

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.

NOTICE OF APPEAL (Order No. 7004)

Actions Complained Of: Allegheny Energy Supply Company, LLC (“Appellant”) respectfully represents that is aggrieved by the following actions of Scott G. Mandirola, Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection (“Appellee”):

The inclusion of the following terms and conditions in Order No. 7004 (the “Order”), which was issued by Appellee on May 5, 2011 contemporaneously with the reissuance of WV/NPDES Permit No. WV0005339 (the “Permit”):

1. All provisions of the Order to the extent that they are based on an alleged failure by Appellant to comply with the requirement in its previous permit to revise and implement changes to its Stormwater Pollution Prevention Plan (“SWPPP”) in order to achieve the applicable benchmark values.

2. The 11-month compliance period provided for achieving compliance with the effluent limitations in the Permit for the newly established Internal Outlet 102, as set forth under Paragraph 4 under “Order for Compliance” on page 2 of the Order.

3. The statement in Paragraph 4 under “Order for Compliance” on page 2 of the Order that Outlet 102 is subject to a daily maximum limitation of 60 mg/l for total suspended solids (“TSS”), which is inconsistent with the applicable Effluent Limitations and Guidelines for the Steam Electric Power Generating Point Source Category (“ELGs”).

4. The statement in Paragraph 1 under the “Order for Compliance” on page 2 of the Order requiring Appellant to “immediately take measures to initiate compliance with all terms and conditions” of the Permit and Order, to the extent that it would require compliance with terms or conditions of the Permit and Order that are the subject of this appeal or the related appeal of the Permit.

Relief Requested: Appellant prays that the Environmental Quality Board (the “Board”) review this matter and order the following revisions to the Permit:

1. Deletion of all provisions of the Order relating to Appellant’s alleged failure to comply with the requirement in its previous permit to revise and implement changes to its SWPPP in order to achieve the applicable benchmark values, including, but not limited to, Paragraphs 1-3 under “Findings of Fact” and Paragraphs 2-3 under “Order for Compliance.”

2. Revision of Paragraph 4 under “Order for Compliance” to extend the compliance period until December 4, 2012 to allow Appellant sufficient time to make the necessary upgrades to the Station.

3. Revision of Paragraph 4 under “Order for Compliance” to reflect the proper daily maximum limitation for TSS under the ELGs, 100 mg/l.

4. Revision of Paragraph 1 under "Order for Compliance" to limit its application to those parts of the Permit and Order that are not the subject of this or the related Permit appeal.

5. Such other revisions as the Board deems appropriate.

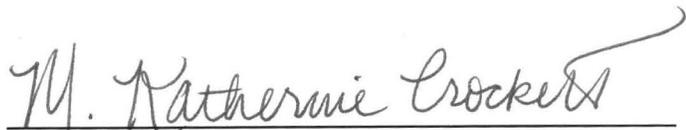
Specific Objections: Appellant's specific objections to Appellee's action, including questions of fact and law to be determined by the Board, are set forth in detail in separate numbered paragraphs and attached hereto as Exhibit A.

A copy of the Order is attached hereto and made a part hereof as Exhibit B.

Amendment of this Notice of Appeal may be had only by leave of the Board, and only for good cause shown.

Respectfully submitted this 3rd day of June, 2011.

**ALLEGHENY ENERGY SUPPLY COMPANY,
LLC**



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Allyn G. Turner (WV State Bar No. 5561)
M. Katherine Crockett (WV State Bar No. 10799)
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EXHIBIT A

FACTS RELEVANT TO APPEAL

The facts relevant to this appeal and the particular grounds on which this appeal is based, including questions of fact and questions of law to be determined by the Environmental Quality Board (“the Board”), are as follows:

1. On May 5, 2011, the Director of the Division of Water and Waste Management within the West Virginia Department of Environmental Protection (“Appellee”) unilaterally issued Order No. 7004 (the “Order”) to Allegheny Energy Supply Company, LLC (“Appellant”) pursuant to the West Virginia Water Pollution Control Act, W. Va. Code §§ 22-11-1 *et seq.* (the “Act”).

2. This appeal has been timely filed within thirty days of receipt of the Order in accordance with W. Va. Code § 22-11-21.

3. The Order relates to WV/NPDES Permit No. WV0005339 (the “Permit”), which authorizes discharges from Appellant’s Harrison Power Station in Haywood, Harrison County, West Virginia (“Harrison” or the “Station”). Specifically, the Order alleges that Appellant failed to revise and implement changes to the Station’s Stormwater Pollution Prevention Plan (“SWPPP”) in response to exceedances of benchmark values contained in the prior version of the Permit at Outlets 006, 007, 008, 009, 010 and 011 (the “Stormwater Outfalls”), and requires Appellant to submit a proposed corrective action plan and schedule that identifies (a) the causes of past exceedances of benchmark values at the Stormwater Outfalls, (b) what actions have been taken in the past to address such exceedances, and (c) what revisions will be made to the SWPPP to in order to achieve benchmark values. The Order also requires Appellant to submit quarterly progress reports identifying revisions made to the SWPPP until the applicable benchmark values

are achieved. Additionally, in response to Appellant's comments on the draft permit, the Order includes a compliance period for achieving effluent limitations at a newly established Internal Outlet 102.

