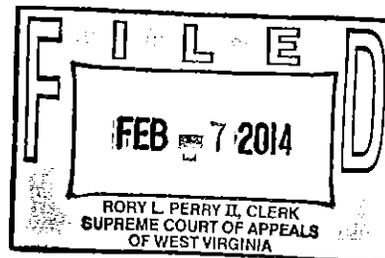


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Upon Original Jurisdiction

No. _____

STATE OF WEST VIRGINIA
ex rel. COVENANT HOUSE,
WEST VIRGINIA COALITION
AGAINST DOMESTIC VIOLENCE,
MONIQUE WATKINS, and
VIRGINIA GARDNER,



Petitioners,

v.

RANDY C. HUFFMAN, Secretary of the West Virginia
Department of Environmental Protection,
LETITIA TIERNEY, Commissioner of the Bureau for Public Health,
and KAREN L. BOWLING, Secretary of the West Virginia
Department of Health and Human Resources,

Respondents.

EMERGENCY PETITION FOR WRIT OF MANDAMUS

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PETITION FOR WRIT OF MANDAMUS

I. QUESTIONS PRESENTED

1. Is Respondent Bureau for Public Health (BPH)¹ violating its clear legal duty to protect West Virginia's drinking water by failing "to enforce legislative rules concerning . . . sources of water supply," W. Va. Code § 16-1-6(n); specifically, failing to require public water systems to have adequate emergency response plans and source water protection plans, as required by sections 16-1-1, -4, -6, and -9a of the West Virginia Code and accompanying legislative rules?
2. Is Respondent BPH violating its clear legal duty to protect West Virginia's public health from chemical exposure by failing to maintain and update a comprehensive hazardous materials list that includes materials that are frequently used in the State as well as emergency response procedures, as required by section 16-3A-2 of the West Virginia Code?
3. Is Respondent Department of Environmental Protection (DEP) violating its clear legal duty to protect public health and the environment by failing to require the prior submission of plans and inspection of facilities before authorizing facilities to engage in permitted activities as required by section 22-11-4, of the West Virginia Code?
4. Is Respondent DEP violating its clear legal duty to protect the public health and the environment by failing to disseminate information about the Elk River chemical spill pursuant to section 22-11-4 of the West Virginia Code and accompanying legislative rules?

¹ The Bureau of Public Health is a subdivision of the West Virginia Department of Health and Human Resources (DHHR). Petitioners have named Karen Bowling, Secretary of DHHR, as a Respondent to this petition in the event that BPH asserts that it is not responsible for some of the mandatory public health duties set forth herein.

5. Is Respondent DEP violating its clear legal duty by failing to protect and maintain the existing uses of the Elk River as required by section 47-2-4.1.a of the West Virginia Code of State Rules?

II. STATEMENT OF THE CASE

A. Summary

This suit is filed by Petitioners—low-income West Virginians and non-profit organizations that serve low-income West Virginians in crisis—to compel Respondents BPH and DEP to comply with their clear, mandatory duties under statute and legislative rule to protect the public health and water quality of West Virginians. Respondent BPH is tasked with ensuring safe drinking water, in part by ensuring adequate water system infrastructure and source water protection: “At a minimum inspectors *shall* evaluate . . . [t]he reliability of the system’s overall infrastructure, *including source water protection.*” W. Va. Code St. R. § 64-61-6.2.a (emphasis added). Indeed, in order to obtain a permit, a public water system must have a source water protection plan: “A source water protection plan shall be adopted by the public water system for the continued protection of the watershed from potential sources of contamination.” W. Va. Code St. R. § 64-77-5.2.

Respondent BPH is further required to compile and update annually a hazardous materials list and emergency response information for chemical contaminants present in West Virginia:

The director of the West Virginia department of health *shall* within one hundred eighty days of the passage of this article establish a list of hazardous materials, including their treatment and effect, which have been determined to be, or are suspected to be hazardous or toxic to human health.

W. Va. Code § 16-3A-2(a) (emphasis added). In updating and compiling the list of hazardous substances, BPH “shall give consideration to: (1) The materials’ frequency of use in the state, (2) the frequency of exposure or overexposure of persons in the state to the materials, (3) the seriousness of the effects of such exposure, or (4) such other reason as the director may determine to be sufficient.” Id. As set forth below, Respondent BPH is failing to comply with these clear, mandatory duties.

Respondent DEP has similar requirements. The agency is mandated by the Legislature to perform an enumerated list of specific mandatory duties. W. Va. Code § 22-11-4 (“In addition to all other powers and duties the director has and may exercise. . . the director has the following powers and authority *and shall perform the following duties.*” (emphasis added)). Among these is the duty to “require the prior submission of plans, specifications, and other data relative to, and to inspect the construction and operation of, any activity or activities in connection with the issuance and revocation of such permits as are required by this article” W. Va. Code § 22-11-4(a)(12). The agency is failing to meet this duty by allowing facilities like Freedom Industries to engage in permitted activities without the prior submission of plans, specifications and other data and without inspection. Respondent DEP has other mandatory duties under the statute including the duty to “collect and disseminate information relating to water pollution.” W. Va. Code § 22-11-4(a)(6). It is not meeting this duty because it has not kept the public adequately informed about the current state of remediation at the Freedom Industries facility and the water quality in the Elk River. Finally, DEP has not complied with its legislative mandate to maintain the uses of the Elk River as a public water supply, a warm water fishery, and a site for water recreation. W. Va. Code St. R. § 47-2-4.1.a (“Existing water uses and the level of water quality necessary to protect the existing use *shall* be maintained and protected.” (emphasis added)).

On January 9, 2014, as a direct result of Respondents' failures to meet their mandatory duties, approximately 10,000 gallons of a coal cleaning chemical mixture spilled into the Elk River, one and one-half miles upstream from the water utility intake for approximately 300,000 West Virginians in nine counties. Water customers were told that it was unsafe to use the water for any purpose other than flushing the toilet or putting out a fire; customers could not drink, wash laundry, bathe, or cook with the water. Businesses in the nine counties were ordered closed and could not reopen until obtaining approval from the Charleston-Kanawha Health Department. Low-wage workers were prevented from receiving tips or wages that they rely on to make ends meet. Schools were closed for six days, and low-income families were not able to receive the benefit of free or reduced-cost school lunch. Hospitals cancelled non-emergency procedures, including previously scheduled life-saving organ transplants and other surgeries.

Days after the water ban was lifted, pregnant women were advised that they should not be using the water. Thereafter, residents were warned that young children should also avoid the water. Public officials stated that, despite lifting the "do not use" order, residents should make their own choices about whether to use the water. Public officials acknowledged a lack of data or information about toxicity, mutagenic, or carcinogenic properties of the chemical that might stem from medium to long term use of the water. Even weeks after the spill, the public has not received any information about the safety of their water except unsupported and general statements about a one part-per-million (1 ppm) safe threshold. Many affected residents still feel unsafe drinking or cooking or bathing with their water and a survey of legislators revealed that none of the legislators who responded were drinking tap water in the affected area.

The chemical spill and its impacts were avoidable and should have come as no surprise to Respondents. Respondents had been advised on numerous occasions to take steps to prevent just

such a disaster, and they were aware of the risk to the water supply and other threats to the public health of residents near chemical facilities in West Virginia. However, despite their clear duty to act, Respondents chose to ignore clear recommendations and their own statutory and regulatory requirements to prevent the disaster. Further, in the wake of the spill, Respondents have failed to meaningfully and accurately disseminate information and otherwise study the impacts of the spill on public health and the environment. In order to prevent similar disasters in the near future, Respondents must be compelled to comply with their statutory duties to protect the lives, health, and livelihoods of West Virginians from chemical exposure.

