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ENVIR. APPEALS BOARD

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June 18, 2008

VIA UPS

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1314 G Street, N.W., Suite 600
Washington, D.C. 20005

**Re: Bacardi Corporation
NPDES Permit No. PR0000591**

Dear Sirs:

Enclosed for filing please find original and five copies of Appeal Pursuant to 40 C.F.R. § 124.19 in the case of reference. I will appreciate if you can return the enclosed additional copy stamped filed in the enclosed addressed envelope.

Cordially,


Eduardo Negrón Navas

Enclosure

1

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

In re:)
Bacardí Corporation)
NPDES Permit No. PR0000591)

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ENVIR. APPEALS BOARD

APPEAL PURSUANT TO 40 C.F.R. § 124.19

COMES NOW, Bacardí Corporation (hereinafter, the Appellant), represented by the undersigned counsel and respectfully submits the following:

STATEMENT OF FACTS

The Appellant hereby stipulates and agrees that the following facts are true and correct.

1. On September 8, 2006, the Environmental Quality Board (EQB) issued a draft Water Quality Certificate (WQC). The Appellant and the Environmental Protection Agency (EPA) participated in the WQC public comment process. The Appellant submitted comments on October 31, 2006, and EPA submitted comments on October 30, 2006.
2. EPA commented, in part, that it objected to a three (3) year compliance term and requested a shorter term and that EQB add language defining an end date for the study and requiring that Bacardi submit the study report to both EPA and EQB. EPA did not object to the interim limitations and the compliance plan as such.

3. On June 12, 2007, EQB issued a final WQC and a response to the comments of Appellant. The final WQC addressed the comments of EPA. EQB reduced the compliance term to two (2) years and added the requirement that Bacardi submit the study report to both EPA and EQB.
4. On January 2008, EPA issued a draft NPDES permit, which partially incorporated the draft WQC. The Appellant participated in the NPDES permit public comment process. The Appellant submitted timely comments to the draft NPDES permit on February 14, 2008.
5. Appellant commented, in part, that EPA had wrongly removed the compliance plan and interim limitations for bacterial parameters (Enterococci, Fecal Coliforms and Total Coliforms) that were included in Special Condition 18 and Table A-2 of the final WQC issued by EQB on June 12, 2007.
6. On May 20, 2008, EPA issued a final NPDES permit, with a proposed effective date of June 30, 2008, which partially incorporated the final WQC and partially addressed Appellant's comments pertaining the compliance plan and interim limitations for Enterococci and Fecal Coliforms, but not for Total Coliforms.
7. EPA and Appellant currently are negotiating a Consent Decree and have reached an agreement in principle which, among other things, provides for a compliance plan and an interim limitation for Total Coliforms. Thus, this appeal could become moot if a Consent Decree with such an agreement is lodged and becomes effective. Because the term to appeal the final NPDES permit most likely will expire prior to the lodging and effectiveness of the Consent Decree, Appellant is compelled to file this protective appeal.

PETITION

EPA failed to incorporate in the NPDES permit certain conditions that were imposed by EQB in the final WQC. The NPDES permit and the conditions therein set forth below are based on clearly erroneous finding of facts and conclusions of law and involved an exercise of discretion and important policy consideration that warrants review. The Appellant hereby requests this Board to grant review of this case and order EPA to include in the NPDES permit the Total Coliforms interim limitation and compliance plan granted by EQB in the final WQC.

ARGUMENT

I EPA's DELETION OF THE TOTAL COLIFORMS INTERIM LIMITATION AND COMPLIANCE PLAN IN SPECIAL CONDITION 18 AND TABLE A-2 OF THE FINAL WQC ISSUED BY EQB IS PREMISED ON THE NO LONGER APPLICABLE 1983 WATER QUALITY STANDARDS REGULATION

EPA cites *In the Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175, 177(1990) to support its contention that:

[T]he Clean Water Act does not authorize EPA to establish schedules of compliance in the permit that would sanction pollutant discharges that do not meet applicable state water quality standards. In my opinion, the only instance in which the permit may lawfully authorize a permittee to delay compliance after July 1, 1977, pursuant to a schedule of compliance, is when the water quality standard itself (or the State's implementing regulations) can be fairly construed as authorizing a schedule of compliance. The Agency's powers in this respect * * * are no greater than the States'.

