up as required by the DEP, that site was not included in this appeal.

⁷ Although the DEP charged the Baker Companies with being the “owner/operator” of the USTs, the DEP never presented evidence that either of them operated the USTs, never proposed any findings of fact on the issue of

Counsel for the DEP contended, but only after entering into the *Stipulations* and after their admittance at the Hearing, that the DEP supposedly agreed to the *Stipulations* because it believed they were irrelevant. See Exhibit E which is attached hereto and made a part hereof, *Appellee WVDEP'S Supplemental Brief*, footnote 2. However, the Procedural Rules require application of the West Virginia Rules Of Evidence (“WVRE”) and, under the WVRE, irrelevant evidence is not admissible. *See* WVRE, Rule 103(d) (irrelevant evidence is to be kept from the jury); Rule 402 (relevant evidence is admissible). It is unfathomable that the DEP would spend the amount of time it did making its objections to the wording of the *Stipulations* to ensure their precise wording was acceptable to the DEP, and then agreeing to their admission into evidence at the Hearing, if it seriously believed the *Stipulations* were irrelevant and, therefore, meaningless.

10. A key piece of evidence on the Fixture Issue, namely the *Stipulations*, was the very first piece of evidence entered into the record at the Hearing with the agreement of counsel for the DEP. See Exhibit F, which is attached hereto and made a part hereof, Transcript of Hearing on October 9, 2023 (“Trans. I”), pp. 7-8. Agreement to the admission of the *Stipulations* is the equivalent of not objecting to witness testimony on the ownership of the real property at each of the sites involved in this appeal; the *Stipulations* are the equivalent of uncontradicted witness testimony. Thus, the Fixture Issue was tried at the Hearing.⁸

11. The DEP itself introduced additional evidence on the Fixture Issue on the first day of the Hearing when counsel for the DEP inquired into the process by which Michael C. Baker’s (“Mr. Baker”), of the Baker Companies, began to revise his initial belief that one or the other of

operation of the USTs and, in fact, stipulated in the *Stipulations* that neither ever operated the “service station business” located at each of the sites, except that J.C. Baker did operate the Glenville site, which was not part of the proceedings at the Hearing.

⁸ This Board’s conclusion in its *Final Order* that no evidence on the Fixture Issue was offered at the Hearing, and which erroneous conclusion it relied on in refusing to address the Fixture Issue in its *Final Order* is, therefore, incorrect, and this Board’s reliance on such conclusion in refusing to consider the Fixture Issue was improper.

the Baker Companies owned the USTs at issue in this appeal. Counsel for the DEP asked Mr. Baker “at what point did you go from May 1990 where you believed you were the owner to February 9th of 2022 when you don’t believe you ever were the owner?” See Exhibit F, Trans. I, p. 154. Mr. Baker’s response was that “we thought the tanks were fixtures, you know, to the property, you know, that the landowner was the owner of the tanks.” See Exhibit F, Trans. I, p. 155. Counsel for the DEP’s questioning after eliciting this response resulted in approximately five (5) pages of questions and answers related to the Fixture Issue regarding this change in Mr. Baker’s understanding with respect to the issue of whether either of the Baker Companies owned any of the USTs, a change which he clearly explained to counsel for the DEP as having been based on his growing awareness of the implications of West Virginia law on fixtures and trade fixtures.

12. The DEP then introduced the Fixture Issue again when the DEP’s representative at the Hearing, Ruth M. Porter (“Ms. Porter”), outlined her background and qualifications. On the second day of the Hearing, Ms. Porter testified that, after she became the underground storage tanks program manager for the State of West Virginia, she “worked with the EPA on a research – responsibility party research for underground storage tanks program on a document that they were doing to provide guidance, nationwide, on how to find and determine who is the responsible party for underground storage tanks, and then I gave two national talks related to that topic.” See Exhibit G which is attached hereto and made a part hereof, Transcript of Hearing On October 10, 2023 (“Trans. II”), p. 8. Ms. Porter became a national expert on that topic and participated in the preparation of the *Responsible Party Search Guide For The Underground Storage Tank Program*, Appellants’ Exhibit 31 (“*Search Guide*”). See Exhibit H which is attached hereto and made a part hereof.

13. The *Search Guide* was admitted into evidence at the Hearing, as Appellants' Exhibit 31, without any objection by the DEP. See Exhibit G, Trans. II, pp. 94-95. Again, the only relevance of the *Search Guide* was its instruction that the ownership of USTs is to be determined by reference to state law, "including state property law, [which] may influence the definition of UST." See Exhibit H, *Search Guide*, Section 1.0 Fundamentals: RP Searches In The UST Program, p. 6. The *Search Guide* also notes that "[s]tates follow their own laws, including any applicable state property laws, when identifying UST owners. . . . For example, states may designate tanks as fixtures under state law . . ." See Exhibit H, *Search Guide*, Section 22.3.1 State Searches Compared To Federal Searches, p. 10 (emphasis added). Section 2.4 of the *Search Guide*, p. 11, then discusses in more detail the impact of fixture and trade fixture principles applicable to determining who is the owner of a UST.

14. The *Search Guide* was also the subject of questioning by counsel for the Board. Counsel for the Board elicited testimony on the *Search Guide* from Ms. Porter that the DEP follows "a lot of procedures" in the *Search Guide* and trains its employees on them. See Exhibit G, Trans. II, pp. 97-98. The DEP made no objection to this questioning.

15. "West Virginia Rules Of Civil Procedure, Rule 15(b), encourages amendments to conform to the evidence. . . This is to be liberally construed." Holiday Plaza, Inc. v. First Federal Saving and Loan Association Of Clarksburg, 168 W.Va. 356, 360, 285 S.E.2d 131 (1981) (emphasis added). Rule 15(b) of the WVRCP itself provides that amendment shall be freely given "when the presentation of the merits of the action will be subserved thereby." Clearly, a full presentation of the merits of the Fixture Issue will be subserved and promoted by the consideration of all the law applicable to whether or not either of the Appellants were ever the owners of the

USTs at issue in this appeal, including West Virginia's laws dealing with fixtures and trade fixtures.

16. Rule 15(b) of the WVRCP also provides that a tribunal may grant a continuance to enable the opposing party to meet the evidence. Thus, should the DEP require more time to meet the evidence presented at the Hearing on the Fixture Issue, Appellants have no objection to the grant of a reasonable amount of time for it to do so, including a continuance of the hearing currently scheduled to begin on October 10, 2024. Rule 15(b) clearly provides for such a continuance if requested.

WHEREFORE, Appellants request that this Board:

(a) grant this *Motion* and permit Appellants to amend their *Notice Of Appeal* to conform to the evidence adduced at the Hearing that Appellants denied ownership of the USTs at issue in this appeal on the basis of West Virginia law on fixtures and trade fixtures;

(b) permit the DEP to introduce evidence on the Fixture Issue if it chooses at the hearing now scheduled for October 10, 2024, with Appellants being permitted to introduce rebuttal evidence to any such evidence introduced by the DEP at said hearing;

(c) if requested by the DEP, grant a continuance of the October 10, 2024 hearing for the DEP to meet the evidence adduced at the Hearing on the Fixture Issue; and

(d) thereafter amend its *Final Order* to address the application of West Virginia law on the Fixture Issue.

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

Appellants,

BY COUNSEL:



R. TERRANCE RODGERS (WVSB #3148)

KAY CASTO & CHANEY PLLC

P. O. Box 2031

Charleston, West Virginia 25327

(304) 720-4217 / Telephone

(304) 345-8909 / Telefax

trodgers@kaycasto.com

EXHIBIT A

INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Apr 12 2024
03:13PM EDT
Transaction ID 72737443

J.C. Baker & Son, Inc., and
Baker Oil Company,
Appellants Below, Petitioners

v.) No. 24-ICA-143

Katheryn D. Emery, Director,
Division of Water and Waste
Management, West Virginia Department
of Environmental Protection,
Appellee Below, Respondent

DISMISSAL ORDER

On April 12, 2024, at a Regular Term of the Intermediate Court of Appeals of West Virginia, the following order was made and entered:

On April 3, 2024, Petitioners, J.C. Baker & Son, Inc., and Baker Oil Company, by counsel, R. Terrance Rodgers, Kay Casto & Chaney, PLLC, presented a notice of appeal from an order of the West Virginia Environmental Quality Board (Case No. 22-03-EQB) entered on March 4, 2024.

