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' OBJECTIONS TO PROPOSED "FINAL ORDER" SUBMITTED BY APPELLEE JEREMY M. BANDY, DIRECTOR, DIVISION OF WATER AND WASTE MANAGEMENT, WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION

Comes now appellants J.C. Baker & Son, Inc. ("Baker, Inc.") and Baker Oil Company ("Baker Oil") (Baker, Inc. and Baker Oil are jointly referred to as "Appellants"), by their counsel, R. Terrance Rodgers, of Kay Casto & Chaney PLLC, and submit their objections to the proposed *Final Order* submitted by appellee Jeremy M. Bandy, Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection ("DEP") ("Appellee"), to the West Virginia Environmental Quality Board ("Board"), on January 23, 2025 ("*Appellee Proposed Final Order*").[1]

[1] On February 9 and 10, 2023, a hearing was conducted by this Board on the issue of ownership/operation of the removed underground storage tanks referred to in the *Order Issued Under The Underground Storage Tank Act West Virginia Code, Article 22, Chapter 17*, issued by the DEP, on April 26, 2022 ("*DEP Order*") ("Removed USTs") which are at issue in this appeal ("First Hearing"). A hearing was conducted by this Board on October 10 and 11, 2024 ("Second Hearing") on the liability issue regarding the leaks with which Appellants have been charged in the *DEP Order*. The *Appellee Proposed Final Order* was submitted as a result of the Second Hearing.

I. The *Appellee Proposed Final Order* Fails To Recognize That, Under The Law, Neither The Regulations Found in 40 CFR Part 280, As Revised In 1988, And Which Are Relied Upon By The DEP In This Appeal ("1988 Regulations"), Nor W.Va. Code §§ 22-17-1 Et Seq., As Amended, Which Is The Codification Of 1994 West Virginia Laws Ch. 61 (H.B. 4065) ("West Virginia Code Provisions"), Apply Retroactively Such That Adoption Of The *Appellee Proposed Final Order* Would Exceed This Board's Authority

A. This Board Has No Authority To Apply The West Virginia Code Provisions Retroactively

The Supreme Court of Appeals Of West Virginia ("Supreme Court") has made it clear that "an 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." State ex rel. Mountaineer Park, Inc. v. Polan, 190 W.Va. 276, 280, 438 S.E.2d 308 (1993).[2] The Supreme Court has also succinctly established when a statute may be applied retroactively:

> [a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute (or the date of enactment if no separate effective date is stated) unless the statute provides explicitly for retroactive application. Syl. Pt. 2, Public Citizen, Inc. v. First Nat'l Bank in Fairmont, 198 W.Va. 329, 480 S.E.2d 538 (1996).

Syl. Pt. 3, Gallant v. County Commission of Jefferson County, 212 W.Va. 612, 575 S.E.2d 222 (2002) (emphasis added). The Gallant court further held that W.Va. Code 2-2-10(bb) "constitutes the Legislature's rule for the application of a statute and provided that '[a] statute is presumed to be prospective in its operation unless expressly made retrospective.'" Gallant, 212 W.Va. at 618 (emphasis added).

The Gallant decision was cited in American Investment Financial v. United States of

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[2] Under the West Virginia Administrative Procedures Act, W.Va. Code §§ 29A-1-1, *et seq.* ("APA"), a state "agency" includes all state boards as well. "'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. Thus, this Board is an agency within the meaning of the APA.

America, 364 F.Supp.2d 1321 (D. Utah 2005) for the principle that "*in the absence of clear language to the contrary, statutes must be construed to operate prospectively only.*" American Investment, 364 F.Supp. at 1327 (emphasis added), *citing* Gallant in footnote 25 as additional authority. The American Investment court determined that a certain statutory amendment would be applied because the enactment clearly directed that "[e]xcept as otherwise provided in this part, this act applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before this act takes effect." American Investment, 364 F.Supp. at 1327, *quoting* Utah Code Ann. § 70A–9a–702(1). Nowhere in the West Virginia Code Provisions is any similar language incorporated.

The United States District Court for the Southern District of West Virginia, in applying West Virginia law on retroactive application of a statutory enactment, held, in Biser v. Manufacturers and Traders Trust Company, 211 F.Supp.3d 845 (S.D.W.Va. 2016), that a statutory amendment which had consequences for past conduct if applied retroactively, just as the West Virginia Code Provisions would have consequences for past conduct, was not to be applied retroactively. The amendment to the West Virginia Consumer Credit and Protection Act, W.Va. Code §§ 46A-1-101et seq. ("WVCCPA"), at issue in Biser, required that consumers inform those making collections on defaulted obligations in writing if they are represented by an attorney in order for subsequent calls to constitute violations of the WVCCPA. The previous statutory provision provided that it need only appear the consumer was represented by an attorney in order for subsequent calls to be violations. In addition, the amendment inserted a specific number of calls required for liability to arise for harassment.[3] Because the consumer in Biser had only informed the bill collector verbally during several of the calls which formed the basis of the claim,

[3] There were also other issues, such as disputed evidence as to when their attorney sent letters and when those letters were received.

the change in the statutory provision clearly had negative consequences for the consumer's claim for a violation for continuing to call once it clearly appears she was represented by counsel. Therefore, the Biser court determined that the statutory amendment to the WVCCPA was not applicable retroactively.[4]

In this appeal, the DEP is asking this Board to effectively reach back to past completed acts, namely years and even decades of an industry practice that failed to appreciate the need to maintain underground storage tanks ("USTs") which dispensed petroleum products, such as at the small mom and pop gasoline stations located on the sites at issue in this appeal, and apply the West Virginia Code Provisions to those acts. Under Biser, where a statutory enactment would apply consequences for past, completed conduct if applied retroactively, the enactment is not retroactive.

In 1994, the West Virginia Legislature ("Legislature") enacted the West Virginia Code Provisions, which first authorized the DEP to regulate USTs, in 1994 West Virginia Laws Ch. 61 (H.B. 4065) ("H.B. 4065") (Attachment A, pp. 206), which specifically states that H.B. 4065 was "[p]assed March 12, 1994; in effect ninety days from passage." Attachment A, p. 386.[5] Thus, by the Legislature's decree, its effective date was June 10, 1994.

Accordingly, the West Virginia Code Provisions do not apply in this appeal, because they are not retroactive to any leaks which occurred prior to June 10, 1994, the effective date of the

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[4] Among other principles, the Biser court noted that, under West Virginia law, "[a]s a general rule, retroactivity is disfavored." Biser, 211 F.Supp.3d at 852. The Biser court relied on W.Va. Code § 2-2-10(bb), which states that a statute is "presumed to be prospective in its operation unless expressly made retrospective." Id. (emphasis added). Finally, if, in a pending case, application would "attach a new legal consequence to a completed event, then it will not be applied in that case unless the Legislature has made clear its intention that it apply." Biser, 211 F.Supp.3d at 853, *quoting* Pub. Citizen, Inc. v. First Nat. Bank in Fairmont, 198 W.Va. 329, 480 S.E.2d 538, 540–41 (1996).

[5] H.B. 4065 is close to four hundred pages long. Therefore, select pages are included in Attachment A, including the introductory pages showing the provisions in the West Virginia Code that were repealed by H.B. 4065, the provisions that are now the West Virginia Code Provisions, and the page on which the effective date is stated. Prior to the enactment of H.B. 4065, the West Virginia Department of Natural Resources ("DNR") had been the agency overseeing USTs as provided in W.Va. Code §§ 20-5H-1 et seq. The provisions in W.Va. Code §§ 20-5H-1 et seq. were repealed by H.B. 4065. See Attachment A, first two pages (the pages are not numbered). The DEP's jurisdiction over USTs, therefore, began with the effective date of H.B. 4065 in 1994.

West Virginia Code Provisions. Since all the USTs at the sites at issue in this appeal had been removed before June 10, 1994, there are no leaks which are subject to the West Virginia Code Provisions, because a leak from a UST cannot occur after it has been removed from the ground.[6]

Therefore, the *Appellee Proposed Final Order* must be rejected because, if it were adopted, this Board would be illegally exceeding its proper authority granted by the West Virginia Code Provisions by retroactively applying the West Virginia Code Provisions to leaks which occurred before the West Virginia Code Provisions became effective, in violation of Gallant, 212 W.Va. 612, W.Va. Code 2-2-10(bb), and the Legislature's expressly stated decision that those provisions were to be effective at a future date, not retroactively.

B. The 1988 Regulations Are Not Retroactive

The DEP is authorized to regulate USTs under the authority granted to it by the Legislature in the West Virginia Code Provisions. In fact, the *DEP Order* specifically recites the West Virginia Code Provisions as the source of its authority. See footnote 11, *infra*. However, the DEP contended at the Second Hearing that the 1988 Regulations were applicable to this appeal. Oct. 10 Trans. p. 173. Therefore, the Appellants address the 1988 Regulations, although such regulations are not the source of the DEP's authority to regulate USTs; instead, the sole source of that authority is the West Virginia Code Provisions which do not apply retroactively.

Just as the West Virginia Code Provisions are not retroactive, similarly, the 1988 Regulations cannot be applied retroactively to support the *Appellee Proposed Final Order*. "The

[6] The Point C Mart USTs were removed and disposed of by Jerry Stout by March 15, 1994. C.R. 3628. The Clendenin USTs were removed in 1991. C.R. 3393-3394, 3402. The Coastal Hacker Valley USTs were removed in 1991. C.R. 3038-3039; 3055. The Steve White's USTs were closed in 1992. C.R. 2847-2851. The Sample's USTs were closed in 1992. C.R. 2569. The W.J. Prince's USTs were closed in 1993 (C.R. 2358). The Hamrick's USTs were closed in 1993 C.R. 1877-1880. The Coastal Buckhannon USTs were closed in 1992. C.R. 1530. The USTs at Paul's were removed in 1992. C.R. 0843. The Linger's USTs were removed in 1992. The C. Adam Toney's USTs were removed by April 30, 1994. C.R. 4138. The Young's USTs were removed on April 13, 1994, also prior to that effective date.

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). 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). 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). Landgraf explains that "in cases ... in which prior law afforded no relief," a regulation which creates a new cause of liability, as is the case with the 1988 Regulations, has an "especially pronounced" impact on rights. Landgraf, 511 U.S. at 283. In discussing the statute before it, the Landgraf court determined that it had never read "a statute substantively increasing the monetary liability of a private party to conduct occurring before the statute's enactment. Landgraf, 511 U.S. at 284. Therefore, the Landgraf court determined that the statutory provision at issue "is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent." Landgraf, 511 U.S. at 283.

Leaks from USTs, such as those installed at gasoline service stations, were unregulated by the federal government for decades, with no burdens imposed requiring corrective action to remediate leaks and spills of petroleum products from those USTs. Eventually, after passage of a certain act by Congress, the federal Environmental Protection Agency ("EPA") turned its attention

toward this problem and, as a first step to get a handle on what USTs existed nationwide, promulgated a regulation in 1985 requiring that owners and/or operators provide certain information about the USTs they owned and/or operated to a designated state agency; the DNR was initially the designated agency in West Virginia. Feb 9 Trans. p. 16; Appellants' Exhibit 8 (made part of the record at the First Hearing). Eventually, the EPA promulgated certain additional requirements in 1988, namely 40 CFR Part 280 - the 1988 Regulations.[7] Under the 1988 Regulations, without question, if Appellants are responsible for performing the corrective action sought in the *DEP Order*, they will be subject to a substantive monetary liability imposed on conduct that occurred years prior to the date the 1988 Regulations went into effect, as the vast majority of the leaks occurred years before the 1988 Regulations became effective.[8] Moreover,

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[7] See Appellee's Exhibit 132, made part of the record at the Second Hearing, and Attachment B, Rules And Regulations, Environmental Protection Agency, *Underground Storage Tanks, Technical Requirements,* 40 CFR Part 280, 53 FR 37082-01, 1988 WL 253164 (F.R. Sept. 23, 1988). As the document is 174 pages long, Attachment B contains the body of the final rule, and excludes such things as public comment on the rule and the EPA's analysis of the rule.

[8] The USTs at the Point C. Mart site were installed approximately 10 years before the required notification was submitted to the DEP's predecessor in 1986, or in 1976, 12 years before the 1988 Regulations became effective (for purposes of this footnote only "Regulation Effective Date"). C.R. 3599. They were removed and disposed of by Jerry Stout by March 15, 1994. C.R. 3628. Thus, they were in the ground for 6 years after the Regulation Effective Date, but 12 years – or twice as long – before it.

The USTs at Clendenin were 23 years old when the notification was submitted in 1989, meaning they were installed in 1966! They were then removed in 1991. C.R. 3393-3394, 3402. Thus, they were in the ground for 3 years after the Regulation Effective Date (1988 to 1991), but 22 years before it (1966 to 1988).

The Coastal Hacker Valley USTs were 17 years old in 1986, and were removed in 1991, meaning they were in the ground 17 years before the Regulation Effective Date, but only 3 years after it. C.R. 3038-3039; 3055.

The USTs at Steve White's were installed in 1978, except for one for which the installation date was unknown (but was there when Baker, Inc. bought the property in 1969, see C.R. 2766); they were closed in 1992. C.R. 2847-2851. Thus, these USTs were in the ground for 10 years prior to the Regulation Effective Date and only 4 years after it.

The USTs at Samples were 15 years old in 1986 (C.R. 2558-2559) and closed in 1992 (C.R. 2569), meaning they were in the ground for 17 years prior to the Regulation Effective Date, and 4 years after it.

The W.J. Prince's USTs were 14 years old in 1986 (C.R. 2298-2299), and were closed in 1993 (C.R. 2358), meaning they were in the ground 16 years prior to the Regulation Effective Date and only 5 years after it.

The USTs at Hamrick's were various ages, two of which were installed in 1971, two in 1978, one in 1983, and two of which no installation date is known. C.R. 1877-1880. They were closed in 1993 (C.R. 1877-1880), meaning the USTs installed in 1971 had been in the ground for 19 years before the Regulation Effective Date, but only 5 after it.

The Coastal Buckhannon's USTs were installed in 1981 (C.R. 1484-1485) and closed in 1992. C.R. 1530. They were in the ground for 7 years before the Regulation Effective Date, but only 4 years after it.

Paul's had three (3) USTs that were installed in 1976, one that was installed in 1984, and one that was installed in 1985. C.R. 0810-0811. They were removed in 1992. C.R. 0843. The three tanks installed in 1976 were

there is no clear congressional intent that it be applied retroactively. Just as with the West Virginia Code Provisions, there is no mention of the word retroactive in any form in the 1988 Regulations, and the 1988 Regulations themselves explicitly state that their effective date is December 22, 2988, singling out a single section for an earlier effective date of October 24, 1988. Rules And Regulations, 1988 WL 253164 at *37082 (Attachment B).

However, despite the effective date of the 1988 Regulations being December 22, 1988, those regulations do not serve to authorize the DEP to issue the *DEP Order*, nor do they authorize this Board to uphold or adopt the *DEP Order*. The statutory scheme established by Congress passed the baton to the states to regulate USTs through their own programs. W.Va. Code § 22-17-

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in the ground 12 years before the Regulation Effective Date, but only 4 years after it; the newer tanks, not surprisingly, however, were in good shape when they were removed, so likely contributed little to no contamination. C.R. 0843.

Linger's had one UST that was installed in 1972, and 5 USTs that were installed in 1982, all of which were removed in 1992. C.R. 0068-0073. One UST was in the ground for 16 years before the Regulation Effective Date, but only 4 after it; five were in the ground 6 years before the Regulation Effective Date, but only 4 years after it.

C. Adam Toney had three USTs which were removed by April 30, 1994. C.R. 4138. However, two notification forms were submitted, one indicating they were installed in 1976 and one indicating they were installed in 1982. C.R. 4119-4123; 4131-4124. If they were installed in 1976, they were in the ground 12 years before the Regulation Effective Date and 6 years after; if they were installed in 1982, they were in the ground 6 years before and 6 years after the Regulation Effective Date.

Young's had two 2 USTs, one 8 years old in 1987 and one that was 1 year old in 1987. C.R. 3980-3981. They were removed on April 13, 1994. C.R. 4017. Thus, the earlier installed UST had been in the ground 9 years before the Regulation Effective Date; the later installed UST was in the ground 2 years before the Regulation Effective Date. Both were in the ground 6 years after it.

With respect to the USTs that had been in the ground for a significant number of years before the Regulation Effective Date (particularly Point C Mart, Clendenin, Coastal Hacker Valley, Steve White's, Sample's, W.J. Prince's, Hamrick's, Paul's, and Linger's), they had been underground much longer before the Regulation Effective date than after it. Plainly, no reasonable person could conclude anything other than the majority of leaks, if any, from USTs in the ground much longer before the Regulation Effective Date than after it, occurred before the Regulation Effective Date. Logic unquestionably dictates that where a UST, as with Clendenin's, was in the ground for 22 years before the 1988 Regulations went into effect, nearly all of the contamination, if any, at the site would have occurred prior to 1988 as opposed to between 1988 and 1991, especially when the testimony of Appellee's sole witness, Ruth M. Porter ("Ms. Porter"), that contamination comes not just from the tanks, but from spills during delivery, over-spills during filling, and leaking connecting pipes, as well as the USTs themselves. The burden is not on Appellants to prove how much they are liable for; it is upon the DEP. Nevertheless, the facts set forth in the Certified Record clearly demonstrate that, for nearly all of the USTs across the sites, those USTs were in the ground for a combined forty-eight (48) years after the Regulation Effective Date, but one hundred and fifty-one (151) years before it, or more than triple the number of years they were in the ground after the Regulation Effective Date. Yet the DEP seeks to improperly impose liability for the entire one hundred and fifty-one (151) years on Appellants.

2.[9] See footnote 12, *infra*. Thus, the effective date of the 1988 Regulations do not give the DEP, or this Board, any authority to act, as the 1988 Regulations only establish the standards to be applied the State of West Virginia under its own program. Nevertheless, if those 1988 Regulations have some impact on the regulation of USTs in West Virginia, any such supposed impact would not be retroactive before the effective date of the 1988 Regulations, namely December 22, 1988. Thus, the *Appellee Proposed Final Order* must be rejected because it would apply the 1988 Regulations to past, completed conduct as it covers all contamination at the sites at issue in this appeal.

Therefore, the *Appellee Proposed Final Order* must be rejected because, if it were adopted, this Board would be illegally exceeding its proper authority granted by the West Virginia Code Provisions by retroactively applying both the West Virginia Code Provisions and the 1988 Regulations erroneously, and contrary to their explicitly stated effective dates.

II. The *Appellee Proposed Final Order* Must Be Rejected Because This Board Does Not Have Subject Matter Jurisdiction Over Any Leaks That Occurred Before The Effective Date Of The West Virginia Code Provisions Or The Effective Date Of The 1988 Regulations

Subject matter jurisdiction is "jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things." Black's Law Dictionary, *Jurisdiction, Subject Matter Jurisdiction*, 9th Edition 2009, p. 931. "Subject matter jurisdiction is the power of a court to adjudicate a particular type of matter and provide the remedy demanded." https://www.law.cornell.edu/wex/subject_matter_jurisdiction.

As the Supreme Court has held:

> 'it is fundamental doctrine that "jurisdiction of the subject-matter can only be acquired by virtue of the Constitution or of some statute."' Cruikshank v. Duffield,

[9] Indeed, W.Va. Code §22-17-2 declares it to be the Legislature's purpose in enacting the West Virginia Code Provisions that the State of West Virginia was to "assume regulatory primacy" for regulating USTs with federal assistance.

138 W.Va. 726, 734, 77 S.E.2d 600, 604 (1953) (*quoting* Shelton v. Sydnor, 126 Va. 625, 102 S.E. 83).

State ex rel. Dale v. Stucky, 232 W.Va. 299, 304, 752 S.E.2d 330, 335 (2013). "Jurisdiction ... is the power to adjudicate a case upon the merits and dispose of it as justice may require" and it must be granted by the Constitution or by statute. Shelton v. Sydnor, 126 Va. 625, 629. 102 S.E. 83, 85 (1920). When subject matter jurisdiction is conferred by statute, the tribunal may exercise jurisdiction "only under the prescribed statutory conditions of fact," which the party asserting the tribunal has subject matter jurisdiction must allege and prove. Cruikshank v. Duffield, 138 W.Va. 726, 735, 77 S.E.2d 600, 605 (1953). Finally, "[s]ubject matter jurisdiction consists of the authority the legislature has given" to a tribunal to hear and adjudicate a particular type of dispute. Valone v. Valone, Civil No. CL08–5249, Cir. Ct. City Of Norfolk, 80 Va. Cir. 45 * 2 (January 20, 2010).[10]

Here, the DEP issued the *DEP Order* solely under the authority given to it by the West Virginia Code Provisions.[11] However, the West Virginia Code Provisions do not grant this Board the authority to adjudicate the issue of Appellants' supposed liability for leaks that occurred before June 10, 1994, the effective date of the West Virginia Code Provisions. Therefore, if this Board adopts the *Appellee Proposed Final Order*, it will be exercising subject matter jurisdiction it does not have, because no authority over the leaks occurring before the effective date of the West Virginia Code Provisions has been granted to it by the Legislature to the DEP. Any such adoption

[10] Subject matter jurisdiction cannot be waived and so may be raised for the first time at any time, even on appeal, and even at oral argument on appeal. Argus Energy, LLC v. Marenko, 248 W.Va. 98, 104, 887 S.E.2d 223, 229 (2023).

[11] The cover letter to Appellants sent certified mail by the DEP enclosing the *DEP Order* states the *DEP Order* was "issued to J. C. Baker & Son, Inc. and Baker Oil Company ... under the authority of Chapter 22, Article 17, Section 15 of the Code of West Virginia." The *DEP Order* itself is titled "Order Issued Under The Underground Storage Tank Act West Virginia Code, Chapter 22, Article 17." In the Introduction of the *DEP Order*, reference is made to "the authority vested in the Director of The Division of Water and Waste Management under Chapter 22, Article 17, Section 1 et seq. of the Code Of West Virginia."

would be null and void and of no force and effect because

> '[w]here a [tribunal] is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity, and are a mere nullity and void, not voidable, even prior to reversal, whether the lack of jurisdiction appears on the face of the record or by proof out-side of it; likewise, a [tribunal's] acts in excess of its jurisdiction are void, even if it has jurisdiction of the subject matter of the action and of the parties, as where a [tribunal] of special or limited jurisdiction exceeds its powers.'

Cruikshank, 138 W.Va. at 734.

Therefore, the *DEP Order*, and any order entered by this Board adopting the same, is limited in the subject matter jurisdiction upon which it may pass by the West Virginia Code Provisions to leaks occurring after June 10, 1994. As outlined in footnote 6, *supra*, and as demonstrated by the Certified Record, no leaks occurred from any of the Removed USTs after June 10, 1994, because all the USTs had been removed before then. Therefore, there is no violation by reason of leaks from the Removed USTs as charged in the *DEP Order* over which this Board has jurisdiction and about which it may issue an order. Accordingly, the *Appellee Proposed Final Order* must be rejected.

