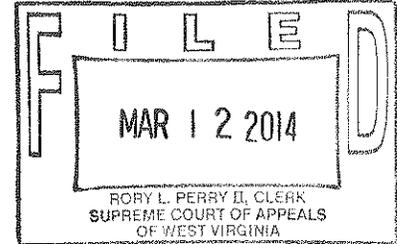


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

14-0112

STATE OF WEST VIRGINIA
ex rel. COVENANT HOUSE,
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.

RESPONDENT WVDEP'S RESPONSE TO
EMERGENCY PETITION FOR WRIT OF MANDAMUS

RANDY C. HUFFMAN, SECRETARY,
WEST VIRGINIA DEPARTMENT OF
ENVIRONMENTAL PROTECTION

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- State ex rel. W. Va. Parkways Auth. v. Barr*, 228 W. Va. 27, 716 S.E.2d 689 (2011) 4

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- W. Va. Code § 16-1, *et seq.* 9, 11
- W. Va. Code § 22-11-4(a)(6) 11
- W. Va. Code § 22-30, *et seq.* 9, 11, 13
- W. Va. Code § 22-31, *et seq.* 9, 11, 13

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioners,

v.

Case No.: 14-0112

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

Respondents.

**RESPONDENT WVDEP'S RESPONSE TO
EMERGENCY PETITION FOR WRIT OF MANDAMUS**

The respondent, Randy C. Huffman, Secretary of the West Virginia Department of Environmental Protection ("WVDEP"), by counsel, hereby responds to the Emergency Petition for Writ of Mandamus ("Petition") filed by the petitioners, Covenant House¹, West Virginia Coalition Against Domestic Violence, Monique Watkins, and Virginia Gardner (collectively, "Petitioners"). WVDEP so responds pursuant to W. Va. R. App. P. 16(g). In support of its response, WVDEP states as follows:

¹ By motion filed on February 11, 2014, petitioner West Virginia Coalition Against Domestic Violence has moved to withdraw as a petitioner in the above-styled matter.

STATEMENT OF THE CASE

The Petitioners state that there are no issues of fact in the above-styled matter. WVDEP takes issue with this statement and disputes the truth or materiality of numerous facts as characterized in the Petition.

The Petitioners allege that WVDEP neglected its statutory and regulatory duty prior to and in response to the January 9, 2014 leak and spill at a chemical storage facility operated by Freedom Industries, which incident is hereafter referred to as “the Freedom spill.” This allegation is unsupported by the facts of the case. At no time did WVDEP “simply [choose] to ignore” any duties ascribed to it by law.

The Petitioners allege that WVDEP should have exercised authority and performed duties which it is, at the time of filing of this response, only now in the process of being granted after lengthy, thorough consideration and debate by the West Virginia Legislature. In effect, the Petitioners fault WVDEP for not exercising powers which the Legislature has just spent weeks in study over giving to the agency.

Furthermore, the Petitioners provide no evidence or argument supporting the proposition that any lawful action within the regulatory framework provided to WVDEP could have prevented the Freedom spill from taking place. The Petition makes broad conclusory statements without any specific reference to any authority or duty vested in WVDEP which would have prevented the spill.

In any event, the Petition has been rendered entirely moot by legislative action. The Petitioners ask that mandamus relief compel WVDEP and the West Virginia Department of Health and Human Resources (“BPH/DHHR”) to perform duties to protect public health and safety by instituting “appropriate and meaningful chemical contamination prevention measures

and emergency response mechanisms.” This relief has already been granted². The Petition has therefore been rendered moot by the passage of Senate Bill 373 (“S.B. 373”), attached as an Appendix, which awaits only the expected gubernatorial signature to become law. A more proper remedy at law than mandamus clearly exists, and was pursued to the full satisfaction of the Petitioners’ requests and beyond, through the legislative process which vested new statutory authority and duties in WVDEP.

The Petitioners ask the Court to usurp that legislative role, adopt by fiat the non-binding recommendations of a non-authoritative body, and award relief which has already been awarded in its proper venue. There are no actions that WVDEP could lawfully take that would satisfy the Petitioners’ demands more completely than the West Virginia Legislature already has, and it is both improper and unnecessary to ask the Court to assume the responsibilities just exercised by the Legislature.

