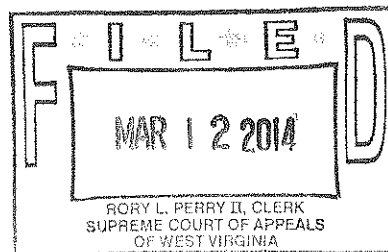


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

RESPONSE OF DHHR RESPONDENTS TO PETITION FOR WRIT OF MANDAMUS

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RESPONSE OF DHHR RESPONDENTS TO PETITION FOR WRIT OF MANDAMUS

This “emergency” mandamus action rests on Petitioners’ flawed understanding of the role the Department of Health and Human Resources (“DHHR”) and the Bureau for Public Health (“BPH”) play in ensuring West Virginia’s drinking water satisfies federal and state standards.¹ Petitioners claim the DHHR Respondents failed to prevent the 2014 Elk River chemical spill by “ignoring” existing regulations. In making this argument, Petitioners create a classic “straw man”: they attribute to the DHHR Respondents authority they do not have, and then chide them for not exercising that authority. Tellingly, after the Petition was filed, the Legislature passed a bill that, when signed into law by the Governor, will imbue the Respondents with the authority to do the things that Petitioners demand be done. The extraordinary relief of mandamus is inappropriate, and the “Emergency Petition” must be denied.²

¹ For ease of reference, the Department of Health and Human Resources and the Bureau for Public Health are referred to herein as the “DHHR Respondents.”

² This Response is filed under West Virginia Revised Rule of Appellate Procedure 16(g).

STATEMENT OF THE CASE

Petitioners assert that “[t]his Petition involves no issues of fact.” Pet. 18. That assertion is accurate to a degree. The basic facts underlying this mandamus action are well known and not disputed. As stated in the Petition, on January 9, 2014, a report of a chemical spill in the Elk River compelled the Governor of West Virginia to issue a “Do Not Use” order, instructing West Virginia American Water customers in 9 southern West Virginia counties that they should use their water only for flushing and emergency fire services. Aside from these basic facts, however, the DHHR Respondents contest Petitioners’ allegations of misfeasance by the DHHR Respondents.

I. The Petition Alleges Several Misleading “Facts.”

The DHHR Respondents deny that they failed in any respect to carry out their statutory or administrative duties, or that there was anything they could have done to prevent this unprecedented emergency. Two sections of Petitioners’ “Factual Background” are particularly misleading; neither is “relevant to the assignments of error.” Rev. R.A.P. 10(c)(4).

First, Petitioners blame the DHHR Respondents for “ignoring” recommendations from the Chemical Safety Board in 2011 regarding the potential prevention of future chemical incidents following the tragic 2008 chemical explosion in South Charleston. Petitioners cite a January 2014 newspaper article for the proposition that “the Secretary of DHHR reported that neither it, nor DEP, would follow the CSB recommendations.” Pet. 16. That article reports that the then-DHHR Secretary, Michael Lewis, stated to the CSB that his agency did not “have the expertise in-house to draft the appropriate legislation that would be needed to develop the type of program suggested in your report.” Pet’rs’ App. 451.

As the statement from former Secretary Lewis shows, the decision to implement the CSB recommendations was not solely within the DHHR Respondents’ discretion, as Petitioners

suggest, but would have instead required legislative action. In fact, following the CSB recommendation, DHHR continued efforts to implement the recommended chemical safety measures. For example, on April 12, 2013, an email from then-DHHR Secretary Rocco Fucillo recognized that DHHR and Respondent West Virginia Department of Environmental Protection (“DEP”) had engaged in “considerable discussion . . . about the logistics and feasibility of establishing such a program [as the CSB had recommended].” DHHR Resp’ts’ App. 61. Then-Secretary Fucillo explained that “[s]ince DHHR has neither the capacity, resources, nor expertise to undertake such a program, and because several other state, federal and local agencies are also recommended to take action (and in fact have some responsibility in this arena), we believe the appropriate course of action would be a legislative study on the need for a program of this nature.” *Id.* Attached to the email was a draft resolution that DHHR intended to introduce during the 2014 legislative session. It is thus a gross mischaracterization for Petitioners to suggest that the DHHR Respondents—professionals who diligently advocate for the health and well-being of West Virginians—would “ignore” any safety recommendation from federal regulators.