III. Even Assuming, For Argument's Sake, That This Board May Consider Leaks Occurring Before The Effective Date Of The 1988 Regulations, Although The *DEP Order* Was Issued Under The Authority The Legislature Granted To The DEP In The West Virginia Code Provisions, The *Appellee Proposed Final Order* Must Be Rejected Because The DEP Failed To Prove, By Affirmative Evidence, The Extent Of The Contamination Which Occurred Prior To The Effective Date Of The 1988 Regulations

The DEP was empowered by the Legislature to begin exercising its powers under the West Virginia Code Provisions on or after June 10, 1994.[12] Even assuming, however, that in some

[12] While the state UST program through the West Virginia Code Provisions may be applying the 1988 Regulations as its standards, it is still the West Virginia Code Provisions under which the DEP has asserted its authority to act. In other words, the 1988 Regulations may govern *what* the DEP applies as standards *when* it acts, but the Legislature, by enacting the 1994 Underground Storage Tank Act, i.e., the West Virginia Code Provisions, determined *when* the DEP was empowered to start acting under the authority of that Act. The DEP was not empowered by the Legislature under the West Virginia Code Provisions to apply the standards until June 10, 1994, and then only to leaks

fashion the critical date supposedly is the effective date of the 1988 Regulations instead of the effective date of the West Virginia Code Provisions, there is still a limitation on the exercise of that power. Just as the West Virginia Code Provisions are not to be applied retroactively, neither are the 1988 Regulations. See Part I, *supra*. Thus, only leaks which occurred after the 1988 Regulations became effective would be within the DEP's supposed authority even under the 1988 Regulations. A review of the Certified Record clearly demonstrates that the vast majority of the leaks would have occurred prior to the December 22, 1988 effective date of the 1988 Regulations.[13]

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which occurred on or after that date. As discussed above in Part I, footnote 6, all of the Removed USTs were removed before June 10, 1994.

[13] The USTs at the Point C. Mart site were installed approximately 10 years before the required notification was submitted to the DEP's predecessor in 1986, or in 1976, 12 years before the 1988 Regulations became effective (for purposes of this footnote only, "Regulation Effective Date"). C.R. 3599. They were removed and disposed of by Jerry Stout by March 15, 1994. C.R. 3628. Thus, they were in the ground for 6 years after the Regulation Effective Date, but 12 years – or twice as long – before it.

The USTs at Clendenin were 23 years old when the notification was submitted in 1989, meaning they were installed in 1966! They were then removed in 1991. C.R. 3393-3394, 3402. Thus, they were in the ground for 3 years after the Regulation Effective Date (1988 to 1991), but 22 years before it (1966 to 1988).

The Coastal Hacker Valley USTs were 17 years old in 1986, and were removed in 1991, meaning they were in the ground 17 years before the Regulation Effective Date, but only 3 years after it. C.R. 3038-3039; 3055.

The USTs at Steve White's were installed in 1978, except for one for which the installation date was unknown (but was there when Baker, Inc. bought the property in 1969, see C.R. 2766); they were closed in 1992. C.R. 2847-2851. Thus, these USTs were in the ground for 10 years prior to the Regulation Effective Date and only 4 years after it.

The USTs at Samples were 15 years old in 1986 (C.R. 2558-2559) and closed in 1992 (C.R. 2569), meaning they were in the ground for 17 years prior to the Regulation Effective Date, and 4 years after it.

The W.J. Prince's USTs were 14 years old in 1986 (C.R. 2298-2299), and were closed in 1993 (C.R. 2358), meaning they were in the ground 16 years prior to the Regulation Effective Date and only 5 years after it.

The USTs at Hamrick's were various ages, two of which were installed in 1971, two in 1978, one in 1983, and two of which no installation date is known. C.R. 1877-1880. They were closed in 1993 (C.R. 1877-1880), meaning the USTs installed in 1971 had been in the ground for 19 years before the Regulation Effective Date, but only 5 after it.

The Coastal Buckhannon's USTs were installed in 1981 (C.R. 1484-1485) and closed in 1992. C.R. 1530. They were in the ground for 7 years before the Regulation Effective Date, but only 4 years after it.

Paul's had three (3) USTs that were installed in 1976, one that was installed in 1984, and one that was installed in 1985. C.R. 0810-0811. They were removed in 1992. C.R. 0843. The three tanks installed in 1976 were in the ground 12 years before the Regulation Effective Date, but only 4 years after it; the newer tanks, not surprisingly, however, were in good shape when they were removed, so likely contributed little to no contamination. C.R. 0843.

Linger's had one UST that was installed in 1972, and 5 USTs that were installed in 1982, all of which were removed in 1992. C.R. 0068-0073. One UST was in the ground for 16 years before the Regulation Effective Date, but only 4 after it; five were in the ground 6 years before the Regulation Effective Date, but only 4 years after it.

C. Adam Toney had three USTs which were removed by April 30, 1994. C.R. 4138. However, two notification forms were submitted, one indicating they were installed in 1976 and one indicating they were installed in 1982. C.R. 4119-4123; 4131-4124. Regardless of the date of installation, there were several years (either 12 or 6 years) that they were in the ground before the Regulation Effective Date, and either 7 years or the same number of years (depending on which installation date is used) after the Regulation Effective Date.

With respect to the USTs that had been in the ground for a significant number of years before the December 22, 1988 effective date of the 1988 Regulations (particularly Point C Mart, Clendenin, Coastal Hacker Valley, Steve White's, Sample's, W.J. Prince's, Hamrick's, Paul's, and Linger's), they had been underground much longer before such effective date than after it. Plainly, no reasonable person could conclude anything other than the majority of leaks, if any, from USTs in the ground occurred well before the effective date of the 1988 Regulations than after it. For example, logic and common sense unquestionably dictate that where a UST, as in the case of one of the USTs at the Clendenin site, was in the ground for 22 years before the 1988 Regulations went into effect (see footnote 13, *supra)*, nearly all of the contamination from that UST, if any, at the Clendenin site would have occurred prior to the 1988 Regulations' effective date, as opposed to between 1988 (the year of the effective date of the 1988 Regulations) and 1991 (when that UST was removed), especially in light of Ms. Porter's testimony that contamination comes not just from the tanks, but from spills during delivery, over-spills during filling, and leaking connecting pipes, as well as the USTs themselves, is considered.[14] The burden is not on Appellants to prove the extent of the contamination over which the DEP has jurisdiction, it is upon the DEP. Cruikshank, 138 W.Va. 726, 735. Nevertheless, the facts set forth in the Certified Record clearly demonstrate that, for nearly all of the USTs at the sites at issue in this appeal, those USTs were in the ground for a combined forty-eight (48) years after the effective date of the 1988 Regulations, but one hundred and fifty-one (151) years before it, or more than triple the number of years they were in the ground after the effective date of the 1988 Regulations. Yet the DEP seeks to improperly

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Young's had two 2 USTs, one 8 years old in 1987 and one that was 1 year old in 1987. C.R. 3980-3981. They were removed on April 13, 1994. C.R. 4017. Thus, they had been in the ground 9 years before the Regulation Effective Date and 2 years, respectively. They were in the ground 6 years after it.

[14] 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).

impose liability for the entire one hundred and fifty-one (151) years, as embodied in the *Appellee Proposed Final Order*.

It was the DEP's burden to prove, by affirmative evidence, the extent of any contamination which came from leaks over which this Board has jurisdiction. See Part IV, *infra*. Even assuming this Board could supposedly consider leaks occurring before the effective date of the West Virginia Code Provisions that are, nevertheless, after the effective date of the 1988 Regulations, as being within the scope of its jurisdiction, the DEP failed to prove, by affirmative evidence, the extent of the contamination emanating from those leaks.[15] Therefore, the *Appellee Proposed Final Order*, which covers all of the Removed USTs and not just those for which this Board might have jurisdiction, must be rejected as this Board has no authority to adopt it.

IV. The *Appellee Proposed Final Order* Should Be Rejected Because It Improperly Urges This Board To Adopt A Burden Of Persuasion/Burden Of Proof Procedure Which Is Contrary To The Clear Pronouncement In West Virginia Department Of Environmental Protection V. Kingwood Coal Company, 200 W.Va. 734, 745, 490 S.E. 2d 823 (1997) On How An Appeal To This Board Was To Be Conducted

As Appellants made clear in their objections to this Board at the start of the Second Hearing held on October 10, 2024, the Burden Of Proof, outlined on page 2 of the *Appellee Proposed Final Order*, is incorrect. While it relies on a decision rendered by the Circuit Court of Kanawha County, West Virginia, 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 decision

[15] The "assumption" relied upon by the DEP that assumes all contamination at a site comes from the UST in place at the time of its removal, has no application and serves as no assumption that all contamination resulted from leaks occurring before the effective date of either the West Virginia Code Provisions or the effective date of the 1988 Regulations. This issue concerns jurisdiction of this Board and no "assumption" can grant a tribunal jurisdiction; instead, it must be proved by facts. "Where the jurisdiction invoked is not inherent in the [tribunal], but conferred by special statute, and is to be exercised only under the prescribed statutory conditions of fact, the plaintiff must allege and prove the required jurisdictional facts." Cruikshank, 138 W.Va. at 735 (emphasis added). By definition, an assumption is not a fact. See Part V, *infra*.

misstates the law on how this appeal is to proceed. Pursuant to 46 CSR § 6.8, all appeals to this Board are *de novo*. The Supreme Court has clearly held that when an appeal is *de novo*, the order under appeal is not to be given any deference because this Board is "to be the ultimate finder of fact and to act independently on the evidence before it." West Virginia Department of Environmental Protection v. Kingwood Coal Company, 200 W.Va. 734, 745, 490 S.E. 2d 823 (1997). Furthermore, this Board also is not to be "concerned with what took place below...[a]s no presumption of correctness attaches to the action of the DEP.'" Kingwood, 200 W.Va. at 745, *quoting* Big Fork Mining Co. v. Tennessee Water Quality Control Bd., 620 S.W.2d 515, 521 (Tenn.Ct.App. 1981).

The Kingwood court carefully and succinctly explained what a *de novo* hearing means:

> The term "hearing *de novo*" means "[g]enerally, a new hearing or a hearing for the second time, contemplating an entire trial in same manner in which matter was originally heard and a review of previous hearing. *Trying matter anew the same as if it had not been heard before and as if no decision had been previously rendered.* On hearing 'de novo' court hears matter as court of original and not appellate jurisdiction." *Black's Law Dictionary* 721 (6th ed.1990). (citations omitted and emphasis added).

Kingwood, 200 W.Va. at 745 (emphasis in original). Significantly, the Kingwood court held that when a tribunal considers an appeal of a decision "*de novo*," it hears the matter as a tribunal of original and not appellate jurisdiction. In addition, it is determined as if it had not been heard below. In other words, this appeal was to be heard by this Board as if the *DEP Order* had never been entered. [16] Thus, as clearly in keeping with Kingwood, Appellants were appellants in name only, not in position; they were, in essence, the defendants, not the plaintiffs in this "new" proceeding, with all the duties imposed on defendants and none of those imposed on plaintiffs. In

[16] It is for this reason that Appellants objected to "testimony" from Appellee's sole witness, Ms. Porter, which consisted of reading the *DEP Order* as though it were evidence. Oct 11 Trans., pp. 40, 42, 44-45. It is not evidence and is, under Kingwood, to be given no consideration.

other words, under Kingwood, the Supreme Court made it clear that the DEP was obligated to put on its case first, that the DEP bears the burden of proving, with affirmative evidence, the entirety of its case, meaning the entirety of what it charged in the *DEP Order*, and that the DEP bears the burden of meeting, with sufficient affirmative evidence, not mere assumptions, Appellants' case.[17]

This Board has held that the holding in Wetzel County Solid Waste Authority compels the procedure it adopted. However, although the decision was rendered in 1999 and Kingwood was rendered in 1997, Kingwood still controls, as it is binding precedent. A review of the Wetzel County Solid Waste Authority decision reveals that it makes no mention of Kingwood, let alone distinguish the holding in a manner that would supposedly justify ignoring what the Supreme Court clearly held in Kingwood; thus, it is clear that the Wetzel County Solid Waste Authority court established the procedure it did, in apparent ignorance of the Kingwood holding, a holding which dictates a procedure the opposite of what the Wetzel County Solid Waste Authority court followed. The Wetzel County Solid Waste Authority court apparently looked at the fact that the proceeding was "titled" an appeal and applied traditional appellate notions, when the Kingwood court made it clear it is not an appeal at all and it was to proceed as any initial proceeding would – with the party attempting to hold the other party liable proceeding first and bearing the burden of proof throughout the proceeding.

Accordingly, this entire proceeding, consisting of both the First Hearing and the Second Hearing, was tainted by an improper and legally erroneous procedure, and the *Appellee Proposed*

[17]Even though the DEP contends, which Appellants refute, that it is entitled to rely on an assumption that all the contamination found on a site was caused by the Removed USTs, taking, for argument sake only, that may be correct, such assumption does not carry over into any other factual finding which is at issue, including the impossibility to comply with any order, which may issue in favor of the DEP, due to lack of access to the sites, and impossibility to comply with any order, which may issue in favor of the DEP, due to lack of ability to finance any remediation work. Nor does such assumption empower the DEP to apply the West Virginia Code Provisions or the 1988 Regulations retroactively in order to exercise a jurisdiction it does not have.

Final Order perpetuates this taint. For that reason, the *Appellee Proposed Final Order* must be rejected.

V. The *Appellee Proposed Final Order*, Relying On Assumptions Not Authorized Or Supported By The Law, Erroneously Holds Appellants Responsible For All Of The Contamination At The Sites At Issue In This Appeal, Despite Failing To Prove, By Affirmative Evidence, That All Of The Contamination At Each Site Came From The Removed USTs At Each Site

As Appellee's sole witness, Ms. Porter admitted at the Second Hearing (October 10 Transcript, p. 184), that an owner of a UST that leaks has the burden of cleaning up any releases from that UST, not the contamination from other sources. October 10 Transcript, p. 184 ("Oct 10 Tran."). This limited, not all-encompassing, responsibility is in keeping with W.Va. Code § 22-17-14, which is the statutory provision requiring UST owners to remediate leaks from their USTs. That statutory provision significantly states that "the director is authorized to … [r]equire the owner or operator of an underground storage tank to undertake corrective action with respect to any release of petroleum from said tank."[18] W.Va. Code § 22-17-14(a)(1) (emphasis added.) In other words, by the clear and unmistakable language of this West Virginia Code provision, the DEP is given authority to require corrective action against an owner of a UST only to the extent of the contamination, if any, arising from a release from that owner's UST. Any attempt to order corrective action with respect to any contamination arising from some source other than the specified UST belonging to the party being charged exceeds the DEP's statutory authority. "[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

[18] "Director" is defined as the "director of the West Virginia Division of Environmental Protection or such other person to whom the director has delegated authority or duties pursuant to section six or eight, article one of this chapter [Chapter 22 of the West Virginia Code]." W.Va. Code § 22-17-3(b). Accordingly, reference to the DEP incorporates reference to its director.

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).

When examining an agency's construction of a statute, it is well-established law that "administrative constructions that are contrary to the clear language of a statute" are to be rejected. Syl. Pt. 2 (in part), Domestic Violence Survivors' Support Group, Inc. v. West Virginia Department Of Health And Human Resources, Office Of Health Facility Licensure And Certification, 238 W.Va. 566, 797 S.E.2d 543 (2017), *quoting* Syl. Pt. 5, CNG Transmission Corp. v. Craig, 211 W.Va. 170, 564 S.E.2d 167 (2002). Furthermore,

> "'A statute ... may not, under the guise of "interpretation," be modified, revised, amended or rewritten.' Syllabus Point 1, Consumer Advocate Div'n v. Public Service Comm'n, 182 W.Va. 152, 386 S.E.2d 650 (1989)." Syl. Pt. 4, CNG Transmission Corp. v. Craig, 211 W.Va. 170, 564 S.E.2d 167 (2002).

Syl. Pt. 4, Domestic Violence Survivor's Support Group, 238 W.Va. 566; In re New Jersey State Funeral Directors Ass'n, 427 N.J.Super. 268, 279, 48 A.3d 391 (2012) ("[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.")

Ms. Porter testified repeatedly that, if contamination is found, "the assumption is made" that it – all of it – comes from the particular UST in place at the time the contamination is found. Oct. 10 Tran. pp. 182, 240. In her opinion, "that's what the rule assumes." Oct. 10 Tran. p. 183. She further contends that this assumption is made "according to what the law says." Oct. 10 Tran. p. 244. Assuming Ms. Porter is referring to the 1988 Regulations, those regulations make no mention of the words "assumption," "presume," or "presumption," and they make only two references to the word "assume," neither of which reference creates any sort of "assumption" that all contamination at a site is to be taken as emanating from leakage from the UST in place when

the leak was detected.[19] *See* Appellee Exhibit 132 pp. 1, 31. Given that an assumption is "an assertion or statement that is taken as true or supposed as a fact without proof or substantiating evidence," (https://www.law.cornell.edu/wex/assumption (emphasis added); https://www.britannica.com/dictionary/assumption), such assumption is evidence of nothing.

With respect to certain of the sites at issue in this appeal, Appellants, on the other hand, presented evidence (some of which was reflected in the Certified Record, the DEP's own record), which the DEP never refuted, that there were other contamination sources. Because, contrary to Ms. Porter's testimony, "the law" does not create an assumption that contamination at a site is all due to the UST in place at the time the leak is detected, and because the clear West Virginia statutory law (W.Va. Code § 22-17-14(a)(1)[20]) empowers the DEP to require an owner or operator "to undertake corrective action with respect to any release of petroleum from said [the owner's] tank" only, any "assumption" that all of the contamination is to be attributed to the owner of the tank in place at the time the leak was detected, is contrary to, and overruled by, the specific statutory language limiting the scope of a UST's owner or operator's liability for corrective action. Because the DEP is attempting to exercise authority over Appellants to compel corrective action as granted to it under W.Va. Code § 22-17-14(a)(1), it must ensure its exercise is within the scope of what it was authorized to do.[21] That burden cannot be shifted to Appellants and that is exactly

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[19] The West Virginia Code Provisions likewise make no mention of an "assumption" or "presumption." Furthermore, as discussed in Part II, *supra*, the issue of whether the DEP has the authority to compel an owner or operator of a UST to remediate contamination from other sources, is a question of the DEP's jurisdiction, and jurisdiction cannot be created by an assumption or presumption.

[20] Significantly, W.Va. Code § 22-17-14(a)(1) does not empower the DEP to require an owner or operator of a UST to take corrective action with respect to all contamination found at a site. Neither state agencies nor boards may add language to a statute which is not there, nor may they construe a statutory provision in a manner that would render any words in the statute meaningless. Syl. Pt 11, Brooke v. Ray, 230 W.Va. 355, 738 S.E2d 21 (2013). If the "assumption" is applied, it will render the phrase "from said tank" totally meaningless.

[21] Significantly, neither the DEP nor this Board have any subject matter jurisdiction in this appeal which is asserted against Appellants for contamination not the result of leaks from the Removed USTs. Since the West Virginia Code Provisions make it clear that only contamination from USTs owned, if any, by Appellants is the responsibility of Appellants, neither the DEP nor this Board may compel them to remediate someone else's contamination. Thus, there is no subject matter for such other contamination which may be exercised to hold Appellants responsible for

what this supposed assumption on which the DEP relies attempts to do. Ms. Porter's and the DEP's interpretation of W.Va. Code § 22-17-14(a)(1) seeks to saddle Appellants with the responsibility of performing corrective work for all the contamination based on an unfounded assumption; it is nothing more than a disguised attempt to read into the statute liability which is not there, contrary to Syl. Pt. 4, Domestic Violence Survivor's Support Group, 238 W.Va. 566, Consumer Advocate Div'n, 182 W.Va. 152 and CNG Transmission Corp., 211 W.Va. 170.

The burden of proof, resting on the DEP, as to Appellants' supposed liability for performing corrective action, therefore, required the DEP to prove the extent of Appellants' supposed liability so that, if necessary, a proper order outlining what Appellants supposedly would be responsible to do could be framed by this Board. Meeting that burden of proof required evidence as to the extent of the contamination for which Appellants supposedly were responsible. Because the DEP failed to prove the extent of the contamination at each of the sites at issue in this appeal, which emanated from the Removed USTs, the findings of fact and conclusions of law in the *Appellee Proposed Final Order* are totally unsubstantiated. Absence an evidentiary showing by the DEP regarding the extent of the contamination for which the Appellants supposedly are liable, and unequivocally demonstrating the extent of the contamination over which the DEP and this Board supposedly have subject matter jurisdiction, the DEP failed to meet its burden of proof as to the sites at issue in this appeal. As the DEP has no authority to compel corrective action for all the contamination at the sites for which it was established that there were other sources of contamination,[22] and because the *Appellee Proposed Final Order* imposes liability for all the contamination, the same must be rejected.

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such contamination. *See* Part II, *supra* (explaining, in part, that subject matter jurisdiction is the authority of a tribunal to rule on a person's conduct or actions, or to adjudicate a matter and provide the requested remedy.) An "assumption" without question cannot cure the absence of subject matter jurisdiction.

[22] *See* Part VI, *infra*.

VI. The *Appellee Proposed Final Order* Does Not Point To Any Evidence That The DEP Met Its Burden Of Proof In Proving, By Affirmative Evidence, The Amount Of Contamination Which Is The Responsibility Of Appellants With Respect To Sites Where There Was Clear Evidence Of Other Sources Of Contamination

As discussed above in Part V, the DEP erroneously relied entirely on the legally invalid assumption that, just because the Removed USTs were in place when leaks were detected, all of the contamination at the sites where they were located emanated from those Removed USTs. However, such assumption is not valid. Again, as outlined above in Part V, neither the 1988 Regulations nor the W.Va. Code Provisions establish such assumption. Moreover, W.Va. Code § W.Va. Code § 22-17-14(a)(1) expressly limits the DEP's authority to compel a UST owner or operator to engage in corrective action only with respect to leaks stemming from the USTs which such owner or operator owns or operates. Thus, the DEP is not authorized, and has no subject matter jurisdiction, to compel Appellants to engage in any corrective action for any contamination from any other source and cannot "disguise" such lack of authorization and such lack of subject matter jurisdiction by "assuming" it all came from the Removed USTs, especially where there is evidence of other sources of contamination.