This case was decided on April 16, 1990, under the Water Quality Standards Regulation of 1983, which was silent on compliance plans. An issue in the case was whether the state regulator's silence on compliance plans should be construed as a deliberate statement that none is

allowed. The 1983 Regulation under which the case was decided was amended on July 20, 1990 (three months after the decision was issued) and on May 14, 2003. Article 6.12 of the 1990 and 2003 Regulations specifically provides for compliance plans of up to five years. Article 6.12 constitutes a deliberate and explicit statement that Puerto Rico's implementing regulations authorize a schedule of compliance. Consequently, EPA's reliance on the *Star-Kist Caribe* decision is misplaced.

II EPA's DELETION OF THE TOTAL COLIFORMS INTERIM LIMITATION AND COMPLIANCE PLAN IN SPECIAL CONDITION 18 AND TABLE A-2 OF THE FINAL WQC ISSUED BY EQB IS CONTRARY TO APPLICABLE LAW AND REGULATIONS OF THE COMMONWEALTH OF PUERTO RICO

The discharge of pollutants into coastal waters is regulated by the Public Policy Environmental Act¹ (Act No. 416), the Water Quality Standards Regulation² (Water Regulation), as well as by the federal Clean Water Act³ (CWA), and the regulations promulgated there under.

Act No. 416 grants EQB the authority to establish water quality standards, and to promulgate regulations to control the discharge of pollutants into bodies of water. The CWA requires that NPDES permits include the contaminant limitations and conditions required to comply with state⁴ water quality standards.⁵ EPA, as part of the NPDES permitting process,

¹ Act No. 416 of September 22, 2004, 12 L.P.R.A. §§ 1121, *et seq.*

² Water Quality Standards Regulation of March 28, 2003, Dep't of State Regulation No. 6616 of May 14, 2003.

³ 33 U.S.C. §§ 1251, *et seq.*

⁴ The term "State" is defined to include "the Commonwealth of Puerto Rico." CWA § 502(3), 33 U.S.C. § 1362(3).

⁵ 33 U.S.C. § 1341(a).

requests the state to certify whether any water quality based limitations should be included in the permit.⁶ Certification by the state is carried out through the issuance of a WQC. EPA may not issue an NPDES permit unless the state has either issued a certification or waived the right to certify. EPA must incorporate into the permit any additional conditions or limitations imposed by the state in the WQC.⁷

On June 12, 2007, EQB certified that it had received and reviewed the Bacardí applications for a NPDES permit, for a WQC, for the definition and authorization of a Mixing one, and for the approval of Compliance Plans pursuant to Articles 5 and 6 of the Water Regulation. In addition, the EQB on June 12, 2007 specifically certified as follows:

Pursuant to Section 401(a)(1) of the Act [CWA], after due consideration of the applicable provisions established in the PRWQSR [Water Regulation] and in Sections 208(e), 301, 302, 303, 304(e), 306 and 307 of the Act [CWA], it is certified that there is reasonable assurance as determined by the Environmental Quality Board (EQB) that the alluded discharge will not cause violations to the applicable water quality standards at the receiving water body, if the limitations and monitoring requirements on Tables A-1, A-2 and A-3 are met. The conditions specified in the aforementioned tables shall be incorporated into the NPDES permit in order to satisfy the provisions of Section 301(b)((1)(C) of the Act (emphasis added).

