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.

APPELLANTS' SUBMISSION OF PROPOSED "FINAL ORDER (NO LIABILITY FOR CONTAMINATION)"

Come now appellants J. C. Baker & Son, Inc. ("Baker, Inc.") and Baker Oil Company ("Baker Oil") (Baker, Inc. and Baker Oil are collectively "Appellants"), by their counsel, R. Terrance Rodgers, of Kay Casto & Chaney PLLC, pursuant to the request made by the West Virginia Environmental Quality Board ("Board") at the conclusion of the hearing it conducted on October 10, 2024 and October 11, 2024, and hereby submit their proposed *Final Order (No Liability For Contamination),* which is attached hereto and made a part hereof as "Exhibit 1."[1]

[1] A Word version of said proposed *Final Order (No Liability For Contamination)* is being submitted by the Appellants simultaneously with the filing of this *Submission* to the Honorable Kenna M. DeRaimo, Clerk of the Board, at kenna.m.deraimo@wv.gov.

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and BAKER OIL COMPANY,

Appellants,

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EXHIBIT 1

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DIVISION OF WATER AND WASTE
MANAGEMENT, DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Appellee.

FINAL ORDER (NO LIABILITY FOR CONTAMINATION)

I. PROCEDURAL BACKGROUND

This appeal of the *Order Issued Under The Underground Storage Tank Act West Virginia Code, Article 22, Chapter 17*, issued by the West Virginia Department of Environmental Protection ("DEP"), on April 26, 2022 ("*DEP Order*"), was filed with the West Virginia Environmental Quality Board ("Board") on May 31, 2022. By *Order Granting "Motion To Bifurcate Hearing To Determine First Whether Appellants Are Or Were The Owner Or Operator Of The Underground Storage Tanks (USTS) At Issue In This Appeal," Continuing Evidentiary Hearing, And Scheduling Prehearing Conference*, entered September 9, 2022, the Board granted *Appellants' Motion To Bifurcate Hearing To Determine First Whether Appellants Are Or Were The Owner Or Operator Of The Underground Storage Tanks (USTs) At Issue In This Appeal*. Accordingly, on February 9 and 10, 2023, a hearing was held before a quorum of the Board solely

on the issue of ownership or operation of the USTs at issue in this appeal ("First Hearing").[1] On March 4, 2024, by *Final Order (Owner of Subject USTs)*, the Board issued its order on the ownership/operation issue.

At a hearing held before a quorum of the Board on October 10 and October 11, 2024, the remaining issue was heard by the Board, namely whether either or both of appellants J.C. Baker & Son, Inc. ("Baker, Inc.") and Baker Oil Company ("Baker Oil") (Baker, Inc. and Baker Oil are jointly "Appellants") were liable for the contamination charged in the *DEP Order* ("Second Hearing"). Appellants were represented by R. Terrance Rodgers, of Kay Casto & Chaney PLLC, at the Second Hearing, and appellee Jeremy M. Bandy, Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection ("DEP") ("Appellee"), was represented by Charles S. Driver, of the Office of Legal Services of the DEP, at the Second Hearing.[2] At the Second Hearing, the Board heard testimony from Michael C. Baker ("Mr. Baker"), as a representative of Appellants, and Ruth M. Porter ("Ms. Porter"), as a representative of the DEP, and exhibits were placed in the record by both parties. In addition, the parties agreed that certain Stipulations submitted to the Board in connection with the First Hearing were also applicable to the issue to be determined at the Second Hearing. Transcript of Hearing on October 10, 2024 ("Oct. 10 Transcript"), p. 14.[3]

At the Second Hearing, it was agreed that Mr. Bandy was "withdrawing the [*DEP Order*] as it applies to the Glenville Sunoco" site and that Appellants were withdrawing their appeal of

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[1] As the First Hearing was conducted over the course of two days, there are two volumes of the transcript. The transcript for that part of the First Hearing conducted on February 9, 2023 will be referred to as "Feb 9 Transcript," and the transcript for that part of the First Hearing conducted on February 10, 2023 will be referred to as "Feb 10 Transcript."

[2] Mr. Bandy is now the Director of the Division of Water and Waste Management, West Virginia Department of Environmental Protection.

[3] The transcript of day two of the Second Hearing, held on October 11, 2024, will be referred to as "Oct 11 Transcript."

the *DEP Order* as to the Glenville Sunoco site because, as the DEP represented, "we're good on where we're at with the Glenville Sunoco" site. Oct. 10 Transcript, pp. 15-17. At the conclusion of the Second Hearing, the parties were directed to submit proposed findings of fact and conclusions of law.

The *DEP Order*, charging Appellants with violations of West Virginia Code §§ 22-17-1 et seq. (1994) ("W.Va. Code Provisions"), asserts the following:

• "As the owner and/or operator of Underground Storage Tanks (USTs) at the time of releases from the USTs, [Appellants are] the responsible party for confirmed releases at the following … facilities. The USTs at these sites are permanently out of service (POS) and were removed by [Appellants]" ("Removed USTs").[4]

• The sites include Linger's Service Station in Upshur County, West Virginia ("Linger's"); Paul's Service Station in Barbour County, West Virginia ("Paul's"); Coastal Lumber Company in Buckhannon, Upshur County, West Virginia ("Coastal Buckhannon"); Hamrick Service Station in Webster County, West Virginia ("Hamrick's"); W.J. Princes Store in Lewis County, West Virginia ("Prince's"); Sample's Service Station in Clay County, West Virginia ("Sample's"); Steve White Service Station in Braxton County, West Virginia ("Steve White's"); Coastal Lumber Company located in Hacker Valley, Webster County, West Virginia ("Coastal Hacker Valley"); Clendenin Service Station located in Kanawha County, West Virginia ("Clendenin's"); Point C Mart located in Lewis County, West Virginia ("Point C Mart"); Young's Service Station located in Nicholas County, West Virginia ("Young's"); and C. Adam Toney Tire located in Nicholas County, West Virginia ("C. Adam Toney's").[5]

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[4] "Removed USTs" as used herein refers to the USTs at issue in this appeal; "USTs" refers to underground storage tanks in general.

[5] The *DEP Order* also included the Glenville Sunoco station in Gilmer County, West Virginia, but that site has been withdrawn from both the *DEP Order* and this appeal. Oct 10 Transcript, pp. 15-17.

It was agreed by the parties and represented to the Board at the First Hearing (Feb 9 Transcript, p. 9) that the entire Certified Record of the DEP was part of the record in this appeal and could be utilized regardless of whether the entire Certified Record was submitted as exhibits. The transcripts of both hearings and exhibits admitted therein may also be utilized in determining this final issue regarding the *DEP Order*.

II. GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. GENERAL FINDINGS OF FACT

1. Baker Oil's only asset was a tank farm liquid products terminal, commonly known as a bulk terminal, located in Kanawha County, West Virginia. Oct 10 Transcript, p. 115.

2. Baker Oil sold that bulk terminal in approximately 2021. Oct 10 Transcript, p. 116.

3. Baker Oil is no longer an operating company. Oct 10 Transcript, p. 115.

4. Baker Oil has no assets and has no funds which could be used to perform remediation work. Oct 10 Transcript, pp. 117, 119-120.

5. Baker Oil's authority to conduct business in West Virginia has been revoked. Appellants' Exhibit 77.

6. Baker, Inc. has a judgment against it in the amount of $1,555,112.72, which carries interest at a rate of 4.75% per year ("Judgment"). Appellants' Exhibit 76.

7. According to https://www.calculators.org/business/judgment.php, interest is currently accruing on the Judgment at a rate of $202.377 per day, making the amount owed as of the end of November, 2024, close to $2,000,000.00.

8. Abstracts Of Judgment against Baker, Inc., have been filed in certain West Virginia counties where Baker, Inc. has real property, including Braxton County, Gilmer County, Lewis County, Nicholas County, Raleigh County, and Webster County. Oct 10 Transcript, p. 121; Appellants' Exhibit 76.

9. Because of these judgment liens, Baker, Inc. is unable to sell any of its real property to obtain cash to pay for any remediation work. Oct 10 Transcript, p. 121.

10. Baker, Inc. has no readily available funds to pay for any remediation work which may be ordered by the Board. Oct 10 Transcript, p. 12.

11. Based on a report prepared by Environmental Remediation Technologies And Supplies, dated January 4, 1992, outlining various costs associated with remediating the Coastal Hacker Valley site (Certified Record, p. 003072 et seq., p. 003080), the soil removal was estimated to cost in a range of $190,000.00 - $215,000.00 or more, soil recycling was estimated to cost $245,000.00 - $265,000.00, soil venting was estimated to cost $60,000.00 to $100,000.00, and draw down and air stripping was estimated to cost $45,000.00 to $65,000.00 (C.R. 00380).

12. Because Rule 201 of the West Virginia Rules of Evidence permits tribunals to take judicial notice of facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," the Board may take judicial notice of the fact that, due to inflation, One Dollar ($1.00) in January of 1992 is worth approximately Two Dollars and Twenty-Nine Cents ($2.29) in October 2024.[6]

[6] Calculated using the Inflation Calculator located on the U.S. Department of Labor's website located at https://www.dol.gov/general/topic/statistics/inflation.

13. A simple mathematical calculation (multiplying the estimated cost by 2.29) determines that the cost for soil removal for remediation at one of the sites at issue in this appeal (the Coastal Hacker Valley site) that was estimated in 1992 to cost $190,000.00 to $215,000.00 or more would, in 2024, be estimated to cost $435,100.00 to $492,350.00 or more, the soil recycle option estimated in 1992 to cost $245,000.00 to $265,000.00 would, in 2024, be estimated to cost $561,050.00 to $606,850.00, the $60,000.00 to $100,000.00 1992 cost for soil venting would, in 2024, be projected to cost $137,400.00 to $229,000.00, and the $45,000.00 to $65,000.00 1992 cost for draw down and air tripping would, in 2024, be projected to cost $103,050.00 to $148,850.00.

14. A simple mathematical calculation determines that, if only four (4) of the twelve (12) sites at issue in this appeal had similar projected costs for remediation today, the cost of the soil removal across four sites would be $1,740,400.00 to $1,969,400.00 "or more," for the soil recycling would be $2,244,299.00 to $2,427,400.00, the cost of the soil venting would be $549,600.00 to $916,000.00, and the cost of draw down and air tripping would be $412,200.00 to $595,400.00.

