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' REPLY TO "APPELLEE WVDEP'S RESPONSE TO APPELLANTS' PROPOSED FINAL ORDER"

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 this reply to *Appellee WVDEP's Response To Appellants' Proposed Final Order ("Appellee's Response").*

APPELLANTS' OBJECTION IS NOT TO THE STANDARD OF REVIEW, BUT TO THE PROCEDURE ADOPTED BY THE WEST VIRIGNIA ENVIRONMENTAL QUALITY BOARD FOR THIS APPEAL[1]

Contrary to the position taken by appellee Jeremy M. Bandy, Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection ("Appellee" or "DEP), in *Appellee's Response,* that the decision rendered by the Circuit Court of Kanawha County, West Virginia, in Wetzel County Solid Waste Authority v. Chief, Office of Waste Management, Division Of Environmental Protection, Civil Action No. 95-AA-3 (Circuit Court of

[1] This unnumbered argument is directed toward the unnumbered argument in *Appellee's Response.*

Kanawha County, West Virginia) (October 5, 1999) ("Wetzel County Solid Waste Authority"), established a standard of review for the West Virginia Environmental Quality Board ("Board"), Wetzel County Solid Waste Authority created a procedure and established certain burdens of proof which are contrary to the law. In taking said position, Appellee relies on this Board's procedural rule, W.Va. C.S.R § 46-4-6.8 ("CSR Rule"). However, the CSR Rule appears to have an internal conflict. It provides that the consideration of the agency action, 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")*, in this appeal, is *de novo*, which The Supreme Court of Appeals of West Virginia ("Supreme Court"), in the West Virginia Department of Environmental Protection v. Kingwood Coal Company, 200 W.Va. 734, 745, 490 S.E. 2d 823 (1997), clearly explained is not an appeal at all. Appellants object to the procedural order because, if this proceeding is not an appeal at all, which the Supreme Court has held it is not, then the review is the equivalent of an initial trial, and even lay people understand that the "charging" party goes first in a trial. In criminal cases, it is the prosecutor; in civil cases, it is the plaintiff; with respect to an agency order seeking to compel certain conduct or actions, it is the agency. The disconnect between the CSR Rule, with its own internal inconsistency of reciting that the proceeding to review an agency order is an appeal *de novo*, but then providing that the party being compelled to act must present its case first, violates the clear holding in Kingwood Coal Company that the review by this Board is not an appeal.

I. APPELLANTS ARE NOT SEEKING, AT THIS TIME, A REVIEW OF THE FEBRUARY 16, 2024 ORDER OF THIS BOARD IN THIS APPEAL

Appellants are not seeking, at this time, a review of this Board's *Bifurcated Hearing Order (Ownership Of Subject USTs) ("Board Order")* entered on February 16, 2024, with the exception

again of objecting to the procedure used in the Second Hearing.[2] This Board held in the *Board Order* that Appellants were the owners of the Removed USTs at issue in this appeal during the relevant time period. However, since the issue of liability was bifurcated from the ownership issue, and the *Board Order* addressed only the issue of ownership, the *Board Order* does not somehow result in a determination that all of the contamination came from the Removed USTs or, that simply because the Removed USTs at issue in this appeal were owned by Appellants at the time the leaks were detected, Appellants are responsible for all of the contamination at the sites where the Removed USTs were located.[3] To the extent, then, that the DEP's assertion in *Appellee's Response* that any objection in this portion of this appeal concerning liability, which includes the issue of whether Appellants are liable for all of the contamination at the sites of the Removed USTs, is somehow irrelevant, that assertion is totally unfounded. The *Board Order* may have determined ownership of the Removed USTs, but it did not determine liability which, without question, includes the issue regarding how much of the contamination at the sites of the Removed USTs is the responsibility of Appellants.

II. APPELLANTS CLEARLY MET ANY BURDEN OF PROOF APPLICABLE TO THEIR POSITION

Contrary to the DEP's assertion in *Appellee's Response*, Appellants met their proper burden of proof. First, although Appellants believe this Board's procedure is problematic, this

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[2]Since the *Board Order* is not a final order, this Board has the authority to revisit the owner/operator issue, even without request by Appellants. Nevertheless, Appellants are not raising that issue in connection with the Second Hearing.

