WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

MONONGAHELA POWER COMPANY,

Appellant,

v. **Appeal No. 16-04-EQB**

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

Appellee.

ORDER GRANTING APPELLANT'S MOTION TO STAY

Pending before the Board is Monongahela Power Company's (Appellant) "Motion for Stay Pending Appeal" regarding certain provisions of a reissued solid waste NPDES permit (WV0075795).

The Board heard oral argument concerning the motion for stay on October 25, 2016. Having considered all the information presented, the Board finds that Appellant's arguments warrant a stay until final resolution of the case. Therefore, the Board **GRANTS** the Appellant's Motion for Stay and has set this matter for an evidentiary hearing.

Applicable Law

In analyzing a Motion for Stay, the Board reviews the request and applies the standard associated with injunctive relief. In *Camden-Clark Memorial Hospital v. Turner*, 212 W. Va. 752, 575 S.E.2d 362 (2002), the West Virginia Supreme Court of Appeals held:

> "In making this balancing' inquiry, we have followed the lead of the Fourth Circuit Court of Appeals: Under the balance of hardship test the [lower] court must consider, in flexible interplay, the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff

> without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n*, 183 W.Va. 15, 24, 393 S.E.2d 653, 662 (1990) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985)

Id. at 756, 356 (internal citations omitted).

The Federal Courts have provided additional insight on the weight to be applied to the factors:

> "...a party moving for a stay pending appeal must make *at least as strong* a showing on the first prong (likelihood of success)..." *Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Engineers, 890 F. Supp. 2d 688, 692 (S.D.W. Va. 2012)*
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> "...heightened showing of chances of success was required by movants for a stay pending appeal compared to movants for a preliminary injunction, a burden which was justified by the stage in the proceedings at which a motion for a stay occurs." Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Engineers, 890 F. Supp. 2d 688, 691-92 (S.D.W. Va. 2012)
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> "...the factors are balanced, such that a stronger showing on some of these prongs can make up for a weaker showing on others." *Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Engineers, 890 F. Supp. 2d 688, 692 (S.D.W. Va. 2012)*

Facts

An extensive review of the facts is not necessary for this Order. In summary, Appellant's previous permits required it to monitor the amount of mercury discharged from its outlet 008. However, for the first time, the new permit (issued September 19, 2016) contained effluent limits for mercury at the outlet. The limits will come into effect (and be enforceable) on November 1, 2016.

In addition to other arguments, Appellant claims the limits were erroneously calculated by the West Virginia Department of Environmental Protection (DEP). More importantly for this Order, Appellant argues that once the new limits become effective on November 1, 2016, the limits cannot be reversed even if the Board later agrees that they were erroneously calculated. The basis

of this argument is that the EPA's anti-backsliding provision prohibits subsequent permits from having weaker limits. See: 33 U.S.C.A. § 1342(o). In other words, if a permit has a limit of 10, permits in the future can never be 9 or less.

On the other hand, the DEP argues that there is "no harm, no foul". DEP points to the fact that Appellant has never had a problem keeping mercury under control at the outlet. In other words, even with the new effluent limits in place, there remains little chance that Appellant would violate those limits based on its discharge history.

The Board finds Appellant has sufficiently proven it will experience irreparable harm if the stay is not granted. If the affluent limits become effective (and enforceable) before the evidentiary hearing, Appellant may be precluded by the anti-backsliding provision from obtaining relief even if it sufficiently proves its underlying claims. (See factor 1 above.) In addition, given that Appellant has never consistently exceeded the DEP's proposed limits in the new permit, there is no likelihood of detrimental harm to DEP's ability to protect the waters in the Moundsville Power area. (See factor 2 above.) The stay is **GRANTED**.

ENTERED 10/31/2016

Edward M. Snyder, Ph.D.
Chairman