B. Petitioners²

1. Covenant House

Petitioner Covenant House is a non-profit services and advocacy organization founded to help people with the fewest resources meet their basic needs for food, clothing, and shelter. Covenant House characterizes itself as a safety net, an advocate, and a safe haven in times of crisis for low-income individuals in the Kanawha Valley. Covenant House offers several direct services, including a drop-in center day shelter, which provides (among other services) free showers and laundry; a food pantry; housing assistance, including owning and operating housing; and nutritional and other support for HIV+ individuals. Covenant House's services were, and remain, severely impacted by the Elk River chemical spill. Despite its mission of providing assistance in times of crisis, Covenant House was unable to offer showers or laundry services for several days. Covenant House further was required to spend its limited resources on bottled water and to ask for additional donations from its supporters. Covenant House was

² As set forth in the attached verifications, Petitioners verify the information about themselves. Petitioners verify the remaining information in this Petition upon information and belief, in reliance on the source material cited and appended hereto.

required to flush its own water systems and the water systems in the buildings that it owns, where it houses low-income people with disabilities or who are HIV+. It is also concerned about the safety of those residents and its clients in other housing programs in which private landlords were required to flush the plumbing. Covenant House is further concerned about the ongoing impact of the water contamination on its clients, including pregnant women and young children. For instance, there is no information of the impact of chemical exposure on its clients suffering from HIV, who have compromised immune systems. Many of its clients suffer from mental health disabilities, which can be exacerbated by the stresses of the crisis. Covenant House continues to distribute water to its clients to use for drinking, cooking, and bathing small children, and joins this petition with the hope of ensuring that Respondents prevent future chemical exposure of low-income West Virginians, as required by law.

2. West Virginia Coalition Against Domestic Violence

Petitioner West Virginia Coalition Against Domestic Violence (CADV) is a non-profit statewide office working to end personal and institutional violence in the lives of women, children and men. CADV is a coalition of fourteen licensed domestic violence programs. CADV's services and the services of its members were significantly impacted by the chemical spill. In times of crisis, domestic violence rises. As the result, calls to the domestic violence hotline and people seeking shelter from domestic violence in the nine impacted counties increased after the spill. During this time of increased need, shelters were required to operate without running water and were unable to provide showers or other water-related services to their clients. Shelters were required to use their limited resources to obtain and supply bottled water to their clients. In addition, when the Charleston domestic violence shelter was instructed to flush its water system, the sewers backed up and contaminated water dripped into its storage

area, destroying its in-kind donations and supplies. In an attempt to salvage these supplies, shelter staff was exposed to contaminated water. Further, many victims of domestic violence are limited from accessing transportation, and in rural counties many could not obtain clean water from distribution sites as a result. Purchasing water has also created additional financial strain for lower income individuals, leading some victims of domestic violence back to their abusers. CADV is concerned about the impact of unsafe water because victims of domestic violence, who are struggling for safety in their own homes on a daily basis, are disproportionately impacted by unsafe infrastructure. CADV joins in the current petition in hopes of preventing future infrastructure crises that place victims of domestic violence at increased risk.

3. Monique Watkins

Petitioner Monique Watkins lives in North Charleston, West Virginia, with her husband and two sons. Monique Watkins spent several years of her childhood in Charleston and has lived in the Charleston for the past sixteen years. Ms. Watkins and her family regularly enjoy the Elk River, including by fishing in the Elk near Charleston and frequent visits to Coonskin Park, and she is concerned about its ecological health and well-being for their enjoyment, fishing, and as a source of their drinking and bathing water.

Ms. Watkins is the only wage-earner in her family and works as a teacher assistant at a day care in the Kanawha Valley. After the chemical spill, Ms. Watkins was not able to work while the day care facility was closed from the chemical spill, and as a result lost necessary income to support her family. Ms. Watkins's husband suffers from bipolar disorder and schizophrenia; the crisis has caused additional stress that makes it more difficult to manage his mental health. Ms. Watkins's younger son suffers from autism. Although Ms. Watkins has attempted to limit the impact of the crisis on her son's routine, her son has become extremely

afraid of the water after overhearing conversations and witnessing a fight in a grocery store over containers of bottled water. Ms. Watkins's son takes baths as a method of managing his autism and related stress, but he will not use the tap water. Ms. Watkins has attempted to obtain free water through distribution sites, but the lines are too long and upset her son. As a result, she has had to spend her family's limited resources to pay for cases of bottled water for her son's bathing and for the family's cooking and drinking. The crisis has put significant financial and emotional stress on Ms. Watkins's family. Ms. Watkins joins this petition in an effort to ensure that Respondents comply with their duties to prevent future, avoidable chemical exposure of herself, her family, and the children that she works with.

4. Virginia Gardner

Petitioner Virginia Gardner is a client of Petitioner Covenant House. Ms. Gardner receives services through the Housing First program, which provides housing and other assistance to people with disabilities who are at risk of chronic homelessness. Ms. Gardner lives on a small fixed income and resides in subsidized housing on the West Side of Charleston, West Virginia, with her two-year-old son. Ms. Gardner does not have a car or access to personal transportation. As a result, she has had significant difficulty obtaining water from distribution sites, which are largely located outside of walking distance. Ms. Gardner found one distribution site in walking distance days after the spill, but had trouble carrying enough water for her and her son while walking and pushing her son's stroller. When Ms. Gardner received the instruction to flush her system, she ran her taps as instructed, but the smell persisted. Ms. Gardner's landlord did not assist his tenants with flushing, and she is not aware of him flushing the hot water tanks for the building or taking any other protective measures. Ms. Gardner is frightened of the potential impact of the contaminated water on her young son, who she has taken to the hospital

for burns to his eyes as the result of exposure to the water. Ms. Gardner continues to use bottled water for drinking, cooking, and rinsing dishes. Ms. Gardner cannot afford to pay for bottled water and does not know what she will do when her current supply runs out, since the distribution site within walking distance of her apartment has now closed. Ms. Gardner joins in this petition in an effort to require Respondents to comply with their legal duties to protect the public health and the drinking water, in hopes that her son will be able to grow up in Charleston without additional chemical contamination.

C. Factual Background

1. The Chemical Spill & Response

At around 8:15 on the morning of January 9, 2014, DEP was alerted to a strong odor by residents of the area surrounding a chemical storage facility operated by Freedom Industries. (See App. 1, 95-97.) Tracing the odor, air-quality officials arrived at the facility around 11:10 a.m. After first being advised that there were no problems at the site, an employee advised the officials of a leak. (App. 1, 95-97.) After this notification, DEP located a four foot stream of chemical leaking out of a 30,000 gallon tank. (App. 3, 4-5.) The leaking chemical was ultimately identified as crude MCHM, or a substance including, in large part, 4-methylcyclohexanemethanol. Other chemicals included in this mix are 4-(methoxymethyl)cyclohexanemethanol; methyl 4-methylcyclohexanecarboxylate; dimethyl 1,4-cyclohexanedicarboxylate; methanol; and 1,4-cyclohexanedimethanol. (App. 6-34.) Eighteen days later, it was disclosed that approximately 10,000 gallons of crude MCHM had leaked into

the Elk River, although this figure remains unconfirmed by DEP.³ (App. 93-94.) Experts estimate that the leak must have continued for at least twenty hours unabated to release this amount of chemical. (App. 95-97.)

The site was operating under a general industrial stormwater permit issued by Respondent DEP, which allows inspections by DEP to ensure compliance.⁴ (See App. 98-141, 142-157.) Although the permit required the site to develop both a Stormwater Pollution Prevention Plan and a Groundwater Protection Plan, DEP never required submission or review of these documents. Requests to the agency have revealed that the only Stormwater Pollution Prevention Plan in existence was a draft from 2002 and that no Groundwater Protection Plan was developed. (App. 243-53, 254-75.) The Stormwater Protection Plan was not provided to the agency until after the spill and did not even list crude MCHM as being stored on site. (App. 243-53.)

