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BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD MAR 22 2024

ALLEGHENY ENERGY SUPPLY COMPANY, LLC,

Environmental Quality  
Board

Appellant,

Appeal No.: 24-03-EQB

v.

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

Appellee.

**MOTION FOR STAY PENDING APPEAL and  
MEMORANDUM IN SUPPORT OF MOTION**

Pursuant to *W. Va. Code* § 22B-1-7(d) and Rules 5.3, 5.4 and 5.5 of the Board's Procedural Rules, Appellant Allegheny Energy Supply Company, LLC ("AESC"), by counsel, hereby MOVES for the entry of a Stay of certain provisions of Modification No. 2 to WV/NPDES Solid Industrial Waste Permit No. WV0079171 dated February 7, 2024,<sup>1</sup> as supplemented by Letter of Correction dated February 16, 2024<sup>2</sup> (collectively, "Permit Mod No. 2") issued by the Director, Division of Water and Waste Management, W. Va. Department of Environmental Protection ("DEP") for the McElroy's Run CCR Landfill and Impoundment (the "Facility"). This Motion<sup>3</sup> is based upon the following grounds (as further described below):

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<sup>1</sup> A copy of the February 7, 2024 Modification No. 2 is attached to AESC's Notice of Appeal as Exhibit B and found at Certified Record pp. 97-121.

<sup>2</sup> A copy of the February 16, 2024 Letter of Correction is attached as Exhibit C to the appeal and found at Certified Record pp. 122-144. The Letter of Correction changed the "Effective Date" of Modification No. 2 to April 1, 2024.

<sup>3</sup> AESC acknowledges that the Notice of Appeal was filed on March 6, 2024. Nevertheless, AESC submits that this Motion should be considered to be filed "contemporaneously" with the Notice of Appeal within the meaning of Rule 5.5 of the Board's Procedural Rules because (a) Permit Mod No. 2 does not become effective until **April 1, 2024**; and (b) consistent with the Board's general policy encouraging settlement of disputes brought before it, the parties have been in good faith discussions since the Notice of Appeal was filed, in hopes of avoiding the need for this Motion.

1. As described in more detail in the Notice of Appeal (which is incorporated by reference in its entirety), DEP failed to prepare a revised Draft Permit and allow for comment prior to issuance of Permit Mod No. 2, even though the agency imposed more stringent effluent limits than were in the Draft Permit and made other substantial changes to the permit and the method of preparing the permit that were never explained in the Fact Sheet or any public document. Permit Mod No. 2 also contains water quality based-effluent limits (“WQBELs”) for more parameters than is required by law, and those limits are more stringent than required by law.<sup>4</sup> Because these errors are plainly in violation of the controlling regulations, arbitrary and capricious, and/or reflect an abuse of discretion, AESC is likely to prevail in this appeal, and a Stay should be entered so that AESC is not irreparably harmed while this appeal is under consideration.
2. If the Challenged Provisions are not Stayed, there is a substantial risk that AESC will suffer irreparable harm because it may be deprived of its right to appeal those limits due to the “Anti-backsliding” provision of the federal Clean Water Act, 33 U.S.C. § 1342(o). In short, if the effluent limits in Permit Mod No. 2 are allowed to take effect, then DEP, the U.S. Environmental Protection Agency (“EPA”), and/or other persons may assert that those effluent limits may not later be rescinded or modified -- *regardless* of the Board’s ruling on this appeal – due to the Anti-backsliding statute. In addition, AESC faces material risk of exceeding certain of the WQBELs set forth in Permit Mod No. 2. If it is forced to take steps to ensure compliance with those

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<sup>4</sup> As identified in the Notice of Appeal, AESC seeks to have the Board vacate: (a) the effluent limits for Fluoride and Selenium applicable to Outlet 001; (b) the effluent limits for Aluminum, Arsenic, Cadmium, and Selenium applicable to Outlet 002; (c) the interim effluent limits for Aluminum and Cadmium at Outlet 002; and (d) the Compliance Schedule (Part B) provisions applicable to the effluent limits identified in Subparagraphs (a), (b) and (c). These parts of Permit Mod No. 2 are referred to herein as the “Challenged Provisions.”