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 ("USTs") referred to in the *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*.

[3] As even the DEP admitted at the Second Hearing, Appellants are responsible only for the extent of the contamination emanating from the Removed USTs. Oct 10 Trans. p. 184. The issue of liability, which plainly includes the extent of the contamination for which the DEP may impose liability, was expressly reserved for the Second Hearing.

Board adopted its procedure based on the holding in Wetzel County Solid Waste Authority, which also clearly held that, despite this procedure and the "shifting burden of proof," the DEP bears the ultimate burden of proving its case. What the DEP offered by way of evidence was directed at the orders and directives with which, it contends, Appellants did not comply. However, it did not address the evidence adduced at the Second Hearing by Appellants. A review of the evidence clearly demonstrates:

1. Appellants placed uncontroverted evidence in the record, documentary as well as testimony from Appellants' witness at the Second Hearing, that for many of the sites at issue in this appeal, contamination from other sources clearly occurred;[4] as the DEP admitted it had the authority to hold Appellants liable only for contamination from the Removed USTs, the DEP had the burden of proof, under Wetzel County Solid Waste Authority, to prove the amount of contamination that came from the Removed USTs, so that, if any order was entered by this Board compelling them to remediate, it would compel them to remediate only that contamination which emanated from the Removed USTs; because Wetzel County Solid Waste Authority unquestionably placed the burden of proof on the DEP to prove its case, and since the DEP can hold Appellants liable only for the contamination the Removed USTs caused, it is up to the DEP to prove exactly for what the Appellants are liable; See Part V of *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* ("*Appellants' Objections*"); Appellants' proposed *Final Order (No Liability For Contamination)* ("*Appellants' Final Order*"), Part III, Paragraph Nos. A 4-10; C 4-9; E 2-5; G 9-10; K 3-6; O 1-4; Q 1-6;

[4] Documentary evidence includes, but is not limited to, Appellants' Exhibit No. 38 at p. 1562, Exhibit No. 42, Exhibit No. 43A; Exhibit No. 67; Exhibit No. 65A; Exhibit No. 65B; Exhibit No. 68.

2. Appellants clearly demonstrated in *Appellants' Objections* that, under the law, neither the DEP nor this Board may apply W.Va. Code §§ 22-17-1 et seq. ("West Virginia Code Provisions") retroactively, nor may they apply the federal regulations found in 40 CFR Part 280, as revised in 1988 ("1988 Regulations"); moreover, the uncontroverted evidence in the DEP's own Certified Record clearly demonstrated that all of the Removed USTs were removed before the West Virginia Code Provisions became effective; since the DEP is authorized to compel remediation only by virtue of the West Virginia Code Provisions, there are no leaks which occurred once the DEP received its authorization under the West Virginia Code Provisions; were the DEP and this Board to compel Appellants to remediate for leaks which occurred prior to the DEP receiving this authorization, they would be applying the West Virginia Code Provisions retroactively, which the law does not authorize; Appellants met their burden of proving that there were no leaks which occurred on or after the time the DEP became authorized to compel remediation; and

3. Appellants met their burden of proof regarding, as explained in both *Appellants' Final Order* and *Appellants' Objections*, impossibility of remediating based both on lack of access to certain sites where some of the Removed USTs had been located and for lack of financial ability to fund any remediation with respect to all sites; it is unrefuted that Baker Oil is no longer an operating company, has no assets, and its authority to do business has been revoked by the West Virginia Secretary Of State; Baker, Inc. has a multi-million-dollar judgment against it with the sale of its real estate to raise funds made impossible by judgment liens recorded on said real estate; the multi-million dollar judgment continues to accrue interest; with the exception of Steve White's and Point C. Mart, neither Appellant has access to the site as they no longer own the site and/or

were denied access, and in the case of Young's, the site cannot even be found; Appellants met their burden of proof regarding impossibility based on both lack of access and financial inability.