Under West Virginia Code § 51-11-4(b)(4), the Intermediate Court of Appeals “has appellate jurisdiction over . . . [f]inal judgments, orders, or decisions of an agency or an administrative law judge . . . heretofore appealable to the Circuit Court of Kanawha County pursuant to § 29A-5-4, or any other provision of this code” “The Intermediate Court of Appeals does not have appellate jurisdiction over . . . [i]nterlocutory appeals.” West Virginia Code § 51-11-4(d)(8). Accordingly, because this is an appeal of an interlocutory order of the West Virginia Environmental Quality Board, the Intermediate Court of Appeals lacks jurisdiction over this appeal.

Upon consideration and review on April 11, 2024, it is ordered that this matter is dismissed from the active docket of this Court.

A True Copy

Attest: /s/ Ashley N. Deem
Deputy Clerk of Court



STATE OF WEST VIRGINIA

SCA EFiled: Jun 04 2024
04:53PM EDT
Transaction ID: 73307299

At a Regular Term of the Supreme Court of Appeals, continued and held in Charleston, Kanawha County, on June 4, 2024, the following order was made and entered:

J.C. Baker & Son, Inc., and
Baker Oil Company,
Petitioners

v.) No. 24-311

Katherin D. Emery, Director,
Division of Water and Waste
Management, West Virginia Department
of Environmental Protection,
Respondent

ORDER

On April 18, 2024, the petitioners, J.C. Baker & Sons, Inc. and Baker Oil Company, by counsel R. Terrance Rogers, Kay Casto & Chaney PLLC, presented to the Court a motion to file a notice of appeal out of time, together with a notice of appeal, for the reasons stated.

Upon consideration and review, the Court is of the opinion to, and does, refuse the petitioner's motion. The notice of appeal is based on an order that is interlocutory and not immediately appealable. The Environmental Quality Board's March 4, 2024, order is not subject to an exception to the requirement that an appeal be taken from a final order under West Virginia Code § 58-5-1 and Rule 5 of the Rules of Appellate Procedure. Therefore, the appeal is not docketed in this Court. Justice Bunn would grant the motion and docket the appeal.

A True Copy

Attest: /s/ C. Casey Forbes
Clerk of Court



EXHIBIT B



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
9489 0090 0027 6402 6081 23

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

And

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: Kathryn 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 from 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 C

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

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

Appellants,

v.

Appeal No. _____

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

Appellee.

NOTICE OF APPEAL

Action Complained Of: Appellants J.C. Baker & Son, Inc. (“J.C. Baker”) and Baker Oil Company (“Baker Oil”) (J.C. Baker and Baker Oil are collectively “Appellants”) respectfully represent that they are aggrieved by the attached *Order Issued Under The Underground Storage Act West Virginia Code Chapter 22, Article 17*, Order No. UST-22-005 (“*Order*”), issued by appellee Kathryn Emery, P.E., Director of the Division of Water and Waste Management of the West Virginia Department of Environmental Protection (“WVDEP”) (“Appellee”), on April 26, 2022 (Exhibit A).

Relief Requested: Appellants therefore pray that the *Order* be reviewed by the West Virginia Environmental Quality Board (“Board”) and that the Board grant the following relief: Reverse all provisions of the *Order* and determine that:

a. Neither J.C. Baker nor Baker Oil is, or was, at any relevant time, the owner or operator of, or otherwise liable for, any of those certain underground storage tanks (“UST”) within the meaning of state and/or federal law governing the USTs located at:

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 Precious (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 Lewis County, WV (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 Sunoco site in Gilmer County, WV (Leak No. 17-034).¹

b. Neither J. C. Baker nor Baker Oil is liable, or has any responsibility, for any releases/leaks identified in the *Order*, or any other releases related to the Identified USTs which are the subject of the *Order*, under any environmental or other law governing USTs.

c. Vacate the *Order*'s "Order For Compliance" in full; and

d. Vacate the *Order*'s "Other Provisions" in full.

Specific Objections: Appellants' specific objections to the *Order*, including questions of fact and law to be determined by the Board, are set forth in detail in the separate numbered paragraphs below:

a. Appellants object to the following Findings Of Fact, and such Conclusions Of Law as are based on said Findings Of Fact, in the *Order*:

1. Finding Of Fact No. 1 - that J. C. Baker and/or Baker Oil were found to be the owner/operator of the Identified USTs;

2. Finding Of Fact No. 1 – that J. C. Baker and/or Baker Oil were found to be the responsible party for confirmed releases at the facilities identified in the *Order*;

3. Finding Of Fact Nos. 2-132 – that J. C. Baker and/or Baker Oil were found to be the owner(s) of the Identified USTs; and

4. All factual findings in Finding Of Fact Nos. 1-132;

b. Appellants object to the Appellee's apparent conclusion that the actions taken by Appellants in efforts to be good corporate citizens by their previous willingness

¹ The USTs which are or were located on the thirteen (13) sites identified above will collectively be referred to as "Identified USTs."

to address certain issues regarding the registration of the Identified USTs conferred ownership of, and/or responsibility for, the Identified USTs on Appellants;

c. Appellants object to the Appellee's apparent conclusion that the actions taken by Appellants in efforts to be good corporate citizens by their previous willingness to address certain issues regarding leaks from the Identified USTs conferred ownership of, and/or responsibility for, the Identified USTs on Appellants;

d. Appellants object to all grounds on which the Appellee apparently relies in concluding that Appellants owned, or is otherwise responsible for, any of the Identified USTs;

e. Appellants object to the complete failure of the Appellee to address the facts and points recited in Exhibit B attached hereto, an email from Appellants, dated February 24, 2022, with attachments, said email and attachments demonstrating that Appellants only delivered product to the sites referenced in the *Order*, and did not own or operate, and are not otherwise responsible for, the Identified USTs to which the product was delivered; included in said email and attachments is evidence of Appellee's failure to proceed against the entities who did own and/or operate and/or who are otherwise responsible for the Identified USTs as revealed in, or whose identities could be ascertained from information in, the invoices and ledger sheets supplied by Appellants in Exhibit B;

f. Appellants object to the complete failure of the Cabinet Secretary of the WVDEP to address the facts, points and law recited in Exhibit C attached hereto, Appellants' notice of request for reconsideration of the *Order*, dated May 3, 2022, with attachments, said notice and attachments demonstrating that Appellants only delivered

product to the sites referenced in the *Order*, and did not own or operate, and are not otherwise responsible for, the Identified USTs to which the product was delivered; included in said notice and attachments is evidence of Appellee's failure to proceed against the entities who did own and operate and/or who are otherwise responsible for the Identified USTs as revealed in, or whose identities could be ascertained from information in, the invoices and ledger sheets supplied by Appellants in Exhibit C;

g. Appellants object to any conclusion in the *Order* that any contamination at Paul's service station site in Phillippi (Leak No. 92-306-L01) emanated from the Identified USTs at that site for which Appellee has concluded one of the Appellants is responsible, given that:

i. there have been one or more service stations operating at this site since circa 1940s (well before the 1976, 1984 and 1985 installations of USTs by Baker Oil), the USTs for any one of which could have been responsible for any contamination;

ii. in 1991, the West Virginia Division of Highways ("WVDOH") released over 2000 gallons of diesel fuel that directly impacted this site and the WVDOH undertook no clean-up measures to correct such contamination of this site;

iii. there no credible evidence that any leak came from any of the Identified USTs which Appellee claims was installed and/or owned by Baker Oil;

h. Appellants object to any conclusion in the *Order* that there is any leak and/or other problems requiring remediation at the Glenville Sunoco site in Gilmer County and further object on the grounds that the Glenville Sunoco site in Gilmer County was not

discussed at the January 22, 2022 meeting, nor was it mentioned in the WVDEP's January 25, 2022 email to Appellants.

i. Appellants further object to the *Order* on the grounds there is no credible evidence that any of the contamination on the sites listed above came from any of the Identified USTs for which the Appellee wrongfully attributes ownership, or other grounds supporting responsibility, to Appellants inasmuch as gas stations operated on most, if not all, of the sites for decades before the identified leaks and, furthermore, on many, if not all, of the sites, USTs had been replaced over the years, such that there is no evidence that any of the Identified USTs for which Appellee wrongfully attributes ownership, or other grounds supporting responsibility, to Appellants were the ones which leaked, causing the contamination.