Challenged Provisions, it will be required to expend substantial resources that it would not otherwise have been required to commit to those purposes, while this Board may determine that such requirements should not have been imposed in the first place. AESC, however, will have no opportunity to recover those losses should it prevail in this appeal. For both of these reasons, AESC will be irreparably harmed if a Stay is not issued.

3. The DEP will face no harm if a Stay is issued. It has made no finding that the effluent limits in the existing permit are inadequate to protect water quality standards in the receiving stream, and the record includes no evidence of same. Issuance of a Stay would present no risk of harm to the DEP, the public or the environment.

For all of these reasons, a Stay of the challenged provisions should be granted.

**I. The Board's Standards for Issuance of a Stay.**

In evaluating a Motion for Stay, the Board has adopted the four-part test for issuance of a temporary restraining order as set forth in *Camden-Clark Memorial Hospital v. Turner*, 575 S.E.2d 362, 366 (W.Va. 2002) (which cited, indirectly, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048, 1054 (4<sup>th</sup> Cir. 1985)). Specifically, in *Camden-Clark* the Court undertook a “balancing” test in which it applied, in “flexible interplay” the following factors:

- (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.

*Camden-Clark*, 575 S.E.2d at 366 (citations omitted). See, e.g., *Cleveland-Cliffs Weirton LLC v. DEP*, Stay Order, Appeal No. 22-06-EQB (Sept. 19, 2022). Application of these factors in this case strongly demonstrates that issuance of a Stay is warranted.

## II. AESC Meets All the Standards for Granting a Stay.

### A. AESC Will Suffer Irreparable Harm Without a Stay.

AESC will suffer irreparable harm absent a Stay for at least three reasons. First, AESC will likely be unable to consistently comply with the certain of the WQBELs included in Permit Mod No. 2 (specifically, the Selenium limits at Outlets 001 and 002, and the Arsenic, Cadmium and Aluminum effluent limits at Outlet 002). Such non-compliance will expose AESC to potential enforcement action from DEP, EPA, and possibly third-party organizations through a “citizens suit” under the federal Clean Water Act, 33 U.S.C. §1365.

Second, AESC could be forced to expend substantial resources that it would not otherwise have been required to devote to achieving compliance if the Board later determines that these WQBELs should not have been imposed. In such a circumstance, AESC has no ability to recover those expenses. *See W.Va. Dep’t. of Envtl. Prot. v. Dotson*, 856 S.E.2d 213, 219-221 (DEP entitled to immunity for discretionary administrative actions). By definition, such a monetary loss without the possibility of recovery constitutes irreparable harm. *Hughes Network Systems, Inc. v. Interdigital Communications Corp.*, 17 F.3d 691, 694 (4<sup>th</sup> Cir.1994).

Third, the “Anti-backsliding” provision of the federal Clean Water Act, 33 U.S.C. § 1342(o), provides as follows:

“In the case of [water quality-based] effluent limitations... a permit may not be renewed, reissued or modified...to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit...”

*Id.* Should the challenged WQBELs become effective before the Board has had an opportunity to consider and rule on AESC’s appeal, under the federal Anti-backsliding provision, the DEP, EPA, and/or other persons may assert that those effluent limits may not be later rescinded or modified,

regardless of the Board's ruling on this appeal. Although AESC would vigorously dispute any such effort, if successful, it would have the effect of eliminating AESC's statutory right to appeal Permit Mod No. 2 as established in *W.Va. Code* §§ 22-11-21 and 22B-1-7(b). Such a risk of depriving AESC of its appeal rights under the West Virginia Water Pollution Control Act, *W.Va. Code* § 22-11-1, et seq., in and of itself constitutes "unjust hardship" sufficient to warrant issuance of a Stay of the Challenged Provisions under *W.Va. Code* § 22B-1-7(d).