III. THE LAW REQUIRES THAT THE DEP PROVE ITS CASE, WHICH INCLUDES PROVING WHAT CONTAMINATION, IF ANY, APPELLANTS ARE SUPPOSEDLY OBGLIGATED TO REMEDIATE

The DEP insists that the Wetzel County Solid Waste Authority is applicable to this appeal, but then misapplies it. Under Wetzel County Solid Waste Authority, it is only when an appellant makes its case that the DEP, as appellee, is then obligated to put on its case. At the Second Hearing, the DEP effectively admitted that Appellants sufficiently made their case because, except for W.J. Prince's site, it never moved to dismiss this appeal at the close of Appellants' case, nor at the close of the Second Hearing. It then became, under Wetzel County Solid Waste Authority, the burden of the DEP to meet the evidence adduced by Appellants. This the DEP did not do: it did not put on any evidence that the contamination from the other sources was not part of the contamination for which it seeks to hold Appellants liable, nor did it put on evidence demonstrating how much of the contamination came from the Removed USTs even though it is the party seeking relief as to the contamination from the Removed USTs (which is the extent of its authority over the leaks at the sites in issue in this appeal as specified in the *DEP Order)*. See W.Va. Code § 22-17-14(1) (authorizing the DEP to require corrective action by an owner/operator of a leaking UST only with respect to leaks "from said tank.") As outlined in *Appellants' Objections*, an agency is limited in its jurisdiction to that over which it is authorized to act. Here, the DEP is plainly authorized to compel remediation only with respect to the contamination emanating from the Removed USTs, which were the only USTs found by this Board to be owned by Appellants in the *Board Order*. It simply has no authority to compel Appellants to remediate any other contamination.

Also, the DEP also did not put on any evidence demonstrating that any leaks occurred once the West Virginia Code Provisions, from which provisions the DEP's authority here arises, became effective. In fact, the incontrovertible evidence is that there were no such leaks and there could be no such leaks because all the Removed USTs had been removed before the DEP was authorized – with a prospective authorization only – to act. In fact, it makes no difference who has the burden of proof on this issue, although the burden belongs to the DEP, because the indisputable evidence is that the DEP has no jurisdiction over any leaks from the Removed USTs since any such leaks occurred before the DEP acquired jurisdiction over USTs in general under the West Virginia Code Provisions.[5] In similar fashion, the DEP failed to put on any evidence, including any of the evidence the DEP posits that Appellants should have put on, to demonstrate the extent to which it has authority so any order of compliance which may issue properly covers only the extent of the contamination over which the DEP and this Board have jurisdiction.[6]

Finally, the DEP failed to put on any evidence that addressed the issues of impossibility. Its only response to these issues was that Appellants had only one witness, but the DEP also had only one witness. Moreover, the testimony of Appellants' witness was corroborated in many respects. There was email evidence of the refusal of the owner of the Coastal Buckhannon site to

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[5] The DEP's only basis for claiming it has no burden to prove the amount of contamination for which Appellants are liable comes from the "assumption" under the 1988 Regulations that all contamination is deemed from the owner's UST unless the owner proves otherwise. Even assuming for argument's sake that "assumption" has the impact the DEP argues it does, that "assumption" – stemming from the 1988 Regulations - has no application to any other issue in this appeal, including the extent of the DEP's, and this Board's, jurisdiction over leaks which occurred before the DEP was ever authorized to act under the West Virginia Code Provisions, the extent of the contamination after the DEP was authorized to act under the West Virginia Code Provisions, and the impossibility of performance because of lack of access and financial issues.

[6] The DEP suggests that Appellants rely on supposed records of contamination from other sources concerning each site. Presumably, the DEP is referring to supposed records kept by those in charge of these other sources, which as the evidence showed would include records supposedly kept by mom and pop gas stations in the 1930's through the 1970's, well before anyone in the industry even suspected such records could become important with respect to future regulation of USTs not even on the radar. Not surprisingly, Appellants have no knowledge of whether or not such records exist, let alone access to them. It is fair to say, then, that both parties have the same "access" to those records and so it would be no more "burdensome" to require the DEP to find those records to prove its position that all of the contamination came from the Removed USTs, as required under Wetzel County Solid Waste Authority.

grant access to that site.[7] There was documented evidence of past oil derricks clustered around another site. Documentation of the revocation of Baker Oil's authority to do business, as well as documentation of Baker, Inc.'s judgment debt and property liens, was placed in the record. This Board is encouraged by the Smith v. Slack, 125 W.Va. 812, 26 S.E.2d 387 (1945) and Hiett v. Shull, 36 W.Va. 563, 15 S.E. 146 (1892) decisions to use its common sense. It does not make sense that a business with a multi-million-dollar judgment debt against it that is accruing interest would fail to pay off that debt and so incur hundreds of thousands of dollars in interest which it also owes, unless it does not have the funds to do so. Appellants provided sufficient proof on these issues to base a finding of impossibility. Applying a regulation to compel the impossible "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).

