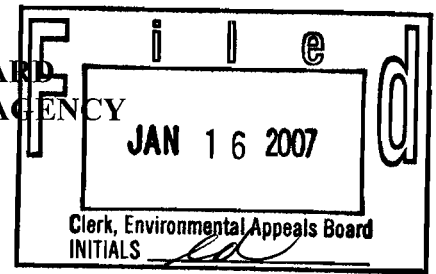


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)

Easley Combined Utilities)

NPDES Permit No. SC0039853)

NPDES Appeal No. 06-10

**ORDER STAYING PROCEEDINGS AND
ESTABLISHING STATUS REPORT SCHEDULE**

On August 23, 2006, Easley Combined Utilities ("Easley") filed a petition for review of a National Pollutant Discharge Elimination System ("NPDES") permit reissued to it on July 28, 2006, by U.S. Environmental Protection Agency Region IV. The permit authorizes wastewater discharges from the Middle River Wastewater Treatment Plant in Easley, South Carolina. In its petition, Easley challenged four provisions of the reissued permit: (1) monthly and weekly average effluent flow limitations, in millions of gallons per day; (2) concentration and mass limits for total suspended solids; (3) a daily maximum limit for fecal coliform; and (4) a requirement to conduct an annual in-stream macroinvertebrate assessment. Upon receipt of the petition, the Environmental Appeals Board ("Board") mailed a letter to Region IV requesting the filing of a response to the petition with the Board by October 16, 2006.

On October 12, 2006, Region IV and Easley filed a joint motion to stay the proceedings so that the Region could coordinate with EPA Headquarters and the South Carolina Department of Health & Environmental Control regarding its response to the petition, and so that the parties could potentially resolve some of the issues in dispute without litigation. The Board granted the

joint motion and thereby extended the Region's deadline to file its response to the petition until November 13, 2006.

On November 13, 2006, Region IV filed a unilateral motion for a second stay of the proceedings (instead of filing a response). The Region reported that it planned to propose a permit modification to remove the effluent flow limitations challenged by Easley and that it intended to continue to discuss with Easley the other three issues of concern and would either "include any negotiated changes in the proposed permit or file a response to the [p]etition." Motion to Stay the Petition at 1. The Region argued that it was in the interest of judicial economy to stay the appeal proceedings while the Region processed the proposed permit modification and "any other modifications that may be necessary[,] before considering the remaining challenges to the permit." *Id.* Easley opposed the Region's motion, contending that no settlement discussions had been initiated in the case and thus that it had no basis for believing that a full or partial settlement of the challenged issues was likely. In the absence of specific settlement proposals, Easley claimed that a more probable outcome was that the three disputed permit issues would have to be decided by the Board. Response to EPA Motion to Stay at 2, 3-4. Easley also argued that "mere delay is not equivalent to judicial economy," and it claimed that a further stay would prejudice its right to timely review of its petition. On November 24, 2006, the Board issued an order denying the Region's motion for a stay, finding a lack of good cause for such an option. The Board directed Region IV to file a response to the petition for review by December 22, 2006.

The foregoing litany brings us to the presently pending motions. On December 22, 2006, Region IV filed a notice of its intent to withdraw all four challenged permit conditions pursuant

to 40 C.F.R. § 124.19(d), along with a memorandum in support of the notice of intent to withdraw (again instead of responding to the petition). In the memorandum, Region IV explains that it plans to propose modifications to the permit to address the withdrawn permit conditions and will submit the revised permit terms for public comment in the near future. Memorandum in Support of Notification of Intent to Withdraw Portions of NPDES Permit at 2. Region IV anticipates that it may take up to four months to complete the draft-to-final permit modification process. *Id.* at 3. The Region therefore moves the Board to dismiss the pending petition for review in this case without prejudice or, alternatively, to stay the proceedings pending issuance of the final permit modification.

