

# Appalachian Mountain Advocates

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December 7, 2023

**Kenna DeRaimo, Clerk**  
WEST VIRGINIA ENVIRONMENTAL  
QUALITY BOARD  
601 57th Street, S.E.  
Charleston, WV 25304

**Re: Allegheny Energy Supply Co., LLC/Monongahela Power Co. v. WVDEP, Appeal Nos.  
11-21-EQB, 11-22-EQB**

*Via United States First-Class Certified Mail*

Dear Ms. DeRaimo,

Please find enclosed for filing West Virginia Rivers Coalition's Petition to Intervene in the above referenced matter. Also enclosed are six (6) copies.

Thank you for your attention to this matter.

Sincerely,

Elizabeth A. Bower (WVBN 13589)  
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Enc.

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

**ALLEGHENY ENERGY SUPPLY  
COMPANY, LLC, / MONONGAHELA  
POWER COMPANY,**

Appellant,

v.

Appeal No. 11-21-EQB  
11-22-EQB

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

Appellee.

**PETITION TO INTERVENE**

West Virginia Rivers Coalition, by counsel, respectfully move this Board to allow it to intervene in the above captioned proceeding.

**Statement of Facts**

1. West Virginia Rivers Coalition is a non-profit organization whose mission is to conserve and restore West Virginia's exceptional rivers and streams. It not only seeks preservation of high-quality waters but also the improvement of waters that should be of higher quality. It has approximately 2,500 members.
2. Appellant's discharges from the Harrison Power Station are regulated under WV/NPDES Permit No. WV0005339. Of particular concern to West Virginia Rivers Coalition, the permit imposes water quality-based effluent limitations on iron and zinc from the stormwater discharges at Outlets 007, 008, 010 into the West Fork River that Appellant has and continues to violate. *See* List of Permit Violations (attached as Appendix 1).

3. Appellee West Virginia Department of Environmental Protection (“WVDEP”) reissued WV/NPDES Permit No. WV0005339 on May 5, 2011. Contemporaneously, WVDEP issued Order No. 7004 on May 5, 2011, noting Appellant’s failure to revise and implement changes to its Stormwater Pollution Prevention Plan (“SWPPP”) in response to exceedances of benchmark values for aluminum, iron, and total suspended solids at outlets 006, 007, 008, 009, 010, and 011. Order No. 7004 required Appellant to submit a proposed corrective action plan and schedule acknowledging the causes of past exceedances, actions taken to address such exceedances, and revisions to be made to the SWPPP in order to achieve compliance.

4. On June 3, 2011, Appellant lodged an appeal (Appeal No. 11-21-EQB) seeking to delete or revise certain provisions of Order No. 7004, arguing that WVDEP’s issuance of Order No. 7004 was “unreasonable, arbitrary and capricious, in violation of the [West Virginia Water Pollution Control] Act.”

5. Contemporaneously with the Notice of Appeal, Appellant filed a Motion for Stay of Order No. 7004 on June 3, 2011. In its motion, Appellant argued that it would suffer an unjust hardship as a result of certain requirements in Order No. 7004. Those requirements, specifically, were:

a. The requirement under “Order for Compliance” Paragraph 2, requiring Appellant to submit a corrective plan that identifies the causes of prior exceedances, the actions taken in the past to achieve compliance, and revisions to be made to the SWPPP to achieve compliance in the future;

b. The requirement under “Order for Compliance” Paragraph 3, requiring Appellant to submit quarterly progress reports identifying the revisions made to the SWPPP to achieve compliance; and