Appellants deny they have any responsibility for the leaks recited in the *Order* on any grounds or under any theory of law.

Appellants request that, pursuant to 46 CSR §§ 4-5.6, 4-6.1, and 4-6.9, the Board: (1) establish a discovery schedule; (2) schedule an evidentiary hearing for a date after conclusion of discovery; and (3) establish a post-evidentiary briefing schedule.


Amendment of this *Notice Of Appeal* may be had only by leave of the Board, and only for good cause shown.

Dated this 31st day of May, 2022.

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

Appellants,

BY COUNSEL:



R. TERRANCE RODGERS (WVSB #3148)
KAY CASTO & CHANEY PLLC
P. O. Box 2031
Charleston, West Virginia 25327
(304) 720-4217 Telephone
(304) 345-8900 Fax
tr Rodgers@kaycasto.com

EXHIBIT D

R. Terrance Rodgers

From: MICHAEL BAKER <michaelcbaker@hotmail.com>
Sent: Wednesday, January 25, 2023 4:09 PM
To: R. Terrance Rodgers
Subject: Fw: J. C. Baker & Son, Inc., et al. v. West Virginia Department of Environmental Protection; Appeal No. 22-03-EQB (WV Environmental Quality Board)
Attachments: 01-25-23 Letter to Clerk with Stipulations (01798370xA377B).pdf
Follow Up Flag: Copied to Worldox (Main Docs\0126405\000055\01798964.MSG)

[Caution, External Email]

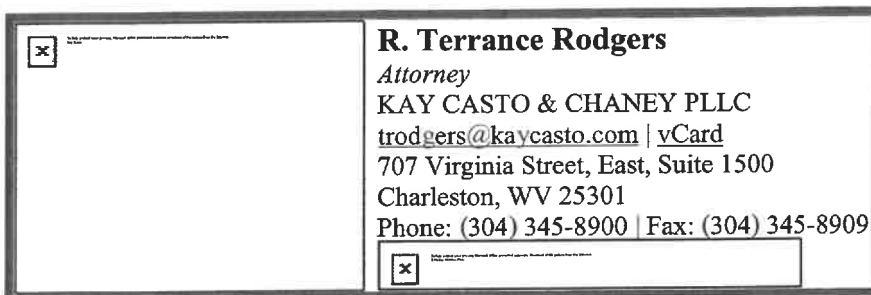
Terry - #25 JCB still owns Glenville .

From: R. Terrance Rodgers <trodgers@kaycasto.com>
Sent: Wednesday, January 25, 2023 3:32 PM
To: kenna.m.deraimo@wv.gov <kenna.m.deraimo@wv.gov>
Cc: Driver, Charles S <charles.s.driver@wv.gov>; brooke.hirst@wv.gov <brooke.hirst@wv.gov>; Karen S. Rodgers <krodgers@kaycasto.com>
Subject: J. C. Baker & Son, Inc., et al. v. West Virginia Department of Environmental Protection; Appeal No. 22-03-EQB (WV Environmental Quality Board)

Ms. DeRaimo,

Attached please find a copy of my January 25, 2023 correspondence to you as well as the document which was enclosed with said correspondence, that document being certain *Stipulations* for filing in your office in the above-referenced appeal. A hard copy of the same has been mailed. If you have any questions, please do not hesitate to call me at (304) 720-4217 or email me at trodgers@kaycasto.com.

Terry



Confidentiality Notice: This e-mail and any attachments are confidential and may be protected by legal privilege. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of this e-mail or any attachment is prohibited. If you have received this e-mail in error, please notify us immediately by returning it to the sender, delete this copy from your system and destroy all printed copies. Thank you for your cooperation.

R. Terrance Rodgers

From: Hirst, Brooke <brooke.hirst@wv.gov>
Sent: Thursday, January 12, 2023 9:27 AM
To: R. Terrance Rodgers
Cc: Scott Driver
Subject: Re: J. C. Baker & Son, Inc., et al. v. West Virginia Department of Environmental Protection; Appeal No. 22-03-EQB (West Virginia Environmental Quality Board) – Ownership of the Hamrick's Service Station Site Real Property

[Caution, External Email]
Terry,

WVDEP will agree to stipulate that Baker Oil Company was never in the chain of title for and was never the owner of the real property for Hamrick's service station site, Steve White service station, Clendenin Service Station, Point C Mart, and C. Adam Toney Discount Tires.

Are you planning to send over any more deeds for our review? I believe the only site I have not reviewed deeds for is the Glenville Sunoco.

On Wed, Jan 11, 2023 at 4:21 PM R. Terrance Rodgers <trodgers@kaycasto.com> wrote:

Scott and Brooke,

In the past, I have sent you numerous Deeds for the various real properties for certain sites at issue in the above-referenced appeal. I did so to demonstrate to the West Virginia Department of Environmental Protection ("WVDEP") that neither J.C. Baker & Son, Inc. nor Baker Oil Company was ever in the chain of title for and never the owner of the real properties for those particular sites.

With this email, I am now forwarding you certain Deeds showing the ownership of the real property for the Hamrick's service station site which is the subject of the above-referenced appeal; attached please find the following:

1. Deed, dated March 5, 1945, by and between Hunter M. Bennett, et al., as grantors, and J. C. Baker, as grantee, as recorded with the Clerk of the County Commission of Webster County, West Virginia ("Webster County Commission Clerk"), on October 4, 1945, in Deed Book No. 89, at Page No. 608;
2. Deed, dated January 29, 1952, by and between J. C. Baker and Blanche Baker, as grantors, and Ruth Baker Smith, as grantee, as recorded with the Webster County Commission Clerk, on February 18, 1952, in Deed Book No. 110, at Page No. 370;



R. Terrance Rodgers

From: Hirst, Brooke <brooke.hirst@wv.gov>
Sent: Thursday, November 3, 2022 11:13 AM
To: R. Terrance Rodgers
Cc: Scott Driver; Karen S. Rodgers
Subject: Re: J. C. Baker & Son, Inc., et al. v. West Virginia Department of Environmental Protection; Appeal No. 22-03-EQB (West Virginia Environmental Quality Board) - REVISED Stipulations, Etc.
Attachments: Second Revised Draft of Stipulations from DEP.docx

[Caution, External Email]

Terry,

Revised Stipulations attached.

On Thu, Nov 3, 2022 at 10:50 AM Hirst, Brooke <brooke.hirst@wv.gov> wrote:

Terry,

I have made some changes to the revised stipulations you sent over and I will get those to you here shortly in a track changes format so that you can clearly see the changes I made. Nothing too major.

On Tue, Nov 1, 2022 at 4:07 PM R. Terrance Rodgers <trodgers@kaycasto.com> wrote:



Scott and Brooke,

I certainly understand and appreciate the fact that the evidentiary hearing before the West Virginia Environment Quality Board has been continued until January 2023. However, I was wondering if you had a chance to review the revised Stipulations which I forwarded to you last Monday and which are attached hereto. If so, are they acceptable? Please let me know, one way or the other.

