

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD
CHARLESTON, WEST VIRGINIA



ALLEGHENY ENERGY SUPPLY
COMPANY, LLC,

Appellant,

v.

Appeal No. 11-21-EQB

SCOTT G. MANDIROLA, Director,
Division of Water and Waste Management
West Virginia Department of Environmental
Protection,

Appellee.

MOTION FOR STAY (Order No. 7004)

Appellant Allegheny Energy Supply Company, LLC ("Appellant") has appealed certain terms and conditions of Order No. 7004 (the "Order"), which was issued to Appellant for its Harrison Power Station (the "Station") on May 5, 2011 by Scott G. Mandirola, Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection ("Appellee"). By its terms, the Order becomes effective upon the date of receipt. The Order expressly relates to and was issued contemporaneously with the reissuance of WV/NPDES Permit No. WV0005339 (the "Permit").

Appellant, by counsel, now comes before this Board and moves for a stay of certain requirements of the Order as set forth below. The requested stay will safeguard Appellant's due process rights and prevent the unjust hardship of depriving Appellant of a meaningful right to present its objections to and be heard on the legality of the Order. Specifically, Appellant requests the Board to stay the following terms and conditions of the Order:

1. The requirement in Paragraph 2 under “Order for Compliance” on page 2 of the Order to submit a corrective plan to the Division of Water and Waste Management by November 4, 2011 that identifies (a) the causes of prior exceedances of the Permit’s benchmark values, (b) what actions have been taken in the past to achieve benchmark values and (c) what revisions to the Station’s Stormwater Pollution Prevention Plan (“SWPPP”) will be made in the future to achieve applicable benchmark values.

2. The requirement in Paragraph 3 under “Order for Compliance” on page 2 of the Order to submit quarterly progress reports identifying the revisions made to the Station’s SWPPP until Appellant achieves benchmark values for Outlets 006, 007, 008, 009, 010 and 011 “that shall ensure compliance with the terms and conditions of the [P]ermit.”

3. The requirement in Paragraph 1 under Order for Compliance on page 2 of the Order to “immediately take measures to initiate compliance with all terms and conditions” of the Permit and the Order, to the extent that this provision applies to conditions that are stayed by this Board pursuant to Appellant’s appeals of the Permit and Order.

In support of this motion, Appellant states as follows:

1. Pursuant to W. Va. Code § 22B-1-7(d), a stay of these conditions is appropriate if Appellant can demonstrate that “an unjust hardship to the appellant will result from the execution or implementation of a[n] . . . order, permit or official action pending determination of the appeal.”

2. As stated in the Findings of Fact, Appellee issued the Order, *inter alia*,¹ because “[m]onitoring in the previous permit indicates that [Appellant] has frequently exceeded benchmark values for total recoverable aluminum, total recoverable iron, and/or total suspended

¹ The Order also provides a compliance period for achieving newly imposed technology-based limits required by 40 C.F.R. § 423.12(b)(5) at Outlet 102.

solids at Outlet(s) 006, 007, 008, 009, 010 and 011 . . . While exceeding benchmark values does not constitute a violation of the permit, failure to revise and implement changes to the [SWPPP] in order to achieve benchmark values is a violation of Section C.13 of the previous permit issued May 16, 2005.” Order FOF ¶¶ 2-3. In its Notice of Appeal, Appellant has challenged the issuance of the Order on these grounds, arguing that the agency’s representations regarding Appellant’s activities during the prior permit term with regard to its SWPPP are unsupported by the record. Because it would infringe upon Appellant’s due process rights and impose an unjust hardship upon Appellant to require compliance with the punitive aspects of the Order before Appellant has an opportunity to raise its legitimate challenges to the basis of the Order, Paragraphs 2 and 3 under “Order for Compliance” should be stayed pending the Board’s final decision in this appeal.

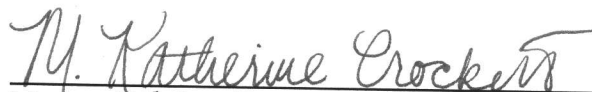
3. Additionally, Appellant has objected to Paragraph 1 under “Order of Compliance” on page 2 of the Order, which requires Appellant to “immediately take measures to initiate compliance with all terms and conditions” of both the Permit and the Order, to the extent that this provision applies to conditions that are the subject of Appellant’s separate appeals of those documents. By extension, therefore, Appellant now requests a corresponding stay of this provision as it applies to conditions of the Permit or Order that are stayed by this Board. Absent a separate stay of this independent directive to comply, the Order will require Appellant to undertake measures to comply with all provisions of the Order and Permit irrespective of this Board’s ruling on Appellant’s Motions for Stay. Because this result would negate any relief granted by this Board, Paragraph 1 should be stayed accordingly.

WHEREFORE Appellant prays that the Board grant a stay of the terms and conditions of the Order as set forth below:

1. That the requirements of Paragraphs 2 and 3 of the Order under "Order for Compliance" be stayed pending the Board's final decision in this appeal.
2. That the requirement set forth in Paragraph 1 of the Order under "Order for Compliance" requiring Appellant to "immediately take measures to initiate compliance with all terms and conditions" of the Permit and the Order be stayed pending entry of the Board's final decision in this appeal, to the extent that it applies to conditions in the Permit and the Order otherwise stayed by the Board in conjunction with Appellant's appeals of those documents.

Respectfully submitted this 3rd day of June, 2011.

**ALLEGHENY ENERGY SUPPLY COMPANY,
LLC**



M. Ann Bradley (WV State Bar No. 437)
Allyn G. Turner (WV State Bar No. 5516)
M. Katherine Crockett (WV State Bar No. 10799)
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
Charleston, West Virginia 25301
Telephone: (304) 340-3800
Facsimile: (304) 340-3801