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Environmental Quality  
Board

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

**APPALACHIAN POWER COMPANY,  
dba AEP**

**Appellant,**

**v.**

**Appeal No. 22-02-EQB**

**DIVISION OF WATER AND WASTE  
MANAGEMENT, WEST VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION,**

**Appellee,**

**MOTION FOR STAY**

The Appellant Appalachian Power Company, doing business as AEP, (“Appellant” “AEP” or the “Company”), respectfully moves this Board for a stay of certain provisions of WV/NPDES Permit No. WV0048500 issued on March 7, 2022, and received by AEP on March 14, 2022, pending resolution of this appeal. In support of its motion, Appellant states as follows:

1. As set forth more fully in its appeal, incorporated herein by reference, AEP has appealed and objects to certain terms and conditions of its newly reissued WV/NPDES Permit (“Permit”).
2. AEP’s appeal has been timely filed, as has this Motion for Stay.

3. The Permit covers all water discharges from the Mountaineer Plant. AEP anticipated a number of changes in the renewed Permit and incorporated those changes into the overall compliance strategies for the facility. AEP's Mountaineer plant is subject to two new major federal rules – one for water discharges (effluent limitation guidelines, or ELG) and one for coal ash management and disposal (coal combustion residuals rule, or CCR). Both of these new rules will require Mountaineer to spend millions of dollars to comply or, in the alternative, to commit to permanent cessation of coal combustion or retirement. The permit renewal includes requirements for the ELGs, which are new to the permit and were expected.
4. Unfortunately, the WVDEP also included unexpected changes in the Permit. Notably, none of the new Permit conditions for which a stay is sought is the result of a change in the law, or a change in AEP's operations. All are unanticipated changes based completely on changes in agency practice.
5. AEP's concerns were raised through timely filed comments submitted to the agency in response to the draft Permit, and AEP now files its appeal of these issues, and seeks a stay of the following conditions in the Permit:
  - a. Outlet 001 Sulfate limits (improperly derived limit);
  - b. Outlet 201 Arsenic, Mercury, Selenium, and Nitrate+Nitrite limits (CWF and removal efficiency issues); and

- c. Section B Compliance Date for May 1, 2022 (we think it is unreasonable to have the plan of action for Aluminum due the first day the permit goes effective).
6. The imposition of these conditions, without relief, will result in unjust hardship to AEP.

#### **Sulfate Effluent Limits – Outlet 001**

7. First, AEP cannot comply with the newly imposed sulfate limits for Outlet 001. WVDEP imposed new average and daily maximum limits for sulfate – a change that was not the result of any change at the facility or any change in the requirements applicable to sulfate. It was solely the result of a permit writer’s decision to make substantive and significant changes to the agency’s interpretation and application long-existing rules and requirements. Indeed, as recognized by the Permit’s Fact Sheet, West Virginia does not have a numeric criteria for sulfate. Further, past data from this plant shows no toxicity concerns for Outlet 001.<sup>1</sup> Yet the WVDEP has relied on “possible toxicity” together with narrative water quality standards to justify the inclusion of numeric effluent limits for sulfate.
8. The previous (2009) version of the Permit required sulfate monitoring; the reissued permit has an average sulfate limit of 1,427 mg/L and a maximum daily limit of 1,993 mg/L. Based on past monitoring data, the Mountaineer Plant will

<sup>1</sup> Mountaineer conducted quarterly toxicity sampling for *ceriodaphnia dubia* and *pimpephales* during the last permit cycle with all results being less than 1.0 TUa. Mountaineer will continue monitoring toxicity during this permit cycle and this is adequate to address DEP’s stated concern regarding potential toxicity associated with this pollutant.

not be able to consistently meet either the monthly average or daily maximum limits every month without adding new treatment technology. This will require a significant capital investment above and beyond the investments already planned for CCR and ELG compliance.

