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.

APPELLEE WVDEP'S RESPONSE TO APPELLANTS' PROPOSED FINAL ORDER

The Appellee, Jeremy W. Bandy[1], Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection ("WVDEP"), by counsel, hereby responds to the proposed Final Order (No Liability for Contamination) ("Appellants' Proposed Order") previously submitted by the Appellants, J.C. Baker & Son, Inc. and Baker Oil Company. In support of its response, WVDEP states as follows:

STANDARD OF REVIEW

The Board has repeatedly made clear throughout the pendency of the appeal, and historically, that it recognizes as persuasive authority the Kanawha County Circuit Court's decision in *Wetzel County Solid Waste Authority v. Chief, Office of Waste Management, Division of Environmental Protection*, Case No. 95-AA-3 (Cir. Ct. Kanawha Cnty. 1999). On February 9, 2003, the Board stated in this case:

[1]During the pendency of the appeal, Mr. Bandy replaced Ms. Emery as Director.

> Burden of proof, in order to prevail, the appellant has the burden to raise an issue with sufficient evidence to support a finding that the appellee's decision was incorrect, that it violated a statute or regulation or otherwise should not have issued the permit violation under order. Then the appellee must produce the evidence demonstrating [its] reasoning in making its decision. The appellant then has the opportunity to show that the evidence produced by the appellee is deficient. Now, the shifting burden of proof standard is set out in a case before the Circuit Court in Kanawha County, *Wetzel County Solid Waste Authority v. Chief[,] Water and Waste Management[,] Division of Environmental Protection*, Civil Action Number 95[-]AA-3. This is in the court of Kanawha County. While Wetzel County is merely persuasive authority, the board agrees with the analysis. We use that test here. (Brackets indicate likely transcription errors.) 2/9/23 Transcript, p. 6.

On October 10, 2024, the Board stated in this case:

> Discussing the burden of proof, in order to prevail, the Appellant has a burden to raise an issue with sufficient evidence to support a finding that the Appellee's decision was incorrect. It violated a statute [or] regulation or otherwise should not [have issued] the permit violation and order. Then the Appellee must produce the evidence demonstrating its reasoning [in] making its decision. The Appellant then has the opportunity to show that the evidence produced by the Appellee is deficient or a pretext, and this goes back to the Wetzel County Solid [W]aste Authority v. Wastewater Management case back in 1999. (Brackets indicate likely transcription errors.) 10/10/24 Transcript, p. 13

The relevant subsection of the Procedural Rules Governing Appeals Before the Environmental Quality Board, W. Va. C.S.R. § 46-4-6.8, explicitly states as follows:

> 6.8. Presentation. The board shall hear the appeal de novo. The appellant *shall* open the hearing and present testimony and offer exhibits that support the notice of appeal. The appellant's witnesses shall be subject to cross-examination by any other party or by the board. At the conclusion of the appellant's case, the appellee *may* then present testimony and offer exhibits. After initial presentations have been made, both the appellant and the appellee may present rebuttal evidence on the issues in the case, providing that such evidence is not cumulative, repetitive, or immaterial to the case. (Emphasis added.)

Notwithstanding repeated arguments by the Appellants, the Board has remained adamant about its position. The Procedural Rules are similarly clear. The Appellants have an affirmative initial burden to raise an issue and produce sufficient evidence to support their position. Then, if that burden has been met, WVDEP must produce evidence demonstrating its reasoning. An opportunity for rebuttal is then offered. Accordingly, insofar as the Appellants propose in their Appellants' Proposed Order that the

Board overturn itself as to the burden of proof, that proposal is unwarranted. This issue is discussed below as specifically appropriate.

INCORPORATION OF PREVIOUS PLEADINGS

Both the West Virginia Intermediate Court of Appeals and Supreme Court of Appeals have ruled that the evidentiary hearings on ownership and on liability are part of the same proceeding. Accordingly, WVDEP incorporates by reference its prior pleadings in this case.

ARGUMENT

I. The Board has ruled in this case that the Appellants are the owners of, and parties responsible for, the subject USTs. Accordingly, any argument to the contrary is irrelevant.

By order entered on September 9, 2022, the Board granted the Appellants' motion to bifurcate the evidentiary hearing for the purposes of two discrete determinations: whether the Appellants were the owners or operators[2] of the underground storage tanks (USTs) at issue ("subject USTs"), and whether the Appellants were liability for contamination at the UST sites at issue.

As to whether the Appellants were the owners or operators of the subject USTs, the Board ruled in its Final Order (Owner of Subject USTs) ("Ownership Order") that the Appellants were the owners of the UST and that they are the responsible parties for purposes of the appeal. Ownership Order, p. 38.

