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Environmental Quality
Board

BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

ALLEGHENY ENERGY SUPPLY COMPANY, LLC,

Appellant,

Appeal No.: 24-03-EQB

v.

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

Appellee.

**APPELLANT'S MOTION TO AMEND APPEAL and
SECOND MOTION TO CONTINUE EVIDENTIARY HEARING**

Pursuant to Rules 5.3, 5.4 and 6.2 of the Environmental Quality Board ("Board")'s Procedural Rules, Appellant Allegheny Energy Supply Company, LLC ("AESC"), by counsel, hereby MOVES the Board to: (1) allow the amendment of its Notice of Appeal, to dismiss certain grounds for appeal as set forth below; and (2) in light of the reduced scope of the appeal and AESC's recent filing of an application to modify the permit under appeal, continue the evidentiary hearing scheduled to commence on August 15-16, 2024, for at least ninety (90) days or as soon thereafter as the hearing may be scheduled. In support of these requests, AESC states the following.

I. Background.

This appeal involves the terms and conditions of two (2) modifications made by Appellee West Virginia Department of Environmental Protection ("WVDEP") to WV/NPDES Permit No. WV0079171 (the "Permit"), governing discharges from the McElroy's Run Coal Combustion Residuals ("CCR") Landfill and Impoundment facility ("the Facility"). AESC appealed from the issuance of both modifications.

Modification No. 1 pertained to certain changes to groundwater monitoring and other actions required under the WVDEP's solid waste regulations. AESC appealed Modification No. 1 ("**Appeal Issue One**") based on WVDEP's failure to revise the Compliance Schedule set forth in the permit to include an opportunity to complete an alternate source demonstration ("ASD") as to lithium in groundwater, and the failure to modify the Compliance Schedule so that an Assessment of Corrective Measures would only be required for lithium if a successful ASD is not achieved.

Modification No. 2 involves changes to the water quality-based effluent limits ("WQBELs") applied to discharges from the Facility, necessitated by changes to the configuration of the Facility involving the cessation of use of the impoundment for deposits of CCR and the subsequent dewatering of the impoundment. AESC appealed Modification No. 2 because more stringent effluent limits were imposed in the final modification than were proposed in the Draft Permit, without the reopening of the comment period or preparation of a new draft permit ("**Appeal Issue Two**"); and because certain WQBELs were imposed for parameters that did not previously have limits or were more stringent than required, based upon new inputs or approaches to the computer modeling used to calculate those limits ("**Appeal Issue Three**").

On July 22, 2024, AESC filed a Motion to Continue the August 15-16, 2024 hearing in this appeal based on its intent to analyze and compile additional water sampling results collected since issuance of Modification No. 2 and provide them to the WVDEP. WVDEP opposed that motion. On July 26, 2024, the Board entered an Order denying AESC's continuance request.

II. Motion to Amend AESC's Notice of Appeal.

The Board's Procedural Rules at 5.3, 5.4 and 6.13, as well as Rule 15 of the West Virginia Rules of Civil Procedure, allow the Board to grant a motion to amend an appeal "freely" and

whenever “justice so requires.” Rule 15(a), W. Va. R. Civ. P. In addition, the Board’s Rules (Rule 5.7) encourage motions that “tend to regulate the course of a hearing” or “simplify the issues” to be presented.

Appeal Issue One. Since Modification No. 1 was issued and after this appeal was filed, AESC has decided to forego its appeal of Modification No. 1 and allow any objections it may have with respect to the issues raised in that part of the appeal to be addressed (if necessary) during subsequent permitting. Accordingly, AESC moves to amend its appeal by **withdrawing Appeal Issue One.**

Appeal Issue Three. Since Modification No. 2 was issued and after this appeal was filed, AESC developed an updated diffuser design for the primary discharge outlet at the Facility. In addition, with the knowledge and consent of the WVDEP, AESC collected additional water samples (through June 2024) to help fully characterize that discharge. On the basis of this new information, on July 31, 2024, AESC filed a new permit modification application (the “July 2024 Modification Request”) seeking calculation of new effluent limits and other changes to the Permit. Consistent with that, AESC moves to amend its appeal by **withdrawing Appeal Issue Three.**

This leaves **Appeal Issue Two**, which presents primarily a legal question, for the Board’s consideration should this appeal proceed. However, should the WVDEP grant the July 2024 Modification Request, AESC plans to promptly withdraw this appeal in its entirety, which will eliminate the need for any further proceedings in this matter.

III. Motion to Continue Evidentiary Hearing.

As noted, on July 31, 2024, AESC filed the July 2024 Modification Request. It seeks to incorporate a new design for the facility effluent diffuser and the use of additional discharge

sampling data it has obtained (through June 2024) to calculate revised WQBELs. That application also seeks to delete water sample locations identified as “LM3” and “LM4” from the permit based upon the piping changes associated with the water management changes addressed in the July 2024 Modification Request.

The issuance by WVDEP of a permit modification requested in the July 2024 Modification Request will supersede the need for the relief requested by AESC in this appeal. As stated above, in the event that modification request is granted, AESC plans to withdraw or move to dismiss this appeal in its entirety.

Based upon this new information and the new filing since the Board’s July 26, 2024 Order, AESC believes it has satisfied Procedural Rule 6.2 by showing good cause for a continuance of the evidentiary hearing in this appeal while the WVDEP processes the July 2024 Modification Request. If a hearing is held, it will be limited to a narrow, mostly legal determination of an issue that should become moot once the WVDEP acts on the July 2024 Modification Request. In addition, AESC represents that a continuance would not present a significant risk of environmental harm because there is no indication that AESC’s discharges will violate water quality standards in the interim.

A continuance of at least 90 days is necessary to allow time for WVDEP to process the modification application, complete the public notice process, and consider any public comments submitted prior to taking final action on the application.

IV. Conclusion.

For all these reasons, AESC MOVES the Board to (1) GRANT its Motion to Amend this appeal and (2) GRANT a continuance of the evidentiary hearing scheduled to commence on August 15-16, 2024, for at least ninety (90) days in order to allow sufficient time for the July 2024 Modification Request to be fully processed to the point of a final decision by the WVDEP. A proposed Order is being filed with this Motion.

Respectfully submitted,

Allegheny Energy Supply Company, LLC
By counsel



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CERTIFICATE OF SERVICE

I, Christopher B. Power, counsel for Appellant Allegheny Energy Supply Company, do hereby certify that copies of the foregoing Appellant's Motion to Amend Appeal and Motion to Continue Evidentiary Hearing and proposed Order Granting Motion to Amend Appeal and Continue Hearing have been served upon the Appellee's counsel, this 7th day of August, 2024, via e-mail and regular U.S. mail, addressed to the following:

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