As outlined in Appellants' proposed *Final Order (No Liability For Contamination)* ("*Appellants' Proposed Final Order)*, evidence established other sources of contamination for the following sites: (1) Linger's (*Appellants' Proposed Final Order,* pp. 18-19); (2) Coastal Buckhannon (*Appellants' Proposed Final Order*, pp. 24-25); Paul's (*Appellants' Proposed Final Order*, pp. 30-31); (3) Coastal Hacker Valley (*Appellants' Proposed Final Order*, p. 36); (4) Clendenin (*Appellants' Proposed Final Order*, p. 44); (5) Steve White's (*Appellants' Proposed Final Order*, p. 52); and (6) Point C Mart (*Appellants' Proposed Final Order*, pp. 56-57). In addition, Ms. Porter testified that contamination results when USTs are over-filled, or when a spill

occurs during the delivery process, or from leaks in the connecting pipes. Oct 10 Tran. p. 245.[23] Thus, there was ample evidence that other sources contributed to the contamination at these sites. The DEP, however, failed to offer any evidence that there was no such contribution and, in fact, through Ms. Porter's testimony, confirmed that such contribution was inevitable. Therefore, with other source contribution clearly established by the evidence, the DEP had the burden to establish exactly what corrective action it was asking this Board to require Appellants to take to correct just that portion of the contamination attributable to the Removed USTs.[24] Because it did not do so, the *Appellee Proposed Final Order* must be rejected.

VII. The *Appellee Proposed Final Order* Misapplies The *Final Order* Entered In Jill Fischer v. Department Of Environmental Protection And WV Environmental Quality Board, Case No. CC-32-2018-AA-1 (Circuit Court of Monroe County, West Virginia)

On February 23, 2018, this Board issued an order in 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 ("*Board Fischer Order*"). At issue was certain corrective action needed when a concrete truck owned and operated by RBS, Inc. ("RBS") overturned on property owned by Jill Fischer ("Ms. Fischer"), with a resulting spill of petroleum products on Ms. Fischer's property. Ms. Fischer had contracted for certain concrete work to be performed on her property and, thus, was instrumental in creating the presence of the concrete truck on her property.

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[23]Despite having outlined that contamination arises from various aspects of the operation of a gas station (over-fill, spills, and leaking connecting pipes in addition to the USTs themselves), Ms. Porter wants this Board to believe that, just because a previous gas station was located on a certain site, that does not mean "there was contamination associated with it," calling such conclusion an "assumption," (by definition, a "fact" that is not known to be true) that does not prove such contamination's existence. Oct 10 Tran. p. 260. However, she does not hesitate to rely on such an assumption in seeking to impose liability on Appellants by assuming that all the contamination on a site emanated from the Removed USTs that had been on that site.

[24] Because the DEP has no authority to act outside the scope of its subject matter jurisdiction, it cannot order corrective action outside that scope. Thus, its orders must be tailored to compel corrective action only with respect to the amount of the contamination over which it has subject matter jurisdiction. The DEP, therefore, has the burden of determining the extent of the contamination it can compel a party to remediate, which is only the contamination emanating from that party's USTs, so that its orders constitute a proper and legal exercise of its authority.

A dispute arose between Ms. Fischer and RBS, which had contracted with CORE Environmental Services, Inc. ("CORE"), over remediation of the spill, with the result that Ms. Fischer denied both RBS and CORE entry onto her property. At a hearing this Board conducted in the matter, the DEP's assistant chief inspector of environmental enforcement testified that it was impossible for RBS to comply with any order requiring corrective action without legal access to Ms. Fischer's property. Attachment C attached hereto, ¶ 34.

The conclusions of law, which this Board made in the *Board Fischer Order*, include the following:

1. "[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." Attachment C, p. 9.

2. "[Ms.] Fischer must accept some responsibility for bringing the concrete truck onto her property." Attachment C, p. 10.[25]

Ultimately, this Board ordered that, if Ms. Fischer continued to deny access to her property, Ms. Fischer would be responsible for remediation and its costs. Attachment C, *Board Fischer Order*, p. 11, ¶¶ 2, 3 and 5. In other words, this Board acknowledged that RBS could not be required to remediate or pay remediation costs when it did not have access to Ms. Fischer's property.

On appeal filed by Ms. Fischer to the Circuit Court of Monroe County, West Virginia ("Monroe Circuit Court"), Ms. Fischer challenged this Board's order requiring her to either grant

[25] The *Board Fischer Order* also found grounds for authority to compel Ms. Fischer to comply under the broad grant of powers to enforce environmental laws. See Attachment C, *Board Fischer Order*, pp. 9-10. However, since none of the current owners of the real property on which the USTs were located are parties to this appeal, any issue regarding this Board's authority over these property owners is not an issue in this appeal. Appellants would also note that, when the West Virginia Code Provisions (the ones that control this appeal) are examined, nowhere is there any authorization for the DEP to exercise jurisdiction over anyone other than an owner or operator of a UST that has leaked.

access to her property or to remediate the spill herself and assume the costs thereof. However, there was no appeal of the Board's conclusion that RBS would not be required to remediate or pay its costs if it was not given access. The Monroe Circuit Court noted in its *Proposed Order Implementing ruling at March 21, 2019 hearing* ("*Monroe Circuit Court Order*") (Attachment D hereto), that the parties had reached an agreement on access by RBS to Ms. Fischer's property, and, based upon this agreement to allow access, the Monroe Circuit Court then held that "[a]ccordingly, 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 [this Board's] order to conform to the DEP's stated position at oral argument." Attachment D, *Monroe Circuit Court Order*, fifth page.[26] Therefore, this Board's conclusion in the *Board Fischer Order*, that "[]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," was not negated by the *Monroe Circuit Court Order*.

In the *Appellee Proposed Final Order,* the DEP has completely mischaracterized the *Monroe Circuit Court Order*. First, as the Monroe Circuit Court noted, at oral argument, the DEP stated it would no longer contest Ms. Fischer's on-going objection that an armed law enforcement officer or other person would accompany those conducting remedial work,[27] and the Monroe Circuit Court included a provision in the *Monroe Circuit Court Order* prohibiting RBS from using a remedial contractor who insisted upon being accompanied by another person who was armed; in addition, the DEP also stated it would no longer contest Ms. Fischer's objection that costs be imposed on her so long as she ceased denying access to her property. *Monroe Circuit Court Order,* fourth and fifth pages.

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[26] The *Monroe Circuit Court Order* has no page numbers, but counting pages, the holding is on the fifth page.
[27] See Attachment C, *Board Fischer Order*, ¶¶ 36 and 37.

In other words, responsibility was imposed on RBS because the reason for Ms. Fischer's denial of access, the remedial work contractor's insistence upon being accompanied by an armed individual, was resolved and RBS gained access. It was only because Ms. Fischer granted access that the Monroe Circuit Court determined that RBS would be responsible for remediation and its costs.

Contrary to the position taken in the *Appellee Proposed Final Order*, the *Monroe Circuit Court Order* does not recognize that Appellants may be assessed the costs of remediation work when they have no access to perform such work. In fact, this Board's holding in the *Board Fischer Order* directly held that, without access, RBS was not responsible for costs or remediation work. Attachment C, *Board Fischer Order*, p. 11, ¶¶ 2 and 5. Accordingly, the *Appellee Proposed Final Order* should be rejected as it reaches an erroneous conclusion with respect to the responsibility that may be imposed on Appellants when they have no access to certain of the sites at issue in this appeal.

VIII. The *Appellee Proposed Final Order* Ignores Both Common Sense And The Evidence Adduced At The Second Hearing Regarding Appellants' Lack Of Access To Certain Sites, Making It Impossible For Them To Comply With Any Ordered Corrective Action, As This Board Has No Authority To Compel Appellants To Trespass, And Ignores The Law That Tribunals Cannot Order Parties To Do The Impossible And That Any Order Compelling The Impossible Is Arbitrary And Capricious And Violates Due Process Rights

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). "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).

As this Board held in the *Board Fischer Order*, there is no statute that gives the WVDEP "unilateral authority to force a third party to legally enter and perform remedial work on real property belonging to another." Attachment C, *Board Fischer Order*, p. 9 (emphasis added). Equally, and perhaps more, true, the WVDEP does not have authority to compel a third party to illegally (i.e. trespass) enter and perform remedial work on another party's real property.[28] When that is the situation, it is not, according to the holding in the *Board Fischer Order*, the responsibility of an owner or operator of a leaking UST to remediate the contamination, nor to pay for it.

[28] This Board further noted that the DEP recognized that "[Ms.] Fischer controls access to her property in her role as property owner." Attachment C, *Board Fischer Order*, p. 5, ¶ 22.

Because this Board would be ordering the impossible, adopting the *Appellee Proposed Final Order* would be arbitrary and capricious in violation of Appellants' due process rights. Therefore, the *Appellee Proposed Final Order* must be rejected.

IX. The *Appellee Proposed Final Order* Ignores Both Common Sense And The Evidence Adduced At The Second Hearing Regarding Appellants' Financial Inability To Pay For Any Corrective Action, Ignoring The Law That Tribunals Cannot Order Parties To Do The Impossible And That Any Order Compelling The Impossible Is Arbitrary And Capricious And Violates Due Process Rights

The public records, as well as the evidence adduced at the Second Hearing, establish that Baker Oil has no assets, no longer is an operating company, and has no funds which could be used to perform any remediation work. Oct 10 Trans. pp. 115, 117, 119-120. In fact, Baker Oil's authority to conduct business in West Virginia has been revoked. Appellants' Exhibit 77.

With respect to Baker, Inc., it has a judgment against it in the amount of $1,555,112.72, which carries an interest rate of 4.75% per year ("Judgment"). As outlined in *Appellants' Proposed Final Order*, as of the end of November 2024, accrued interest increased the amount owed to nearly $2,000,000.00. *Appellants' Proposed Final Order*, p. 4, ¶ 7. In addition, Baker, Inc.'s real property is encumbered by the Judgement, meaning Baker, Inc. is unable to sell any of its real estate to pay for any remediation work. *Appellants' Proposed Final Order*, p. 5, ¶¶ 8-10. Moreover, the potential costs of remediation could cost several hundreds of thousands of dollars to up to $6,000,000.00. *Appellants' Proposed Final Order*, p. 6, ¶¶ 13-15.

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).[29] Common sense dictates that a company in Baker,

[29] Appellants ask this Board to exercise common sense when considering this appeal as the circumstances surrounding this appeal are quite unique. The leaks, if any, which are at issue here occurred at a time of transition between decades of no regulation and the sudden imposition of extensive and costly regulation. The Removed USTs

Inc.'s financial position, with no readily available funds and no real estate to sell to raise those funds, would not be able to pay the huge costs involved in remediating all of the leaks at all of the sites at issue in this appeal, as the *DEP Order* is seeking to require.[30] Compliance would be impossible.

As discussed above in Part VIII, tribunals cannot order the impossible. To do so would be arbitrary and capricious, and a violation of due process. Nevertheless, the DEP seeks to have this Board order the impossible. For this reason, the *Appellee Proposed Final Order* must be rejected.

X. Conclusion

For all the reasons outlined above, this Board should reject the *Appellee Proposed Final Order* and adopt *Appellants' Proposed Final Order*.

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

Appellants,

BY COUNSEL:

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were all removed prior to the June 10, 1994 effective date of the West Virginia Code Provisions, or more than 30 years ago! See footnote 6, *supra*. Not only were they removed over 30 years ago, but much of the contamination – as common sense will tell – clearly occurred up to decades before then, with some of the sites having been gas stations as early as in the 1930's and 1940's. People simply cannot foresee the future, and anticipating future regulation is no exception. Plainly, for example, it would not be reasonable to expect mom and pop gas stations to have done testing for contamination before purchasing a gas station business or installing a new UST in the 1930's or 1940's so as to have a baseline reading to protect against liability against some future decades-later regulation when such regulation was not even "on the radar" of anyone in the industry, regardless of how common a business practice it may be now, as even the DEP agrees. See Oct 10 Trans. p. 247. Accordingly, Appellants respectfully request that this Board exercise its common sense and consider this appeal through the lens of events and circumstances as they were at the time before, as well as at the time when, regulation of USTs first began.

[30] Common sense recognizes that clean-up can be extremely expense, outrageously so. This Board noted in the *Board Fischer Order* that a small amount of gear oil had leaked from the truck's manual transmission, "perhaps a gallon or less," which made its way to a private well serving only Ms. Fischer's property. Attachment C, *Board Fischer Order*, p. 2, ¶ 2, and footnote 2. After two years of negotiations, and with clean-up of the spring far from complete, the cost to RBS had already been approximately $300,000.00. Attachment C, *Board Fischer Order*, p. 7, ¶¶ 27 and 30.

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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.

ATTACHMENT A

APPELLANTS' OBJECTION TO PROPOSED *FINAL ORDER* SUBMITTED BY APPELLEE

1994 West Virginia Laws Ch. 61 (H.B. 4065)

WEST VIRGINIA 1994 SESSION LAWS

SECOND REGULAR SESSION OF THE 71ST LEGISLATURE

Additions and deletions are not identified in this document.

Ch. 61 (H.B. No. 4065)

West's No. 231
ENVIRONMENTAL PROTECTION–GENERAL AMENDMENTS

AN ACT to repeal articles twenty and twenty-six, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to repeal articles five, five-a, five-b, five-c, five-d, five-e, five-f, five-g, five-h, five-i, five-m, five-n, six-a, nine, ten and ten-a, chapter twenty; to repeal article one-a, chapter twenty-two-a of said code; to repeal articles one-c and one-d, chapter twenty-nine of said code; to amend and reenact section one, article three, chapter five; to amend and reenact section eight, article seven, chapter six; to amend and reenact sections three-aa and three-ff, article one, and section twenty-two, article five, chapter seven; to amend and reenact section seventeen, article twenty, and section twenty-seven, article twenty-four, chapter eight; to amend and reenact section ten, article one-c, sections one and two, article six-a and section six, article thirteen-a, chapter eleven; to amend and reenact section four, article five-a, chapter fifteen; to amend and reenact sections nine and fourteen-a, article one, sections two and three, article nine, section six, article twelve, section twenty-three-a, article thirteen-a, section ten, article thirteen-b, and section two, article twenty-seven, chapter sixteen; to amend and reenact sections three, five, and seven, article one-b, section five, article twelve-a, section four, article twenty-one-a, and section five, article twenty-five, chapter nineteen; to amend and reenact sections two, seven and fourteen, article one, sections six and ten, article five-j, sections four and twenty-six, article seven, chapter twenty; to further amend said article seven, by adding thereto two new sections, designated sections twenty-eight and twenty-nine; to amend and reenact section one, article eight and sections four, five-a, five-b, nine and twelve, article eleven of said chapter twenty; to amend and reenact section three, article three-b, chapter twenty-one; to amend and reenact chapter twenty-two; to amend and reenact article one, chapter twenty-two-a; to amend and reenact sections one, two, three, seven, twelve, twenty-three, twenty-five, thirty-three, thirty-six, fifty-three-c, fifty-four, sixty-six, sixty-eight, seventy, seventy-two, seventy-three, seventy-four, seventy-five, seventy-six, seventy-seven and seventy-eight, article two of said chapter twenty-two-a; to amend and reenact articles three, four, five, six and seven, of said chapter twenty-two-a; to further amend said chapter twenty-two-a by adding thereto three new articles, designated articles eight, nine and ten; to amend and reenact chapter twenty-two-b; to amend said code by adding thereto a new chapter, designated chapter twenty-two-c; to amend and reenact section two, article four, chapter twenty-three; to amend and reenact sections one-b, one-c, one-f, one-h, one-i and four-b, article two, chapter twenty-four; to amend and reenact section eleven, article two-b and section five-a, article three, chapter twenty-nine; to amend and reenact section four, article sixteen; section twenty-a, article eighteen and section four, article nineteen, chapter thirty-one; to amend and reenact section nine-a, article four, chapter thirty-six; to amend and reenact section seventeen, article seven and section two, article twelve-a, chapter fifty-five; to amend and reenact section forty-seven, article three, chapter sixty-one, all of said code relating to revising, arranging and consolidating in the code laws relating generally to the environment, the division of environmental protection, laws administered and enforced by the division, laws incidental thereto and the related criminal and civil penalties.

Be it enacted by the Legislature of West Virginia:

<< Repealed: WV ST §§ 16–20–1, 16–20–2, 16–20–3, 16–20–4, 16–20–5, 16–20–6, 16–20–7, 16–20–8, 16–20–9, 16–20–10, 16–20–11, 16–20–11a to 16–20–11c, 16–20–12, 16–20–13, 16–20–14, 16–20–15, 16–20–16, 16–20–17, 16–20–18, 16–20–19, 16–20–20, 16–26–1, 16–26–2, 16–26–3, 16–26–4, 16–26–5, 16–26–6, 16–26–6a, 16–26–7, 16–26–8, 16–26–9, 16–26–10, 16–26–11, 16–26–12, 16–26–13, 16–26–14, 16–26–15, 16–26–16, 16–26–17, 16–26–18, 16–26–19, 16–26–20, 16–26–21, 16–26–22, 16–26–23, 16–26–24, 16–26–25, 20–5–1, 20–5–1a, 20–5–2, 20–5–3, 20–5–4, 20–5–5,

20–5–6, 20–5–7, 20–5–8, 20–5–9, 20–5–10, 20–5–11, 20–5–12, 20–5–13, 20–5–14, 20–5–15, 20–5–16, 20–5A–1, 20–5A–2, 20–5A–3, 20–5A–3a, 20–5A–4, 20–5A–5, 20–5A–6, 20–5A–6a, 20–5A–7, 20–5A–8, 20–5A–8a, 20–5A–8b, 20–5A–9, 20–5A–10, 20–5A–11, 20–5A–11a, 20–5A–12, 20–5A–12a, 20–5A–13, 20–5A–14, 20–5A–15, 20–5A–16, 20–5A–17, 20–5A–18, 20–5A–19, 20–5A–19a, 20–5A–20, 20–5A–21, 20–5A–22, 20–5A–23, 20–5A–24, 20–5B–1, 20–5B–2, 20–5B–3, 20–5B–4, 20–5B–5, 20–5B–6, 20–5B–7, 20–5B–8, 20–5B–9, 20–5B–10, 20–5B–11, 20–5B–12, 20–5B–13, 20–5B–14, 20–5B–15, 20–5B–16, 20–5B–17, 20–5C–1, 20–5C–2, 20–5C–3, 20–5C–4, 20–5C–5, 20–5C–6, 20–5C–6a, 20–5C–7, 20–5C–8, 20–5C–9, 20–5C–9a, 20–5C–10, 20–5C–11, 20–5C–12, 20–5C–13, 20–5C–14, 20–5C–15, 20–5C–16, 20–5C–16a, 20–5C–16b, 20–5C–17, 20–5C–18, 20–5C–19, 20–5C–20, 20–5C–21, 20–5C–22, 20–5C–23, 20–5C–24, 20–5D–1, 20–5D–2, 20–5D–3, 20–5D–4, 20–5D–5, 20–5D–6, 20–5D–7, 20–5D–8, 20–5D–9, 20–5D–10, 20–5D–11, 20–5D–12, 20–5D–13, 20–5D–14, 20–5D–15, 20–5D–16, 20–5D–17, 20–5D–18, 20–5D–19, 20–5E–1, 20–5E–2, 20–5E–3, 20–5E–4, 20–5E–5, 20–5E–6, 20–5E–7, 20–5E–8, 20–5E–8a, 20–5E–9, 20–5E–10, 20–5E–11, 20–5E–12, 20–5E–13, 20–5E–14, 20–5E–15, 20–5E–16, 20–5E–17, 20–5E–18, 20–5E–19, 20–5E–20, 20–5E–21, 20–5E–22, 20–5E–23, 20–5E–24, 20–5E–25, 20–5F–1, 20–5F–2, 20–5F–2a, 20–5F–2b, 20–5F–3, 20–5F–4, 20–5F–4a, 20–5F–4b, 20–5F–4c, 20–5F–4d, 20–5F–5, 20–5F–5a, 20–5F–5b, 20–5F–5c, 20–5F–5d, 20–5F–6, 20–5F–7, 20–5F–8, 20–5F–9, 20–5F–10, 20–5F–11, 20–5F–12, 20–5G–1, 20–5G–2, 20–5G–3, 20–5G–4, 20–5G–5, 20–5G–6, 20–5H–1, 20–5H–2, 20–5H–3, 20–5H–4, 20–5H–5, 20–5H–6, 20–5H–7, 20–5H–8, 20–5H–9, 20–5H–10, 20–5H–11, 20–5H–12, 20–5H–13, 20–5H–14, 20–5H–15, 20–5H–16, 20–5H–17, 20–5H–18, 20–5H–19, 20–5H–20, 20–5H–21, 20–5H–22, 20–5H–23, 20–5I–1, 20–5I–2, 20–5I–3, 20–5I–4, 20–5I–5, 20–5I–6, 20–5I–7, 20–5I–8, 20–5M–1, 20–5M–2, 20–5M–3, 20–5M–4, 20–5M–5, 20–5M–6, 20–5M–7, 20–5M–8, 20–5M–9, 20–5M–10, 20–5M–11, 20–5M–12, 20–5M–13, 20–5M–14, 20–5M–15, 20–5M–16, 20–5N–1, 20–5N–2, 20–5N–3, 20–5N–4, 20–5N–4a, 20–5N–4b, 20–5N–4c, 20–5N–4d, 20–5N–4e, 20–5N–5, 20–5N–6, 20–5N–7, 20–5N–8, 20–5N–9, 20–5N–10, 20–5N–11, 20–5N–12, 20–5N–13, 20–6A–1, 20–6A–2, 20–9–1, 20–9–2, 20–9–3, 20–9–4, 20–9–5, 20–9–5a, 20–9–6, 20–9–7, 20–9–8, 20–9–9, 20–9–10, 20–9–10a, 20–9–10b, 20–9–10c, 20–9–10d, 20–9–10e, 20–9–10f, 20–9–10g, 20–9–10h, 20–9–10i, 20–9–10j, 20–9–11, 20–9–12, 20–9–12a, 20–9–12b, 20–9–12c, 20–9–12d, 20–9–12e, 20–9–12f, 20–9–13, 20–10–1, 20–10–2, 20–10–3, 20–10–4, 20–10–5, 20–10–6, 20–10–7, 20–10–8, 20–10A–1, 20–10A–2, 20–10A–3, 22A–1A–1, 22A–1A–2, 22A–1A–3, 22A–1A–4, 22A–1A–5, 22A–1A–6, 22A–1A–7, 22A–1A–8, 22A–1A–9, 22A–1A–10, 22A–1A–11, 22A–1A–11a, 22A–1A–12, 22A–1A–13, 22A–1A–14, 22A–1A–15, 22A–1A–16, 22A–1A–17, 22A–1A–18, 22A–1A–19, 22A–1A–20, 22A–1A–21, 22A–1A–22, 22A–1A–23, 22A–1A–24, 22A–1A–25, 22A–1A–26, 22A–1A–27, 22A–1A–28, 22A–1A–29, 22A–1A–30, 22A–1A–31, 22A–1A–32, 22A–1A–33, 22A–1A–34, 22A–1A–35, 29–1C–1, 29–1C–2, 29–1C–3, 29–1C–4, 29–1C–5, 29–1D–1, 29–1D–2, 29–1D–3, 29–1D–4, 29–1D–5, 29–1D–6 >>

That articles twenty and twenty-six, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that articles five, five-a, five-b, five-c, five-d, five-e, five-f, five-g, five-h, five-i, five-m, five-n, six-a, nine, ten and ten-a, chapter twenty be repealed; that article one-a, chapter twenty-two-a be repealed; that articles one-c and one-d, chapter twenty-nine be repealed; that section one, article three, chapter five be amended and reenacted; that section eight, article seven, chapter six be amended and reenacted; that sections three-aa and three-ff, article one, and section twenty-two, article five, chapter seven be amended and reenacted; that section seventeen, article twenty, and section twenty-seven, article twenty-four, chapter eight be amended and reenacted; that section-ten, article one-c, sections one and two, article six-a and section six, article thirteen-a, chapter eleven be amended and reenacted; that section four, article five-a, chapter fifteen be amended and reenacted; that sections nine and fourteen-a, article one, sections two and three, article nine, section six, article twelve, section twenty-three-a, article thirteen, sections one-b, three, nine and twenty-one, article thirteen-a, section ten, article thirteen-b, and section two, article twenty-seven, chapter sixteen be amended and reenacted; that sections three, five and seven, article one-b, section five, article twelve-a, section four, article twenty-one-a, and section five, article twenty-five, chapter nineteen be amended and reenacted; that sections two, seven and fourteen, article one, sections six and ten, article five-j, sections four and twenty-six, article seven, chapter twenty be amended and reenacted; that said article seven be further amended by adding thereto two new sections, designated sections twenty-eight and twenty-nine; that section one, article eight and sections four, five-a, five-b, nine and twelve, article eleven of said chapter twenty be amended and reenacted; that section three, article three-b, chapter twenty-one be amended and reenacted; that chapter twenty-two be amended and reenacted; that article one, chapter twenty-two-a be amended and reenacted; that sections one, two, three, seven, twelve, twenty-three, twenty-five, thirty-three, thirty-six, fifty-three-c, fifty-four, sixty-six, sixty-eight, seventy, seventy-two, seventy-three, seventy-four, seventy-five, seventy-six, seventy-seven and seventy-eight, article two of said chapter twenty-two-a be amended and reenacted; that articles three, four, five, six and seven of said chapter twenty-two-a be amended and reenacted; that said chapter twenty-two-a be further amended by adding thereto three new articles, designated articles eight, nine and ten; that chapter twenty-two-b be amended and reenacted; that said code be amended by adding thereto a new chapter, designated chapter twenty-two-c; that section two, article four, chapter twenty-three be amended and reenacted; that sections one-b, one-c, one-f, one-h, one-i and four-b, article two, chapter

disposition of gifts or grants.