After the spill, it was determined that the chemical mixture had leaked into the Elk River and contaminated the water supply through an intake for the water utility for nine counties, located approximately one and one half miles downstream from the leak. (App. 95.) Several hours passed before any serious response was put into action. (App. 171-83.) For example, the utility—West Virginia American Water Company (WVAWC)—assured area residents that there would be no problem with the water supply because their filters could handle the contamination. (See App. 96, 171-77.) No shelter in place was ever issued, despite a strong and pervasive odor

³ The day of the spill, residents were informed that approximately 2,000 to 5,000 gallons had been released. Thereafter, residents were informed that 7,500 gallons had been released. On January 27, it was reported that 10,000 gallons had been released. (Compare App. 3 with App. 93-94; see also App. 90-92.)

⁴ The permit is held by Etowah River Terminal which merged with Freedom Industries on December 31, 2013. See W. Va. Sec'y of State, Business Listing for Freedom Industries available at <http://apps.sos.wv.gov/business/corporations/organization.aspx?org=141397>.

in the Charleston metro-area. At no point did WVAWC close its intake from the Elk River or use a different water supply.⁵ (App. 167.)

At approximately 6:00 p.m. on January 9, Governor Tomblin advised West Virginians in five counties to not drink, wash, cook, bathe, or otherwise use the water except to flush toilets or put out fires. (App. 171-83.) This announcement was the first time residents were warned about potential hazards from the leak, despite that at this time the chemical had been leaking into the water for at least several hours and for perhaps as long as several days. (App. 171-77.) By 9:32 p.m. on January 9, a state of emergency was announced for approximately 300,000 people in nine West Virginia counties. (App. 184-91.) Restaurants, day care facilities, schools, hospitals, nursing homes, and other businesses with health permits were ordered to close until further notice. (App. 464-70.) Hospitals cancelled non-emergency procedures, including previously scheduled life-saving organ transplants and other surgeries. (App. 471-75.) On January 10, a federal emergency declaration was issued. (App. 192.) Residents who were exposed to the water before the do not use order was issued reported effects including vomiting, diarrhea, respiratory distress, and rashes, burns, and welts on their skin. (App. 58.)

On January 13, the do not use order began to be lifted for portions of the affected area, and residents were advised to flush their systems. (App. 184-91, 215.) In private communications with Respondents, the U.S. Agency for Toxic Substances and Disease Registry advised that residents should flush until no odor could be detected. (App. 193-97.) Nonetheless, Respondents instructed residents only to flush their taps for approximately twenty-five minutes. (App. 193-

⁵ WVAWC stated that it could not close the intake and protect its customers from the contaminated water, due to its infrastructure. However, other cities downriver, including Cincinnati and Louisville, closed their water intakes to prevent contamination of their cities' water supplies, apparently because their water systems had been developed with secondary intakes or other emergency back-up systems.

97.) After flushing, the water was designated to be safe for all purposes, despite reports of persistent odor. (App. 197.) However, on January 15 at 7:40 p.m.—a full two days after the do not use orders began to be lifted—Respondent BPH advised pregnant women that they should not drink the water. (App. 216.) Thereafter, some public health professionals—but not Respondents—advised the public that young children should not drink the water. (App. 198-99.) On January 17, the do not use order was lifted for all areas, except for pregnant residents. (App. 216, 184-91.)

Schools in many of the impacted areas remained closed for six days, and upon reopening, used only bottled water. Low-income students were deprived of free or reduced price meals. (App. 202-03.) Schools and businesses were only permitted to reopen after inspection by public health authorities; low-wage workers lost days of tips and wages, while small businesses lost income. (App. 204-05.) Parents who were able to work were unable to place their children in day care programs, which were closed as the result of the spill. (*Id.*) Residents (including state legislators)—skeptical of ever changing statements from public officials—continue not to use the water and to frequent only those restaurants and businesses that promise to use only bottled water, costing local businesses additional funds simply to retain their customer base. (App. 204-07.) Hospital visits rose after the do not use advisory was lifted,⁶ and public officials stated that residents should make their own decisions about whether to use the water, given the lack of information about the long-term impacts of the chemical. (App. 208, 477.) Low-income residents, despite fears of water safety, struggle to be able to afford bottled water for drinking and other needs.

⁶ As of Thursday, January 23, 533 West Virginians had been evaluated at hospitals for chemical spill related symptoms, and 27 patients were admitted. (App. 208-12.)

Nearly two weeks after the spill, on January 21, 2014, Freedom Industries disclosed that a second substance known as “PPH, stripped” was included in the spill. (App. 213.) As with crude MCHM, little information is known about this substance. (App. 214.) Despite this, officials made public announcements that residents should not be concerned, and the do not use order was not reinstated. (App. 214.) On January 29, 2014, Scott Simonton, an environmental engineer and member of the West Virginia Environmental Quality Board, testified that formaldehyde had been found in the water, as a byproduct of the crude MCHM breakdown. (App. 193-97.) Instead of calling for further study or investigation, state officials publicly chastised Dr. Simonton and urged residents simply to discount his research and trust that the water was safe. (Id.; App. 217.) However, Dr. Rahul Gupta of the Charleston-Kanawha County Health Department stated at public meetings that “we are the first humans being experimented on” by MCHM, that he was not drinking municipal water, and that residents should make their own decisions regarding the safety of the water. (App. 218.)

On January 30, 2014, there was another leak of crude MCHM at the Freedom site. Despite immediately learning of the leak, Respondent DEP did not advise the public until the next day, at which point DEP did not reveal how much of the chemical had leaked, although it did state that the spill reportedly did not reach the Elk River. (App. 220.) On January 31, 2014, officials revealed that tap water at three Kanawha County public schools remained contaminated with crude MCHM, despite the fact that children had been attending school for days prior to the testing results. (App. 221-22.) This number has continued to increase daily; by February 6, the number at least eleven schools were re-closed due to contaminated water. (See App. 492-93.)

Lack of information about the investigation and site remediation have left serious concerns and confusion about the continued threat posed by the Elk River chemical

contamination. DEP has not revealed to the public what actions it is taking at the site and what measures it has taken to assess water quality in the river. Media inquiries about the response have been ignored. (App. 485-86.) Requests for information about sampling locations have been rebuffed. (App. 481-84.)

2. Warning & Lack of Action

Although Respondents' responses to the spill indicated that it was a surprise to them, it should not have been. Indeed, as a lead investigator with the U.S. Chemical Safety Board stated, West Virginia has a "systemic problem" with chemical safety. (App. 223-24.)

a. 2002 Source Water Assessment Report & Recommendations—Ignored

In 2002, BPH conducted a Source Water Assessment Report (Report) of the Elk River water source. (App. 225-35.) The Report noted that the water supply was highly susceptible to contamination and identified the Freedom Industries site as a source of "large volumes of potential contaminants." (App. 225, 230.) The Report set forth that "the next step in source water protection planning is to prepare a [source water assessment] protection plan." (App. 232.) The protection plan would include a detailed risk assessment and development of protective strategies; the "establishment of an effective and efficient emergency response plan;" and the development of a contingency plan, alternative sources, and management planning. (App. 230, 231, 232.)

Although BPH recognized the serious risk of potential spills of contaminants into the source water, including from the Freedom Industries site, it did not take any further action as recommended by the Report, including determining the actual risk and consequences of a spill from the chemicals stored at the Freedom facility or other coordination with government agencies. (App. 239-42.) In addition, BPH has not updated the Source Water Assessment in over

a decade, despite that Respondent BPH is required to update assessments every five years. BPH, W. Va. Source Water Assessment & Protection Program 57 (Aug. 1, 1999), <http://www.wvdhhr.org/oehs/eed/swap/swapplan.asp>. Finally, BPH has not required WVAWC to provide a comprehensive and adequate source water protection plan, despite issuing multiple permits to the utility over the past decade. (See App. 239-42, 236-38.)

b. Kanawha Valley Chemical Casualties & 2011 Chemical Safety Board Report & Recommendations—Ignored

In 2008 a chemical explosion and fire at the Bayer CropSciences chemical plant in Institute, West Virginia, killed two workers and injured eight others. The explosion resulted in an investigation conducted by the U.S. Chemical Safety Board (CSB). (App. 276-77.) The CSB concluded that if the explosion had occurred slightly differently, the chemical methyl isocyanate (MIC) could have been released into the atmosphere of the Kanawha Valley, which could have proven deadly on a large scale. (*Id.*) Less than two years later, in January 2010, three serious leaks occurred at the Dupont chemical plant in Belle, West Virginia, one of which resulted in one worker's death. (278-80.)

