

BEFORE THE WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD

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MONONGAHELA POWER COMPANY,

Environmental Quality
Board

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 December 12, 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.” *See* Stay Order, p. 2. The Board therefore granted the Stay even though (according to the DEP) there was “little chance” that MPC would violate the mercury limits based on its discharge history. The discharge history since that time continues to support that conclusion.
4. On May 18, 2019 (pursuant to a settlement agreement between the parties), 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 and reissuance applications and other changes to the permit (the “Draft 2024 NPDES Permit”). 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, and MPC did not object to those proposed limits in its written comments on the draft permit.
6. Following the submission of comments by MPC pertaining to issues other than the proposed mercury effluent limits, the DEP has recently indicated that it plans to prepare a new draft reissuance of the permit and re-open the public comment period on the

reissuance. Since the public notice process has not yet been initiated, it will likely be sometime in early 2025 before the comment period expires and the DEP is able to review any comments and finalize a new permit.

7. Unless the Board's October 31, 2016 Stay Order remains in place, if there are less stringent mercury effluent limits in the final reissued permit than those in the 2016 NPDES Permit, those mercury limits 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 reissued 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 almost certain to become moot once the final permit is reissued. 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 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 December 12, 2024, to the Board's docket in February, 2025 or later. A proposed Order accompanies this motion.

Respectfully submitted,

Monongahela Power Company, LLC
1803 Murdoch Avenue
Parkersburg, WV 26101

By counsel



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

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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 20th day of November, 2024, via e-mail and 1st-Class U.S. mail, to the following:

Jonathan C. Frame, Esq.
Office of Legal Services
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)