<< WV ST § 22–16–18 >>

§ 22–16–18. Management and control of project.

(a) The director shall manage and control all projects, and may make and enter into all contracts or agreements necessary and incidental to the performance of the duties imposed under this article.
(b) On or before the thirty-first day of December, one thousand nine hundred ninety-two, the director, in consultation with the public service commission, shall complete a statewide closure plan, a comprehensive analysis of the total costs of closure anticipated under such statewide closure plan, and a proposal for implementation of closure assistance funding. The director, in consultation with the public service commission, shall prepare and issue a report which shall include the following:
(1) An identification of specific landfills expected to be closed during the three-year period next following the completion of the plan;
(2) An estimate of the projected closure costs associated with each such identified landfill, including such engineering and technical analysis as may be necessary to provide a reasonable estimate;
(3) The extent to which closure assistance will be needed for each such specific landfill; and
(4) An assessment of the order of priority which should be established for closure of landfills and all moneys potentially available therefor.
The plan and report required pursuant to the provisions of this section shall be submitted to the Legislature for its approval or rejection by a concurrent resolution.

ARTICLE 7. UNDERGROUND STORAGE TANK ACT.

<< WV ST § 22–17–1 >>

§ 22–17–1. Short title.

This article may be known and cited as the "Underground Storage Tank Act."

<< WV ST § 22–17–2 >>

§ 22–17–2. Declaration of policy and purpose.

The Legislature recognizes that large quantities of petroleum and hazardous substances are stored in underground storage tanks within the state of West Virginia and that emergency situations involving these substances can and will arise which may present a hazard to human health, safety or the environment. The Legislature also recognizes that some of these substances have been stored in underground storage tanks in the state in a manner insufficient to protect human health, safety or the environment. The Legislature further recognizes that the federal government has enacted Subtitle I of the federal Resource Conservation and Recovery Act of 1976, as amended, which provides for a federal program to remove the threat and remedy the effects of releases from leaking underground storage tanks and authorizes federal assistance to respond to releases of petroleum from underground storage tanks. The Legislature declares that the state of West Virginia desires to produce revenue for matching the federal assistance provided under the federal act; to create a program to control the installation, operation and abandonment of underground storage tanks and to provide for corrective action to remedy releases of regulated substances from these tanks. Therefore, the Legislature hereby enacts the West Virginia underground storage tank act to create an underground storage tank program and to assume regulatory primacy for such federal programs in this state.

<< WV ST § 22–17–3 >>

§ 22–17–3. Definitions.

(a) "Change in status" means causing an underground storage tank to be no longer in use or a change in the reported uses, contents or ownership of an underground storage tank.

(b) "Director" means the director of the West Virginia division of environmental protection or or such other person to whom the director has delegated authority or duties pursuant to sections six or eight, article one of this chapter.
(c) "Nonoperational storage tank" means an underground storage tank in which regulated substances will not be deposited or from which regulated substances will not be dispensed after the eighth day of November, one thousand nine hundred eighty-four.
(d) "Operator" means any person in control of, or having responsibility for, the daily operation of an underground storage tank.
(e) "Owner" means:
(1) In the case of an underground storage tank in use on the eighth day of November, one thousand nine hundred eighty-four, or brought into use after that date, a person who owns an underground storage tank used for the storage, use or dispensing of a regulated substance.
(2) In the case of an underground storage tank in use before the eighth day of November, one thousand nine hundred eighty-four, but no longer in use on that date, a person who owned such a tank immediately before the discontinuation of its use.
(f) "Person" means any individual, trust, firm, joint stock company, corporation (including government corporations), partnership, association, state, municipality, commission, political subdivision of a state, interstate body, consortium, joint venture, commercial entity and the United States government.
(g) "Petroleum" means petroleum, including crude oil or any fraction thereof which is liquid at a temperature of sixty degrees Fahrenheit and a pressure of fourteen and seven-tenths pounds per square inch absolute.
(h) "Regulated substance" means:
(1) Any substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, but not including any substance regulated as a hazardous waste under Subtitle C of the federal Resource Conservation and Recovery Act of 1976, as amended; or
(2) Petroleum.
(i) "Release" means any spilling, leaking, emitting, discharging, escaping, leaching or disposing from an underground storage tank into groundwater, surface water or subsurface soils.
(j) "Subtitle I" means Subtitle I of the federal Resource Conservation and Recovery Act of 1976, as amended.
(k) "Underground storage tank" means one tank or a combination of tanks, and the underground pipes connected thereto, which is used to contain an accumulation of regulated substances and the volume of which, including the volume of the underground pipes connected thereto, is ten percent or more beneath the surface of the ground, but does not include:
(1) Farm or residential tanks with a capacity of eleven hundred gallons or less and used for storing motor fuel for noncommercial purposes;
(2) Tanks used for storing heating oil for consumptive use on the premises where stored;
(3) Septic tanks;
(4) A pipeline facility, including gathering lines, regulated under the Natural Gas Pipeline Safety Act of 1968, or the Hazardous Liquid Pipeline Safety Act of 1968, or an intrastate pipeline facility regulated under state laws comparable to the provisions of either of those acts;
(5) Surface impoundments, pits, ponds or lagoons;
(6) Storm water or waste water collection systems;
(7) Flow-through process tanks;
(8) Liquid traps or associated gathering lines directly related to oil or gas production and gathering operations; or
(9) Storage tanks situated in an underground area such as a basement, cellar, mineworking, drift, shaft or tunnel, if the storage tank is situated upon or above the surface of the floor.
The term "underground storage tank" does not include any pipes connected to any tank which is described in subparagraphs (1) through (9).

<< WV ST § 22–17–4 >>

§ 22–17–4. Designation of division of environmental protection as the state underground storage tank program lead agency.

The division of environmental protection is hereby designated as the state underground storage tank program lead agency for purposes of Subtitle I and is hereby authorized to take all actions necessary or appropriate to secure to this state the benefits of said legislation. In carrying out the purposes of this article, the director is hereby authorized to cooperate with the United States environmental protection agency, other agencies of the federal government, agencies of this state or other states, and

other interested persons in all matters relating to underground storage tank regulation.

<< WV ST § 22–17–5 >>

§ 22–17–5. Powers and duties of director; integration with other acts.

(a) In addition to all other powers and duties prescribed in this article or otherwise by law, and unless otherwise specifically set forth in this article, the director shall perform any and all acts necessary to carry out the purposes and requirements of Subtitle I.
(b) The director shall cooperate with and may receive and expend money from the federal government or other source.
(c) The director may enter into any agreements, including reimbursement for services rendered, contracts and cooperative arrangements under such terms and conditions as he or she deems appropriate, with other state agencies, educational institutions or other organizations and individuals as necessary to implement the provisions of this article.

<< WV ST § 22–17–6 >>

§ 22–17–6. Promulgation of rules and standards by director.

(a) The director has overall responsibility for the promulgation of rules under this article. In promulgating and revising such rules the director shall comply with the provisions of chapter twenty-nine-a of this code. Such rules shall be no more stringent than the rules and regulations promulgated by the United States environmental protection agency pursuant to Subtitle I.
(b) The director shall promulgate rules applicable to owners or operators of underground storage tanks or other affected persons, as appropriate, as follows:
(1) A requirement for a yearly registration fee for underground storage tanks;
(2) A requirement that an owner or operator register with the director each underground storage tank after the effective date of the rules and that an owner or operator report annually on changes in status of any underground storage tank;
(3) Such release detection, prevention and correction rules applicable to underground storage tanks as may be necessary to protect human health and the environment;
(4) Requirements for maintaining a leak detection system, inventory control systems together with tank testing, or a comparable system or method designed to identify releases from underground storage tanks in a manner consistent with the protection of human health and the environment;
(5) Requirements for maintaining records of any monitoring or leak detection system or inventory control system or tank testing system;
(6) Rules for procedures and amount of fees to be assessed for the underground storage tank administrative fund, the leaking underground storage tank response fund and the underground storage tank insurance fund established pursuant to this article, which shall include a capitalization fee to be assessed against all owners or operators of underground tanks to be used for initial establishment of the underground storage tank insurance fund;
(7) Procedures for making expenditures from the underground storage tank administrative fund, the leaking underground storage tank response fund and the underground storage tank insurance fund;
(8) Acceptable methods by which an owner or operator may demonstrate financial responsibility;
(9) Requirements for reporting of releases and corrective action taken in response to a release;
(10) Requirements for taking corrective action in response to a release from an underground storage tank;
(11) Requirements for the closure of tanks to prevent future releases of regulated substances to the environment;
(12) Requirements for certification of installation, removal, retrofit, testing and inspection of underground storage tanks and leak detection systems by a registered professional engineer or other qualified person;
(13) Requirements for public participation in the enforcement of the state underground storage tank program;
(14) Procedures establishing when and how the director determines if information obtained by any agency under this article is confidential;
(15) Standards of performance for new underground storage tanks; or
(16) Any other rules or standards necessary and appropriate for the effective implementation and administration of this article.

<< WV ST § 22–17–7 >>

§ 22–17–7. Underground storage tank advisory committee; purpose.

The underground storage tank advisory committee is continued. The committee is composed of seven members, which shall include a member of the West Virginia petroleum council, a member of the West Virginia service station dealers association, a member of the West Virginia petroleum marketers association, the director, a member of the West Virginia manufacturers association, the West Virginia insurance commissioner, and a representative from the citizenry-at-large who is appointed by the governor.

The committee is advisory to the director and the division of environmental protection regarding the expenditure of funds from the leaking underground storage tank response fund and the underground storage tank insurance fund created by this article. The director shall deliver to the committee annually a report on expenditures made from each fund. The committee shall consider any matter brought before it by the director or any member of the committee and may consider any matter referred to it by a person not a member of the committee. At the conclusion of its consideration of any proposal, the committee shall make its recommendation to the director. The director is not bound by any recommendations of the committee. The committee may also formulate general or long-range plans for improvements in the administration of the funds for the consideration of the director.

By the second Wednesday of January of each year the committee shall prepare and deliver to the director and to the Legislature a report of all matters it considered, recommendations it made and plans it formulated during the preceding calendar year. The report shall include any recommendation it may have for changes in the law which would be necessary to implement any of its administrative recommendations.

<< WV ST § 22–17–8 >>

§ 22–17–8. Notification requirements.

(a) Underground storage tank owners shall notify the director of any underground storage tank brought into use on or after the tenth day of June, one thousand nine hundred eighty-eight within thirty days of such use, on a form prescribed by the director. The notice shall specify the date of tank installation, tank location, type of construction, size and age of such tank and the type of regulated substance to be stored therein. If, at the time this information is required to be submitted, the director has not prepared the form required by this section, the owner shall nevertheless submit the information in writing to the director.

(b) A person who sells a tank intended to be used as an underground storage tank shall reasonably notify the owner or operator of such tank of the owner's notification requirements of this section.

(c) A new owner of any underground storage tank shall notify the director in writing of the transfer of ownership of any underground storage tank. The new owner upon the effective date of such transfer becomes subject to all provisions of this article. The director may prescribe by rule the appropriate form and timing for such notification.

<< WV ST § 22–17–9 >>

§ 22–17–9. Registration requirements; undertaking activities without registration.

(a) No person may operate any underground storage tank for the purpose of storing any regulated substance identified or listed under this article without registering with the director and paying a registration fee for such underground storage tank.

(b) No person may install any underground storage tank after the effective date of this article without first registering said tank in a form and manner prescribed by the director.

<< WV ST § 22–17–10 >>

§ 22–17–10. Financial responsibility.

The director shall promulgate rules, as provided in section six of this article, containing requirements for maintaining evidence of financial responsibility as deemed necessary and desirable for taking reasonable corrective action and for compensating third parties for bodily injury and property damage caused by sudden and nonsudden accidental releases arising from operating an underground storage tank. Such means of financial responsibility may include, but not be limited to, insurance, guarantee, surety bond, letter of credit, proof of assets or qualification as a self-insurer. In promulgating rules

under this section, the director is authorized to specify policy or other contractual terms, conditions or defenses which are necessary or are unacceptable in establishing such evidence of financial responsibility in order to effectuate the purposes of this article.

<< WV ST § 22–17–11 >>

§ 22–17–11. Performance standards for new underground storage tanks.

(a) The director shall promulgate performance standards for new underground storage tanks as provided in section six of this article. The performance standards for new underground storage tanks shall include, but not be limited to, design, construction, installation, release detection and compatibility standards.
(b) New underground storage tank construction standards must include at least the following requirements:
(1) That an underground storage tank will prevent releases of regulated substances stored therein, which may occur as a result of corrosion or structural failure, for the operational life of the tank;
(2) That an underground storage tank will be cathodically protected against corrosion, constructed of noncorrosive material, steel clad with a noncorrosive material or designed in a manner to prevent the release or threatened release of stored regulated substances; and
(3) That materials used in the construction or lining of an underground storage tank are compatible with the regulated substances to be stored therein.

<< WV ST § 22–17–12 >>

§ 22–17–12. Confidentiality.

(a) Any records, reports or information obtained from any persons under this article shall be available to the public, except that upon a showing satisfactory to the director by any person that records, reports or information, or a particular part thereof, to which the director or any officer, employee, or representative thereof has access under this section, if made public, would divulge information entitled to protection under section 1905 of title 18 of the United States Code, such information or particular portion thereof is confidential in accordance with the purposes of this section, except that such record, report, document or information may be disclosed to other officers, employees, or authorized representatives of this state implementing the provisions of this article.
(b) Any person who knowingly and willfully divulges or discloses any information entitled to protection under this section is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five thousand dollars, or imprisoned in the county jail for not more than one year, or both fined and imprisoned.
(c) In submitting data under this article, a person required to provide such data may designate the date which he or she believes is entitled to protection under this section and submit such designated data separately from other data submitted under this article. A designation under this subsection shall be made in writing and in such manner as the director may prescribe.

<< WV ST § 22–17–13 >>

§ 22–17–13. Inspections, monitoring and testing.

(a) For the purposes of developing or assisting in the development of any rule, conducting any study, taking any corrective action or enforcing the provisions of this article, any owner or operator of an underground storage tank shall, upon request of the director, furnish information relating to such tanks, their associated equipment and contents, conduct reasonable monitoring or testing, permit the director or his or her authorized representative at all reasonable times to have access to, and to copy all records relating to such tanks and permit the director or his or her authorized representative to have access to the underground storage tank for corrective action.
(b) For the purposes of developing or assisting in the development of any rule, conducting any study, taking corrective action or enforcing the provisions of this article, the director or his or her authorized representative may:
(1) Enter at reasonable times any establishment or other place where an underground storage tank is located;
(2) Inspect and obtain samples from any person of any regulated substances contained in such tank;
(3) Conduct monitoring or testing of the tanks, associated equipment, contents or surrounding soils, air, surface, water or

groundwater; and
(4) Take corrective action as specified in this article.
Each such inspection shall be commenced and completed with reasonable promptness.

<< WV ST § 22–17–14 >>

§ 22–17–14. Corrective action for underground petroleum storage tanks.

(a) Prior to the effective date of rules promulgated pursuant to subdivision (9) or (10), subsection (b), section six of this article, the director is authorized to:
(1) Require the owner or operator of an underground storage tank to undertake corrective action with respect to any release of petroleum from said tank when the director determines that such corrective action shall be done properly and promptly by the owner or operator if, in the judgment of the director, such action is necessary to protect human health and the environment; or
(2) Undertake corrective action with respect to any release of petroleum into the environment from an underground storage tank if, in the judgment of the director, such action is necessary to protect human health and the environment.
The corrective action undertaken or required under this subsection shall be such as may be necessary to protect human health and the environment. The director shall use funds in the leaking underground storage tank response fund established pursuant to this article for payment of costs incurred for corrective action taken under subparagraph (2) of this subsection in the manner set forth in subsection (e), section twenty-one of this article. The director shall give priority in undertaking corrective actions under this subsection, and in issuing orders requiring owners or operators to undertake such actions, to releases of petroleum from underground storage tanks which pose the greatest threat to human health and the environment and where the director cannot identify a solvent owner or operator of the tank who will undertake action properly.
(b) Following the effective date of rules promulgated under subdivision (9) or (10), subsection (b), section six of this article, all actions or orders of the director described in subsection (a) of this section shall be in conformity with such rules. Following such effective date the director may undertake corrective action with respect to any release of petroleum into the environment from an underground storage tank only if, in the judgment of the director, such action is necessary to protect human health and environment and one or more of the following situations exists:
(1) If no person can be found within ninety days, or such shorter period as may be necessary to protect human health and the environment, who is an owner or operator of the tank concerned, subject to such corrective action rules and capable of carrying out such corrective action properly.
(2) A situation exists which requires prompt action by the director under this subsection to protect human health and the environment.
(3) Corrective action costs at a facility exceed the amount of coverage required pursuant to the provisions of section ten of this article and, considering the class or category of underground storage tank from which the release occurred, expenditures from the leaking underground storage tank response fund are necessary to assure an effective corrective action.
(4) The owner or operator of the tank has failed or refused to comply with an order of the director under this section or of the environmental quality board under article one, chapter twenty-two-b of this code to comply with the corrective action rules.
(c) The director is authorized to draw upon the leaking underground storage tank response fund in order to take action under subdivision (1) or (2), subsection (b) of this section if the director has made diligent good faith efforts to determine the identity of the party or parties responsible for the release or threatened release and:
(1) He or she is unable to determine the identity of the responsible party or parties in a manner consistent with the need to take timely corrective action; or
(2) The party or parties determined by the director to be responsible for the release or threatened release have been informed in writing of the director's determination and have been requested by the director to take appropriate corrective action but are unable or unwilling to take such action in a timely manner.
(d) The written notice to a responsible party must inform the responsible party that if that party is subsequently found liable for releases pursuant to subsection (a) or (b) of this section, he or she will be required to reimburse the leaking underground storage tank response fund for the costs of the investigation, information gathering and corrective action taken by the director.
(e) If the director determines that immediate response to an imminent threat to public health and welfare or the environment is necessary to avoid substantial injury or damage to persons, property or resources, corrective action may be taken pursuant to subsections (a) and (b) of this section without the prior written notice required by subdivision (2), subsection (c) of this section. In such a case the director must give subsequent written notice to the responsible party within fifteen days after the action is taken describing the circumstances which required the action to be taken without prior notice.
(f) As used in this section, the term "owner" does not include any person who, without participating in the management of an

underground storage tank and otherwise not engaged in petroleum production, refining or marketing, holds indicia of ownership primarily to protect the person's security interest in the tank.

<< WV ST § 22–17–15 >>

§ 22–17–15. Administrative orders; injunctive relief; requests for reconsideration.

(a) Whenever on the basis of any information, the director determines that any person is in violation of any requirement of this article, he or she may issue an order stating with reasonable specificity the nature of the violation and requiring compliance within a reasonable specified time period or the director may commence a civil action in the circuit court of the county in which the violation occurred or in the circuit court of Kanawha county for appropriate relief, including a temporary or permanent injunction. The director may, except as provided in subsection (b) of this section, stay any order he or she issues upon application, until the order is reviewed by the environmental quality board.
(b) Any person issued an order may file a notice of request for reconsideration with the director not more than seven days from the issuance of such order. The notice of request for reconsideration shall identify the order to be reconsidered and shall set forth in detail the reasons for which reconsideration is requested. The director shall grant or deny the request for reconsideration within twenty days of the filing of the notice of request of reconsideration.

<< WV ST § 22–17–16 >>

§ 22–17–16. Civil penalties.

(a) Any violator who fails to comply with an order of the director issued under subsection (a), section fifteen of this article within the time specified in the order is liable for a civil penalty of not more than twenty-five thousand dollars for each day of continued noncompliance.
(b) Any owner who knowingly fails to register or knowingly submits false information pursuant to this article is liable for a civil penalty not to exceed ten thousand dollars for each tank which is not registered or for which false information is submitted.
(c) Any owner or operator of an underground storage tank who fails to comply with any requirement or standard promulgated by the director under section six of this article is subject to a civil penalty not to exceed ten thousand dollars for each tank for each day of violation.

<< WV ST § 22–17–17 >>

§ 22–17–17. Public participation.

Any adversely affected person may intervene in any civil or administrative proceeding under this article when such person claims an interest relating to the property or transaction which is the subject of the action and such person is so situated that the disposition of the action may as a practical matter impair or impede his or her ability to protect that interest.