- c. The requirement under "Order for Compliance" Paragraph 1, requiring Appellant to "immediately take measures to initiate compliance with all terms and conditions" of the permit and Order No. 7004.
6. In addition to appealing the Order for Compliance (Appeal No. 11-21-EQB), Appellant also appealed WV/NPDES Permit No. WV5005339 (Appeal No. 11-22-EQB). In that appeal, Appellant specifically appealed "the imposition of unnecessary reporting requirements at Outlets 006, 007, 008, 009, 010 and 011 (the 'Stormwater Outfalls')" and "[t]he [water quality based effluent limitations] for iron, zinc and aluminum at the Stormwater Outfalls."
7. Like in Appeal No. 11-21-EQB, Appellant contemporaneously filed a Motion for Stay of WV/NPDES Permit No. WV0005339, in which it sought immediate stay of certain terms and conditions of the permit, including "[t]he two-year compliance schedule for achieving the final discharge limitations for iron, zinc and aluminum at Outlets 006, 007, 008, 009, 010 and 011 contained in Sections A and B of the Permit."
8. After a hearing on two Motions for Stay, this Board issued an Order Granting Stay of Certain Permit Terms and Conditions and Certain Conditions of Order 7004 on June 17, 2011. In its Order Granting Stay, this Board stayed the following terms and conditions of Order No. 7004:
  - a. The water quality based effluent limitations for iron at Outlet 001 and aluminum at Outlet 002;
  - b. The two-year compliance schedule for iron at Outlet 002;
  - c. The two-year compliance schedule for iron, zinc, and aluminum at Outlets 006,007, 008, 009, and 010;
  - d. The summer maximum daily limits for effluent temperature at Outlets 001 and 002;

e. The requirement to install two-stream temperature monitors in the West Fork River downstream of Outlets 001 and 002 within six months of the permit; and

f. The requirement under “Order for Compliance” Paragraph 1, requiring Appellant to “immediately take measures to initiate compliance with all terms and conditions” of the permit and Order No. 7004, to the extent that provision applied to conditions stayed by the Board.

9. Since that time, WVDEP administratively extended Permit No. WV0005339, most recently on December 20, 2019 with an expiration date of June 30, 2020.

10. Appellant’s application for permit reissuance is currently pending, according to the permit file available on WVDEP’s Application Electronic Submission System. The last update to the permit file was the “End of Public Comment Period” on April 29, 2021. West Virginia Rivers Coalition is unaware of any permitting updates on the part of either WVDEP or Appellant since that time.

11. This Board has scheduled a status conference for December 14, 2023, at which time the parties are to provide the Board with information regarding:

a. The permit conditions under which the Appellant is currently operating;

b. Justification for the stay currently in place;

c. Are the terms of the permit being enforced?;

d. Answer any and all questions the Board may have regarding the permit Appellant is operating under; and

e. Answer any and all questions the Board may have regarding the permit modification currently being processed by the West Virginia Department of Environmental Protection.

12. Since at least June 2017 to the present, Appellant has been consistently discharging iron and zinc in excess of permit limitations at Outlets 007, 008, and 010. *See* Appendix 1. Due to the stay currently in place, as well as both Appellant's and WVDEP's inaction, these violations have gone unchecked and unmitigated.

### **Legal Analysis**

Pursuant to W. Va. Code § 22B-1-7(e), “[w]ith the consent of the board and upon such terms and conditions as the board may prescribe, any person affected by the matter pending before the board may, by petition, intervene as a party appellant or appellee.” West Virginia Rivers Coalition now seeks to intervene in this appeal as a party appellee because it is affected by the matter pending before the Board. In particular, West Virginia Rivers Coalition is affected by the matter pending before the Board because it has an interest in the general water quality of West Virginia's streams, including the West Fork River into which the Harrison Power Station discharges. As noted above, a core mission of West Virginia Rivers Coalition is to conserve, restore, protect, and improve the streams and rivers of West Virginia. To achieve this, West Virginia Rivers Coalition regularly monitors the water quality of West Virginia waterways and brings citizen suits against WV/NPDES permit holders for violations under the Clean Water Act. West Virginia Rivers Coalition therefore has an interest in the proper and effective implementation of the Clean Water Act's provisions and processes. Both the water quality of the West Fork River, and eventually the Monongahela River into which the West Fork River converges, and the proper implementation of the Clean Water Act are at stake in this matter.

As it further relates to this matter before the Board, West Virginia Rivers Coalition is affected by the stay currently in place because it has effectively placed West Virginia Rivers Coalition in an enforcement purgatory: If West Virginia Rivers Coalition seeks to pursue a citizens'

suit against Appellant for its past and ongoing permit violations under the provisions of the Clean Water Act, a court may find that WVDEP's Order No. 7004 constitutes "diligent prosecution" and bar the suit. At the same time, however, certain provisions of Order No. 7004 have been stayed by this Board for over a decade, including the "Schedule of Compliance" in Section B of the permit for Outlets 006, 007, 008, 009, and 010. Thus, West Virginia Rivers Coalition is without recourse for the harm the organization and its members suffer as a result of Appellant's past and ongoing permit violations.