Scott,

When we last spoke, I specifically asked you about why the West Virginia Department of Environmental Protection would not stipulate that neither J.C. Baker & Son, Inc. nor Baker Oil Company were ever the "operators" of any of the underground storage tanks ("USTs") at any of the sites other than the Glenville Sunoco site. You mentioned something about the fact that J.C. Baker & Son, Inc. and Baker Oil Company had obtained insurance coverage on those USTs, and that somehow made J.C. Baker & Son, Inc. and/or Baker Oil Company the "operators" of those USTs. I responded by indicating that I did not see how obtaining insurance coverage gave either J.C. Baker & Son, Inc. or Baker Oil Company "control of, or having responsibility for, the daily operation of" those USTs. You replied by indicating you would make an inquiry with the West Virginia Department of Environmental Protection and get back in touch with me. Have you had a chance to make that inquiry? If so, what was the result of that inquiry? If not, please let me know when you might be making that inquiry and getting back in touch with me. In either event, I look forward to receiving your reply.

Terry

	<p>R. Terrance Rodgers <i>Attorney</i> KAY CASTO & CHANEY PLLC trodgers@kaycasto.com vCard 707 Virginia Street, East, Suite 1500 Charleston, WV 25301 Phone: (304) 345-8900 Fax: (304) 345-8909</p> 
--	---

Confidentiality Notice: This e-mail and any attachments are confidential and may be protected by legal privilege. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of this e-mail or any attachment is prohibited. If you have received this e-mail in error, please notify us immediately by returning it to the sender, delete this copy from your system and destroy all printed copies. Thank you for your cooperation.

R. Terrance Rodgers

From: Hirst, Brooke <brooke.hirst@wv.gov>
Sent: Thursday, November 3, 2022 10:50 AM
To: R. Terrance Rodgers
Cc: Scott Driver; Karen S. Rodgers
Subject: Re: J. C. Baker & Son, Inc., et al. v. West Virginia Department of Environmental Protection; Appeal No. 22-03-EQB (West Virginia Environmental Quality Board) - REVISED Stipulations, Etc.

[Caution, External Email]

Terry,

I have made some changes to the revised stipulations you sent over and I will get those to you here shortly in a track changes format so that you can clearly see the changes I made. Nothing too major.

On Tue, Nov 1, 2022 at 4:07 PM R. Terrance Rodgers <trodgers@kaycasto.com> wrote:

Scott and Brooke,

I certainly understand and appreciate the fact that the evidentiary hearing before the West Virginia Environment Quality Board has been continued until January 2023. However, I was wondering if you had a chance to review the revised Stipulations which I forwarded to you last Monday and which are attached hereto. If so, are they acceptable? Please let me know, one way or the other.

Scott,

When we last spoke, I specifically asked you about why the West Virginia Department of Environmental Protection would not stipulate that neither J.C. Baker & Son, Inc. nor Baker Oil Company were ever the "operators" of any of the underground storage tanks ("USTs") at any of the sites other than the Glenville Sunoco site. You mentioned something about the fact that J.C. Baker & Son, Inc. and Baker Oil Company had obtained insurance coverage on those USTs, and that somehow made J.C. Baker & Son, Inc. and/or Baker Oil Company the "operators" of those USTs. I responded by indicating that I did not see how obtaining insurance coverage gave either J.C. Baker & Son, Inc. or Baker Oil Company "control of, or having responsibility for, the daily operation of" those USTs. You replied by indicating you would make an inquiry with the West Virginia Department of Environmental Protection and get back in touch with me. Have you had a chance to make that inquiry? If so, what was the result of that inquiry? If not, please let me know when you might be making that inquiry and getting back in touch with me. In either event, I look forward to receiving your reply.

Terry

R. Terrance Rodgers

From: R. Terrance Rodgers
Sent: Tuesday, November 1, 2022 4:07 PM
To: Driver, Charles S; brooke.hirst@wv.gov
Cc: Karen S. Rodgers
Subject: J. C. Baker & Son, Inc., et al. v. West Virginia Department of Environmental Protection; Appeal No. 22-03-EQB (West Virginia Environmental Quality Board) - REVISED Stipulations, Etc.
Attachments: REVISED DRAFT of Stipulations - REVISED 10-21-2022 (01766049xA377B).pdf

Scott and Brooke,

I certainly understand and appreciate the fact that the evidentiary hearing before the West Virginia Environment Quality Board has been continued until January 2023. However, I was wondering if you had a chance to review the revised Stipulations which I forwarded to you last Monday and which are attached hereto. If so, are they acceptable? Please let me know, one way or the other.

Scott,

When we last spoke, I specifically asked you about why the West Virginia Department of Environmental Protection would not stipulate that neither J.C. Baker & Son, Inc. nor Baker Oil Company were ever the "operators" of any of the underground storage tanks ("USTs") at any of the sites other than the Glenville Sunoco site. You mentioned something about the fact that J.C. Baker & Son, Inc. and Baker Oil Company had obtained insurance coverage on those USTs, and that somehow made J.C. Baker & Son, Inc. and/or Baker Oil Company the "operators" of those USTs. I responded by indicating that I did not see how obtaining insurance coverage gave either J.C. Baker & Son, Inc. or Baker Oil Company "control of, or having responsibility for, the daily operation of" those USTs. You replied by indicating you would make an inquiry with the West Virginia Department of Environmental Protection and get back in touch with me. Have you had a chance to make that inquiry? If so, what was the result of that inquiry? If not, please let me know when you might be making that inquiry and getting back in touch with me. In either event, I look forward to receiving your reply.

Terry

 <p>KAY CASTO & CHANNEY <i>Law. Business. Life.</i></p>	<p>R. Terrance Rodgers <i>Attorney</i> KAY CASTO & CHANEY PLLC trodgers@kaycasto.com vCard 707 Virginia Street, East, Suite 1500 Charleston, WV 25301 Phone: (304) 345-8900 Fax: (304) 345-8909  MERITAS® LAW FIRMS WORLDWIDE</p>
---	---

Confidentiality Notice: This e-mail and any attachments are confidential and may be protected by legal privilege. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of this e-mail or any attachment is prohibited. If you have received this e-mail in error, please notify us immediately by returning it to the sender, delete this copy from your system and destroy all printed copies. Thank you for your cooperation.

R. Terrance Rodgers

From: Driver, Charles S <charles.s.driver@wv.gov>
Sent: Wednesday, October 12, 2022 8:03 AM
To: R. Terrance Rodgers
Cc: brooke.hirst@wv.gov; Ruth M Porter
Subject: Re: J.C. Baker & Son, Inc., et al. v. West Virginia Department of Environmental Protection; Appeal No. 22-03-EQB (WV Environmental Quality Board) – DRAFT of Stipulations

[Caution, External Email]

Terry, we haven't had a chance to review yet, but the problem stipulations that immediately and obviously stand out are those that state that J.C. Baker never owned/operated _____ tanks for legal purposes. Obviously we're not going to agree to those, as ownership and operation is the literal only issue we're having a hearing on in November.

We'll look at the stipulations regarding ownership of real property, purchasing, and other matters in light of the documents you've sent over. It'll take longer than between now and tomorrow afternoon for us to do that, and I'm having my first eye surgery on Monday. I'm going to confirm with everyone but I'd suggest Wednesday of next week.

I've cc'ed Ruth on this e-mail to keep her in the loop.

Scott

On Wed, Oct 12, 2022 at 6:28 AM R. Terrance Rodgers <trodgers@kaycasto.com> wrote:

Scott,

Thanks for the response. I am not sure what you mean by your statement about your thinking that the West Virginia Department of Environmental Protection ("WVDEP") probably will not be stipulating that J. C. Baker & Son, Inc. "never owned or operated anything." I am particularly concerned about that statement considering all the deeds and other documents I provided you which clearly demonstrate that J. C. Baker & Son, Inc., as well as Baker Oil Company, never owned the real property for seven (7) of the sites at issue in the above-referenced appeal. What documents does the WVDEP have which demonstrate that J. C. Baker & Son, Inc. or Baker Oil Company ever owned said real property? I will await your further response. I am certainly hopeful you can agree to each of the stipulations since they were stated in such a way to be accurate and not overreaching.