4. With regard to item (1) under "Actions Complained Of" in the Notice of Appeal, Appellant objects to Appellee's issuance of the Order to the extent that it is based upon an alleged failure by Appellant to comply with the requirement in its previous permit to revise and implement changes to the Station's SWPPP in order to achieve the applicable benchmark values. Appellant disputes the allegations upon which the Order is based, and contends that the record does not support the issuance of the Order on such grounds. Because Appellee lacks a basis for issuing the Order on the stated grounds in light of the Station's past and continuing efforts to update and revise the Station's SWPPP and best management practices for the control of stormwater discharges, the Order's provisions relating to this issue, including but not limited to Paragraphs 1-3 under "Findings of Fact" and Paragraphs 2-3 under "Order for Compliance," constitute unreasonable, arbitrary and capricious action by Appellee in violation of the Act and must be vacated in their entirety.

5. With regard to item (2) under "Actions Complained Of" in the Notice of Appeal, Appellant has objected to the compliance period for the effluent limitations applicable to the newly established Internal Outlet 102 set forth in Paragraph 4 under "Order for Compliance," which requires Appellant to achieve compliance with these limits by May 4, 2012—a mere 11 months from the effective date of the Permit. As Appellee recognizes in the Order, Appellant "currently does not have an internal monitoring location or the necessary treatment to meet the monitoring and effluent limit requirements at Internal Outlet 102." Order FOF ¶ 4. It is Appellant's position that it will require at least 18 months to install the tank system and clarifier

necessary to collect its metal cleaning wastewater for treatment to achieve the effluent limitations in the Permit. Because the compliance period does not provide adequate time for Appellant to perform the requested action, Appellee's action is unreasonable, arbitrary and capricious, in violation of the Act.

6. With regard to item (3) under "Actions Complained Of" in the Notice of Appeal, Appellant has objected to the stated daily maximum limitation for total suspended solids ("TSS") of 60 mg/l, as set forth in Paragraph 4 under "Order for Compliance" on page 2 of the Order. This limit is flatly inconsistent with the applicable Effluent Limitations and Guidelines for the Steam Electric Power Generating Point Source Category ("ELGs"), which establish a maximum daily limitation for TSS of 100 mg/l. 40 C.F.R. § 423.12(b)(3). Because the Order contravenes the applicable ELGs, this provision constitutes arbitrary and capricious action by Appellee.¹

7. With regard to item (4) under "Actions Complained Of" in the Notice of Appeal, Appellant objects to Paragraph 1 under "Order for Compliance," which requires Appellant to "immediately take measures to initiate compliance all terms and conditions" of the Permit and the Order, to the extent that it applies to numerous terms and conditions of both the Permit and the Order that have been appealed and were issued in error. The scope of this directive is overly broad in light of these many errors. Any requirement that Appellant immediately initiate measures to comply with these provisions is unreasonable, arbitrary, and capricious, in violation of the Act.

¹ Appellant also notes that Paragraph 4 under "Findings of Fact" on page 2 of the Order contains an inaccurate citation to the applicable provision of the ELGs that is the basis for the newly imposed effluent limitations at Outlet 102. While Appellant has not specifically appealed this issue, the correct reference should be 40 C.F.R. § 423.12(b)(5).

QUESTIONS OF FACT

1. Did Appellant revise and update its SWPPP in response to exceedances of benchmark values at the Stormwater Outfalls under the prior version of the Permit?
2. How much time is necessary to achieve compliance with the effluent limitations at Internal Outlet 102?

QUESTIONS OF LAW

1. Whether the issuance of the Order on the basis of Appellant's alleged failure to revise and implement changes to the SWPPP in response to exceedances of benchmark values contained in the prior version of the Permit is contrary to the record and unreasonable, arbitrary and capricious under the Act?
2. Whether the timeframe for achieving the effluent limitations at Outlet 102 constitutes unreasonable, arbitrary and capricious action by Appellee?
3. Whether the inclusion of a daily maximum limitation for TSS at Outlet 102 that is contrary to the applicable ELGs constitutes unreasonable, arbitrary and capricious action by Appellee?
4. Whether Paragraph 1 under "Order for Compliance" on page 2 of the Order constitutes unreasonable, arbitrary and capricious action by Appellee, to the extent that it requires immediate compliance with terms and conditions of the Permit and the Order that have been timely appealed and stayed by this Board?

