

BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

MONONGAHELA POWER COMPANY, LLC,

Appellant,

Appeal No.: 24-02-EQB

v.

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

RECEIVED

FEB 23 2024

Environmental Quality  
Board

Appellee.

**NOTICE OF APPEAL**

TO THE ENVIRONMENTAL QUALITY BOARD:

Appellant Monongahela Power Company, LLC (“MPC”) respectfully represents that it is aggrieved by the issuance by the Director of the Division of Water and Waste Management, West Virginia Department of Environmental Protection (“DEP”), of West Virginia Solid Waste/NPDES Permit No. WV0050766 (“Permit”) for the Rivesville Power Station Closed Coal Combustion By-Products Landfill located in Marion County, West Virginia (“Facility”) on January 19, 2024. (A copy of the Permit is attached as Exhibit A). MPC received the Permit from DEP via email on January 25, 2024. More specifically, and as described below, MPC is aggrieved by the following terms and conditions of the Permit:

- (1) The discharge limitations found in Section A.006. of the Permit for Aluminum, Arsenic, Beryllium, Boron, Cadmium, Iron, and Mercury;
- (2) The lack of a Compliance Schedule for the discharge limitations found in Section A.006 of the Permit that become effective on March 1, 2024;
- (3) The 24-month Compliance Schedule for the final discharge limitations found in Section A.006 and Section B. of the Permit for Boron and Cadmium; and

(4) Such other and related language and conditions that are arbitrary and capricious, contrary to law, and duplicate or further compound the errors identified above.

The Appellant therefore prays that this matter be reviewed, and that the Permit be remanded to the DEP to be modified in accordance with the relief requested below.

Respectfully submitted,

Monongahela Power Company, LLC

By counsel

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**A. PERMIT FROM WHICH APPEAL IS BEING TAKEN.**

MPC hereby appeals certain conditions in the Solid Waste/NPDES Permit No. WV0050766 (“Permit”) issued for the Rivesville Power Station Closed Coal Combustion By-Product Landfill located in Marion County (“Facility”) on January 19, 2024.

**B. NATURE AND GROUNDS OF APPELLANT’S CLAIMS.**

**1. MPC Must be Given a Reasonable Opportunity Under a Compliance Schedule to Collect Background Data and Establish a Mixing Zone Before any Water Quality-Based Limits are Imposed.**

- a. The Permit appropriately designates the Monongahela River as the “receiving stream” for the discharge at Outlet 006. Section A.006 of the Permit requires MPC to meet water quality-based permit limits for the Outlet 006 discharge for the following parameters: (1) Aluminum; (2) Arsenic; (3) Beryllium; (4) Boron ( interim monitoring and final permit limits); (5) Cadmium (both interim and final permit limits); (6) Iron; and (7) Mercury.
- b. DEP imposed these water quality-based permit limits without giving MPC any time and a reasonable compliance schedule to complete a study to establish the background concentrations in the Monongahela River for these parameters and without considering the assimilative capacity of the Monongahela River. This stands in contrast to DEP’s *Water Quality Standards/Mixing Zones Implementation Guidance* (June 30, 1997)(“*Guidance*”)<sup>1</sup>, which states that “[f]or existing facilities seeking mixing zones, where information is lacking and generation is not possible within the permitting time frame, the draft permit

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<sup>1</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).

should include a compliance schedule that requires the submission of information by the permittee” and “[t]he permit should require the submission of a Modification Application after a reasonable time period for data generation (generally 6-18 months after the effective date of the permit). Within the Modification Application, the permittee would request a mixing zone and provide the required information.” *Guidance*, p. 14. Here, DEP did not follow this *Guidance* to allow MPC any time to collect the required data to support a mixing zone for the Outlet 006 parameters based on a discharge to the Monongahela River.

- c. In the response to MPC’s comments on the draft version of the Permit, DEP stated that MPC “may pursue a default mixing zone upon establishment of background in the Monongahela River for the parameters limited in Section A. of the Permit” and that MPC could do so through “a major permit modification application.” DEP, however, imposed several permit limits that become effective on March 1, 2024, without providing MPC time to establish background and a mixing zone and without recognizing that it could take a significant amount of time for DEP to process and act on a major permit modification application.
- d. DEP’s imposition of these water quality-based permit limits without giving MPC any time and a reasonable compliance schedule to complete a study to establish the background concentrations in the Monongahela River and without considering the assimilative capacity of the Monongahela River is arbitrary, unreasonable, an abuse of discretion, and otherwise contrary to the law.