Terry

R. Terrance Rodgers

From: R. Terrance Rodgers
Sent: Tuesday, October 11, 2022 5:25 PM
To: 'charles.s.driver@wv.gov'
Cc: brooke.hirst@wv.gov
Subject: J.C. Baker & Son, Inc., et al. v. West Virginia Department of Environmental Protection; Appeal No. 22-03-EQB (WV Environmental Quality Board) – DRAFT of Stipulations INITIAL DRAFT of Stipulations - 10-11-2022 (01763759xA377B).docx

Attachments:

Follow Up Flag: Copied to Worldox (Main Docs\0126405\000055\01763798.MSG)

Scott,

Attached please find a DRAFT of the *Stipulations* we have prepared to submit to the West Virginia Environmental Quality Board in connection with the above-referenced appeal. Would you be available for me to call you at 3:00 p.m., on Thursday, October 13, 2022, to discuss these DRAFT *Stipulations*? If so, please simply let me know that to be the case and please provide a telephone number at which I can reach you at that time. If that is not a good time for me to call you, please provide me with a couple alternative times/dates when you would be available for me to call you. In either event, I look forward to receiving your reply.

Terry

 <p>KAY CASTO & CHANEY <i>Law. Business. Life.</i></p>	<p>R. Terrance Rodgers <i>Attorney</i> KAY CASTO & CHANEY PLLC trodgers@kaycasto.com vCard 707 Virginia Street, East, Suite 1500 Charleston, WV 25301 Phone: (304) 345-8900 Fax: (304) 345-8909 </p>
---	---

Confidentiality Notice: This e-mail and any attachments are confidential and may be protected by legal privilege. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of this e-mail or any attachment is prohibited. If you have received this e-mail in error, please notify us immediately by returning it to the sender, delete this copy from your system and destroy all printed copies. Thank you for your cooperation.

EXHIBIT E

**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, DIRECTOR,
DIVISION OF WATER AND WASTE
MANAGEMENT, WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**

Appellee.

APPELLEE WVDEP'S SUPPLEMENTAL BRIEF

The Appellee, Katheryn D. Emery, Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection ("WVDEP"), by counsel, hereby submits this supplemental brief as ordered by the West Virginia Environmental Quality Board ("Board").

On February 9-10, 2023, the Board held an initial evidentiary hearing before a quorum of the Board and the Board's legal counsel on the limited issue of ownership and operation. All parties appeared by counsel. At the conclusion of the evidentiary hearing, the Board ordered the Parties to submit proposed findings of fact and conclusions of law, along with subsequent responsive pleadings, on a schedule determined by the Board.

On September 18, 2023, after the Parties submitted the above pleadings, the Board ordered the Parties to provide additional briefing on the following two issues¹:

¹ The Board's order requests only that these two specific questions be addressed. Accordingly, this brief is solely and narrowly tailored to address these two specific questions. Argument as to the actual application of the law of fixtures has already been offered in previous pleadings and is, as necessary, incorporated herein.

1. Is it necessary for the Board to perform a personal property fixture analysis as set forth in *Snuffer v. Spangler*, 79 W.Va. 626, 92 S.E. 106 (1917) and *In re Weikle*, No. 1:17-BK-10001, 2017 WL 4127994 (Bankr. S.D.W.Va. 2017)?
2. May the Board assess the evidence in the record, or lack thereof, in determining ownership without performing that analysis?

The answer to each of the above questions is “no.” In support of its position, WVDEP states as follows.

PREVIOUS STIPULATIONS AND AGREEMENTS

As detailed in previous pleadings and on the record, the Parties stipulated to the authenticity of various titles, deeds, and real estate documents offered by the Appellants and entered into the record. WVDEP acknowledges and affirms these stipulations.²

As detailed in previous pleadings and on the record, the Parties and the Board have stated that all materials contained in the Certified Record in this appeal may be used by the Parties in their pleadings, with the weight afforded such evidence to be determined by the Board. WVDEP acknowledges and affirms this position.

I. The Appellants Bear the Initial Burden of Proof

The assignment of the burden of proof in this matter has been argued at length, with the Board having repeatedly and explicitly reiterated that, pursuant to legal precedent and the Board’s rules, the initial burden of proof lies with the Appellants. WVDEP responds to those issues that are raised. As the Appellants did not offer any evidence at the evidentiary hearing regarding material facts relevant to the fixtures issue, they did not meet their burden of proof as to that issue.

² It is a settled matter that the ownership of the real property on which underground storage tanks (“USTs”) are present and that of the USTs themselves may be held by separate persons or entities. Accordingly, WVDEP maintains that the documents are irrelevant.

As the Board notes, the fixtures issue was not raised by the Appellants prior to or during the hearing. The Appellant only raised the issue after the hearing, denying WVDEP the opportunity to object to any evidence offered, to cross-examine witnesses, to offer its own evidence or witnesses as to contrary intent, or to otherwise contest material factual issues raised during the evidentiary portion of the proceedings. The Board and its counsel also had no opportunity to explore the issue, nor were they made aware that there was an issue to explore.

Again, the Appellants bear the initial burden of proof as to issues on appeal. The Appellants cannot meet that burden as to issues that are not raised, nor can WVDEP respond to such issues.

II. *Snuffer* and *Weikle* provide a test for analysis of the fixtures issue and this test can be performed without analysis of factual components.

Snuffer provides a three-pronged test to determine whether personal property used in connection with real estate constitutes a fixture:

First, It must be attached to the real estate, and by this we do not mean that it has to become so attached as to do serious damage to the realty, or to the property itself in order to remove it, but that it must be so attached as that the two, the real estate and the fixtures, work together to one end; *second*, it must be reasonably necessary and adapted to the purposes for which the real estate is being used; and, *third*, it must be the intention of the party placing such property upon the real estate to make it a part thereof. If the first two of these elements concur -- that is, its attachment to the real estate and its adaptability to the purposes for which the real estate is being used -- it will be presumed that the party attaching it intended that it should be a part of the real estate, **unless a contrary intention appears from the conduct of the parties in relation to it.** (Italic emphasis in original, bold emphasis added.)

Weikle elaborates further on the *Snuffer* test by clarifying that WVDEP is afforded the opportunity to address the intention of the placing party, stating that “[w]hen the first two requirements are satisfied, **there is a rebuttable presumption** that the party intended to create a fixture.” (Emphasis added.)

To apply the test, all three prongs must be analyzed. The third prong of the *Snuffer* test requires consideration of evidence of the placing party's intent, a central factual issue necessary to perform the analysis. The Appellants did not raise the issue at all, whether regarding the satisfaction of the first two prongs or the establishment of any presumption as to the third. Not only did the Appellants not meet their initial burden of proof as to the fixtures issue, but neither WVDEP nor the Board were made aware of an issue to respond to or consider.

Again, under the burden of proof standard provided for by law and adopted by the Board, WVDEP responds to factual evidence and proof offered during the Appellants' case in chief. WVDEP can neither respond to evidence nor rebut a presumption without those having been raised.

Nonetheless, the fixtures issue was raised only in the post-hearing pleadings after the opportunity had passed for WVDEP counsel to object to any evidence offered, to cross-examine witnesses, to offer its own evidence or witnesses as to contrary intent, or to otherwise contest material factual issues raised during the evidentiary portion of the proceedings. Again, the Board and its counsel had no opportunity to explore the issue, nor were they made aware that there was an issue to explore.

CONCLUSION

The Board requires the Appellants to raise any issues on appeal, to offer evidence, and to bear the initial burden of proof during the evidentiary hearing. WVDEP then bears the burden of responding to any such issues raised or evidence offered. The fixtures issue, which involves analysis of factual matters subject to WVDEP's opposition, was not raised prior to or during the evidentiary hearing.

The evidentiary hearing is, by definition, the method by which the Board hears evidence.

Evidence regarding factual matters is required in order to perform an analysis of the fixtures issue. An analysis performed without the benefit of hearing such evidence is inappropriate and in fact impossible. The Board has insufficient evidence with which to perform the analysis.

PRAYER FOR RELIEF

WVDEP therefore moves the Board to decline to perform an analysis of the fixtures issue, the required record for such analysis being incomplete and insufficient due to the Appellants' failure to properly raise the issue or to provide any required proof of central factual matters during the evidentiary hearing.