Second, Petitioners claim the DHHR Respondents also “ignored” Tier II forms that were filed by Freedom Industries from 2007 through 2013 with the state Division of Homeland Security and Emergency Management, a division of Respondent DEP. This too is misleading. The federal Community Right-to-Know Act requires that companies holding certain hazardous materials submit Tier II forms to state regulators. 42 U.S.C. § 116.³ Tier II forms identify the

³ The federal Emergency Planning and Community Right to Know Act was enacted in 1986. Under that federal law, entities that store hazardous materials—materials required by federal law to have a Material Safety Data Sheet (“MSDS”)—to submit a copy of the MSDS for hazardous materials to the State—here, the West Virginia Division of Homeland Security and Emergency Management.

company and any parent, and they must describe the chemical that is stored, how much of the chemical is stored, and how it is stored. See W. Va. Div. of Homeland Security & Emer. Mgmt., Tier II Reporting, <http://www.dhsem.wv.gov/SERC/Pages/TIERIIREPORTING.aspx> (last visited March 11, 2014). Crucially, however, Tier II forms are not submitted to either of the DHHR Respondents. Petitioners' allegation that the DHHR Respondents "took no action in response to the Tier II form" is thus baseless.

II. The DHHR Respondents Took Every Available Action to Protect West Virginians Following the Elk River Chemical Leak.

The DHHR Respondents carry a heavy mantle to ensure that West Virginia's drinking water meets scientifically appropriate standards. Their actions in the wake of the January 2014 chemical leak were no exception. Immediately after learning of the spill, the DHHR Respondents took all available steps to protect the community, including the following:

- immediately contacting local health departments, hospitals, schools, and long-term care facilities to quickly announce the discontinuation of all water use;
- spearheading plans to conduct health surveillance across the nine affected counties;
- collaborating with the West Virginia Poison Control Center to facilitate dissemination of information regarding the leaked chemicals to health care providers and the public;
- overseeing an interagency team to collect water samples throughout the affected system; and
- obtaining information from the federal Center for Disease Control to learn more about the leaked chemicals.

Written testimony of Dr. Letitia Tierney to U.S. House of Representatives Transp. & Infrastructure Comm., Feb. 10, 2014, *available at* <https://transportation.house.gov/calendar/eventsingle.aspx?EventID=368180> (last visited Mar. 11, 2014). Thereafter, the DHHR

Respondents continued to monitor the drinking water contamination, in addition to conducting community health assessments. *Id.* Those efforts continue today.

The claims against the DHHR Respondents are grounded in three legislative rules promulgated under the state's public health statute, West Virginia Code § 16-3A-1, *et seq.* A brief background of those rules is necessary to properly address those claims.

III. West Virginia's Water Quality Regulations Were Enacted Pursuant to the 1996 Amendments to the Federal Safe Drinking Water Act.

Federal law forms the genesis of West Virginia's current drinking water regulations. The Safe Drinking Water Act, Pub. L. 93-523; 88 Stat. 1660; 42 U.S.C. § 300f *et seq.* 1974-12-16 (the "SDWA"), was enacted in 1974 and set national standards for water quality. Although a number of federal rules and regulations were established in the ensuing years, the SDWA was amended in 1996 to further protect public drinking water. Among the 1996 amendments to the SDWA were requirements that each State develop and submit a Surface Water Assessment Plan to the United States Environmental Protection Agency; that public water systems annually issue Consumer Confidence Reports to their customers, *see, e.g.,* W. Va. Am. Water Co., 2012 Consumer Confidence Report, *available at* <http://www.amwater.com/customer-service/water-quality-reports.html> (last visited Mar. 11, 2014); and that States make publicly available Annual Compliance Reports, which show any violations of drinking water standards by public water systems, *see, e.g.,* W. Va. Dep't of Health & Human Res., Public Water Systems Compliance Reports, *available at* <http://www.wvdhhr.org/oehs/eed/c&e/reports.asp> (last visited Mar. 11, 2014).⁴

⁴ A public water system "is any water supply or system that regularly supplies or offers to supply water for human consumption through pipes or other constructed conveyances, if serving at least an average of twenty-five individuals per day for at least sixty days per year, or which has at least fifteen service connections[.]" W. Va. Code § 16-1-9a.

