AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
October 4, 2022, Meeting Minutes

AOPA COMMITTEE MEMBERS PRESENT
Jane Ann Stautz, Chair
Jennifer Jansen
Bart Herriman

NRC, DIVISION OF HEARINGS STAFF PRESENT
Elizabeth Gamboa
Aaron Bonar
Scott Allen

GUESTS PRESENT

Ihor Boyko	William Illingworth	Jim Brooker
Codi Weiler	Alicia Rosales	Greg Schrader

Call to order

Jane Ann Stautz, Chair, called the meeting to order at 2:03 p.m., ET, at the Natural Resources Commission, Division of Hearings, Indiana Government Center North, 100 North Senate Avenue, N103, Hearing Room, Indianapolis, Indiana. With the presence of three members, the Chair observed a quorum.

Consideration and approval of minutes for the meeting held on October 6, 2021

Jennifer Jansen made a motion to approve the minutes of the meeting held on October 6, 2021. Bart Herriman seconded the motion. Upon a voice vote, the motion carried.

Consideration of Findings of Fact and Conclusions of Law with Non-Final Order in the matter of *Brookston Resources, Inc. v. Department of Natural Resources*; Administrative Cause No. 20-052G

The Chair recognized William Illingworth representing the Petitioner.

Illingworth presented a document he described as a "timeline of events".

The Chair asked Administrative Law Judge (ALJ) Gamboa if she had previously seen the document presented by the Petitioner. ALJ Gamboa replied she had not seen the document. Illingworth said he prepared the document for the oral argument. Boyko said Illingworth gave him a copy of the document prior to the Administrative Orders and Procedures Act (AOPA) meeting.

Illingworth said the case involves a production oil well dug into the ground to recover oil, and Class II Injection Wells, known as a "facility" under EPA Regs. He said an operator will drill an injection well to push water down into the oil and gas formation to pressure up the zone and push the oil to the production wells. He said when an operator drills a Class II Well or converts an existing well into a Class II Well, they must get a permit, identify wells within one quarter of a mile of the facility they are permitting, and determine if the other wells are adequately constructed or plugged. The risk is if another well is not constructed or plugged properly water could get pushed into them and come to the surface. Illingworth said the Department of Natural Resources (Department) and the operator will review the information on any surrounding wells to ensure they have been properly constructed and plugged, then the permit is issued, and the operator will convert or drill their well.

Illingworth said the issuance of a Class II Injection Well permit is for the lifetime of the facility. The process to drill the well is approximately three hundred thousand dollars, so it is important the well is done correctly the first time. He said if an operator drills or converts a well, everything passes review, the location of the well is good, and the well is drilled, the operator does not want the Department coming back later and saying there is a problem with the well.

Illingworth said the Safe Drinking Water Act (SDWA) of 1974 provided regulations for the Class II Facilities. According to the SDWA, "once you determine the location is suitable for injection, its there for the lifetime, unless there is new information that comes about later, which shows there's a threat to human health or environment and that threat to human health or environment was not known at the time the permit was originally issued." Illingworth said when an operator is investing a lot of money in the wells it is important to make sure the review is done correctly the first time.

Illingworth said the Department will argue the permit is for the purposes of drilling or converting a well, not for the injection, and a review of the other wells within one-quarter mile could be done later to determine if they are safe. He said the SDWA says once the permit is issued its for the lifetime of the well and unless there is an unknown issue. The suitability of the well shall not be changed.

Illingworth stated the two wells in question were plugged in 1958 and 1960 and permits for converting the wells to water injection wells were issued in 1964 predating the SDWA. He noted the Department does not allege any migration of fluids, leaking, any change, or that anything has been done regarding the wells. Illingworth said in 1974 the SDWA passed, requiring a review of injection wells within one-quarter mile every five years to look for fluid migration and changes to plugged wells. Illingworth said prior to 1990, the Environmental Protection Agency (EPA) were reviewing wells under the SDWA, and the wells had probably been reviewed several times before Indiana began reviewing them in 1990. He said in 1992, the Department determined the

two wells in question had been properly plugged and in 1997 and 2002 no inspection of the wells was done. Illingworth stated in 2002 the Petitioner takes over operation and investment of the wells and in 2004 the Department determines the two injection wells need to be re-plugged. He noted the injection wells could not be found. It's been 40 years since the wells were plugged, the after the Department had previously said the wells were fine, Petitioner invested money in the lease.

Illingworth said the Department passed a regulation in 2017 that contradicts the federal regulations, and the Department can review wells within one-quarter mile of a well site. He said the Department can flippantly change its position and it's hard for operators to rely on the job the Department does when they do.

The Chair recognized Ihor Boyko representing the Respondent.

Boyko said the Petitioner did not drill the wells, but the wells had been drilled by the previous operator, whose license was revoked, noting ALJ Jensen's Finding 32 of the Interlocutory Order on Summary Judgment (Interlocutory Order) [Issued March 25, 2021]. Boyko said the Petitioner did not verbally address the objections they submitted in writing, but he thinks the Petitioners objections are the Department should apply federal law. He noted the Interlocutory Order reviewed federal law as a guidance to ensure the Department is in compliance with federal requirements.

Boyko stated the operative word is "equivalent" in Finding 76 of the Interlocutory Order, where the Indiana Administrative Code (IAC) must be equivalent to the federal requirements. He said there is not a requirement that IAC be identical in language to the federal requirements and the state program only needs to be as stringent as the federal requirements. Boyko said Finding 76 of the Interlocutory Order determined that 312 IAC 29-28-8 was applicable, and that federal regulations would not apply. Boyko noted the rule applies to all wells within the area of review that penetrate the injection zone.