15. The same mathematical calculation reveals that, if the soil removal were required across all twelve (12) sites, the projected cost today for the soil removal would be $5,221,200.00 to $5,908.200.00 or more, and, if the soil recycling were required across all twelve (12) sites, the projected cost today for the soil recycling would be $6,732,600.00 to $7,282,200.00, while the cost for soil venting would be $1,648,800.00 to $2,748,000.00, and the cost for draw down and air tripping would be $1,236,600.00 to $1,786,200.00.[7]

[7] While the DEP claims it is not seeking penalties (Oct 10 Transcript pp. 250-251), under the circumstances of this appeal, the results which the DEP seek appear perilously close to a penalty on whoever happens to be the current owner or operator at the time the government finally decided this industry needed regulation, even though for decades such pollution was ignored by state and federal governments, the petroleum industry, gas station owners, and

16. A business which: (1) has an outstanding judgement against it in the amount of nearly $2,000,000.00 that has remained unpaid for over four (4) years and continues to accrue interest; (2) has judgment liens placed against the real property which it owns; and (3) has no readily available funds which it could use for any remediation work, would be unable to obtain a loan to sufficient to cover the costs of any remediation work, especially where any collateral which could serve to secure such loan is already subject to

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operators, and the general public; societal norms simply did not perceive the problem until after considerable contamination has occurred for decades. The facts supporting this conclusion are as follows: (1) gasoline stations were operating as early as in the 1930's at some of these locations (Oct 10 Transcript, p. 104; Appellants' Exhibit 68), but neither the federal government nor the DEP became concerned about potential environmental issues and/or potential health hazards until 50 years later, in the mid to late 1980's when the regulations governing this appeal were first adopted (*see* Oct 10 Transcript, pp. 173-174); thus, many business operated for years without any understanding of, or appreciation for, petroleum contamination of soil and ground water; (2) some gasoline stations were so lax, which was not illegal, frowned upon, or even seen as a problem, such that examples of poor practices leading to severe contamination included one owner/operated which stored used oil in a buried Volkswagen automobile (Oct. 10 Transcript, pp. 141, 161, 163-164, 165); (3) under the DEP's interpretation of the governing regulations, the only way an owner can defend against prior contamination that was not regulated when it occurred was to meet the impossible burden of proving facts showing the exact amount of prior, unregulated, contamination that occurred decades before the current owner/operator took over (Oct 10 Transcript, p. 183); (4) however, obtaining this proof (before any regulations, including record keeping, was even a gleam in the EPA's eye, let alone required) meant accomplishing the impossible feat of somehow uncovering records from mom and pop rural small-operation businesses (see Appellants' Exhibit 5; Feb 9 Transcript, p. 48) which had sold out, or gone out of business, decades before. Thus, even though Wetzel County Solid Waste Authority v. Chief, Office of Waste Management, Division Of Environmental Protection, Civil Action No. 95-AA-3, Circuit Court of Kanawha County, West Virginia (October 5, 1999) ("Wetzel County Solid Waste Authority"), the case upon which the Board relies in determining the burden and shifting of proof, places the burden of proof on the DEP, that burden is illusory because the DEP need only rely on its assumption, which it has decreed (without any authorization to do so), that the contamination was caused by the Removed USTs unless Appellants prove otherwise, shifting the burden to Appellants to prove the impossible to overcome this DEP manufactured assumption. In Re C.W., No. 19-0505, 2020 WL2765855 (W.Va. May 27, 2020) (dissent, fn 1, *quoting* Com. v. 1997 Chevrolet, 106 A.3d 836, 869 (Pa. Commw. Ct. 2014) ("[A] party required to prove a negative is saddled with a 'virtually impossible burden.' ") (*quoting* Com. v. Buonopane, 599 A.2d 681, 683 n.2 (Pa. Super. Ct. 1991). This process, contrary to criminal and civil law, assumes the owner/operator of a UST is guilty of all of the contamination and places a wholly impossible and unfair burden on that owner/operator to prove it is not responsible for all of it. Furthermore, the DEP seeks to apply a wholly unsupportable standard of proof, namely that of absolute proof. Even in criminal law, the burden of proof is only beyond a reasonable doubt. Thus, if evidence is introduced showing someone else could have been responsible, that is sufficient evidence to support the conclusion there is reasonable doubt. Here, as Ms. Porter testified, the owner/operator of a UST supposedly must prove exactly how much of the contamination was caused by others. Oct 10 Transcript, p. 183. This standard requires an exacting, absolute level of proof required in neither civil nor criminal law because, even under criminal law, the defendant is not required to prove someone else did the crime to demonstrate reasonable doubt.

a nearly $2,000,000.00 judgment lien and where the costs of any such remediation work are potentially in the range of millions of dollars.

17. A business which: (1) has an outstanding judgement against it in the amount of nearly $2,000,000.00 that has remained unpaid for over four (4) years and continues to accrue interest; (2) has judgment liens placed against the real property which it owns; and (3) has no readily available funds which it could use for professional services to accomplish any remediation work, would be unable to contract the necessary engineering and other services required to accomplish any ordered remediation work and, therefore, unable to accomplish such work.

18. 40 CFR Part 280, as revised in 1988 ("1988 Regulations"), which are the federal regulations governing this appeal and the regulations upon which the DEP rely in seeking to hold Appellants liable for the leaks subject to this appeal (Oct 10 Transcript, p. 173), were not promulgated until 1988. Appellee's Exhibit 132; Oct 10 Transcript, pp. 173-174.

19. The W.Va. Code Provisions pursuant to which the *DEP Order* was entered (*DEP Order*, Introductory Paragraph) were enacted in 1994. 1994 West Virginia Laws Ch. 61 (H.B. 4065).

20. All of the Removed USTs were installed and operated before the 1988 Regulations or the W.Va. Code Provisions came into effect, which is demonstrated as follows:

a. Linger's: C.R. 000013-000015, showing all of the Removed USTs at Linger's were installed prior to 1988;

b. Paul's: C.R. 000810-000811, 000851-000854, showing all of the Removed USTs at Paul's were installed prior to 1988;

c. Coastal, Buckhannon: C.R. 001484-001485, showing that all the Removed USTs at this site were installed prior to 1988;

d. Hamrick's: C.R. 001793-001794, showing that all of the Removed USTs at this site were installed prior to 1988;

e. W. J. Prince's: C.R. 002298-002299, showing that all Removed USTs at this site were installed prior to 1988;

f. Sample's: C.R. 002558-002559, showing that all the Removed USTs at this site were installed prior to 1988;

g. Steve White's: C.R. 002847-002851, showing that except for Removed UST #3, a 500 gallon kerosene tank, for which the installation date is unknown, all of the other Removed USTs were installed prior to 1988;[8]

h. Coastal Hacker Valley: C.R. 3038-3039, showing that all the Removed USTs at this site were installed prior to 1988;

i. Clendenin: C.R. 003393-3394, showing that all the Removed USTs at this site were installed prior to 1988;

j. Point C. Mart: C.R. 003599-003600, showing that all the Removed USTs at this site were installed prior to 1988;

k. Young's: C.R. 003977-003978, showing that all the Removed USTs at this site were installed prior to 1988; and

[8] It should be noted that C.R. 002850 shows that Removed UST No. 3, the 500-gallon kerosene tank, shows no leak for this Removed UST was detected when it was removed.

l. C. Adam Toney: C.R. 004119-004123, C.R. 004131-004134, showing that all the Removed USTs at this site were installed prior to 1988.

B. GENERAL CONCLUSIONS OF LAW

1. As represented to the Board, the pertinent regulations applicable to this appeal are those that became effective in 1988, provided by the DEP to the Board at the Second Hearing as the document marked as Appellee's Exhibit 132.[9] Oct 10 Transcript p. 174.

2. The law not only permits, but encourages, the trier of fact to not leave common sense outside the courtroom door. Smith v. Slack, 125 W.Va. 812, 26 S.E.2d 387, 389 (1943); Hiett v. Shull, 36 W.Va. 563, 15 S.E. 146, 147 (1892).

3. The *DEP Order*, the allegations of which must be proven by the DEP by affirmative evidence as the DEP bears the burden of proving its case, charges that the Appellants are liable for all of the contamination at each of the sites at issue in this appeal because such contamination is the result of leaks from USTs owned or operated by one or the other, or both, Appellants "at the time of the leaks." *DEP Order*, Findings Of Fact, ¶ 1; Wetzel County Solid Waste Authority v. Chief, Office of Waste Management, Division Of Environmental Protection, Civil Action Number 95:AA-3 (Circuit Court of Kanawha County, West Virginia), order entered on October 5, 1999.

4. Accordingly, the DEP bears the burden of proving that, for each of the sites at issue in this appeal, Baker, Inc. or Baker Oil is liable for all of the contamination at each such site at issue.

[9] As Appellee's Exhibit 132 is a copy of the applicable regulations and not a documentary exhibit, it was not moved into admission as an exhibit.

5. Thus, the DEP bears the burden of proving both that all the contamination at each site at issue in this appeal was caused by one or more of the Removed USTs, and that the DEP and the Board have subject matter jurisdiction authorizing them to hold Appellants liable for all said contamination at each site. *DEP Order*, Findings Of Fact, ¶ 1; Wetzel County Solid Waste Authority.

6. The Board may take judicial notice of publicly recorded documents such as abstracts of judgment and official records of the West Virginia Secretary of State's office as available online. Rule 6.12 of the Procedural Rules Governing Appeals Before The Environmental Quality Board, adopting the West Virginia Rules of Evidence; Rule 201 of the West Virginia Rules of Evidence; Katrib v. Herbert J. Thomas Memorial Hospital Association, 247 W.Va. 763, 769, 885 S.E.2d 894, 900 (2023) (It is "clearly proper … to take judicial notice of matters of public record."); State ex rel. TermNet Merchant Services, Inc. v. Jordan, 217 W.Va. 696, 619 S.E.2d 209, fn 2. (2005); Osburn v. Staley, 5 W.Va. 85, 92 (1871).

7. "[A]n administrative agency [or board] can only exercise such powers as those granted by the legislature, and if such agency [or board] exceeds its statutory authority, its action may be nullified by" the Supreme Court of Appeals of West Virginia. State ex rel. Mountaineer Park, Inc. v. Polan, 190 W.Va. 276, 280, 438 S.E.2d 308 (1993).[10]

8. Just as an injured plaintiff in a civil action filed as a result of a vehicular accident has no power or authority to declare that he may rely upon a presumption that,

[10] Under the West Virginia Administrative Procedures Act (W.Va. Code §§ 29A-1-1, *et seq.*), a state "agency" includes all state boards. "'Agency' means any state board, commission, department, office or officer authorized by law to make rules or adjudicate contested cases, except those in the legislative or judicial branches." W.Va. Code § 29A-1-2.

simply because the accident occurred, the other driver was negligent and, instead, must prove that other driver's negligence, neither is the DEP empowered or authorized to declare that it may rely on a presumption that if there is contamination, all of it was caused by the USTs owned by the owner or operator against whom enforcement is sought; neither the 1988 Regulations nor the W.Va. Code Provisions create such presumption, nor empower the DEP to manufacture one.[11]

9. Unless explicitly authorized by the West Virginia Legislature or by judicial decision, an enforcing state agency, such as the DEP, has no authority to ignore settled law on evidence regarding meeting a burden of proof and create an unauthorized presumption in its favor on the issue of liability; where it bears the burden of proof, as the DEP does in this appeal (Wetzel Solid Waste Authority), it must prove every element of liability, by affirmative evidence, including the extent to which, if any, the contamination is the result of leaks from the Removed USTs; reliance on an unauthorized and manufactured presumption is insufficient evidence. State ex rel. Mountaineer Park, Inc., 190 W.Va. 276; Wetzel Solid Waste Authority.

10. An owner or operator of a UST is responsible for remediating only that portion of contamination at a site that resulted from a leak from the USTs which it owned or operated. *See* Oct 10 Transcript, p. 184; W.Va. Code § 22-17-14 (requiring corrective action by the owner or operator of an underground storage tank "with respect to any release of petroleum from said tank" (emphasis added)).

[11] Moreover, this presumption contradicts the holding in Wetzel Solid Waste Authority that the DEP bears the burden of proving every element of its case, including the extent of the contamination caused by leaks from the Removed USTs. Nothing in Wetzel Solid Waste Authority recognizes any presumption that may be relied upon in proving such contamination.

11. When an owner or operator of removed USTs introduces evidence that there were other sources which caused contamination at a site where those removed USTs were previously located, that owner or operator has met its initial burden of production that such other sources contributed to the contamination. *See* Wetzel County Solid Waste Authority; Smith v. Slack, 125 W.Va. 812.