A. West Virginia Enacted a Regulatory Scheme in accordance with the Safe Drinking Water Act.

West Virginia dutifully followed this federal mandate and adopted the surface water assessment requirement. W. Va. Code §§ 16-13C-1 through -6. As the appropriate subject matter experts, the DHHR Respondents developed the State of West Virginia Source Water Assessment and Protection Program in August 1999. They subsequently conducted assessments of every public water supply in the State, which totaled nearly 1300 assessments. *See* W. Va. Dep't of Health & Human Res., Source Water Assessments Reports & Summaries, *available at* <http://www.wvdhhr.org/oehs/eed/swap/search.cfm> (last visited Mar. 11, 2014). Pertinent to this action, an assessment of the West Virginia American Water Company's ("WVAWC") Kanawha District was conducted in 2002. Pet'rs' App. 225-35 (the "2002 Assessment"). As Petitioners note, the site that eventually became the Freedom Industries facility (then called the "Pennzoil manufacturing plant") was recognized as a "potential significant contaminant source[]." Pet'rs' App. 230.

B. The DHHR Respondents Set Water Quality Standards for Finished Drinking Water and Ensure Those Standards Are Met.

The mission of the DHHR Respondents "is to have healthy West Virginians in healthy communities and to shape the environments within which they can be safe and healthy." Tierney testimony, *supra*. With regard to drinking water quality, the DHHR Respondents' scope of authority and responsibility are limited to regulating water system outtakes—in other words, the finished product. *See* W. Va. Code § 16-1-4(b)(4) (authorizing DHHR Secretary to implement rules establishing maximum contaminant levels, minimum requirements for sampling, testing, and system operations, and bottled water requirements); § 16-1-9a (same). The DHHR Respondents have enacted legislative rules that "establish[] State standards and procedures and adopt[] national drinking water standards for public water systems." W. Va. Code R. § 64-3-1.1.

Pertinent to this appeal, those rules address the design, construction, alteration, and renovation of public water systems, *id.* § 64-3-4 and § 64-77-1, *et seq.*, and the verification that all new community water systems and new non-transient non-community water systems demonstrate technical, managerial, and financial capacity to comply with national drinking water regulations, *id.* § 64-61-1, *et seq.*; *see also* § 64-3-4 (construction permits); § 64-15-4 (cross connections); § 64-15-5 (backflow prevention); §§ 64-4-1 to -11 (operator certification); § 64-3-13 (laboratory certification); § 64-19-6 (well-water drillers). Additionally, the DHHR Respondents' legislative rules incorporate several federal regulations concerning water contaminant limits. *Id.* § 64-3-10 (adopting 40 C.F.R. § 141, portions of 40 C.F.R. § 142, and 40 C.F.R. § 143).

Under these regulations, public water systems must submit to regular inspections by, and submit reports to, the DHHR Respondents. *See* W. Va. Code § 16-1-9a(c) ("Authorized representatives of the bureau have right of entry to any part of a public water system, whether or not the system is in violation of a legal requirement, for the purpose of inspecting, sampling or testing and shall be furnished records or information reasonably required for a complete inspection."). For example, water utilities that utilize surface water are subject to sanitary surveys by the DHHR Respondents every three years. W. Va. Code R. §§ 64-3-3.8, -6. These sanitary surveys assess eight specific categories, including the system's treatment of drinking water, the system's capacity, and potential contaminant sources. *See* DHHR Resp'ts' App. 1-56 (2013 Sanitary Survey of WVAWC's Kanawha District).⁵ Water systems must also perform "microbiological, turbidity, radiological, and chemical analyses" and submit that information to the DHHR Respondents in monthly operational reports. W. Va. Code R. §§ 64-3-9, -12.2. If

⁵ Portions of this Sanitary Survey are redacted for public safety reasons.

finished water is outside of established standards, the DHHR Respondents are authorized to impose fines for “willful violations.” W. Va. Code § 16-1-9a(2)-(3).

In addition to obtaining information through their limited statutory powers, the DHHR Respondents also obtain information from water systems through a voluntary disclosure process. For example, in 2006, WVAWC submitted information to the DHHR Respondents detailing their emergency response plans. W. Va. Am. Water Co. Emer.-Contingency & Land Mgmt. Plan, Aug. 10, 2006, *available at* <http://www.dhsem.wv.gov/Pages/WV-American-Water-Emergency.aspx> (last visited Mar. 11, 2014). WVAWC has also submitted responses to surveys from the DHHR Respondents regarding source water protection. *See* DHHR Resp’ts’ App. 57-60 (response from WVAWC to 2006 BPH source water questionnaire).⁶

Despite their ability to set requirements for finished water, however, the DHHR Respondents lack authority to regulate private property that is located upstream of a water intake. Even if the DHHR Respondents suspect that a potential contaminant is placed north of an intake, the DHHR Respondents have no authority to inquire of the property owner what the contaminant is or what it is used for, let alone to demand that it be inspected or moved. So even though the DHHR Respondents identified the Freedom Industries site as a potential source of contamination in 2002, their sole recourse was to notify the water utility of the risk, which they did in the 2002 Assessment.