**B. The DEP Will Suffer No Harm from a Stay.**

The only possible harm to the DEP from issuance of a Stay would be with respect to its authority to enforce the specific WQBELs at issue. However, staying the effluent limits during the pendency of this appeal will have no effect on the DEP's authority to enforce other provisions of the permit, or otherwise enforce the NPDES program in other contexts, or against any other person. DEP retains full authority to require compliance monitoring and to enforce the West Virginia Water Pollution Control Act, *W. Va. Code* § 22-11-1, et seq ("WPCA") and related regulations, and to take such actions as it deems necessary to ensure that discharges to State waters protect human health and the environment.

**C. AESC Is Likely to Succeed on the Merits of this Appeal.**

There is strong evidence that DEP violated the law and acted in an arbitrary and capricious manner in issuing Permit Mod No. 2. In short, the DEP: (a) imposed more stringent WQBELs than were proposed in the Draft Permit; (b) without explanation, changed the inputs to the CORMIX computer model (specifically, using different temperature combinations selected on the basis of different CORMIX outputs) that was used in preparing the Draft Permit for the purpose of determining whether WQBELs were required for various parameters; and (c) arbitrarily

truncated the size of the mixing zones used in the CORMIX modeling (i.e., did not allow the use of the number of dilutions that are clearly available to AESC under the DEP's mixing zone regulations at W.Va. C.S.R. §47-2- 5), in an attempt to justify its imposition of WQBELs for more parameters than is required under law and more stringent WQBELs for those parameters than is required by law.

Under W.Va. C.S.R. § 47-10-12.4, “[i]f any data, information or arguments submitted during the public comment period raise substantial new questions concerning a permit,” the DEP must re-open the comment period on the proposed permitting action (even if it does not prepare a new Draft Permit). *Id.* The new inputs to the CORMIX model that DEP used to determine the size of mixing zones for Permit Mod No. 2 are equivalent to new “data” that raise substantial questions concerning the terms of the permit that resulted from those changes. The DEP is also required to re-open the comment period whenever it “revises any condition of the [Draft Permit] that had been sent to initial public notice.” *Id.* The inclusion of effluent limitations for Aluminum and Cadmium at Outlet 002 that are more stringent than the limits proposed in the Draft Permit are revisions that also required a re-opening of the comment period under the DEP regulations.

Moreover, the DEP's use of temperature data in a new manner in the CORMIX model and its arbitrary truncating of the mixing zones for the purpose of imposing WQBELs for two parameters at Outlet 001 (Fluoride and Selenium) and for three parameters at Outlet 002 (Aluminum, Arsenic and Selenium) that would not otherwise have been subject to limits was unlawful, arbitrary and capricious, or an abuse of discretion within the meaning of *W. Va. Code* § 29A-5-4(g), the statute setting forth the standards of review that apply to appeals to the Board. *See W. Va. Code* § 22B-1-6(d). There is no statute or regulation authorizing the DEP to administer the NPDES permit program in this manner, and the truncating of mixing zones based on the DEP's

unbridled discretion is directly contrary to the applicable regulations. As a result, AESC is likely to prevail in proving that all of these aspects of Permit Mod No. 2 should be reversed and vacated.

#### **D. Issuance of a Stay Is in the Public Interest.**

Granting the requested stay will serve the public interest in several ways. First, as noted above, in the event DEP decides to revise any condition of the proposed permit after it has been advertised for public comment, West Virginia regulations mandate that the agency either (a) issue a revised Draft Permit for consideration (during a new comment period); or (b) reopen or extend the public comment period. W. Va. C.S.R. §§ 47-10-11.1, 11.3; 47-10-12.4. This serves the public interest of providing notice and opportunity for both the applicant and the public to evaluate the proposed permit terms and provide comments on those proposed terms prior to final issuance. The requested Stay will serve the public interest by preventing DEP from imposing and enforcing permit terms for which it failed to provide an opportunity for public comment.

