

**ENVIRONMENTAL QUALITY BOARD**

**BRADLEY KEENAN, NATURAL RESOURCES  
DEFENSE COUNCIL, WEST VIRGINIA SURFACE  
OWNERS' RIGHTS ORGANIZATION, AND  
PLATEAU ACTION NETWORK,**

**Appellants,**

v.

**Appeal No. 14-04-EQB**

**SCOTT G. MANDIROLA, DIRECTOR,  
DIVISION OF WATER AND WASTE  
MANAGEMENT, DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,**

**Appellee.**

**FINAL ORDER**

Appeal No.14-04-EQB was filed with the West Virginia Environmental Quality Board (“Board”) on March 17, 2014. The evidentiary hearing in the matter was held before a court reporter and a quorum of the Board on June 12, 2014.

After careful consideration of the pleadings, arguments of counsel, and evidence presented at hearing, the Board unanimously decided to DENY in part and GRANT in part the relief sought by the Appellant.

**Standard of Review**

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When hearing an appeal, pursuant to W. Va. Code §22B-1-7(e), the Board “shall hear the appeal *de novo*, and evidence may be offered on behalf of the appellant, appellee and by any intervenors.” In accordance with *Syl. Pt. 2, W. Va. Div. of Env’tl Protection v. Kingwood Coal*

Co., 200 W. Va. 734, 745, 490 S.E.2d 823, 834 (1997), the board “is not required to afford any deference to the DEP decision but shall act independently on the evidence before it.”

After hearing the evidence, pursuant to W. Va. Code § 22B-1-7(g), the Board “shall make and enter a written order affirming, modifying or vacating the order, permit or official action of the chief or secretary, or shall make and enter such order as the chief or secretary should have entered.”

### **Standing to Appeal**

The Appellee (“WVDEP”) alleges that Appellants do not have standing to appeal. Pursuant to *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, to have standing, a party must show “(1) it has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *528 U.S. 167, 180-81, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (U.S.S.C. 2000)*.

Under the current facts, Appellants allege that WVDEP has allowed Danny Webb Construction to continue operating an underground injection well after its permit was revoked:

2. Although the order revokes a UIC permit, it still allows Danny E. Webb Construction, Inc. to continue injection into the well. Allowing further injection into this well when the permit itself has been revoked violates 47 CSR 13-13.1.a, 47 CSR 13-13.2.a.1, 47 CSR 13-13.12.b, and 42 U.S.C. § 300h(b)(1).

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Appellants do have an “injury in fact” because they allege that a permit is required for operation of this underground injection well. The purpose of permits, in part, is to allow the public to be informed about operations within the State that impact the environment for which the public resides and relies upon. An allegation that operations are occurring without a permit and that a

permit is required constitutes an “injury in fact” because it deprives the public of the kind of oversight provided by the permitting process. Second, the alleged injury to Appellants is traceable to WVDEP because it is responsible for issuing or denying permits. Finally, a decision favorable to Appellants, i.e. requiring WVDEP to monitor the operations of Danny Webb Construction with a permit, would provide the redress that Appellants are seeking.

Consequently, Appellants do have standing to challenge the decision of WVDEP to allow Danny Webb Construction to operate an underground injection well without a permit. The relief sought by WVDEP on this issue is **DENIED**.

### **Specificity of the Order Revoking Permit**

Appellants allege that WVDEP revoked Danny Webb Construction’s permit without providing a sufficient reason for the revocation. Specifically, Appellants allege that WVDEP cannot simply cite “procedural deficiencies” as the reason for the revocation without providing more detail:

1. By order dated March 4, 2014, the WV DEP revoked Underground Injection Control (UIC) Permit No. 2D0190460, originally issued to Danny E. Webb Construction, Inc. on February 6, 2014. The revocation order states in Paragraph 8 that the permit was revoked due to "procedural deficiencies" but nothing further is noted in

the order about what these "procedural deficiencies" are or how they are to be corrected. The order additionally fails to provide any deadline for when a reapplication should occur and instead, gives an open-ended extension, allowing injection to occur at the site indefinitely.

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Pursuant to the *Code of State Regulations* §47-13-13.12.f, permits “may be modified, *revoked* and reissued, suspended, or *revoked* for cause...” (emphasis added)

Under the current facts, WVDEP revoked Danny Webb Construction’s permit to operate an underground injection well on March 4, 2014:

8. Due to certain procedural deficiencies with regard to the February 6, 2014 Permit No. UIC2D0190460, Permit No. UIC2D0190460 was revoked by ORDER of this Office dated March 4, 2014.

*Certified Record, Pg. 4 of 561*

WVDEP cites “procedural deficiencies” as the reason for the revocation. Though the reason is vague, there is no law that requires the findings of facts for a revocation to be more specific than this. Thus, the relief sought by Appellants for this issue is **DENIED**.

### **Operating an Underground Injection Well without a permit**

Appellants allege that WVDEP is allowing Danny Webb Construction to operate an underground injection well without a permit:

2. Although the order revokes a UIC permit, it still allows Danny E. Webb Construction, Inc. to continue injection into the well. Allowing further injection into this well when the permit itself has been revoked violates 47 CSR 13-13.1.a, 47 CSR 13-13.2.a.1, 47 CSR 13-13.12.b, and 42 U.S.C. § 300h(b)(1).

