

**IN THE CIRCUIT COURT OF MONROE COUNTY, WEST VIRGINIA**

JILL FISCHER,

Petitioner,

V.

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

WEST VIRGINIA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,

Respondent.

**BRIEF OF PETITIONER JILL FISCHER**

On Appeal from the February 23, 2018  
Decision of the Environmental Quality Board in  
*RBS, Inc. and Jill Fischer v. DEP Division  
of Water and Waster Management,*  
DEP Case Nos. 17-01 and 17-02

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June 11, 2018

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## **BRIEF OF PETITIONER**

Pursuant to Rule 5, Rules of Procedure for Administrative Appeals, Petitioner Jill Fischer, by her counsel, William V. DePaulo, Esq., hereby files her Brief in the above-captioned matter.

### **I. JURISDICTION AND VENUE**

1. This Court's jurisdiction is founded upon, and venue properly lies in Monroe County under, W. Va. Code §29A-5-4(b), because the Petitioner resides there.

### **II. PARTIES**

2. Petitioner Jill Fischer is a resident of Monroe County.

3. Environmental Quality Board (EQB) is a component of the Respondent West Virginia Department of Environmental Protection (DEP), which is itself an agency of the State of West Virginia.

### **III. STATEMENT OF THE CASE**

4. 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. By order dated May 9, 2018, this Court extended until June 11, 2018 the time for filing this Brief under Rule 5(a) of the Rule of Procedure for Administrative Appeals.

5. The February 23, 2018 order of the EQB 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.

6. For the first time in the now four-year history of this matter, the February 23, 2018 order specified that RBS, Inc. contractor, CORE Environmental Solutions, could – despite Petitioner's objection – be accompanied onto Petitioner's property in the company of armed law enforcement personnel.

7. Petitioner Fischer's Petition for Review challenges the EQB order which requires her to either: (a) incur the cost of remediation of RBS, Inc.'s spill or, (b) impose the cost of remediation on RBS, Inc., but conditioning that remediation requirement on Jill Fischer allowing RBS, Inc.'s remediation personnel coming upon her property in the company of armed law enforcement personnel.

#### **IV. STATEMENT OF FACTS**

8. The material facts of this case are not in dispute. On October 13, 2014, 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.

9. On October 17, 2014, DEP conducted an inspection of Petitioner's property, and found that RBS, Inc. had caused an 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 settleable solids, suspended solids, scum, foam or oily slicks” in any of the waters of the State.

10. On October 27, 2014, RBS, Inc. removed the truck tractor and proposed to return to the property to remove the drum containing concrete by dragging it from Petitioner’s spring. Because RBS, Inc.’s proposed dragging of the concrete drum presented a risk of damage to the highly fragile karst of the area; Petitioner rejected that particular remedial action. Instead, Petitioner suggested that the drum be dismantled and the concrete inside broken up by hand and removed without risk to karst, a method actually employed a year later.

11. On October 29 and November 13, 2014, Petitioner hired Down Stream Strategies to conduct tests of the area on their property near the spill of gear oil from RBS, Inc.’s overturned vehicle. Laboratory tests confirmed contaminants, however, complete testing could not be conducted due to the continuing presence of the concrete drum. Returning to Petitioner’s property on November 19, 2014, DEP found that RBS, Inc. had failed to conduct adequate remediation, and issued RBS, Inc. a Notice of Violation (NOV) pursuant to 47 CSR 11, § 2.5a, WVDEP Order No. 653.

12. In the course of a follow-up inspection on April 2, 2015, the DEP found that RBS, Inc. had not at that time remediated the gear oil spill. Soil samples disclosed exceedances of established levels for Total Petroleum Hydrocarbons Diesel (TPH DRO) and Oil Range Organics (TPH ORO), and DEP issue NOV No. 1-15-32-04/02-MDP-1 to RBS, Inc.

13. On October 13, 2015 – one year after RBS, Inc.’s October 13, 2014 spill of gear oil onto Petitioner’s property and into her spring – ALL Construction, an agent of

RBS, Inc., returned to Petitioner's property and removed the drum, by hand, as Petitioner had requested twelve months previously.

14. March 2016 samples collection by CORE, conducted at the Petitioner's property in the same place tested by Down Stream Strategies on October 29 and November 13, 2014, found either "non-detect" or below benchmarks/standards; laboratory analysis revealed exceedance of TPH-ORO for Groundwater Protection levels.