IV. State Law Was Amended after the Petition Was Filed.

On February 7, 2014, Petitioners filed their Petition under this Court’s original jurisdiction. *See generally* Pet. Claiming that the Respondents have “ignored” their statutory

⁶ Citations to “DHHR Resp’ts’ App. ___” are to the appendix that the DHHR Respondents filed with this Response brief.

duties, Petitioners claim that this Court must order them to act.⁷ With regard to the DHHR Respondents, the Petition seeks an order compelling them to (1) “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 materials exposure.” Pet. 17.⁸ They contend that emergency relief is required because “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.” Pet. 18.

The law has changed since the Petition was filed. Since the January 2014 chemical leak, the West Virginia Legislature has endeavored to enact laws to prevent a similar disaster from occurring in the future. On March 8, 2014, the Legislature passed Senate Bill 373, which made a number of changes to the State’s drinking water laws in the Environmental Resources statute, Section 22 of the West Virginia Code. *See* S.B. 373, 81st Leg., 2nd Reg. Sess. (W. Va. 2014), *available at* http://www.legis.state.wv.us/Bill_Status/Bills_history.cfm?input=373&year=2014&sessiontype=RS&btype=bill (last visited Mar. 11, 2014). Under this legislation, Respondent DEP will have the exclusive authority to regulate chemical storage in the State. In pertinent part, S.B. 373 proposes a new Code section, § 22-30-24, entitled “Source Water Protection.” This section will require water systems to create source water protection plans, submit them to the

⁷ West Virginia Coalition Against Domestic Violence was initially named as a Petitioner but withdrew as a party on February 14, 2014.

⁸ On February 17, 2014, this Court entered a Scheduling Order requiring the Respondents to file a response or summary response by March 5, 2014. Feb. 17, 2014 Modified Sch. Order. On February 27, this Court granted a request for an extension of time by the DHHR Respondents, moving the response due date to March 12, 2014.

DHHR Respondents for approval by July 1, 2015, and then revise them every three years. *Id.* (to be codified at W. Va. Code § 22-30-24(f)). The plans will be required to include the following:

- (1) A contingency plan that documents each public water system's planned response to contamination of the source water supply;
- (2) Alternative water source or intake, with particular emphasis on single-source intake systems, focusing on source replacement should the system be required to use a new or alternate source of water due to contamination;
- (3) A management plan that identifies specific activities that will be pursued by the system to protect its source water supply from contamination, including coordination with government agencies and periodic surveys of the system; and
- (4) A communications plan that documents the manner in which the public shall be notified of information related to any contamination of the source water supply.

Id. (to be codified at § 22-30-24(b)). The Governor has 15 days from the passage of the bill, until March 23, 2014, to sign S.B. 373 into law or veto it.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The claims against the DHHR Respondents are moot, improper and without merit. The Petition can be decided upon the written submissions of the parties. If, however, this Court decides that oral argument is necessary, the DHHR Respondents request that oral argument be scheduled under Rule 20 of the West Virginia Revised Rules of Appellate Procedure because the Petition involves an important issue of public interest and because granting the Petition would require an unprecedented expansion of this Court's mandamus authority.

SUMMARY OF ARGUMENT

Petitioners argue that the DHHR Respondents must be compelled to do two things: (1) require all public water systems to maintain a source water protection plan and an emergency response plan; and (2) create and maintain a repository of information concerning hazardous materials. Not only would granting these requests require this Court to disregard recent legislative action concerning an issue of critical public concern, but it would also require this Court to cast aside the reasoned expertise of the DHHR Respondents in the exercise of their official duties. This request for drastic judicial interference must be rejected.

First, the Petition is moot. The recent change to West Virginia law's regarding drinking water regulation has obviated Petitioners' request for court action. Unlike the legislative rules upon which Petitioners' claims so tenuously rely, S.B. 373 will affirmatively require water utilities to create and submit source water protection plans, including source water contamination contingency plans, to the DHHR Respondents by July 1, 2015. This change in the law has mooted Petitioners' claims, and a ruling on Petitioners' claims would be nothing more than an advisory opinion. *Cf. Zaleski v. W. Va. Mut. Ins. Co.*, 224 W. Va. 544, 552, 687 S.E.2d 123, 131 (2009) ("Courts must be cautious not to issue advisory opinions. . . . [and] put the cart before the horse.").