In sum, West Virginia Rivers Coalition is affected by the matter pending before the Board because staying an Order for Compliance for over a decade and allowing impermissible and violative effluent discharges to persist undermines West Virginia Rivers Coalition's efforts to conserve, restore, protect, and improve West Virginia's waters and to ensure the proper implementation and enforcement of the Clean Water Act in West Virginia. West Virginia Rivers Coalition therefore satisfies the requirements for intervention under W. Va. Code § 22B-1-7(e).

Because this Board is a creature of statute, West Virginia Rivers Coalition does not need to satisfy any intervention requirements beyond that required by the statute. However, even if it were to be required to satisfy regulatory requirements for intervention, West Virginia Rivers Coalition could do so here. As instructed by the Board's procedural rules, 46 C.S.R. § 4-6.13, the West Virginia Rules of Civil Procedure guide the appeals process before this Board, and state that:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this State confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

W. Va. R. Civ. P. 24(a). As previously discussed, West Virginia Rivers Coalition has an interest in conserving, restoring, protecting, and improving the water quality of West Virginia's streams and

Rivers and ensuring the proper and effective implementation and enforcement of the Clean Water Act. These interests may be impaired or impeded without West Virginia Rivers Coalition's participation in this appeal. West Virginia Rivers Coalition's interests are not adequately represented by WVDEP, as clearly demonstrated by the decade's long stay in this matter. Moreover, WVDEP and West Virginia Rivers Coalition often have widely disparate views and approaches when it comes to the proper and effective implementation of the Clean Water Act. As a result, West Virginia Rivers Coalition often has to seek relief from federal and state courts or administrative bodies due to the agency's actions or inactions.

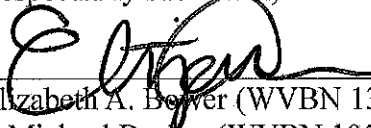
Lastly, West Virginia Rivers Coalition's intervention will not delay this appeal, nor will either party suffer prejudice as a result of its intervention. This matter is currently set for a status conference on December 14, 2023, at which West Virginia Rivers Coalition seeks to be present.

#### **Conclusion**

For the foregoing reasons, West Virginia Rivers Coalition respectfully requests that this Board grant their Petition to Intervene.

DATED: December 7, 2023

Respectfully submitted,



Elizabeth A. Bower (WVBN 13589)

J. Michael Becher (WVBN 10588)

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*Counsel for West Virginia Rivers Coalition*



**WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD  
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**ALLEGHENY ENERGY SUPPLY  
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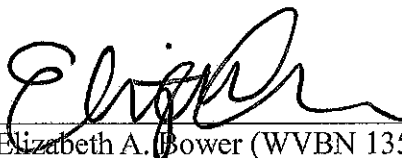
**CERTIFICATE OF SERVICE**

I hereby certify that I served a true copy of the foregoing *Petition to Intervene* on December 7, 2023, for the above-referenced matter via U.S. First Class mail upon the following:

**David L. Yaussy**  
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**Jonathan Fame**  
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*Counsel for West Virginia Rivers Coalition*