15. Petitioner, RBS, Inc. and the DEP exchanged a number of proposals regarding a Right of Entry (ROE) agreement, pursuant to which RBS, Inc. contractors could implement a Corrective Action Plan proposed by CORE, RBS, Inc.'s agent, but had not agreed upon an ROE by January 2017.

16. 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.

17. At the May 11, 2017 hearing, RBS, Inc. and the Petitioner testified regarding the foregoing facts. The narrative of the factual events leading up to the spill were testified to by RBS, Inc.'s executive, but are depicted in the attachments to this Brief.

- Attachment #1 is a photograph of the rear of RBS, Inc.'s concrete truck taken immediately after overturned on Petitioner's property.
- Attachment #2 is a side photograph of the same vehicle coming to rest between the Petitioner's road and the springhouse that supplies drinking water to Petitioner.
- Attachment #3 is a picture of the spilled gear oil and resulting sheen on the water adjacent to Petitioner's springhouse.

- Attachment #4 depicts the overturned tractor and attached concrete drum from the Petitioner's road.
- Attachment #5 depicts RBS, Inc. personnel at the scene where the overturned vehicle came to rest.
- Attachment #6 depicts RBS, Inc. personnel with a bucket collecting oil from the rig.
- Attachment #7 depicts a bulldozer adjacent to the overturned truck in an effort to remove it from the bank below the road.
- Attachment #8 depicts the bulldozer dragging RBS, Inc.'s vehicle away from Petitioner's property.
- Attachment #9 depicts the concrete drum in the Fall of 2015 prior to removal in October 2015.
- Attachment #10 is a picture of plastic bags of spill-affected material, collected by Petitioner and her husband, from the spill site.
- Attachment #11 shows RBS, Inc. personnel loading the bagged material onto their truck for removal from the site.
- Attachment #12 depicts RBS, Inc. personnel commencing the disassembly of the concrete drum in the summer of 2015 prior to its removal that fall.
- Attachments #13 – 20 show the progressive disassembly by hand of the concrete drum over the summer and fall of 2015.
- Attachment #21 shows RBS, Inc. personnel removing the tarp following the removal of the concrete drum in October 2015.

18. At the May 11, 2017 hearing, the parties also testified regarding the difficulty that they had encountered in agreeing upon the terms of an ROE that would permit RBS, Inc. and its remediation agent onto Petitioner's property to remediate the spill. At no point in the May 11, 2017 hearing or prior thereto did any person state any

grounds warranting the presence of armed law enforcement personnel on Petitioner's property.

19. No one proposed the need for an armed remediation force and, consequently, no one accepted that as a part of any ROE. Predictably, Petitioner's suggested ROE, presented at the May 11, 2017 hearing and appended as **Attachment 22**, does not address the presence of an armed law enforcement person accompanying RBS and/or its remediation partner, CORE, prior to that time.

20. For the first time on June 14, 2017, CORE, RBS, Inc. designated remediation agent, proposed, as reflected in **Attachment 23**, that CORE be accompanied onto Petitioner's property by a "West Virginia Department of Natural Resources Police Officer" who would be armed.

21. Petitioner filed with the EQB her August 15, 2017 objection (**Attachment 24**) 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 (**Attachment 25**) signifying that they did not insist on the presence of armed law enforcement personnel.

22. 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).

23. 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 and bold added).

24. 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.

25. EQB further found, at least implicitly, that the requirement of an armed remediation force, objected to by Petitioner, was to them not “material:

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.

26. On March 26, 2018, Petitioner filed a timely Petition for Review.

## V. ARGUMENT

### **A. EQB's Coercion of Petitioner 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.**

27. EQB acknowledges that it has no legal authority to order the Petitioner to consent to CORE entering her property with armed law enforcement personnel; nonetheless they impose a totally unwarranted remediation burden on Petitioner as a means of forcing her to allow armed personnel on her property. Effectively EQB is holding a gun to Petitioner's head and advising her that her money or her signature will be on the CORE demanded ROE.

28. In *NFIB v. Sebelius*, 567 US 519, 132 S.Ct. 2566, 183 L.Ed 2d 450 (2012), the United States Supreme Court, albeit in a significantly different context, struck down an attempt by the Federal government to coerce acquiescence by the States in a significant expansion of Medicaid, by threatening to cut off all Federal subsidies then provided to the States for the existing Medicaid program.

29. Writing for the Court, Justice Scalia stated that:

[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." ... Otherwise the two-government

system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer. That insight has led this Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes.