<< WV ST § 22–17–18 >>

§ 22–17–18. Appeal to environmental quality board.

Any person aggrieved or adversely affected by an order of the director made and entered in accordance with the provisions of this article may appeal to the environmental quality board, pursuant to the provisions of article one, chapter twenty-two-b of this code.

<< WV ST § 22–17–19 >>

§ 22–17–19. Disclosures required in deeds and leases.

(a) The grantor in any deed or other instrument of conveyance or any lessor in any lease or other instrument whereby any real

property is let for a period of time shall disclose in such deed, lease or other instrument the fact that such property, or the substrata of such property whether or not the grantor or lessor is at time of such conveyance or lease the owner of such substrata, contains an underground storage tank. The provisions of this subsection only apply to those grantors or lessors who owned or had an interest in the real property when the same or the substrata thereof contained an underground storage tank which was being actively used for storing any regulated substance or who have actual knowledge or reason to believe that such real property or the substrata thereof contains an underground storage tank.
(b) Any lessee of real estate or of any substratum underlying said real estate who intends to install an underground storage tank in the leased real estate or any substratum underlying the same shall disclose in writing at the time of such lease, or within thirty days prior to such installation, such fact to the lessor of such real estate or substratum. Such disclosure shall describe the proposed location upon said property where the tank is to be located and all other information required by the director.

<< WV ST § 22–17–20 >>

§ 22–17–20. Appropriation of funds; underground storage tank administrative fund.

(a) The director shall collect annual registration fees from owners of underground storage tanks. The registration fee collected under this section shall not exceed twenty-five dollars per tank per year. All such registration fees and the net proceeds of all fines, penalties and forfeitures collected under this article including accrued interest shall be paid into the state treasury into a special fund designated "the underground storage tank administrative fund" to be used to defray the cost of administering this article in accordance with rules promulgated pursuant to section six of this article.
(b) The total fee assessed shall be sufficient to assure a balance in the fund of not to exceed four hundred thousand dollars at the beginning of each year.
(c) Any amount received pursuant to subsection (a) of this section which exceeds the annual balance required in subsection (b) of this section shall be deposited into the leaking underground storage tank response fund established pursuant to this article to be used for the purposes set forth therein.
(d) The net proceeds of all fines, penalties and forfeitures collected under this article shall be appropriated as directed by article XII, section 5 of the constitution of West Virginia. For the purposes of this section, the net proceeds of such fines, penalties and forfeitures are the proceeds remaining after deducting therefrom those sums appropriated by the Legislature for defraying the cost of administering this article. In making the appropriation for defraying the cost of administering this article, the Legislature shall first take into account the sums included in such special fund prior to deducting such additional sums as may be needed from the fines, penalties and forfeitures collected pursuant to this article. At the end of each fiscal year any unexpended balance of such collected fines, penalties, forfeitures and registration fees shall not be transferred to the general revenue fund but shall remain in the fund.

<< WV ST § 22–17–21 >>

§ 22–17–21. Leaking underground storage tank response fund.

(a) Each underground petroleum storage tank owner within this state shall pay an annual fee, if assessed by the director, to establish a fund to assure adequate response to leaking underground petroleum storage tanks. The fees assessed pursuant to this section shall not exceed twenty-five dollars per tank per year. The proceeds of such assessment shall be paid into the state treasury into a special fund designated "the leaking underground storage tank response fund," which is hereby continued.
(b) Each owner of an underground petroleum storage tank subject to a fee assessment under subsection (a) of this section shall pay a fee based on the number of underground petroleum storage tanks he or she owns. The director shall vary the fees annually to a level necessary to produce a fund of at least seven hundred fifty thousand dollars at the beginning of each calendar year taking into account those amounts deposited in the fund pursuant to subsection (c), section twenty of this article. In no event shall the fees assessed in this section be set to produce revenues exceeding two hundred fifty thousand dollars in any year.
(c) When the unobligated balance of the leaking underground storage tank response fund exceeds one million dollars at the end of a calendar year, fee assessment under this section shall cease until such time as the unobligated balance at the end of any year is less than seven hundred fifty thousand dollars.
(d) At the end of each fiscal year, any unexpended balance including accrued interest of such collected fees shall not be transferred to the general revenue fund but shall remain in the fund.

(e) The director is authorized to enter into agreements and contracts and to expend the moneys in the fund for the following purposes:
(1) Responding to underground petroleum storage tank releases when, based on readily available information, the director determines that immediate action may prevent or mitigate significant risk of harm to human health, safety or the environment from regulated substances in situations for which no federal funds are immediately available for such response, cleanup or containment: Provided, That the director shall apply for and diligently pursue available federal funds for such releases at the earliest possible time.
(2) Reimbursing any person for reasonable cleanup costs incurred with the authorization of the director in responding to an underground petroleum storage tank release.
(3) Reimbursing any person for reasonable costs incurred with the authorization of the director responding to perceived, potential or threatened releases from underground petroleum storage tanks where response activities do not indicate that any release has occurred.
(4) Financing the nonfederal share of the cleanup and site reclamation activities pursuant to Subtitle I of the federal Resource Conservation and Recovery Act, as amended, as well as future operation and maintenance costs for these sites: Provided, That no portion of the moneys in the leaking underground storage tank response fund shall be used for defraying the costs of administering this article.
(5) Financing the nonfederal share of costs incurred in compensating third parties, including payment of judgments, for bodily injury and property damage, caused by release of petroleum into the environment from an underground storage tank.

<< WV ST § 22–17–22 >>

§ 22–17–22. Underground storage tank insurance fund.

(a) The director may establish an underground storage tank insurance fund for the purpose of satisfying the financial responsibility requirements established pursuant to section ten of this article. In addition to the capitalization fee to be assessed against all owners or operators of underground storage tanks provided by subdivision (6), subsection (b), section six of this article, the director shall promulgate rules establishing an annual financial responsibility assessment to be assessed on and paid by owners or operators of underground storage tanks who are unable to obtain insurance or otherwise meet the financial responsibility requirements established pursuant to section ten of this article. Such assessments shall be paid into the state treasury into a special fund designated "the underground storage tank insurance fund".
(b) At the end of each fiscal year, any unexpended balance of such assessment shall not be transferred to the general revenue fund but shall remain in the underground storage tank insurance fund.

<< WV ST § 22–17–23 >>

§ 22–17–23. Duplicative enforcement prohibited.

No enforcement proceeding brought pursuant to this article may be duplicated by an enforcement proceeding subsequently commenced under some other article of this code with respect to the same transaction or event unless such subsequent proceeding involves the violation of a permit or permitting requirement of such other article.

ARTICLE 18. HAZARDOUS WASTE MANAGEMENT ACT.

<< WV ST § 22–18–1 >>

§ 22–18–1. Short title.

This article may be known and cited as the "Hazardous Waste Management Act."

<< WV ST § 22–18–2 >>

§ 22–18–2. Declaration of policy.

(a) The Legislature finds that:

No person may fell any timber and permit the same to remain in any navigable or floatable stream of this state when to do so obstructs the passage of boats, rafts, staves, ties or timber of any kind.

Except as may be provided in chapter twenty or twenty-two of this code, no person may construct or maintain any dam or other structure in any stream or watercourse, which in any way prevents or obstructs the free and easy passage of fish up or down such stream or watercourse, without first providing as a part of such dam or other structure a suitable fish ladder, way or flume, so constructed as to allow fish easily to ascend or descend the same; which ladder, way or flume shall be constructed only upon plans, in a manner, and at a place, satisfactory to the division of natural resources: Provided, That if the director of the division of natural resources determines that there is no substantial fish life in such stream or watercourse, or that the installation of a fish ladder, way or flume would not facilitate the free and easy passage of fish up or down a stream or watercourse, or that an industrial development project requires the construction of such dam or other structure and the installation of an operational fish ladder, way or flume is impracticable, the director may, in writing, permit the construction or maintenance of a dam or other structure in a stream or watercourse without providing a suitable fish ladder, way or flume; and in all navigable and floatable streams provisions shall be made in such dam or structure for the passage of boats and other crafts, logs and other materials: Provided, however, That this section does not relieve such person from liability for damage to any riparian owner on account of the construction or maintenance of such dam.

Any person who violates any of the provisions of this section is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year, or both fined and imprisoned, and, whether a conviction is had under this section or not, such violation is a nuisance, which may be abated at the suit of any citizen or taxpayer, the county commission of the county, or, as to fish ladders, at the suit of the director of the division of natural resources, and, if the same endangers county roads, the county commission may abate such nuisance peaceably without such suit.

Approved March 30, 1994.

Passed March 12, 1994; in effect ninety days from passage.

WV LEGIS 61 (1994)

End of Document

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.

ATTACHMENT B

APPELLANTS' OBJECTION TO PROPOSED *FINAL ORDER* SUBMITTED BY APPELLEE

53 FR 37082-01, 1988 WL 253164(F.R.)
RULES and REGULATIONS
ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 280
[FRL-63385-3]

Underground Storage Tanks; Technical Requirements

Friday, September 23, 1988

*37082 AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) today finalizes regulations for underground storage tanks containing petroleum or substances defined as hazardous under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), except any substance regulated as a hazardous waste under Subtitle C of the Resource Conservation and Recovery Act (RCRA). These regulations were first proposed on April 17, 1987 (52 FR 12662) and a subsequent Supplemental Notice was published on December 23, 1987 (52 FR 48638).

Under Section 9003 of RCRA, EPA must establish requirements for leak detection, leak prevention, financial responsibility, and corrective action for all underground storage tanks containing regulated substances as necessary to protect human health and the environment. Today's final rule sets forth requirements satisfying the mandates of section 9003, except that final requirements concerning financial responsibility will be addressed later by EPA in another Federal Register notice.

EFFECTIVE DATE: December 22, 1988, except § 280.22(g) which is effective October 24, 1988.

ADDRESS: The docket for this rulemaking (Docket No. UST 2-1) is located at the U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The docket is open from 9:30 a.m. to 3:30 p.m., Monday through Friday, except for federal holidays. You may make an appointment to review docket materials by calling (202) 475-9720. You may copy a maximum of 50 pages of material from any one regulatory docket at no cost. Additional copies cost $0.20 per page.

FOR FURTHER INFORMATION CONTACT: Call the RCRA/Superfund Hotline at (800) 424-9346 (toll free) or 382-3000 (in Washington, DC).

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

planning. A corrective action that required cleaning up a dispersed plume would represent more than 13 percent of the general revenues of such a community, a sum that would probably cause severe financial distress.

In 1982, of the 38,886 local governments classified as counties, municipalities, and townships, 37,581 (approximately 97 percent) had populations of 50,000 or less. Almost all UST-owning local governments would, therefore, be subject to potentially substantial economic impacts under the technical standards rule if an UST release occurred.

C. Paperwork Reduction Act

The information collection requirements in this rule have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) and have been assigned OMB Control Number 2050-0068. Reporting and recordkeeping burden on the public for this collection is estimated at 8,265,220 hours for the 1,750,000 respondents, with an average of 4 hours per response. These burden estimates include all aspects of the collection effort and may include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

If you wish to submit comments regarding any aspect of this collection of information, including suggestions for reducing the burden, or if you would like a copy of the information collection request (please reference ICR 1360), contact Rick Westlund, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460 (202-382-2745); and Marcus Peacock, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

List of Subjects in 40 CFR Part 280

Administration practice and procedures, Confidential business information, Ground water, Hazardous materials, Reporting and recordkeeping requirements, Underground storage tanks, Water pollution control, Water supply.

September 8, 1988.

Lee Thomas,

Administrator.

For the reasons set out in the Preamble, Part 280 of Title 40 of the Code of Federal Regulations is revised to read as follows:

PART 280—TECHNICAL STANDARDS AND CORRECTIVE ACTION REQUIREMENTS FOR OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS (UST)

Subpart A—Program Scope and Interim Prohibition

Sec.280.10 Applicability.280.11 Interim prohibition for deferred UST systems.280.12 Definitions.

Subpart B—UST Systems: Design, Construction, Installation and Notification

280.20 Performance standards for new UST systems.280.21 Upgrading of existing UST systems.280.22 Notification requirements.

Subpart C—General Operating Requirements

280.30 Spill and overfill control.280.31 Operation and maintenance of corrosion protection.280.32 Compatibility.280.33 Repairs allowed.280.34 Reporting and recordkeeping.

Subpart D—Release Detection

280.40 General requirements for all UST systems.280.41 Requirements for petroleum UST systems.280.42 Requirements for hazardous substance UST systems.280.43 Methods of release detection for tanks.280.44 Methods of release detection for piping.280.45 Release detection recordkeeping.

Subpart E—Release Reporting, Investigation, and Confirmation

280.50 Reporting of suspected releases.280.51 Investigation due to off-site impacts.280.52 Release investigation and confirmation steps.280.53 Reporting and cleanup of spills and overfills.

Subpart F—Release Response and Corrective Action for UST Systems Containing P etroleum or Hazardous Substances
280.60 General.280.61 Initial response.280.62 Initial abatement measures and site check.280.63 Initial site characterization.280.64 Free product removal.280.65 Investigations for soil and ground-water cleanup.280.66 Corrective action plan.280.67 Public participation.

Subpart G—Out-of-Service UST Systems and Closure
280.70 Temporary closure.280.71 Permanent closure and changes-in-service.280.72 Assessing the site at closure or change-in-service.280.73 Applicability to previously closed UST systems.280.74 Closure records.Appendix I—Notification for Underground Storage Tanks (Form).Appendix II—List of Agencies Designated to Receive Notifications.Appendix III—Statement for Shipping Tickets and Invoices.
Authority: 42 U.S.C. 6912, 6991, 6991(a), 6991(b), 6991(c), 6991(d), 6991(e), 6991(f), 6991(h).

Subpart A—Program Scope and Interim Prohibition
40 CFR § 280.10

§ 280.10 Applicability.
(a) The requirements of this part apply to all owners and operators of an UST system as defined in § 280.12 except as otherwise provided in paragraphs (b), (c), and (d) of this section. Any UST system listed in paragraph (c) of this section must meet the requirements of § 280.11.

(b) The following UST systems are excluded from the requirements of this part:

(1) Any UST system holding hazardous wastes listed or identified under Subtitle C of the Solid Waste Disposal Act, or a mixture of such hazardous waste and other regulated substances.

(2) Any wastewater treatment tank system that is part of a wastewater *37195 treatment facility regulated under section 402 or 307(b) of the Clean Water Act.

(3) Equipment or machinery that contains regulated substances for operational purposes such as hydraulic lift tanks and electrical equipment tanks.

(4) Any UST system whose capacity is 110 gallons or less.

(5) Any UST system that contains a de minimis concentration of regulated substances.

(6) Any emergency spill or overflow containment UST system that is expeditiously emptied after use.

(c) Deferrals. Subparts B, C, D, E, and G do not apply to any of the following types of UST systems:

(1) Wastewater treatment tank systems;

(2) Any UST systems containing radioactive material that are regulated under the Atomic Energy Act of 1954 (42 U.S.C. 2011 and following);

(3) Any UST system that is part of an emergency generator system at nuclear power generation facilities regulated by the Nuclear Regulatory Commission under 10 CFR Part 50, Appendix A;

(4) Airport hydrant fuel distribution systems; and

(5) UST systems with field-constructed tanks.

(d) Deferrals. Subpart D does not apply to any UST system that stores fuel solely for use by emergency power generators.
40 CFR § 280.11

§ 280.11 Interim prohibition for deferred UST systems.
(a) No person may install an UST system listed in § 280.10(c) for the purpose of storing regulated substances unless the UST system (whether of single- or double-wall construction):

(1) Will prevent releases due to corrosion or structural failure for the operational life of the UST system;

(2) Is cathodically protected against corrosion, constructed of noncorrodible material, steel clad with a noncorrodible material, or designed in a manner to prevent the release or threatened release of any stored substance; and

(3) Is constructed or lined with material that is compatible with the stored substance.

(b) Notwithstanding paragraph (a) of this section, an UST system without corrosion protection may be installed at a site that is determined by a corrosion expert not to be corrosive enough to cause it to have a release due to corrosion during its operating life. Owners and operators must maintain records that demonstrate compliance with the requirements of this paragraph for the remaining life of the tank.

Note: The National Association of Corrosion Engineers Standard RP-02-85, "Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems," may be used as guidance for complying with paragraph (b) of this section.
40 CFR § 280.12

§ 280.12 Definitions.
"Aboveground release" means any release to the surface of the land or to surface water. This includes, but is not limited to, releases from the above-ground portion of an UST system and aboveground releases associated with overfills and transfer operations as the regulated substance moves to or from an UST system.

"Ancillary equipment" means any devices including, but not limited to, such devices as piping, fittings, flanges, valves, and pumps used to distribute, meter, or control the flow of regulated substances to and from an UST.

"Belowground release" means any release to the subsurface of the land and to ground water. This includes, but is not limited to, releases from the belowground portions of an underground storage tank system and belowground releases associated with overfills and transfer operations as the regulated substance moves to or from an underground storage tank.

"Beneath the surface of the ground" means beneath the ground surface or otherwise covered with earthen materials.

"Cathodic protection" is a technique to prevent corrosion of a metal surface by making that surface the cathode of an electrochemical cell. For example, a tank system can be cathodically protected through the application of either galvanic anodes or impressed current.

"Cathodic protection tester" means a person who can demonstrate an understanding of the principles and measurements of all common types of cathodic protection systems as applied to buried or submerged metal piping and tank systems. At a minimum, such persons must have education and experience in soil resistivity, stray current, structure-to-soil potential, and component electrical isolation measurements of buried metal piping and tank systems.

"CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

"Compatible" means the ability of two or more substances to maintain their respective physical and chemical properties upon contact with one another for the design life of the tank system under conditions likely to be encountered in the UST.

"Connected piping" means all underground piping including valves, elbows, joints, flanges, and flexible connectors attached to a tank system through which regulated substances flow. For the purpose of determining how much piping is connected to any individual UST system, the piping that joins two UST systems should be allocated equally between them.

"Consumptive use" with respect to heating oil means consumed on the premises.

"Corrosion expert" means a person who, by reason of thorough knowledge of the physical sciences and the principles of engineering and mathematics acquired by a professional education and related practical experience, is qualified to engage in the practice of corrosion control on buried or submerged metal piping systems and metal tanks. Such a person must be accredited or certified as being qualified by the National Association of Corrosion Engineers or be a registered professional engineer who has certification or licensing that includes education and experience in corrosion control of buried or submerged metal piping systems and metal tanks.

"Dielectric material" means a material that does not conduct direct electrical current. Dielectric coatings are used to electrically isolate UST systems from the surrounding soils. Dielectric bushings are used to electrically isolate portions of the UST system (e.g., tank from piping).

"Electrical equipment" means underground equipment that contains dielectric fluid that is necessary for the operation of equipment such as transformers and buried electrical cable.

"Excavation zone" means the volume containing the tank system and backfill material bounded by the ground surface, walls, and floor of the pit and trenches into which the UST system is placed at the time of installation.

"Existing tank system" means a tank system used to contain an accumulation of regulated substances or for which installation has commenced on or before December 22, 1988. Installation is considered to have commenced if:

(a) The owner or operator has obtained all federal, state, and local approvals or permits necessary to begin physical construction of the site or installation of the tank system; and if,

(b)(1) Either a continuous on-site physical construction or installation program has begun; or,

(2) The owner or operator has entered into contractual obligations—which cannot be cancelled or modified without substantial loss—for physical *37196 construction at the site or installation of the tank system to be completed within a reasonable time.

"Farm tank" is a tank located on a tract of land devoted to the production of crops or raising animals, including fish, and associated residences and improvements. A farm tank must be located on the farm property. "Farm" includes fish hatcheries, rangeland and nurseries with growing operations.

"Flow-through process tank" is a tank that forms an integral part of a production process through which there is a steady, variable, recurring, or intermittent flow of materials during the operation of the process. Flow-through process tanks do not include tanks used for the storage of materials prior to their introduction into the production process or for the storage of finished products or by-products from the production process.

"Free product" refers to a regulated substance that is present as a non-aqueous phase liquid (e.g., liquid not dissolved in water.)

"Gathering lines" means any pipeline, equipment, facility, or building used in the transportation of oil or gas during oil or gas production or gathering operations.

"Hazardous substance UST system" means an underground storage tank system that contains a hazardous substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (but not including any substance regulated as a hazardous waste under subtitle C) or any mixture of such substances and petroleum, and which is not a petroleum UST system.

"Heating oil" means petroleum that is No. 1, No. 2, No. 4—light, No. 4—heavy, No. 5—light, No. 5—heavy, and No. 6 technical grades of fuel oil; other residual fuel oils (including Navy Special Fuel Oil and Bunker C); and other fuels when used as substitutes for one of these fuel oils. Heating oil is typically used in the operation of heating equipment, boilers, or furnaces.

"Hydraulic lift tank" means a tank holding hydraulic fluid for a closed-loop mechanical system that uses compressed air or hydraulic fluid to operate lifts, elevators, and other similar devices.

"Implementing agency" means EPA, or, in the case of a state with a program approved under section 9004 (or pursuant to a memorandum of agreement with EPA), the designated state or local agency responsible for carrying out an approved UST program.

"Liquid trap" means sumps, well cellars, and other traps used in association with oil and gas production, gathering, and extraction operations (including gas production plants), for the purpose of collecting oil, water, and other liquids. These liquid traps may temporarily collect liquids for subsequent disposition or reinjection into a production or pipeline stream, or may collect and separate liquids from a gas stream.

"Maintenance" means the normal operational upkeep to prevent an underground storage tank system from releasing product.

"Motor fuel" means petroleum or a petroleum-based substance that is motor gasoline, aviation gasoline, No. 1 or No. 2 diesel fuel, or any grade of gasohol, and is typically used in the operation of a motor engine.

"New tank system" means a tank system that will be used to contain an accumulation of regulated substances and for which installation has commenced after December 22, 1988. (See also "Existing Tank System.")

"Noncommercial purposes" with respect to motor fuel means not for resale.

"On the premises where stored" with respect to heating oil means UST systems located on the same property where the stored heating oil is used.

"Operational life" refers to the period beginning when installation of the tank system has commenced until the time the tank system is properly closed under Subpart G.

"Operator" means any person in control of, or having responsibility for, the daily operation of the UST system.

"Overfill release" is a release that occurs when a tank is filled beyond its capacity, resulting in a discharge of the regulated substance to the environment.

"Owner" means:

(a) In the case of an UST system in use on November 8, 1984, or brought into use after that date, any person who owns an UST system used for storage, use, or dispensing of regulated substances; and

(b) In the case of any UST system in use before November 8, 1984, but no longer in use on that date, any person who owned such UST immediately before the discontinuation of its use.

"Person" means an individual, trust, firm, joint stock company, Federal agency, corporation, state, municipality, commission, political subdivision of a state, or any interstate body. "Person" also includes a consortium, a joint venture, a commercial entity, and the United States Government.