In January 2011, the CSB issued recommendations, including that the West Virginia BPH and DEP implement a Hazardous Chemical Release Prevention Program pursuant to their existing authority under state law and regulations. (App. at 281-449.) The Hazardous Chemical Release Prevention Program would specifically require Respondents to: (1) define chemical facilities that would be covered by the Program, including hazards, risks, quantities, etc.; (2) ensure that all facilities implement (after approval) written safety plans, emergency response plans, and prevention systems; (3) conduct oversight, review, and periodic audits; (4) establish a fee structure to cover the costs of oversight and related services; (5) and ensure public

participation and transparency, including through public reporting. (*Id.* 404-06.) Later that year, the CSB reiterated this recommendation. (*See* App. 450-51.)⁷

In June 2011, faced with opposition from industry groups, the Secretary of DHHR reported that neither it, nor DEP, would follow the CSB recommendations. *Id.* The Chairman of the Chemical Safety Board recently confirmed that implementation of the CSB recommendations “would have prevented the accident we’re dealing with today.” (App. 457-58.)

c. Tier II Form on Freedom Industries Tank Farm—Ignored

In February 2013 (as it had for each year since 2007), Freedom Industries filed a Tier II form alerting the West Virginia Emergency Response Commission—which includes Respondents—that it was storing crude MCHM at its Elk River facility directly upstream from the WVAWC intake. *See* W. Va. Code § 15-5A-4; App. 494-512. Respondents—despite their responsibilities to ensure safe drinking water for West Virginians—took no action in response to the Tier II form. (App. 459-63.)

d. Preventing the Spill Was Within Respondents’ Ability, Authority, and Control

According to DEP Secretary Randy Huffman, “[t]his incident could have been prevented or minimized just with the regulations we have in place, but it just didn’t click in anyone’s mind that this was a concern.” (App 239-42.) As set forth below, Secretary Huffman was correct; Respondents simply chose to ignore their authority and clear, mandatory duties to prevent incidents such as the Elk River chemical spill. (App. 6-26.)

⁷ Chemical leaks have continued in the Kanawha Valley. For instance, in October 2013, a shelter-in-place was issued as the result of a chemical leak at the Clearon plant at South Charleston. (App. 452-56.)

III. SUMMARY OF THE ARGUMENT

Petitioners seek a writ of mandamus to compel Respondents to perform their clear mandatory duties to protect the public health of West Virginians by instituting appropriate and meaningful chemical contamination prevention measures and emergency response mechanisms. Specifically, as set forth below, Respondent BPH has violated its clear legal duties to (1) protect the drinking water of West Virginians, by failing to require public water systems to maintain source water protection plans and emergency response plans to protect source water and minimize hazards to the public drinking water supply; and (2) provide adequate information and emergency response planning for hazardous material exposure. Respondent DEP has similarly violated its clear legal duties to protect the waterways of West Virginia by failing (1) “to require the prior submission of plans, specifications, and other data relative to, and to inspect the operation of, any activity or activities in connection with the issuance and revocation of such permits as required [under chapter 22, article 11 of the West Virginia Code],” W. Va. Code § 22-11-4(a)(12); (2) to investigate and accurately inform the public about the spill, W. Va. Code § 22-11-4(a)(6); and (3) to protect and maintain existing uses of the Elk River, W. Va. Code St. R. § 47-2-4.1.a. Indeed, in the wake of the Elk River chemical spill, Respondents have admitted that the spill and its impacts should have been prevented under their existing regulatory and statutory duties.

The emergency need for this extraordinary writ has been made clear by the recent—preventable—chemical spill directly upriver of the water supply for approximately 300,000 West Virginians in nine counties and by the continuing confusion about the threat and extent of the spill. Despite several clear warnings that West Virginia residents in the Kanawha Valley were at imminent risk of toxic exposure, Respondents refused to take the actions necessary to protect the

public health and the environment as required by statute and regulation. Respondents refused to follow recommendations from their own internal offices as well as the U.S. Chemical Safety Board that would prevent mass chemical exposure. Moreover, Respondents failed to follow their own permitting processes, regulations, and statutes, which require Respondents to ensure that chemical spills are prevented, that hazards are understood, that facilities are inspected, and that appropriate emergency plans are in place.

Respondents' collective dereliction of their duties has led to the preventable current disaster and significantly undermined public confidence in the workings of our public health system. Respondents have, however, continued to take little or no remedial action and will not release the information they have to the public—just as was the case in response to past chemical spills and forewarnings of chemical contamination. As a result of Respondents' continued failures to comply with their duties, West Virginians remain confused about the current safety of the water and are at daily risk of future chemical exposure and other public health disasters. Mandamus is thus both necessary and appropriate.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners respectfully request that the Court enter an expedited briefing schedule for this Writ of Mandamus sufficient to permit the Court to reach a decision on this matter as quickly as possible. This petition raises clear violations of law that significantly impact the public health of all West Virginians. This petition involves no issues of fact.

West Virginians, including the most vulnerable citizens represented by Petitioners, face daily risk of chemical exposure as the direct result of Respondents' failure to comply with their statutory mandate to protect the public health and water of West Virginians. Petitioners further face continued uncertainty and anxiety related to actual risks of recent exposure and risks of

future exposure to hazardous materials manufactured and stored in West Virginia. Respondents' clear violations of law, combined with the extreme costs of inaction, warrant immediate relief. Further delay will result in continued public anxiety and uncertainty, and—whether this month or this year—additional preventable chemical disasters.

Pursuant to Rule 18(a) of the Rules of Appellate Procedure, oral argument is appropriate in this matter. Petitioners respectfully request Rule 19 oral argument, on the basis that this case involves “assignments of error in the application of settled law” and “an unsustainable exercise of discretion where the law governing that discretion is settled.” W. Va. R. App. P. 19(a)(1) & (2). Alternatively, oral argument under Rule 20 also is appropriate because this matter raises issues of fundamental public importance. W. Va. R. App. P. 20(a)(2). Petitioners respectfully request that oral argument be set as soon as practicable.

V. ARGUMENT

Petitioners bring this action seeking a Writ of Mandamus requiring Respondents to perform their nondiscretionary duties under West Virginia statute and regulation. “Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies.” State ex rel. W. Virginia Parkways Auth. v. Barr, 228 W. Va. 27, 31, 716 S.E.2d 689, 693 (2011).

Before this Court may properly issue a writ of mandamus three elements must coexist: (1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of the respondent to do the thing the petitioner seeks to compel; and (3) the absence of another adequate remedy at law.

Syl. Pt. 1, State ex rel. E. End Ass'n v. McCoy, 198 W. Va. 458, 481 S.E.2d 764 (1996) (quoting cases). As set forth herein, each of these three elements exists in this case.

A. Clear Legal Right to Relief Sought

Petitioners have a clear legal right to the relief sought. Petitioners are two non-profit organizations that serve low-income individuals in the Kanawha Valley and two low-income individuals who suffered the consequences of the chemical spill. Petitioners are concerned about the health and well-being of themselves, their families, and—for organizational Petitioners—their clients and staff. The organizational Petitioners were unable to provide the full range of essential services during the period of the water ban. Petitioners incurred increased costs associated with providing clean and acceptable drinking water. Petitioners further fear that another chemical spill could occur at any time, threatening the lives and well-being of themselves, their families, their clients, and their employees. Finally, Petitioners remain concerned about unknown or unpublicized effects of the Freedom Industries spill as a result of continued inaction by the Respondents. As such, Petitioners are members of the class that chapters 16 and 22 of the West Virginia Code are designed to protect. See W. Va. Code § 16-1-1 (establishing West Virginia’s public health system “to promote the physical and mental health of all of its citizens”); W. Va. Code § 22-11-2 (requiring DEP to “maintain reasonable standards of purity and quality of the water of the state consistent with . . . public health and public enjoyment thereof”).