132 Ct. 2602.

30. Justice Scalia continued with the observation that the Court did not attempt in a prior case to “fix the outermost line” where federal persuasion gave way to coercion of a state, but found “the financial “inducement” Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.” 132 S. Ct. 2604.

Continuing, Scalia noted that it is:

[E]nough for present purposes that wherever the line may be, this statute is within it.” *Ibid.* We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it. Congress may not simply “conscript state [agencies] into the national bureaucratic army.”

132 S.Ct. 2606-2607.

31. As in *Sebelius*, there are limits on what the State, acting through EQB and/or DEP, may do to force Petitioner Jill Fischer to surrender her right to property under the United States and West Virginia constitutions. The most patent limit is “just compensation” incident to a taking. This is not to allege that Petitioner, or any landowner, is immune to the limitations on the use of their private property implicit in the existence of common law nuisance actions. Nor does Petitioner contend that the mandates for environmental protection do not apply to private landowners like Petitioner. However, these generally applicable regulatory restraints do not warrant EQB’s action in this case.

32. EQB's February 23, 2018 order acknowledges "*there is no statute that straightforwardly give the WVDEP unilateral authority to legally enter and perform remedial work on real property belonging to another.*" February 23, 2018 order at p. 9. A single page further into its February 23, 2018 order, EQB asserts that: "*There is no express prohibition against this Board ordering two parties to comply with West Virginia law.*" February 23, 2018 order at p. 10.

33. In short, EQB recognizes its lack of express statutory authority over Petitioner's real property, while simultaneously assuming an inherent authority to coerce the same result. An absence of clear statutory authority cannot be cured by a rhetorical flourish asserting the absence of an express statutory prohibition. Here, EQB attempts to do indirectly by coercion what it cannot do directly, i.e., effectively intimidate Petitioner into surrendering her property rights as a means of avoiding financial liability under EQB's order for the remediation cost for a spill caused by another, RBS, Inc.

34. Nor is EQB's lack of authority to compromise Petitioner's property rights assisted by the February 23, 2018 order's lame attempt to recast responsibility for the October 2014 spill from RBS, Inc. to Petitioner, by a simple reference to her allowing RBS, Inc. onto her property, particularly where EQB, DEP and RBS, Inc. itself acknowledge that RBS, Inc. alone caused the spill.

35. The February 23, 2018's arbitrary reallocation of an unspecified portion of the blame for RBS, Inc.'s spill, is a transparent attempt to mustache its use of regulatory coercion of Petitioner's property rights, guaranteed by the Fifth Amendment

to the US Constitution, made applicable to the States by the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226 (1897).

36. To be sure, the EQB's and DEP's enabling statutes may not include an express prohibition, but the US and West Virginia Constitution's both do. It is known as the "takings" clause and prohibits government conscription of property without just compensation by providing, in language familiar to both professionals and lay persons, as follows:

No person shall be ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fifth Amendment, US Constitution.

37. Similarly, the West Virginia Constitution in Article III, provides that:

Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner as may be prescribed by general law: *Provided*, That when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

Article III, Clause 3-9. Private property, how taken.

38. Indeed, the limits of the takings clause is folded into the EQB/DEP enabling legislation at W. Va. Code § 22-11-17, where the legislature provides as follows:

(a) When any person who is owner of an establishment is ordered by the director to stop or prevent pollution or the violation of the rules of the board or director or to take

corrective or remedial action, compliance with which order will require the acquisition, construction or installation of a new treatment works or the extension or modification of or an addition to an existing treatment works, (which acquisition, construction, installation, extension, modification or addition of or to a treatment works pursuant to such order is referred to in this section as "such compliance") such person may exercise the power of eminent domain in the manner provided in chapter fifty-four of this code, to acquire such real property or interests in real property as may be determined by the director to be reasonably necessary for such compliance.

(b) Upon application by such person and after twenty days' written notice to all persons whose property may be affected, the director shall make and enter an order determining the specific real property or interests in real property, if any, which are reasonably necessary for such compliance. In any proceeding under this section, the person seeking to exercise the right of eminent domain herein conferred shall establish the need for the amount of land sought to be condemned and that such land is reasonably necessary for the most practical method for such compliance.

W. Va. Code §22-11-17. Power of eminent domain; procedures; legislative finding.

39. This otherwise broad eminent domain authority is of no utility to the EQB/DEP or RBS, Inc. in the present proceeding because of the express limits in subsection (c) which are triggered by the location of Petitioner's house within 500 feet of the area to be remediated:

(c) The right of eminent domain herein conferred does not apply to the taking of any dwelling house or for the taking of any land within five hundred feet of any such dwelling house.

