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BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

Environmental Quality
Board

MONONGAHELA POWER COMPANY,

Appellant,

Appeal No.: 16-04-EQB

v.

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

Appellee.

MOTION FOR CONTINUANCE OF HEARING

Pursuant to *W. Va. Code* § 22B-1-6(d), *W. Va. Code* § 29A-5-1, et seq., and Rules 5.2, 5.3, 5.4, and 6.2 of the Board's Procedural Rules, Appellant Monongahela Power hereby MOVES for a continuance of the hearing in this appeal that is currently scheduled for August 15-16, 2024. In support of this Motion, MPC represents that:

1. By this appeal, MPC challenged, *inter alia*, the inclusion of water quality-based effluent limitations for mercury at Outlet 008 in Solid Waste/NPDES Permit No. WV0075795 issued by the Director of the Division of Water and Waste Management, West Virginia Department of Environmental Protection ("DEP"), on September 19, 2016 (the "2016 NPDES Permit"), an outlet which had never before had such limits.
2. This appeal was based upon MPC's belief that the mercury limits at Outlet 008 were erroneously calculated, and/or that MPC should have been granted a reasonable period of time to achieve compliance with the new mercury limits pursuant to an appropriate compliance schedule.

3. On October 31, 2016, the Board entered the “Order Granting Appellant’s Motion for Stay,” staying the mercury effluent limits for Outlet 008 in the 2016 NPDES Permit. That Stay was granted because (among other considerations) if those limits were allowed to become effective on November 1, 2016 (as contemplated by the permit), then pursuant to the federal Clean Water Act’s Anti-backsliding” provision at 33 U.S.C. § 1342(o) (the “CWA ABS Provision”), they “cannot be reversed even if the Board later agrees they were erroneously calculated.” The Board also observed that, according to the DEP, there was “little chance” that MPC would violate the mercury limits based on its discharge history.
4. On May 18, 2019 (pursuant to a settlement agreement between the parties and the “Agreed Order Remanding Permit” entered by the Board on August 18, 2017), MPC applied to modify the 2016 NPDES Permit to, *inter alia*, incorporate a diffuser and obtain mixing zone limits for mercury and other parameters.
5. On March 22, 2024, the DEP released a draft reissuance of Solid Waste/NPDES Permit No. WV0075795, incorporating the agency’s decisions on MPC’s modification application and other changes to the permit (the “Draft 2024 NPDES Permit”). In its written comments on the Draft 2024 NPDES Permit, MPC did not object to or address the proposed mercury effluent limitations for Outlet 008 in that draft permit.
6. The proposed mercury effluent limitations for Outlet 008 in the Draft 2024 NPDES Permit are higher than the (stayed) mercury effluent limitations in the 2016 NPDES Permit.
7. Unless the Board’s October 31, 2016 Stay Order remains in place, if the less stringent mercury effluent limits in the Draft 2024 NPDES Permit remain at the same values

when the permit is finalized, they could be subject to an action to set them aside as in violation of the CWA ABS Provision.

8. This appeal must remain on the Board's docket to keep the Board's October 31, 2016 Stay Order in effect.
9. If forced to do so, MPC could litigate the challenges it made to the mercury limits in the 2016 NPDES Permit, which (until that permit is superseded) remain an actual controversy and live dispute between the parties. However, since the Draft 2024 NPDES Permit is likely to be finalized in the near future, it would cause an unnecessary waste of the time and resources of the Board and of the parties to require that a hearing be held on an issue that is sure to become moot once the Draft 2024 NPDES Permit is finalized. This, in turn, would violate the spirit of the Board's rules that encourage parties to seek entry of orders that will help "regulate the course of a hearing" and "simplify issues" in order to promote the "fair and orderly" disposition of matters before it. Procedural Rules 1.1.a, 5.2.

WHEREFORE, for good cause shown, MPC asks that the Board continue the hearing in this appeal that is currently scheduled for August 15-16, 2024, to the Board's docket in November, 2024 or later. A proposed Order accompanies this motion.

Respectfully submitted,

Monongahela Power Company, LLC
1803 Murdoch Avenue
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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 a copy of the foregoing Motion for Continuance of Hearing and proposed Order Granting Motion for Continuance has been served upon the Appellee this 22nd day of July, 2024, via e-mail and 1st-Class U.S. mail, to the following:

Jonathan C. Frame, Esq.
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West Virginia Department of Environmental Protection
601 57th Street, S.E.
Charleston, West Virginia 25304
Jonathan.C.Frame@wv.gov



Christopher B. Power (W. Va. Bar No. 4286)

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ORDER GRANTING MOTION FOR CONTINUANCE

On Thursday, July 25, 2024, the parties, by and through their legal counsel, appeared before the Environmental Quality Board ("Board"), via Zoom, for a prehearing status conference in this appeal and to address related issues. Prior to the conference, the Appellant filed its "Unopposed Motion to Continue Evidentiary Hearing." The motion (which the Appellee did not oppose) was presented for consideration and addressed by counsel at the conference.

For good cause shown, the Board GRANTS Appellant's Motion and ORDERS that the evidentiary hearing in this appeal shall be continued to _____, beginning at **8:30 a.m.**, at the Board's offices located at 601 57th Street, Charleston, Kanawha County, West Virginia 25304. As indicated in the previous Notice of Hearing, parties may participate in the evidentiary hearing either at the Board's offices or virtually via Zoom, using the following link:

Additionally, the **prehearing status conference** shall be held on _____,
at **10:00 a.m.**, *via Zoom only*, using the following link:

All other matters addressed in the previous Notice of Hearing shall continue to apply.

It is so **ORDERED** and **ENTERED** this _____ day of July, 2024.

WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

By: _____
Dr. Edward Snyder, Chairperson