12. When an owner or operator of removed USTs introduces evidence that there were other sources of contamination at a site where those removed USTs were previously located, such as, but not limited to, a long history of other gasoline stations operating on that site, or evidence of oil contaminating the site where no oil had been stored in those removed USTs, or that there is a history of prior extensive oil drilling, involving fracking with diesel fuel, surrounding the vicinity of the site, or that a landfill abuts the site, then that owner or operator has met its initial burden of production that other sources caused contamination at that site, and the DEP must then prove, by affirmative evidence, its case by proving the extent to which, if any, the contamination came from any removed USTs at that site. *See* Wetzel County Solid Waste Authority.

13. A tribunal may not enter an order compelling a party to perform the impossible. Farran v. Johnston Equipment, Inc., Civ. A. No. 933-6148, 1995 WL 549005 (E.D. Pa. Sept. 12, 1995) (holding that where there is a lack of knowledge and no means of obtaining knowledge to answer interrogatories, a motion to compel must be denied because a court cannot compel the impossible); Lopez v. City of Santa Ana, Case No. 8:14-cv-01369-SVW-RZ, 2015 WL 13764939 (D.C. Cal. February 27, 2015) (holding that because the City of Santa Ana lacked the power to place the plaintiff in federal witness protection, the plaintiff is not entitled to the relief requested because the court cannot

compel the impossible); Rodgers v. Whitten, Case No. CIV-20-00839-PRW, 2020 WL 5407457 (W.D. Okl. September 9, 2020) (holding that the court could not order relief that was impossible to grant because the state had not chosen to enact legislation that would permit such relief to be granted); Straughan v. Hallwood, 30 W.Va. 274 (1887) (holding that the court could not compel defendant to bring certain property back into West Virginia which had been sold to a third party because it would have been impossible for defendant to have done so); Goff v. Goff, 177 W.Va. 742, 356 S.E.2d 496 (1987) (holding that defendant could not be compelled to provide medical insurance coverage for plaintiff, his former spouse, when he sought, but was unable, to obtain such coverage as the court would not order him to do the impossible); Agricultural Ditch Co. v. Rollins, 42 Colo. 267, 93 P. 1125 (1908); Murff v. Louisiana Highway Commission, 182 La. 61, 161 So. 21 (1935).

14. "There is no question that '[a] regulation which in practice is illusory or impossible to comply with is arbitrary and oppressive and would violate due process.'" In re New Jersey State Funeral Directors Ass'n, 427 N.J.Super. 268, 282, 48 A.3d 391 (2012)

15. Due process precludes an agency from requiring an entity to prove that which is virtually impossible to prove; therefore, to the extent the DEP's interpretation of the 1988 Regulations and W.Va. Code Provisions requires that an owner or operator of a UST prove how much of the contamination of a site was caused by other sources, such as USTs owned or operated by gasoline stations and similar businesses no longer in existence and which have not been in business for decades, and the history is unknowable, in order to avoid liability for such other source contamination, such interpretation under these circumstances is tantamount to requiring the owner or operator to prove that which is impossible to prove, and, thus, violates due process; such interpretation may not be relied

upon by the DEP. *See* State v. Peacher, 167 W.Va. 540, 280 S.E.2d 559 (holding that because the court's restrictions on the scope of defendant's inquiry on *voir dire* made it "impossible to effectively and adequately exercise his peremptory challenges," such restrictions violated his right to due process); Missouri, K. & T. Ry. Co. of Texas v. State, 100 Tex. 420, 424 (March 20, 1907) (holding that where immediate compliance with the requirements of a statute, which imposed a penalty for non-compliance, would be impossible, such "a requirement would be so oppressive and arbitrary that by no known authority could it be held to be 'due process of law.'").

16. "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." Landgraf v. USI Film Productions, 511 U.S. 244, 272, 114 S.Ct. 1483 (1994).

17. United States "congressional enactments and administrative rules" will not be construed to have retroactive effect unless their language demonstrates a "clear congressional intent authorizing retroactivity." Landgraft, 511 U.S. at 272, *quoting* Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208, 109 S.Ct. 468 (1988).

18. If the United States Congress ("Congress") has not "expressly prescribed the statute's proper reach…the court must determine whether the new statute would have retroactive effect, i.e., whether it would . . . increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," then the "traditional presumption teaches that it does not govern absent clear congressional intent favoring such result." Landgraft, 511 U.S. at 280 (emphasis added).

19. Where, as here, contamination of soil and groundwater by petroleum products from leaking USTs was never regulated for decades prior to the promulgation of

the 1988 Regulations and prior to the enactment of the W.Va. Code Provisions, nor was responsibility for clean-up costs previously imposed, such that "prior law afforded no relief," the 1988 Regulations and the W.Va. Code Provisions have created a new cause of liability which attaches "an important new legal burden" to the conduct of owning or operating a UST that leaks; under Landgraft, neither the 1988 Regulations nor the W.Va. Code Provisions may be applied to impose liability on Appellants for leaks and contamination which occurred before such leaks and contamination came under regulation; the DEP bears the burden of proof, therefore, to demonstrate the extent to which the contamination, if any, at the sites at issue in this appeal occurred after the 1988 Regulations and the W.Va. Code Provisions became effective .

20. Where regulations and statutory provisions are not applicable to contamination that occurred prior to their enactment, as here, plainly no tribunal has subject matter jurisdiction over such contamination.

21. The 1988 Regulations specifically recite that they "apply to all owners and operators of an UST system" as the terms "owner," "operator," and "UST system" are defined in those regulations.

22. A review of the 1988 Regulations and of the W.Va. Code Provisions reveals neither said regulations nor said code provisions impose any obligations for leaks from USTs, or liability therefore, on the owners of real property where a UST is located which is based solely on ownership of the real property on which that UST is located

23. The Board is limited to exercising only powers granted to it and neither the 1988 Regulations nor the W.Va. Code Provisions grant the Board the authority to compel a third-party landowner to permit an owner or operator of a UST, which no longer exists

on such third-party landowner's real property, access to such third-party landowner's real property; accordingly, the Board has no authority to compel such access. RBS, Inc. and Jill Fischer v. Director, Division Of Water And Waste Management, Department Of Environmental Protection, Appeal Nos. 17-01-EQB and 17-02 EQB, February 23, 2018, Environmental Quality Board, Final Order Finding Of Fact No. 22 ("WVDEP further recognizes that [a landowner] controls access to her property in her role as property owner."); RBS, Inc. and Jill Fischer, Final Order Conclusion Of Law on page 9 ("[T]here is no statute that straightforwardly gives the WVDEP unilateral authority to force a third party to legally enter and perform remedial work on real property belonging to another person.");[12] State ex rel. Mountaineer Park, Inc., 190 W.Va. 276; In re New Jersey State Funeral Directors Ass'n, 427 N.J.Super. 268, 279, 48 A.3d 391 (2012) (holding that "[a]n administrative agency may not under the guise of interpretation extend a statute to include persons not intended, nor may it give the statute any greater effect than its language allows").

24. Because the 1988 Regulations and the W.Va. Code Provisions cannot be applied retroactively to hold Appellants liable for any contamination that occurred before the 1988 Regulations and the W.Va. Code Provisions became effective, the Board does not have subject matter jurisdiction to enforce the *DEP Order* to the extent it seeks to impose such liability.

25. Because subjection matter jurisdiction may be raised at any stage of a proceeding, even upon appeal and even by the court or other tribunal *sua sponte*, it is

[12] In this *Final Order,* the Board ordered that RBS would be responsible for remedial work only if it was granted access without restriction by the landowner. RBS, Inc. and Jill Fisher, *Final Order,* p. 11, Paragraph No. 4.

incumbent upon a court or other tribunal to address the issue promptly because any order entered by a court or tribunal that does not have subject matter jurisdiction over the issue is void. State ex re. TermNet Merchant Services, Inc. v. Jordan, 217 W.Va. 696, 619 S.E.2d 209 (2005).

26. As the DEP bears the burden of proof, it was incumbent upon the DEP to demonstrate, by affirmative evidence, that portion of the contamination which was caused after the 1988 Regulations and the W.Va. Code Provisions became effective; the DEP has no authority to create, and then rely upon, any assumption that all the contamination occurred after the 1988 Regulations and W.Va. Code Provisions became effective.

III. SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. FINDINGS OF FACT – LINGER'S

1. Neither Appellant ever owned the real property on which Linger's was located. Joint Exhibit 1, Stipulations, E.1. and 2.

2. In 2018, the owner of the real property where Linger's was formerly located, James Lee ("Mr. Lee"), refused to grant an engineer engaged by Baker, Inc. for remediation work, access to the real property. Appellants' Exhibit 48; Oct 10 Transcript, p. 59.

3. Mr. Baker, Appellants' witness and President of Baker, Inc., also spoke with Mr. Lee, who again refused access to the real property that was formerly the site of Linger's because he did not want the DEP or Baker, Inc., on that real property. Oct 10 Transcript, p. 60.

4. The Linger's site had gasoline stations operating on it dating back to the 1950's. Oct 10 Transcript, p. 62.

5. The backside of the Linger's site was used for years as a landfill by the City of Buckhannon. Oct 10 Transcript, p. 62.

6. When wells were drilled for a soil vapor extraction system at the Linger's site, old vehicles buried in the ground were encountered. Oct 10 Transcript, p. 62.

7. Gasoline stations operating decades before anyone, including the state and federal governments, had any concern about contamination from leaking USTs or from overfilling tanks during product delivery, undoubtedly leaked petroleum products at that site over the course of those decades.

8. Used oil and other sources of petroleum products were deposited in landfills, including the landfill behind the Linger site, in the decades before state and federal authorities became concerned about the environmental issues from petroleum product contamination of the soil and ground water.

9. The landfill that existed for years at the backside of the Linger's site contributed to any contamination found at the Linger's site.

10. Appellants met their initial burden of production that there were other sources of the contamination at the Linger's site, requiring the DEP to prove its case by proving, by affirmative evidence, the extent to which the contamination at the Linger' site, if any, was caused by the Removed USTs. Wetzel County Solid Waste Authority; Oct 10 Transcript, p. 232.

11. The DEP failed to meet that burden of proof and prove, by affirmative evidence, the extent to which, if any, the contamination at Linger's was caused by the Removed USTs at that site; reliance on an unauthorized and manufactured presumption is insufficient.

12. Because Appellants have been denied access to the Linger's site, the Board cannot compel them to remediate any contamination at that site. RSB, Inc. and Jill Fischer.

13. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, the Board finds that neither Appellant has the financial resources to perform any remediation work at the Linger's site.

14. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, the Board finds that neither Appellant would be able to find an environmental remediation firm willing to contract with either Appellant for remediation work.

15. Each of the Appellants met its initial burden of production that it is impossible for it to perform any remediation based upon financial inability; therefore, the DEP bore the burden of proving, by affirmative evidence, that each of the Appellants has the financial ability to perform remediation work, which burden the DEP failed to meet. *See* General Finding Of Fact Nos. II.A., 1-17, *supra*.

16. The Removed USTs were installed at the Linger's site prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions. *See* General Finding of Fact No. II.A., 19, *supra*.

17. Because the Removed USTs at the Linger's site were installed prior to the effective date of the 1988 Regulations and the effective date of the W.Va. Code Provisions, and because contamination occurs not just from USTs that leak, but also from overfilling USTs (including simple spills occurring during the filling of a USTs even without an overspill) and leaks in the connecting pipes which occur throughout the history of a site (Oct 10 Transcript, p. 245), since gasoline stations had been operated at the Linger's site

dating back to the 1950's, part of the contamination at the Linger's site occurred prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

18. The DEP failed to meet its burden of proof and prove, by affirmative evidence, the extent to which the contamination at Linger's caused by the Removed USTs, if any, occurred after the 1988 Regulations and the W.Va. Code Provisions became effective.

