

**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD  
CHARLESTON, WEST VIRGINIA**

**TOM D. JARRELL,**

**Appellant,**

**v.**

**Appeal No. 07-25-EQB**

**DIRECTOR, DIVISION OF WATER AND WASTE  
MANAGEMENT, WEST VIRGINIA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION,**

**Appellee,**

**and**

**EAGLE ENERGY, INC.,**

**Intervenor.**

**FINAL ORDER**

This appeal involves the reissuance of WV/NPDES Permit No. WV0025607 to Eagle Energy, Inc. On February 14, 2008, a quorum of the Environmental Quality Board (“Board”) convened in Charleston, West Virginia, to conduct an evidentiary hearing in this matter. Mr. Tom Jarrell (“Appellant”) appeared *pro se*. The West Virginia Department of Environmental Protection (“Appellee” or “WVDEP”) was represented by Heather A. Connolly, Esquire with the WVDEP’s Office of Legal Services. Eagle Energy, Inc. (“Intervenor”) was represented by Robert McLusky, Esquire and Christopher M. Hunter, Esquire of Jackson Kelly, PLLC.

Appellant filed a Notice of Appeal on November 7, 2007. Eagle Energy, Inc., as the permittee, was granted Intervenor status on December 5, 2007. Appellant argued that he is aggrieved

by the reissuance of WV/NPDES Permit No. WV0025607 and questions the validity of the certification of maps.

Specifically, Appellant argued that WVDEP failed to follow all requirements of 47CSR30-4.7 when the certification was not signed by a registered professional engineer or licensed land surveyor pursuant to 47CSR30-4.5.a.6.L and 4.5.d.1.A.11.

The Board heard testimony from three witnesses, including the Appellant. Appellant's Exhibits 1 through 4 were admitted into evidence. At the conclusion of the evidentiary hearing, WVDEP moved for a directed verdict and alleged Appellant failed to show any material evidence of noncompliance with the rules and regulations surrounding the permit which is the subject of this appeal. During its review of the Motion for a Directed Verdict, the Board is required, and did so, review the evidence presented by the Appellant in a light most favorable to the Appellant and assumed his evidence as fact. After due consideration and deliberation, the Board granted WVDEP's motion for a directed verdict. The Board finds that WVDEP acted properly regarding the NPDES permit and granting the permit. The Board finds no error in the certification of the professional engineer regarding the maps. Further, the Board finds that the applicant did not misrepresent relevant facts in the application.

The Board hears appeals of permits issued by Appellee de novo and in accordance with W. Va. Code § 22B-1-7. The Board does not afford deference to the Director's decision. W. Va. Division of Env'tl. Protection v. Kingwood Coal Co., 200 W. Va. 734, 745, 490 S.E.2d 823, 834 (1997). Under 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."

To prevail in the appeal, the Appellant must raise an issue with sufficient evidence to support a finding that the Appellee's decision was incorrect. If sufficient evidence supports such a finding, then the Appellee would have to produce the evidence demonstrating why its decision was sound,

regardless of the Appellants' evidence. The Appellant has an opportunity to show that the evidence produced by the Appellee is pre-textual or otherwise deficient. This shifting burden of proof standard was set out in a case before the Circuit Court of Kanawha County, *Wetzel County Solid Waste Authority v. Chief, Office of Waste Management, Division of Environmental Protection*, Civil Action Number: 95-AA-3 (Circuit Court of Kanawha County, 1999). The Kanawha County Circuit once again approved the use of the *Wetzel County* burden-shifting rule in environmental appeals in *Sierra Club v. Benedict*, Civ. Action No. 07-AA-42, Slip Op. at 6 (Kanawha County Circuit Ct. June 29, 2007). While *Wetzel County* is merely persuasive authority, the Board agrees with the analysis and has used that test here to determine if the Appellant met his initial burden.

Rule 50(a) of the *West Virginia Rules of Civil Procedure* provides that judgment as a matter of law is appropriate when a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party. (W.Va. R.C.P. 50(a)) (2008).

#### **Findings of Fact**

1. NPDES Number WV0025607 was issued by the WVDEP on September 28, 2007.
2. Claudio Yon is recognized by WVDEP as an approved person to submit maps and certifications of maps to WVDEP.
3. The Board finds that there was no error in the certification of the professional engineer regarding the maps.
4. The Board disagrees with the Appellant that the applicant misrepresented relevant facts in the application.
5. Although the Appellant participated in the review of the application, provided

comments, and demonstrated an interest in the outcome of the application, WVDEP did not notify the Appellant of his right to appeal the issuance of the NPDES permit.

6. The WVDEP and applicant responded to Mr. Jarrell's comments and met with him several times about his concerns and questions. (Tr. pg. 45-48.)

#### **Conclusions of Law**

7. 47CSR30.4.7.d states as follows:

"Any person signing a document under Section 4.5.a.6.L., 4.5.d.1.A.11., 4.7.a. or 4.7.b. of these rules shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under the direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations."

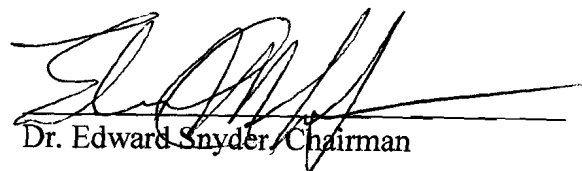
8. Contrary to the Appellant's assertions W.Va. Code §§ 22-11-8(a) and 22-11-21 do not require notification of final permitting actions however the statute does require a formal response to comments to be mailed to the person that filed the comment.
9. The Board hears appeals of permits issued by Appellee de novo and in accordance with W. Va. Code § 22B-1-7. The Board does not afford deference to the Director's decision. W. Va. Division of Env'tl. Protection v. Kingwood Coal Co., 200 W. Va. 734, 745, 490 S.E.2d 823, 834 (1997). Under 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."

For the reasons set forth herein, this appeal is dismissed from the Board's docket.

In accordance with West Virginia Code §22B-1-7(j), 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*.

**ORDERED** and **ENTERED** this 15<sup>th</sup> day of August, 2008.

ENVIRONMENTAL QUALITY BOARD

  
Dr. Edward Snyder, Chairman