Accordingly, the issue of whether the Appellants are the owners of, or responsible parties in regard to, the subject USTs is already settled. Insofar as the Appellants suggest at any point that they are not the owners or responsible parties, that contention is irrelevant.

II. The Board has previously ruled that where the Appellants are required to put on material evidence as to an issue but fail to do so, they have not met their burden of proof.

After the conclusion of the evidentiary hearing as to ownership, the Appellants contended that the Board must analyze whether the subject USTs were to be considered fixtures to the real property

[2]WVDEP contended only that the Appellants were the owners of the USTs at issue, not the operators thereof, and the Board accordingly ruled that no evidence had been offered on that issue and that the Appellants were owners only for purposes of the Board's determination.

and thus the Appellants could not be considered responsible for them. The Board declined to perform such an analysis, ruling that by neither raising an issue nor putting onto the record any evidence as to the material facts, the Appellants had not met their burden of proof. Ownership Order, p. 5.

There are several issues in this case, discussed below as specifically appropriate, that were raised by the Appellants. However, sufficient evidence was not introduced to meet the Appellants' burden of proof. Regardless of whether an issue is raised, the Appellants bear the initial burden of proof as to any allegations or representations they make. When those issues are factual or require factual analysis, the Appellants are obligated to put evidence into the record. As the Board stated, "argument is not evidence."

III. The Appellants may not claim that WVDEP has an affirmative duty to prove that all contamination was solely caused by the Appellants.

The Board has stated, and repeatedly restated, its position that the Appellants bear the initial burden of proof as to their allegations. The Appellants claim that because there may have been existing contamination at some of the UST sites at issue, they are relieved of any responsibility for cleanup. In fact, throughout the Appellant's Proposed Order, the Appellants treat cleanup obligations as a binary matter. They imply that they are responsible for either all obligations or none. However, the potential presence of other contamination at a site from other sources does not negate their responsibility for their leaking tanks prior to and at the time of closure.

Despite the Appellants' repeated beating of the metaphorical dead horse of the Board's burden of proof ruling, they bear the initial burden of proof as to this and all other issues. The Appellants must accordingly place into the record some credible evidence as to the extent of their own contamination. Throughout the case, the Appellants have adduced testimony from only one source -- Mr. Baker -- and characterize his testimony as dispositive on factual issues. No other testimony has been offered at any

point in the case and, as was demonstrated in the first portion of the evidentiary proceedings, Mr. Baker's recollections sometimes prove to be incomplete or faulty.

It has been amply proven throughout the pendency of the appeal, and so ruled by the Board, that the Appellants were the owners of, and responsible parties for, the subject USTs. It has similarly been amply proven that the Appellants represented that they had obtained financial assurances for the subject USTs, demonstrating their acknowledgment of responsibility for, and ability to assume, the costs of cleanup. WVDEP inspectors, the Appellants' own consultants, and the Appellants themselves personally observed and confirmed releases involving holes, pitting, and other structural deficiencies in multiple USTs on multiple sites (C.R. 843, 2834, 2869-73, and C.R. generally); continuing contemporary leakage directly from subject USTs (C.R. 78, 1550-1553, 2355, 2370-2373, 3052-55, 3401-03, 3623, 3628, 4016, 4137, 4174, and C.R. generally); contaminated soil affected by confirmed releases (C.R. 1926-63, 3406, and C.R. generally); overfilling and leaking lines (C.R. 849, 1892, 2369, 2629); and, pumping of contaminated water into nearby waters by the Appellants (C.R. 2577).

As indicated in the WVDEP Order at issue, WVDEP issued multiple confirmed release notices to comply for leaks from the subject USTs and *repeatedly* pressed the Appellants for information about the state of the subject USTs, the UST sites at issue, and the sources of contamination, including corrective action plans, groundwater monitoring reports, site assessment reports, site assessment work plans, and site investigation reports. At the request of the Appellants and their own consultants, WVDEP continued to grant extensions for submission of this information. The Appellants repeatedly failed in these duties. *See* WVDEP Order and C.R. generally. The Appellants have, over and over again, been afforded the opportunity to provide documentation or proof for their claims, during both the relevant time periods and the evidentiary hearings in this case, and they have not done so. Accordingly, they have not met their burden of proof.

IV. The Appellants' financial status is unproven and is irrelevant to their environmental obligations.

The load-bearing pillar of the Appellants' argument is financial hardship. The Appellants contend throughout the Appellants' Proposed Order that Appellant Baker Oil[3] is no longer an operating or viable entity and thus cannot be held responsible for its environmental obligations. However,

[3] Upon information and belief, J.C. Baker and Sons, Inc. remains an operating entity.

insufficient evidence was introduced to support this allegation and the allegation is, in any case, irrelevant.

The Appellants introduced evidence purporting to show that by virtue of its liabilities, Baker Oil has no ability to pay cleanup costs. Therefore, the argument goes, the Appellants are under no obligation to pay the cleanup costs either partially or totally.