# Appendix 1

**List of Violations at Harrison Power Station  
WV/NPDES Permit No. WV0005339  
June 2017 – September 2023**

#	Date	Outlet	Parameter	Permit Limit	Units	Type	Reported	% Over Limit
1	06/23/17	007	Iron, total recoverable	1.5	mg/L	Max	5.24	249
2	06/23/17	007	Zinc, total recoverable	0.12	mg/L	Max	0.7	479
3	07/01/17	007	Iron, total recoverable	1.5	mg/L	Max	2.64	76
4	07/01/17	007	Zinc, total recoverable	0.12	mg/L	Max	0.2	66
5	07/20/17	007	Iron, total recoverable	1.5	mg/L	Max	3.1	107
6	07/20/17	007	Zinc, total recoverable	0.12	mg/L	Max	0.44	270
7	07/28/17	008	Zinc, total recoverable	0.12	mg/L	Max	2.25	1775
8	07/28/17	010	Iron, total recoverable	1.5	mg/L	Max	5.59	273
9	08/03/17	007	Iron, total recoverable	1.5	mg/L	Max	7	367
10	08/03/17	007	Zinc, total recoverable	0.12	mg/L	Max	2.84	2267
11	08/03/17	010	Iron, total recoverable	1.5	mg/L	Max	1.89	26
12	08/18/17	007	Zinc, total recoverable	0.12	mg/L	Max	0.21	76
13	09/01/17	010	Iron, total recoverable	1.5	mg/L	Max	1.85	23
14	09/14/17	010	Iron, total recoverable	1.5	mg/L	Max	2.11	41
15	10/15/17	007	Iron, total recoverable	1.5	mg/L	Max	2.91	94
16	10/15/17	007	Zinc, total recoverable	0.12	mg/L	Max	1.06	783
17	10/15/17	008	Zinc, total recoverable	0.12	mg/L	Max	4.73	3842
18	10/23/17	007	Zinc, total recoverable	0.12	mg/L	Max	0.12	2
19	10/28/17	007	Zinc, total recoverable	0.12	mg/L	Max	0.55	361
20	01/27/18	007	Iron, total recoverable	1.5	mg/L	Max	4.84	223
21	01/27/18	007	Zinc, total recoverable	0.12	mg/L	Max	0.45	275
22	01/27/18	008	Zinc, total recoverable	0.12	mg/L	Max	7.36	6033
23	05/04/18	007	Iron, total recoverable	1.5	mg/L	Max	9.07	505
24	05/04/18	007	Zinc, total recoverable	0.12	mg/L	Max	2.05	1608
25	05/04/18	008	Zinc, total recoverable	0.12	mg/L	Max	11.2	9233
26	05/04/18	010	Iron, total recoverable	1.5	mg/L	Max	3.96	164
27	07/30/18	007	Zinc, total recoverable	0.12	mg/L	Max	0.98	717
28	07/30/18	008	Zinc, total recoverable	0.12	mg/L	Max	3.71	2992
29	10/11/18	008	Zinc, total recoverable	0.12	mg/L	Max	1.35	1025
30	10/11/18	010	Iron, total recoverable	1.5	mg/L	Max	2.42	61
31	01/04/19	007	Iron, total recoverable	1.5	mg/L	Max	7.75	417
32	01/04/19	007	Zinc, total recoverable	0.12	mg/L	Max	0.7	485
33	01/04/19	008	Zinc, total recoverable	0.12	mg/L	Max	3.45	2775
34	01/04/19	010	Iron, total recoverable	1.5	mg/L	Max	1.86	24