B. CONCLUSIONS OF LAW – LINGER'S

1. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), it is incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which, if any, the contamination at the Linger's site was caused by the Removed USTs.

2. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Linger's site was caused by the Removed USTs, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

3. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs, where there were other sources of the contamination at the Linger's site, it was incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which, if any, the contamination at the Linger's site was caused by the Removed USTs.

4. Because the DEP failed to meet that burden of proof as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Linger's site was

caused by the Removed USTs, the DEP failed to prove its case such that the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

5. As the 1988 Regulations and the W.Va. Code Provisions do not apply to any contamination which occurred prior to the date they became effective because they do not apply retroactively, it was incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which the contamination at the Linger's site caused by the Removed USTs, if any, occurred after the 1988 Regulations and the W.Va. Code Provisions became effective.

6. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which the contamination at the Linger's site that was caused by the Removed USTs, if any, occurred after the effective date of the 1988 Regulations and the W.Va. Code Provisions, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

7. Neither Appellant has a right of entry to the Linger's site because: (1) neither owns the real property; (2) neither has any other basis, such as ownership of USTs at that site since the Removed USTs no longer exist on that site; and (3) they were denied access to that site.

8. The Board is without authority to compel Appellants to perform any remediation work at any site to which it does not have a right of entry. RBS, Inc. and Jill Fischer.

9. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have access to the Linger's site to perform

remediation work, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

10. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have the financial resources to pay, or contract, for the performance of any required remediation work at the Linger's site, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

11. Because the 1988 Regulations and the W.Va. Code Provisions are not retroactive, the Board does not have subject matter jurisdiction over any contamination that may have occurred at the Linger's site prior to their effective dates.

12. The Board may not order performance that would be impossible to perform, nor may it order remediation of contamination over which it has no subject matter jurisdiction, nor may it enter an order which exceeds its authority or violates Appellants' due process rights, and, therefore, the Board must grant Appellants' appeal and reverse the *DEP Order* as to the Linger's site.

C. FINDINGS OF FACT – COASTAL BUCKHANNON

1. Neither Appellant ever owned the real property on which the Coastal Buckhannon site was located. Joint Exhibit 1, Stipulations E. 5 and 6.

2. Coastal Lumber Company, through its employee, Tim Hinkle, worked with the DEP to remove the Removed USTs at the Coastal Buckhannon site. Oct 10 Transcript p. 30.

3. The tank closure report for the Coastal Buckhannon site shows that no leaks were detected with respect to the Removed USTs upon their removal. Oct 10 Transcript p. 32; Appellants' Exhibit 36.

4. A Site Assessment Addendum Report for the Coastal Buckhannon site, prepared by Allegheny Environmental Technology Corporation ("AET"), dated September 15, 1995, states that, in the opinion of AET "it is likely that the source of the hydrocarbons is leakage from the former UST system or possible spillage associated with the current AST, above ground storage system." Oct 10 Transcript p. 35 (emphasis added); Appellants' Exhibit 38, p. 1562.

5. A map contained in Appellants' Exhibit 38 (Bates No. page 001568) shows where the above ground storage tank system ("ASTS") is at the Coastal Buckhannon site in relation to the monitoring wells ("MW") and the Removed USTs tank pit, and where the former UST system tank pit is located in relation to the MWs.

6. A letter from AET to the DEP, dated April 8, 1997, showed that MW4 at the Coastal Buckhannon site is the only well out of compliance with DEP regulations. Oct 10 Transcript p. 41; Appellants' Exhibit 39.

7. Appellants' Exhibit 40, a Ground Water Monitoring Report, prepared by CORE Environmental Services, Inc. ("CORE"), and dated May 2011, and reflecting certain levels in MWs 1 and 3-5 (MW2 having been buried under gravel), also shows that MW4 was the only well out of compliance at the Coastal Buckhannon site. Oct 10 Transcript p. 43; Appellants' Exhibit 40, p. 1654.

8. The proximity of MW4 with the ASTS and the ASTS with the Removed UST tank pit, coupled with the CORE sampling report showing MW4 as the only well out

of compliance at the Coastal Buckhannon site, corroborates the conclusion that the ASTS caused contamination at the Coastal Buckhannon site.

9. By letter, dated January 30, 2012, Mr. Baker informed the DEP that the Coastal Buckhannon site was being used as an industrial site, including by a trucking company, and that he had "witnessed a spill" as he drove by, observing "absorbent pads and liquidy petroleum liquid substance on the ground." Oct 10 Transcript p. 43-44; Appellants' Exhibit 42; Oct 10 Transcript p. 47-48; Appellants' Exhibit 43A; *See* C.R. 001679.

10. Baker, Inc. attempted to get permission from the owner of the Coastal Buckhannon site, but Mr. Martin verbally denied permission. Oct 10 Transcript, p. 51; *See* C.R. 001719.

11. At the direction of Randal Scott Lemons, of the DEP, Baker, Inc. sent a certified mail letter to Mr. Martin, asking that he (Mr. Martin) send a letter denying permission and include in that letter "the property address, the contact information of the landowner (name, address and phone #) and the reason that access is being denied." Oct 10 Transcript p. 49-51; Appellants' Exhibit 43B.

12. Requesting such a letter would be futile as a landowner who has already been demonstrated to be uncooperative is not suddenly going to become cooperative in responding to a request asking for detailed information on why access was being denied.

13. Mr. Martin never responded to Baker, Inc.'s certified mail letter. Oct 10 Transcript p. 51.

14. As Coastal Lumber Company took complete charge of closing and removing the Removed USTs at the Coastal Buckhannon site, neither Appellant had any access to the site for closure or removal of the Removed USTs.

15. Appellants could not obtain permission to access the Coastal Buckhannon site and, as a result, do not have any right of entry onto that site to perform any remediation work.

16. Because Appellants have been denied access to the Coastal Buckhannon site, the Board cannot compel them to remediate any contamination at that site. RSB, Inc. and Jill Fischer.

17. Appellants met their initial burden of production that there were other sources of the contamination at the Coastal Buckhannon site, requiring the DEP to prove its case by proving, by affirmative evidence, the extent to which the contamination on the Coastal Buckhannon site, if any, was caused by the Removed USTs. Wetzel County Solid Waste Authority; Oct 10 Transcript, p. 232.

18. The DEP failed to meet its burden of proof and prove, by affirmative evidence, the extent to which, if any, the contamination at the Coastal Buckhannon site was caused by the Removed USTs at that site; reliance on an unauthorized and manufactured presumption is insufficient.

19. Appellants have met their burden of production regarding impossibility of performance because of denial of access to the Coastal Buckhannon site.

20. Based upon the General Findings of Fact Nos. II.A. 1-17 above, neither Appellant has the financial resources to perform any remediation work at the Coastal Buckhannon site.

21. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, Appellants would not be able to find an environmental remediation firm willing to contract with Appellants for any remediation work at the Coastal Buckhannon site.

22. Each of the Appellants met its initial burden of production that it is impossi2le for it to perform any remediation work based upon financial inability; therefore, the DEP bore the burden of proving, by affirmative evidence, that each of the Appellants has the financial ability to perform remediation work at the Coastal Buckhannon site, which burden the DEP failed to meet. *See* General Finding Of Fact Nos. 1-17, *supra*.

23. The Removed USTs at the Coastal Buckhannon site were installed prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions. *See* General Finding Of Fact No. II.A., 19 (*supra*).

24. Because the Removed USTs at the Coastal Buckhannon site were installed prior to the effective date of the 1988 Regulations and the effective date of the W.Va. Code Provisions, and because contamination occurs not just from USTs that leak, but also from overfilling USTs (including simple spills occurring during the filling of a USTs even without an overspill) and leaks in the connecting pipes which occur throughout the history of a site (Oct 10 Transcript, p. 245), part of the contamination at the Coastal Buckhannon site occurred prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

25. The DEP failed to meet it burden of proof and prove, by affirmative evidence, the extent to which, if any, the contamination at the Coastal Buckhannon site occurred after the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

D. CONCLUSIONS OF LAW – COASTAL BUCKHANNON

1. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), it is incumbent upon the DEP, which bears the burden of proving its case, to prove by affirmative evidence the extent to which, if any, the contamination at the Coastal Buckhannon site was caused by the Removed USTs.

2. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Coastal Buckhannon site was caused by the Removed USTs, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

3. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), where there were other sources of the contamination at the Coastal Buckhannon site, it was incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which, if any, the contamination at the Coastal Buckhannon site was caused by the Removed USTs.

4. Because the DEP failed to meet that burden of proof as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Coastal Buckhannon site was caused by the Removed USTs, the DEP failed to prove its case such that the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

5. As the 1988 Regulations and the W.Va. Code Provisions do not apply to any contamination which occurred prior to the date they became effective because they do

not apply retroactively, it was incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which the contamination at the Coastal Buckhannon site caused by the Removed USTs, if any, occurred after the 1988 Regulations and the W.Va. Code Provisions became effective.

6. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which the contamination at the Coastal Buckhannon site that was caused by the Removed USTs, if any, occurred after the effective date of the 1988 Regulations and the W.Va. Code Provisions, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

7. Neither Appellant has a right of entry to the Coastal Buckhannon site because: (1) neither owns the real property; (2) neither has any other basis, such as ownership of USTs at that site since the Removed USTs no longer exist on that site; and (3) they were denied access to that site.

8. The Board is without authority to compel Appellants to perform any remediation work at any site to which it does not have a right of entry. RBS, Inc. and Jill Fischer.

9. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have access to the Coastal Buckhannon site to perform remediation work, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

10. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have the financial resources to pay, or contract, for the performance of any required remediation work at the Buckhannon site site,

any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

11. Because the 1988 Regulations and the W.Va. Code Provisions are not retroactive, the Board does not have subject matter jurisdiction over any contamination that may have occurred at the Coastal Buckhannon site prior to their effective dates.

12. The Board may not order performance that would be impossible to perform, nor may it order remediation of contamination over which it has no subject matter jurisdiction, nor may it enter an order which exceeds its authority or violates Appellants' due process rights, and, therefore, the Board must grant Appellants' appeal and reverse the *DEP Order* as to the Coastal Buckhannon site.

E. FINDINGS OF FACT – PAUL'S

1. Neither Appellant ever owned the real property on which the Paul's site was located. Joint Exhibit 1, Stipulations E. 3 and 4.

2. The location of Paul's site had been dispensing gasoline since the 1940's, and, in particular, was a branded Texaco site from the late 1950's through the early 1970's and supplied by a Texaco distributor in Elkins; prior to being a Texaco outlet, it had been supplied by various other suppliers. Oct 10 Transcript pp. 64-65; Appellants' Exhibit 49.

3. A number of USTs had been installed and then replaced at the Paul's site during this period. Oct 10 Transcript p. 65; Appellants' Exhibit 49.

4. AET submitted a letter regarding Pauls' site to the DEP explaining that "[t]here have been too many other known and possible sources of contamination to single out these [five removed USTs] without a platform of solid evidence." Oct 10 Transcript p. 67; Appellants' Exhibit 67.

5. Additional evidence pointed to the existence of other sources of contamination at Paul's site. *See* Appellants' Exhibit 51; Oct 10 Transcript pp. 67-69.

6. The Removed USTs at the Paul's site were installed prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions. *See* General Finding Of Fact No. II.A., 19 (*supra*).

