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Environmental Quality  
Board

BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

MONONGAHELA POWER COMPANY, LLC

Appellant,

Appeal No.: 24-02-EQB

v.

JEREMY W. BANDY, DIRECTOR,  
DIVISION OF WATER AND WASTE MANAGEMENT,  
WEST VIRGINIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,

Appellee.

**MOTION FOR STAY PENDING APPEAL**

Pursuant to *W. Va. Code* § 22B-1-7(d) and Rule 5.3 of the Board's Procedural Rules, Appellant Monongahela Power Company, LLC ("MPC"), by counsel, hereby MOVES for the entry of a Stay of a certain provision of Solid Waste/NPDES Permit No. WV0050766 issued by the Director of the Division of Water and Waste Management, West Virginia Department of Environmental Protection ("DEP"), on January 19, 2024, with an effective date of March 1, 2024, ("the NPDES Permit"), on the following grounds:

1. By this appeal, MPC is challenging the imposition of various water quality-based permit limits in the Permit. *See* MPC's Notice of Appeal (filed contemporaneously with this Motion, and incorporated herein by reference).
2. As described in the Notice of Appeal, the Permit authorizes discharges from the Rivesville Power Station Closed Coal Combustion By-Products Landfill located in Marion County, West Virginia ("Facility").

3. When it issued the Permit, the Department appropriately changed the “receiving stream” for the Facility’s discharge at Outlet 006 from an unnamed tributary to the Monongahela River. The Monongahela River has far more assimilative capacity as compared to the unnamed tributary. When it changed the “receiving stream” for the discharge at Outlet 006 to the Monongahela River in the Permit, however, DEP imposed water quality-based permit limits for Aluminum, Arsenic, Beryllium, Cadmium, Iron, and Mercury that become effective on March 1, 2024.<sup>1</sup> These limits that become effective on March 1, 2024, do not reflect mixing with the Monongahela River (*i.e.*, there is no mixing zone and they do not reflect the assimilative capacity of the Monongahela River).
4. In its response to MPC’s comments on the draft version of the Permit, DEP indicated that MPC could collect background data on Aluminum, Arsenic, Beryllium, Cadmium, Iron, and Mercury after the permit limits for these parameters become applicable and submit this data with an application for a major permit modification to establish a mixing zone<sup>2</sup>. *See* Permit, p. 3. This is contrary to DEP’s *Water Quality Standards/Mixing Zones Implementation Guidance* (June 30, 1997)(“*Guidance*”)<sup>3</sup>, which states that “existing facilities seeking mixing zones” are to be given a six to 18 month compliance schedule to submit background data in support of a mixing zone. *See Guidance*, p. 14.

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<sup>1</sup> For Cadmium, DEP imposed interim permit limits that become effective on March 1, 2024, as well as final permit limits that become effective on March 1, 2026. *See* Permit, Section A.006. At this time, MPC seeks a stay of the interim permit limits for Cadmium. DEP imposed monitoring and reporting requirements for Boron effective March 1, 2024, and final permit limits for Boron effective March 1, 2026. MPC reserves the right to supplement this motion or file a separate motion seeking a stay of the final permit limits for Boron and Cadmium, if necessary.

<sup>2</sup> Per DEP’s response, background data can also be collected for Boron, which could be used to modify the limits for Boron that become effective March 1, 2026.

<sup>3</sup> Available at [https://dep.wv.gov/wwe/permit/individual/documents/370\\_mzguide.pdf](https://dep.wv.gov/wwe/permit/individual/documents/370_mzguide.pdf) (last visited on Feb. 22, 2024).

5. DEP rejected MPC's request for a compliance schedule for the permit limits for Aluminum, Arsenic, Beryllium, Cadmium, Iron, and Mercury on other grounds:. 1) DEP indicated that past effluent data reported by MPC for Aluminum, Cadmium, Iron, and Mercury would have exceeded the new or more stringent limits on numerous occasions. Permit, p. 3 (noting that past effluent data would result in five exceedances of the new permit limits for Aluminum, 24 exceedances of the new permit limits for Cadmium, four exceedances of the new permit limits for Iron, and three exceedances of the new permit limits for Mercury). DEP, however, concluded that these would-be exceedances for Aluminum, Iron, and Mercury "are not frequent enough to justify compliance schedules," Permit, p. 3.; and 2) "anti-backsliding" prevents "monitoring only" conditions for Aluminum, Arsenic, and Cadmium limits that were in the prior version of the Permit until final limits become effective, a conclusion with which MPC disagrees and is subject of the appeal.
6. DEP's refusal to grant MPC a compliance schedule or schedules to meet water quality-based permit limits for Aluminum, Arsenic, Beryllium, Cadmium, Iron, and Mercury was contrary to the *Guidance*; inconsistent with W.Va. C.S.R. § 47-10-8.1; was arbitrary, capricious, or an abuse of discretion; was clearly wrong in view of the entire record; and/or was affected by other error of law. Under *W. Va. Code* § 29A-5-4(g), this means that the Permit must be modified or otherwise revised to provide MPC with a reasonable compliance schedule or schedules to meet the permit limits Aluminum, Arsenic, Beryllium, Cadmium, Iron, and Mercury.

7. In the absence of a Stay, the new or more stringent permit limits for Aluminum, Arsenic, Beryllium, Cadmium, Iron, and Mercury will become effective on March 1, 2024. *See* Permit, Section A.006.
8. Should the water-quality based permit limits become effective before the Board has had an opportunity to consider and rule on MPC's appeal, MPC will be at risk of immediate noncompliance and will be required to expend substantial resources that it would not otherwise have been required to devote to that purpose, while this Board may determine that these new or more stringent permit limits should not have been imposed in the first place or must be adjusted based on background data collected from the Monongahela River. MPC's inability to comply with these new or more stringent limits subjects MPC to the possibility of costly enforcement actions and third-party citizens suits, which could result in the expenditure of resources by MPC prior to a hearing on the merits of its Appeal. Furthermore, should the Board find that MPC's appeal is meritorious and that its requested relief should be granted, MPC will have incurred these expenses and suffered these burdens without valid cause, and without any hope of recompense. This constitutes "unjust hardship" sufficient to warrant issuance of a Stay of the relevant provisions of the NPDES Permit under *W.Va. Code* § 22B-1-7(d).

WHEREFORE until such time as the Board issues a final order in this appeal, MPC asks that the Board issue an Order that: (1) grants a Stay of the permit limits for Aluminum, Arsenic, Beryllium, Cadmium, Iron, and Mercury that become effective on March 1, 2024, and a Stay of

the permit limits for Boron and Cadmium that become effective on March 1, 2026; and (2) subjects MPC to “report only” requirements for Aluminum, Arsenic, Beryllium, Boron, Cadmium, Iron, and Mercury.

Respectfully submitted,

Monongahela Power Company, LLC  
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By counsel

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**CERTIFICATE OF SERVICE**

I, Christopher B. Power, counsel for Appellant Monongahela Power Company, do hereby certify that copies of the foregoing Motion for Stay Pending Appeal have been served upon the Appellee and Appellee's counsel, this 23rd day of February 2024, via either hand-delivery or first-class mail, addressed to the following:

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