"Petroleum UST system" means an underground storage tank system that contains petroleum or a mixture of petroleum with de minimis quantities of other regulated substances. Such systems include those containing motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.

"Pipe" or "Piping" means a hollow cylinder or tubular conduit that is constructed of non-earthen materials.

"Pipeline facilities (including gathering lines)" are new and existing pipe rights-of-way and any associated equipment, facilities, or buildings.

"Regulated substance" means:

(a) Any substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 (but not including any substance regulated as a hazardous waste under subtitle C), and

(b) Petroleum, including crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute).

The term "regulated substance" includes but is not limited to petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons derived from crude oil though processes of separation, conversion, upgrading, and finishing, such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils.
"Release" means any spilling, leaking, emitting, discharging, escaping, leaching or disposing from an UST into ground water, surface water or subsurface soils.

"Release detection" means determining whether a release of a regulated substance has occurred from the UST system into the environment or into the interstitial space between the UST system and its secondary barrier or secondary containment around it.

"Repair" means to restore a tank or UST system component that has caused a release of product from the UST system.

"Residential tank" is a tank located on property used primarily for dwelling purposes.

"SARA" means the Superfund Amendments and Reauthorization Act of 1986.

"Septic tank" is a water-tight covered receptacle designed to receive or process, through liquid separation or biological digestion, the sewage discharged from a building sewer. The effluent from such receptacle is distributed for disposal through the soil and settled solids and scum from the tank are pumped out periodically and hauled to a treatment facility.

"Storm-water or wastewater collection system" means piping, pumps, conduits, and any other equipment ***37197** necessary to collect and transport the flow of surface water run-off resulting from precipitation, or domestic, commercial, or industrial wastewater to and from retention areas or any areas where treatment is designated to occur. The collection of storm water and wastewater does not include treatment except where incidental to conveyance.

"Surface impoundment" is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials) that is not an injection well.

"Tank" is a stationary device designed to contain an accumulation of regulated substances and constructed of non-earthen materials (e.g., concrete, steel, plastic) that provide structural support.

"Underground area" means an underground room, such as a basement, cellar, shaft or vault, providing enough space for physical inspection of the exterior of the tank situated on or above the surface of the floor.

"Underground release" means any belowground release.

"Underground storage tank" or "UST" means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10 percent or more beneath the surface of the ground. This term does not include any:

(a) Farm or residential tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes;

(b) Tank used for storing heating oil for consumptive use on the premises where stored;

(c) Septic tank;

(d) Pipeline facility (including gathering lines) regulated under:

(1) The Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. App. 1671, et seq.), or

(2) The Hazardous Liquid Pipeline Safety Act of 1979 (49 U.S.C. App. 2001, et seq.), or

(3) Which is an intrastate pipeline facility regulated under state laws comparable to the provisions of the law referred to in paragraph (d)(1) or (d)(2) of this definition;

(e) Surface impoundment, pit, pond, or lagoon;

(f) Storm-water or wastewater collection system;

(g) Flow-through process tank;

(h) Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations; or

(i) Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft, or tunnel) if the storage tank is situated upon or above the surface of the floor.

The term "underground storage tank" or "UST" does not include any pipes connected to any tank which is described in paragraphs (a) through (i) of this definition.
"Upgrade" means the addition or retrofit of some systems such as cathodic protection, lining, or spill and overfill controls to improve the ability of an underground storage tank system to prevent the release of product.

"UST system" or "Tank system" means an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.

"Wastewater treatment tank" means a tank that is designed to receive and treat an influent wastewater through physical, chemical, or biological methods.

Subpart B—UST Systems: Design, Construction, Installation and Notification
40 CFR § 280.20

§ 280.20 Performance standards for new UST systems.
In order to prevent releases due to structural failure, corrosion, or spills and overfills for as long as the UST system is used to store regulated substances, all owners and operators of new UST systems must meet the following requirements.

(a) Tanks. Each tank must be properly designed and constructed, and any portion underground that routinely contains product must be protected from corrosion, in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory as specified below:

(1) The tank is constructed of fiberglass-reinforced plastic; or

Note: The following industry codes may be used to comply with paragraph (a)(1) of this section: Underwriters Laboratories Standard 1316, "Standard for Glass-Fiber-Reinforced Plastic Underground Storage Tanks for Petroleum Products"; Underwriter's Laboratories of Canada CAN4-S615-M83, "Standard for Reinforced Plastic Underground Tanks for Petroleum Products"; or American Society of Testing and Materials Standard D4021-86, "Standard Specification for Glass-Fiber-Reinforced Polyester Underground Petroleum Storage Tanks."

(2) The tank is constructed of steel and cathodically protected in the following manner:

(i) The tank is coated with a suitable dielectric material;

(ii) Field-installed cathodic protection systems are designed by a corrosion expert;

(iii) Impressed current systems are designed to allow determination of current operating status as required in § 280.31(c); and

(iv) Cathodic protection systems are operated and maintained in accordance with § 280.31 or according to guidelines established by the implementing agency; or

Note: The following codes and standards may be used to comply with paragraph (a)(2) of this section:

(A) Steel Tank Institute "Specification for STI-P3 System of External Corrosion Protection of Underground Steel Storage Tanks";

(B) Underwriters Laboratories Standard 1746, "Corrosion Protection Systems for Underground Storage Tanks";

(C) Underwriters Laboratories of Canada CAN4-S603-M85, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids," and CAN4-G03.1-M85, "Standard for Galvanic Corrosion Protection Systems for Underground Tanks for Flammable and Combustible Liquids," and CAN4-S631-M84, "Isolating Bushings for Steel Underground Tanks Protected with Coatings and Galvanic Systems"; or

(D) National Association of Corrosion Engineers Standard RP-02-85, "Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems," and Underwriters Laboratories Standard 58, "Standard for Steel Underground Tanks for Flammable and Combustible Liquids."

(3) The tank is constructed of a steel-fiberglass-reinforced-plastic composite; or

Note: The following industry codes may be used to comply with paragraph (a)(3) of this section: Underwriters Laboratories Standard 1746, "Corrosion Protection Systems for Underground Storage Tanks," or the Association for Composite Tanks ACT-100, "Specification for the Fabrication of FRP Clad Underground Storage Tanks."

(4) The tank is constructed of metal without additional corrosion protection measures provided that:

(i) The tank is installed at a site that is determined by a corrosion expert not to be corrosive enough to cause it to have a release due to corrosion during its operating life; and

(ii) Owners and operators maintain records that demonstrate compliance with the requirements of paragraphs (a)(4)(i) for the remaining life of the tank; or

(5) The tank construction and corrosion protection are determined by the implementing agency to be designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than paragraphs (a) (1) through (4) of this section.

*37198 (b) Piping. The piping that routinely contains regulated substances and is in contact with the ground must be properly designed, constructed, and protected from corrosion in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory as specified below:

(1) The piping is constructed of fiberglass-reinforced plastic; or

Note: The following codes and standards may be used to comply with paragraph (b)(1) of this section:

(A) Underwriters Laboratories Subject 971, "UL Listed Non-Metal Pipe";

(B) Underwriters Laboratories Standard 567, "Pipe Connectors for Flammable and Combustible and LP Gas";

(C) Underwriters Laboratories of Canada Guide ULC-107, "Glass Fiber Reinforced Plastic Pipe and Fittings for Flammable Liquids"; and

(D) Underwriters Laboratories of Canada Standard CAN 4-S633-M81, "Flexible Underground Hose Connectors."

(2) The piping is constructed of steel and cathodically protected in the following manner:

(i) The piping is coated with a suitable dielectric material;

(ii) Field-installed cathodic protection systems are designed by a corrosion expert;

(iii) Impressed current systems are designed to allow determination of current operating status as required in § 280.31(c); and

(iv) Cathodic protection systems are operated and maintained in accordance with § 280.31 or guidelines established by the implementing agency; or

Note: The following codes and standards may be used to comply with paragraph (b)(2) of this section:

(A) National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code";

(B) American Petroleum Institute Publication 1615, "Installation of Underground Petroleum Storage Systems";

(C) American Petroleum Institute Publication 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems"; and

(D) National Association of Corrosion Engineers Standard RP-01-69, "Control of External Corrosion on Submerged Metallic Piping Systems."

(3) The piping is constructed of metal without additional corrosion protection measures provided that:

(i) The piping is installed at a site that is determined by a corrosion expert to not be corrosive enough to cause it to have a release due to corrosion during its operating life; and

(ii) Owners and operators maintain records that demonstrate compliance with the requirements of paragraph (b)(3)(i) of this section for the remaining life of the piping; or

Note: National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code"; and National Association of Corrosion Engineers Standard RP-01-69, "Control of External Corrosion on Submerged Metallic Piping Systems," may be used to comply with paragraph (b)(3) of this section.

(4) The piping construction and corrosion protection are determined by the implementing agency to be designed to prevent the release or threatened release of any stored regulated substance in a manner that is no less protective of human health and the environment than the requirements in paragraphs (b) (1) through (3) of this section.

(c) Spill and overfill prevention equipment. (1) Except as provided in paragraph (c)(2) of this section, to prevent spilling and overfilling associated with product transfer to the UST system, owners and operators must use the following spill and overfill prevention equipment:

(i) Spill prevention equipment that will prevent release of product to the environment when the transfer hose is detached from the fill pipe (for example, a spill catchment basin); and

(ii) Overfill prevention equipment that will:

(A) Automatically shut off flow into the tank when the tank is no more than 95 percent full; or

(B) Alert the transfer operator when the tank is no more than 90 percent full by restricting the flow into the tank or triggering a high-level alarm.

(2) Owners and operators are not required to use the spill and overfill prevention equipment specified in paragraph (c)(1) of this section if:

(i) Alternative equipment is used that is determined by the implementing agency to be no less protective of human health and the environment than the equipment specified in paragraph (c)(1) (i) or (ii) of this section; or

(ii) The UST system is filled by transfers of no more than 25 gallons at one time.

(d) Installation. All tanks and piping must be properly installed in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and in accordance with the manufacturer's instructions.

Note: Tank and piping system installation practices and procedures described in the following codes may be used to comply with the requirements of paragraph (d) of this section:

(i) American Petroleum Institute Publication 1615, "Installation of Underground Petroleum Storage System"; or

(ii) Petroleum Equipment Institute Publication RP100, "Recommended Practices for Installation of Underground Liquid Storage Systems"; or

(iii) American National Standards Institute Standard B31.3, "Petroleum Refinery Piping," and American National Standards Institute Standard B31.4 "Liquid Petroleum Transportation Piping System."

(e) Certification of installation. All owners and operators must ensure that one or more of the following methods of certification, testing, or inspection is used to demonstrate compliance with paragraph (d) of this section by providing a certification of compliance on the UST notification form in accordance with § 280.22.

(1) The installer has been certified by the tank and piping manufacturers; or

(2) The installer has been certified or licensed by the implementing agency; or

(3) The installation has been inspected and certified by a registered professional engineer with education and experience in UST system installation; or

(4) The installation has been inspected and approved by the implementing agency; or

(5) All work listed in the manufacturer's installation checklists has been completed; or

(6) The owner and operator have complied with another method for ensuring compliance with paragraph (d) of this section that is determined by the implementing agency to be no less protective of human health and the environment.
40 CFR § 280.21

§ 280.21 Upgrading of existing UST systems.
(a) Alternatives allowed. Not later than December 22, 1998, all existing UST systems must comply with one of the following requirements:

(1) New UST system performance standards under § 280.20;

(2) The upgrading requirements in paragraphs (b) through (d) of this section; or

(3) Closure requirements under Subpart G of this part, including applicable requirements for corrective action under Subpart F.

(b) Tank upgrading requirements. Steel tanks must be upgraded to meet one of the following requirements in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory:

(1) Interior lining. A tank may be upgraded by internal lining if:

(i) The lining is installed in accordance with the requirements of § 280.33, and

*37199 (ii) Within 10 years after lining, and every 5 years thereafter, the lined tank is internally inspected and found to be structurally sound with the lining still performing in accordance with original design specifications.

(2) Cathodic protection. A tank may be upgraded by cathodic protection if the cathodic protection system meets the requirements of § 280.20(a)(2)(ii), (iii), and (iv) and the integrity of the tank is ensured using one of the following methods:

(i) The tank is internally inspected and assessed to ensure that the tank is structurally sound and free of corrosion holes prior to installing the cathodic protection system; or

(ii) The tank has been installed for less than 10 years and is monitored monthly for releases in accordance with § 280.43 (d) through (h); or

(iii) The tank has been installed for less than 10 years and is assessed for corrosion holes by conducting two (2) tightness tests that meet the requirements of § 280.43(c). The first tightness test must be conducted prior to installing the cathodic protection system. The second tightness test must be conducted between three (3) and six (6) months following the first operation of the cathodic protection system; or

(iv) The tank is assessed for corrosion holes by a method that is determined by the implementing agency to prevent releases in a manner that is no less protective of human health and the environment than paragraphs (b)(2) (i) through (iii) of this section.

(3) Internal lining combined with cathodic protection. A tank may be upgraded by both internal lining and cathodic protection if:

(i) The lining is installed in accordance with the requirements of § 280.33; and

(ii) The cathodic protection system meets the requirements of § 280.20(a)(2)(ii), (iii), and (iv).

Note: The following codes and standards may be used to comply with this section:

(A) American Petroleum Institute Publication 1631, "Recommended Practice for the Interior Lining of Existing Steel Underground Storage Tanks";

(B) National Leak Prevention Association Standard 631, "Spill Prevention, Minimum 10 Year Life Extension of Existing Steel Underground Tanks by Lining Without the Addition of Cathodic Protection";

(C) National Association of Corrosion Engineers Standard RP-02-85, "Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems"; and

(D) American Petroleum Institute Publication 1632, "Cathodic Protection of Underground Petroleum Storage Tanks and Piping Systems."

(c) Piping upgrading requirements. Metal piping that routinely contains regulated substances and is in contact with the ground must be cathodically protected in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and must meet the requirements of § 280.20(b)(2)(ii), (iii), and (iv).

Note: The codes and standards listed in the note following § 280.20(b)(2) may be used to comply with this requirement.

(d) Spill and overfill prevention equipment. To prevent spilling and overfilling associated with product transfer to the UST system, all existing UST systems must comply with new UST system spill and overfill prevention equipment requirements specified in § 280.20(c).

40 CFR § 280.22

§ 280.22 Notification requirements.
(a) Any owner who brings an underground storage tank system into use after May 8, 1986, must within 30 days of bringing such tank into use, submit, in the form prescribed in Appendix I of this part, a notice of existence of such tank system to the state or local agency or department designated in Appendix II of this part to receive such notice.

Note: Owners and operators of UST systems that were in the ground on or after May 8, 1986, unless taken out of operation on or before January 1, 1974, were required to notify the designated state or local agency in accordance with the Hazardous and Solid Waste Amendments of 1984, Pub. L. 98-616, on a form published by EPA on November 8, 1985 (50 FR 46602) unless notice was given pursuant to section 103(c) of CERCLA. Owners and operators who have not complied with the notification requirements may use portions I through VI of the notification form contained in Appendix I of this part.

(b) In states where state law, regulations, or procedures require owners to use forms that differ from those set forth in Appendix I of this part to fulfill the requirements of this section, the state forms may be submitted in lieu of the forms set forth in Appendix I of this part. If a state requires that its form be used in lieu of the form presented in this regulation, such form must meet the requirements of section 9002.

(c) Owners required to submit notices under paragraph (a) of this section must provide notices to the appropriate agencies or departments identified in Appendix II of this part for each tank they own. Owners may provide notice for several tanks using one notification form, but owners who own tanks located at more than one place of operation must file a separate notification form for each separate place of operation.

(d) Notices required to be submitted under paragraph (a) of this section must provide all of the information in sections I through VI of the prescribed form (or appropriate state form) for each tank for which notice must be given. Notices for tanks installed after December 22, 1988 must also provide all of the information in section VII of the prescribed form (or appropriate state form) for each tank for which notice must be given.

(e) All owners and operators of new UST systems must certify in the notification form compliance with the following requirements:

(1) Installation of tanks and piping under § 280.20(e);

(2) Cathodic protection of steel tanks and piping under § 280.20 (a) and (b);

(3) Financial responsibility under Subpart H of this part; and

(4) Release detection under §§ 280.41 and 280.42.

(f) All owners and operators of new UST systems must ensure that the installer certifies in the notification form that the methods used to install the tanks and piping complies with the requirements in § 280.20(d).

(g) Beginning October 24, 1988, any person who sells a tank intended to be used as an underground storage tank must notify the purchaser of such tank of the owner's notification obligations under paragraph (a) of this section. The form provided in Appendix III of this part may be used to comply with this requirement.

Subpart C—General Operating Requirements
40 CFR § 280.30

§ 280.30 Spill and overfill control.
(a) Owners and operators must ensure that releases due to spilling or overfilling do not occur. The owner and operator must ensure that the volume available in the tank is greater than the volume of product to be transferred to the tank before the transfer is made and that the transfer operation is monitored constantly to prevent overfilling and spilling.

Note: The transfer procedures described in National Fire Protection Association Publication 385 may be used to comply with

paragraph (a) of this section. Further guidance on spill and overfill prevention appears in American Petroleum Institute Publication 1621, "Recommended Practice for Bulk Liquid Stock Control at Retail Outlets," and National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code."

(b) The owner and operator must report, investigate, and clean up any *37200 spills and overfills in accordance with § 280.53.
40 CFR § 280.31

§ 280.31 Operation and maintenance of corrosion protection.
All owners and operators of steel UST systems with corrosion protection must comply with the following requirements to ensure that releases due to corrosion are prevented for as long as the UST system is used to store regulated substances:

(a) All corrosion protection systems must be operated and maintained to continuously provide corrosion protection to the metal components of that portion of the tank and piping that routinely contain regulated substances and are in contact with the ground.

(b) All UST systems equipped with cathodic protection systems must be inspected for proper operation by a qualified cathodic protection tester in accordance with the following requirements:

(1) Frequency. All cathodic protection systems must be tested within 6 months of installation and at least every 3 years thereafter or according to another reasonable time frame established by the implementing agency; and

(2) Inspection criteria. The criteria that are used to determine that cathodic protection is adequate as required by this section must be in accordance with a code of practice developed by a nationally recognized association.

Note: National Association of Corrosion Engineers Standard RP-02-85, "Control of External Corrosion on Metallic Buried, Partially Buried, or Submerged Liquid Storage Systems," may be used to comply with paragraph (b)(2) of this section.

(c) UST systems with impressed current cathodic protection systems must also be inspected every 60 days to ensure the equipment is running properly.

(d) For UST systems using cathodic protection, records of the operation of the cathodic protection must be maintained (in accordance with § 280.34) to demonstrate compliance with the performance standards in this section. These records must provide the following:

(1) The results of the last three inspections required in paragraph (c) of this section; and

(2) The results of testing from the last two inspections required in paragraph (b) of this section.
40 CFR § 280.32

§ 280.32 Compatibility.
Owners and operators must use an UST system made of or lined with materials that are compatible with the substance stored in the UST system.

Note: Owners and operators storing alcohol blends may use the following codes to comply with the requirements of this section:

(a) American Petroleum Institute Publication 1626, "Storing and Handling Ethanol and Gasoline-Ethanol Blends at Distribution Terminals and Service Stations"; and

(b) American Petroleum Institute Publication 1627, "Storage and Handling of Gasoline-Methanol/Cosolvent Blends at Distribution Terminals and Service Stations."
40 CFR § 280.33

§ 280.33 Repairs allowed.
Owners and operators of UST systems must ensure that repairs will prevent releases due to structural failure or corrosion as

long as the UST system is used to store regulated substances. The repairs must meet the following requirements:

(a) Repairs to UST systems must be properly conducted in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory.

Note: The following codes and standards may be used to comply with paragraph (a) of this section: National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code"; American Petroleum Institute Publication 2200, "Repairing Crude Oil, Liquified Petroleum Gas, and Product Pipelines"; American Petroleum Institute Publication 1631, "Recommended Practice for the Interior Lining of Existing Steel Underground Storage Tanks"; and National Leak Prevention Association Standard 631, "Spill Prevention, Minimum 10 Year Life Extension of Existing Steel Underground Tanks by Lining Without the Addition of Cathodic Protection."

(b) Repairs to fiberglass-reinforced plastic tanks may be made by the manufacturer's authorized representatives or in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory.

(c) Metal pipe sections and fittings that have released product as a result of corrosion or other damage must be replaced. Fiberglass pipes and fittings may be repaired in accordance with the manufacturer's specifications.

(d) Repaired tanks and piping must be tightness tested in accordance with § 280.43(c) and § 280.44(b) within 30 days following the date of the completion of the repair except as provided in paragraphs (d) (1) through (3), of this section:

(1) The repaired tank is internally inspected in accordance with a code of practice developed by a nationally recognized association or an independent testing laboratory; or

(2) The repaired portion of the UST system is monitored monthly for releases in accordance with a method specified in § 280.43 (d) through (h); or

(3) Another test method is used that is determined by the implementing agency to be no less protective of human health and the environment than those listed above.

(e) Within 6 months following the repair of any cathodically protected UST system, the cathodic protection system must be tested in accordance with § 280.31 (b) and (c) to ensure that it is operating properly.

(f) UST system owners and operators must maintain records of each repair for the remaining operating life of the UST system that demonstrate compliance with the requirements of this section.
40 CFR § 280.34

§ 280.34 Reporting and recordkeeping.
Owners and operators of UST systems must cooperate fully with inspections, monitoring and testing conducted by the implementing agency, as well as requests for document submission, testing, and monitoring by the owner or operator pursuant to section 9005 of Subtitle I of the Resource Conservation and Recovery Act, as amended.

(a) Reporting. Owners and operators must submit the following information to the implementing agency:

(1) Notification for all UST systems (§ 280.22), which includes certification of installation for new UST systems (§ 280.20(c)),

(2) Reports of all releases including suspected releases (§ 280.50), spills and overfills (§ 280.53), and confirmed releases (§ 280.61);

(3) Corrective actions planned or taken including initial abatement measures (§ 280.62), initial site characterization (§ 280.63), free product removal (§ 280.64), investigation of soil and ground-water cleanup (§ 280.65), and corrective action plan (§ 280.66); and

(4) A notification before permanent closure or change-in-service (§ 280.71).

(b) Recordkeeping. Owners and operators must maintain the following information:

(1) A corrosion expert's analysis of site corrosion potential if corrosion protection equipment is not used (§ 280.20(a)(4); § 280.20(b)(3)).

(2) Documentation of operation of corrosion protection equipment (§ 280.31);

(3) Documentation of UST system repairs (§ 280.33(f));

(4) Recent compliance with release detection requirements (§ 280.45); and

(5) Results of the site investigation conducted at permanent closure (§ 280.74).