B. Respondents Have Failed to Comply with Their Clear Legal Duties.

Respondents BPH/DHHR and DEP are the two primary public agencies charged with preventing chemical disasters and providing appropriate and necessary emergency responses in the case of such a disaster in West Virginia. While statute and regulation sets forth clear and straightforward requirements to fulfill these duties, Respondents have failed to follow the law, resulting in the current crisis and, inevitably, crises to come. As a result, and as set forth in more

detail below, mandamus is appropriate. See, e.g., State ex rel. E. End Ass'n v. McCoy, 198 W. Va. 458, 481 S.E.2d 764 (1996) (issuing mandamus against Respondents DEP and DHHR for failing to comply with the requirements of the West Virginia Medical Waste Act and the West Virginia Solid Waste Management Act and fulfill their duties to protect the public health); State ex rel. W. Va. Highlands Conservancy v. W. Va. Div. of Environ. Protection, 191 W. Va. 719, 447 S.E.2d 920 (1994) (issuing mandamus against Respondent DEP for failing to treat water pollutants); Reed v. Hansbarger, 173 W. Va. 258, 314 S.E.2d 616 (1984) (issuing mandamus against Respondent DHHR for failing to “enforce the licensing inspection, penalty, and other provisions governing the construction and operation of food service establishments”).

1. Respondent BPH Is Violating Its Clear Legal Duty to Protect the Health and Drinking Water of West Virginians.

West Virginia’s public health system was established “to promote the physical and mental health of all of its citizens.” W. Va. Code § 16-1-1. West Virginia specifically recognizes its duty “to assist in the provision of essential public health services . . . [to] encourage healthy people in healthy communities.” Id. To this end, Respondent BPH has the duty to “enforce all laws of this state concerning public health” and to “make inspections, conduct hearings, and to enforce the legislative rules concerning . . . industrial health hazards, the sanitary condition of streams, sources of water supply, sewerage facilities, and plumbing systems . . .” W. Va. Code § 16-1-6(b), (n); see also W. Va. Code St. R. § 64-77-5.2 (requiring source water protection plans); W. Va. Code § 16-3A-2 (requiring hazardous materials list and emergency planning); Reed v. Hansbarger, 173 W. Va. 258, 260, 314 S.E.2d 616, 618 (1984) (recognizing “nondiscretionary, mandatory” duty to enforce public health laws and regulations). Respondent may provide for “[f]ees for services provided by the Bureau for Public Health including, but not

limited to . . . environmental health service fees . . . and permit fees.” W. Va. Code § 16-1-4(b)(8). By failing to adequately protect the public drinking water supply and inform the public of and protect the public from potentially hazardous materials, as described in more detail below, Respondent has violated its mandatory duties as set forth in statute and regulation.

a. Respondent BPH Is Violating Its Mandatory Legal Duty to Require Public Water Systems to Maintain Source Water Protection Plans and Emergency Response Plans.

The Legislature has mandated that the Secretary of DHHR promulgate rules to ensure “the sanitary condition of streams or sources of water supply” and to ensure “[s]afe drinking water,” including setting “the maximum contaminant level to which all public water systems must conform in order to prevent adverse effects on the health of individuals and, if appropriate, treatment techniques that reduce the contaminant or contaminants to a level which will not adversely affect the health of the consumer.” W. Va. Code § 16-1-4(b)(1)(C), (3), (4); W. Va. Code St. R. § 64-77-1; W. Va. Code § 16-1-9a(b)(1) (using mandatory “shall”). The Legislature has further imposed the “duty” on the Commissioner of BPH to “collect data as may be required to foster knowledge on the citizenry’s health status” and “[t]o make inspections . . . and enforce the legislative rules concerning occupational and industrial health hazards, the sanitary condition of streams [and] sources of water supply.” W. Va. Code § 16-1-6(g), (n).

Legislative rules promulgated pursuant to the public health statute impose on BPH the mandatory, non-discretionary duty to ensure that public water systems maintain a source water protection plan: “[a] source water protection plan *shall* be adopted by the public water system for the continued protection of the watershed from potential sources of contamination.” W. Va. Code St. R. § 64-77-5.2 (emphasis added); see also W. Va. Code St. R. § 64-77-5.2.b (requiring a

sanitary survey and study including an assessment of “hazard to the supply by accidental spillage of materials that may be toxic, harmful or detrimental to treatment processes”). The legislative rules further impose the mandatory duty to inspect public water systems to ensure a reliable source water protection plan. See W. Va. Code St. R. § 64-61-6.2.a (“At a minimum, inspectors *shall* evaluate . . . [t]he reliability of the system’s overall infrastructure, including source water protection.” (emphasis added)). Any plan for public water system improvements must include information about potential sources of contamination (including chemical facilities) as well as a protection area and plan. W. Va. Code St. R. § 64-77-3.1, -3.2.i.1, -3.2.i.4, -3.2.i.5, -3.2.n, -3.3.b.7. Finally, Respondent BPH must ensure that water utilities have adequate emergency response plans. See W. Va. Code St. R. § 64-61-5.2.

BPH recognizes its clear legal duty as set forth by the Legislature and the legislative rules, admitting that it “is responsible for ensuring that source water assessments are completed for all of West Virginia’s public water systems.” BPH, “Fact Sheet: Source Water Assessment and Protection (SWAP) Program” (Mar. 19, 2008), available at <http://www.wvdhhr.org/oehs/eed/swap/swapfactsheet.pdf>. BPH explains, “The public water supply must have an emergency plan describing procedures to be followed to correct problems with the distribution system, wells, and source water.” BPH, “Step-by-Step Guide for Developing a Local Source Water Assessment and Protection Program,” Appx. E (June 2007) (emphasis added), available at http://www.wvdhhr.org/oehs/eed/swap/swap_ed/unit6/Program_Guide.pdf. The elements of an emergency plan include identifying threats, designating an emergency coordinator, identifying necessary resources to respond to potential threats, establishing procedures to shut down and isolate the contaminated area from the rest of the system, and so forth. Id. BPH specifically notes that chemical drums and storage pose a high risk

and that chemical spills leaking from storage tanks are a significant threat that should be planned for. Id. at Appx. C, E.

Since 2000, the Elk River West Virginia American Water facility has dramatically expanded its operations in southern West Virginia. (See App. 236-38.) Respondent BPH completed a Source Water Assessment Report in 2002 and stated that a protection plan was the next step. However, it has failed to require appropriate and necessary source water protection and emergency plans, despite the ongoing expansion of the public water system. That failure is a violation of Respondent's mandatory duty to protect the water supply by requiring that the water utility develop adequate source water protection plans to account for potential contaminants and develop appropriate emergency responses, including back-up water sources, in the permitting process. See W. Va. Code St. R. § 64-77-5.2; see also W. Va. Code St. R. § 64-77-5.2.b. Compliance with this duty would have prevented complete contamination of the water supply for 300,000 West Virginians. Respondent has further violated its mandatory duty to protect the public drinking water by refusing to implement the Chemical Safety Board's recommendations, as outlined above. Those recommendations, as related to Respondent's responsibility for the drinking water supply, simply fulfill Respondent's minimum mandatory duties pursuant to statute and regulation to inspect, review, create emergency plans, and establish a fee mechanism to protect source water and minimize hazards to the public drinking water supply. See W. Va. Code §§ 16-1-6(n), -4(b)(8).