7. Because the Removed USTs at the Paul's site were installed prior to the effective date of the 1988 Regulations and the effective date of the W.Va. Code Provisions, and because it is commonly recognized that contamination occurs not just from USTs that leak, but also from overfilling of those USTs (including simple spills occurring during the filling of the USTs even without an overspill) and leaks in the connecting pipes which occur throughout the history of a site (Oct 10 Transcript, p. 245), since gasoline stations had been operated at the Paul's site dating back to the 1940's, part of the contamination at the Paul's site occurred prior to the effective dates of the Regulations and the W.Va. Code Provisions.

8. The DEP failed to meet it burden of proof and prove, by affirmative evidence, the extent to which, if any, the contamination at the Paul's site occurred after the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

9. Appellants met their initial burden of production that there were other sources of the contamination at the Paul's site, requiring the DEP to prove its case by proving, by affirmative evidence, the extent to which the contamination on the Paul' site, if any, was caused by the Removed USTs. Wetzel County Solid Waste Authority; Oct 10 Transcript, p. 232.

10. The DEP failed to meet its burden of proof and prove, by affirmative evidence, the extent to which, if any, the contamination at the Paul's site was caused by the Removed USTs at that site; reliance on an unauthorized and manufactured presumption is not sufficient.

11. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, neither Appellant has the financial resources to perform any remediation work at the Paul's site.

12. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, Appellants would be unable to find an environmental remediation firm willing to contract with Appellants for any remediation work at the Paul's site.

13. Each of the Appellants met its initial burden of production that it is impossible for it to perform any remediation work based upon financial inability; therefore, the DEP bore the burden of proving each of the Appellants has the financial ability to perform remediation work, which burden the DEP failed to meet. *See* General Finding Of Fact Nos. II.A., 1-17, *supra*.

F. CONCLUSIONS OF LAW – PAUL'S

1. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), it is incumbent upon the DEP, which bears the burden of proving its case, to prove by, affirmative evidence, the extent to which, if any, the contamination at the Paul's site was caused by the Removed USTs.

2. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Paul's

site was caused by the Removed USTs, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

3. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), where there were other sources of the contamination at the Paul's site, it was incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which, if any, the contamination at the Paul's site was caused by the Removed USTs.

4. Because the DEP failed to meet that burden of proof as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Paul's site was caused by the Removed USTs, the DEP failed to prove its case such that the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

5. As the 1988 Regulations and the W.Va. Code Provisions do not apply to any contamination which occurred prior to the date they became effective because they do not apply retroactively, it was incumbent upon the DEP, which bears the burden of proving its case, to prove by affirmative evidence, the extent to which the contamination at the Paul's site caused by the Removed USTs, if any, occurred after the 1988 Regulations and the W.Va. Code Provisions became effective.

6. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which the contamination at the Paul's site that was caused by the Removed USTs, if any, occurred after the effective date of the 1988 Regulations and the W.Va. Code Provisions, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

7. Neither Appellant has a right of entry to the Paul's site because: (1) neither owns the real property; and (2) neither has any other basis, such as ownership of USTs on that site since the Removed USTs no longer exist on that site.

8. The Board is without authority to compel Appellants to perform any remediation work at any site to which it does not have a right of entry. RBS, Inc. and Jill Fischer.

9. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have access to the Paul's site to perform remediation work, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

10. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have the financial resources to pay, or contract, for the performance of any required remediation work at the Paul's site, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

11. Because the 1988 Regulations and W.Va. Code Provisions are not retroactive, the Board does not have subject matter jurisdiction over any contamination that may have occurred at the Paul's site prior to their effective dates.

12. The Board may not order performance that would be impossible to perform, nor may it order remediation of contamination over which it has no subject matter jurisdiction, nor may it enter an order which exceeds its authority or violates Appellants' due process rights, and, therefore, the Board must grant Appellants' appeal and reverse the *DEP Order* as to the Paul's site.

G. FINDINGS OF FACT – COASTAL HACKER VALLEY

1. Neither Appellant ever owned the real property at Coastal Hacker Valley. Joint Exhibit 1, Stipulations E. 11 and 12.

2. Coastal Lumber Company closed and removed the Removed USTs at the Coastal Hacker Valley site. Oct. 10 Transcript pp. 70-73; Appellants' Exhibit 57; C.R. 3268; Table of Contents to C.R. (showing document 3268 falls within the range of pages for the Coastal Hacker Valley file).[13]

3. Coastal Lumber Company, through its employee, Tim Hinkle, had an Extended Phase II Report, dated January 4, 1992, prepared by Environmental Remediation Technologies And Supplies, regarding the Coastal Hacker Valley site. Appellants' Exhibit 59.

4. Said report was not prepared for either Appellant, but, instead, was prepared for Coastal Lumber Company. Oct Transcript p. 78; Appellants' Exhibit 59.

5. Appellants' Exhibit 60, a Contamination Assessment Report, also was not sent to either Appellant, nor was it prepared for either Appellant; instead, it was prepared for Coastal Lumber Company. Oct 10 Transcript p. 80; Appellants' Exhibit 60.

6. In a letter from AET to the DEP, dated March 10, 1995, enclosing a Recap/Summary Review, an engineer with AET states that Coastal Lumber Company has stated it owns all the Removed USTs at the Coastal Hacker Valley site and had removed all known USTs at that site.

[13] The Table of Contents to the Certified Record shows that the pages to the "Coastal Lumber Company 91-075-L51" file start at page 3037 and end at 3390. A review of those pages show that file is the DEP's Coastal Hacker Valley file.

7. The evidence shows neither Appellant had any ability to participate in any remediation work which was done at the Coastal Hacker Valley site, nor were they given access to that site to participate in any such remediation work.

8. Because Appellants have been denied access to the Coastal Hacker Valley site, the Board cannot compel them to remediate any contamination at that site. RSB, Inc. and Jill Fischer.

9. The Coastal Hacker Valley sawmill had been in operation for thirty (30) to forty (40) years prior to the removal of the Removed USTs at the Coastal Hacker Valley site and fuel was stored on that site for many of those years. Appellants' Exhibit 60, p. 2.

10. Appellants met their initial burden of production that there were other sources of the contamination at the Coastal Hacker Valley site, requiring the DEP to prove its case by proving, by affirmative evidence, the extent to which the contamination at the Coastal Hacker Valley site, if any, was caused by the Removed USTs. Wetzel County Solid Waste Authority; Oct 10 Transcript, p. 232.

11. The DEP failed to meet its burden of proof and prove, by affirmative evidence, the extent to which, if any, the contamination at the Coastal Hacker Valley site was caused by the Removed USTs at that site; reliance on an unauthorized and manufactured assumption is insufficient.

12. The Removed USTs at the Coastal Hacker Valley site were installed prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions. *See* General Finding Of Fact No. II.A., 19 (*supra*).

13. Because the Removed USTs at the Coastal Hacker Valley site were installed prior to the effective date of the 1988 Regulations and the effective date of the W.Va. Code

Provisions, and because contamination occurs not just from USTs that leak, but also from overfilling USTs (including simple spills occurring during the filling of the USTs even without an overspill) and leaks in the connecting pipes which occur throughout the history of a site, since fuel had been stored on the Coastal Hacker Valley site for 30 or 40 years prior to the violations which with Appellants are charged, part of the contamination found at the Coastal Hacker Valley site occurred prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

14. The DEP failed to meet it burden of proof and prove, by affirmative evidence, the extent to which, if any, the contamination at the Coastal Hacker Valley site occurred after the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

15. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, neither Appellant has the financial resources to perform any remediation work at the Coastal Hacker Valley site.

16. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, Appellants would be unable to find an environmental remediation firm willing to contract with Appellants for any remediation work at the Coastal Hacker Valley site.

17. Each of the Appellants met its initial burden of production that it is impossible for it to perform any remediation work based upon financial inability; therefore, the DEP bore the burden of proving each of the Appellants has the financial ability to perform remediation work, which burden the DEP failed to meet. *See* General Finding Of Fact Nos. II.A., 1-17, *supra*.

H. CONCLUSIONS OF LAW – COASTAL HACKER VALLEY

1. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), it is incumbent upon the DEP, which bears the burden of proving its case, to prove by affirmative evidence the extent to which, if any, the contamination at the Coastal Hacker Valley site was caused by the Removed USTs.

2. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Coastal Hacker Valley site was caused by the Removed USTs, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

3. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), where there were other sources of the contamination at the Coastal Hacker Valley site, it was incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which, if any, the contamination at the Coastal Hacker Valley site was caused by the Removed USTs.

4. Because the DEP failed to meet that burden of proof as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Coastal Hacker Valley site was caused by the Removed USTs, the DEP failed to prove its case such that the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

5. As the 1988 Regulations and the W.Va. Code Provisions do not apply to any contamination which occurred prior to the date they became effective because they do not apply retroactively, it was incumbent upon the DEP, which bears the burden of proving

its case, to prove, by affirmative evidence, the extent to which the contamination at the Coastal Hacker Valley site caused by the Removed USTs, if any, occurred after the 1988 Regulations and the W.Va. Code Provisions became effective.

6. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which the contamination at the Coastal Hacker Valley site that was caused by the Removed USTs, if any, occurred after the effective date of the 1988 Regulations and the W.Va. Code Provisions, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

7. Neither Appellant has a right of entry to the Coastal Hacker Valley site because: (1) neither owns the real property; (2) neither has any other basis to claim a right of access, such as ownership of any USTs on that site since the Removed USTs no longer exist on that site; and (3) Coastal Lumber Company shut out Appellants from being involved in the removal of the Removed USTs at that site.

8. The Board is without authority to compel Appellants to perform any remediation work at any site to which it does not have a right of entry. RBS, Inc. and Jill Fischer.

9. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have access to the Coastal Hacker Valley site to perform remediation work, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

10. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have the financial resources to pay, or contract, for the performance of any required remediation work at the Coastal Hacker

Valley site, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

11. Because the 1988 Regulations and W.Va. Code Provisions are not retroactive, the Board does not have subject matter jurisdiction over any contamination that may have occurred at the Coastal Hacker Valley site prior to their effective dates.

12. The Board may not order performance that would be impossible to perform, nor may it order remediation of contamination over which it has no subject matter jurisdiction, nor may it enter an order which exceeds its authority or violates Appellants' due process rights, and, therefore, the Board must grant Appellants' appeal and reverse the *DEP Order* as to the Coastal Hacker Valley site.

I. FINDINGS OF FACT – HAMRICK'S

1. Baker Oil never owned the real property at the Hamrick's site. Joint Exhibit 1, Stipulation E. 17.

2. Baker, Inc. at one time owned the real property at the Hamrick's site, but no longer does. Oct 10 Transcript pp. 86-87. Appellants' Exhibit 75.

3. Roger McCoy, who purchased the Hamrick's site real property from Baker, Inc., has denied Appellants access to the Hamrick's site real property. Oct 10 Transcript p. 87.

4. Appellants have met their initial burden of production regarding impossibility of performance because of denial of access to the Hamrick's site.

5. Because Appellants have been denied access to the Hamrick's site, the Board cannot compel them to remediate the contamination. RSB, Inc. and Jill Fischer.

5. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, neither Appellant has the financial resources to perform any remediation work at the Hamrick's site.

6. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, Appellants would be unable to find an environmental remediation firm willing to contract with Appellants for any remediation work at the Hamrick's site.

7. Each of the Appellants met its burden of production that it is impossible for it to perform any remediation work at the Hamrick's site based upon financial inability; therefore, the DEP bore the burden of proving each of the Appellants has the financial ability to perform remediation work at that site, which burden the DEP failed to meet. *See* General Finding Of Fact Nos. II.A., 1-17, *supra.*

8. The Removed USTs at the Hamrick's site were installed prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions. *See* General Finding Of Fact No. II.A., 19 (*supra*).