² The Petitioners’ second request for mandamus relief and Section 1 of its argument do not mention WVDEP and are accordingly not taken up in this response.

STANDARD FOR RELIEF

"Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies." *State ex rel. W. Va. Parkways Auth. v. Barr*, 228 W. Va. 27, 31, 716 S.E.2d 689, 693 (2011). Mandamus relief is not available where the issues have become moot. *Cantrell v. Bd. of Educ. of Lee Dist.*, 107 W. Va. 362, 148 S.E. 320, 321 (1929).

Before the Court may properly issue a writ of mandamus, the application of a three-pronged test is required: (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 remedy at law." Syl. Pt. 1, *State ex rel. East End Ass'n v. McCoy*, 198 W. Va. 458, 481 S.E.2d 764 (1996) (citations omitted).

REQUEST FOR ORAL ARGUMENT

Insofar as the Petition is not denied on the merits of the pleadings, WVDEP respectfully requests an opportunity for oral argument pursuant to Rule 20(a)(2) R.A.P. because the instant case involves issues of fundamental public importance.

FACTS

Notwithstanding the Petitioners' contention, there are issues of fact in the above-styled matter. WVDEP disputes the truth or materiality of numerous facts as characterized in the Petition.

The quote attributed to Secretary Huffman on page 16 of the Petition regarding WVDEP's exercise of its authority is provided completely without context, as it was in the source material, and no argument is advanced as to either the quote's materiality as a matter of law in the above-styled matter, or the conclusion that WVDEP "simply chose to ignore" its duties. WVDEP acted within the regulatory framework that existed at the time of the spill. It is noteworthy that the Legislature only days ago completed a long, torturous process of wrangling and public debate to grant WVDEP that authority, which is indicative of the gaps in the previous regulatory framework.

The Petitioners allege that some exercise of WVDEP's existing framework for groundwater and stormwater protection would have prevented the spill. There is no evidence suggesting that this is material or that any provisions of a groundwater or stormwater protection plan would have prevented the aboveground storage tank at issue from leaking. There is no authority suggesting that WVDEP was lawfully empowered or required to regulate such a tank in the manner requested by the Petitioners within the regulations available at the time of the spill. The Petitioners do not provide any support for this allegation.

The Petitioners allege that WVDEP has somehow been willfully evasive of its responsibility to keep the public informed of its findings and remediation measures. This is demonstrably false. Far from making "no effort" to keep the public informed, or "stonewalling" journalists, WVDEP has tirelessly provided information regarding the Freedom spill as such

information has become available, has openly and promptly complied with numerous requests under the Freedom of Information Act and for interviews, has voluntarily participated in extensive public briefings, and has been fully and publically involved in the legislative process. WVDEP takes its responsibilities to the public very seriously. No credible support whatsoever has been provided for any allegations to the contrary, which are misguided and false.

The Petitioners have mischaracterized, misunderstood, or neglected to support the version of the facts alleged by the Petition. However, these flaws in the Petitioners' allegations have been rendered moot by legislative action which grants the relief they request notwithstanding their representations as to the foregoing facts.

PETITIONERS' FIRST REQUEST FOR MANDAMUS RELIEF

The Petitioners' first request for mandamus relief asks the Court to order WVDEP and BPH/DHHR to implement a Hazardous Chemical Release Prevention Program as recommended by the United States Chemical Safety Board.

This request for relief has been wholly and emphatically rendered moot as to WVDEP by the passage by the West Virginia Legislature of S.B. 373, which establishes a comprehensive regulatory framework addressing the respective authority and duties of WVDEP and BPH/DHHR to regulate the facilities at issue in the above-styled matter. The legislative history and four corners of S.B. 373 reflect thoroughly considered, detailed, and multilateral concern. The new statutes are explicitly intended to address every possible aspect and contingency relating to the Freedom chemical spill and the prevention and remediation of any potential further incidents. The legislation clearly directs the newly created Public Water System Supply Study Commission, of which the Secretary of WVDEP is a member, to conduct a "review and consideration of the recommendations of the United States Chemical Safety and Hazard and Investigation Board after its investigation of the Bayer CropScience incident of 2008[.]" See new W. Va. Code § 22-31-12(a)(4).