Respectfully Submitted,
KATHERYN D. EMERY
By Counsel

\s\Scott Driver
Scott Driver, W.Va. Bar ID #9846
Office of Legal Services
West Virginia Department of
Environmental Protection
601 57th Street SE
Charleston WV 25304
Telephone: (304) 926-0460 x 1453
E-mail: charles.s.driver@wv.gov

EXHIBIT F

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

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

Appellants,

Case No: 22-03-EQB

vs.

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

Appellee.

Original

HEARING

FEBRUARY 9, 2023

Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Denys Snodgrass
Certified Court Reporter

GARRETT REPORTING SERVICE
"PROFESSIONAL STENOMASK FOR THE RECORD"

1 subject to cross-examination by any other party of the
2 appeal or by board members. At the conclusion -- and of
3 course, our counsel.

4 At the conclusion of the appellant's case,
5 the appellee may then present testimony and offer
6 exhibits. After initial presentations have been made,
7 both the appellant and the appellee may present rebuttal
8 evidence on the issues of the case, providing that such
9 evidence is not cumulative, repetitive or immaterial to
10 the case.

11 Now, the board did receive some stipulations
12 prior to the hearing. Who would like to address the
13 information that was sent to the board? Mark, do you
14 have any input as to where we want to go from here?

15 MR. RODGERS: Sir, stipulations were filed in
16 this matter in this appeal on January 25, 2023. These
17 stipulations are the result of efforts of Mr. Driver, Ms.
18 Hirst and Ms. Rodgers and me to try to narrow, at least
19 come to an agreement on the facts that we could agree to
20 and put those to the board.

21 It's -- the document, including the
22 certificate of service is 15-page long and -- or not
23 including the certificate of service -- excuse me. I
24 think it will hopefully help the board and all of us here

1 today to make this go smoother. I know I don't plan on
2 discussing these stipulations, but for purposes of the
3 record, I'd move that these stipulations be admitted.

4 CHAIRMAN SNYDER: Thank you.

5 MR. DRIVER: We agree, Dr. Snyder.

6 CHAIRMAN SNYDER: Thank you. Yeah. Thank
7 you, Mr. Driver. Okay. So that will be so moved. They
8 will be admitted and, hopefully adhered to by the
9 parties.

10 *****

11 (WHEREUPON, JOINT EXHIBIT 1
12 WAS ADMITTED WITHOUT OBJECTION
13 AND MADE PART OF THE RECORD.)

14 *****

15 CHAIRMAN SNYDER: Any -- after stipulations,
16 do you have any preliminary motions, anything the parties
17 wish to do before we proceed?

18 MR. RODGERS: Sir, the only thing that I
19 would raise is that -- and we raised it before and it's
20 already part of this appeal, and that is, I'm not --
21 we're not sure, the appellants aren't sure that the state
22 of the review that the board plans on applying is
23 correct, but that will be part of an appeal, if there
24 needs to be to a higher court. But we filed a motion.

1 A. I'm sorry. I was looking at that form.

2 Q. That's all right. I'll ask it again. This
3 correspondence indicates at least on its face that at one
4 point, you believed J.C. Baker and Sons owned this tank,
5 Baker Oil purchased it from them. Was that your belief at
6 the time?

7 A. Yes.

8 Q. And you have subsequently revised your belief
9 and now believe that at no point did they actually own it
10 and the purchase never took place because no transfer
11 could've taken place; is that correct?

12 A. Yes.

13 Q. So it would be safe to say that at some
14 relevant times, you actually held the belief that a Baker
15 Oil Company owned the tanks associated with Linger Service
16 Station?

17 A. I mistakenly believed that when I signed this
18 form.

19 Q. How did you come to discover that that was
20 untrue and revise your opinion?

21 A. What makes me think that that's not true?

22 Q. At what point did you go from May of 1990
23 where you believed you were the owner to February 9th of
24 2022 when you don't believe you ever were the owner? What

1 changed your mind?

2 A. Well, part of it would be conversations that
3 I had with my counsel.

4 Q. So prior to retaining counsel in this case,
5 you held the belief that you were the owner?

6 A. No. What I'm saying is, you know, I was
7 questioning it in my own mind, but I never really sought
8 out Terry to dig into it and really go through everything.

9 Q. But you said what changed your mind was
10 conversations with him?

11 A. Yeah. Part of it was. Yeah.

12 Q. So for about 30 years, you believed you were
13 the owner; is that correct?

14 A. Well, I would -- you know, like I said, I
15 signed this form. At the time, I believed that the more
16 we dug into it, it seemed as though we had made a mistake
17 and prematurely registered the tanks as us being the
18 owner, and -- to me, you know, we thought the tanks were
19 fixtures, you know, to the property, you know, that the
20 landowner was the owner of the tanks.

21 Q. Could you describe the digging process to me?

22 A. The digging?

23 Q. Yeah. How did you dig into it and why?

24 A. I did a lot of research, of course, on the

1 that Baker Oil had purchased them? Did someone tell you
2 to write that? Was that your --

3 THE WITNESS: My recollection was it was
4 something to do with the insurance.

5 MR. WEILER: Okay.

6 THE WITNESS: But I really don't recall what
7 the reason.

8 MR. WEILER: Do you have any knowledge if
9 Baker Oil purchased several underground storage tanks from
10 J.C. Baker? I mean do you have any personal knowledge?

11 THE WITNESS: Do I have any personal
12 knowledge?

13 MR. WEILER: Yeah. That Baker Oil purchased
14 several underground storage tanks from J.C. Baker and
15 Sons?

16 THE WITNESS: I mean if J.C. Baker never
17 owned the tanks, then there wasn't a transfer.

18 MR. WEILER: I'm just asking what your
19 knowledge are, what's your knowledge? If you don't have
20 any knowledge, then let's get on with other witnesses.
21 That's what I'm getting at. You know what I mean? If you
22 don't have knowledge, just say it. If you do have
23 knowledge, tell us the knowledge.

24 I'm not trying to be tricky or anything here,

EXHIBIT G

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

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

Appellants,

Case No: 22-03-EQB

vs.

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

Appellee.

Original

HEARING

FEBRUARY 10, 2023

Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Denys Snodgrass
Certified Court Reporter

GARRETT REPORTING SERVICE
"PROFESSIONAL STENOMASK FOR THE RECORD"

1 counsel Brooke Hirst is actually going to be handling our
2 first witness, so I'll go ahead and pass over the mic to
3 her.

4 CHAIRMAN SNYDER: Okay. Ms. Hirst, I
5 should've let you just take care of it and not wait for
6 Mr. Driver. You were totally correct. I apologize.

7 MR. HIRST: That's all right. DEP would call
8 Ruth Porter to the witness stand.

9 *****

10 (WHEREUPON

11 RUTH PORTER

12 WAS CALLED AS A WITNESS

13 DULY SWORN AND TESTIFIED

14 AS FOLLOWS:)

15 *****

16 DIRECT EXAMINATION

17 *****

18 BY MS. HIRST:

19 Q. Good morning.

20 A. Good morning.

21 Q. Can you please state your name for the
22 record?

23 A. My name is Ruth Porter.

24 Q. And if you wouldn't mind spelling that for

1 the court reporter.

2 A. It's R-U-T-H, my last name is Porter, P-O-R-
3 T-E-R.

4 Q. And where are you employed and what is your
5 job title?

6 A. I am employed by the West Virginia Department
7 of Environmental Protection. I am the Tanks Program
8 Manager.

9 Q. And what type of degrees or certifications do
10 you have?

11 A. I have a degree in chemistry. I have a
12 Bachelor's of Science from Marshall University in
13 chemistry, and I have worked 18 hours towards a Master's
14 in organic chemistry. I have been working in the
15 environmental field for probably 30-some-plus years.

16 Q. And you stated that you're the Tanks Program
17 Manager, Correct.

18 A. That is correct. Yes.

19 Q. Can you briefly describe your duties as the
20 Tanks Program Manager?

21 A. Okay. So the Tanks Program actually has four
22 programs within it. It actually has the underground
23 storage tanks program, which I began managing in 2011.
24 In 2014, the AST program was added under my management,

1 and then in 2017, the leaking underground storage tank
2 and the leaking aboveground storage tank program was
3 added under my management.