On December 28, 2006, Easley filed an opposition to Region IV's notice of intent to withdraw the challenged permit conditions. Easley complains that it has been prejudiced by the Region's purportedly ongoing delays in issuing this permit. Easley's Opposition to EPA Notice of Intent to Withdraw and Request for Relief at 1. Easley opposes any withdrawal of the challenged conditions, contending that such a withdrawal will cause it harm by retaining in place the same permit provisions that are administratively continued from the prior permit. In Easley's view, "EPA will effectively have precluded any due process and statutory rights by Easley to review EPA's decision not to provide relief from the contested conditions." *Id.* at 5.

Accordingly, Easley asks the Board to either decide the case on the petition alone or, alternatively, to stay the appeal until the permit modification is completed, provided, in the latter instance, that the Board imposes a schedule for Region IV to complete the modification process and also directs the Region to immediately disclose what the substance of the proposed permit modifications will be. *Id.* at 4-5. Finally, Easley argues that, in any event, it is "too late" for

Region IV to withdraw the challenged permit conditions because the Board's November 24th order denying the Region's motion for a further stay of the proceedings "effectively took review" of all the contested conditions. Thus, Easley contends, the Region's opportunity for withdrawal under the permitting regulations has passed. *Id.* at 5.

The withdrawal provision in the regulations provides that at any time prior to the Board's issuance of an order granting or denying a petition for review of a permit decision, the permit issuer may withdraw all or part of the permit and prepare a new draft permit, which must then proceed through the public comment process in the same manner as any proposed permit.

40 C.F.R. § 124.19(d).¹ In this case, the Board has not yet issued an order granting or denying Easley's petition; contrary to Easley's assertion, our November 24th Order did *not* grant or deny review of any of the issues raised in the petition within the meaning of 40 C.F.R. § 124.19(c).

Thus, Region IV is not foreclosed at this juncture from withdrawing the contested permit terms.

The Board has fairly commonly dismissed with prejudice those permit appeals that come before it and subsequently are withdrawn, settled, or otherwise resolved in some fashion prior to the Board's adjudication of the cases on the merits. The Board has proceeded in this fashion to facilitate the efficient management of the Board's docket and to ensure the finality of appeals of permits that are remanded or withdrawn for reconsideration and reproposal by the permit issuer. However, the kinds of cases that are dismissed in this manner are typically presented to the Board by means of joint motions for dismissal or at least as motions for dismissal by the permit issuer with the consent of the petitioner.

¹ Under the terms of 40 C.F.R. § 124.19(d), any portions of the permit that are not withdrawn and not stayed under 40 C.F.R. § 124.16(a) continue to apply.

Upon consideration of the specific circumstances and posture of this case, we have decided to stay the proceedings pending Region IV's issuance of the final permit modification, a process that, based on the Region's representations, we expect to be relatively brief in duration. In particular, the Region has represented that a final permit modification in this case could be accomplished within a four-month time frame. Accordingly, we hereby stay the present proceedings until May 15, 2007. In the interim, we direct the Region to file status reports with the Board, beginning with a first such report on February 15, 2007, and followed by reports on April 1, 2007, and May 15, 2007. The May 15, 2007 status report shall indicate whether the Region expects that the pending appeal will be withdrawn, settled, or otherwise resolved on the basis of developments arising during the permit modification process. In the event the pending appeal is not so resolved prior to May 15, 2007, the stay will be lifted on that day and the Region's response to the petition for review will be due to be filed with the Board by May 31, 2007. If any appeals of the final permit modifications independent of the current appeal flow out of the Region's reproposal process in accordance with the permitting regulations at 40 C.F.R. part 124, the Board will entertain motions to consolidate those with the present appeal if circumstances at the time so warrant.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: January 2, 2007

By: Kathie A. Stein
Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Staying Proceedings and Establishing Status Report Schedule** in the matter of Easley Combined Utilities, NPDES Appeal No. 06-10, were sent to the following persons in the manner indicated:

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Dated: JAN 16 2007



Annette Duncan
Secretary