IV. APPELLANTS PROVIDED SUFFICIENT EVIDENCE OF FINANCIAL IMPOSSIBILITY

As stated above, the DEP failed to put on any evidence that addressed the issues of impossibility. Appellants' witness, Michael C. Baker ("Mr. Baker"), testified, without equivocation, that Baker Oil's only asset had been a certain terminal and that was sold several years ago. Oct 10 Trans. p. 16. The DEP also attempts to convince this Board that the evidence Appellants presented with respect to Baker Oil is insufficient because Appellants' only evidence is Mr. Baker's testimony. Appellants would point out, then, that the same defect is present in all of the DEP's evidence because the DEP similarly offered only one witness, Ruth M. Porter, who did not even have first-hand knowledge of what she was testifying about. Mr. Baker clearly testified that Baker Oil has no assets and is no longer doing business, and, in fact, the public records unequivocally show its authority to do business has been revoked. The DEP says it's not enough

[7] See Oct 10 Trans. pp. 49-51, 86-17; Appellants' Exhibits 43B and 64.

to "plead poverty," they must "account for what they have." For Baker Oil, that is nothing, and evidence was clearly adduced on that point at the Second Hearing.

Significantly, the *DEP Order* was entered by lumping Baker Oil and Baker, Inc. together and referring to them jointly as "Baker." It then made "findings" with respect to "Baker" as owner/operator and issued an order to "Baker" with respect to compliance. However, the uncontroverted evidence is that no Removed UST was jointly owned by Baker Oil and Baker, Inc. Some were owned by Baker, Inc., and some came to be owned by Baker Oil. Since the Removed USTs were never jointly owned, the *DEP Order* is fatally flawed because it imposes joint liability. Plainly, since only an owner or operator of a UST can be compelled to remediate under the authority granted to the DEP by the West Virginia Code Provisions, it was incumbent upon the DEP to charge each Appellant only with respect to the USTs it owned. For the Baker Oil, it simply has no assets from which it could fund remedial work. And no longer authorized to do business, it also could not legally contract for any remedial work, assuming Baker Oil could even find an appropriate environmental engineering firm willing to do work for a company with no assets, no income, and no authorization to do business in the State of West Virginia. Common sense compels only one conclusion: This Board could no more enter an order compelling remediation by Baker Oil and expect compliance than it could ordering a deceased indigent individual to comply. Therefore, with respect to those sites where documents in the Certified Record show the USTs were owned by Baker Oil, namely Linger's, Paul's, Coastal Buckhannon, W.J. Princes', Samples', Coastal Hacker Valley, and Young's,[8] there is no question but that such an order would be attempting to compel the impossible. Accordingly, pursuant to Goff v. Goff, 177 W.Va. 742, 356

[8] See C.R. 00017-19; C.R. 00851-854, 00861-864; C.R. 01492-1494; C.R. 02300-2302; C.R. 02560-2562; C.R. 03041-3043; C.R. 03041-3043; C.R. 03982-3984, respectively.

S.E.2d 496 (1987), Straughan v. Hallwood, 30 W.Va. 274 (1887), and other authority cited in *Appellants' Objections*, this Board must decline to enter an impossible order regarding Baker Oil.

