

**West Virginia Environmental Quality Board
Charleston, West Virginia**

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

Appellants,

v.

Appeal No. 22-03-EQB

**Kathy Emery, P.E., Director,
Division of Water and Waste Management,
West Virginia Department of Environmental
Protection,**

Appellee.

Order Denying Baker Oil’s Rule 15(b) Motion to Amend

Background

The underlying appeal was filed by J.C. Baker & Son, Inc., and Baker Oil Company (hereinafter jointly referred to as “Baker Oil”), and with the Environmental Quality Board (“EQB”) challenging Order No. UST-22-005 issued by the West Virginia Department of Environmental Protection (“WVDEP”) on April 26, 2022, and pursuant to the Underground Storage Tank Act (West Virginia Code, Chapter 22, Article 17).

WVDEP found Baker Oil to be the owner and/or operator of several underground storage tanks where releases or leaks have occurred. WVDEP deemed Baker Oil as the responsible party and ordered Baker Oil to take corrective action to comply with all “pertinent laws and rules.” (See Order No. UST-22-005 – Order for Compliance).

A motion to stay enforcement of Order No. UST-22-005 was contemporaneously filed by Baker Oil and was granted by an agreed order entered on June 8, 2022. Then, Baker Oil moved to bifurcate the hearing to address the limited issue of whether they were ever the owners or operators of the underground storage tanks (“USTs”). By order entered September 9, 2022, the Board granted Baker Oil’s motion.

The hearing conducted on February 8 and 9, 2023, addressed the singular issue of whether Baker Oil was ever the owners or operators of the USTs at issue. If it was determined that Baker Oil was the responsible party, a second hearing would be conducted to address Baker Oil's appeal of WVDEP's order directing it to take corrective actions with respect to releases and leaks from USTs.

After consideration of proposed findings and conclusions, response and reply briefs, supplemental briefs, Certified Record, the testimony and evidence presented at the hearing, exhibits, and arguments of legal counsel, the Board, by unanimous decision, affirmed Order No. UST-22-005 as it relates to the issue of ownership of the USTs. (See EQB Order re Owner of Subject USTs entered March 4, 2024¹).

An evidentiary hearing is set for October 10, 2024, to address the remaining issue on appeal, which is Baker Oil's appeal of WVDEP's order directing it to take corrective actions with respect to releases and leaks from the USTs at issue.

On or about September 9, 2024, Baker Oil, by legal counsel, filed a motion titled as follows:

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.

Baker Oil is seeking to amend its original notice of appeal dated April 26, 2022, to conform to the evidence as it relates to ownership or non-ownership of the USTs at issue. Also, Baker Oil

¹ The Board incorporates by reference this Order addressing ownership of the subject USTs.

is requesting to introduce evidence at the upcoming hearing on the fixture issue. Baker Oil is essentially requesting the opportunity to provide additional evidence concerning whether they were ever the owners or operators of the USTs. This is tantamount to a request to reopen the record. During the two-day hearing, Baker Oil was given every opportunity to put in the record evidence related to or in support of its Notice of Appeal.

Discussion

The Board may, “in its administrative discretion, and in the interests of fairness and justice, rule on motions which tend to regulate the course of hearing, simplify the issues, and dispose of procedural requests or similar matters.” W. Va. Code R. § 46-4-5.2.

The Board finds that Baker Oil could have filed a motion to amend their Notice of Appeal at any time between April 26, 2022, and the first part of the bifurcated hearing which began on February 8, 2023, wherein they could have raised the fixture issue. Also, they could have sought an amendment to conform to the evidence during the hearing or even as part of their post-hearing briefs. They could have moved to reopen the record in 2023, concerning the fixtures issues, but did not do so.

It appears that Baker Oil is seeking a “do-over” because it disagrees with the outcome of the first part of the bifurcated hearing. The Board finds that Baker Oil’s motion concerning a hearing that took place in February 2023, to be untimely and unwarranted. Also, Baker Oil has not presented a persuasive reason at this late date for the Board to reconsider or overturn its own ruling or to allow Baker Oil to present additional evidence concerning ownership of the USTs. As noted, during the two-day hearing in February 2023, Baker Oil was given every opportunity to put in the record evidence related to or in support of its Notice of Appeal.

Rule 15 of the W. Va. Rules of Procedure and applicable case law does have an element of timeliness. The Board finds that Baker Oil's motion is untimely. Moreover, liberality allowed in the amendment of pleadings pursuant to procedural rule governing such amendments does not entitle a party to be dilatory in asserting claims or neglect his case or her case for a long period of time. See *Jones v. Sanger*, 618 S.E.2d 573 (W. Va. 2005); See also *McCoy v. CAMC, Inc.*, 557 S.E.2d 378 (W. Va. 2001)(delay of patient's attorney in filing motion to amend complaint was unreasonable, warranting denial of the motion, where attorney had not filed motion to amend at the time he had previously moved to substitute an expert witness, such that, although attorney had begun asserting new theory of case, motion to amend was not filed for months thereafter). Also, it would not be sensible at this late date for the WVDEP to have to address at the upcoming hearing both the issue of ownership of USTs and WVDEP's order directing Baker Oil to take corrective actions with respect to releases and leaks from USTs.

For all the foregoing reasons, and in the interest of fairness, justice, and judicial economy, the Board hereby denies Baker Oil's Rule 15(b) Motion and Baker Oil's Motion to Continue the Hearing set for October 10, 2024. The hearing set to begin on October 10, 2024, will address only Baker Oil's appeal of WVDEP's order directing it to take corrective actions with respect to releases and leaks from USTs.

ENTERED this 24th day of September 2024.

West Virginia Environmental Quality Board


Dr. Edward Snyder, Chairman

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

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

Appellants,

Appeal Nos. 22-03-EQB

v.

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

Appellee.

CERTIFICATE OF SERVICE

I, Kenna M. DeRaimo, Clerk for the Environmental Quality Board, hereby certify that on this day, the 24th day of September, 2024, a true copy of the foregoing **ORDER DENYING BAKER OIL'S RULE 15(b) MOTION TO AMEND** has been served upon the following:

R. Terrance Rodgers, Esq.
KAY CASTO & CHANEY PLLC
Post Office Box 2031
Charleston, WV 25327

*Via Certified First-Class Mail
and Electronic Mail*

9489 0090 0027 6628 8856 81

Charles S. Driver, Esq.
WV DEPARTMENT OF ENVIRONMENTAL PROTECTION
OFFICE OF LEGAL SERVICES
601 57th Street SE
Charleston, WV 25304

*Via Interdepartmental Mail
and Electronic Mail*


Kenna M. DeRaimo, Clerk