9. Because the Removed USTs at the Hamrick site were installed prior to the effective date of the 1988 Regulations and the effective date of the W.Va. Code Provisions, and because contamination occurs not just from USTs that leak, but also from overfilling USTs (including simple spills occurring during the filling of the USTs even without an overspill) and leaks in the connecting pipes which occur throughout the history of a site (Oct 10 Transcript, p. 245), part of the contamination at the Hamrick's site occurred prior to the effective dates of the Regulations and W.Va. Code Provisions.

10. The DEP failed to meet its burden of proof, by proving, by affirmative evidence, the extent to which, if any, the contamination at the Hamrick's site was caused

by the Removed USTs at that site after the 1988 Regulations and W.Va. Code Provisions became effective.

J. CONCLUSIONS OF LAW – HAMRICK'S

1. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), it is incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which, if any, the contamination at the Hamrick's site was caused by the Removed USTs.

2. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Hamrick's site was caused by the Removed USTs, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

3. As the 1988 Regulations and the W.Va. Code Provisions do not apply to any contamination which occurred prior to the date they became effective because they do not apply retroactively, it was incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which the contamination at the Hamrick's site caused by the Removed USTs, if any, occurred after the 1988 Regulations and the W.Va. Code Provisions became effective.

4. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which the contamination at the Hamrick's site that was caused by the Removed USTs, if any, occurred after the effective date of the 1988 Regulations and the W.Va. Code Provisions, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

5. Neither Appellant has a right of entry to the Hamrick's site because: (1) neither owns the real property; (2) neither has any other basis, such as ownership of USTs on that site since the Removed USTs no longer exist on that site; and (3) they were denied access to that site.

6. The Board is without authority to compel Appellants to perform any remediation work at any site to which it does not have a right of entry. RBS, Inc. and Jill Fischer.

7. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have access to the Hamrick's site to perform remediation work, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

8. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have the financial resources to pay, or contract, for the performance of any required remediation work at the Hamrick's site, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

9. Because the 1988 Regulations and the W.Va. Code Provisions are not retroactive, the Board does not have subject matter jurisdiction over any contamination that may have occurred at the Hamrick's site prior to their effective dates.

10. The Board may not order performance that would be impossible to perform, nor may it order remediation of contamination over which it has no subject matter jurisdiction, nor may it enter an order which exceeds its authority or violates Appellants'

due process rights, and, therefore, the Board must grant Appellants' appeal and reverse the *DEP Order* as to the Hamrick's site.

K. FINDINGS OF FACT – CLENDENIN

1. Baker Oil never owned the Clendenin site. Stipulations E. 16.

2. While Baker, Inc. did own the real property on which the Clendenin site is located at one time, it no longer does. Oct 10 Transcript pp. 98-99.

3. In 1992, Baker, Inc. informed Dave Long, of the DEP, that there were other sources of contamination at the Clendenin site. Oct 10 Transcript, p. 88-89; Appellants' Exhibit 65.

4. Other sources included the numerous oil derricks that, historically prior to the development of the Clendenin site as a gas station, dotted the landscape surrounding the Clendenin site, including across an alley behind that site that was drilled in 1945. Oct 10 Transcript pp. 91-97; Appellants' Exhibit 65A; Appellants' Exhibit 65B.

5. These oil wells were shallow wells that were fracked with diesel oil, causing that diesel oil to be introduced into the ground surrounding the Clendenin site. Oct 10 Transcript pp. 97-98.

6. Appellants met their initial burden of production that there were other sources of the contamination at the Clendenin site, requiring the DEP to prove its case by proving, by affirmative evidence, the extent to which the contamination at the Clendenin site, if any, was caused by the Removed USTs. Wetzel County Solid Waste Authority; Oct 10 Transcript, p. 232.

7. The DEP failed to meet its burden of proof showing, by affirmative evidence, the extent to which, if any, the contamination at the Clendenin site was caused by the Removed USTs at that site; reliance on an unauthorized and manufactured assumption is insufficient.

8. The Removed USTs at the Clendenin site were installed prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions. *See* General Finding Of Fact No. II.A., 19 (*supra*).

9. Because the Removed USTs at the Clendenin site were installed prior to the effective date of the 1988 Regulations and the effective date of the W.Va. Code Provisions, and because it is commonly recognized that contamination occurs not just from USTs that leak, but also from overfilling of those USTs (including simple spills occurring during the filling of the USTs even without an overspill) and leaks in the connecting pipes which occur throughout the history of a site (Oct 10 Transcript, p. 245, part of the contamination at the Clendenin site occurred prior to the effective dates of the Regulations and the W.Va. Code Provisions.

10. The DEP failed to meet its burden of proof showing, by affirmative evidence, the extent to which, if any, the contamination at the Clendenin site was caused by the Removed USTs at that site after the 1988 Regulations and W.Va. Code Provisions became effective.

11. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, neither Appellant has the financial resources to perform any remediation work at the Clendenin site.

12. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, Appellants would be unable to find an environmental remediation firm willing to contract with Appellants for any remediation work at the Clendenin site.

13. Each of the Appellants met its burden of production that it is impossible for it to perform any remediation work at the Clendenin site based upon financial inability; therefore, the DEP bore the burden of proving each of the Appellants has the financial ability to perform remediation work, which burden the DEP failed to meet. *See* General Finding Of Fact Nos. II.A., 1-17, *supra*.

L. CONCLUSIONS OF LAW – CLENDENIN

1. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), it is incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which, if any, the contamination at the Clendenin site was caused by the Removed USTs.

2. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Clendenin site was caused by the Removed USTs, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

3. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), where there were other sources of the contamination at the Clendenin site, it was incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the

extent to which, if any, the contamination at the Clendenin site was caused by the Removed USTs.

4. Because the DEP failed to meet that burden of proof as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Clendenin site was caused by the Removed USTs, the DEP failed to prove its case such that the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

5. As the 1988 Regulations and the W.Va. Code Provisions do not apply to any contamination which occurred prior to the date they became effective because they do not apply retroactively, it was incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which the contamination at the Clendenin site caused by the Removed USTs, if any, occurred after the 1988 Regulations and the W.Va. Code Provisions became effective.

6. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which the contamination at the Clendenin site that was caused by the Removed USTs, if any, occurred after the effective date of the 1988 Regulations and the W.Va. Code Provisions, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at the Clendenin site.

7. Neither Appellant has a right of entry to the Clendenin site because: (1) neither owns the real property; and, (2) neither has any other basis, such as ownership of USTs on that site since the Removed USTs no longer exist on that site.

8. The Board is without authority to compel Appellants to perform any remediation work at any site to which it does not have a right of entry. RBS, Inc. and Jill Fischer.

9. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have access to the Clendenin site to perform remediation work, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

10. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have the financial resources to pay, or contract, for the performance of any required remediation work at the Clendenin site, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

11. Because the 1988 Regulations and the W.Va. Code Provisions are not retroactive, the Board does not have subject matter jurisdiction over any contamination that may have occurred at the Clendenin site prior to their effective dates.

12. The Board may not order performance that would be impossible to perform, nor may it order remediation of contamination over which it has no subject matter jurisdiction, nor may it enter an order which exceeds its authority or violates Appellants' due process rights, and, therefore, the Board must grant Appellants' appeal and reverse the *DEP Order* as to the Clendenin site.

M. FINDINGS OF FACT – C. ADAM TONEY'S

1. Baker Oil never owned the real property at the C. Adam Toney's site. Joint Exhibit 1, Stipulation E. 15.

2. While Baker, Inc. did own the real property on which the C. Adam Toney's site is located at one time, it no longer does. Oct 10 Transcript p. 101-102.

3. Baker, Inc. sold the C. Adam Toney's site to Go-Mart. Oct 10 Transcript p. 102; Appellants' Exhibit 73.

4. When the USTs were removed from the C. Adam Toney's site, a visual inspection was conducted which revealed that the Removed USTs appeared to be in good condition "with no visible holes or noticeable pitting." Appellants' Exhibit, p. 2 (C.R. 004148).

5. The Removed USTs at the C. Adam Toney site were installed prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions. *See* General Finding Of Fact No. II.A., 19, *supra.*

6. Because the Removed USTs at the C. Adam Toney's site were installed prior to the effective date of the 1988 Regulations and the effective date of the W.Va. Code Provisions, and because contamination occurs not just from USTs that leak, but also from overfilling USTs (including simple spills occurring during the filling of the USTs even without an overspill) and leaks in the connecting pipes which occur throughout the history of a site (Oct 10 Transcript, p. 245), part of the contamination at the C. Adam Toney's site occurred prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

7. The DEP failed to meet its burden of proving the extent of the contamination caused by the Removed USTs at the C. Adam Toney's site which occurred after the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

8. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, neither Appellant has the financial resources to perform any remediation work at the C. Adam Toney's site.

9. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, Appellants would be unable to find an environmental remediation firm willing to contract with Appellants for any remediation work at the C. Adam Toney's site.

10. Each of the Appellants met its burden of production that it is impossible for it to perform any remediation based upon financial inability; therefore, the DEP bore the burden of proving each of the Appellants has the financial ability to perform remediation work at the C. Adam Toney's site, which burden the DEP failed to meet. *See* General Finding Of Fact Nos. II.A., 1-17, *supra*.

N. CONCLUSIONS OF LAW – C. ADAM TONEY'S

1. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), it is incumbent upon the DEP, which bears the burden of proving its case, to prove by affirmative evidence the extent to which, if any, the contamination at the C. Adam Toney's site was caused by the Removed USTs.

2. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the C. Adam Toney's site was caused by the Removed USTs, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

3. As the 1988 Regulations and W.Va. Code Provisions do not apply to any contamination which occurred prior to the date they became effective because they do not

apply retroactively, it was incumbent upon the DEP, which bears the burden of proving its case, to prove by affirmative evidence, the extent to which the contamination at the C. Adam Toney's site caused by the Removed USTs, if any, occurred after the 1988 Regulations and W.Va. Code Provisions became effective.

4. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which the contamination at the C. Adam Toney's site that was caused by the Removed USTs, if any, occurred after the effective date of the 1988 Regulations and the W.Va. Code Provisions, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at the C. Adam Toney's site.

5. Neither Appellant has a right of entry to the C. Adam Toney's site because: (1) neither owns the real property; and, (2) neither has any other basis, such as ownership of USTs on that site since the Removed USTs no longer exist on that site.

6. The Board is without authority to compel Appellants to perform any remediation work at any site to which it does not have a right of entry. RBS, Inc. and Jill Fischer.

7. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have access to the C. Adam Toney's site to perform remediation work, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

8. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have the financial resources to pay, or contract, for the performance of any required remediation work at the C. Adam Toney's

site, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

9. Because the 1988 Regulations and the W.Va. Code Provisions are not retroactive, the Board does not have subject matter jurisdiction over any contamination that may have occurred at the C. Adam Toney's site prior to their effective dates.

10. The Board may not order performance that would be impossible to perform, nor may it order remediation of contamination over which it has no subject matter jurisdiction, nor may it enter an order which exceeds its authority or violates Appellants' due process rights, and, therefore, the Board must grant Appellants' appeal and reverse the *DEP Order* as to the C. Adam Toney's site.

O. FINDINGS OF FACT – STEVE WHITE'S

1. Abandoned USTs were still in the ground at the Steve White's site when the Removed USTs were removed at that site. Oct 10 Transcript, pp. 103-104.