With respect to Baker, Inc., the DEP would have this Board believe that it will be able to engage and pay for remediation work simply because the obligation to remediate is not dischargeable under bankruptcy law. However, being non-dischargeable does not create funds. Appellants submitted documentary evidence of an unpaid judgment entered against Baker, Inc. on March 6, 2020, in the amount of $1,555,112.72, which carries an interest rate of 4.75% per year ("Judgment"), with the Judgment secured by certain Abstracts Of Judgment placed on Baker, Inc.'s real property in various counties in West Virginia. Appellants' Exhibit 76. None of these facts were controverted by the DEP. Once again, common sense dictates that a business with a two plus million dollar unpaid judgment debt against it, which has been unpaid for five years, and which accrued nearly a half a million dollars in interest, and which continues to accrue interest, would have paid off that debt if able to avoid incurring that half million dollars in interest. That such business has not paid off that debt leads to the entirely reasonable conclusion that such business does not have the ability to do so. And once again, that a claim is not dischargeable in bankruptcy does not create funds that are not there.

V. WITHOUT A RIGHT OF ACCESS, IT IS IMPOSSIBLE FOR EITHER APPELLANT TO REMEDIATE

The DEP attempts to denigrate Appellants' evidence by calling the documentary evidence on lack of access "one hear-say email and one hear-say letter." *Appellants' Response*, p. 7. However, Appellants' Exhibit 48 is a business record of a communication between a consultant and Mr. Baker. Thus, it is not "hear-say." Rule 803 of the West Virginia Rules of Evidence.[9]

[9] The email exchange was part of certain customary business activity. It was sent within days of the events it reports on. The custodian of the record, Mr. Baker, authenticated it at the Second Hearing. And the information was transmitted by someone with knowledge of its contents.

Similarly, Appellants' Exhibit 43B was authenticated by Mr. Baker as yet another business record and, in fact, memorializes a communication with the DEP. Furthermore, it was stipulated that neither Appellant ever owned certain of the sites where Removed USTs had been located, and that all of the USTs had been removed. Stipulations, Joint Exhibit 1, Parts E and F; thus, neither Appellant has any access as owners of the real property at those certain sites (because neither ever owned those sites), or through a right to claim access based upon ownership of USTs still located on the sites. With respect to the remaining sites, all of them except two are no longer owned by Baker, Inc.[10] See Oct 10 Trans. p. 86, Appellants' Exhibit 75; Oct 10 Trans. p. 98, Appellants' Exhibit 74; Oct 10 Trans. p. 102, Appellants' Exhibit 73; Stipulations, Joint Exhibit 1, Part E. Mr. Baker's testimony was corroborated by the public records.

This Board has held that "there is no statute that straightforwardly gives the WVDEP unilateral authority to force a third party [Baker, Inc.] to legally enter and perform remedial work on real property belonging to another [the new owners]." 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's Fischer Order*"), Attachment C to *Appellants' Objections*, p. 9.[11] In other words, this Board cannot order Baker, Inc. to trespass on the real property it does not own. No one would dispute that, without access, remediation work cannot be done by Baker, Inc. and any order by this Board requiring it with respect to any of the non-owned sites (Linger's, Paul's, Coastal Buckhannon, W.J. Prince's, Samples', Coastal Hacker Valley, Young's, C. Adam

[10] Baker Oil never owned the real property at any of the sites at issue in this appeal; Baker, Inc. at one time did own the real property for five of the sites at issue in this appeal, but it has sold all but two.

[11] See *Appellants' Objections*, Part VII, for a discussion of the *Board's Fischer Order*. This holding by this Board is applicable in all circumstances because this Board is acknowledging that it has no authority to compel an owner of a UST on non-owned property to legally enter, meaning this Board has no authority to compel a UST owner, who is not the owner of the real property, to take steps to gain access, particularly, but not solely, where it has been denied. As this Board also held, an owner of real property "controls access to" said property. *Board's Fischer Order*, ¶ 22.