However, the Appellants have failed to introduce material evidence of their assets, which evidence is obviously necessary to determine their financial state. A bare recitation of liabilities without a concurrent accounting of assets renders any financial analysis unintelligible. "I owe this" is meaningless without an accompanying "I have this." The Appellants plead poverty based on what they allegedly owe. In order for this to carry even theoretical weight, they must account for what they have.

The Appellants argue that because they are allegedly unable to pay the costs of cleanup on the UST sites at issue, they are entitled to walk away from that responsibility. However, bankruptcy law, being concerned with a debtor's verifiable balance of assets and liabilities and its ability to shed its obligations, provides guidance in this case.

In 1985, the United States Supreme Court addressed the issue of the ability of a corporate entity to shed liability for cleanup by virtue of its inability to pay. In *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 106 S.Ct. 755, the bankruptcy trustee sought to abandon a contaminated site under 11 U.S.C. 554(a), which allows a trustee to "abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." The United States Supreme Court held that a trustee may *not* abandon property in contravention of a state statute or regulations.

The *Midlantic* Court referred to its previous decision in *Ohio v. Kovacs*, 469 U.S. 274 (1985). Under *Kovacs*, a monetary judgment for environmental cleanup is generally a "claim" subject to

discharge in bankruptcy, but where the obligation is equitable or injunctive such as a duty to clean up the contamination, that remains enforceable even after bankruptcy.

In re Chateaugay Corp., 944 F.2d 997 (2nd Circ. 1991), holds that cost recovery is a "claim" dischargeable in bankruptcy but that "a cleanup order that accomplishes the dual objectives of removing accumulated wastes and stopping or ameliorating ongoing pollution emanating from such wastes is not a dischargeable claim." See also *In re Torwico Elecs., Inc.*, 8 F.3d 146 (3rd Cir. 1993) (cleanup duties are an ongoing regulatory obligation and not dischargeable); *United States v. Apex Oil Co.*, 579 F.3d 734 (7th Circ. 2009); *In re Mark IV Indus., Inc.*, 438 B.R. 460 (Bankr. S.D.N.Y. 2010) (a debtor may not claim financial hardship to escape environmental cleanup duties).

The overriding principle relevant to this case is that even if a debtor claims financial hardship, they cannot evade responsibility for fulfillment of environmental obligations. Public health and safety take precedence over financial hardship, as environmental obligations are continuing responsibilities, not merely debts that can be erased.

The Appellants seek to totally evade liability for their obligations by reason of alleged financial hardship. However, even if such hardship exists, they do not get a pass.

V. The Appellants may not evade the duty to fulfill their environmental obligations in this case by a claim that it is "impossible."

The load-bearing pillar of the Appellants' argument is that fulfillment of their obligations is "impossibility." It absolutely cannot be done. However, there is an utter absence of evidence demonstrating that this is the case, or that the Appellants have made any good faith effort to surmount the alleged obstacles placed in their path.

In several cases, the Appellants claim that they were denied access to the sites by the current landowners. However, other than unsupported testimony about alleged verbal requests, they offered no evidence other than one hearsay e-mail and one hearsay letter from a consultant to support the

allegation that access had in fact been denied to any site. (10/10/24 Transcript, pp. 59-60.) There is no evidence of direct communication from a landowner refusing entry. There is no evidence of any good faith effort to gain entry to the property beyond sending a letter and giving up. There is no evidence that the Appellants tried to negotiate further. There is no evidence that they sought the assistance of WVDEP in gaining entry. There is no evidence that they pursued any legal remedy, such as application to the appropriate circuit court for an injunction to allow entry for mandatory remediation.

The Appellants seek to buttress their contention that "it's impossible" by repeatedly stating that they are not responsible for cleanup of contamination caused by the subject USTs because they do not own the real property upon which they are situated and therefore cannot gain access based on that reason. However, the Board has previously recognized, and no party disputes, that ownership of the subject USTs and the real property upon which they are situated. Separate ownership does not relieve the Appellants of their duties.

The circumstances of this case are far different than those 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. In that case, the Board's ruling was predicated on ample evidence supporting a finding that 1) Ms. Fischer *had*, repeatedly and unequivocally, denied access to her property and 2) WVDEP sought to compel Ms. Fischer's compliance and to mandate her payment of costs. Neither factor is in play here. The Appellants have not entered into the record any support for their contention that entry to the property has been repeatedly and unequivocally denied to the extent that nothing more can be done. WVDEP does not seek cost distribution or a ruling by the Board as to enforcement. The circumstances in Mrs. Fischer's case are therefore easily distinguishable from those in this case.

