

**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA**

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

Appellants,

v.

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

Appellee.

RECEIVED

JAN 23 2025

Environmental Quality
Board

Appeal No. 22-03-EQB

FINAL ORDER

On May 31, 2022, the Appellants, J.C. Baker & Son, Inc. ("J.C. Baker") and Baker Oil Company ("Baker Oil"), by counsel, filed a Notice of Appeal with the West Virginia Environmental Quality Board ("Board") alleging that the Appellants were aggrieved by Order No. UST-22-05 ("WVDEP Order") entered by the West Virginia Department of Environmental Protection ("WVDEP") on April 26, 2022. The Notice of Appeal properly names Kathryn D. Emery, Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection as Appellee¹. WVDEP² and Ms. Emery appeared by counsel, with Ruth Porter appearing as agency representative for purposes of the evidentiary hearing.

On September 29, 2022, on the Appellants' motion, the Board ordered that the initial

¹ During the pendency of the case, Jeremy W. Bandy has been named Director of the Division of Water and Waste Management.

² In some cases, documents and correspondence in the record refers to the West Virginia Department of Natural Resources, WVDEP's regulatory predecessor for the matters discussed herein. Where the distinction is of no practical effect, the West Virginia Department of Natural Resources is additionally herein referred to as WVDEP.

evidentiary hearing in the above-styled matter should address only the limited issue of whether the Appellants were ever the owners or operators of the underground storage tanks ("USTs") at issue. The Final Order entered subsequent to that hearing finds that the Appellants were the owners of the USTs at issue during the relevant time periods.

Pursuant to W. Va. Code § 22B-1-7(g) and 46 CSR 4 *et seq.*, the Board has heard and considered the testimony, evidence, and record in the above-styled matter and hereby **AFFIRMS** the Order issued by WVDEP and **DENIES** the appeal, dismissing it with prejudice and striking it from the docket of the Board.

Pursuant to W. Va. Code § 22B-1-7(i) and W. Va. Code § 29A-5-3, this order is accompanied by findings of fact and conclusions of law as set forth below.

BURDEN OF PROOF

The Board adopts a burden-shifting standard in its evidentiary hearings. The Appellants have an initial burden to raise an issue with sufficient evidence to support a finding that WVDEP's decision was incorrect. WVDEP must then produce evidence demonstrating its reasoning in making its decision. The Appellants then have the opportunity to show that the evidence produced by WVDEP is deficient or pretextual. (Transcript of 10/11/24 hearing, 13:1-12)

GENERAL FINDINGS OF FACT

1. The WVDEP Order sets forth certain findings of fact regarding the following USTs owned by the Appellants:

- a. Linger's Service Station, located in Upshur County, West Virginia;
- b. Paul's Service Center, located in Barbour County, West Virginia;
- c. Coastal Lumber Company site, located in Upshur County, West Virginia;
- d. Hamrick Service Station, located in Webster County, West Virginia;
- e. W.J. Princes Store, located in Lewis County, West Virginia;

- f. Sample's Service Station, located in Clay County, West Virginia;
- g. Steve White Service Station, located in Braxton County, West Virginia;
- h. Coastal Lumber Company site, located in Webster County, West Virginia;
- i. Clendenin Service Station, located in Kanawha County, West Virginia;
- j. Point C Mart, located in Lewis County, West Virginia;
- k. Young's Service Station, located in Nicholas County, West Virginia;
- l. C. Adam Toney Tire, located in Nicholas County, West Virginia; and,
- m. Glenville Sunoco, located in Gilmer County, West Virginia.³

The WVDEP Order indicates that the Appellants have responsibility for releases and contamination at the listed sites and that the Appellants have violated numerous requirements for submission of required documentation or performance of required actions. The Board's findings of fact as to each site are as follows:

Linger's Service Station

2. The Appellants did not submit evidence as to the portions of the WVDEP Order regarding the Appellants' failures to submit required documentation or perform required actions as detailed in the following paragraphs (Certified Record⁴, pp. 7888-89):

- ¶ 7: Failure to submit a Corrective Action Plan (CAP);
- ¶ 9: Failure to submit a Supplemental Site Assessment Report (SSAR);
- ¶ 10: Failure to submit a SSAR;
- ¶ 11: Failure to submit a Site Assessment Work Plan (SAWP);
- ¶ 12: Failure to investigate; and,
- ¶ 13: Failure to investigate.

3. On March 10, 1993, WVDEP received a Notification for Underground Storage Tanks ("Notification") indicating that multiple USTs had leaked at the site in question. This Notification was signed by Mr. Baker.⁵ (C.R. 68-73)

4. On December 17, 1992, a WVDEP inspector completed a UST Closure Inspection form.

³ The parties agree that the portion of WVDEP's order referencing the Glenville Sunoco site is withdrawn and that the Glenville Sunoco site is no longer a subject of this appeal.

⁴ By request of the Board, the relevant portions of the Certified Record were separated into exhibits for presentation. By agreement of the parties, citation to the Certified Record is acceptable for ease of review.

⁵ Unless otherwise indicated, "Mr. Baker" herein refers to Michael Baker.

The inspection indicated that at the time the inspection was performed, there was extensive contamination and that holes and pitting were observed in multiple USTs. The inspection further indicated a confirmed release (C.R. 75)

5. On October 15, 1993, a WVDEP inspector completed a Site Visit Report and an Inspection of Non-Compliance indicating the continuing presence of contamination and failure on the Appellants' part to adequately control and remediate the contamination.(C.R. 97; 114-17)

6. From October 24, 1994 to May 21, 2018, reports and correspondence were submitted by the Appellants' consultants and contractors indicating the continuing presence of contamination at the site at issue and providing plans for remediation and steps to be undertaken by the Appellants. These reports and correspondence were all commissioned by the Appellants.

7. During the relevant time period for the USTs at issue, WVDEP repeatedly pressed the Appellants for documentation and plans which the Appellants failed to submit as indicated by the WVDEP order.

Paul's Service Station

8. The Appellants did not submit evidence as to the portions of the WVDEP Order regarding the Appellants' failures to submit required documentation or perform required actions as detailed in the following paragraphs (C.R. pp. 7889-90):

- ¶ 17: Failure to submit a CAP;
- ¶ 19: Failure to submit a CAP or SSAR;
- ¶ 20: Failure to submit a SAWP;
- ¶ 21. Failure to investigate; and,
- ¶ 22: Failure to investigate.

9. On December 17, 1992, a WVDEP inspector completed a UST Closure Inspection form. The inspection indicated that at the time the inspection was performed, there was extensive contamination and that holes and pitting were observed in multiple USTs. (C.R. 843)

10. On February 5, 1993, correspondence from the Appellants to WVDEP indicates that a release was detected when the USTs at issue were removed. The correspondence and other communications suggested that any contamination was due to a previous spill from a UST owned by the Department of Highways. However, the February 5, 1993 acknowledges that the release may also have occurred due to "overfilling and leaking lines," indicating the Appellants' acknowledgment of potential responsibility. This correspondence was signed by Mr. Baker. (C.R. 849)

11. During the relevant time period for the USTs at issue, WVDEP repeatedly pressed the Appellants for documentation and plans which the Appellants failed to submit as indicated by the WVDEP order.