4 And so I have statewide duties for managing
5 those programs, and that includes things, you know,
6 oversight of the prevention group, which is the ones that
7 do inspections, the corrective action unit, which does
8 remedial activities, and then we have an administrative
9 support staff that basically helps support all of the
10 programs. And they do things such as registration,
11 invoicing and things like that.

12 Q. Do you have any other experience related to
13 underground storage tanks?

14 A. Prior to the position in working as a program
15 manager in DEP, I worked earlier in my career as an
16 environmental consultant for about 12 years, and in doing
17 that, I did some UST-related work. I did Phase I and
18 Phase II site assessments as part of those duties.

19 Then I worked for about six years for the
20 West Virginia Department of Environmental Protection,
21 Office of Environmental Remediation as a project manager,
22 managing leaking underground storage tanks sites in four
23 counties in West Virginia. And then after I became the
24 underground storage tanks program manager, I worked with

1 EPA on a research -- responsible party research for
2 underground storage tanks programs on a document that
3 they were doing to provide guidance, nationwide, on how
4 to find and determine who is the responsible party for
5 underground storage tanks, and then I gave two national
6 talks related to that topic.

7 Q. Okay. Can you briefly describe the purpose
8 of the UST program that you're running here?

9 A. Well, it's to basically document and track
10 the underground storage tanks to ensure compliance with
11 the law and to document any releases that would occur
12 from underground storage tanks, and then to clean up
13 associated -- after a release occurs.

14 Q. And do you know how the State of West
15 Virginia is authorized to administer this program?

16 A. Yes. We were authorized to administer the
17 program through the Environmental Protection Agency. We
18 had to apply for state program approval to do so. That
19 was originally done early on in the program after the
20 federal rule came out, so there was state program
21 approval that was done at that time, and then we did it
22 again most recently in 2018. We had to go back through
23 state program approval.

24 Q. So can you give me like a brief overview of

1 don't know if the EPA published it in like a hardback book
2 or whatever, but it is clearly available on their website.

3 Q. Okay. I don't have any further questions.
4 Thank you very much for your time.

5 A. Okay. Thank you.

6 CHAIRMAN SNYDER: Thank you. Ms. Hirst?

7 MS. HIRST: Yes. I just have a few
8 questions.

9 *****

10 REDIRECT EXAMINATION

11 *****

12 BY MS. HIRST:

13 Q. Ms. Porter, is it permissible for an owner
14 and an operator of a UST to be two separate parties?

15 A. Yes.

16 Q. Is that a common arrangement?

17 A. Yes.

18 Q. would you undertake any type of responsible
19 party search efforts if you had numerous forms stating
20 that one party was an owner?

21 A. No. There would be no need to.

22 MS. HIRST: Okay. I have no further
23 questions.

24 MR. RODGERS: Nothing further, Chairman

1 Snyder.

2 CHAIRMAN SNYDER: Very good.

3 MR. WEILER: I just want to check one thing.
4 With regards to Appellant's Exhibit 28, do we have in the
5 record the email that was sent to Mr. Baker that generated
6 this response? Is that in the record as part of the
7 certified record or do we know?

8 MS. HIRST: The email previous to this email?

9 MR. WEILER: Yeah. It says, "In your
10 response in your January 25th email to me." I just didn't
11 know if that's made -- or if you have that.

12 MR. RODGERS: Can we go off the record?

13 MR. WEILER: Yeah.

14 *****

15 (Off the record.)

16 (On the record.)

17 *****

18 CHAIRMAN SNYDER: Okay. Are we on the
19 record, again?

20 MR. RODGERS: I'm sorry, Chairman.

21 CHAIRMAN SNYDER: So we're back on the
22 record?

23 MR. RODGERS: Yeah.

24 CHAIRMAN SNYDER: Please, Mr. Rodgers.

1 MR. RODGERS: The only other thing -- I have
2 two final things. One is I'd like to move the admission
3 of the various exhibits or documents that I used with Ms.
4 Porter, starting, I think, at Exhibit Number 9,
5 Appellant's Exhibit Number 9 through Appellant's Exhibit
6 Number 20, and then Appellant's Exhibits 28, 29 and 30 --
7 excuse me, 26, 28, 29 and 30 and 31. I need a lot of help
8 here, Chairman, and I'm getting a lot of help. I
9 appreciate it.

10 The only other thing that I -- do you have
11 another one, Ms. DeRaimo. You didn't have a 27?

12 MR. RODGERS: No, I did not. Similar to Mr.
13 Driver and Ms. Hirst, they had more exhibits than they
14 actually used, I have a few more exhibits.

15 MS. DERAIMO: Okay. I just wanted to make
16 sure.

17 MR. RODGERS: No. That's a good question.
18 Thank you very much. So I move for the admission of those
19 exhibits. with help from various people in the room, I
20 think I've clarified what the numbers are.

21 MS. HIRST: We have no objection.

22 CHAIRMAN SNYDER: Any objection?

23 MS. HIRST: None.

24 CHAIRMAN SNYDER: Okay. Thank you, Ms.

1 Hirst. So moved.

2 *****

3 (WHEREUPON, APPELLANT'S EXHIBITS 9 THROUGH 20
4 AND 26 THROUGH 31 WERE ADMITTED WITHOUT
5 OBJECTION AND MADE PART OF THE RECORD.)

6 *****

7 MR. RODGERS: Mr. Chairman, I have one final
8 thing and it was I think -- I thought we were on the
9 record, but we weren't on the record, so --

10 MR. WEILER: Well, first of all, let me see
11 if any of the board members have any questions.

12 MR. RODGERS: Okay.

13 CHAIRMAN SNYDER: Thank you. Questions from
14 board members?

15 MR. CAPELLI: None here.

16 MS. WINTERS: None here. Thank you.

17 DR. SOMERVILLE: Nothing from me. Thanks.

18 CHAIRMAN SNYDER: I don't have any questions.
19 Just with the email and the responses and that whole, I
20 want to make sure all that information is there and
21 available, so I can review that and look at how that sits
22 with the transcripts. I just want to make sure that all
23 of it trails in.

24 MR. DRIVER: And, Mr. Chairman, the guidance

1 document or however we want to refer to it that Ms. Porter
2 reviewed, I don't know if it was marked as an exhibit. It
3 is publicly available, but I just ask that the board gets
4 a copy of that to examine, too.

5 MR. RODGERS: That's Exhibit 21 -- 31.

6 Excuse me. That's Appellant's Exhibit 31. Everything has
7 been admitted. I think there might've been a few
8 documents that, again, were part of the file, except for
9 this very last one that were already part of the file, but
10 they may not have been provided to you, Chairman Snyder,
11 beforehand, and if there's anything that I can do to make
12 sure they get to you, just let me know.

13 MS. DERAIMO: I will scan them and make sure
14 you get them.

15 CHAIRMAN SNYDER: Thank you, Kenna.

16 MR. DRIVER: And that addresses my question,
17 Mr. Chairman.

18 MR. WEILER: I just had one question about
19 the guidance document. Do you know if this is being used
20 by the DEP in any way, Exhibit 31?

21 THE WITNESS: I don't know that we use the
22 guidance document so much, but I do work with staff on
23 explaining to them how to go through, determining a
24 responsible party. And since I helped with this document

1 and stuff, you know, we follow a lot of the procedures
2 that are in there.

3 I would note that the responsible party
4 search guide is really for when you don't know who the
5 responsible party is, when someone hasn't notified the
6 processes to go through to try to determine ownership
7 and/or operator.

8 MR. WEILER: If that generates any further
9 questioning.

10 MR. RODGERS: No. I was really just getting
11 her -- wanting her to authenticate the document.

12 MR. WEILER: Yeah.

13 CHAIRMAN SNYDER: Very good. Any additional
14 questions, comments from parties?

15 MS. HIRST: None.

16 MR. RODGERS: None, Mr. Chairman.

17 *****

18 (WHEREUPON, THE WITNESS STANDS ASIDE.)