Toney's, Clendenin, and Hamrick's), would be ordering the impossible.[12] As the authorities cited in *Appellants' Objections*, Part VIII, hold, tribunals cannot order the impossible, and would constitute an "arbitrary and oppressive [order] 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).[13]

VI. THE DEP MISUNDERSTANDS APPELLANTS' ARGUMENT REGARDING ACCESS WHERE USTs NO LONGER EXIST ON A SITE

Plainly, if one or the other of the Appellants still owned the real property at the sites where leaks from Removed USTs occurred, such Appellant would have access to those sites. In addition, it could be argued that, if USTs owned by an Appellant were still in place on a site where leaks had occurred, such Appellant might also have some sort of claim of right to access the USTs based upon some sort of legal principle like easement for purposes of maintaining said USTs. However, if USTs are no longer in place at a site, the latter possible basis for claiming access, based upon the right to access the USTs for such purposes as maintenance, no longer exists. Thus, Appellants' reference to the USTs no longer being present on various sites was to underscore that they had no claim to a right of access through ownership of the real property, nor through any right of access

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[12] The real property at the C. Adam Toney's, Clendenin, and Hamrick's sites had been owned by Baker, Inc., but the real property at these three sites is no longer owned by Baker, Inc. See Appellants' Exhibits 73, 74 and 75, respectively. The real property at the other listed sites was never owned by Baker, Inc. *Stipulations*, Part E, Feb 9 Trans. p. 8, Joint Exhibit 1.

[13] The DEP seems to think it has authority to compel Appellants to take extraordinary steps, apparently including repeated harassing actions directed to scary, highly unstable landowners, so unstable they commit suicide (Oct 10 Trans., pp. 14-145), or going to court to obtain an injunction (based upon what grounds has never been explained by the DEP), to obtain access, yet cites to no authority supporting such contention. It must be remembered that the statutory provision which authorizes the DEP to compel corrective action (W.Va. Code § 22-17-14(a)(1)), makes absolutely no mention of that authority to compel corrective action extending to third parties, even third party landowners, but specifically limits the authorization granted to the DEP to compelling corrective action against the owners/operators of any UST that leaks, and no one else. The DEP has contended throughout this appeal that ownership of the USTs and the land is often separate – and as W.Va. Code § 22-17-14(a)(1) makes clear - where there is such separation, the DEP has authority to compel corrective action over only the UST owner, and not the landowner. So with the DEP having no authority over landowners who are not UST owners, on what basis does it have authority to compel UST owners to demand, and seek, through harassment, access from such owners? "[A]n administrative agency [or board] can only exercise such powers as those granted by the legislature, and if such agency [or board] exceeds its statutory authority, its action may be nullified by" the Supreme Court. State ex rel. Mountaineer Park, Inc. v. Polan, 190 W.Va. 276, 280, 438 S.E.2d 308 (1993).

that might arise if they owned a UST on the site. The Stipulations, Joint Exhibit 1, remove any doubt that, for certain sites, there is no right of access based on ownership of the real property. The fact that the Removed USTs no longer exist on any of the sites removes any doubt that there is no claim to a right of access based on owning a fixture, such as a UST, that is on the real property.

In Part VI of *Appellee's Response*, the DEP claims that there is a "federally mandated duty" because the state adopted the 1988 Regulations. This is incorrect. As stated in *Appellants' Objections*, the incorporation of the 1988 Regulations into state regulations does not create a federal mandate. The federal government created a program under which a state could become the enforcing agency of federal standards if the state program met certain requirements; that program would then receive "federal assistance." W.Va. Code §22-17-2.[14] The DEP's authority to implement W.Va. Code §§ 22-17-1 et seq. comes only from the state statutory provisions, including W.Va. Code § 22-17-14(a)(1). The DEP's authority and jurisdiction must be measured by the West Virginia Code Provisions only; the 1988 Regulations may have been adopted as the standards to be applied to remediate, but it is state law which codifies against whom the DEP may

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[14] W.Va. Code § 22-17-2 provides, in pertinent part:

> 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.

(Emphasis added).

proceed.[15] Without jurisdiction over non-UST owner/landowners, there is no basis for concluding that the DEP has the authority to compel a UST owner to press a landowner for access.

VII. WHILE RELEASES WERE CONFIRMED AS HAVING OCCURRED AT THE SITES AT ISSUE IN THIS APPEAL, CONTENDING THAT THERE WAS A CONFIRMATION ON A CERTAIN DATE THAT A RELEASE OCCURRED IS NOT THE SAME THING AS CONTENDING THE DATE OF CONFIRMAION IS THE DATE THE RELEASE OCCURRED.

DEP's argument that "all confirmed" leaks took place after the enactment of the 1988 Regulations means the Appellants are liable for all of these "confirmed leaks." However, the DEP's argument is misplaced for at least three reasons.

