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ATTORNEY GENERAL'S OFFICE
Ecology Division

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

COSMO SPECIALTY FIBERS, INC.,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 15-140

ORDER GRANTING STAY OF PERMIT
CONDITION S11

Cosmo Specialty Fibers, Inc. (Cosmo) filed an appeal with the Pollution Control Hearings Board (Board) of National Pollutant Discharge Elimination System Waste Permit No. WA-0000809 (Permit) issued by the Washington State Department of Ecology (Ecology). Cosmo filed a motion seeking a stay of one condition of the permit, Condition S11. Ecology does not oppose the stay.

The Board considering the motion for partial stay was comprised of Board Chair Thomas C. Morrill, and Members Joan M. Marchioro and Kay M. Brown. Administrative Appeals Judge Heather C. Francks presided for the Board. Attorneys Joseph Rehberger and Tanya Barnett represented Cosmo. Assistant Attorney General Phyllis J. Barney represented Ecology. In ruling on the stay, the Board considered the following material:

1. Notice of Appeal and Exs. 1-2;
2. Motion for Entry of Partial Stay (Permit Condition S11);

1 3. Declaration of Paula Stoppler in Support of Motion for Entry of Partial Stay and Exhibits.

2 A-B; and

3 4. Ecology Response to Appellant's Motion for Entry of Partial Stay.

4 Based upon the evidence submitted and the written material filed, the Board enters the
5 following decision:

6 **BACKGROUND**

7 Condition S11 of the Permit requires the facility to submit a Plan for Maintaining
8 Adequate Capacity (Adequate Capacity Plan). Notice of Appeal, Ex. 1 at 29. Cosmo is required
9 to submit an Adequate Capacity Plan by November 30, 2016. *Id.* at 5.

10 Cosmo alleges that the trigger for when an Adequate Capacity Plan must be submitted is
11 when a facility operates its treatment plant at 85 percent of design capacity for three consecutive
12 months or when a treatment plant has reached capacity. Stoppler Decl. ¶6. Cosmo contends that
13 its plant has never met or exceeded its design capacity and it contends that its plant has never
14 been operated at 85 percent of design capacity for any three consecutive months. Stoppler Decl.
15 ¶¶ 10-11, Exs. A-B. Cosmo asserts that a triggering event has not occurred and thus the
16 requirement in the Permit to submit an Adequate Capacity Plan by November 30, 2016 should be
17 stayed. Motion at 5.

18 Ecology does not oppose the stay of the deadline for submitting an Adequate Capacity
19 Plan. Response at 2. Ecology did not stipulate to Cosmo's facts but did not submit any
20 information to counter Cosmo's alleged facts or to raise issues with Cosmo's alleged facts.
21 Response.

1 ANALYSIS

2 The Board is authorized to stay the effectiveness of an order until a decision is rendered
3 on the merits. RCW 43.21B.320; WAC 371-08-415. The party requesting the stay must make a
4 prima facie case for issuance of the stay by showing either a likelihood of success on the merits
5 of the appeal or irreparable harm. *Id.* If a prima facie case is made, the Board shall grant the
6 stay unless the agency demonstrates either a substantial probability of success on the merits or a
7 likelihood of success combined with an overriding public interest justifying denial of the stay.
8 *Id.*

9 “*Prima facie*” means “on its face” or “at first glance.” In the legal context, it requires
10 sufficient evidence in the first instance that, if unrefuted, would allow Appellants to prevail in
11 their appeal. *Snohomish County Farm Bureau v. WDFW et al*, HAB 09-001, (Order Granting
12 Stay, September 11, 2009) at 5. A stay is akin to a preliminary injunction and is not an
13 adjudication on the merits, but rather is a device for preserving the status quo. *Strode et al v.*
14 *Ecology et al*, PCHB 11-085, 11-086, 11-089, (Order on Stay, August 4, 2011) at 4. Likelihood
15 of success on the merits is not a pure probability standard under RCW 43.21B.320 and WAC
16 371-08-415(4). This standard does not require the moving party to demonstrate it will
17 conclusively win on the merits. *Id.* Evaluating the likely outcome on the merits also involves
18 balancing the comparative injuries that the parties and non-parties may suffer if a stay is granted
19 or denied. *Id.*

20 Cosmo submitted evidence of the design of the wastewater treatment system and
21 calculations of the plant’s waste flows from 2012-2016. Stoppler Decl. ¶¶ 7-11, Exs. A-B.

1 Cosmo asserts that the evidence shows that operation of the plant has never exceeded 85 percent
2 of the maximum design criteria for any three consecutive months and that the plant has never
3 been operated at or above its design capacity. Stoppler Decl. ¶10. Ecology did not controvert
4 Cosmo's facts or present any opposing facts. On this record, the Board concludes Cosmo has
5 presented a prima facie case for granting a stay by showing a likelihood of success on the merits.
6 The ultimate facts at issue will be determined at a hearing on the merits before the Board.

7 Based on the foregoing analysis, the Board enters the following:

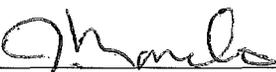
8 **ORDER**

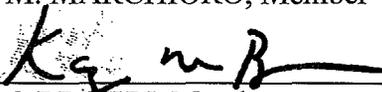
9 Condition S11 and the Summary of Permit Report Submittals in National Pollutant
10 Discharge Elimination System Waste Permit No. WA-0000809 requiring Cosmo Specialty
11 Fibers to submit a Plan for Maintaining Adequate Capacity by November 30, 2016 are hereby
12 STAYED during the pendency of this appeal, or until further order of this Board.

13 SO ORDERED this 30th day of December, 2016.

14 **POLLUTION CONTROL HEARINGS BOARD**

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16 _____
17 THOMAS C. MORRILL, Chair

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20 JOAN M. MARCHIORO, Member

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21 HEATHER C. FRANCKS, Presiding
Administrative Appeals Judge