This request, and the Petitioners' other requests as addressed below, ask that the Court substitute its own judgment for an act of the Legislature and formulate a complex regulatory scheme. Especially in light of recent legislative developments, this request is perverse.

Relevant changes and additions instituted by the passage of Senate Bill 373 are detailed below.

a. Authority and Duties Vested in BPH/DHHR

The new W. Va. Code § 16-1-1, *et seq.*³ vests BPH/DHHR with the authority and duties to regulate public water systems by establishing maximum contaminant levels; treatment techniques; protection and prevention provisions; minimum requirements for sampling and testing, system operation, transparency to the public, record keeping, variances and exemptions, access to bottled water, narrative parameters for the palatability of drinking water, and any other requirements at BPH/DHHR's discretion.

The new W. Va. Code § 16-1-1, *et seq.* further establishes BPH/DHHR's plenary right of entry to such facilities to conduct such evaluations and inspections as are necessary to safeguard the public health, and provides procedures regarding source water protection plans.

b. Authority and Duties Vested in WVDEP

As newly established by S.B. 373, the new W. Va. Code § 22-30 *et seq.* and § 22-31-1, *et seq.* expansively detail the authority and duties vested in WVDEP to regulate the facilities at issue in the above-styled matter.

Under the above-cited statutes, WVDEP has explicit and exhaustive authority and duties to:

- (1) perform detailed inventory and require registration of all existing and prospective aboveground storage tanks in the State, whether operational or not;
- (2) require submission of detailed data, plans, and records regarding all aspects of aboveground storage tanks, including adequate and binding assurances regarding financial responsibility and potential corrective action;
- (3) promulgate rules and develop a regulatory program to implement and ensure compliance with the above-cited statutes, including regulation of the permitting process, with provisions for mandatory and discretionary inspections, monitoring, testing, and certification;

³ Where this response refers to W. Va. Code § 16-1-1, *et seq.*, § 22-30-1, *et seq.*, and § 22-31-1, *et seq.*, it refers to those code provisions contained in Senate Bill 373 unless otherwise noted.

- (4) require public notice by operators and WVDEP of relevant data and notice regarding aboveground storage tanks to governmental agencies and to the public;
- (5) report annually, with recommendations, to the Joint Legislative Oversight Commission on State Water Resources;
- (6) require annual payment into the Aboveground Storage Tank Administrative Fund and the Protect Our Water Fund; and,
- (7) propose rules and enter into cooperative agreements with local, state, and federal agencies, and with private policy or research groups, to implement and ensure compliance with this Act.
- (8) provide a mechanism for appeals by parties aggrieved by any agency action or decision.

Because the authority and duties in the Petitioners' first request for relief are only now being granted, it follows that there was, at the time of the Freedom spill, no legal duty (or authority) on the part of WVDEP to act in the way the Petitioners demand. The second prong of the three-part test for the award of mandamus relief is not satisfied.

Finally, S.B. 373 vests WVDEP with the duties and full authority to ensure public health and safety above and beyond the recommendations of the Chemical Safety Board. The Petitioners' first request for mandamus relief is moot; the Petitioners have received the relief they seek, and more, by legislative act, a remedy other than mandamus which was available and exercised. The third prong of the three-part test for the award of mandamus relief is not satisfied.

PETITIONERS' THIRD REQUEST FOR MANDAMUS RELIEF

The Petitioners' third request for mandamus relief asks the Court to order WVDEP and BPH/DHHR to monitor and study the effects of the Freedom chemical spill. The request also asks the Court to order WVDEP and BPH/DHHR to release all remediation information and data, and to comply with duties to the public health and existing uses of the Elk River.

In support of their argument, the Petitioners assert that pursuant to W. Va. Code § 22-11-4(a)(6), WVDEP must "collect and disseminate information relating to water pollution and the control and reduction thereof." No evidence is cited that WVDEP has not complied with this duty; the Petitioners make a broad and inaccurate assertion that WVDEP has somehow refused to engage the public since the Freedom spill, an assertion which is entirely false.