Second, the Petition is meritless. Prior to S.B. 373, no statute or regulation required the DHHR Respondents to insist that water utilities create source water protection plans or emergency response plans. Petitioners' reliance on stretched interpretations of inapplicable legislative rules proves this point. For example, § 64-77-5.2 of the Code of State Rules does not, as Petitioners contend, require that public water systems adopt a "source water protection plan." That rule sets "Public Water System Design Standards" for new water systems constructed after 1999; it does not authorize the DHHR Respondents to demand a plan from an *existing* facility,

such as the WVAWC Kanawha facility. Similarly, § 64-61-5 of the Code of State Rules does not mandate that public water systems create emergency response plans. Instead, that rule allows the DHHR Respondents to establish a permitting process for public water systems. Should such a program be established, the rule identifies “[e]mergency response plans” as one of 31 indicators that should be considered in the granting or denial of a permit. In other words, neither rule requires the action that Petitioners claim the DHHR Respondents have failed to take.

The Petition also relies on false assumptions. For instance, the allegation that the DHHR Respondents have failed to create a repository of hazardous materials information is simply not true. The DHHR Respondents maintain access to all available hazardous material information through the West Virginia Poison Control Center, as required by Section 16-3A-2(a) of the West Virginia Code and Title 64, Series 53 of the West Virginia Code of State Rules. This information is readily accessible to medical professionals and first responders and satisfies the purpose of the statute. For these reasons, and as explained below, the Petition must be dismissed.

ARGUMENT

I. Senate Bill 373 Will Moot Petitioners' Claim Regarding Source Water Protection Plans and Emergency Response Plans.

This Court has made clear that “mandamus is a drastic remedy to be invoked only in extraordinary situations.” See Syl. pt. 1, in part, *State ex rel. Billings v. Point Pleasant*, 194 W. Va. 301, 460 S.E.2d 436 (1995). “Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, *but it is never employed to prescribe in what manner they shall act, or to correct errors they have made.*” Syl. pt. 1, *State ex rel. Buxton v. O'Brien*, 97 W. Va. 343, 125 S.E. 154 (1924) (emphasis added). A non-discretionary duty in the context of a mandamus action is one that “is so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of its performance[.]” Syl. pt. 3, in part, *Walter v. Ritchie*, 156 W. Va. 98, 191 S.E.2d 275 (1972).

A writ of mandamus cannot be issued unless three requirements are satisfied: there must be (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy. Syl. pt. 2, *State ex rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S.E.2d 367 (1969). This Court has long-recognized that “[m]andamus proceedings are not available for the purpose of obtaining a decision on mere moot questions.” *Cantrell v. Bd. of Educ. of Lee Dist.*, 107 W. Va. 362, 148 S.E. 320, 321 (1929). “When a subsequent law brings the existing controversy to an end the case becomes moot and should be treated accordingly.” *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir. 2000).

Senate Bill 373 has brought this controversy “to an end,” and mandamus is not available. Intended to fill a hole in the State’s regulatory framework, S.B. 373 was introduced in the West Virginia Senate with the support of the Governor on January 16, 2014, and it was subsequently considered by numerous legislative committees through countless hours of debate. It was eventually passed by both houses on March 8, 2014. When signed into law, this bill will require all public water systems in the State to create and submit detailed source water protection plans, including emergency contingency plans. The Legislature has thus obviated any need for judicial action by creating a regulatory program that does the things Petitioners seek.

The consequences of granting the Petition underscore the conflict that Petitioners are looking to create. If the Petition were granted, the DHHR Respondents would be faced with two conflicting orders: one judicial, the other legislative. Under this Court’s order, the DHHR Respondents would be required to create and execute a regulatory scheme envisioned by Petitioners using existing but non-germane legislative rules. But at the same time, the DHHR Respondents would also be required to follow the specific statutory commands of S.B. 373, which could very well conflict with Petitioners’ demands. This outcome would be absurd.