In other words, EQB certified that there is reasonable assurance that a Bacardí discharge that comports with the limitations and monitoring requirements on Tables A-1, A-2 and A-3 in the final WQC will not cause violations of WQS. Further, EQB required that the conditions in

⁶ *Id.*

⁷ *Id.*

Tables A-1, A-2 and A-3 must be included in the NPDES permit in order to satisfy the provisions of the CWA.

III EPA's DELETION OF THE TOTAL COLIFORMS INTERIM LIMITATION AND COMPLIANCE PLAN IN SPECIAL CONDITION 18 AND TABLE A-2 OF THE FINAL WQC ISSUED BY EQB IS CONTRARY TO APPLICABLE LAW AND REGULATIONS OF THE UNITED STATES

EQB required that the conditions in Tables A-1, A-2, and A-3 must be included in the NPDES permit in order to satisfy the provisions of the CWA. EPA's CWA NPDES permitting regulations require the same. For example, 40 C.F.R. § 124.55 provides in pertinent part:

Sec. 124.55 Effect of State certification.

(a) When certification is required under CWA section 401(a)(1) **no final permit shall be issued:**

* * *

(2) **Unless the final permit incorporates the requirements specified in the certification under Sec. 124.53(e).**

In other words, EPA's own regulations provide that the permit EPA issues must incorporate the requirements specified in the EQB WQC, including Special Condition 18 and Table A-2 of the final WQC issued EQB.

EPA guidance supports Bacardi's position that EPA cannot independently interpret and unilaterally apply its own interpretation of a state WQS. For example, in the August 6, 1996 EPA GUIDANCE ON APPLICATION OF STATE MIXING ZONE POLICIES IN EPA-ISSUED NPDES PERMITS, EPA discusses the strict limits of EPA's authority to second-guess a state's interpretation of its own WQS and a state's determination as to what permit limitation is necessary to meet the WQS, as follows:

[I]n the absence of a state certification under CWA § 401 (i.e., where certification is waived), EPA's interpretation of what constitutes a limitation necessary to meet the state's water quality standard will be upheld if it is "reasonable." *In re American Cyanamid Co. v. Santa Rosa Plant, et al.*, 4 E.A.D. 790, 801 (E.A.B. 1993). If the state does certify a permit under CWA § 401, its interpretation of its own water quality standards generally is controlling. ... In addition, if the state informs EPA in its CWA § 401 certification that a less stringent effluent limitation is all that is necessary to meet its water quality standards (e.g., a mixing zone should be included), **EPA must defer to the state's interpretation unless it is clearly wrong.** *In re Ina Road Water Pollution Control Facility, Pima County, Arizona*, NPDES Appeal 84-12 (Nov. 6, 1985) at 3; *see also American Paper Inst. v. EPA*, 996 F.2d 346, 352 (D.C. Cir. 1993).

... EPA's inclusion of a mixing zone in an NPDES permit constitutes an interpretation of the state water quality standards, which much therefore be "reasonable" if the state does not certify to the permit under CWA § 401. *American Cyanamid, supra*. August 6, 1996 EPA GUIDANCE, at 3 (emphasis added).

In fact, the "reasonable" standard in the above-quoted passage actually understates the hurdle EPA faces as articulated in *American Cyanamid*. A footnote in that decision states that EPA needs "a **compelling reason**" for rejecting a state's interpretation of its own WQS: "[W]hen a State certification specifically prescribes a permit condition or limitation that interprets one of the State's water quality standards less strictly than the [EPA] Region might prefer, * * *, the Region would have to provide a **compelling reason** for rejecting the State's interpretation of the standard." *In re American Cyanamid Co.*, 4 E.A.D. 790, 801 n.12 (1993) (emphasis added).