First, Appellants are not arguing that there is no liability because all the USTs have been removed from the sites at issue in this appeal. Appellants have made it clear, supported by the evidence, that the Removed USTs leaked repeatedly over time. See Part I.B. in *Appellants' Objections* and footnote 8 therein. The DEP's own witness. Ms. Porter, testified that leaks can come from overfilling USTs, from spillage from delivery trucks during the filling process, and from leaking connecting pipes. Oct 10 Trans. p. 245. If this Board were to accept DEP's argument on this point, it would be accepting the absurd. For example, it would be absurd to conclude that there were no over-fills or no delivery spills or no leaking connection pipes or no leaks in the USTs themselves for the Clendenin site before December 22, 1988 (when the 1988 Regulations became effective) when the USTs had been in the ground for approximately 22 years before the effective date of the 1988 Regulations, and that, therefore, all of the leaks occurred in the three years between the effective date of the 1988 Regulations and 1991 when those USTs were removed. To

[15] Appellants would also note that nowhere in the 1988 Regulations is there any provision for proceeding against a landowner who is not the owner of a UST. As Ms. Porter repeatedly testified, the ownership of the land and the ownership of the USTs could rest in two different entities. In those cases, there is no West Virginia statutory or regulatory provision extending the DEP's authority to the landowner. However, since the only parties which are the subject of the *DEP Order* are the Appellants as the imputed owners of the Removed USTs, the issue of the extent, if any, of the DEP's authority over landowners who supposedly never owned the Removed USTs, is not an issue for this Board to consider.

accept this absurd conclusion would be more than just "suspending disbelief," it would require this Board to deliberately turn a blind eye to the clear evidence.

Second, the DEP cites to no document or other proof that the date a release is confirmed, which means only that a leak has been corroborated, is the date the leak occurred. Again, to accept that notion means turning a blind eye and accepting, again, that all the leaks at the Clendenin site occurred in a narrow three-year window for USTs that had been in the ground for over two decades. There is no evidence that all the leaks occurred after the 1988 Regulations became effective, and ample proof that such a conclusion would be completely erroneous.

Third, as Appellants discussed thoroughly in Parts I.A. and B. of *Appellants' Objections*, the operative provisions which authorize the DEP to act are the West Virginia Code Provisions, not the 1988 Regulations, and the West Virginia Code Provisions did not become effective until June 10, 1994, or after every single Removed UST at issue in this appeal was no longer in the ground. Therefore, no leaks could have occurred after the West Virginia Code Provisions became effective.[16] Therefore, even assuming the 1988 Regulations somehow "authorize" the DEP to order corrective action with respect to leaks which may have occurred after the effective date of the 1988 Regulations, the DEP could exercise jurisdiction only over whatever leaks, and resulting contamination, occurred after the 1988 Regulations became effective. It is the responsibility of the DEP to ensure it is properly exercising its statutorily granted jurisdiction. Therefore, it is the responsibility of the DEP to demonstrate the extent of the contamination over which it has that jurisdiction.

[16]Moreover, the 1988 Regulations did not become effective until the specified effective date of December 22, 1988, and, as with the West Virginia Code Provisions, they are not to be applied retroactively. Accordingly, the 1988 Regulations cannot be applied to any conduct or event occurring prior to December 22, 1998 amounting to a failure to prevent leaks from the Removed USTs or the events of the actual leaks themselves.

VIII. IF THIS BOARD WERE TO AFFIRM THE *DEP ORDER*, IT WOULD BE ORDERING RELIEF IT HAS NO JURISDICTION TO ORDER

The DEP's argument in Part VIII of the *Appellee's Response* is novel. The DEP argues that, because it is the DEP which orders corrective action, by affirming the *DEP Order,* this Board supposedly would not be entering an order outside its jurisdiction. However, the practical effect of such an order by this Board would be to order corrective action over leaks and contamination over which the West Virginia Legislature determined not to include in the leaks to be addressed by the West Virginia Code Provisions. At the very least, this Board would be endorsing the DEP's unauthorized conduct and such an order entered by the Board would be a clearly erroneous misapplication of the law because the *DEP Order* is not proper for the reasons relied on by Appellants in this appeal, as outlined in *Appellants' Proposed Final Order* and as discussed in *Appellants' Objections* and in this *Reply*.