Mandamus is thus appropriate to ensure that Respondent complies with its clear legal duty to protect the water supply and source water for West Virginians, which would be accomplished by requiring timely and updated source water protection and emergency response plans from water authorities (as required by legislative rule) and by implementing the CSB

recommendations, which would require similar emergency planning from businesses that store, manufacture, or work with potential contaminants to the water supply.

b. Respondent BPH Is Violating Its Duty to Provide Necessary Information About Hazardous Materials Present in West Virginia

In December 1984, there was a massive methyl isocyanate (MIC) leak from a Union Carbide (now Dow Chemical) plant in Bhopal, India. More than 500,000 people were exposed to the chemical and thousands died from exposure. MIC—which was stored and manufactured large quantities in West Virginia—had not be characterized as “hazardous” under federal or state law prior to the leak, and thus remained largely unregulated. During the 1985 West Virginia legislative session, in response to the Bhopal disaster and a chemical leak in Institute, West Virginia, that injured 135 people, the Legislature found:

[T]here is a lack of adequate information concerning hazardous materials, present in West Virginia, the immediate effects of exposure to such hazardous materials on human beings and the appropriate emergency medical treatment for exposure to hazardous materials. This lack of information increases the medical health risks of persons or communities who are exposed to hazardous materials. The prompt availability of this information would afford increased protection to persons and communities exposed to hazardous materials.

W. Va. Code § 16-3A-1(b). To remedy this problem, the Legislature required BPH to “provide a centralized repository of information on hazardous materials and to identify the chemical elements of such materials, the harmful effects of exposure to such materials and the proper recommended emergency medical treatment for exposure to such hazardous materials.” W. Va. Code § 16-3A-1(a).

Specifically, the Legislature directed: “The director of the West Virginia department of health *shall* within one hundred eighty days of the passage of this article *establish a list of hazardous materials, including their treatment and effect, which have been determined to be,*

or are suspected to be hazardous or toxic to human health.” W. Va. Code § 16-3A-2(a)
(emphasis added).

In determining what hazardous materials to place on the list, *the director shall* give consideration to: (1) The materials’ frequency of use in the state, (2) the frequency of exposure or overexposure of persons in the state to the materials, (3) the seriousness of the effects of such exposure, or (4) such other reason as the director may determine to be sufficient.

Id. (emphasis added). The list of hazardous substances shall be updated annually. Id. § 16-3A-2(d).

After the list of hazardous substances is compiled, BPH has a non-discretionary mandatory duty to determine the health effects of the materials and disseminate the information to the public:

The director of DEPARTMENT of health *shall*, within ninety days of the preparation of the list described above, *determine the immediate health effects of exposure to and the recommended emergency medical treatment of exposure to such hazardous materials and publish such information in a usable form for medical and emergency personnel.* The director shall also arrange that this information shall be immediately available to medical or emergency personnel at any time in the event of an accident.

W. Va. Code § 16-3A-2(b).

BPH does not currently maintain the hazardous materials list required by statute and rule. The undersigned has contacted the following offices of Respondent: Office of the Commissioner of Public Health, Office of Epidemiology and Prevention, and Office of Environmental Health Services, as well as conducted a thorough review of Respondent’s website. BPH employees, including the director of the office of epidemiology and prevention, are wholly unaware of the

hazardous materials list requirement.⁸ Maintenance of such a list and development of appropriate emergency response procedures was suggested by the Chemical Safety Board recommendations, further alerting Respondent to this duty.

BPH has violated and continues to violate its mandatory duty to maintain, review, and update of a hazardous materials list specific for West Virginia. An appropriately maintained list would necessarily include any items identified in Tier II reports, such as MCHM, as well as other items of particular concern to West Virginia, such as those stored near a public water intake.⁹ Respondent BPH is required to develop appropriate medical treatment information regarding all chemicals on the list. Such a list would assist the state in preventing and responding to chemical leaks such as the Freedom Industries leak in the Kanawha Valley. An ongoing feature of the disaster is the lack of meaningful information about the chemicals leaked, their impacts on public health, and the appropriate public health response. Respondent has provided inconsistent information, undermining public confidence and trust. Had Respondent simply implemented a Hazardous Chemical Release Prevention Program, as recommended by the CSB, it would have fulfilled its clear, mandatory duty under these provisions.

Because Respondent BPH has violated its duty to provide “adequate information concerning hazardous materials, present in West Virginia, the immediate effects of exposure to such hazardous materials on human beings and the appropriate emergency medical treatment for exposure to hazardous materials,” mandamus is required to ensure appropriate dissemination of

⁸ The Commissioner’s office referred the undersigned to the Office of Epidemiology and Prevention, which suggested the Office of Environmental Health Services, where one employee had not heard of such a list and transferred the call to another employee’s voicemail. That employee has, to date, not returned the call.

⁹ MCHM is also classified as hazardous by the U.S. Occupational Health and Safety Administration.

public health information about the Freedom Industries spill and to prevent future accidents of this magnitude or worse from occurring.

2. Respondent DEP Is Violating Its Clear Legal Duty to Protect Human Health and the Environment.

West Virginia's Water Pollution Control Act (WVWPCA) was established to "maintain reasonable standards of purity and quality of the water of the state consistent with 1) public health and public enjoyment thereof; [and,] 2) the propagation and protection of animal, bird, fish, aquatic and plant life." W. Va. Code § 22-11-2. Respondent DEP is tasked with the power and duty to "perform any and all acts necessary to carry out the purposes and requirements" of both the WVWPCA and the federal Clean Water Act. W. Va. Code § 22-11-4.

a. Respondent DEP Is Violating Its Duty To Require Submission of Necessary Information and to Conduct Inspections Prior to the Issuance of Permits.

The WVWPCA provides, "[i]n addition to all other powers and duties the director has and may exercise . . . the director has the following powers and authority and *shall* perform the following duties." W. Va. Code § 22-11-4(a) (emphasis added). What follows is a list of seventeen specifically enumerated powers and mandatory duties. *Id.* Among those is the specific duty: "to require the prior submission of plans, specification, and other data relative to, and to inspect the construction and operation of, any activity or activities in connection with the issuance and revocation of such permits as are required by this article." *Id.* § 22-11-4(a)(12) (emphasis added). "'Activity' or 'activities' means any activity or activities for which a permit is required" ¹⁰

¹⁰ The statute continues, "under section seven of this Article." The reference is a relic from the original numbering of the statute, when WV/NDPES permits were regulated pursuant to section 20-5A-7 of the West

Freedom Industries, like other similar entities, is required to hold a Water Pollution Control permit for its “activity” of discharging of stormwater into the Elk River. See 33 U.S.C. § 1311 (prohibiting discharge of any pollution by any person without a permit); W. Va. Code § 22-11-8. Pursuant to section 47-10-13.6 of the West Virginia Code of State Rules, DEP may promulgate a “general permit” for a specific class of facilities. Individual facilities must then apply for coverage under the general permit by submitting their own data and information to the agency along with a certification that they will comply with all of the conditions of the permit. When issuing a general permit and when authorizing individual activities pursuant to that permit, DEP has a non-discretionary duty under the statute to require the submission of plans, specifications, and data as well as perform inspections. Both events should occur at least once every five years. W. Va. Code St. R. § 47-10-3.5.a. Two such plans are required to authorize the discharge of stormwater from an industrial site: a Stormwater Pollution Prevention Plan (SWPP) and a Groundwater Protection Plan (GWPP). (App. 128-32.) Those plans are designed to prevent spills, like the one that occurred at Freedom Industries, or to minimize the effects of such spills. (See App. 98, 128-32.) The SWPP requires (1) a detailed description of pollutant sources at the facility; and (2) the development of stormwater management controls to minimize the risk of potential pollutants entering stormwater, including measures to prevent spills and respond to such spills. (App. 128-31.) The GWPP contains similar requirements for material inventory, spill prevention, and response planning. (App. 131-32.) DEP is violating its duty by initially permitting and subsequently renewing permits for “activities” at facilities like Freedom Industries without requiring the submission of adequate plans, specifications, and other data—

Virginia Code. NDPES permits are not regulated pursuant to section 22-11-8, and section 22-11-7 pertains to the cooperation of agencies and does not address permitting.

specifically without requiring the submission of a SWPP and GWPP; and without inspecting the facilities.