IV EPA HAS FAILED TO PROVIDE PREVIOUSLY ORDERED TIME TO FINALIZE AND CONSIDER THE RESULTS OF THE BACTERIAL STUDIES AND OTHER DATA WHICH SUPPORT THE TOTAL COLIFORMS INTERIM LIMITATION AND COMPLIANCE PLAN IN SPECIAL CONDITION 18 AND TABLE A-2 OF THE FINAL WQC ISSUED BY EQB

Bacardí and the Puerto Rico Aqueduct and Sewer Authority (PRASA) have diligently and jointly conducted detailed Bacterial Mixing Zone (BMZ) studies, which include Total Coliforms, during the current permit cycle. The current WQCs/NPDES permits regulate the discharges to the combined Bayamón/Puerto Nuevo/Bacardí outfall discharge system. PRASA is a key contributor to and partner in the study; thus, Bacardí and PRASA must work with the same schedule. Bacardí and PRASA have met required deadlines for submittal of study plans and subsequent Quality Assurance Project Plan (QAPP) documents for the bacterial studies provided for under the existing permit. Bacardí and PRASA have conducted that complex and expensive study with the understanding, and in reliance on the anticipation of all the parties, that EPA, in requiring the study as a Compliance Plan in the previous NPDES permit, would review the results of the study in making permitting decisions for this upcoming permit cycle.

During the course of meetings with EPA and EQB, there was consensus, if not a directive, that the new WQC and NPDES permit should be carefully drafted and adequately provide for limits and compliance plans to avoid unnecessary and unworkable potential compliance issues. In fact, EPA's decision is directly at odds with the approach and schedule that EPA *approved* as part of Bacardí's January 3, 2006 Plan of Action. That Plan of Action called for the BMZ study to comply with a schedule and milestones.

In its Order dated March 22, 2006, EPA acknowledged that Bacardí had complied with the submittal of the Plan of Action and the QAPP for the BMZ studies. *See* Ordered Provision 8, Administrative Order CWA 02-2006-3040. And, pursuant to Order CWA-02-2006-3089,

Bacardí has submitted to EPA quarterly progress reports that specifically include reports on the status of the coliform study. Further, EPA has reaffirmed that obligation in subsequent administrative orders, including Order CWA-02-2008-3006 issued on December 28, 2007. (*See, e.g.,* Ordered Provision 9, Dec. 28, 2007 Order.)

V THE BACTERIAL MIXING ZONE STUDY PERFORMED BY BACARDÍ/PRASA ESTABLISHES THAT A MIXING ZONE IS FEASIBLE, WHICH FURTHER SUPPORTS THE TOTAL COLIFORMS INTERIM LIMITATION AND COMPLIANCE PLAN IN SPECIAL CONDITION 18 AND TABLE A-2 OF THE FINAL WQC ISSUED BY EQB

The BMZ study results show three key findings:

1. A “conventional” mixing zone, as defined by EQB, is achievable for Total and Fecal Coliform bacteria as long as PRASA continues to chlorinate its effluents.
2. It would require only a very small extension of the “conventional” mixing zone, as defined by EQB, for Bacardí and PRASA to comply with WQS for Total and Fecal Coliform and Enterococci.
3. There would not be danger of human exposure to above-standard bacterial concentrations due to the location of the discharge close to the commercial shipping channel in an area not used for direct contact recreational purposes or shellfish harvesting.

The fact that the BMZ study establishes that a mixing zone is feasible validates the reasonableness of the EQB decision of approving the compliance plan and interim limitations for bacterial parameters (Enterococci, Fecal Coliforms and Total Coliforms)

in Special Condition 18 and Table A-2 of the final WQC issued by EQB on June 12, 2007.

CONCLUSION

For the forgoing reasons, the removal of Total Coliforms from the interim limitations and compliance plan provisions, granted in both the final WQC and in the draft NPDES permit, would be arbitrary, capricious, and otherwise not in accordance with law. Appellant requests this Board to grant review of this case and order EPA to include in the NPDES permit the Total Coliforms interim limitation and compliance plan granted by EQB in the final WQC.

Respectfully submitted, this June 18, 2008.



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