The DHHR Respondents deny that they have failed to act in any respect. Indeed, the passage of S.B. 373—which imbues the DHHR Respondents with enhanced regulatory authority—reveals that the DHHR Respondents lacked the authority that Petitioners claim they failed to exercise. Nevertheless, S.B. 373 has mooted Petitioners’ claims. The Petition must therefore be dismissed.

II. Petitioners’ Claims Are Without Merit.

Petitioners are asking this Court to issue a writ of mandamus to compel the DHHR Respondents to do two things. *First*, Petitioners ask this Court to order the DHHR Respondents to “require[e] 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.” Pet. 24. And *second*, Petitioners seek an order compelling the DHHR Respondents to “maintain, review, and update . . . a hazardous materials list specific for West Virginia.” Pet. 27. As explained below, the DHHR Respondents have complied with every statutory and regulatory mandate that applies to them. There is simply no merit to Petitioners’ claims.

A. Under Current Law, the DHHR Respondents Are Not Obligated to Require that Public Water Systems Produce Source Water Protection Plans or Emergency Response Plans.

The Petition misunderstands the DHHR Respondents’ obligations and authority regarding the maintenance of safe drinking water in this State—obligations that the DHHR Respondents take very seriously. Petitioners are asking this Court to grant powers to the DHHR Respondents that State law has yet to authorize and then to command them to exercise those powers in a specific way. Cf. Syl. pt. 3, *Mountaineer Disposal Serv., Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973) (“Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature.”). The dubious authorities relied on by Petitioners underscores the infirmity of their claims. With regard to ensuring that West Virginians are provided a suitable supply of drinking water, the DHHR Respondents are obligated to establish drinking water standards that accord with federal standards and for ensuring that public water systems properly test their product for compliance with those standards. The DHHR Respondents lack authority, however, to regulate materials located at the intake of a public water system.

Petitioners’ first claim alleges that DHHR has failed to comply with its own legislative rules to regulate sources of public drinking water. West Virginia Code § 16-1-4 authorizes the DHHR Secretary, among other things, to enact rules regulating “[s]afe drinking water.” W. Va. Code 16-1-4(d). Recognizing the DHHR’s agency expertise, the Code gives the Secretary

discretion on how to best achieve statutory ends. W. Va. Code § 16-1-14 (“The secretary may propose rules . . . that are necessary and proper to effectuate the purposes of this chapter.”).

Those legislative rules form the foundation of Petitioners’ claims. Petitioners assert that the DHHR Respondents are responsible for requiring that public water suppliers develop a source water protection plan under Title 64, Series 77 of the DHHR legislative rules, which is entitled “Public Water System Design Standards.” Pet. 22. They also contend that Title 64, Series 61 of DHHR’s legislative rules, entitled “Public Water Systems Capacity Development,” require it to “ensure that water utilities have adequate emergency response plans,” Pet. 23, which they contend includes requiring utilities to provide “back-up water sources,” Pet. 24. It is clear, however, that Petitioners misread the DHHR Respondents’ obligations under their legislative rules. And, in any event, the DHHR Respondents have zealously performed their regulatory functions, as required by statute and rule.

1. Title 64, Section 77 of the Code of State Rules Pertains to Standards Required in the Construction of New Public Water Systems; It Does Not Apply to Existing Facilities.

Petitioners argue that the DHHR Respondents have “failed to require appropriate and necessary source water protection and emergency plans” from public water systems. Pet. 24. They say “[t]hat 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.” *Id.* Had the DHHR Respondents complied with two particular legislative rules and implemented recommendations from the federal Chemical Safety Board, Petitioners contend it “would have prevented” the Elk River chemical spill. *Id.* This claim is baseless.

The two legislative rules that Petitioners cite to support their claims are found in Chapter 64, Article 77 of the Code of State Rules. This series of rules was “prepared to assist professional engineers responsible for the design and construction of public water supply systems.” W. Va. Code R. § 64-77-1.1.a. Particularly, Petitioners point to section 5.2 of the rules, which requires that in choosing source water, “[a] water source protection plan shall be adopted by the public water system for the continued protection of the watershed from potential sources of contamination.” *Id.* § 64-77-5.2. Subsection 5.2.b further requires that sanitary surveys be performed on the water source to ensure its quality. *Id.* § 64-77-5.2.b.