Second, in determining which parameters should be subject to WQBELs and in calculating the proposed WQBELs, DEP concedes that it did not afford AESC the benefit of the mixing zones authorized under West Virginia law. Instead, DEP limited the mixing zones to the size the agency unilaterally and subjectively determined was “needed.”<sup>5</sup> Such an arbitrary exercise of discretion is contrary to the public interest. Rather, the public interest is served when government agencies are required to apply laws as written, which provide predictability and accountability.

Third, there is no indication that AESC’s discharges will violate water quality standards with a Stay in place. As explained in the Notice of Appeal, AESC’s modeling shows that concentrations of several pollutants in AESC’s discharge are so low that there is an absence of

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<sup>5</sup> Permit Mod No. 2, p. 1 (Certified Record, p. 98).

“reasonable potential” to violate water quality standards, and thus no limit should be required in the first place for several of the parameters that are subject to WQBELs in Permit Mod No. 2. Additionally, AESC understands that DEP’s own modeling shows that the discharge is expected to comply with water quality standards for those parameters if the mixing zones authorized by West Virginia law are implemented.

In short, granting a Stay of the Challenged Provisions will not threaten the public interest in any way. To the contrary, it is in the public interest that the DEP administer the environmental laws in a manner that is authorized by the plain language of those laws.

### **III. Conclusion.**

Allowing the Challenged Provisions of Permit Mod No. 2 (in particular, the WQBELs for the disputed parameters) to take effect during the pendency of this appeal presents a substantial likelihood of causing AESC to incur irreparable harm. If it exceeds those WQBELs, it faces the prospect of potential violations and penalties, based on effluent limitations that should never have been applied. Perhaps even more injurious, if those WQBELs are allowed to take effect, then DEP, EPA or others may claim that the Anti-backsliding statute prohibits the DEP from later removing or reducing those limits even if AESC is successful in demonstrating that they should never have been included in the permit.

As described above, AESC has presented serious legal grounds for seeking reversal and vacation of the Challenged Provisions, and is likely to succeed on the merits of this appeal. In addition, neither the DEP nor the public interest will be adversely affected by a Stay pending the Board’s final order.

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WHEREFORE the Appellant asks that the Board issue an Order granting a Stay of the following provisions of Permit Mod No. 2: (a) the effluent limits for Fluoride and Selenium applicable to Outlet 001; (b) the effluent limits for Aluminum, Arsenic, Cadmium, and Selenium applicable to Outlet 002; (c) the interim effluent limits for Aluminum and Cadmium at Outlet 002; and (d) the Compliance Schedule (Part B) provisions applicable to the effluent limits identified in Subparagraphs (a), (b) and (c).

Respectfully submitted,

Allegheny Energy Supply Company, LLC  
By counsel

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Christopher B. Power (W. Va. Bar No. 4286)  
Robert M. Stonestreet (W.Va. Bar No. 9370)  
Babst Calland Clements and Zomnir, P.C.  
Truist Place  
300 Summers Street, Suite 1000  
Charleston, WV 25301  
Phone: (681) 265-1362  
Fax: (681) 205-8814  
[cpower@babstcalland.com](mailto:cpower@babstcalland.com)  
[rstonestreet@babstcalland.com](mailto:rstonestreet@babstcalland.com)

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Appeal No.: 24-03-EQB

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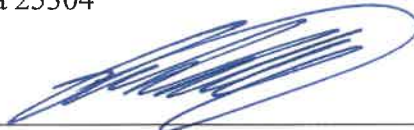
JEREMY W. BANDY, DIRECTOR,  
DIVISION OF WATER AND WASTE MANAGEMENT,  
WEST VIRGINIA DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,

Appellee.

**CERTIFICATE OF SERVICE**

I, Robert M. Stonestreet, counsel for Appellant Allegheny Energy Supply Company, do hereby certify that copies of the foregoing Motion for Stay have been served upon the Appellee and Appellee's counsel, this 22<sup>nd</sup> day of March 2024, via e-mail and hand-delivery, addressed to the following:

Chance J. Chapman, Esq.  
Office of Legal Services  
West Virginia Department of Environmental Protection  
601 57<sup>th</sup> Street, S.E.  
Charleston, West Virginia 25304



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Robert M. Stonestreet