This request for relief has also been rendered moot as to WVDEP by S.B. 373. The new W. Va. Code § 16-1-9e explicitly vests authority in duties in BPH/DHHR for long-term medical studies regarding the human health impacts of the Freedom chemical spill. Additionally, the new W. Va. Code § 16-1-1, *et seq.*, § 22-30-1, *et seq.*, and § 22-31-1, *et seq.* include extremely detailed provisions regarding every aspect necessary to monitor and ensure public health, safety, and use of the impacted waterways, and to prevent and remediate any further incidences of non-compliance.

Additionally, as noted above, the new W. Va. Code § 22-30 *et seq.* and § 22-31-1, *et seq.* provide for complete WVDEP and operator transparency as to all relevant data necessary to ensure public health and safety.

WVDEP has worked in good faith and with great effort to make the media and public aware of information regarding the Freedom spill as such information has become available. WVDEP has complied, as it always has, with requests made under the Freedom of Information

Act and continues to strive to connect with and inform the public about health, safety, and resource use issues. Allegations to the contrary are false, and as noted above, S.B. 373 codifies very specific duties of transparency in the future.

As above, neither the second nor third prong of the three-part test for mandamus relief can be satisfied here, as the clear legal duty to perform the requested act is only now being established, and the entire issue is rendered moot by alternative remedy.

PETITIONERS' FOURTH REQUEST FOR MANDAMUS RELIEF

The Petitioners' fourth request for mandamus relief asks the Court to order WVDEP to require submission of relevant data, plans, and specifications, including Groundwater Protection Plans and Stormwater Pollution Plans, and to inspect facilities prior to issuance and renewal of, and operation under, WV/NPDES permits.

This request for relief has also been rendered moot by S.B. 373. It is unclear how WVDEP could require or collect data, plans, or specifications in a more comprehensive or specific manner than that provided in the new W. Va. Code § 22-30-1, *et seq.* and § 22-31-1, *et seq.* In addition, the cited bills provide for WVDEP and operator transparency to the public of all such data, and for appeals by parties aggrieved by any agency action or decision.

As above, neither the second nor third prong of the three-part test for mandamus relief can be satisfied here, as the clear legal duty to perform the requested act is only now being established, and the entire issue is rendered moot by alternative remedy.

CONCLUSION

The Petitioners have presented flawed allegations regarding the facts and applicable law in the above-styled matter, faulting WVDEP for not exercising authority or performing duties it did not have at the time of the Freedom spill and is only now in the process of being granted. The contentious process of enacting S.B. 373 makes it obvious that the Legislature, in its final analysis, intends to vest WVDEP with authorities and duties which are requested by the Petition but which it did not possess at the time of the Freedom spill. The second prong of the three-part test for the award of mandamus relief is therefore not satisfied and the Petition must be denied.

The entire Petition as to WVDEP has been rendered moot by the passage of S.B. 373, which awaits only the expected gubernatorial signature to become law. Another remedy at law, the legislative process, obviously existed to address the Petitioners' grievances and was used. The third prong of the three-part test for the award of mandamus relief is therefore not satisfied and the Petition must be denied.

Every request for relief which implicates WVDEP is more than adequately addressed by the Bill, which was duly considered and passed in the appropriate venue, the West Virginia Legislature. It is unclear what action WVDEP could lawfully take that could more thoroughly satisfy the Petitioner's demands.

REQUEST FOR RELIEF

ACCORDINGLY, based on the foregoing arguments, WVDEP respectfully moves this Honorable Court to deny the Petition, to strike it from the docket of this Court, and to provide such other relief as is deemed just and appropriate.

Respectfully Submitted,
RANDY C. HUFFMAN, Secretary
WEST VIRGINIA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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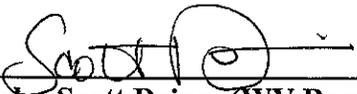
CERTIFICATE OF SERVICE

I, Charles Scott Driver, do hereby certify that service of the foregoing "Respondent WVDEP's Response to Emergency Petition for Writ of Mandamus" was served this 12th day of March, 2014, by first class mail, postage prepaid, on the following counsel of record:

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