35	04/12/19	007	Iron, total recoverable	1.5	mg/L	Max	5.96	297
36	04/12/19	008	Zinc, total recoverable	0.12	mg/L	Max	0.43	256
37	04/12/19	010	Iron, total recoverable	1.5	mg/L	Max	5.65	277
38	07/02/19	007	Iron, total recoverable	1.5	mg/L	Max	6.49	333
39	07/02/19	007	Zinc, total recoverable	0.12	mg/L	Max	0.97	707
40	07/02/19	008	Zinc, total recoverable	0.12	mg/L	Max	5.99	4892
41	07/11/19	007	Iron, total recoverable	1.5	mg/L	Max	3.34	123
42	07/11/19	007	Zinc, total recoverable	0.12	mg/L	Max	0.18	47
43	07/11/19	008	Zinc, total recoverable	0.12	mg/L	Max	0.88	635
44	07/11/19	010	Iron, total recoverable	1.5	mg/L	Max	2.31	54
45	10/16/19	007	Iron, total recoverable	1.5	mg/L	Max	3.03	102
46	10/16/19	007	Zinc, total recoverable	0.12	mg/L	Max	0.77	540
47	10/16/19	008	Zinc, total recoverable	0.12	mg/L	Max	2.63	2092
48	10/16/19	010	Iron, total recoverable	1.5	mg/L	Max	43.2	2780
49	02/18/20	007	Iron, total recoverable	1.5	mg/L	Max	5.35	257
50	02/18/20	007	Zinc, total recoverable	0.12	mg/L	Max	0.58	383
51	02/18/20	008	Zinc, total recoverable	0.12	mg/L	Max	1.67	1292
52	02/18/20	010	Iron, total recoverable	1.5	mg/L	Max	2.68	79
53	05/14/20	007	Iron, total recoverable	1.5	mg/L	Max	5.23	249
54	05/14/20	007	Zinc, total recoverable	0.12	mg/L	Max	0.43	256
55	05/14/20	008	Zinc, total recoverable	0.12	mg/L	Max	1.21	908
56	07/30/20	007	Iron, total recoverable	1.5	mg/L	Max	4.8	220
57	07/30/20	007	Zinc, total recoverable	0.12	mg/L	Max	1.12	833
58	07/30/20	008	Zinc, total recoverable	0.12	mg/L	Max	2.56	2033
59	10/29/20	007	Iron, total recoverable	1.5	mg/L	Max	2.14	43
60	10/29/20	007	Zinc, total recoverable	0.12	mg/L	Max	0.53	338
61	10/29/20	008	Zinc, total recoverable	0.12	mg/L	Max	1.95	1525
62	03/18/21	007	Iron, total recoverable	1.5	mg/L	Max	4.28	185
63	03/18/21	010	Iron, total recoverable	1.5	mg/L	Max	2.95	97
64	03/31/21	007	Zinc, total recoverable	0.12	mg/L	Max	0.27	126
65	03/31/21	008	Zinc, total recoverable	0.12	mg/L	Max	2.02	1579
66	06/30/21	007	Iron, total recoverable	1.5	mg/L	Max	55.05	3570
67	06/30/21	007	Zinc, total recoverable	0.12	mg/L	Max	1.68	1297
68	06/30/21	008	Iron, total recoverable	1.5	mg/L	Max	3.25	117
69	06/30/21	008	Zinc, total recoverable	0.12	mg/L	Max	2.2	1734
70	09/30/21	007	Iron, total recoverable	1.5	mg/L	Max	9.82	555
71	09/30/21	007	Zinc, total recoverable	0.12	mg/L	Max	0.52	333
72	09/30/21	008	Iron, total recoverable	1.5	mg/L	Max	2.65	77
73	09/30/21	008	Zinc, total recoverable	0.12	mg/L	Max	9.77	8042
74	12/31/21	007	Iron, total recoverable	1.5	mg/L	Max	10.12	575
75	12/31/21	007	Zinc, total recoverable	0.12	mg/L	Max	0.8	565
76	12/31/21	008	Zinc, total recoverable	0.12	mg/L	Max	4.01	3246

77	12/31/21	010	Iron, total recoverable	1.5	mg/L	Max	4.82	221
78	03/31/22	008	Zinc, total recoverable	0.12	mg/L	Max	0.43	255
79	03/31/22	010	Iron, total recoverable	1.5	mg/L	Max	2.77	85
80	06/30/22	007	Iron, total recoverable	1.5	mg/L	Max	9.81	554
81	06/30/22	007	Zinc, total recoverable	0.12	mg/L	Max	0.47	293
82	06/30/22	008	Zinc, total recoverable	0.12	mg/L	Max	1.01	744
83	06/30/22	010	Iron, total recoverable	1.5	mg/L	Max	3.62	141
84	09/30/22	007	Iron, total recoverable	1.5	mg/L	Max	22	1367
85	09/30/22	007	Zinc, total recoverable	0.12	mg/L	Max	1.92	1504
86	09/30/22	008	Zinc, total recoverable	0.12	mg/L	Max	1.26	948
87	09/30/22	010	Iron, total recoverable	1.5	mg/L	Max	3.17	111
88	12/31/22	007	Iron, total recoverable	1.5	mg/L	Max	10.02	568
89	12/31/22	007	Zinc, total recoverable	0.12	mg/L	Max	0.48	302
90	12/31/22	008	Zinc, total recoverable	0.12	mg/L	Max	0.58	383
91	12/31/22	010	Iron, total recoverable	1.5	mg/L	Max	4.1	174
92	03/31/23	007	Zinc, total recoverable	0.12	mg/L	Max	0.23	92
93	03/31/23	007	Iron, total recoverable	1.5	mg/L	Max	3.34	123
94	03/31/23	008	Zinc, total recoverable	0.12	mg/L	Max	0.37	208
95	09/30/23	007	Zinc, total recoverable	0.12	mg/L	Max	0.125	4
96	09/30/23	007	Iron, total recoverable	1.5	mg/L	Max	2.43	62
97	09/30/23	008	Zinc, total recoverable	0.12	mg/L	Max	0.735	512.5