Coastal Lumber (Buckhannon)

12. The Appellants did not submit evidence as to the portions of the WVDEP Order regarding the Appellants' failures to submit required documentation or perform required actions as detailed in the following paragraphs (C.R. pp. 7890-91):

- ¶ 27: Failure to submit a CAP;
- ¶ 29: Failure to submit a Site Assessment Report (SAR);
- ¶ 30: Failure to submit a SSAR;
- ¶ 31: Failure to cooperate;
- ¶ 32: Failure to investigate; and,
- ¶ 33: Failure to investigate.

13. On February 7, 1995, a WVDEP inspector completed a Confirmed Release Notice to Comply form confirming the occurrence of a leak from the USTs at issue. (C.R. 1550)

14. On February 9, 1995, WVDEP correspondence to the Appellants again confirms the release and notifies the Appellants of their responsibilities. (C.R. 1551-53)

15. From August 23, 1994 to July 15, 2015, reports and correspondence were submitted by

the Appellants' consultants and contractors indicating the continuing presence of contamination at the site at issue and providing plans for remediation and steps to be undertaken by the Appellants. These reports and correspondence were all commissioned by the Appellants.

16. During the relevant time period for the USTs at issue, WVDEP repeatedly pressed the Appellants for documentation and plans which the Appellants failed to submit as indicated by the WVDEP order.

Coastal Lumber (Hacker Valley)

17. The Appellants did not submit evidence as to the portions of the WVDEP Order regarding the Appellants' failures to submit required documentation or perform required actions as detailed in the following paragraphs (C.R. pp. 7895-96):

- ¶ 76: Failure to submit a CAP;
- ¶ 77: Failure to submit an ISCR;
- ¶ 78: Failure to investigate and to perform an ISCR;
- ¶ 79: Failure to complete a SIR; and,
- ¶ 80: Failure to investigate.

18. On August 20, 1991, a WVDEP inspector completed a Confirmed Release Notice to Comply form confirming the occurrence of a leak from the USTs at issue. (C.R. 3052).

19. On August 20, 1991, the inspector further noted liquid in the pit area and contaminated soil around the pump station and tank field. (CR 3052-3055)

20. During the relevant time period for the USTs at issue, WVDEP repeatedly pressed the Appellants for documentation and plans which the Appellants failed to submit as indicated by the WVDEP order.

Hamrick Service Station

21. The Appellants did not submit evidence as to the portions of the WVDEP Order regarding the Appellants' failures to submit required documentation or perform required actions

as detailed in the following paragraphs (C.R. pp. 7891-92):

- ¶ 38: Failure to submit a Groundwater Monitoring Report (GMR);
- ¶ 40: Failure to submit a SAR;
- ¶ 41: Failure to submit an Initial Site Characterization Report (ISCR);
- ¶ 42: Failure to investigate;
- ¶ 43: Failure to submit a Site Investigation Report (SIR); and,
- ¶ 44: Failure to investigate.

22. On April 30, 1993, correspondence from the Appellants to WVDEP indicates that a release was detected when the USTs at issue were removed. The correspondence acknowledges that the release occurred due to "overfilling and leaking lines," indicating the Appellants' acknowledgment of responsibility. This correspondence was signed by Mr. Baker. (C.R. 1892)

23. From November 3, 1995 to July 15, 2015, reports and correspondence were submitted by the Appellants' consultants and contractors indicating the continuing presence of contamination at the site at issue and providing plans for remediation and steps to be undertaken by the Appellants. These reports and correspondence were all commissioned by the Appellants.

24. The November 3, 1995 Site Assessment Report commissioned by the Appellants indicates that the likely source of the surrounding contamination is the USTs at issue. (C.R. 1926-63)

25. During the relevant time period for the USTs at issue, WVDEP repeatedly pressed the Appellants for documentation and plans which the Appellants failed to submit as indicated by the WVDEP order.

W. J. Princes Store

26. The Appellants did not submit evidence as to the portions of the WVDEP Order regarding the Appellants' failures to submit required documentation or perform required actions as detailed in the following paragraphs (C.R. pp. 7892-93):

- ¶ 50: Failure to submit a SAR;
- ¶ 51: Failure to submit a SAWP;
- ¶ 52: Failure to investigate; and,
- ¶ 53. Failure to investigate.

27. On December 3, 1993, a Leak Data Report confirms a release on December 2, 1993 and resulting contamination. (C.R. 2355)

28. On April 30, 1993, correspondence from the Appellants to WVDEP indicates that a release was detected when the USTs at issue were removed. The correspondence acknowledges that the release occurred due to "overfilling and leaking lines," indicating the Appellants' acknowledgment of responsibility. This correspondence was signed by Mr. Baker. (C.R. 2369)

29. On February 2, 1994, a Notification indicated the presence of multiple leaks from the USTs at issue. This Notification was signed by Mr. Baker.

30. From March 1, 1995 to July 15, 2015, reports and correspondence were submitted by the Appellants' consultants and contractors indicating the continuing presence of contamination at the site at issue and providing plans for remediation and steps to be undertaken by the Appellants. These reports and correspondence were all commissioned by the Appellants.

31. During the relevant time period for the USTs at issue, WVDEP repeatedly pressed the Appellants for documentation and plans which the Appellants failed to submit as indicated by the WVDEP order.

Sample's Service Station

32. The Appellants did not submit evidence as to the portions of the WVDEP Order regarding the Appellants' failures to submit required documentation or perform required actions as detailed in the following paragraphs (C.R. pp. 7893-94):

- ¶ 58: Failure to submit a SAR;
- ¶ 60: Failure to submit a SAR;

- ¶ 61: Failure to submit a SIR; and,
- ¶ 62. Failure to investigate.

33. On April 7, 1992, a WVDEP inspector completed a UST Closure Inspection form. The inspection indicated that at the time the inspection was performed, there were holes in multiple USTs at issue and moderate contamination. The inspection further indicated a confirmed release (C.R. 2569)

34. On April 7, 1992, a WVDEP inspector completed a Notice of Non-Compliance form indicating that contaminated water from the pit area was being pumped into a nearby stream and that a petroleum sheen was observed. (C.R. 2577)

35. On May 5, 1992, a Notification indicated the presence of multiple leaks from the USTs at issue. This Notification was signed by Mr. Baker.

36. On October 27, 1993, correspondence from the Appellants to WVDEP indicates that a release was detected when the USTs at issue were removed. The correspondence acknowledges that the release occurred due to "overfilling and leaking lines," indicating the Appellants' acknowledgment of responsibility. This correspondence was signed by Mr. Baker. (C.R. 2629)

37. During the relevant time period for the USTs at issue, WVDEP repeatedly pressed the Appellants for documentation and plans which the Appellants failed to submit as indicated by the WVDEP order.

Steve White Service Station

38. The Appellants did not submit evidence as to the portions of the WVDEP Order regarding the Appellants' failures to submit required documentation or perform required actions as detailed in the following paragraphs (C.R. pp. 7894-95):

- ¶ 66: Failure to submit a SAR;
- ¶ 69: Failure to submit a SAR or SSAR;

- ¶ 70: Failure to submit a SIR; and,
- ¶ 71. Failure to investigate.