Three flaws undermine Petitioners’ argument regarding this rule. *First*, these legislative rules were enacted in 1998 as part of the effort to comply with the federal amendments to the SDWA. At that point, however, the WVAWC’s Kanawha District facility was an existing facility, not a new facility. Thus, these legislative rules concerning the design of new water plants would not have applied. *Second*, WVAWC has voluntarily submitted information to the DHHR Respondents identifying its actions to protect source water. Even if water utilities were required to submit source water protection plans, the WVAWC facility would have satisfied that requirement. And *third*, sanitary surveys of public water systems are performed annually, and such a survey was done most recently at WVAWC on January 8, 2013. Among several factors, this survey specifically considered the steps that WVAWC had taken to protect its source water. The DHHR Respondents thus faithfully executed their duties.

2. Title 64, Section 61 of the Code of State Rules Provides Standards for Setting a Discretionary Permitting Process.

Petitioners also cite Chapter 64, Article 61 of the Code of State Rules to claim that the DHHR Respondents have failed to require water utilities to establish emergency response plans. That rule too was written in 1999 in the wake of the 1996 SDWA amendments. The rule

recognizes the director of BPH “*may* develop a program for the issuing of a permit to operate a public water system.” W. Va. Code R. § 64-61-5.1 (emphasis added). And among the 31 factors that BPH may consider in determining an existing public water system’s capacity is a system’s “[e]mergency response plans.” *Id.* § 64-61-5.2.w.

But Petitioners ignore the discretionary language of this rule. Under this rule, the DHHR Respondents are not required to create a permitting process. Instead, the rule authorizes them to establish a program, something the DHHR Respondents have not yet elected to do. *See McComas v. Bd. of Educ.*, 197 W. Va. 188, 193, 475 S.E.2d 280, 285 (1996) (recognizing that “issuance of a writ of mandamus is normally inappropriate unless the right or duty to be enforced is nondiscretionary”). Aside from this discretionary decision, however, the DHHR Respondents have sought emergency-plan information from water utilities, and those utilities—including WVAWC—have voluntarily provided that information. There is simply no ground for granting this mandamus request.

B. The DHHR Respondents Maintain a Hazardous Materials Repository with the West Virginia Poison Control Center.

Likewise, Petitioners are incorrect when they allege that “BPH does not currently maintain the hazardous materials list required by statute and rule.” Pet. 26. BPH does, in fact, maintain such information, which is readily available to first responders and medical personnel.

In 1985, the West Virginia Legislature enacted West Virginia Code § 16-3A-1, *et seq.*, which contains an unfunded mandate, requiring that the DHHR Respondents maintain a repository of information regarding hazardous materials. *See* W. Va. Code § 16-3A-2(g) (“This program shall be developed using the budget provided by the Legislature for this program.”). The DHHR Respondents are required to “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.” *Id.* § 16-3A-2(a). The purpose of the statute is “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.” *Id.* § 16-3A-1(a). To this end, the statute instructs the DHHR Respondents to “develop by rule or regulation . . . a program to assemble and update the hazardous materials list, the information on the immediate medical effects of exposure to such materials, and the appropriate emergency medical treatment of persons exposed[.]” *Id.* § 16-3A-2(g).

Pursuant to this statute, the DHHR Respondents in 1987 enacted legislative rules detailing such a program. W. Va. Code R. § 64-53-1, *et seq.* This rule provides that the DHHR Respondents must assemble a database of hazardous materials from a non-inclusive list of state and federal sources for ready access by health care providers. *Id.* § 64-53-3.1. To maintain this database, the rules “authorize the use of any reliable source which includes a comprehensive listing of hazardous materials and the emergency medical treatment recommended for exposure to such materials as meeting the intent of this rule in full or in part relating to the distribution of such information to medical or emergency personnel.” *Id.* § 64-53-4.2.2. The rules also provide that “[t]he director may utilize the West Virginia poison information center as the central repository for the information and medical care practices necessary for treatment of persons exposed to substances identified in the hazardous materials list.” *Id.* § 64-53-6.1. Clearly, the intent of the statute and the rule are to have a central resource where medical personnel can turn in an emergency to treat patients who have been exposed to chemicals. The DHHR Respondents have satisfied this intent.