W. Va. Code §22-11-17 (c)(emphasis added).

40. A taking need not be total or permanent to trigger the limitations of the "takings" clause; it is enough that it is a direct appropriation or physical invasion. See, e.g., United States v. Pewee Coal Co., 341 U. S. 114 (1951) (Government's seizure and operation of a coal mine to prevent a national strike of coal miners effected

a taking); *United States v. General Motors Corp.*, 323 U. S. 373 (1945) (Government's occupation of private warehouse effected a taking).

41. Nor is this an indirect “regulatory” taking as in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), the taking here occurs not directly by adjudication, not indirectly by regulation. More instructive, in light of the coercive character of EQB’s February 23, 2018 order here, is a pair of zoning cases, *Nollan v. California Coastal Comm’n*, 483 U. S. 825 (1987), and *Dolan v. City of Tigard*, 512 U. S. 374 (1994).

42. Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions — specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit. See *Dolan, supra*, at 379-380 (permit to expand a store and parking lot conditioned on the dedication of a portion of the relevant property for a “greenway,” including a bike/pedestrian path); *Nollan, supra*, at 828 (permit to build a larger residence on beachfront property conditioned on dedication of an easement allowing the public to traverse a strip of the property between the owner’s seawall and the mean high-tide line).

43. In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking. *Dolan, supra*, at 384; *Nollan, supra*, at 831-832. The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny.

44. The Court in *Nollan* answered in the affirmative, provided that the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit. 483 U. S., at 834-837. The Court further refined this requirement in *Dolan*, holding that an adjudicative exaction requiring dedication of private property must also be "rough[ly] proportiona[l]" . . . both in nature and extent to the impact of the proposed development." 512 U. S., at 391; see also *Del Monte Dunes, supra*, at 702 (emphasizing that we have not extended this standard "beyond the special context of [such] exactions").

45. But *Nollan* and *Dolan* both involved landowner dedications of property so onerous that, in the context where the government was capable of extracting a benefit in return, i.e., a contractual benefit of economic value. Absent that context, they would be deemed *per se* physical takings.

46. As the Court explained in *Dolan*, these cases involve a special application of the "doctrine of 'unconstitutional conditions,'" which provides that:

[T]he government may not require a person to give up a constitutional right — here the right to receive just compensation when property is taken for a public use — in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.

512 U. S., at 385 (emphasis added).

47. Here EQB is not offering to confer any benefit on Petitioner Jill Fischer. Instead, EQB while explicitly recognizing it has no authority to order Petitioner to allow a third party on her property, EQB simply does indirectly, by the exercise of adjudicatory muscle, what it obviously knows it has no authority to do. In plain English, EQB is requiring Petitioner "to give up a constitutional right" – here the right to control

access to her own property -- in exchange for nothing. Only if one considers the government's agreement not to impose liability on Petitioner for the regulatory infractions of another (RBS, Inc.), may the EQB order be deemed to convey a "benefit."

**B. EQB's and DEP's Enforcement Authority is Explicitly Confined to Imposition of Remedial Duties or Financial Penalties on Violators of DEP Regulations**

48. A discussion of the constitutional limits on takings by adjudication leads directly to the EQB/DEP enabling legislation at Title 22-11 of the West Virginia Code. Nothing in that title allows EQB/DEP to impose liability on anyone other than the person who commits a regulatory violation. Specifically, West Virginia Code §22-11-15, entitled "Orders of director to stop or prevent discharges or deposits or take remedial action; service of orders, provides in pertinent part that:

If the director, on the basis of investigations, inspections and inquiries, determines that any person who does not have a valid permit issued pursuant to the provisions of this article is causing the pollution of any of the waters of the state, or does on occasions cause pollution or is violating any rule or effluent limitation of the board or the director, he or she shall either make and enter an order directing such person to stop such pollution or the violation of the rule or effluent limitation of the board or director, or make and enter an order directing such person to take corrective or remedial action.

W. Va. Code §22-11-15 (emphasis added).

49. Title 47 CSR § 2.5 generally provides that:

It shall be the responsibility of any person who causes or contribute in any way to the spill or accidental discharge of any pollutant or pollutants into state waters to immediately take any and all measures necessary to contain such spill or discharge.