39. On February 7, 1992, a WVDEP inspector completed a UST Closure Inspection form. The inspection indicated that at the time the inspection was performed, there was extensive contamination and that holes and pitting were observed in multiple USTs. The inspection further indicated a confirmed release (C.R. 2834)

40. On March 15, 1992, a Notification indicated the presence of a leak from one of the USTs at issue. This Notification was signed by Mr. Baker. (C.R. 2869-73)

41. During the relevant time period for the USTs at issue, WVDEP repeatedly pressed the Appellants for documentation and plans which the Appellants failed to submit as indicated by the WVDEP order.

Clendenin Service Station

42. The Appellants did not submit evidence as to the portions of the WVDEP Order regarding the Appellants' failures to submit required documentation or perform required actions as detailed in the following paragraphs (C.R. pp. 7896-97):

- ¶ 83: Failure to submit a SAR;
- ¶ 84: Failure to submit a SAR;
- ¶ 86: Failure to submit a SAR;
- ¶ 87. Failure to submit a SIR; and,
- ¶ 88: Failure to investigate.

43. On February 28, 1991, a WVDEP inspector completed a Confirmed Release Notice to Comply form confirming the occurrence of a leak from the USTs at issue. (C.R. 3401)

44. On February 28, 1991, a WVDEP inspector completed a UST Closure Inspection form indicating that at the time the inspection was performed, there was moderate contamination and that one of the USTs at issue was in "fair" condition. The inspection further indicated a

confirmed release. (C.R. 3402-03)

45. On May 25, 1991, correspondence from Mr. Baker to WVDEP indicated that contaminated soil was hauled away with a portion being dumped in a landfill and the balance being disposed of at Mr. Baker's farm. (C.R. 3406)

46. On May 25, 1994, an initial abatement report commissioned by the Appellants indicated the presence of free product in the tank pit excavation in the area of the tank fill port. (C.R. 4174)

47. During the relevant time period for the USTs at issue, WVDEP repeatedly pressed the Appellants for documentation and plans which the Appellants failed to submit as indicated by the WVDEP order.

Point C Mart

48. The Appellants did not submit evidence as to the portions of the WVDEP Order regarding the Appellants' failures to submit required documentation or perform required actions as detailed in the following paragraphs (C.R. pp. 7896-97):

- ¶ 102: Failure to submit a SAR;
- ¶ 103: Failure to submit a SAR;
- ¶ 104: Failure to investigate;
- ¶ 106: Failure to submit a CAP or GMR;
- ¶ 107: Failure to submit a SIR; and,
- ¶ 108: Failure to investigate.

49. On March 2, 1994, a WVDEP inspector completed a Confirmed Release Notice to Comply form confirming the occurrence of a leak from the USTs at issue. (C.R. 3623)

50. On March 16, 1994, a WVDEP inspector completed a UST Closure Inspection form. The inspection indicated that at the time the inspection was performed, there was moderate contamination and that holes and pitting were observed in multiple USTs. The inspection further indicated a confirmed release (C.R. 3628)

51. On August 11, 1995, WVDEP received a Notification for Underground Storage Tanks indicating that multiple USTs had leaked at the site in question. This Notification was signed by Mr. Baker.

52. During the relevant time period for the USTs at issue, WVDEP repeatedly pressed the Appellants for documentation and plans which the Appellants failed to submit as indicated by the WVDEP order.

Young's Service Station

53. The Appellants did not submit evidence as to the portions of the WVDEP Order regarding the Appellants' failures to submit required documentation or perform required actions as detailed in the following paragraphs (C.R. p. 7898):

- ¶ 115: Failure to submit a SAR;
- ¶ 116: Failure to submit a SIR; and,
- ¶ 117: Failure to investigate.

54. On April 13, 1994, a Leak Data Report confirms a release on December 2, 1993 and resulting contamination. (C.R. 4016)

55. During the relevant time period for the USTs at issue, WVDEP repeatedly pressed the Appellants for documentation and plans which the Appellants failed to submit as indicated by the WVDEP order.

C. Adam Toney Tire

56. The Appellants did not submit evidence as to the portions of the WVDEP Order regarding the Appellants' failures to submit required documentation or perform required actions as detailed in the following paragraphs (C.R. p. 7898):

- ¶ 121: Failure to submit a GWR; and,
- ¶ 123: Failure to investigate.

57. On March 31, 1994, a Leak Data Report confirms a release on March 30, 1994 and resulting contamination. (C.R. 4137)

58. On March 31, 1994, a WVDEP inspector completed a UST Closure Inspection form indicating that at the time the inspection was performed, there was moderate contamination and that multiple USTs at issue were in "fair" condition and that one was in "poor" condition. The inspection further indicated a confirmed release and that product was currently leaking from the tank. (C.R. 3402-03)

Additional Findings of Fact

59. The Appellants stated that they are unable to access certain properties and are accordingly not responsible for remediation.

60. The Appellants did not offer evidence of a concerted good faith effort to gain access to the properties or, barring that, to gain access through force of law.

CONCLUSIONS OF LAW

Linger's Service Station

1. The Board concludes that the Appellants have not met their initial burden of proof as to the following assignments of error and that the WVDEP Order is accordingly affirmed in those instances:

- ¶ 7: Failure to submit a Corrective Action Plan (CAP);
- ¶ 9: Failure to submit a Supplemental Site Assessment Report (SSAR);
- ¶ 10: Failure to submit a SSAR;
- ¶ 11: Failure to submit a Site Assessment Work Plan (SAWP);
- ¶ 12: Failure to investigate; and,
- ¶ 13: Failure to investigate.

2. The Board concludes that WVDEP has amply met its burden of demonstrating that the Appellants were responsible for corrective action as it relates to the USTs at issue and for the

resulting contamination, notwithstanding any contamination present at the time of acquisition.

Paul's Service Station

3. The Board concludes that the Appellants have not met their initial burden of proof as to the following assignments of error and that the WVDEP Order is accordingly affirmed in those instances:

- ¶ 17: Failure to submit a CAP;
- ¶ 19: Failure to submit a CAP or SSAR;
- ¶ 20: Failure to submit a SAWP;
- ¶ 21: Failure to investigate; and,
- ¶ 22: Failure to investigate.

4. The Board concludes that WVDEP has amply met its burden of demonstrating that the Appellants were responsible for corrective action as it relates to the USTs at issue and for the resulting contamination, notwithstanding any contamination present at the time of acquisition.

Coastal Lumber (Buckhannon)

5. The Board concludes that the Appellants have not met their initial burden of proof as to the following assignments of error and that the WVDEP Order is accordingly affirmed in those instances:

- ¶ 27: Failure to submit a CAP;
- ¶ 29: Failure to submit a Site Assessment Report (SAR);
- ¶ 30: Failure to submit a SSAR;
- ¶ 31: Failure to cooperate;
- ¶ 32: Failure to investigate; and,
- ¶ 33: Failure to investigate.

6. The Board concludes that WVDEP has amply met its burden of demonstrating that the Appellants were responsible for corrective action as it relates to the USTs at issue and for the resulting contamination, notwithstanding any contamination present at the time of acquisition.