*37201 (c) Availability and Maintenance of Records. Owners and operators must keep the records required either:

(1) At the UST site and immediately available for inspection by the implementing agency; or

(2) At a readily available alternative site and be provided for inspection to the implementing agency upon request.

(3) In the case of permanent closure records required under § 280.74, owners and operators are also provided with the additional alternative of mailing closure records to the implementing agency if they cannot be kept at the site or an alternative site as indicated above.

Note: The recordkeeping and reporting requirements in this section have been approved by the Office of Management and Budget and have been assigned OMB Control No. 2050-0068.

Subpart D—Release Detection
40 CFR § 280.40

§ 280.40 General requirements for all UST systems.
(a) Owners and operators of new and existing UST systems must provide a method, or combination of methods, of release detection that:

(1) Can detect a release from any portion of the tank and the connected underground piping that routinely contains product;

(2) Is installed, calibrated, operated, and maintained in accordance with the manufacturer's instructions, including routine maintenance and service checks for operability or running condition; and

(3) Meets the performance requirements in § 280.43 or 280.44, with any performance claims and their manner of determination described in writing by the equipment manufacturer or installer. In addition, methods used after December 22, 1990 except for methods permanently installed prior to that date, must be capable of detecting the leak rate or quantity specified for that method in § 280.43 (b), (c), and (d) or 280.44 (a) and (b) with a probability of detection of 0.95 and a probability of false alarm of 0.05.

(b) When a release detection method operated in accordance with the performance standards in § 280.43 and § 280.44 indicates a release may have occurred, owners and operators must notify the implementing agency in accordance with Subpart E.