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

CERTIFICATE OF SERVICE

I, M. Katherine Crockett, counsel for Allegheny Energy Supply Company, LLC, do hereby certify that I have served a true and exact copy of the foregoing **Notice of Appeal and Motion for Stay** upon the Appellee, Scott G. Mandirola, Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection, by hand delivery, on this 3rd day of June, 2011, addressed as follows:

Scott G. Mandirola, Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57th Street, S.E.
Charleston, West Virginia 25304

ALLEGHENY ENERGY SUPPLY COMPANY,
LLC,



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west virginia department of environmental protection

Division of Water and Waste Management
601 57th Street SE
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Phone: (304) 926-0495
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Earl Ray Tomblin, Governor
Randy C. Huffman, Cabinet Secretary
www.dep.wv.gov

**ORDER
ISSUED UNDER THE
WATER POLLUTION CONTROL ACT
WEST VIRGINIA CODE, CHAPTER 22, ARTICLE 11**

TO: Allegheny Energy Supply Co.
Harrison Power Station
Route 20
Haywood, WV 26366

DATE: May 5, 2011

ORDER NO.: 7004

INTRODUCTION

The following findings are made and Order issued to Allegheny Energy Supply Company Harrison Power Station pursuant to the authority vested in the Director of the Division of Water and Waste Management under Chapter 22, Article 11, Section 1 et seq. of the Code of West Virginia.

FINDINGS OF FACT

In support of this Order, the Director hereby finds the following:

1. The permittee owns and operates a facility, which is located in Harrison County. This facility is permitted (WV/NPDES Permit No. WV0005339 reissued the 5th day of May 2011 to discharge wastewater via Outlet(s) 006, 007, 008, 009, 010 and 011 into the West Fork River.
2. Monitoring in the previous permit indicates that the permittee has frequently exceeded benchmark values for total recoverable aluminum, total recoverable iron, and/or total suspended solids at Outlet(s) 006, 007, 008, 009, 010 and 011.
3. While exceeding benchmark values does not constitute a violation of the permit, failure to revise and implement changes to the storm water pollution prevention plan (SWPPP) in order to achieve benchmark values is a violation of Section C.13 of the previous permit issued May 16, 2005.

Promoting a healthy environment.



4. The new monitoring and effluent limits imposed in the permit at Internal Outlet 102 are technology based requirements required by 40 CFR 423(b)(5) and the statutory deadline for these technology based limits has past. No compliance schedule can be granted in the permit for any technology based limitations. The permittee currently does not have an internal monitoring location or the necessary treatment to meet the monitoring and effluent limit requirements at Internal Outlet 102.

ORDER FOR COMPLIANCE

Now, therefore, in accordance with Chapter 22, Article 11, Section 1 et seq. of the West Virginia Code, it is hereby ORDERED by the Director as follows:

1. The permittee shall immediately take measures to initiate compliance with all terms and conditions of WV/NPDES Permit No. WV0005339 and Order No. 7004.
2. On or before November 4, 2011, the permittee shall submit to the Division of Water and Waste Management a corrective plan which identifies the causes of the exceedences of the benchmark values, what actions have been taken in the past, and what revisions to the SWPPP will be made in order to achieve benchmark values.
3. The permittee shall submit quarterly progress reports identifying the revisions made to the SWPPP until the permittee achieves benchmark values for Outlet(s) 006, 007, 008, 009, 010 and 011 that shall ensure compliance with the terms and conditions of the permit.
4. For Outlet 102, final limitations mean an average monthly limitation of no more than 30 mg/l and a daily maximum limitation of no more than 60 mg/l for total suspended solids, an average monthly limitation of no more than 15 mg/l and a daily maximum limitation of no more than 20 mg/l for oil and grease, an average monthly limitation of no more than 1 mg/l and a daily maximum limitation of no more than 1 mg/l for copper and iron. The permittee shall comply with the final limits as soon as possible but no later than May 5, 2012. Until May 4, 2012, interim monitoring requirements at Outlet 102 are not required and no DMRs are required to be submitted for Outlet 102.

OTHER PROVISIONS

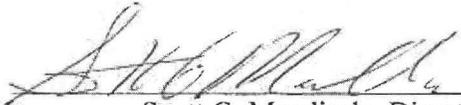
1. Compliance with the terms and conditions of this Order shall not in any way be construed as relieving the permittee of the obligation to comply with any applicable law, permit, other order, or any other requirement otherwise applicable. Violations of the terms and conditions of this Order may subject the permittee to additional enforcement action in accordance with the applicable law.
2. The provisions of this Order are severable and should a court or board of competent jurisdiction declare any provisions to be invalid or unenforceable, all other provisions shall remain in full force and effect.

3. This Order is binding on the permittee, its successors and assigns.
4. This Order shall terminate upon the permittee's notification of full compliance with the "Order for Compliance" and verification of this notification by WVDEP.

RIGHT OF APPEAL

Notice is hereby given of your right to appeal the terms and conditions of this Order which you are aggrieved to the Environmental Quality Board by filing a NOTICE of APPEAL on the form prescribed by such Board, in accordance with the provisions of Section 21, Article 11, Chapter 22 of the Code of West Virginia within thirty (30) days after receipt of this Order.

This Order shall become effective upon receipt.



Scott G. Mandirola, Director
Division of Water and Waste Management

revised January 2007

SGM:rc

cc: Environmental Enforcement Inspector
Environmental Enforcement Inspector Supervisor
US EPA Region 3