Coastal Lumber (Hacker Valley)

7. The Board concludes that the Appellants have not met their initial burden of proof as to the following assignments of error and that the WVDEP Order is accordingly affirmed in those instances:

- ¶ 76: Failure to submit a CAP;
- ¶ 77: Failure to submit an ISCR;
- ¶ 78: Failure to investigate and to perform an ISCR;
- ¶ 79: Failure to complete a SIR; and,
- ¶ 80: Failure to investigate.

8. The Board concludes that WVDEP has amply met its burden of demonstrating that the Appellants were responsible for corrective action as it relates to the USTs at issue and for the resulting contamination, notwithstanding any contamination present at the time of acquisition.

Hamrick Service Station

9. The Board concludes that the Appellants have not met their initial burden of proof as to the following assignments of error and that the WVDEP Order is accordingly affirmed in those instances:

- ¶ 76: Failure to submit a CAP;
- ¶ 77: Failure to submit an ISCR;
- ¶ 78: Failure to investigate and to perform an ISCR;
- ¶ 79: Failure to complete a SIR; and,
- ¶ 80: Failure to investigate.

10. The Board concludes that WVDEP has amply met its burden of demonstrating that the Appellants were responsible for corrective action as it relates to the USTs at issue and for the resulting contamination, notwithstanding any contamination present at the time of acquisition.

W. J. Princes Store

11. The Board concludes that the Appellants have not met their initial burden of proof as to the following assignments of error and that the WVDEP Order is accordingly affirmed in those instances:

- ¶ 50: Failure to submit a SAR;
- ¶ 51: Failure to submit a SAWP;
- ¶ 52: Failure to investigate; and,
- ¶ 53. Failure to investigate.

12. The Board concludes that WVDEP has amply met its burden of demonstrating that the Appellants were responsible for corrective action as it relates to the USTs at issue and for the resulting contamination, notwithstanding any contamination present at the time of acquisition.

Sample's Service Station

13. The Board concludes that the Appellants have not met their initial burden of proof as to the following assignments of error and that the WVDEP Order is accordingly affirmed in those instances:

- ¶ 58: Failure to submit a SAR;
- ¶ 60: Failure to submit a SAR;
- ¶ 61: Failure to submit a SIR; and,
- ¶ 62. Failure to investigate.

14. The Board concludes that WVDEP has amply met its burden of demonstrating that the Appellants were responsible for corrective action as it relates to the USTs at issue and for the resulting contamination, notwithstanding any contamination present at the time of acquisition.

Steve White Service Station

15. The Board concludes that the Appellants have not met their initial burden of proof as to the following assignments of error and that the WVDEP Order is accordingly affirmed in those instances:

- ¶ 66: Failure to submit a SAR;
- ¶ 69: Failure to submit a SAR or SSAR;
- ¶ 70: Failure to submit a SIR; and,
- ¶ 71. Failure to investigate.

16. The Board concludes that WVDEP has amply met its burden of demonstrating that the

Appellants were responsible for corrective action as it relates to the USTs at issue and for the resulting contamination, notwithstanding any contamination present at the time of acquisition.

Clendenin Service Station

17. The Board concludes that the Appellants have not met their initial burden of proof as to the following assignments of error and that the WVDEP Order is accordingly affirmed in those instances:

- ¶ 83: Failure to submit a SAR;
- ¶ 84: Failure to submit a SAR;
- ¶ 86: Failure to submit a SAR;
- ¶ 87: Failure to submit a SIR; and,
- ¶ 88: Failure to investigate.

18. The Board concludes that WVDEP has amply met its burden of demonstrating that the Appellants were responsible for corrective action as it relates to the USTs at issue and for the resulting contamination, notwithstanding any contamination present at the time of acquisition.

Point C Mart

19. The Board concludes that the Appellants have not met their initial burden of proof as to the following assignments of error and that the WVDEP Order is accordingly affirmed in those instances:

- ¶ 102: Failure to submit a SAR;
- ¶ 103: Failure to submit a SAR;
- ¶ 104: Failure to investigate;
- ¶ 106: Failure to submit a CAP or GMR;
- ¶ 107: Failure to submit a SIR; and,
- ¶ 108: Failure to investigate.

20. The Board concludes that WVDEP has amply met its burden of demonstrating that the Appellants were responsible for corrective action as it relates to the USTs at issue and for the resulting contamination, notwithstanding any contamination present at the time of acquisition.

Young's Service Station

21. The Board concludes that the Appellants have not met their initial burden of proof as to the following assignments of error and that the WVDEP Order is accordingly affirmed in those instances:

- ¶ 115: Failure to submit a SAR;
- ¶ 116: Failure to submit a SIR; and,
- ¶ 117: Failure to investigate.

22. The Board concludes that WVDEP has amply met its burden of demonstrating that the Appellants were responsible for corrective action as it relates to the USTs at issue and for the resulting contamination, notwithstanding any contamination present at the time of acquisition.

C. Adam Toney Tire

23. The Board concludes that the Appellants have not met their initial burden of proof as to the following assignments of error and that the WVDEP Order is accordingly affirmed in those instances:

- ¶ 121: Failure to submit a GWR; and,
- ¶ 123: Failure to investigate.

24. The Board concludes that WVDEP has amply met its burden of demonstrating that the Appellants were responsible for corrective action as it relates to the USTs at issue and for the resulting contamination, notwithstanding any contamination present at the time of acquisition.

Additional Conclusions of Law

25. The Appellants advance the theory that difficulty of access to certain properties relieves them of responsibility for remediation of contamination caused by USTs on those properties.

26. In *RBS, Inc. and Jill Fischer v. Director, Division of Water and Waste Management* (West Virginia Environmental Quality Board Appeal No. 17-01-EQB, 2017), Appellant RBS,

Inc. was responsible for a concrete spill onto property owned by Ms. Fischer. Ms. Fischer denied access to RBS, Inc. to perform remedial measures as required by WVDEP.

27. As in this case, RBS, Inc. argued that because of this denial of access, it could not be held responsible for its remedial obligations.

28. The Board held in its Final Order, attached as Exhibit A, that Ms. Fischer must bear all remediation costs until such time as she granted access to her property.

29. Upon appeal by Ms. Fischer to the Circuit Court of Monroe County, WVDEP stated that it would no longer argue that Ms. Fischer must bear the costs of remediation. Accordingly, the Court modified the Board's order to state that Ms. Fischer was not responsible for the cost of remediation, which remained the responsibility of RBS, Inc. See Proposed Order Implementing Ruling at March 21, 2019 Hearing, *Jill Fischer v. Department of Environmental Protection and WV Environmental Quality Board*, Case No. CC-32-2018-AA-1 (Circ. Ct. Monroe Co., 2019).

30. The Board concludes that the Court's ruling in Fischer is analogous to this appeal in that denial of access to property does not relieve an entity of its responsibility for the costs of remediation.

31. The Board further notes that whereas it had ample evidence to conclude that RBS, Inc. had made extensive good faith efforts to work with Ms. Fischer, insufficient similar evidence has been offered as to the Appellants' efforts.