In the case of facilities like Freedom Industries, DEP has failed to enforce its non-discretionary duties because it authorizes permitted activities without the submission of the required plans by the regulated entity. Instead the agency simply accepts a company's assurance that its plans are up to date and maintained on site. (App. 126.) For example, when Freedom Industries applied for coverage under the general permit, it simply checked a box asserting that both the SWPP and GWPP were maintained at the facility. (App. 513-14.)¹¹ In fact, Freedom Industries did not possess a current or final SWPP and never developed a GWPP. In the aftermath of the spill, the only SWPP that has been produced by either Freedom Industries or DEP is a document from 2002, clearly labeled as a draft; this document is outdated and does not list MCHM as one of the chemicals stored on site. (App. 243-53, 254-75.) This document was not in DEP's possession prior to the spill. (App. 243-53.) After repeated requests, DEP has admitted that it does not have a GWPP. (*Id.*) The company has been unable to produce one. (*Id.*) DEP's compliance with its common-sense statutory duty to require the submission of those plans, before a company is allowed to engage in permitted activities, and before the permit is renewed, may have prevented the Freedom Industries spills and would likely prevent or minimize future disasters.

To compound the problem, DEP also regularly violates its non-discretionary duty to inspect sites like Freedom Industries in connection with its issuance and reissuance of permits, even though compliance with the statutory duty would only require such inspections once every

¹¹ On November 17, 2009, DEP granted coverage to Freedom Industries under the general permit WV011457 by authorizing its activity and issuing Permit Registration No. WVG610920 to the facility. (App. 142.)

five years. Records show that no inspection in connection with the company's Water Pollution Control Permit has occurred since at least 2003. (App. 487-91.) It is not improbable that an inspection in 2009, when DEP both promulgated general permit WV0111457 and issued permit registration number WVG610920, would have revealed the defects that led to the Freedom Industries spill.

Mandamus is appropriate to ensure that DEP enforces its own requirements that facilities posing risk to public water supplies develop water protection plans and comply with those plans, as enforced by regular inspections.¹² See, e.g., State ex rel. E. End Ass'n v. McCoy, 198 W. Va. 458, 481 S.E.2d 764 (1996) (issuing mandamus against Respondents for allowing construction and operation of facilities without complying with permitting requirements); Wetzel Co. Solid Waste Auth. v. The Public Serv. Comm'n of W. Va., 219 W. Va. 341, 633 S.E.2d 286 (2006) (issuing mandamus against the Public Service Commission for failing to enforce its own orders and requirements). The Court should order DEP to comply with its statutory duties and by requiring submission of necessary plans and performing inspections, both before facilities are allowed to engage in permitted activities and at the time of permit renewal.

b. Respondent DEP Is Violating Its Duty to Study and Investigate Water Pollution Problems and Disseminate that Information to the Public.

Another of DEP's enumerated statutory duties is to "collect and disseminate information relating to water pollution and the control and reduction thereof." W. Va. Code § 22-11-4(a)(8). The agency has violated this duty by failing to keep the public adequately informed about the risk that the Freedom Industries site may continue to pose to human health and the environment.

¹²A Hazardous Chemical Release Prevention Program, as recommended by the CSB, would have required similar planning mechanisms.

Since the spill there has been no effort by DEP to keep the public informed about the cleanup of the Freedom Industries site. Indeed, the agency has done quite the opposite by stonewalling journalists and by failing to disseminate information about groundwater and soil sampling. (App. 485-86.) Because of the lack of sampling and investigation and/or DEP's failure to disseminate this information to the public, citizens have little information about whether the spill site poses an ongoing threat to the Elk River and to the downstream drinking water intake, and cannot make reasoned decisions about the quality of the Elk as a drinking water source. Similarly DEP made no effort to inform the public about the ecological health of the Elk River. For example, DEP has not disseminated any information regarding the maximum chemical concentration levels reached in the river immediately after the spill or the concentrations of pollutants that may persist. This lack of information affects recreational users of the Elk and those who live nearby.

Mandamus is thus appropriate to ensure that DEP collects and disseminates information related to testing at the Freedom Industries site and in the Elk River.

c. Respondent DEP Is Violating Its Duty to Maintain and Protect Existing Uses of the Elk River.

Legislative rules impose the following duty on DEP: “[e]xisting uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” W. Va. Code St. R. § 47-2-4.1.a. An existing use is any use of the water that has been attained since November 28, 1975. *Id.* Prior to the spill, the Elk River was used as a public water supply, a location for water contact recreation (including fishing, boating, and swimming) and as a warm water fishery. Each of these uses is recognized as an official category under the regulations and must be protected. W. Va. Code St. R. §§ 47-2-6.2, -6.3.a, -6.4.

As observed above, DEP's failures to inspect facilities and require remediation and emergency plans has led to the disruption of uses of the Elk River for drinking water, contact recreation, and the maintenance of aquatic life. Indeed DEP's failures to carry out its basic duties associated with monitoring and creation of protection plans has led to its failure to carry out its core function: to protect and maintain the State's waters. The Elk River chemical spill demonstrates DEP's failure to carry out its fundamental, non-discretionary duty to protect and maintain existing uses of the State's waters. To remedy this failure and comply with its duties to protect water quality, DEP must assess the current state of the Elk River and the water therein to ensure that it is fit for use as a public drinking water supply, a warm water fishery, and water contact recreation. To do this, the agency must test to determine what levels of pollutants from the Freedom Industries spill remain in the water, and if necessary determine what concentrations of those chemicals are safe for each type of use. In the absence of known standards for pollutants such as MCHM, DEP should be compelled to follow the procedures set forth in section 47-2-9 of the West Virginia Code State Rules, which provides for the establishment of safe concentration values for materials discharged into waters of the State. Mandamus is necessary to ensure that Respondent DEP fulfills its mandatory duty to protect the State's waters by conducting appropriate testing of the Elk River and taking those remedial measures necessary to best protect water quality in the future.

C. Absence of Another Adequate Remedy at Law

As a final matter, the issuance of mandamus is appropriate in this case because no other adequate remedy is available. Respondents continue to violate clearly established laws by failing to ensure prevention of chemical spills, emergency planning, and information sharing, as required by statute. Mandamus is an appropriate remedy to compel "a State official to adjust

prospectively his or her conduct to bring it into compliance with any statutory or constitutional standard.” Syl. Pt. 2, Gribben v. Kirk, 195 W. Va. 488, 466 S.E.2d 147 (1995).

This Court has often entertained original mandamus petitions to address Respondents’ failures to comply with their clear legal duties. For example, this Court has issued mandamus against these same respondents for failing to enforce similar public health measures set forth in the West Virginia Medical Waste Act and the West Virginia Solid Waste Management Act. See State ex rel. E. End Ass’n v. McCoy, 198 W. Va. 458, 481 S.E.2d 764 (1996); see also State ex rel. W. Va. Highlands Conservancy v. W. Va. Div. of Environ. Protection, 191 W. Va. 719, 447 S.E.2d 920 (1994); Reed v. Hansbarger, 173 W. Va. 258, 314 S.E.2d 616 (1984). As this Court has previously explained, “the trend in this Court has been to enlarge the scope of mandamus, especially where there is an urgent question of public policy or where there is no reason for delaying adjudication of the issue by the highest court of the State.” Cooper v. Gwinn, 171 W. Va. 245, 257, 298 S.E.2d 781, 793 (1981). The current Petition—which presents an urgent question of public policy regarding Respondents’ failure to protect the public health and environment—is just such a situation. As a result, and because Petitioners have no other remedy available, mandamus is appropriate.