Boyko stated on page five of [Petitioner, Brookston Resources, Inc.'s, Objection to Findings of Fact and Conclusions of Law with Non-Final Order] (Petitioner's Objections), the Petitioner cites 312 IAC 29-5-1, and a federal regulation, but that rule applies to an application to construct or convert a Class II Well. He noted the wells were already Class II Wells when the Petitioner took them over.

Boyko stated the Petitioner cites other federal regulations, but the focus should be on what Indiana requires and protecting underground sources of drinking water. Boyko stated the Findings of Fact and Conclusions of Law with Non-Final Order (Non-Final Order) should be upheld and Petitioner's Objections should be denied.

The Chair asked for rebuttal.

Illingworth stated a state regulation cannot be the opposite of a federal regulation or disregard the federal regulation. Illingworth read the "facility siting" part of the SWDA, stating: "Suitability of the facility location will not be considered at the time of permit modification or

revocation and reissuance unless new information or standards indicate that a threat to human health or the environment exists which was unknown at the time of permit issuance." He said he agrees the state does not have to have the same language, but he does not believe they can do the opposite of what the SWDA says.

The Chair stated it was her understanding the information being discussed was not at issue. She asked if the issues Illingworth raised were included in Petitioner's Objections.

Illingworth replied, "it has been" and said it was the central issue. He said the intent of the SWDA is not only to prevent migration but also to provide protection for the operators that the Department disregards.

The Chair noted the documents provided to the AOPA Committee would be for informational purposes since it was not evidence presented at the hearing and not part of the record. The Chair entertained discussions and questions on the matter.

Herriman said the sole issues is if there is potential for migration. Herriman asked about the injection authorization that the Department said the Petitioner did not attempt to get. Herriman asked if the injection authorization is done contemporaneously with the permit application or after the fact.

Illingworth stated based on plan specifications the well permit is issued, the well gets drilled, and then the injection authorization is done to make sure the well construction is good.

Herriman asked if Brookston Resources, Inc. (Brookston) did exactly what the previous company had done regarding the injection model or have they done more or less than the previous company.

Brooker answered that Brookston constructs a well to withstand a mechanical integrity test (MIT) witnessed by a state inspector, who then confirms the injection authorization upon completion of the MIT.

The Chair asked for clarification on Finding 20 that says, "Brookston submitted "Change of Operator" permit applications for each Subject Wells… The permits required the operator of the wells to obtain injection authorization prior to operating the wells," noting Finding 21 which indicated Brookston never sought authority to operate the Subject Wells.

Boyko stated, "I believe those are correct".

The Chair said she did not see any objections to Findings 20 and 21.

Illingworth said the authorization is for the construction of the well and the Department is using the authorization to do their review of the well later.

The Chair asked Schrader to clarify why there was a need to obtain an injection authorization prior to operating the wells.

Schrader said the permits were originally injection permits in the 1960's but the EPA grandfathered the Class II Wells. The original permits issued to the previous operator were revoked by the Department. Schrader said when there is no active operator the Department re-permits those as a "change of operator" because they [the permits] cannot be transferred. Schrader said the Department received primacy in their agreement with the EPA to issue authorization after an MIT, fluid analysis, proof of cement on the injection well, or completion report showing how the well is constructed.

Schrader said he reviewed the wells in 2017 and 2018 under the current rules and he was not asking that the wells be re-plugged. He was, asking for a corrective action plan.

The Chair acknowledged Brooker for his response.

Brooker stated when Brookston took over the site there were leaks, four wells to plug, the property had to be re-leased because the lease had expired, a new water flood unit had to be reformed, a reduced spacing petition was needed, and the Brookston crew were traveling from Illinois to the site every day to do work. Brooker said they did not seek authorization for the two Wells because he had already been told they would not get the authorization.

The Chair said the burden the Department needed to meet is if Subject Wells have the potential to serve as a conduit for the migration of fluid into underground sources of drinking water.

Herriman said he is struggling with the language that says, "the well has the potential to serve as a conduit" and there might be a low probability or a possibility.

Brooker said every well has the potential to serve as a conduit.

Herriman asked Schrader about the presence of sandstone around the area and if there were studies showing the migration of fluids through sandstone.

Schrader said it is common for fluids to migrate through the Jackson sandstone, but there is not a lot of data for that area. He said his review was to establish that the injection zone is present in all the problem wells, the cement plugging was not sufficient to keep the fluid down, and there is a high possibility of a USDW. Schrader noted because of the lack of data they use sea level as the default then go to the nearest sandstone that would be a possible "lateral conduit" for injected fluids.

The Chair asked if there was a motion or amendments regarding the Nonfinal Order.

Herriman recommended amendments on page seven, paragraph 46, after the word "Brookston" insert a period. Herriman recommended amendments on page ten, paragraph 65, should say "Class II injection" with no 's' after injection. Herriman also recommended amendments on page twelve, paragraph 72, to replace "subject" with "submit".

Jennifer Jansen moved to accept the Findings of Fact and Conclusions of Law with Nonfinal Order, with recommended amendments. Bart Herriman seconded the motion.

The Chair called for a vote to accept the Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Brookston Resources, Inc. v. Department of Natural Resources*. On a voice vote, the motion unanimously carried.

Adjournment

The meeting was adjourned at 2:43 p.m., ET.