ACCORDINGLY, having considered the record, evidence, and arguments in the matter, the Board rules that the WVDEP Order be affirmed and that the appeal be dismissed, striking it from the docket of the Board.

Entered this ____ day of _____, 2025.

Dr. Edgar Snyder, Chairman
Environmental Quality Board

EXHIBIT A

ENVIRONMENTAL QUALITY BOARD

**RBS, Inc. and
JILL FISCHER,**

Appellants,

v.

**Appeal Nos. 17-01-EQB
17-02-EQB**

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

Appellees.

FINAL ORDER

This matter involves the following appeals:

RBS, Inc., v. Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection, with Interested Party Jill Fischer (17-01-EQB); and

Jill Fischer v. Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection, with Interested Party RBS, Inc. (17-02-EQB).

By Order dated April 14, 2017, the appeals were consolidated for the purposes of hearing and disposition. An evidentiary hearing was held on May 11, 2017, before a quorum of the Board. The following order represents the decision of the Board concerning the matters on appeal after considering the hearing testimony, certified record, exhibits, and other evidence presented.

STANDARD OF REVIEW

When hearing an appeal, pursuant to W. Va. Code § 22B-1-7(e), the Board “shall hear the appeal *de novo*, and evidence may be offered on behalf of the appellant, appellee and by any intervenors.” In accordance with *Syl. Pt. 2, W. Va. Div. of Env’tl Protection v. Kingwood Coal Co.*, 200 W. Va. 734, 745, 490 S.E.2d 823, 834 (1997), the Board “is not required to afford any deference to the DEP decision but shall act independently on the evidence before it.”

When ruling on an appeal, pursuant to W. Va. Code § 22B-1-7(g), the Board “shall make and enter a written order affirming, modifying, or vacating the order, permit or official action of the chief or secretary, or shall make and enter such order as the chief or secretary should have entered.”

FINDINGS OF FACT

1. These consolidated appeals seek review of WVDEP Order No. 8653 issued to both RBS and Jill Fischer on January 6, 2017. (Certified Record (“CR”) at 1).

2. WVDEP Order No. 8653 arises out of an October 13, 2014, incident in which a concrete truck operated by RBS overturned on Fischer’s property located in Monroe County. (CR at 3-5).¹ The overturned concrete truck leaked a small amount of gear oil onto the Fischer property including a spring which delivers drinking water to the property.² (Id.).

3. On October 17, 2014, the WVDEP, in response to RBS’ timely filed spill report, conducted an inspection of the Fischer property. During its inspection, WVDEP observed a violation of 47 CSR 2, § 3.2a, noting RBS caused conditions that were not allowable by creating an oily slick in waters of the State. (See WVDEP Order No. 8653).

4. By October 27, 2014, RBS had recovered the concrete truck chassis from the Fischer property. A day later, RBS returned to the property with a plan to remove the drum (which weighed 46,000 pounds) by pulling the drum with the D7 winch and using the excavator to guide the rear as necessary. The drum was to be enclosed to prevent dust and chips from escaping. This procedure was expected to take two working days to complete. (See Hearing Tr. at 87-90).

¹ RBS had been contracted by Fischer to provide concrete to her residence in Monroe County. RBS was to deliver concrete to her property for eventual placement into “ruts” on the main road running through the property. (See WVDEP Order No. 8653); (See Hearing Tr. 84-85).

² A small amount of gear oil — perhaps a gallon or less - leaked from the truck’s manual transmission when it overturned. No hydraulic oil or diesel fuel escaped the vehicle. RBS installed hay bales and tarps to prohibit further introduction of gear oil into the spring. (See Hearing Tr. at 89-90).

5. Fischer would not agree to the plan and RBS was prevented from starting the removal of the drum. (See Hearing Tr. at 19-20, 90-92).

6. On November 19, 2014, WVDEP personnel visited the Fischer property for a follow-up inspection. After noting that only the drum remained, WVDEP observed violations of: 1) 47 CSR 11, § 2.5.a., for RBS' "failure to clean up, remove, and otherwise render the spill harmless to waters of the State" and 2) 47 CSR 2, § 3.2a, for RBS "causing conditions not allowable by creating an oily slick in the waters of the State." WVDEP further noted that Fischer had manually taken some of the petroleum contaminated materials and placed them into garbage bags. (See WVDEP Order No. 8653).

7. WVDEP then issued RBS a Notice of Violation ("NOV") No. I-14-32-11/19-MDP-1, pursuant to 47 CSR 11, § 2.5a. (See WVDEP Order No. 8653).

8. Thereafter, RBS agreed with the landowner to *manually* chip (using only hand tools) the concrete in the drum, remove the chipped concrete in small batches and then cut the drum itself into small pieces for removal from the Fischer property. (See Hearing Tr. at 20, 90-93)

9. On April 2, 2015, WVDEP personnel conducted a follow-up inspection. During the inspection, WVDEP found the following violations of 47 CSR 11 § 2.5.a, to-wit, that RBS failed to clean remove, and otherwise render the spill harmless to waters of the State and had taken no further actions to remediate the site. WVDEP further noted that the garbage bags set out by Fischer "remained uncollected in the same location." (See WVDEP Order No. 8653).

10. WDEP also took soil samples. Laboratory analysis of the samples resulted in exceedances of the established level of 100 Mg/Kg for Total Petroleum Hydrocarbons Diesel and Oil Range Organics (TPH DRO and TPH ORO). The soil test results reported a value of 5,920 Mg/kg for TPH DRO and 13,000 Mg/kg for TPH ORO. Subsequently, WVDEP issued NOV No. I-15-32-04/02-MDP-1 to RBS. (See WVDEP Order No. 8653).

11. On June 5, 2015, WVDEP received a letter of response to the aforementioned NOV from RBS. The correspondence represented that RBS planned to perform the remediation work; however, Fischer had not agreed to any remediation plan. (See WVDEP Order No. 8653).

12. On June 11, 2015, WVDEP received correspondence from Fischer representing that the landowner looked forward to resolving the incident, and they would be in touch with RBS to determine mitigation. (See WVDEP Order No. 8653).

13. On August 3, 2015, pursuant to Fischer's request, a meeting was held with representatives of WVDEP's Advocates Office, Environmental Enforcement, RBS, and Fischer. During this meeting WVDEP advised RBS and Fischer that, should the parties fail to work cooperatively to properly remediate the site, WVDEP would require site remediation by way of an Order. (See WVDEP Order No. 8653).

14. Eventually, a local general contractor, ALL Construction, hand-chipped the concrete in the drum and torched the drum without the use of heavy equipment. With that removal, the entirety of the truck and its contents were removed from the Fischer property. (See Hearing Tr. at 91-93).

15. Thereafter, RBS contracted with CORE Environmental Services, Inc. ("CORE") to develop a Corrective Action Plan ("CAP") to address potential environmental issues resulting from the overturning of the concrete truck. CORE was to sample the site and to develop the CAP for ultimate approval by the WVDEP. (CR at 12-19).

16. On March 10, 2016, CORE conducted sampling at the Fischer property. The sampling consisted of ten samples of surface soil, four samples of sediment, and four samples of surface water. (CR at 10-87).