VI. CONCLUSION

For the reasons stated herein, Petitioners respectfully request relief through the issuance of a writ of mandamus. As set forth above, the Respondents’ failure to require appropriate protection planning in their permitting processes; failure to implement prevention and emergency response plans, such as those recommended by the CSB; and failure to adequately investigate

and inform the public about risks to public health and the environment violates West Virginia law. Accordingly, mandamus relief should be issued as follows:

MANDAMUS RELIEF

WHEREFORE, Petitioners respectfully request that this Court issue a rule in mandamus directing Respondents to show cause why:

1. Respondents DEP and BPH/DHHR should not be ordered to immediately implement a Hazardous Chemical Release Prevention Program as recommended by the Chemical Safety Board, to meet their duties to provide information, prevent, and respond to threats to public health caused by chemical leakage, including BPH/DHHR's duty to maintain a hazardous materials list and emergency response plans;
2. Respondent BPH/DHHR should not be ordered to immediately require that all permits for drinking water providers, including previously issued permits, include Source Water Protection Plans and Emergency Response Plans (including planning for alternative water sources in the event of contamination) and conduct inspections to ensure compliance with said Plans, to comply with its duties to prevent and respond to threats to public health caused by chemical leakage into the water supply;
3. Respondents BPH/DHHR and DEP should not be ordered to monitor the public health impacts of the chemical spill; conduct studies regarding the human and environmental impacts of the chemicals released from the Freedom Industries facility to establish thresholds of safety for human, animal, and aquatic life for any chemicals that were released or may remain present as the result of breakdown products from the release; monitor the levels of chemicals that were released in the spill in the impacted streams and rivers and the drinking water; and release all information and data regarding remediation of the Elk River and Freedom Industries site, all

to comply with their duties to ensure safe drinking water, the public health, and that the Elk River is fit for all existing uses.

4. Respondent DEP should not be ordered to require submission of relevant data, plans, and specifications, including Groundwater Protection Plans and Stormwater Pollution Prevention Plans, and to inspect facilities, both prior to its issuance of WV/NPDES permits or authorization to operate under WV/NPDES permits and at the time of permit renewal;

5. The Court should not order such other relief as the Court deems necessary and equitable, including reasonable attorneys' fees and costs in order to fulfill the referenced statutory mandates.

Petitioners,

**STATE OF WEST VIRGINIA
ex rel. COVENANT HOUSE,
WEST VIRGINIA COALITION
AGAINST DOMESTIC VIOLENCE,
MONIQUE WATKINS, and
VIRGINIA GARDNER,**

By counsel,



Jennifer S. Wagner (WVSB 10639)
Bren J. Pomponio (WVSB 7774)
Mountain State Justice, Inc.
1031 Quarrier Street, Suite 200
Charleston, West Virginia 25301
(304) 344-3144
(304) 344-3145 (fax)

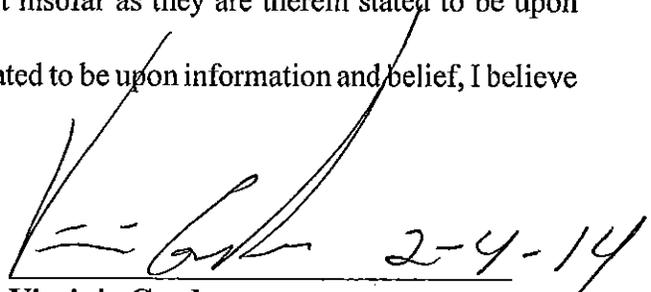
J. Michael Becher (WVSB 10588)
Joseph M. Lovett (WVSB 6929)
Appalachian Mountain Advocates
P.O. Box 507
Lewisburg, West Virginia 24901
(304) 382-4798

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

I, **Virginia Gardner**, after being first duly sworn, depose and say that the facts contained in the foregoing *Petition* are true, except insofar as they are therein stated to be upon information and belief, and that as they are therein stated to be upon information and belief, I believe them to be true.

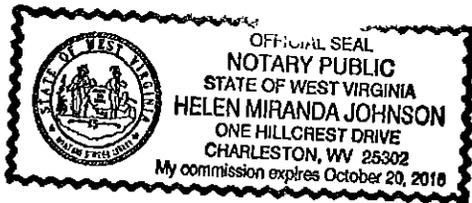

Virginia Gardner

Taken, subscribed and sworn to before me, the undersigned Notary Public, this 4th day of February, 2014.

My commission expires October 20, 2016.


NOTARY PUBLIC

NOTARY SEAL



VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

I, Ellen Allen, after being first duly sworn, depose and say that the facts contained in the foregoing *Petition* are true, except insofar as they are therein stated to be upon information and belief, and that as they are therein stated to be upon information and belief, I believe them to be true.



Ellen Allen

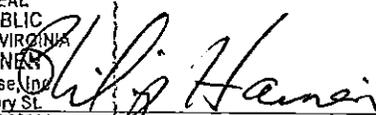
Taken, subscribed and sworn to before me, the undersigned Notary Public, this 4th day of February, 2014.

My commission expires

Feb. 7, 2017.



OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
PHILIP HAINES
Covenant House, Inc.
600 Shrewsbury St.
Charleston, WV 25304
My Commission Expires Feb. 7, 2017


NOTARY PUBLIC

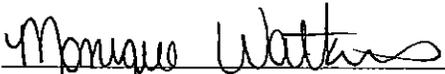
NOTARY SEAL

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

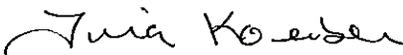
I, Monique Watkins, after being first duly sworn, depose and say that the facts contained in the foregoing *Petition* are true, except insofar as they are therein stated to be upon information and belief, and that as they are therein stated to be upon information and belief, I believe them to be true.



Monique Watkins

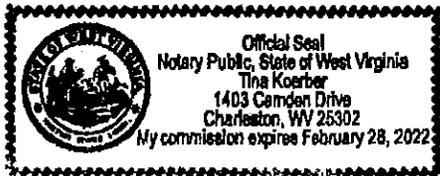
Taken, subscribed and sworn to before me, the undersigned Notary Public, this 4th day of February, 2014.

My commission expires February 28, 2022.



NOTARY PUBLIC

NOTARY SEAL



VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

I, Joyce Yedlosky and/or Tonia Thomas, after being first duly sworn, depose and say that the facts contained in the foregoing *Petition* are true, except insofar as they are therein stated to be upon information and belief, and that as they are therein stated to be upon information and belief, I believe them to be true.

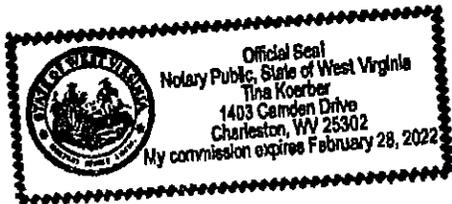

Joyce Yedlosky / Tonia Thomas

Taken, subscribed and sworn to before me, the undersigned Notary Public, this 5th day of February, 2014.

My commission expires February 28, 2022


NOTARY PUBLIC

NOTARY SEAL



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Upon Original Jurisdiction

No. _____

STATE OF WEST VIRGINIA
ex rel. COVENANT HOUSE,
WEST VIRGINIA COALITION
AGAINST DOMESTIC VIOLENCE,
MONIQUE WATKINS, and
VIRGINIA GARDNER,

Petitioners,

v.

RANDY C. HUFFMAN, Secretary of the West Virginia
Department of Environmental Protection,
LETITIA TIERNEY, Commissioner of the Bureau for Public Health,
and KAREN L. BOWLING, Secretary of the West Virginia
Department of Health and Human Resources,

Respondents.

CERTIFICATE OF SERVICE

I, Jennifer S. Wagner, counsel for the Petitioners, do hereby certify that I have served a true and exact copy of the foregoing *Emergency Petition for Writ of Mandamus* and corresponding *Appendix*, via hand delivery on this the 7th day of February, 2014, as follows:

Randy C. Huffman, Secretary
WV Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

Letitia Tierney, Commissioner
WV Bureau for Public Health, Room 702
350 Capitol Street
Charleston, WV 25301

Karen C. Bowling, Secretary
West Virginia Department of Health & Human Resources
One Davis Square, Suite 100 East
Charleston, WV 25301



Jennifer S. Wagner (WVSB 10639)