In accordance with these legislative rules, the DHHR Respondents have determined that the best way to fulfill their statutory directive is to ensure that the West Virginia Poison Center currently has access to hazardous material information through several web-based services with the federal National Institutes of Health's National Library of Medicine. *See* NIH, National Library of Medicine, <https://www.nlm.nih.gov/> (last visited Mar. 11, 2014). That online library, which contains numerous databases with links to virtually any chemical that has reported information available, is the best resource available. The TOXNET database, for example, contains over 390,000 chemical records. *See* TOXNET: Toxicology Data Network, <http://www.nlm.nih.gov/pubs/factsheets/toxnetfs.html> (last visited Mar. 11, 2014). This method of providing hazardous material information meets the intent of the statute and the rule. It allows the Poison Control Center, which employs the State's only board-certified medical toxicologist, to be the primary resource to medical personnel treating patients who have been exposed to hazardous materials, and it ensures that this vital information is readily available. *See* Phil Kabler, *Funding cuts could threaten Poison Control Center*, Charleston Gazette, Mar. 11, 2014, available at <http://www.wvgazette.com/News/201403100281?page=1> (last visited Mar. 11, 2014). Indeed, this "expertise proved important after the Jan. 9 chemical leak in Charleston that contaminated the drinking water supply for 300,000 West Virginians in nine counties," as the Poison Control Center "fielded 2,785 calls regarding exposure to Crude MCHM-tainted water." *Id.*

The Petition suggests that the DHHR Respondents have an obligation to do more than provide this information to the West Virginia Poison Control Center, however. It cites the statutory language of § 16-3A-2(a) and suggests that the DHHR Respondents should have conducted studies on the potential health effects of the consumption of "MCHM," one of the

chemicals leaked into the Elk River. Pet. 27.⁹ Given budgetary constraints, any such assertion would defy reality as well as second-guess agency expertise.¹⁰

As shown above, the DHHR Respondents have acted in accordance with their authority to protect this State's drinking water. They conducted a source water assessment of the WVAWC Kanawha facility in 2002, they have conducted periodic sanitary surveys of WVAWC, they have sought information concerning WVAWC's emergency response plans and source water protection plans, and they have assembled and maintained a repository of hazardous materials information with the West Virginia Poison Control Center. But Petitioners feel these actions are insufficient, and they ask this Court to nullify the expertise of the DHHR Respondents and replace it with what Petitioners have determined is appropriate. The adverse ramifications of granting the Petition cannot be overstated. The Petition is not aimed at the DHHR Respondents' alleged failure to act; rather, it seeks an order compelling the DHHR Respondents to act in a certain way. Granting this mandamus request will open up virtually every regulatory agency in the State to armchair regulating and second-guessing through litigation, undermining the limited purpose of the extraordinary relief of mandamus. The Petition must thus be denied.

⁹ "MCHM" stands for methylcyclohexanemethanol. *See* Ctrs. for Disease Control & Prevention, Emergency Preparedness & Response, Information about MCHM, <http://emergency.cdc.gov/chemical/MCHM/westvirginia2014/mchm.asp> (last visited March 11, 2014).

¹⁰ Two factors in particular explain why the DHHR Respondents utilize the NIH database, rather than assemble a hard-copy "list," which Petitioners apparently seek. The first factor is the increase in online resources. When the hazardous-materials-list requirement was implemented, the DHHR Respondents maintained chemical information in three-ring binders. But the availability of online information has rendered that method obsolete. The second factor is the change in reporting following the September 11, 2001 terrorist attacks. Much of this chemical information is now reported to the State's Division of Homeland Security, rather than DHHR.

CONCLUSION

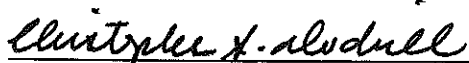
The January 9, 2014 Elk River chemical spill was an unprecedented event that disrupted the lives of over 300,000 West Virginians. But that disaster was not the result of a failure to act by the West Virginia Department of Health and Human Resources or its Bureau for Public Health. To the contrary, these state agencies have been stalwart advocates for the health and well-being of all West Virginians. There is nothing the DHHR Respondents could have done differently that would have prevented the chemical spill. The claims against them in the Petition are baseless and without merit. For the reasons explained above, the "Emergency Petition for Writ of Mandamus" must be denied.

Respectfully submitted,

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LETITIA TIERNEY, Commissioner,
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CERTIFICATE OF SERVICE

I, Christopher S. Dodrill, Assistant Attorney General and counsel for the Respondents Karen L. Bowling, Secretary of the West Virginia Department of Health and Human Resources, and Letitia Tierney, Commissioner of the Bureau for Public Health, hereby verify that I have served a true copy of "Response of DHHR Respondents to Petition for Writ of Mandamus" upon the counsel listed below by depositing said copy in the United States mail, with first-class postage prepaid, on this 12th day of March, 2014, addressed as follows:

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