17. Laboratory results for sediment and surface water were either “non-detect” or below benchmarks/standards. Laboratory results indicated concentrations for TPH-ORO for three samples, a concentration in one sample exceeding Groundwater Protection levels for TPH-DRO, and one sample with Toluene above the Site-Specific Background Screening Levels. (CR at 15).

18. Thereafter, CORE drafted the CAP which was then submitted to the WDEP for approval and implementation. The purpose of the CAP was to determine whether remediation would be required and to determine the appropriate remedial approach based on an evaluation of site assessment data for each media sampled. (CR at 9-19)

19. The CAP was submitted in May of 2016. The CAP was approved on June 9, 2016, by WVDEP’s Groundwater Protection Program. (See WVDEP Order No. 8653).

20. Fischer has denied access to her property to allow CORE’s CAP to be implemented. (See Hearing Transcript); (See Certified Record); (See WVDEP Order No. 8653).

21. On January 6, 2017, the WVDEP issued Order No. 8653 to both parties which, *inter alia*, required the parties to remediate the site. (See WVDEP Order No. 8653).

22. WVDEP recognizes that access to the site for remediation purposes has not been granted by Fischer. (Hearing Tr. at 134-135). WVDEP further recognizes that Fischer controls access to her property in her role as property owner. (Id.)

23. Both parties appealed the Order to the Environmental Quality Board. An evidentiary hearing was held on May 11, 2017.

24. RBS’ Notice of Appeal asserts the following claim:

RBS has submitted and further, has had approved a Corrective Action Plan developed by CORE Environmental Project (Project No. RBS-2015-09). The purpose of the Corrective Action Plan is to correct any outstanding environmental issues, if said issues still exist at the Fischer property (as a factual addenda, RBS would state that this entire issue involves a very small amount of gear oil that leaked out of an overturned truck).

In order to effectuate the Corrective Action Plan, the landowner (Jill Fischer), must grant a right of entry to begin remediation. RBS has no legal right to authorize contractor CORE Environmental to begin work on the landowner's property. Without right of entry, CORE Environmental cannot begin remediation. RBS further states, that upon information and belief, beginning in September of 2016 Ms. Fischer has refused to sign a right of entry onto her land despite repeated assurances from both the DEP and RBS, Inc.'s insurer.

In the Order RBS has been ordered, *inter alia*, to "immediately take measure to initiate compliance with all pertinent rules and law." Order for Compliance, Paragraph #1. RBS has already complied with this Order; it or its insurer has agreed to fund an approved WVDEP remediation plan. RBS has no legal authority to force the landowner to sign the Right of Entry. Thus, RBS relies on the doctrine of impracticability as its defense to the Order.

(RBS Appeal at 1-2). For relief, RBS asks the Board to vacate the Order and require WVDEP to file a civil claim in Circuit Court.

25. Fischer's Notice of Appeal states: "Order #8653, dated 1/6/17, postmarked 1/9/17. Appellant was unable to review Order until 2/2/17 due to out-of-area travel, as per 1/23/17 email to WVDEP's Mr. Hobt." (See Fischer's Notice at 1). She requested that "The Appellant be provided an opportunity to make comments, adjustments and corrections to the Corrective Action Plan." (Id.)

26. Specifically, Fischer states:

On the morning of 6/6/16 WVDEP's Dennis Stottlemeyer sent me an email regarding a Plan of Action created by CORE Environmental Services, dated only May 2016.

That same morning I replied to above email (via email) requesting a hard copy of such plan, which was sent, postmarked 6/14/16.

On 6/9/16 the WVDEP approved CORE's Plan of Action. A 10/26/2016 email from Dennis Stottlemeyer implied that some issues in the Scope of Work, including a 24 hour turn around on samples, could be worked out.

(See Fischer Notice at 2).

27. The WVDEP prepared a 1,095 page certified record in this matter that chronicled the two years' negotiations between the agency, Fischer, and RBS. At the evidentiary hearing of this matter, the parties testified about the conflict in negotiations.

28. Fischer testified at the hearing. (Hearing Tr. at 14). She testified her property is "located approximately two miles out of Union, two miles up Knobs Road, and like Mr. Bryan said, you turn off of Knobs Road. Approximately seven-tenths of a mile is our house, which was built in 1885, and I have lived there since 1973, and the spring in question is my water source, initially carrying water." (Id. at 14).

29. On May 11, 2017, at the evidentiary hearing in this matter, Fischer presented an "amendment" to the right of entry agreement. (Id. at 31). It was the first time anyone had seen the document Ms. Fischer admitted, "It was just created." (Id. at 32). The proposed amendment required 24-hour turnaround, the use of hand tools only, date and time limitations on the work, and road bank construction requirements. (Id. at 33-34).

30. William Snyder, Vice President of RBS, testified at the hearing. (Hearing Tr. at 84). He testified that the leaked product was "gear oil out of the transmission." (Id. at 89). He estimated a gallon of oil leaked. (Id. at 90). He estimated that RBS spent approximately \$300,000 on the cleanup and reclamation so far at the Fischer property. (Id. at 94). He testified that RBS is willing to complete testing and remediation but cannot do so because Fischer will not allow RBS onto the property. (Id. at 95).

31. Michael Puckett, WVDEP environmental inspector, testified at the hearing. (Hearing Tr. at 101). He responded to the initial call about the spill and remained involved in the response from 2014. (Id. at 102). He testified that he issued Notices of Violation because progress at the site was insufficient. (Id. at 104).

32. Dennis Stottlemyer, an employee in the WVDEP's environmental advocate office, also testified. (Hearing Tr. at 117). He confirmed that Fischer did not raise concerns about the Corrective Action Plan in writing until October 26, 2016, five months after receiving it. (Id. at 126).

33. Dave Simmons, the WVDEP's assistant chief inspector of environmental enforcement and a program manager, also testified. (Hearing Tr. at 130). He helped prepare the WVDEP Order at issue. (Id.)

34. Simmons testified that the purpose of the Order is "to finally provide an impetus to resolution to this longstanding problem." (Id. at 131). He agreed that it is impossible for RBS to comply with the Order without legal access to the property. (Id. at 132).

35. The evidentiary hearing ended with Mr. Simmons' testimony and a recommendation from this Board to the parties to resolve the remaining differences between them, but an agreement was not reached.

36. CORE Environmental was adamant that, as noted in the Corrective Action Plan, a law enforcement officer be present for their sampling work on the Fischer property.

37. Fischer, however, refused to allow a law enforcement officer onto her property during the sampling event.

38. Accordingly, the parties were unable to agree to a solution and this matter is ripe for this Board's determination.

CONCLUSIONS OF LAW

There is no dispute that the facts underlying the WVDEP Order are violations of W. Va. Code R. §§ 47-2-3.2.a and 47-11-2.5.a., and that the violations require remediation. Furthermore, there is no dispute that WVDEP properly authorized and approved the Corrective Action Plan in this matter.

Concurrently, however, there 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.