**2. A Compliance Schedule is Warranted for all Water Quality-Based Effluent Limits that Become Effective on March 1, 2024.**

- a. In addition to disregarding its *Guidance* and not giving MPC any time and a reasonable compliance schedule to gather background data and establish a mixing zone for the Outlet 006 discharge to the Monongahela River, *see supra*, DEP generally refused to grant a compliance schedule for the permit limits that become effective on March 1, 2024.
- b. In its response to MPC's comment requesting a compliance schedule for any new or more stringent permit limit for the discharge at Outlet 006, DEP stated that it "does not issue compliance schedules for parameters in which compliance is not an issue" and then goes on to acknowledge that since 2018, MPC reported what would have been five exceedances of the new permit limits for Aluminum, three exceedances of the new permit limits for Mercury, and four exceedances of the new permit limits for Iron. Permit, p. 3. DEP asserts that these would-be exceedances of the new permit limits for Aluminum, Iron, and Mercury "are not frequent enough to justify compliance schedules." By contrast, DEP states that MPC would have exceeded the new final Cadmium limits on 24 occasions, which in DEP's view warrants a compliance schedule.
- c. Under W.Va. C.S.R. § 47-10-8.1, DEP is authorized to "specify a compliance schedule leading to compliance" with NPDES permit limits "when appropriate." DEP's own analysis of MPC's past reported effluent data shows that MPC may not be able to achieve consistent and immediate compliance with the new or more stringent permit limits for Aluminum, Iron, and Mercury.

Compliance with the new or more stringent permit limits Aluminum, Iron, and Mercury may require MPC to evaluate potential wastewater treatment technologies and if necessary, install such technologies at the Facility to ensure consistent compliance with the new or more stringent permit limits.

- d. DEP's failure to grant MPC a compliance schedule to meet the permit limits for Aluminum, Iron, and Mercury is arbitrary, unreasonable, an abuse of discretion, and otherwise contrary to the law.

**3. The 24-Month Compliance Schedule for the Final Boron and Cadmium Permit Limits is Unreasonably Short.**

- a. Section A.006 of the Permit imposes interim and final permit limits for the discharge at Outlet 006 for Boron and Cadmium. The final Outlet 006 permit limits for both Boron and Cadmium become effective on March 1, 2026. Part B (Schedule of Compliance) establishes a 24-month compliance schedule to achieve the final permit limits for these parameters.
- b. Under W.Va. C.S.R. § 47-10-8.1.a, a "schedule of compliance shall require compliance as soon as possible," although W.Va. C.S.R. § 47-10-8.1.c allows compliance schedules to run for multiple years, provided that "interim requirements and dates for their achievement," including progress reports, are required in the compliance schedule.
- c. DEP imposed a 24-month compliance schedule for MPC to meet the new final limits for Boron and Cadmium. DEP provided no analysis or evaluation in the fact sheet for the Permit or response to MPC's comments on the draft version of the Permit as to why 24 months was deemed to be a sufficient amount of

time for MPC to meet these new final permit limits for Boron and Cadmium. An inflexible 24-month compliance schedule also does not leave sufficient time for DEP to modify the Permit or issue new permits or authorizations that may be needed to comply with the new final permit limits for Boron and Cadmium.

- d. DEP's failure to grant MPC a compliance schedule of more than 24 months to meet the new permit limits for Boron and Cadmium is arbitrary, unreasonable, an abuse of discretion, and otherwise contrary to the law.

**4. DEP's Improper Reliance on "Backsliding" to Impose Aluminum, Arsenic, and Cadmium Permit Limits<sup>2</sup>.**

- a. Section A.006 of the Permit imposes permit limits for Aluminum, Arsenic, and Cadmium, some of which were imposed in the most recent version of the Permit issued for the Facility, when the "receiving stream" for the Outlet 006 discharge was considered to be to an unnamed tributary and not the Monongahela River. The Average Monthly permit limit for Aluminum was changed from 0.24 milligrams per liter to 0.23 mg/L in the Permit, and the Maximum Daily permit limit for Arsenic was changed from 0.016 mg/L to 0.015 mg/L, as compared to the most recent version of the Permit issued for the Facility. The Average Monthly and Maximum Daily permit limits for Cadmium in the Permit are the same as those that were imposed in the prior version of the Permit.
- b. In response to MPC's comments, DEP stated that "[i]t should also be noted that should the agency grant compliance schedules for parameters that became more

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<sup>2</sup> Although DEP did not assert that "backsliding" requires it to impose the interim Cadmium limits at Outlet 006, the interim limits for Cadmium in the Permit are the same as those that were effective in the prior version of the Permit, suggesting that DEP believes that "anti-backsliding" requires it to impose the interim Cadmium limits in the Permit.

stringent (arsenic and aluminum) the interim limitation is required to be the effective limit from the previous permit due to anti-backsliding requirements.”