(c) Owners and operators of all UST systems must comply with the release detection requirements of this subpart by December 22 of the year listed in the following table:

```
Schedule for Phase-in of Release Detection
------------------------------------------------------------------------
Year system was Year when release detection is required (by December 22 of
installed the year indicated)
------------------------------------------------------------------------
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```
1989 1990 1991 1992 1993
------------------------------------------------------------------------
Before 1965 or
date unknown .. RD ..... P
1965-69 ..... ---------- P/RD
1970-74 ..... ---------- P ..... RD
1975-79 ..... ---------- P ..... ---------- RD
1980-88 ..... ---------- P ..... ---------- ---------- RD
New tanks (after December 22) immediately upon installation.
------------------------------------------------------------------------
P=Must begin release detection for all pressurized piping in accordance with §
280.41(b)(1) and § 280.42(b)(4).
RD=Must begin release detection for tanks and suction piping in accordance with
§ 280.41(a), § 280.41(b)(2), and § 280.42.
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(d) Any existing UST system that cannot apply a method of release detection that complies with the requirements of this subpart must complete the closure procedures in Subpart G by the date on which release detection is required for that UST system under paragraph (c) of this section.

40 CFR § 280.41

§ 280.41 Requirements for petroleum UST systems.

Owners and operators of petroleum UST systems must provide release detection for tanks and piping as follows:

(a) Tanks. Tanks must be monitored at least every 30 days for releases using one of the methods listed in § 280.43 (d) through (h) except that:

(1) UST systems that meet the performance standards in § 280.20 or § 280.21, and the monthly inventory control requirements in § 280.43 (a) or (b), may use tank tightness testing (conducted in accordance with § 280.43(c)) at least every 5 years until December 22, 1998, or until 10 years after the tank is installed or upgraded under § 280.21(b), whichever is later;

(2) UST systems that do not meet the performance standards in § 280.20 or § 280.21 may use monthly inventory controls (conducted in accordance with § 280.43(a) or (b)) and annual tank tightness testing (conducted in accordance with § 280.43(c)) until December 22, 1998 when the tank must be upgraded under § 280.21 or permanently closed under § 280.71; and

(3) Tanks with capacity of 550 gallons or less may use weekly tank gauging (conducted in accordance with § 280.43(b)).

(b) Piping. Underground piping that routinely contains regulated substances must be monitored for releases in a manner that meets one of the following requirements:

(1) Pressurized piping. Underground piping that conveys regulated substances under pressure must:

(i) Be equipped with an automatic line leak detector conducted in accordance with § 280.44(a); and

(ii) Have an annual line tightness test conducted in accordance with § 280.44(b) or have monthly monitoring conducted in accordance with § 280.44(c).

(2) Suction piping. Underground piping that conveys regulated substances under suction must either have a line tightness test conducted at least every 3 years and in accordance with § 280.44(b), or use a monthly monitoring method conduct in accordance with § 280.44(c). No release detection is required for suction piping that is designed and constructed to meet the following standards:

(i) The below-grade piping operates at less than atmospheric pressure;

(ii) The below-grade piping is sloped so that the contents of the pipe will drain back into the storage tank if the suction is released;

(iii) Only one check valve is included in each suction line;

(iv) The check valve is located directly below and as close as practical to the suction pump; and

(v) A method is provided that allows compliance with paragraphs (b)(2) (ii)-(iv) of this section to be readily determined.
40 CFR § 280.42

§ 280.42 Requirements for hazardous substance UST systems.
Owners and operators of hazardous substance UST systems must provide release detection that meets the following requirements:

(a) Release detection at existing UST systems must meet the requirements for petroleum UST systems in § 280.41. By December 22, 1998, all existing hazardous substance UST systems must meet the release detection requirements for new systems in paragraph (b) of this section.

(b) Release detection at new hazardous substance UST systems must meet the following requirements:

(1) Secondary containment systems must be designed, constructed and installed to:

(i) Contain regulated substances released from the tank system until they are detected and removed;

(ii) Prevent the release of regulated substances to the environment at any time during the operational life of the UST system; and

*37202 (iii) Be checked for evidence of a release at least every 30 days.

Note.—The provisions of 40 CFR 265.193, Containment and Detection of Releases, may be used to comply with these requirements.

(2) Double-walled tanks must be designed, constructed, and installed to:

(i) Contain a release from any portion of the inner tank within the outer wall; and

(ii) Detect the failure of the inner wall.

(3) External liners (including vaults) must be designed, constructed, and installed to:

(i) Contain 100 percent of the capacity of the largest tank within its boundary;

(ii) Prevent the interference of precipitation or ground-water intrusion with the ability to contain or detect a release of regulated substances; and

(iii) Surround the tank completely (i.e., it is capable of preventing lateral as well as vertical migration of regulated substances).

(4) Underground piping must be equipped with secondary containment that satisfies the requirements of paragraph (b)(1) of this section (e.g., trench liners, jacketing of double-walled pipe). In addition, underground piping that conveys regulated substances under pressure must be equipped with an automatic line leak detector in accordance with § 280.44(a).

(5) Other methods of release detection may be used if owners and operators:

(i) Demonstrate to the implementing agency that an alternate method can detect a release of the stored substance as effectively as any of the methods allowed in §§ 280.43(b) through (h) can detect a release of petroleum;

(ii) Provide information to the implementing agency on effective corrective action technologies, health risks, and chemical and physical properties of the stored substance, and the characteristics of the UST site; and,

(iii) Obtain approval from the implementing agency to use the alternate release detection method before the installation and operation of the new UST system.

40 CFR § 280.43

§ 280.43 Methods of release detection for tanks.
Each method of release detection for tanks used to meet the requirements of § 280.41 must be conducted in accordance with the following:

(a) Inventory control. Product inventory control (or another test of equivalent performance) must be conducted monthly to detect a release of at least 1.0 percent of flow-through plus 130 gallons on a monthly basis in the following manner:

(1) Inventory volume measurements for regulated substance inputs, withdrawals, and the amount still remaining in the tank are recorded each operating day;

(2) The equipment used is capable of measuring the level of product over the full range of the tank's height to the nearest one-eighth of an inch;

(3) The regulated substance inputs are reconciled with delivery receipts by measurement of the tank inventory volume before and after delivery;

(4) Deliveries are made through a drop tube that extends to within one foot of the tank bottom;

(5) Product dispensing is metered and recorded within the local standards for meter calibration or an accuracy of 6 cubic inches for every 5 gallons of product withdrawn; and

(6) The measurement of any water level in the bottom of the tank is made to the nearest one-eighth of an inch at least once a month.

Note: Practices described in the American Petroleum Institute Publication 1621, "Recommended Practice for Bulk Liquid Stock Control at Retail Outlets," may be used, where applicable, as guidance in meeting the requirements of this paragraph.

(b) Manual tank gauging. Manual tank gauging must meet the following requirements:

(1) Tank liquid level measurements are taken at the beginning and ending of a period of at least 36 hours during which no liquid is added to or removed from the tank;

(2) Level measurements are based on an average of two consecutive stick readings at both the beginning and ending of the period;

(3) The equipment used is capable of measuring the level of product over the full range of the tank's height to the nearest one-eighth of an inch;

(4) A leak is suspected and subject to the requirements of Subpart E if the variation between beginning and ending measurements exceeds the weekly or monthly standards in the following table:

Nominal tank capacity	Weekly standard (one test)	Monthly standard (average of four tests)
550 gallons or less	10 gallons	5 gallons.
551-1,000 gallons	13 gallons	7 gallons.
1,001-2,000 gallons	26 gallons	13 gallons.

(5) Only tanks of 550 gallons or less nominal capacity may use this as the sole method of release detection. Tanks of 551 to 2,000 gallons may use the method in place of manual inventory control in § 280.43(a). Tanks of greater than 2,000 gallons nominal capacity may not use this method to meet the requirements of this subpart.

(c) Tank tightness testing. Tank tightness testing (or another test of equivalent performance) must be capable of detecting a 0.1 gallon per hour leak rate from any portion of the tank that routinely contains product while accounting for the effects of

thermal expansion or contraction of the product, vapor pockets, tank deformation, evaporation or condensation, and the location of the water table.

(d) Automatic tank gauging. Equipment for automatic tank gauging that tests for the loss of product and conducts inventory control must meet the following requirements:

(1) The automatic product level monitor test can detect a 0.2 gallon per hour leak rate from any portion of the tank that routinely contains product; and

(2) Inventory control (or another test of equivalent performance) is conducted in accordance with the requirements of § 280.43(a).

(e) Vapor monitoring. Testing or monitoring for vapors within the soil gas of the excavation zone must meet the following requirements:

(1) The materials used as backfill are sufficiently porous (e.g., gravel, sand, crushed rock) to readily allow diffusion of vapors from releases into the excavation area;

(2) The stored regulated substance, or a tracer compound placed in the tank system, is sufficiently volatile (e.g., gasoline) to result in a vapor level that is detectable by the monitoring devices located in the excavation zone in the event of a release from the tank;

(3) The measurement of vapors by the monitoring device is not rendered inoperative by the ground water, rainfall, or soil moisture or other known interferences so that a release could go undetected for more than 30 days;

(4) The level of background contamination in the excavation zone will not interfere with the method used to detect releases from the tank;

(5) The vapor monitors are designed and operated to detect any significant increase in concentration above background of the regulated substance stored in the tank system, a component or components of that substance, or a tracer compound placed in the tank system;

(6) In the UST excavation zone, the site is assessed to ensure compliance with the requirements in paragraphs (e) (1) through (4) of this section and to *37203 establish the number and positioning of monitoring wells that will detect releases within the excavation zone from any portion of the tank that routinely contains product; and

(7) Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.

(f) Ground-water monitoring. Testing or monitoring for liquids on the ground water must meet the following requirements:

(1) The regulated substance stored is immiscible in water and has a specific gravity of less than one;

(2) Ground water is never more than 20 feet from the ground surface and the hydraulic conductivity of the soil(s) between the UST system and the monitoring wells or devices is not less than 0.01 cm/sec (e.g., the soil should consist of gravels, coarse to medium sands, coarse silts or other permeable materials);

(3) The slotted portion of the monitoring well casing must be designed to prevent migration of natural soils or filter pack into the well and to allow entry of regulated substance on the water table into the well under both high and low ground-water conditions;

(4) Monitoring wells shall be sealed from the ground surface to the top of the filter pack;

(5) Monitoring wells or devices intercept the excavation zone or are as close to it as is technically feasible;

(6) The continuous monitoring devices or manual methods used can detect the presence of at least one-eighth of an inch of

free product on top of the ground water in the monitoring wells;

(7) Within and immediately below the UST system excavation zone, the site is assessed to ensure compliance with the requirements in paragraphs (f) (1) through (5) of this section and to establish the number and positioning of monitoring wells or devices that will detect releases from any portion of the tank that routinely contains product; and

(8) Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.

(g) Interstitial monitoring. Interstitial monitoring between the UST system and a secondary barrier immediately around or beneath it may be used, but only if the system is designed, constructed and installed to detect a leak from any portion of the tank that routinely contains product and also meets one of the following requirements:

(1) For double-walled UST systems, the sampling or testing method can detect a release through the inner wall in any portion of the tank that routinely contains product;

Note: The provisions outlined in the Steel Tank Institute's "Standard for Dual Wall Underground Storage Tanks" may be used as guidance for aspects of the design and construction of underground steel double-walled tanks.

(2) For UST systems with a secondary barrier within the excavation zone, the sampling or testing method used can detect a release between the UST system and the secondary barrier;

(i) The secondary barrier around or beneath the UST system consists of artificially constructed material that is sufficiently thick and impermeable (at least 10-6 cm/sec for the regulated substance stored) to direct a release to the monitoring point and permit its detection;

(ii) The barrier is compatible with the regulated substance stored so that a release from the UST system will not cause a deterioration of the barrier allowing a release to pass through undetected;

(iii) For cathodically protected tanks, the secondary barrier must be installed so that it does not interfere with the proper operation of the cathodic protection system;

(iv) The ground water, soil moisture, or rainfall will not render the testing or sampling method used inoperative so that a release could go undetected for more than 30 days;

(v) The site is assessed to ensure that the secondary barrier is always above the ground water and not in a 25-year flood plain, unless the barrier and monitoring designs are for use under such conditions; and,

(vi) Monitoring wells are clearly marked and secured to avoid unauthorized access and tampering.

(3) For tanks with an internally fitted liner, an automated device can detect a release between the inner wall of the tank and the liner, and the liner is compatible with the substance stored.

(h) Other methods. Any other type of release detection method, or combination of methods, can be used if:

(1) It can detect a 0.2 gallon per hour leak rate or a release of 150 gallons within a month with a probability of detection of 0.95 and a probability of false alarm of 0.05; or

(2) The implementing agency may approve another method if the owner and operator can demonstrate that the method can detect a release as effectively as any of the methods allowed in paragraphs (c) through (h) of this section. In comparing methods, the implementing agency shall consider the size of release that the method can detect and the frequency and reliability with which it can be detected. If the method is approved, the owner and operator must comply with any conditions imposed by the implementing agency on its use to ensure the protection of human health and the environment.
40 CFR § 280.44

§ 280.44 Methods of release detection for piping.
Each method of release detection for piping used to meet the requirements of § 280.41 must be conducted in accordance with

the following:

(a) Automatic line leak detectors. Methods which alert the operator to the presence of a leak by restricting or shutting off the flow of regulated substances through piping or triggering an audible or visual alarm may be used only if they detect leaks of 3 gallons per hour at 10 pounds per square inch line pressure within 1 hour. An annual test of the operation of the leak detector must be conducted in accordance with the manufacturer's requirements.

(b) Line tightness testing. A periodic test of piping may be conducted only if it can detect a 0.1 gallon per hour leak rate at one and one-half times the operating pressure.

(c) Applicable tank methods. Any of the methods in § 280.43 (e) through (h) may be used if they are designed to detect a release from any portion of the underground piping that routinely contains regulated substances.
40 CFR § 280.45

§ 280.45 Release detection recordkeeping.
All UST system owners and operators must maintain records in accordance with § 280.34 demonstrating compliance with all applicable requirements of this Subpart. These records must include the following:

(a) All written performance claims pertaining to any release detection system used, and the manner in which these claims have been justified or tested by the equipment manufacturer or installer, must be maintained for 5 years, or for another reasonable period of time determined by the implementing agency, from the date of installation;

(b) The results of any sampling, testing, or monitoring must be maintained for at least 1 year, or for another reasonable period of time determined by the implementing agency, except that the results of tank tightness testing conducted in accordance with § 280.43(c) must be retained until the next test is conducted; and

(c) Written documentation of all calibration, maintenance, and repair of release detection equipment permanently located on-site must be maintained for at least one year after the servicing work is completed, or for another reasonable time period *37204 determined by the implementing agency. Any schedules of required calibration and maintenance provided by the release detection equipment manufacturer must be retained for 5 years from the date of installation.

Subpart E—Release Reporting, Investigation, and Confirmation
40 CFR § 280.50

§ 280.50 Reporting of suspected releases.
Owners and operators of UST systems must report to the implementing agency within 24 hours, or another reasonable time period specified by the implementing agency, and follow the procedures in § 280.52 for any of the following conditions:

(a) The discovery by owners and operators or others of released regulated substances at the UST site or in the surrounding area (such as the presence of free product or vapors in soils, basements, sewer and utility lines, and nearby surface water).

(b) Unusual operating conditions observed by owners and operators (such as the erratic behavior of product dispensing equipment, the sudden loss of product from the UST system, or an unexplained presence of water in the tank), unless system equipment is found to be defective but not leaking, and is immediately repaired or replaced; and,

(c) Monitoring results from a release detection method required under § 280.41 and § 280.42 that indicate a release may have occurred unless:

(1) The monitoring device is found to be defective, and is immediately repaired, recalibrated or replaced, and additional monitoring does not confirm the initial result; or

(2) In the case of inventory control, a second month of data does not confirm the initial result.
40 CFR § 280.51

§ 280.51 Investigation due to off-site impacts.

When required by the implementing agency, owners and operators of UST systems must follow the procedures in § 280.52 to determine if the UST system is the source of off-site impacts. These impacts include the discovery of regulated substances (such as the presence of free product or vapors in soils, basements, sewer and utility lines, and nearby surface and drinking waters) that has been observed by the implementing agency or brought to its attention by another party.
40 CFR § 280.52

§ 280.52 Release investigation and confirmation steps.
40 CFR § 280.50
Unless corrective action is initiated in accordance with Subpart F, owners and operators must immediately investigate and confirm all suspected releases of regulated substances requiring reporting under § 280.50 within 7 days, or another reasonable time period specified by the implementing agency, using either the following steps or another procedure approved by the implementing agency:

(a) System test. Owners and operators must conduct tests (according to the requirements for tightness testing in § 280.43(c) and § 280.44(b)) that determine whether a leak exists in that portion of the tank that routinely contains product, or the attached delivery piping, or both.

(1) Owners and operators must repair, replace or upgrade the UST system, and begin corrective action in accordance with Subpart F if the test results for the system, tank, or delivery piping indicate that a leak exists.

(2) Further investigation is not required if the test results for the system, tank, and delivery piping do not indicate that a leak exists and if environmental contamination is not the basis for suspecting a release.

(3) Owners and operators must conduct a site check as described in paragraph (b) of this section if the test results for the system, tank, and delivery piping do not indicate that a leak exists but environmental contamination is the basis for suspecting a release.

(b) Site check. Owners and operators must measure for the presence of a release where contamination is most likely to be present at the UST site. In selecting sample types, sample locations, and measurement methods, owners and operators must consider the nature of the stored substance, the type of initial alarm or cause for suspicion, the type of backfill, the depth of ground water, and other factors appropriate for identifying the presence and source of the release.

(1) If the test results for the excavation zone or the UST site indicate that a release has occurred, owners and operators must begin corrective action in accordance with Subpart F;

(2) If the test results for the excavation zone or the UST site do not indicate that a release has occurred, further investigation is not required.
40 CFR § 280.53

§ 280.53 Reporting and cleanup of spills and overfills.
(a) Owners and operators of UST systems must contain and immediately clean up a spill or overfill and report to the implementing agency within 24 hours, or another reasonable time period specified by the implementing agency, and begin corrective action in accordance with Subpart F in the following cases:

(1) Spill or overfill of petroleum that results in a release to the environment that exceeds 25 gallons or another reasonable amount specified by the implementing agency, or that causes a sheen on nearby surface water; and

(2) Spill or overfill of a hazardous substance that results in a release to the environment that equals or exceeds its reportable quantity under CERCLA (40 CFR Part 302).

(b) Owners and operators of UST systems must contain and immediately clean up a spill or overfill of petroleum that is less than 25 gallons or another reasonable amount specified by the implementing agency, and a spill or overfill of a hazardous substance that is less than the reportable quantity. If cleanup cannot be accomplished within 24 hours, or another reasonable time period established by the implementing agency, owners and operators must immediately notify the implementing agency.

Note: Pursuant to §§ 302.6 and 355.40, a release of a hazardous substance equal to or in excess of its reportable quantity must also be reported immediately (rather than within 24 hours) to the National Response Center under sections 102 and 103 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and to appropriate state and local authorities under Title III of the Superfund Amendments and Reauthorization Act of 1986.

Subpart F—Release Response and Corrective Action for UST Systems Containing Petroleum or Hazardous Substances
40 CFR § 280.60

§ 280.60 General.
40 CFR § 280.10
Owners and operators of petroleum or hazardous substance UST systems must, in response to a confirmed release from the UST system, comply with the requirements of this subpart except for USTs excluded under § 280.10(b) and UST systems subject to RCRA Subtitle C corrective action requirements under section 3004(u) of the Resource Conservation and Recovery Act, as amended.
40 CFR § 280.61

§ 280.61 Initial response.
40 CFR § 280.52
Upon confirmation of a release in accordance with § 280.52 or after a release from the UST system is identified in any other manner, owners and operators must perform the following initial response actions within 24 hours of a release or within another reasonable period of time determined by the implementing agency:

(a) Report the release to the implementing agency (e.g., by telephone or electronic mail);

(b) Take immediate action to prevent any further release of the regulated substance into the environment; and

*37205 (c) Identify and mitigate fire, explosion, and vapor hazards.
40 CFR § 280.62

§ 280.62 Initial abatement measures and site check.
(a) Unless directed to do otherwise by the implementing agency, owners and operators must perform the following abatement measures:

(1) Remove as much of the regulated substance from the UST system as is necessary to prevent further release to the environment;

(2) Visually inspect any aboveground releases or exposed belowground releases and prevent further migration of the released substance into surrounding soils and ground water;

(3) Continue to monitor and mitigate any additional fire and safety hazards posed by vapors or free product that have migrated from the UST excavation zone and entered into subsurface structures (such as sewers or basements);

(4) Remedy hazards posed by contaminated soils that are excavated or exposed as a result of release confirmation, site investigation, abatement, or corrective action activities. If these remedies include treatment or disposal of soils, the owner and operator must comply with applicable State and local requirements;

(5) Measure for the presence of a release where contamination is most likely to be present at the UST site, unless the presence and source of the release have been confirmed in accordance with the site check required by § 280.52(b) or the closure site assessment of § 280.72(a). In selecting sample types, sample locations, and measurement methods, the owner and operator must consider the nature of the stored substance, the type of backfill, depth to ground water and other factors as appropriate for identifying the presence and source of the release; and

(6) Investigate to determine the possible presence of free product, and begin free product removal as soon as practicable and in accordance with § 280.64.

(b) Within 20 days after release confirmation, or within another reasonable period of time determined by the implementing agency, owners and operators must submit a report to the implementing agency summarizing the initial abatement steps taken under paragraph (a) of this section and any resulting information or data.
40 CFR § 280.63

§ 280.63 Initial site characterization.
(a) Unless directed to do otherwise by the implementing agency, owners and operators must assemble information about the site and the nature of the release, including information gained while confirming the release or completing the initial abatement measures in § 280.60 and § 280.61. This information must include, but is not necessarily limited to the following:

(1) Data on the nature and estimated quantity of release;

(2) Data from available sources and/or site investigations concerning the following factors: surrounding populations, water quality, use and approximate locations of wells potentially affected by the release, subsurface soil conditions, locations of subsurface sewers, climatological conditions, and land use;

(3) Results of the site check required under § 280.62(a)(5); and

(4) Results of the free product investigations required under § 280.62(a)(6), to be used by owners and operators to determine whether free product must be recovered under § 280.64.

(b) Within 45 days of release confirmation or another reasonable period of time determined by the implementing agency, owners and operators must submit the information collected in compliance with paragraph (a) of this section to the implementing agency in a manner that demonstrates its applicability and technical adequacy, or in a format and according to the schedule required by the implementing agency.
40 CFR § 280.64

§ 280.64 Free product removal.
40 CFR § 280.62
At sites where investigations under § 280.62(a)(6) indicate the presence of free product, owners and operators must remove free product to the maximum extent practicable as determined by the implementing agency while continuing, as necessary, any actions initiated under §§ 280.61 through 280.63, or preparing for actions required under §§ 280.65 through 280.66. In meeting the requirements of this section, owners and operators must:

(a) Conduct free product removal in a manner that minimizes the spread of contamination into previously uncontaminated zones by using recovery and disposal techniques appropriate to the hydrogeologic conditions at the site, and that properly treats, discharges or disposes of recovery byproducts in compliance with applicable local, State and Federal regulations;

(b) Use abatement of free product migration as a minimum objective for the design of the free product removal system;

(c) Handle any flammable products in a safe and competent manner to prevent fires or explosions; and

(d) Unless directed to do otherwise by the implementing agency, prepare and submit to the implementing agency, within 45 days after confirming a release, a free product removal report that provides at least the following information:

(1) The name of the person(s) responsible for implementing the free product removal measures;

(2) The estimated quantity, type, and thickness of free product observed or measured in wells, boreholes, and excavations;

(3) The type of free product recovery system used;

(4) Whether any discharge will take place on-site or off-site during the recovery operation and where this discharge will be located;

(5) The type of treatment applied to, and the effluent quality expected from, any discharge;

(6) The steps that have been or are being taken to obtain necessary permits for any discharge; and

(7) The disposition of the recovered free product.
40 CFR § 280.65

§ 280.65 Investigations for soil and ground-water cleanup.
(a) In order to determine the full extent and location of soils contaminated by the release and the presence and concentrations of dissolved product contamination in the ground water, owners and operators must conduct investigations of the release, the release site, and the surrounding area possibly affected by the release if any of the following conditions exist:

(1) There is evidence that ground-water wells have been affected by the release (e.g., as found during release confirmation or previous corrective action measures);

(2) Free product is found to need recovery in compliance with § 280.64;

(3) There is evidence that contaminated soils may be in contact with ground water (e.g., as found during conduct of the initial response measures or investigations required under §§ 280.60 through 280.64); and

(4) The implementing agency requests an investigation, based on the potential effects of contaminated soil or ground water on nearby surface water and ground-water resources.

(b) Owners and operators must submit the information collected under paragraph (a) of this section as soon as practicable or in accordance with a schedule established by the implementing agency.
40 CFR § 280.66

***37206§ 280.66 Corrective action plan.**
(a) At any point after reviewing the information submitted in compliance with § 280.61 through § 280.63, the implementing agency may require owners and operators to submit additional information or to develop and submit a corrective action plan for responding to contaminated soils and ground water. If a plan is required, owners and operators must submit the plan according to a schedule and format established by the implementing agency. Alternatively, owners and operators may, after fulfilling the requirements of § 280.61 through § 280.63, choose to submit a corrective action plan for responding to contaminated soil and ground water. In either case, owners and operators are responsible for submitting a plan that provides for adequate protection of human health and the environment as determined by the implementing agency, and must modify their plan as necessary to meet this standard.

(b) The implementing agency will approve the corrective action plan only after ensuring that implementation of the plan will adequately protect human health, safety, and the environment. In making this determination, the implementing agency should consider the following factors as appropriate:

(1) The physical and chemical characteristics of the regulated substance, including its toxicity, persistence, and potential for migration;

(2) The hydrogeologic characteristics of the facility and the surrounding area;

(3) The proximity, quality, and current and future uses of nearby surface water and ground water;

(4) The potential effects of residual contamination on nearby surface water and ground water;

(5) An exposure assessment; and

(6) Any information assembled in compliance with this subpart.

(c) Upon approval of the corrective action plan or as directed by the implementing agency, owners and operators must implement the plan, including modifications to the plan made by the implementing agency. They must monitor, evaluate, and report the results of implementing the plan in accordance with a schedule and in a format established by the implementing

agency.

(d) Owners and operators may, in the interest of minimizing environmental contamination and promoting more effective cleanup, begin cleanup of soil and ground water before the corrective action plan is approved provided that they:

(1) Notify the implementing agency of their intention to begin cleanup;

(2) Comply with any conditions imposed by the implementing agency, including halting cleanup or mitigating adverse consequences from cleanup activities; and

(3) Incorporate these self-initiated cleanup measures in the corrective action plan that is submitted to the implementing agency for approval.
40 CFR § 280.67

§ 280.67 Public participation.
(a) For each confirmed release that requires a corrective action plan, the implementing agency must provide notice to the public by means designed to reach those members of the public directly affected by the release and the planned corrective action. This notice may include, but is not limited to, public notice in local newspapers, block advertisements, public service announcements, publication in a state register, letters to individual households, or personal contacts by field staff.

(b) The implementing agency must ensure that site release information and decisions concerning the corrective action plan are made available to the public for inspection upon request.

(c) Before approving a corrective action plan, the implementing agency may hold a public meeting to consider comments on the proposed corrective action plan if there is sufficient public interest, or for any other reason.

(d) The implementing agency must give public notice that complies with paragraph (a) of this section if implementation of an approved corrective action plan does not achieve the established cleanup levels in the plan and termination of that plan is under consideration by the implementing agency.

Subpart G—Out-of-Service UST Systems and Closure
40 CFR § 280.70

§ 280.70 Temporary closure.
(a) When an UST system is temporarily closed, owners and operators must continue operation and maintenance of corrosion protection in accordance with § 280.31, and any release detection in accordance with Subpart D. Subparts E and F must be complied with if a release is suspected or confirmed. However, release detection is not required as long as the UST system is empty. The UST system is empty when all materials have been removed using commonly employed practices so that no more than 2.5 centimeters (one inch) of residue, or 0.3 percent by weight of the total capacity of the UST system, remain in the system.

(b) When an UST system is temporarily closed for 3 months or more, owners and operators must also comply with the following requirements:

(1) Leave vent lines open and functioning; and

(2) Cap and secure all other lines, pumps, manways, and ancillary equipment.

(c) When an UST system is temporarily closed for more than 12 months, owners and operators must permanently close the UST system if it does not meet either performance standards in § 280.20 for new UST systems or the upgrading requirements in § 280.21, except that the spill and overfill equipment requirements do not have to be met. Owners and operators must permanently close the substandard UST systems at the end of this 12-month period in accordance with §§ 280.71-280.74, unless the implementing agency provides an extension of the 12-month temporary closure period. Owners and operators must complete a site assessment in accordance with § 280.72 before such an extension can be applied for.
40 CFR § 280.71

§ 280.71 Permanent closure and changes-in-service.
(a) At least 30 days before beginning either permanent closure or a change-in-service under paragraphs (b) and (c) of this section, or within another reasonable time period determined by the implementing agency, owners and operators must notify the implementing agency of their intent to permanently close or make the change-in-service, unless such action is in response to corrective action. The required assessment of the excavation zone under § 280.72 must be performed after notifying the implementing agency but before completion of the permanent closure or a change-in-service.

(b) To permanently close a tank, owners and operators must empty and clean it by removing all liquids and accumulated sludges. All tanks taken out of service permanently must also be either removed from the ground or filled with an inert solid material.

(c) Continued use of an UST system to store a non-regulated substance is considered a change-in-service. Before a change-in-service, owners and operators must empty and clean the tank by removing all liquid and accumulated sludge and conduct a site assessment in accordance with § 280.72.

Note: The following cleaning and closure procedures may be used to comply with this section:

(A) American Petroleum Institute Recommended Practice 1604, "Removal and Disposal of Used Underground Petroleum Storage Tanks";

*37207 (B) American Petroleum Institute Publication 2015, " Cleaning Petroleum Storage Tanks";

(C) American Petroleum Institute Recommended Practice 1631, "Interior Lining of Underground Storage Tanks," may be used as guidance for compliance with this section; and

(D) The National Institute for Occupational Safety and Health "Criteria for a Recommended Standard * * * Working in Confined Space" may be used as guidance for conducting safe closure procedures at some hazardous substance tanks.
40 CFR § 280.72

§ 280.72 Assessing the site at closure or change-in-service.
(a) Before permanent closure or a change-in-service is completed, owners and operators must measure for the presence of a release where contamination is most likely to be present at the UST site. In selecting sample types, sample locations, and measurement methods, owners and operators must consider the method of closure, the nature of the stored substance, the type of backfill, the depth to ground water, and other factors appropriate for identifying the presence of a release. The requirements of this section are satisfied if one of the external release detection methods allowed in § 280.43 (e) and (f) is operating in accordance with the requirements in § 280.43 at the time of closure, and indicates no release has occurred.

(b) If contaminated soils, contaminated ground water, or free product as a liquid or vapor is discovered under paragraph (a) of this section, or by any other manner, owners and operators must begin corrective action in accordance with Subpart F.
40 CFR § 280.73

§ 280.73 Applicability to previously closed UST systems.
When directed by the implementing agency, the owner and operator of an UST system permanently closed before December 22, 1988 must assess the excavation zone and close the UST system in accordance with this Subpart if releases from the UST may, in the judgment of the implementing agency, pose a current or potential threat to human health and the environment.
40 CFR § 280.74

§ 280.74 Closure records.
Owners and operators must maintain records in accordance with § 280.34 that are capable of demonstrating compliance with closure requirements under this Subpart. The results of the excavation zone assessment required in § 280.72 must be maintained for at least 3 years after completion of permanent closure or change-in-service in one of the following ways:

(a) By the owners and operators who took the UST system out of service;

(b) By the current owners and operators of the UST system site; or

(c) By mailing these records to the implementing agency if they cannot be maintained at the closed facility.

Appendix I—Notification for Underground Storage Tanks (Form)
BILLING CODE 6560-50-M

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
BILLING CODE 6560-50-C

***37211 Appendix II—List of Agencies Designated To Receive Notifications**

Alabama (EPA Form), Alabama Department of Environmental Management, Ground Water Section/Water Division, 1751 Congressman W.L. Dickinson Drive, Montgomery, Alabama 36130, 205/271-7823

Alaska (EPA Form), Department of Environmental Conservation, Box 0, Juneau, Alaska 99811-1800, 970/465-2653

American Samoa (EPA Form), Executive Secretary, Environmental Quality Commission, Office of the Governor, American Samoan Government, Pago Pago, American Samoa 96799; Attention: UST Notification

Arizona (EPA Form), Attention: UST Coordinator, Arizona Department of Environmental Quality, Environmental Health Services, 2005 N. Central, Phoenix, Arizona 85004

Arkansas (EPA Form), Arkansas Department of Pollution Control and Ecology, P.O. Box 9583, Little Rock, Arkansas 72219, 501/562-7444

California (State Form), Executive Director, State Water Resources Control Board, P.O. Box 100, Sacramento, California 95801, 916/445-1533

Colorado (EPA Form), Section Chief, Colorado Department of Health, Waste Management Division, Underground Tank Program, 4210 East 11th Avenue, Denver, Colorado 80220, 303/320-8333

Connecticut (State Form), Hazardous Materials Management Unit, Department of Environmental Protection, State Office Building, 165 Capitol Avenue, Hartford, Connecticut 06106

Delaware (State Form), Division of Air and Waste Management, Department of Natural Resources and Environmental Control, P.O. Box 1401, 89 Kings Highway, Dover, Delaware 19903, 302/726-5409

District of Columbia (EPA Form), Attention: UST Notification Form, Department of Consumer and Regulatory Affairs, Pesticides and Hazardous Waste Management Branch, Room 114, 5010 Overlook Avenue SW., Washington, DC 20032

Florida (State Form), Florida Department of Environmental Regulation, Solid Waste Section, Twin Towers Office Building, 2600 Blair Stone Road, Tallahassee, Florida 32399, 904/487-4398

Georgia (EPA Form), Georgia Department of Natural Resources, Environmental Protection Division, Underground Storage Tank Program, 3420 Norman Berry Drive, 7th Floor, Hapeville, Georgia 30354, 404/656-7404

Guam (State Form), Administrator, Guam Environmental Protection Agency, P.O. Box 2999, Agana, Guam 96910, Overseas Operator (Commercial call 646-8863)

Hawaii (EPA Form), Administrator, Hazardous Waste Program, 645 Halekauwila Street, Honolulu, Hawaii 96813, 808/548-2270

Idaho (EPA Form), Underground Storage Tank Coordinator, Water Quality Bureau, Division of Environmental Quality, Idaho Department of Health and Welfare, 450 W. State Street, Boise, Idaho 83720, 208/334-4251

Illinois (EPA Form), Underground Storage Tank Coordinator, Division of Fire Prevention, Office of State Fire Marshal, 3150

Executive Park Drive, Springfield, Illinois 62703-4599

Indiana (EPA Form), Underground Storage Tank Program, Office of Environmental Response, Indiana Department of Environmental Management, 105 South Meridian Street, Indianapolis, Indiana 46225

Iowa (State Form), UST Coordinator, Iowa Department of Natural Resources, Henry A. Wallace Building, 900 East Grand, Des Moines, Iowa 50219, 512/281-8135

Kansas (EPA Form), Kansas Department of Health and Environment, Forbes Field, Building 740, Topeka, Kansas 66620, 913/296-1594

Kentucky (State Form), Department of Environmental Protection, Hazardous Waste Branch, Fort Boone Plaza, Building 2, 18 Reilly Road, Frankfort, Kentucky 40601, 501/564-6716

Louisiana (State Form), Secretary, Louisiana Department of Environmental Quality, P.O. Box 44066, Baton Rouge, Louisiana 70804, 501/342-1265

Maine (State Form), Attention: Underground Tanks Program, Bureau of Oil and Hazardous Material Control, Department of Environmental Protection, State House—Station 17, Augusta, Maine 04333

Maryland (EPA Form), Science and Health Advisory Group, Office of Environmental Programs, 201 West Preston Street, Baltimore, Maryland 21201

Massachusetts (EPA Form), UST Registry, Department of Public Safety, 1010 Commonwealth Avenue, Boston, Massachusetts 02215, 617/566-4500

Michigan (EPA Form), Michigan Department of State Police, Fire Marshal Division, General Office Building, 7150 Harris Drive, Lansing, Michigan 48913

Minnesota (State Form), Underground Storage Tank Program, Division of Solid and Hazardous Wastes, Minnesota Pollution Control Agency, 520 West Lafayette Road, St. Paul, Minnesota 55155

Mississippi (State Form), Department of Natural Resources, Bureau of Pollution Control, Underground Storage Tank Section, P.O. Box 10385, Jackson, Mississippi 39209, 601/961-5171

Missouri (EPA Form), UST Coordinator, Missouri Department of Natural Resources, P.O. Box 176, Jefferson City, Missouri 65102, 314/751-7428

Montana (EPA Form), Solid and Hazardous Waste Bureau, Department of Health and Environmental Science, Cogswell Bldg., Room B-201, Helena, Montana 59620

Nebraska (EPA Form), Nebraska State Fire Marshal, P.O. Box 94677, Lincoln, Nebraska 68509-4677, 402/471-9465

Nevada (EPA Form), Attention: UST Coordinator, Division of Environmental Protection, Department of Conservation and Natural Resources, Capitol Complex 201 S. Fall Street, Carson City, Nevada 89710, 800/992-0900, Ext. 4670, 702/885-4670

New Hampshire (EPA Form), NH Dept. of Environmental Services, Water Supply and Pollution Control Division, Hazen Drive, P.O. Box 95, Concord, New Hampshire 03301, Attention: UST Registration

New Jersey (State Form), Underground Storage Tank Coordinator, Department of Environmental Protection, Division of Water Resources (CN-029), Trenton, New Jersey 08625, 609/292-0424

New Mexico (EPA Form), New Mexico Environmental Improvement Division, Groundwater/Hazardous Waste Bureau, P.O. Box 968, Santa Fe, New Mexico 37504, 505/827-2933

New York (EPA Form), Bulk Storage Section, Division of Water, Department of Environmental Conservation, 50 Wolf Road, Room 326, Albany, New York 12233-0001, 518/457-4351

North Carolina (EPA Form), Division of Environmental Management, Ground-Water Operations Branch, Department of Natural Resources and Community Development, P.O. Box 27687, Raleigh, North Carolina 27611, 919/733-3221

North Dakota (State Form), Division of Hazardous Management and Special Studies, North Dakota Department of Health, Box 5520, Bismarck, North Dakota 58502-5520

Northern Mariana Islands (EPA Form), Chief, Division of Environmental Quality, P.O. Box 1304, Commonwealth of Northern Mariana Islands, Saipan, CM 96950, Cable Address: Gov. NMI Saipan, Overseas Operator: 6984

Ohio (State Form), State Fire Marshal's Office, Department of Commerce, 8895 E. Main Street, Reynoldsburg, Ohio 43068, State Hotline: 800/282-1927

Oklahoma (EPA Form), Underground Storage Tank Program, Oklahoma Corporation Comm., Jim Thorpe Building, Oklahoma City, Oklahoma 73105

Oregon (State Form), Underground Storage Tank Program, Hazardous and Solid Waste Division, Department of Environmental Quality, 811 S.W. Sixth Avenue, Portland, Oregon 98204, 503/229-5788

Pennsylvania (EPA Form), PA Department of Environmental Resources, Bureau of Water Quality Management, Ground Water Unit, 9th Floor Fulton Building, P.O. Box 2063, Harrisburg, Pennsylvania 17120

Puerto Rico (EPA Form), Director, Water Quality Control Area, Environmental Quality Board, Commonwealth of Puerto Rico, Santurce, Puerto Rico, 809/725-0717

Rhode Island (EPA Form), UST Registration, Department of Environmental Management, 83 Park Street, Providence, Rhode Island 02903, 401/277-2234

South Carolina (State Form), Ground-Water Protection Division, South Carolina Department of Health and Environmental Control, 2600 Bull Street, Columbia, South Carolina 29201, 803/758-5213

South Dakota (EPA Form), Office of Water Quality, Department of Water and Natural Resources, Joe Foss Building, Pierre, South Dakota 57501,

Tennessee (EPA Form), Tennessee Department of Health and Environment, Division of Superfund Underground Storage Tank Section, 150 Ninth Avenue, North, Nashville, Tennessee 37219-5404, 615/741-0690

***37212** Texas (EPA Form), Underground Storage Tank Program, Texas Water Commission, P.O. Box 13087, Austin, Texas 78711

Utah (EPA Form), Division of Envirormental Health, P.O. Box 45500, Salt Lake City, Utah 84145-0500

Vermont (State Form), Underground Storage Tank Program, Vermont AEC/Waste Management Division, State Office Building, Montpelier, Vermont 05602, 802/828-3395

Virginia (EPA Form), Virginia Water Control Board, P.O. Box 11143, Richmond, Virginia 23230-1143, 804/257-6685

Virgin Islands (EPA Form), 205(J) Coordinator, Division of Natural Resources Management, 14 F Building 111, Watergut Homes, Christianstead, St. Croix, Virgin Islands 00820

Washington (State Form), Underground Storage Tank Notification, Solid and Hazardous Waste Program, Department of Ecology, M/S PV-11, Olympia, Washington 98504-8711, 206/459-6316

West Virginia (EPA Form), Attention: UST Notification, Solid and Hazardous Waste, Ground Water Branch, West Virginia Department of Natural Resources, 1201 Greenbriar Street, Charleston, West Virginia 25311

Wisconsin (State Form), Bureau of Petroleum Inspection, P.O. Box 7969, Madison, Wisconsin 53707, 608/266-7605

Wyoming (EPA Form), Water Quality Division, Department of Environmental Quality, Herschler Building, 4th Floor West,

122 West 25th Street, Cheyenne, Wyoming 82002, 307/777-7781.

Appendix III—Statement for Shipping Tickets and Invoices

Note.—A Federal law (the Resource Conservation and Recovery Act (RCRA), as amended (Pub. L. 98-616)) requires owners of certain underground storage tanks to notify designated State or local agencies by May 8, 1986, of the existence of their tanks. Notifications for tanks brought into use after May 8, 1986, must be made within 30 days. Consult EPA's regulations, issued on November 8, 1985 (40 CFR Part 280) to determine if you are affected by this law.

[FR Doc. 88-21153 Filed 9-22-88; 8:45 am]

BILLING CODE 6560-50-M

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.

ATTACHMENT C

APPELLANTS' OBJECTION TO PROPOSED *FINAL ORDER* SUBMITTED BY APPELLEE

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, 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 Envt'l 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).

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[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 and 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 statets:

> On the morning of 6/6/16 WVDEP's Dennis Stottlemyer 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 Stottlemyer 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

Jackie D. Shultz, Clerk

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.

ATTACHMENT D

APPELLANTS' OBJECTION TO PROPOSED *FINAL ORDER* SUBMITTED BY APPELLEE

/s/ Robert Irons
Circuit Court Judge
Ref. Code: 19M69DQF

E-FILED | 8/6/2019 12:04 PM
CC-32-2018-AA-1
Monroe County Circuit Clerk
Leta Gullette-Comer

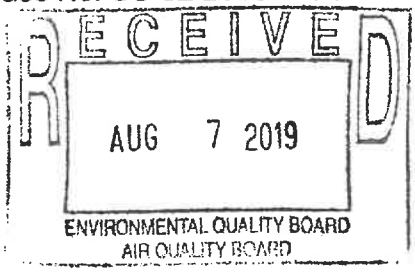
In the Circuit Court of Monroe County, West Virginia

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 enforcment 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
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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.courtswv.gov/e-file/ for more details.

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 20th day of February, 2025, I served the forgoing *Appellants' Objections To Proposed "Final Order" Submitted By Appellee Jeremy M. Bandy, Director, Division Of Water And Waste Management, West Virginia Department Of Environmental Protection,* 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)