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Appellants ask that the operations cease until a permit is issued by WVDEP.

Pursuant to the *Code of State Regulations* §47-13-13.2.a.1, injection into existing Class 2 wells “may be authorized by rule for periods up to five (5) years from the effective date of this rule. All such wells must be issued permits within the five (5) year period or close down at its end, unless the rule is continued under paragraph 13.2.a.2”. In short, this regulation was created on June 1, 2002. So, wells that were already in place on June 1, 2002, could continue to operate “by rule” (i.e. without a permit) for five (5) more years, which would have expired on June 1, 2007. After five (5) years, the operations require a permit. There is an exception - operation “by rule” could be continued under §47-13-13.2.a.2.

Turning to §47-13-13.2.a.2, it states that “...rules under paragraph 13.2.a.1 of this section authorizing Class 2 and 3 wells or projects in existing fields or projects may allow them to

continue normal operations until permitted, including construction, operation, and plugging and abandonment of wells provided the owner or operator maintains compliance with all applicable requirements”. To summarize, for these operations already in place at the time of the regulation, when the five (5) years of operating by rule (and without a permit) expires, the operation can continue as normal *until it is permitted*. That is, the operations do not have to close down while it is obtaining a permit.

Under the current facts, WVDEP first issued Danny Webb Construction an underground injection control permit on October 25, 2007. The permit expired on October 25, 2012:

**1. Danny E. Webb Construction Co., Inc. was issued an underground injection control permit (UIC) number 2D0190460 from the Office of Oil and Gas to inject waste fluids from oil and natural gas exploration and development in well API # 47-019-00460 on October 25, 2007 with an expiration date of October 25, 2012.**

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After the permit expired, Danny Webb Construction applied for another permit. It was issued by WVDEP on February 6, 2014. This permit was revoked for the above referenced “procedural deficiencies” on March 4, 2014:

**8. Due to certain procedural deficiencies with regard to the February 6, 2014 Permit No. UIC2D0190460, Permit No. UIC2D0190460 was revoked by ORDER of this Office dated March 4, 2014.**

*WVDEP Order, Certified Record, Pg. 4 of 561*

WVDEP’s revocation order permitted Danny Webb Construction to continue to operate “by rule” and without a permit since March 4, 2014.

The Board finds that permitting Danny Webb Construction to operate without a permit under these facts is inconsistent with the law. *Code of State Regulations* §47-13-13.2.a.1 was designed to prevent statewide disruption of operations already in existence when the new

regulation requiring permits was imposed. The regulation allowed these existing operations grandfather rights to operate without a permit for five (5) years. *Code of State Regulations* §47-13-13.2.a.2 allowed normal operations to continue after the five (5) years "until permitted". So, the operations did not have to shut down at the end of the five (5) year grandfather period as long as they were in the process of being permitted. These regulations were not enacted to allow operations to fluctuate into and out of permit cycles and operate "by rule" during the unpermitted times. Once an operation receives a permit, it must reapply and maintain a permit thereafter. Consider *Code of State Regulations* §47-13-13.12.b:

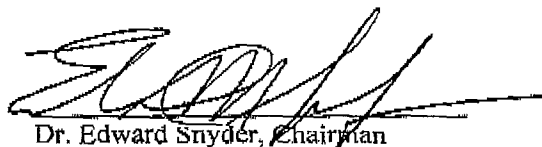
Duty to Reapply. If the permittee wishes to continue activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit.

Consequently, the relief sought by Appellants under this issue is **GRANTED**. WVDEP is ordered to regulate Danny Webb Construction's underground injection control well by permit and not "by rule". WVDEP has thirty (30) days from entry of this order to bring Danny Webb Construction into compliance or otherwise require the operations to cease.

In accordance with §22B-1-7(j) of the *West Virginia Code*, you are hereby notified of your right to judicial review of this FINAL ORDER in accordance with §22B-1-9(a) and §22B-3-3 of the *West Virginia Code*. If appropriate, an appeal of this final order may be made by filing a petition in the appropriate circuit court within thirty (30) days from your receipt of this final order in the manner provided by §29A-5-4 of the *West Virginia Code*.

Entered: April 8, 2015

Environmental Quality Board

  
Dr. Edward Snyder, Chairman

ENVIRONMENTAL QUALITY BOARD

BRADLEY KEENAN, NATURAL RESOURCES  
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DIRECTOR, DIVISION OF WATER AND  
WASTE MANAGEMENT, WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION,

Appellee.

CERTIFICATE OF SERVICE

This is to certify that I, Jackie D. Shultz, Clerk for the Environmental Quality Board, have this day, the 8th day of April, 2015, served a true copy of the foregoing **Final Order** in Appeal No. 14-04-EQB, by mailing the same via United States Mail, with sufficient postage, to the following address:

*via certified first-class mail:*

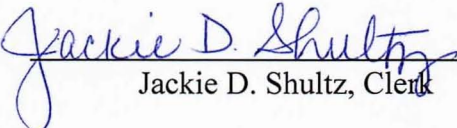
Thomas A. Rist, Esquire  
Rist Law Offices, LC  
103 Fayette Avenue  
Fayetteville, WV 25840

Certified Mail # 91 7199 9991 7035 6694 1427

*via personal service:*

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Jackie D. Shultz, Clerk