47 CSR § 2.5 (emphasis added).

50. Title 47 CSR § 2.5.a further provides that:

It shall further be the responsibility of **such person** to take any and all measures necessary to clean up, remove and otherwise render such spill or discharge harmless to the waters of the state.

47 CSR § 2.5a (emphasis added).

51. Nothing in this core enforcement authority authorizes the EQB or DEP to impose responsibility for remediation on an innocent third party, even if that third party's exercise of their constitutional right to private property operates as a practical impediment to remediation, by a third party seemingly paranoid about entering upon a private person's property without the benefit of firearms or armed federales.

52. Similarly, the authority of EQB and DEP to impose financial or equitable sanctions under W. Va. Code §22-11-22, entitled "Civil penalties and injunctive relief; administrative penalties," is confined to polluters, and does not authorize imposition of penalties on citizens who have the temerity of exercising their right to control their own property. W. Va. Code §22-11-22 (a) provides in pertinent part that:

Any person who violates any provision of any permit issued under or subject to the provisions of this article or article eleven-a of this chapter is subject to a civil penalty not to exceed \$25,000 per day of such violation and any person who violates any provision of this article or of any rule or who violates any standard or order promulgated or made and entered under the provisions of this article, article eleven-a of this chapter or article one, chapter twenty-two-b of this code is subject to a civil penalty not to exceed \$25,000 per day of such violation. Any such civil penalty may be imposed and collected only by a civil action instituted by the director in the circuit court of the county in which the violation occurred or is occurring or of the county in which the waters thereof are polluted as the result of such violation.

W. Va. Code §22-11-22 (a) (emphasis added).

53. It is no answer to the limits on enforcement authority outlined in Title 22-11 of the West Virginia Code to contend, as EQB does here, that it can coerce this Petitioner into surrendering her right to control access to her own property (something it concedes it can't do directly), by the simple expedient of imposing remedial liability on both the Petitioner and RBS, Inc.

54. EQB's gratuitous assertion that Petitioner bears some responsibility for the violation of DEP regulations by allowing RBS, Inc. onto her property is not supported by substantial evidence or analysis. It is a simple *ipsa dixit* and plainly insufficient to allow EQB to avoid its constitutional limits or expand its statutory authority, no matter how convenient it may be as a substitute for thought.

**C. 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.**

55. Civility precludes one from stating candidly in a legal brief Respondent's argument in the straight forward terms that one would ordinarily use in every day conversation. To put it just as politely as one can:

**JUST WHO IS CORE ENVIRONMENTAL?**

56. What basis do they have for insisting upon the presence of armed law enforcement personnel before they embark upon the remedial actions required by RBS, Inc.'s incompetent handling of a truck pulling a drum full of concrete. And even if they think Petitioner is a dangerous people, how does that empower them to set the terms for remediation in this case.

57. RBS, Inc. is the entity that caused the spill that generated the violation of DEP regulations, and RBS, Inc. is the party compelled by law to conduct remediation. If their current contractor is insecure coming onto Petitioner's property without an armed escort, RBS, Inc. is not thereby relieved of its sole and exclusive remedial obligations; they just need to find a new contractor.

58. The EQB decision attempting to compel Petitioner to waive her property rights or face financial liability for RBS, Inc.'s demonstrated incompetence is the model of arbitrary governmental action, protecting the constituent members of the industry it purports to regulate, at the expense of the citizens who pay their salary.

59. This Court should not hesitate to reject out of hand EQB's ham-handed effort to coerce a totally innocent citizen of this County by threatening Petitioner with financial liability for wrongs totally the fault of another. The EQB's February 23, 2018 decision is a model of arbitrary and capricious government action, illegal under W. Va. Code §29A-5-4 (g)(6).

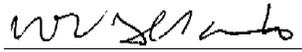
## **VI. CONCLUSION**

Petitioner respectfully requests that this Court vacate the EQB's February 23, 2018 order to the extent that it purports to impose any financial or other remedial obligation on Petitioner for the regulatory violations totally and exclusively attributable to RBS, Inc., and further respectfully requests that this Court remand the matter to the DEP with instructions to direct RBS, Inc. to take whatever steps are required to remediate its spill on Petitioner's property while respecting Petitioner's property rights.

Respectfully submitted,

**PETITIONER JILL FISCHER**

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**VII. CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Petitioner's Brief was, this 11<sup>th</sup> day of June, 2018, filed by the WV E-file system, and thereby served on the following:

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