Permit, p. 3.

- c. The governing regulations, however, do not mandate that DEP impose permit limits from a prior permit in all cases. More specifically, W.Va. C.S.R. § 47-10-6.3.j.2.C. provides that DEP need not impose more stringent permit limits from a prior permit when “[t]he circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance.” The previous permit for the facility considered an unnamed tributary as the “receiving stream,” but in November 2023, DEP’s Watershed Assessment Branch (“WAB”) conducted a field study and concluded that this unnamed tributary is a wet-weather stream. Based on the WAB’s evaluation, DEP changed the “receiving stream” for the discharge at Outlet 006 to the Monongahela River. This is a material and substantial change that required DEP to evaluate the propriety of the Arsenic and Aluminum limits that were imposed in the prior permit.
- d. DEP’s failure to revisit and reassess the Aluminum, Arsenic, and Cadmium limits from the prior permit is arbitrary, unreasonable, an abuse of discretion, and otherwise contrary to the law.

**5. DEP’s Imposition of Boron Limits for Discharge at Outlet 006 is Arbitrary, Unreasonable, An Abuse of Discretion, and Otherwise Contrary to Law.**



- a. In Section A.006 of the Permit, DEP imposes new permit limits for Boron that are to take effect on March 1, 2026. In the response to comments and fact sheet for the Permit, DEP states that it used the LC50 for Boron from a study entitled "Acute and Chronic Toxicity of Boron to a Variety of Freshwater Organisms"; Soucek, Dickenson, and Koch; *Environmental Toxicity and Chemistry* Vol. 30 No. 8; 2011, and a "human health advisory level for Boron" developed by the U.S. Environmental Protection Agency to assess "reasonable potential" and then presumably to develop the new Boron permit limits for the Outlet 006 discharge.
  - b. The new Boron limits for the Outlet 006 discharge appear to have been imposed pursuant to the DEP's interpretation of W. Va. C.S.R. § 47-2-9, *Establishment of Safe Concentration Values*, as well as DEP's interpretation of West Virginia's narrative water quality criteria in W. Va. C.S.R. § 47-2-3.2.e. DEP's imposition of the new Boron limits for the Outlet 006 discharge is arbitrary, capricious, unreasonable, an abuse of discretion, and contrary to the law because (among other errors) the conditions to the proper application of that regulation have not been satisfied.
6. Such other and further grounds as may be revealed or supported by the record, discovery, and evidence developed in this appeal.

### **C. QUESTIONS OF FACT**

1. Is a compliance schedule to establish background data and mixing considerations appropriate when the "receiving stream" for a discharge is changed from a stream

with little to no assimilative capacity to a river with significant assimilative capacity?

2. Is a compliance schedule appropriate when past reported effluent data shows a potential for exceedances of newly established water quality-based effluent limits?
3. Is the change in a receiving stream from an unnamed tributary to a major river a material and substantial change to an NPDES permit?
4. Do the Boron concentrations in the Facility's discharge at Outlet 006 pose a risk to aquatic life or human health?
5. Such other and further questions of fact as may be raised by the administrative record, discovery, and evidence developed during this appeal.

#### **D. QUESTIONS OF LAW**

1. Was it arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with law for the DEP to refuse to grant MPC a compliance schedule to collect background data and establish a mixing zone for the Outlet 006 discharge to the Monongahela River before imposing water-quality based effluent limits?
2. Was it arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with law for the DEP to refuse to grant MPC a compliance schedule for the water-quality based effluent limits that become effective on March 1, 2024?
3. Was it arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with law for the DEP to limit the compliance schedule for the new final Cadmium and new final Boron permit limits to 24 months?

4. Was it arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with law for the DEP to rely on the general “anti-backsliding” prohibition when there has been a material and substantial change involving the designated “receiving stream” for the Outlet 006 discharge?
5. Was it arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with law for the DEP to impose a new final Boron permit limit for the Outlet 006 discharge to protect narrative water quality criterion?
6. Such other and further questions of law as may be raised by discovery and evidence introduced at hearing.

WHEREFORE the Appellant asks that the Board review the Permit, the Certified Record, and evidence to be presented, and enter an Order: (1) remanding the Permit to the DEP so that it may make the changes to it identified under each specific section of this Notice set forth above; and (2) granting such other and further relief as may be shown to be proper.

Respectfully submitted,

Monongahela Power Company

By Counsel



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WEST VIRGINIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,

Appellee.

**CERTIFICATE OF SERVICE**

I, Christopher B. Power, counsel for Appellant Monongahela Power Company, do hereby certify that copies of the foregoing Notice of 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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Christopher B. Power