As noted at the evidentiary hearing in this matter, the Board is unaware of having faced the issue of whether it has the authority to order a landowner to allow third party access to the landowner's real property for purposes of sampling and remediation to fulfill an Order of the agency. However, the Legislature has granted the Board broad authority to carry out the enforcement of West Virginia's environmental laws. The W. Va. Code provides, in material part:

It is hereby declared to be the policy of this state and the purpose of this chapter to provide fair, efficient and equitable treatment of appeals of environmental enforcement and permit actions to the boards set forth herein. It is the policy of this state that administrative hearings and appeals be conducted in a quasi-judicial manner providing for discovery and case management. The appellate functions of the several environmental boards should be accomplished with similar procedural rules designed to assure expeditious and equitable hearings and decisions. Further, there shall be a central depository for appellate information and the filing of appeals. It is also the policy of this state that the rule-making authority set forth in this chapter be implemented in an efficient manner consistent with the public policy of this state.

W. Va. Code § 22B-1-1.

The Board's express powers are also supplied by the Code:

In addition to all other powers and duties of the air quality board, environmental quality board and surface mine board as prescribed in this chapter or elsewhere by law, the boards created or continued pursuant to the provisions of this chapter have and may exercise the following powers and authority and shall perform the following duties:

- (1) To consider appeals, subpoena witnesses, administer oaths, make investigations and hold hearings relevant to matters properly pending before a board;
- (2) On any matter properly pending before it whenever the parties achieve agreement that a person will cease and desist in any act resulting in the discharge or emission of pollutants or do any act to reduce or eliminate such discharge or emission, or do any act to achieve compliance

with this chapter or chapter twenty-two or rules promulgated thereunder or do any act to resolve an issue pending before a board, such agreement, upon approval of the board, shall be embodied in an order and entered as, and has the same effect as, an order entered after a hearing as provided in section seven of this article;

(3) To enter and inspect any property, premise or place on or at which a source or activity is located or is being constructed, installed or established at any reasonable time for the purpose of ascertaining the state of compliance with this chapter or chapter twenty-two and the rules promulgated thereunder: Provided, That nothing contained in this section eliminates any obligation to follow any process that may be required by law; and

(4) To perform any and all acts within the appropriate jurisdiction of each board to secure for the benefit of the state participation in appropriate federally delegated programs.

W. Va. Code § 22B-1-5.

There is no express prohibition against this Board ordering two parties to comply with West Virginia law, even in the case, as here, where one party is a landowner who objects to a nonmaterial portion of the Corrective Action Plan.

The Board finds that Fischer's objection to the presence of a law enforcement officer, outside of her home and merely in the outdoors on her property, is insufficient to defeat the State's interests in protecting the groundwater of the State.

Fischer must accept some responsibility for bringing the concrete truck onto her property. RBS has made a good faith effort to meet its responsibilities. Fischer is not allowing access to her property. Fischer's delay may have placed the waters of the State at risk. Therefore, she must accept remediation responsibility.

ORDER

Accordingly, the Board finds that, in light of the evidence contained in the certified record and ascertained at the hearing in his matter, the WVDEP and the Director of Division of Water and Waste Management acted properly in issuing WVDEP Order No. 8653. Therefore, the appeals are DENIED.

Evidence from testing conducted by Fischer's Downstream Strategies shows there is not an immediate risk. This allows the Board to take a measured approach in resolving this matter. In this regard, the Board modifies the Order for Compliance as follows:

- 1) WVDEP shall approve a seasonal soil and groundwater sampling/testing schedule for the accident location. The sampling/testing is to take place every three months to obtain a total of four samples.
- 2) Fischer shall be responsible for the costs of the sampling/testing. Fischer shall use a WVDEP-approved sampling/testing/laboratory. (Downstream Strategies or another certified laboratory in the State should suffice).
- 3) WVDEP shall review the sampling/testing to make a determination whether remediation is necessary.
- 4) If the results of the testing shows residual contamination, RBS shall remediate if allowed access to the accident site without restriction from the landowner.
- 5) If RBS is not allowed access to the accident site without restriction to carry out remediation, Fischer will be responsible for remediation.
- 6) All sampling plans and remediation plans must be pre-approved by the WVDEP.

The clerk of the Board shall provide certified copies of this ORDER to the parties or counsel of record. Parties have a right to judicial review of this ORDER pursuant to W. Va. Code § 22B-1-9 and W. Va. Code § 29A-5-4. The party seeking judicial review must file its appeal within 30 days after the date the party received notice of this ORDER.

ORDERED and ENTERED this 23rd day of February, 2018.


**Dr. Edward Snyder, Chairperson
Environmental Quality Board**

ENVIRONMENTAL QUALITY BOARD

**RBS, INC. and
JILL FISCHER,**

Appellants,

v.

Appeal No. 17-02-EQB

**SCOTT G. MANDIROLA, DIRECTOR
DIVISION OF WATER AND WASTE MANAGEMENT,
WV DEPT OF ENVIRONMENTAL PROTECTION,**

CERTIFICATE OF SERVICE

This is to certify that I, Jackie D. Shultz, Clerk for the Environmental Quality Board, have this day, the 23rd day of February, 2018, served a true copy of the foregoing **FINAL ORDER** in Appeal Nos. 17-01-EQB and 17-02-EQB, by mailing the same via United States Mail, with sufficient postage, to the following address:

via certified first-class mail:

Jill Fischer, Esquire
1880 Knobs Road
Union WV 24983

Certified Mail: 91 7199 9991 7037 7330 7160

Christopher D. Negley, Esq.
Shuman, McCuskey, & Slicer, PLLC
P.O. Box 3953
Charleston, WV 25339-3953

Certified Mail: 91 7199 9991 7037 7330 7153

via personal service:

Scott D. Mandirola, Director
Division of Water and Waste Management
WV Department of Environmental Protection
601 57th Street, S.E.
Charleston, WV 25304

Jason Wandling, Esquire
Office of Legal Services
WV Department of Environmental Protection
601 57th Street, S.E.
Charleston, WV 25304

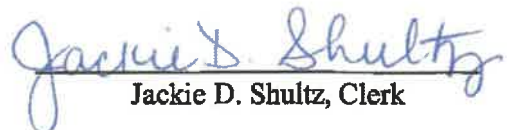

Jackie D. Shultz, Clerk

EXHIBIT B

In the Circuit Court of Monroe County, West Virginia

Jill Fischer,
Plaintiff,

vs.)

Department of Environmental
Protection,
WV Environmental Quality Board,
Defendants

Case No. CC-32-2018-AA-1



Proposed Order Implementing ruling at March 21, 2019 hearing.

Pursuant to Rule 5, Rules of Procedure for Administrative Appeals, Petitioner Jill Fischer, appealed from an Order of the Environmental Quality Board (EQB) conditionally imposing liability on her for the cost of remediation of environmental injuries, caused by RBS, Inc., an unrelated construction company, if Petitioner declined to allow armed law enforcement officers to accompany CORE Environmental Solutions, a third party remediation company hired by RBS, Inc., on to her property to take remedial actions.