2. The DEP was given notification about these abandoned USTs in 1991. Oct 10 Transcript p. 103; Appellants' Exhibit 68.

3. The DEP was made aware that the Steve White's site had been used as gas stations since the 1930s. Oct 10 Transcript p. 104; Appellants' Exhibit 68.

4. Appellants met their initial burden of production that there were other sources of the contamination at the Steve White's site, requiring the DEP to prove its case by proving, by affirmative evidence, the extent to which the contamination at the Steve White's site, if any, was caused by the Removed USTs. Wetzel County Solid Waste Authority; Oct 10 Transcript, p. 232.

5. The DEP failed to meet its burden of proof and prove, by affirmative evidence, the extent to which, if any, the contamination at the Steve White's site was caused by the Removed USTs at that site; reliance on an unauthorized and manufactured assumption is insufficient.

6. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, neither Appellant has the financial resources to perform any remediation work at the Steve White's site.

7. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, Appellants would be unable to find an environmental remediation firm willing to contract with Appellants for any remediation work at the Steve White's site.

8. Each of the Appellants met its burden of production that it is impossible for it to perform any remediation work at the Steve White's site based upon financial inability; therefore, the DEP bore the burden of proving each of the Appellants has the financial ability to perform such remediation work, which burden the DEP failed to meet. *See* General Finding Of Fact Nos. II.A., 1-17, *supra*.

9. The Removed USTs at the Steve White's site were installed prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions. General Finding Of Fact No. II.A., 19, *supra*.

10. Because the Removed USTs at the Steve White's site were installed prior to the effective date of the 1988 Regulations and the effective date of the W.Va. Code Provisions, and because contamination occurs not just from USTs that leak, but also from overfilling USTs (including simple spills occurring during the filling of the USTs even without an overspill) and leaks in the connecting pipes which occur throughout the history

of a site (Oct 10 Transcript, p. 245), part of the contamination at the Steve White's site occurred prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

11. The DEP failed to meet it burden of proof and prove, by affirmative evidence, the extent to which, if any, the contamination at the Steve White's site occurred after the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

P. CONCLUSIONS OF LAW – STEVE WHITE'S

1. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), it is incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which, if any, the contamination at the Steve White's site is the responsibility of Appellants.

2. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Steve White's site was caused by the Removed USTs, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

3. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), where there were other sources of the contamination at the Steve White's site, it was incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which, if any, the contamination at the Steve White's site was caused by the Removed USTs.

4. Because the DEP failed to meet that burden of proof as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Steve White's site was caused by the Removed USTs, the DEP failed to prove its case such that the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

5. As the 1988 Regulations and the W.Va. Code Provisions do not apply to any contamination which occurred prior to the date they became effective because they do not apply retroactively, it was incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which the contamination at the Steve White's site caused by the Removed USTs, if any, occurred after the 1988 Regulations and the W.Va. Code Provisions became effective.

6. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which the contamination at the Steve White's site that was caused by the Removed USTs, if any, occurred after the effective date of the 1988 Regulations and the W.Va. Code Provisions, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at the Steve White's site.

7. Neither Appellant has a right of entry to the Steve White's site because: (1) neither owns the real property; and, (2) neither has any other basis, such as ownership of USTs on that site since the Removed USTs no longer exist on that site.

8. The Board is without authority to compel Appellants to perform any remediation work at any site to which it does not have a right of entry. RBS, Inc. and Jill Fischer.

9. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have access to the Steve White's site to perform remediation work, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

10. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have the financial resources to pay, or contract, for the performance of any required remediation work at the Steve White's site, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

11. Because the 1988 Regulations and the W.Va. Code Provisions are not retroactive, the Board does not have subject matter jurisdiction over any contamination that may have occurred at the Steve White's site prior to their effective dates.

12. The Board may not order performance that would be impossible to perform, nor may it order remediation of contamination over which it has no subject matter jurisdiction, nor may it enter an order which exceeds its authority or violates Appellants' due process rights, and, therefore, the Board must grant Appellants' appeal and reverse the *DEP Order* as to the Steve White's site.

Q. FINDINGS OF FACT – POINT C MART

1. The Point C Mart site is across the street from a site which previously had been an Exxon gasoline station. Oct 10 Transcript pp. 109-111; Appellants' Exhibit 72.

2. The current owner of a used car dealership located where the Exxon gasoline station used to be did some excavation on his property and hit a metal pipe that still contained petroleum products. Oct 10 Transcript pp. 111-112.

3. Baker, Inc. notified the DEP about the spill from the ruptured pipe that was located on the former site of an Exxon gasoline station. Oct 10 Transcript pp. 111-112.

4. In addition, a former dry-cleaning business was located right behind the Point C Mart site.

5. Dry cleaning businesses commonly used benzene products in the past. Oct 10 Transcript pp. 112.

6. Appellants met their initial burden of production that there were other sources of the contamination at the Point C Mart site, requiring the DEP to prove its case by proving, by affirmative evidence, the extent to which the contamination on the Point C Mart site, if any, was caused by the Removed USTs. Wetzel County Solid Waste Authority; Oct 10 Transcript, p. 232.

7. The DEP failed meet its burden of proof and prove, by affirmative evidence, the extent to which, if any, the contamination at Point C Mart site was caused by the Removed USTs at that site; reliance on an unauthorized and manufactured presumption is insufficient.

8. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, neither Appellant has the financial resources to perform any remediation work at the Point C Mart site.

9. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, Appellants would be unable to find an environmental remediation firm willing to contract with Appellants for any remediation work at the Point C Mart site.

10. Each of the Appellants met its initial burden of production that it is impossible for it to perform any remediation work at the Point C Mart site based upon

financial inability; therefore, the DEP bore the burden of proving each of the Appellants has the financial ability to perform remediation work, which burden the DEP failed to meet. *See* General Finding Of Fact Nos. II.A., 1-17, *supra.*

11. The Removed USTs at the Point C Mart site were installed prior to the effective date of the 1988 Regulations and the W.Va. Code Provisions. General Finding Of Fact No. II.A., 19, *supra.*

12. Because the Removed USTs at the Point C Mart site were installed prior to the effective date of the 1988 Regulations and the effective date of the W.Va. Code Provisions, and because contamination occurs not just from USTs that leak, but also from overfilling USTs (including simple spills occurring during the filling of the USTs even without an overspill) and leaks in the connecting pipes which occur throughout the history of a site (Oct 10 Transcript, p. 245), part of the contamination at the Point C Mart site occurred prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

13. The DEP failed to meet it burden of proof and prove, by affirmative evidence, the extent to which, if any, the contamination at the Point C Mart site occurred after the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

R. CONCLUSIONS OF LAW – POINT C MART

1. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), it is incumbent upon the DEP, which bears the burden of proving its case, to prove by affirmative evidence the extent to which, if any, the contamination at the Point C Mart site is the responsibility of Appellants.

2. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Point C Mart site was caused by the Removed USTs, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

3. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), where there were other sources of the contamination at the Point C Mart site, it was incumbent upon the DEP, which bears the burden of proving its case, to prove by affirmative evidence the extent to which, if any, the contamination at the Point C Mart site was caused by the Removed USTs.

4. Because the DEP failed to meet that burden of proof as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Point C Mart site was caused by the Removed USTs, the DEP failed to prove its case such that the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

5. As the 1988 Regulations and the W.Va. Code Provisions do not apply to any contamination which occurred prior to the date they became effective because they do not apply retroactively, it was incumbent upon the DEP, which bears the burden of proving its case, to prove by affirmative evidence, the extent to which the contamination at the Point C Mart site caused by the Removed USTs, if any, occurred after the 1988 Regulations and the W.Va. Code Provisions became effective.

6. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which the contamination at the Point C Mart

site that was caused by the Removed USTs, if any, occurred after the effective date of the 1988 Regulations and the W.Va. Code Provisions, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at the Point C Mart site.

7. Neither Appellant has a right of entry to the Point C Mart site because: (1) neither owns the real property; and (2) neither has any other basis, such as ownership of USTs on that site since the Removed USTs no longer exist on that site.

8. The Board is without authority to compel Appellants to perform any remediation work at any site to which it does not have a right of entry. RBS, Inc. and Jill Fischer.

9. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have access to the Point C Mart site to perform remediation work, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

10. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have the financial resources to pay, or contract, for the performance of any required remediation work at the Point C Mart site, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

11. Because the 1988 Regulations and the W.Va. Code Provisions are not retroactive, the Board does not have subject matter jurisdiction over any contamination that may have occurred at the Point C Mart site prior to their effective dates.

12. The Board may not order performance that would be impossible to perform, nor may it order remediation of contamination over which it has no subject matter

jurisdiction, nor may it enter an order which exceeds its authority or violates Appellants' due process rights, and, therefore, the Board must grant Appellants' appeal and reverse the *DEP Order* as to the Point C Mart site.

S. FINDINGS OF FACT – YOUNG'S

1. Neither Appellant ever owned the real property on which the Young's site was located. Joint Exhibit 1, Stipulations E. 13 and 14; Oct 10 Transcript p. 114.

2. Young's was located near a small unincorporated rural community called Dille in a very remote area of Nicholas County, West Virginia. Oct 10 Transcript p. 113.

3. The gasoline station at the Young's site eventually ceased doing business as the structures were either removed or destroyed in a fire and the real property, which was graded level, became nothing more than a mowed field. Oct Transcript pp. 113-115.

4. As a result, when Mr. Baker and Matt Ford, of CORE, attempted to find the Young's site to check the MWs placed on it, they were unable to find said site and were unable to locate the MWs which were placed on it. Oct 10 Transcript pp. 113-115.

5. If a site can no longer be found, it would be impossible to perform remediation work on that site.

6. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, neither Appellant has the financial resources to perform any remediation work at the Young's site.

7. Based upon the General Findings of Fact Nos. II.A. 1-17 above, Appellants would be unable to find an environmental remediation firm willing to contract with Appellants for any remediation work at the Young's site.

8. Each of the Appellants met its initial burden of production that it is impossible for it to perform any remediation work at the Young's site based upon financial

inability; therefore, the DEP bore the burden of proving each of the Appellants has the financial ability to perform remediation work at the Young's site, which burden the DEP failed to meet. *See* General Finding Of Fact Nos. II.A., 1-17, *supra*.

9. The Removed USTs at the Young's site were installed prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions. *See* General Finding Of Fact No. II.A., 19 (*supra*).

10. Because the Removed USTs at the Young's site were installed prior to the effective date of the 1988 Regulations and the effective date of the W.Va. Code Provisions, and because contamination occurs not just from USTs that leak, but also from overfilling USTs (including simple spills occurring during the filling of the USTs even without an overspill) and leaks in the connecting pipes which occur throughout the history of a site (Oct Transcript, p. 245), part of the contamination at the Young's site occurred prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

11. The DEP failed to meet it burden of proof and prove, by affirmative evidence, the extent to which, if any, the contamination at the Young's site occurred after the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

T. CONCLUSIONS OF LAW – YOUNG'S

1. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), it is incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which, if any, the contamination at the Young's site was caused by the Removed USTs.

2. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Young's site was caused by the Removed USTs, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

3. As the 1988 Regulations and the W.Va. Code Provisions do not apply to any contamination which occurred prior to the date they became effective because they do not apply retroactively, it was incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which the contamination at the Young's site caused by the Removed USTs, if any, occurred after the 1988 Regulations and the W.Va. Code Provisions became effective.

4. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which the contamination at the Young's site that was caused by the Removed USTs, if any, occurred after the effective date of the 1988 Regulations and the W.Va. Code Provisions, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at the Young's site.