IX. THE DEP FAILED TO ADDRESS BOTH THE ISSUE OF LACK OF RETROACTIVE APPLICATION OF THE WEST VIRGINIA CODE PROVISIONS AND THE 1988 REGULATIONS AND THE LACK OF SUBJECT MATTER JURISDICTION OVER LEAKS WHICH, WITHOUT QUESTION, OCCURRED BEFORE THE EFFECTIVE DATE OF THE WEST VIRGINIA CODE PROVISIONS

As discussed above and in *Appellants' Objections,* the DEP has no jurisdiction over events, such as leaks which may have occurred from the Removed USTs, or conduct, such as any failures to properly maintain USTs and prevent leaks, that occurred prior to the June 10, 1994 effective date of the West Virginia Code Provisions. The DEP simply was not authorized to enforce the West Virginia Code Provisions until then; West Virginia law clearly holds that where, as is the case with the West Virginia Code Provisions, a legislative enactment would impose penalties for conduct occurring prior to the effective date of such enactment if applied retroactively, such enactment will be applied prospectively only, unless there is a clear and explicit statement

authorizing retroactive application. There is no such clear and explicit statement in the West Virginia Code Provisions and, in fact, what is clearly provided is that the West Virginia Code Provisions were not to become effective until June 10, 1994. That the federal 1988 Regulations were in effect before then has no bearing because those federal regulations cannot, and did not, empower the DEP to act – they only served as the standards the DEP should apply.

The facts are uncontroverted, and what those facts establish is not just that all of the USTs at issue is this appeal were out of the ground by the effective date of the West Virginia Code Provisions, but also that, since all of those USTs were out of the ground before that effective date, it was impossible for any leaks to have occurred after the DEP was authorized to regulate those USTs. In other words, to enforce the West Virginia Code Provisions against Appellants would require retroactive application. With the complete absence of explicit authorization of such retroactive application, such retroactive application is prohibited.[17]

In the same vein, since the DEP has limited jurisdiction, and that being only over leaks which occurred after it was authorized by the West Virginia Code Provisions to regulate USTs and leaks therefrom, it is the responsibility of the DEP to ensure it is acting within the scope of its jurisdiction. This is a responsibility that cannot be shifted to UST owners and operators. Regardless of who bears the burden of proof, the DEP's own records in the Certified Record (see footnote 6 in *Appellants' Objections*), as well as Mr. Baker's testimony, unequivocally demonstrate that all the Removed UTS were removed before the effective date of the West Virginia

[17] The DEP never addressed its lack of jurisdiction over the leaks which it claims emanated from the Removed USTs in *Appellee's Response.* If the DEP were to submit an order, for example, to an appeal board for another state agency seeking to enforce certain mandates entrusted by the West Virginia Legislature to that other state agency and not to the DEP, without question that order would not be affirmed because the DEP would have no jurisdiction over, and no authority to enforce, those mandates. Similarly, this Board should not affirm the *DEP Order* because the DEP does not have jurisdiction or authority over the leaks at issue in this appeal. Without jurisdiction, the existence of which cannot be waived, any order entered by a court or tribunal that does not have it is void. State ex re. TermNet Merchant Services, Inc. v. Jordan, 217 W.Va. 696, 619 S.E.2d 209 (2005).

Code Provisions, such that all events – namely all leaks which may have occurred from those Removed USTs and the corresponding failure to prevent such leaks – occurred outside the scope of the DEP's jurisdiction and authorization. Therefore, the *DEP Order* is not legally sound and must be rejected by this Board.

X. CONCLUSION

For all of the reasons discussed above, as well as the reasons discussed in *Appellants' Objections* and the findings of fact and conclusions of law set forth in *Appellants' Final Order*, the *DEP Order* clearly should not be adopted by this Board, and this Board should adopt *Appellants' Final Order*.

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

Appellants,

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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 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 18th day of March, 2025, I served the forgoing *Appellants' Reply To "Appellee WVDEP's Response To Appellants' Proposed Final Order"* 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)