

Allegheny Energy Supply Company (“Allegheny Energy”). Allegheny Energy argues that as a matter of law the Pennsylvania Department of Environmental Protection (the “Department”) improperly categorized its newly constructed flue gas desulfurization scrubber system and associated wastewater treatment plant (collectively, the “scrubber system” or the “scrubber facility”) as a “new discharger” under the applicable regulations. In its view, the scrubber system should have been classified as an “existing source.” Allegheny Energy argues that the Department then incorrectly imposed effluent limits for Total Dissolved Solids and Sulfates in its NPDES Permit.

Allegheny Energy contends that there are no issues of genuine material fact which would prevent us from granting its Motion for Summary Judgment. It requests that we declare as a matter of law that it is not a “new discharger,” that it is an “existing source,” and that the Department had no basis to impose what Allegheny Energy calls stringent effluent limits for Total Dissolved Solids and Sulfates in its NPDES Permit. It requests that we remand the permit to the Department so it can be appropriately revised.

The Department, together with the Interveners, Environmental Integrity Project and Citizens Coal Council, vigorously oppose Allegheny Energy’s Motion for Summary Judgment. The Department contends that the scrubber system makes Allegheny Energy a “new discharger” rather than an “existing source.” However,

for the purposes of our deciding the Motion for Summary Judgment, the Department argues this issue is a legal red herring as its action was required based on the water quality of the Monongahela River, to impose effluent limits for Total Dissolved Solids and Sulfates in Allegheny Energy's Amended NPDES Permit (the "Permit" or "Amended Permit") regardless of whether Allegheny Energy's new scrubber facility is characterized as a "new discharger" or "existing source."

The Interveners claim Allegheny Energy's Motion is without merit. They contend that, under the Clean Water Act and its regulations, the scrubber facility at Allegheny Energy's Hatfield Ferry Power Station is a "new discharger" and the Department lawfully imposed the appropriate effluent limits in Allegheny Energy's NPDES Permit.

Following the filing of Allegheny Energy's Motion for Summary Judgment the parties filed voluminous papers setting forth their respective positions and arguments in great detail. We have carefully and fully reviewed this mountain of paper. Their briefs and filings have maintained the exceedingly high standards of excellence that counsel have set in this case since it was filed in 2009. The Board further explored the issues with counsel during an extensive and spirited oral argument held in Pittsburgh on Wednesday, March 9, 2011.

Legal Standard for Summary Judgment

The Board can only grant summary judgment when the pleadings,

depositions, answers to discovery, admissions and affidavits, if any, show that there is no genuine issue of material fact and that the moving party, in this case Allegheny Energy, is entitled to judgment as a matter of law. *Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997); *Bethenergy Mining v. Department of Environmental Protection*, 676 A.2d 711, 714n.7 (Pa. Cmwlth. 1996). The Pennsylvania Environmental Hearing Board will only grant such a motion where it determines that the right to summary judgment is clear and free from doubt. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995).

In making our determination, we must “view the record in the light most favorable to the nonmoving parties, and all doubts as to the presence of a genuine issue of material fact must be resolved against the moving party.” *Department of Environmental Protection v. Weiszer*, 2010 EHB 483, 485. We may only enter summary judgment when “the facts are so clear that reasonable minds cannot differ.” *Atcovitz v. Gulph Mills Tennis Club, Inc.*, 812 A.2d 1218, 1221 (Pa. 2002); *Lyman v. Boonin*, 635 A.2d 1029, 1032 (Pa. 1993).

Allegheny Energy’s Scrubber System is a “New Discharger”

Allegheny Energy contends that the issue regarding whether its scrubber system is a “new discharger” or an “existing source” is a question of law based on undisputed facts. The Department and Interveners argue that questions of material

fact prevent us from ruling on this issue at this stage of the proceedings. We agree with Allegheny Energy that this is a question of law upon which we can rule now.

We part company with Allegheny Energy, however, in ruling that the new scrubber system is a “new discharger.” Therefore, the Pennsylvania Department of Environmental Protection correctly characterized the new scrubber facility as a “new discharger.”

A “new discharger” is “any building, structure, facility, or installation:”

- (a) From which there is or may be a “discharge of pollutants;”
- (b) That did not commence the “discharge of pollutants” at a particular “site” prior to August 13, 1979;
- (c) Which is not a “new source;” and
- (d) Which has never received a finally effective NPDES permit for discharges at the “site.”

40 C.F.R. Section 122.2; 25 Pa. Code Section 92a.2.

We specifically reject Allegheny Energy’s contention that its facility does not fall within the definition of a “new discharger” because it discharges at an existing outfall on the Monongahela River. We agree with the Interveners and the Department that Allegheny Energy’s focus on the discharge site as opposed to the new scrubbing facility ignores the plain language of the regulatory definition, which expressly states that where, as here, a “new discharger” is any “building, structure, facility or installation... which has never received a finally effective

NPDES permit....” 40 C.F.R. Section 122.2.

We also agree with the Department and the Interveners that Allegheny Energy’s position cannot be reconciled with either the plain language of the regulations or the overarching intent of the Clean Water Law. If we adopted Allegheny Energy’s reasoning, a NPDES permittee could convert any number of new facilities into “existing sources” simply by diverting their discharges into an existing outfall. This would substantially gut the Congressional goal to eliminate pollutant discharges to the waters of the United States as quickly as possible. *See* 33 U.S.C. Section 1251(a) (“The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”) Furthermore, “it is the national goal that the discharge of pollutants into navigable waters be eliminated by **1985**.” 33 U.S.C. Section 1251(a)(1). (emphasis added). Most importantly, the regulations require that “new dischargers” “must install and have in operating condition...pollutant control equipment to meet the conditions of its permits before beginning to discharge.” 40 C.F.R. Section 122.2 (d)(4). In other words, “new dischargers” must comply immediately with all applicable effluent limits. “Existing sources,” on the other hand, may take up to five years to comply with effluent limitations. *See* 40 C.F.R. Section 122.47(a); 25 Pa. Code Section 92a.51.

Based on our ruling on the first issue pertaining to “new discharger” we do



not need to discuss the second issue of permit standards at this juncture. We, therefore, will issue an Order denying Allegheny Energy's Motion for Summary Judgment. The hearing on the merits will focus on the standards the Department imposed in the NPDES permit in question.

**COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD**

ENVIRONMENTAL INTEGRITY PROJECT :
AND CITIZENS COAL COUNCIL :
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 v. : **EHB Docket No. 2009-039-R**
 : **(Consolidated with 2009-006-R)**
 :
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION and ALLEGHENY ENERGY :
SUPPLY COMPANY, Permittee :

ORDER

AND NOW, this 21st day of March 2011, Allegheny Energy Supply Company's Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

DATE: March 21, 2011

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