"Requiring effort" or "requiring several efforts" are not functionally equivalent to "impossible." In fact, "difficult" is not "impossible." Remediation of one's contamination is reasonably expected to be

difficult. The Appellants must provide evidence that they have made good faith efforts to gain entry, even where such efforts involve more than verbal communication, a letter, or an e-mail. There is no evidence that any such efforts were made. Accordingly, the Appellants have not carried their burden of proof as to "impossibility" and in any case, as discussed above, they remain responsible for their environmental obligations.

VI. The Appellants may not claim that the prior removal of subject USTs relieves them of their environmental obligations.

The Appellants allege impossibility in some instances because "the Removed USTs no longer exist on that site." It is not difficult to see the implications of this argument. Any UST owner responsible for contamination, no matter how extensive, could simply remove contaminating USTs from a site and claim they no longer have any ability to fulfill remedial obligations for what they leave behind nor any responsibility to do so. While this simple step would likely prove cost-effective for the UST owners, it leads to an absurd conclusion.

Additionally, 40 C.F.R. § 280.60 outlines the federal requirements for owners and operators upon confirmation of release of petroleum or other hazardous substances. § 280.60 mandates that upon confirmation of a release, owners and operators must promptly initiate corrective measures and comply with corrective action procedures except in limited instances, none of which are applicable here. Therefore, as the owners of the USTs, the Appellants had and have a federally mandated duty to comply and clean up the sites.

VII. All relevant releases and contamination from the subject USTs took place after the enactment of the 1988 federal regulations.

The Appellant allege that because the subject USTs were installed prior to 1988, they escape responsibility for releases and contamination from the subject USTs in perpetuity. However, all confirmed releases at issue took place after 1988. (C.R. 60, 844, 1550, 1857, 2357, 2570, 2752, 3052, 3401, 3623, 4016, 4140, and generally.)

Again, this argument is strongly relied upon by the Appellants but leads to an absurd conclusion. A tank owner could allege, and alleges here, that if a UST was installed prior to 1988, the owner bears no responsibility for releases that occurred after 1988.

VIII. The enforcement powers of the Board are irrelevant to the determination at issue.

The Appellants conflate the Board's statutory authority to rule on the appeal with its statutory authority, or lack thereof, to enforce its ruling. Enforcement of the WVDEP Order at issue is the responsibility, appropriately enough, of WVDEP and its Environmental Enforcement division through the appropriate regulatory and legal channels.

The Board does not enforce orders and, by affirmation of the WVDEP Order, would not thereby seek to do so. The Board's statutorily delegated authority in this case is delegated by W. Va. Code 22B-1-7, which states in relevant part as follows:

> **22B-1-7(g)(1).** The environmental quality board or the air quality board as the case shall make and enter a written order affirming, modifying, or vacating the order, permit, or official action of the [WVDEP] chief or secretary, or shall make and enter such order as the chief or secretary should have entered, or shall make and enter an order approving or modifying the terms and conditions of any permit issued[.]

In this case, by affirming the propriety of the WVDEP Order, the Board would not assume the authority or duty to enforce the WVDEP Order. Its statutory authority, or lack thereof, to do so is therefore irrelevant. Affirmation of the WVDEP Order simply means that the Board has ruled that the WVDEP Order was not issued improperly. Enforcement of the WVDEP Order would fall outside the purview of the Board's authority or duty. That falls within WVDEP's bailiwick, and WVDEP does not allege otherwise.

CONCLUSION

The central question in the totality of this case is whether the Appellants, as the owners of the subject USTs, are responsible for cleanup of contamination associated with the subject USTs. The answer is that they are clearly responsible for cleanup of their contamination. The Appellants have not

met their initial burden of proof by presentation of evidence that indicates otherwise. Argument is not evidence.

The Appellants lean most heavily on the idea that it is "impossible" for them to fulfill their environmental obligations because of alleged financial hardship and inability to access (or in one case, even find) the subject USTs. However, this argument is both faulty and irrelevant.

Courts have repeatedly ruled that even in cases of financial hardship, which are here unproven, parties responsible for cleanup of a site are still responsible for cleaning up their mess. Their reasoning is that the legal and policy concerns for public health and safety preclude the shedding of these responsibilities.

The Board has repeatedly ruled that the initial burden of proof that the WVDEP Order was improperly issued lies with the Appellants. Where the Appellants have failed to introduce evidence or offer testimony sufficient to satisfy this burden, the burden does not shift and the appeal fails at that point.

The Board would not, by affirmation of the WVDEP Order, seek to usurp either the authority or the duty of enforcement. An affirmation is simply a determination that WVDEP did not issue its order improperly.

For the reasons stated above, WVDEP therefore moves the Board for entry of an order denying the appeal with prejudice, striking it from the docket of the Board. WVDEP further moves for such relief as is deemed just and appropriate.

Respectfully Submitted,
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