In her appeal to the Circuit Court of Monroe County, where the environmental damage was caused and Petitioner resides, Ms. Fischer has asserted that the decision to impose financial liability on her for environmental damage caused by another, was an unlawful coercion of her property, ultra vires and arbitrary and capricious

The facts are not disputed. On February 23, 2018, the DEP issued a final order in a consolidated administrative proceeding styled RBS, Inc. and Jill Fischer v. Director, Division of Water and Waster Management, DEP Case Nos. 17-01 and 17-02. Petitioner Jill Fischer timely filed, and served on all parties, her Petition for Review on March 26, 2108. The EQB filed a certified copy of the administrative record on April 12, 2018

The February 23, 2018 order of the EQB, from which RBS, Inc. has not appealed, found that RBS, Inc. had caused a toxic material to be spilled on Petitioner Jill Fischer's property in Monroe County, West Virginia and ordered Petitioner Fischer to take action to remediate the spill or, alternatively, to allow RBS, Inc. to enter the Petitioner's property to conduct remediation of the spill which RBS, Inc. had caused.

The environmental damage which is the subject of this appeal occurred on October 13, 2014, when RBS, Inc. overturned a concrete truck on Petitioner Fischer's property, incident to which gear oil spilled onto Petitioner's Fischer's property and into a spring that delivers drinking water to the property. On October 17, 2014, DEP conducted an inspection of Petitioner's property, and found that RBS, Inc. had caused a oily slick in waters of the State in violation of 47 CSR2 § 3.2a which, as then in effect and currently, prohibits "distinctly visible floating or settle able solids, suspended solids, scum, foam or oily slicks" in any of the waters of the State.

Over the course of the next two and a half years, DEP conducted inspections and analysis were made, but not final remediation action was taken. On January 6, 2017, DEP issued Order No. 8653 to both Petitioner and RBS, Inc. requiring both to remediate the site of the spill. Both parties appealed to the EQB, and an evidentiary hearing was held on May 11, 2017.

At the May 11, 2017 hearing, the parties testified regarding the difficulty that they had encountered in agreeing upon the terms of a Right of Entry (ROE) that would permit RBS, Inc. and its remediation agent onto Petitioner's property to remediate the spill. On June 14, 2017, CORE, RBS, Inc. designated remediation agent, proposed that CORE be accompanied onto Petitioner's property by a "West Virginia Department of Natural Resources Police Officer" who would be armed.

Petitioner objected to CORE's proposal to bring armed law enforcement personnel onto her property, and appended to her objection RBS, Inc.'s June 16,

2017 letter signifying that they did not insist on the presence of armed law enforcement personnel. In its February 23, 2108 final order EQB expressly acknowledged that:

There 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.

Feb. 23, 2018 Order at p. 9 (emphasis added).

Notwithstanding the absence of explicit authority, EQB cited the broad statutory authority of W.Va. Code § 22B-1-1 and §22B-1-5, and ruled that:

There is no express prohibition against this Board ordering two parties to comply with West Virginia law, even in the case, where one party is a landowner who objects to a nonmaterial portion of the Corrective Action Plan.

February 23, 2018 Final Order at p. 10 (underscoring added).

In light of these holdings, the EQB issued a final order modifying the WVDEP order as follows:

- 1) WVDEP shall approve a seasonal soil and groundwater sampling/testing schedule for the accident location. The sampling/testing is to take place every three months to obtain a total of four samples.
- 2) Fischer shall be responsible for the costs of the sampling/testing. Fischer shall use a WVDEP-approved sampling/testing/laboratory . (Downstream Strategies or another certified laboratory in the State should suffice).
- 3) WVDEP shall review the sampling/testing to make a determination whether remediation is necessary.
- 4) If the results of the testing shows residual contamination,

RBS shall remediate if allowed access to the accident site without restriction from the landowner.

5) If RBS is not allowed access to the accident site without restriction to carry out remediation, Fischer will be responsible for remediation.

6) All sampling plans and remediation plans must be pre-approved by the WVDEP.

Feb. 23, 2018 Final Order at p. 11.

EQB further found that:

Fischer's objection to the presence of a law enforcement officer, outside of her home and merely in the outdoors on her property, is insufficient to defeat the State's interests in protecting the groundwater of the State.

Fischer must accept some responsibility for bringing the concrete truck onto her property. RBS has made a good faith effort to meet its responsibilities. Fischer is not allowing access to her property. Fischer's delay may have placed the waters of the State at risk. Therefore, she must accept remediation responsibility.

February 23, 2018 Final Order at p. 10.

On March 26, 2018, Petitioner filed a timely Petition for Review. Before this Court, Petitioner Fischer has argued; (1) that EQB's "coercion" of her to waive control of her property rights is an unlawful "taking" under the Fifth Amendment to the US Constitution, and Article III of the West Virginia Constitution; (2) that EQB's and DEP's Enforcement Authority is Explicitly Confined to Imposition of Remedial Duties or Financial Penalties on Violators of DEP regulations, and (3) that EQB's February 23, 2018 Order's decision to allow RBS, Inc.'s remedial contractor to dictate the terms on which remediation will take place is arbitrary or capricious, an abuse of discretion and a clearly unwarranted exercise of discretion.

DEP has filed a Reply Brief contesting all of Petitioner's arguments. However,

at oral argument Counsel for DEP stated that it would no longer contest Petitioner's objection to an armed law enforcement officer or other person accompanying remedial parties on to her property, and the imposition of liability on Petitioner absent her consent to entry onto her property unless she desisted from that objection.

Accordingly, it is not necessary for this Court to address the legal issues raised by Petitioner's Brief or the DEP's Reply Brief. It is only necessary to modify the EQB order to conform to the DEP's stated position at oral argument.

Pursuant to the stated positions of the parties at oral argument, and In lieu of the operative provisions of EQB's May 17, 2018 Order, this Court has determined to modify the EQB order.

It is, therefore, **ORDERED** that the EQB Order be, and hereby is, modified as follows.:

- 1) WVDEP shall approve a seasonal soil and groundwater sampling/testing schedule for the accident location. The sampling/testing is to take place every three months to obtain a total of four samples.
- 2) Fischer shall not be responsible for any of the costs of the sampling/testing., which are and shall remain the sole responsibility of RBS, Inc.
- 3) WVDEP shall review the sampling/testing to make a determination whether remediation is necessary.
- 4) If the results of the testing shows residual contamination, RBS shall take all actions necessary to remediate.
- 5) RBS shall not use a remedial party who insists upon being accompanied by armed law enforcement personnel or others, and no law enforcement personnel shall enter onto Petitioner's property except after applying for, showing cause for and obtaining issuance of a warrant from this Court.
- 6) All sampling plans and remediation plans must be pre-approved by the WVDEP.

It is **FURTHER ORDERED** that the Clerk of this Court mail certified copies of this Order on counsel for all parties and the DEP and EQB at the following addresses:

William V. DePaulo, Esq.
860 Court Street, North
Suite 300
Lewisburg, WV 24901
Tel: 304-342-5588
Fax: 866-850-1501

Jason Wandling, Esq.
Office of Legal Services
WV Dept of Environmental Protection
601 57th Street, SE
Charleston, WV 25304

Scott D. Mandirola, Director
WV Dept of Environmental Protection
601 57th Street, SE
Charleston, WV 25304

Dr. Edward Snyder, Chair
Environmental Quality Board
601 57th Street, SE
Charleston, WV 25304

/s/ Robert Irons
Circuit Court Judge
31st Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtsww.gov/e-file/ for more details.