19 *****

20 CHAIRMAN SNYDER: Okay. So I want to thank
21 everyone. I appreciate a lot of information, a lot of
22 things for us to review. The scheduling for the findings
23 of fact and conclusions of law that will be submitted, Mr.
24 Rodgers or if you guys agreed on what the board typically

EXHIBIT H



Responsible Party Search Guide For The Underground Storage Tank Program

1.0 Fundamentals: RP Searches In The UST Program

- An RP search in the UST program is defined as looking for the owner and/or operator responsible for an UST system
- Key points about owners and operators with regard to RP searches:
 - The landowner is not always the UST owner
 - State laws, including state property law, may influence the definition of UST owner and operator. State laws vary across the country
 - If EPA or a state uses site-specific Leaking Underground Storage Tank (LUST) Trust Fund money, the determination of owner must be based on the federal statutory definition of owner
- Basic information needed from an RP search in the UST program:
 - Owner name(s)
 - Operator name(s)
 - Street address of site
 - Current mailing address of owner(s) or operator(s)
 - Phone numbers or email addresses of owner(s) or operator(s)
 - Dates of ownership or operation
- You are not required to develop an RP search plan but it may be a good idea if you are new to RP searches. A plan can help organize your efforts and answer key questions such as:
 - Will the search be completed in-house, through a contract, or both?
 - What tasks are necessary to complete the search?
 - What on-line search resources are available (e.g., access to LexisNexis or other on-line subscription resources)? See Appendix E (p. 46) for other on-line resources.
 - Does the process require any review or input from others?
 - What will you do with the owner or operator information – enforcement, inventory, use LUST Trust Fund money, etc.?
- How do you identify and locate the responsible UST owner or operator? Here is a step-by-step example:
 - Determine the applicable definition of owner or operator
 - Compile available information from your agency's files
 - Do you have a name but need updated contact information?
 - Check with EPA or the state UST program for information on the USTs (e.g., enforcement actions, notification information, inspection reports)

2.3.1 State Searches Compared To Federal Searches

States follow their own laws, including any applicable state property laws, when identifying UST owners. In situations where federal UST regulations apply, state property law may also impact the federal definition of owner in that state. For example, states may designate tanks as a fixture under state law where the property owner may be considered the UST owner. See Section 2.4 (p. 11) for a discussion on fixtures. EPA may consider this designation when analyzing the federal definition of owner in the state. States have different real property and fixture laws; therefore, EPA's designation of owner under the federal regulations could vary from state to state.

The Basics: State definitions may vary from the federal definitions. State laws may impact the federal definition.

2.3.2 Definition Of Owner In Indian Country

EPA implements the UST program in Indian country and applies the federal definition of owner. In determining the owner under the federal definition, EPA may consider relevant tribal laws covering the area of Indian country at issue. Tribes may have laws under their own authorities addressing issues such as abandonment of fixtures that may be relevant to determining who is an owner of a tank. See Section 2.4 (p. 11) for a discussion on fixtures. EPA regions should consult their tribal program and legal experts because considerations regarding relevant tribal property and other laws can be complicated. EPA's Office of Underground Storage Tanks (OUST) and Office of Site Remediation Enforcement (OSRE) are available to discuss guidance and policy on EPA's implementation of the program in Indian country.

The Basics: In Indian country, the federal definition of owner applies. Tribal laws may be relevant in applying the federal definition.

2.3.3 Definition Of Owner When Using LUST Trust Fund Money

Federal regulations, which track the statutory definition, divide the definition of owner into two parts depending on whether the UST was *in use* on or after November 8, 1984.⁴ An owner means:

- In the case of an UST system in use on November 8, 1984, or brought into use after that date, any person who owns an UST system used for storage, use, or dispensing of regulated substances; and
- In the case of any UST system in use before November 8, 1984 but no longer in use on that date, any person who owned such UST immediately before the discontinuation of its use.

The Basics: When LUST Trust Fund money is used at an UST site, both EPA and the state must follow the statutory federal definition of owner and operator.

⁴ 42 U.S.C. § 6991.

An UST is considered *in use* if it is used to store or dispense a regulated substance (e.g., product). If an UST contains a regulated substance, it would be *in use* even if the potential owner did not dispense fuel or operate the UST system or cause any suspected contamination.⁵ Whether an UST is storing a regulated substance can be evaluated based on the description of empty in 40 CFR 280.70 as follows: “The UST system is empty when all materials have been removed using commonly employed practices so that no more than 2.5 cm (one inch) of residue, or 0.3 percent by weight of the total capacity of the UST system, remain in the system.” Thus, there might have been no fuel deliveries to the UST and no dispensing of petroleum from the UST, but if the UST contained product on or after November 8, 1984, the UST is considered to have been *in use* because of product storage.

For USTs *in use* on or after November 8, 1984, there may be multiple owners of the UST.⁶ Under federal law, the definition of owner is not limited to only the most recent owner. There are different approaches to identifying owners of USTs *in use* after November 8, 1984. In cleanup cases, implementing agencies often try to identify the owners (or operators) from the time of a release but there are other factors that an implementing agency may consider. If the UST was taken out of service (i.e., not *in use*) before November 8, 1984, the only owner is the last person who owned it before it was taken out of service.

States do not frequently use the LUST Trust Fund to conduct site-specific cleanups, but when they do, they need to follow the federal statutory definition of owner, including the *in use* provision, when they determine if an owner is unknown, unable, or unwilling. For example, a local government may be considered an owner under the federal statutory definition if they acquired an UST system with product in a tank even if the state has declared the tank abandoned under state law or policy.

2.4 Leases Can Impact Ownership

USTs are generally considered fixtures or trade fixtures, and belong to the landowner. However, in states where USTs are not a fixture to the land, UST ownership may be changed by entering into contracts or leases. For example, if a lessee installs an UST system, state law may determine whether the lessee may treat the UST like any other personal property or if the UST is a fixture that runs with the

The Basics: If an UST is identified as a trade fixture in a lease, then the lessee (and not the landowner) may be the UST owner. In addition, state property law may determine whether fixtures or trade fixtures run with the land.

⁵ Clarification of LUST Eligibility and Grant Implications Memorandum from Carolyn Hoskinson, March 17, 2010, www.epa.gov/oust/oust_eligibility_letter_031710_finalsigned.pdf.

⁶ This document typically uses the terms “owner” or “operator” as opposed to “owners” or “operators” for ease of reading but, depending on the site-specific circumstances, there may be more than one owner or operator responsible for an UST system or cleanup of a release.

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

Appellee.


CERTIFICATE OF SERVICE

I, R. Terrance Rodgers, counsel for appellants J.C. Baker & Son, Inc. and Baker Oil Company, do hereby certify that, on this 6th day of September, 2024, the forgoing *Appellants' Motion, Pursuant To Rule 15(b) Of The West Virginia Rules Of Civil Procedure And The Inherent Power Of This Board To Amend Its Interlocutory Orders, To Amend Appellants' "Notice Of Appeal" To Conform To The Evidence On The Issue Of Fixtures And/Or Trade Fixtures, And To Continue The Hearing Now Set For October 10, 2024 Should Appellee Deem It Necessary In Order To Adequately Prepare To Address Said Amendment, And For This Board To Thereafter Amend Its Interlocutory Order On The Issue Of Ownership Upon Its Proper Consideration Of Whether The USTs At Issue In This Appeal Were Fixtures And/Or Trade Fixtures* was filed electronically and served via email to the Honorable Kenna M. DeRaimo, Clerk of the West Virginia Environmental Quality Board, at kenna.m.deraimo@wv.gov, via email to Charles S. Driver, counsel for appellee Kathryn D. Emery, P.E., Director, Division of Water and Waste

Management, West Virginia Department of Environmental Protection, at charles.s.driver@wv.gov, and via regular United States mail, postage prepaid, in envelopes addressed as follows:

Kenna M. DeRaimo
Clerk of the West Virginia Environmental Quality Board
601 57th Street SE
Charleston, West Virginia 25304

Charles S. Driver, Esquire
Office of Legal Services
West Virginia Department of Environmental Protection
601 57th Street, S.E.
Charleston, West Virginia 25304



R. Terrance Rodgers (WVSB #3148)