5. Neither Appellant has a right of entry to the Young's site because: (1) neither owns the real property; (2) neither has any other basis to claim a right of access, such as ownership of USTs on that site since the Removed USTs no longer exist on that site; and (3) the Young's site cannot be located because the site was razed and the real property leveled, making its location unrecognizable.

6. The Board is without authority to compel Appellants to perform any remediation work at any site to which it does not have a right of entry. RBS, Inc. and Jill Fischer.

7. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have access to the Young's site to perform remediation work, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

8. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have the financial resources to pay, or contract, for the performance of any required remediation work at the Young's site, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

9. Because the 1988 Regulations and the W.Va. Code Provisions are not retroactive, the Board does not have subject matter jurisdiction over any contamination that may have occurred at the Young's site prior to their effective dates.

10. The Board may not order performance that would be impossible to perform, nor may it order remediation of contamination over which it has no subject matter jurisdiction, nor may it enter an order which exceeds its authority or violates Appellants' due process rights, and, therefore, the Board must grant Appellants' appeal and reverse the *DEP Order* as to the Young's site.

U. FINDINGS OF FACT – SAMPLE'S

1. Neither Appellant ever owned the real property on which the Sample's site was located. Joint Exhibit 1, Stipulations E. 9 and 10.

2. Approximately eight (8) years ago, the Sample's site was close to receiving a No Further Action needed determination. Appellants' Exhibit 69.

3. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, neither Appellant has the financial resources to perform any remediation work at the Sample's site.

4. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, Appellants would be unable to find an environmental remediation firm willing to contract with Appellants for any remediation work at the Sample's site.

5. Each of the Appellants met its initial burden of production that it is impossible for it to perform any remediation work at the Sample's site based upon financial inability; therefore, the DEP bore the burden of proving each of the Appellants has the financial ability to perform remediation work at the Sample's site, which burden the DEP failed to meet. *See* General Finding Of Fact Nos. II.A., 1-17, *supra.*

6. The Removed USTs at the Sample's site were installed prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions. *See* General Finding Of Fact No. II.A., 19 (*supra*).

7. Because the Removed USTs at the Sample's site were installed prior to the effective date of the 1988 Regulations and the effective date of the W.Va. Code Provisions, and because contamination occurs not just from USTs that leak, but also from overfilling of those USTs (including simple spills occurring during the filling of the USTs even without an overspill) and leaks in the connecting pipes which occur throughout the history of a site (Oct 10 Transcript, p. 245), part of the contamination at the Sample's site occurred prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

8. The DEP failed to meet it burden of proof and prove, by affirmative evidence, the extent to which, if any, the contamination at the Sample's site occurred after the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

V. CONCLUSIONS OF LAW – SAMPLE'S

1. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs, it is incumbent upon the DEP, which bears the burden of proving its case, to prove by affirmative evidence the extent to which, if any, the contamination at the Sample's site was caused by the Removed USTs.

2. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the Sample's site was caused by the Removed USTs, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

3. As the 1988 Regulations and the W.Va. Code Provisions do not apply to any contamination which occurred prior to the date they became effective because they do not apply retroactively, it was incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which the contamination at the Sample's site caused by the Removed USTs, if any, occurred after the 1988 Regulations and the W.Va. Code Provisions became effective.

4. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which the contamination at the Sample's site that was caused by the Removed USTs, if any, occurred after the effective date of the 1988 Regulations and the W.Va. Code Provisions, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at the Sample's site.

5. Neither Appellant has a right of entry to the Sample's site because: (1) neither owns the real property; and (2) neither has any other basis, such as ownership of USTs on that site since the Removed USTs no longer exist on that site.

6. The Board is without authority to compel Appellants to perform any remediation work at any site to which it does not have a right of entry. RBS, Inc. and Jill Fischer.

7. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have access to the Sample's site to perform remediation work, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

8. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have the financial resources to pay, or contract, for the performance of any required remediation work at the Sample's site, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

9. Because the 1988 Regulations and W.Va. Code Provisions are not retroactive, the Board does not have subject matter jurisdiction over any contamination that may have occurred at the Sample's site prior to their effective dates.

10. The Board may not order performance that would be impossible to perform, nor may it order remediation of contamination over which it has no subject matter jurisdiction, nor may it enter an order which exceeds its authority or violates Appellants' due process rights, and, therefore, the Board must grant Appellants' appeal and reverse the *DEP Order* as to the Sample's site.

W. FINDINGS OF FACT – W.J. PRINCE'S

1. Neither Appellant ever owned the real property on which W.J. Prince's site was located. Joint Exhibit 1, Stipulations, E. 7 and 8.

2. The Removed USTs at the W.J. Prince's site were installed prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions. *See* General Finding Of Fact No. II.A., 19 (*supra*).

3. Because the Removed USTs at the W.J. Prince's site were installed prior to the effective date of the 1988 Regulations and the effective date of the W.Va. Code Provisions, and because it is commonly recognized that contamination occurs not just from USTs that leak, but also from overfilling of those USTs (including simple spills occurring during the filling of the USTs even without an overspill) and leaks in the connecting pipes which occur throughout the history of a site (Oct 10 Transcript, p. 245), part of the contamination at the W.J. Prince's site occurred prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

4. The DEP failed to meet it burden of proof and prove, by affirmative evidence, the extent to which, if any, the contamination at the W.J. Prince's site occurred after the effective dates of the 1988 Regulations and the W.Va. Code Provisions.

5. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, neither Appellant has the financial resources to perform any remediation work at the W.J. Prince's site.

6. Based upon the General Findings Of Fact Nos. II.A. 1-17 above, Appellants would be unable to find an environmental remediation firm willing to contract with Appellants for any remediation work at the W.J. Prince's site.

7. Each of the Appellants met its initial burden of production that it is impossible for it to perform any remediation work at the W.J. Prince's site based upon financial inability; therefore, the DEP bore the burden of proving each of the Appellants has the financial ability to perform remediation work at the W.J. Prince's site, which burden the DEP failed to meet. *See* General Finding Of Fact Nos. II.A., 1-17, *supra*.

X. CONCLUSIONS OF LAW – W.J. PRINCE'S

1. As the DEP admitted it may hold Appellants' responsible only for the contamination caused by the Removed USTs (Oct 10 Transcript, pp. 262-263), it is incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which, if any, the contamination at the W.J. Prince's site was caused by the Removed USTs.

2. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which, if any, the contamination at the W.J. Prince's site was caused by the Removed USTs, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at that site.

3. As the 1988 Regulations and the W.Va. Code Provisions do not apply to any contamination which occurred prior to the date they became effective because they do not apply retroactively, it was incumbent upon the DEP, which bears the burden of proving its case, to prove, by affirmative evidence, the extent to which the contamination at the W.J. Prince's site caused by the Removed USTs, if any, occurred after the 1988 Regulations and the W.Va. Code Provisions became effective.

4. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, the extent to which the contamination at the W.J. Prince's

site that was caused by the Removed USTs, if any, occurred after the effective date of the 1988 Regulations and the W.Va. Code Provisions, the *DEP Order* must be reversed because it imposed liability on Appellants for all contamination at the W.J. Prince's site.

5. Neither Appellant has a right of entry to the W.J. Prince's site because: (1) neither owns the real property; and (2) neither has any other basis, such as ownership of USTs on that site since the Removed USTs no longer exist on that site.

6. The Board is without authority to compel Appellants to perform any remediation work at any site to which it does not have a right of entry. RBS, Inc. and Jill Fischer.

7. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have access to the W.J. Prince's site to perform remediation work, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

8. Because the DEP failed to meet its burden of proving its case as it failed to prove, by affirmative evidence, that Appellants have the financial resources to pay, or contract, for the performance of any required remediation work at the W.J. Prince's site, any order entered by the Board would be requiring the impossible, in violation of Appellants' due process rights.

9. Because the 1988 Regulations and the W.Va. Code Provisions are not retroactive, the Board does not have subject matter jurisdiction over any contamination that may have occurred at the W.J. Prince's site prior to their effective dates.

10. The Board may not order performance that would be impossible to perform, nor may it order remediation of contamination over which it has no subject matter

jurisdiction, nor may it enter an order which exceeds its authority or violates Appellants' due process rights, and, therefore, the Board must:

(a) deny DEP's motion to dismiss Appellants' appeal as to the W.J. Prince's site (Oct 10 Transcript, p. 130) because the Certified Record clearly establishes that:

i. the Removed USTs at the W.J. Prince's site were installed prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions (*see* General Finding Of Fact II.A., 19), meaning there was contamination at the site prior to those effective dates;

ii. under the law, neither the 1988 Regulations nor the W.Va. Code Provisions are to be applied retroactively;

iii. the Board, therefore, has no subject matter jurisdiction over any contamination that occurred prior to those effective dates;

iv. the DEP, which bears the burden of proving the extent of the contamination which was caused by the Removed USTs at the W.J. Prince's site (*see* General Conclusion of Law, Paragraph No. 9; Wetzel Solid Waste Authority; Oct 10 Transcript, p. 232), bore the burden of proving, by affirmative evidence, the extent of the contamination, if any, at the W.J. Prince's site that occurred after the effective dates of the 1988 Regulations and the W.Va. Code Provisions, which it failed to do;

v. the DEP also failed to meet its burden of proof demonstrating the extent of the contamination which occurred after the effective dates of the 1988

Regulations and the W.Va. Code Provisions for which Appellants are responsible; and

vi. the DEP also failed to prove that: (1) Appellants have access to the W.J. Prince's site; and (2) Appellants have the financial resources to pay, or contract, for the performance of any remediation work at the W.J. Prince's site, such that any order entered requiring any such remediation work would be requiring the impossible, violating Appellants' due process rights;

and

(b) reverse the *DEP Order* as to the W.J. Prince's site: (1) because it seeks to compel the impossible, in violation of Appellants' due process rights, as Appellants have neither access nor the requisite financial resources to accomplish its terms as to the W.J. Prince's site; (2) because the *DEP Order* seeks to exercise subject matter jurisdiction over contamination which occurred at the W.J. Prince's site prior to the effective dates of the 1988 Regulations and the W.Va. Code Provisions, which it does not have; and (3) because, pursuant to RBS, Inc. and Jill Fischer, it would exceed the Board's authority to order remediation at the W.J. Prince's site, a site to which Appellants have no access.

ACCORDINGLY, based upon all the above **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, the Board hereby **ORDERS** that:

1. Appellants' appeal shall be, and it hereby is, **GRANTED**;

2. The *DEP Order* shall be, and it hereby is, **REVERSED**;

3. The enforcement proceedings before the DEP below forming the basis of this appeal shall be, and they hereby are, **DISMISSED, WITH PREJUDICE**; and

4. Appellee's motion to dismiss Appellants' appeal with respect to the W.J. Prince's site shall be, and it hereby is, **DENIED**.

ENTERED this _____ day of _____, 2025.

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

_____

Dr. Edward M. Snyder, Chairperson

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA

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

Appellants,

v. Appeal No. 22-03-EQB

KATHERYN D. EMERY, P.E., DIRECTOR,
DIVISION OF WATER AND WASTE
MANAGEMENT, WEST VIRGINIA
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 23rd day of January, 2025, I served the forgoing *Appellants' Submission Of Proposed "Final Order (No Liability For Contamination")*, via email to the Honorable Kenna M. DeRaimo, Clerk of the West Virginia Environmental Quality Board, at kenna.m.deraimo@wv.gov, and via email to Charles S. Driver, counsel for appellee Jeremy Bandy, M. 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 an envelope addressed as follows:

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

R. Terrance Rodgers (WVSB #3148)