9. This change was made without notice to AEP outside of its review of the initial draft permit. Existing discharge monitoring reports for the facility demonstrate that consistent compliance with these new limits cannot be reasonably expected under current operating conditions.
10. In assigning these sulfate limits, WVDEP has exceeded the scope of its authority under the narrative water quality standards and engaged in *de facto* rulemaking.
11. The procedure used for calculating the sulfate limits is not an approach AEP has seen in any of the other NPDES water discharge permits issued by other States for any other AEP coal powered plant.
12. Without a stay, AEP will be immediately placed in the untenable position of not being able to assure compliance with a new and unexpected permit condition and will suffer an unjust hardship due to the arbitrary and erroneous Permit conditions now subject to appeal.

#### **Arsenic, Mercury, Nitrate+Nitrite, and Selenium Limits at Outlet 201**

13. In addition to the sulfate effluent limit concerns, AEP cannot fully and consistently comply with final monthly average and daily maximum limitations imposed at the Permit's new internal Outlet 201. Average monthly and daily maximums for arsenic, mercury, nitrate + nitrite, and selenium go into effect at

Outlet 201 on June 1, 2023 and are based on an improper application of the building block formula to calculate limits of the combined flue gas desulfurization (FGD) and landfill leachate wastestreams.

14. DEP's application of removal efficiencies to the leachate wastestream is not justified under current regulations or guidance.
15. The use of a removal efficiency in calculating ELG limits as done by WVDEP for Mountaineer is not an approach AEP has seen in any of the other NPDES water discharge permits issued by other States for any other AEP or non-AEP coal powered plant, except at its Amos plant (which is also under appeal).
16. The bioreactor treating the combined landfill leachate and FGD wastestreams at Mountaineer is already in-service and has been operating for several years. While the addition of an ultrafilter is planned as part of upgrades to comply with ELG regulations, the design and operation of the bioreactor is confined to the existing process and cannot be "re-worked" to comply with these new limits.
17. AEP had no reason to anticipate DEP would be imposing a more stringent limit (due to the application of removal efficiencies) than was calculated based on USEPA guidance prior to the draft permit being issued and as such, does not have a long-range plan to meet the average monthly and daily maximum limits included in the Permit.
18. AEP is seeking a stay of the applicability date of June 1, 2023, deadline for the imposition of the final arsenic, mercury, nitrate + nitrite, and selenium limits at

Outlet 201 and to continue interim monitor-only requirements until the appeal can be resolved, to avoid unjust hardship to AEP.

**Section B Compliance Date for May 1, 2022**

19. Section B of the NPDES Permit specifies a Compliance Date of May 1, 2022 to submit a plan of action that “identifies the courses of action to be taken by the permittee that will result in compliance with the final effluent limitations for aluminum at Outlet 001.” May 1, 2022 is the first day the permit goes effective; this is not sufficient time to prepare and submit a thorough plan of action.

20. AEP seeks to move the submittal date for the plan of action to June 1, 2022 to allow sufficient time to develop, prepare, and submit the plan to DEP. Thus, AEP seeks a stay of the May 1, 2022 deadline.

WHEREFORE, Appellant AEP believes it is clear that it will suffer an unjust hardship if its Motion for Stay is not granted, and respectfully moves the Board to GRANT its Motion for Stay and to grant such other and further relief that the Board deems just.



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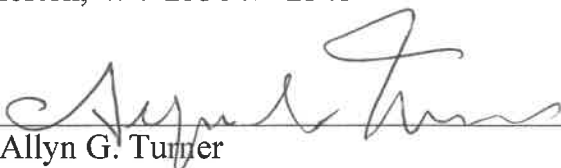
**Appellee,**

**CERTIFICATE OF SERVICE**

I, Allyn G. Turner, do hereby certify that a true and exact copy of the foregoing  
MOTION FOR STAY was caused to be served upon the following via hand delivery this  
12<sup>th</sup> day of April 2022.

Ms. Kathy Emery, Acting Director  
Division of Water and Waste Management  
WV Department of Environmental Protection  
601 - 57th Street SE  
Charleston, WV 25304 – 2345

Office of Legal Services  
Department of Environmental Protection  
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Allyn G. Turner