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TO: CLERK, EPA ENVIRONMENTAL
APPEALS BOARD

Philip G. Mancusi-Ungaro, Esq.

FROM: RICHARD H. SEDGLEY

COMPANY:

DATE: MAY 18, 2007

FAX NUMBER: 202/233-0121
404/562-9486

TOTAL PAGES INCLUDING COVER: 9

PHONE NUMBER:

RE: NPDES APPEAL NO. 06-10

☒ URGENT

☒ FOR REVIEW

☐ PLEASE COMMENT

☐ PLEASE REPLY

☐ PLEASE RECYCLE

Pls see attached Petitioner's Response to EPA Third Status Report and Request for Case Management Hearing, on behalf of Easley Combined Utilities.

801 East Main Street • 10th Floor • Richmond, Virginia 23219

Telephone: 804.716.9021 • Facsimile: 804.716.9022



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RICHARD H. SEDGLEY
DICK@AQUALAW.COM

PH: 804.716.9021
Fx: 804.716.9022

May 18, 2007

By Fax and U.S. Mail

Eurika Durr, Clerk of the Board
Environmental Appeals Board (MC 1103B)
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Re: NPDES Appeal No. 06-10
Easley Combined Utilities, Petitioner
**Petitioner's Response to EPA Third Status Report and
Request for Case Management Hearing**

Dear Ms. Durr:

Enclosed for filing in your usual manner are the original and five copies of Petitioner's Response to EPA Third Status Report and Request for Case Management Hearing.

We appreciate your assistance in this matter.

Sincerely,

Richard H. Sedgley

Cc: Philip G. Mancusi-Ungaro, Esq.,
EPA Region IV
Joel D. Ledbetter, P.E., General Manager
Easley Combined Utilities
F. Paul Calamita, Esq.

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ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ENVIR APPEALS BOARD

Easley Combined Utilities,
Petitioner

In re: NPDES Permit No. SC0039853

NPDES Appeal No. 06-10

PETITIONER'S RESPONSE TO EPA THIRD STATUS REPORT

and

REQUEST FOR CASE MANAGEMENT HEARING

On May 14, 2007 Counsel for Respondent Environmental Protection Agency Region IV ("EPA") submitted its third Status Report in this NPDES permit appeal, pursuant to the Environmental Appeals Board's Order. As noted therein, EPA represents that it has conceded on the instream bioassessment and total suspended solids issues but not on the fecal coliform limit, and it has granted the State of South Carolina an extension of their 401 certification period so that South Carolina can recertify the flow limits. This puts us back to square one on both the flow and fecal limits.

When EPA sought to withdraw the four issues in dispute before the Board, Easley predicted that EPA really did not intend to change anything beyond the instream bioassessment and that prediction has been borne out. The instream bioassessment testing and flow limit were the only requirements which EPA removed in its draft permit modification. Nothing changed regarding the other two issues except EPA's stated legal

basis for TSS and fecal coliform. Regarding flow, EPA knew that the State would put that limit back in through re-certification.

We note that as to TSS, EPA took several years to publish those limits the first time and then they republished them formally as part of this process under the Board's supervision with a new (second) basis. Easley was forced to yet again explain why EPA's basis was incorrect and EPA now represents that it has agreed with Easley and after four attempts (owner's draft; formal public comment draft; final permit; modification to final permit), using several different bases, it will not seek to impose the prior incorrect TSS limits.

As to the fecal coliform effluent limitation issue, EPA has completely retracted the several "Best Professional Judgment" and other bases on which the original limitation was predicated in the permit on appeal before the Board. As we predicted, EPA simply substituted a new legal basis as its claimed record support for the unchanged fecal coliform effluent limitation. When the permit modification is eventually reissued it appears we will be back to square one on this issue and Easley will have to initiate yet again the process to challenge the limitation.

As to the flow limitation issue, EPA has reaffirmed that under the Clean Water Act, there is no need or requirement for a flow limitation in Easley's permit. However, they knew full well from their discussions with South Carolina that the State would certify flow limits again. Accordingly, Easley is extremely disappointed that EPA has decided to unilaterally give the State of South Carolina an additional 30 days to submit a Clean Water Act Section 401 certification of the permit on top of the 30 day certification period that has passed. There is only one reason why South Carolina would certify the

permit at this point and that is to certify flow limits – which EPA finds to be unnecessary. We note that the State has already provided a certification for this entire permit once before. Further, only four limits are now at issue and, only one – flow – is “in play” as TSS and the instream biomonitoring are not longer at issue, and EPA will retain the fecal limit as a matter of federal law. Thus, the only issue left to certify is flow.

EPA predicates its extension to the State on the basis that the State needed an additional 30 days largely due to “ongoing state litigation on the legality of flow limits.” That makes no sense. The state litigation has been ongoing for years. Although there is a pending Petition for Certiorari to the South Carolina Supreme Court, the Petition has been pending for months. We have no reason to think (and neither EPA nor the State even attempted to offer any basis) that it will be acted on during the additional certification period. Even if Certiorari is accepted, the matter will not be resolved anytime soon. Moreover, in deciding to exercise its discretionary authority to give the State of South Carolina more time to certify flow, EPA was well aware of the latest of a string of pronouncements by the South Carolina courts finding that South Carolina lacks authority to impose flow limits. Specifically, on January 23, 2007, the South Carolina Court of Appeals wrote in an unrelated appeal:

“If DHEC has the authority to impose flow limits in NPDES permits, as it contends, DHEC has done nothing required to promulgate this authority into a regulation.

See S.C. Code Ann. §48-1-30(1987)(providing that DHEC is required to promulgate regulations to implement the SCPCA); see also Sloan v. S.C. Bd. of Physical Therapy Exam'rs, Op. No. 26209 (S.C. Sup. Ct. filed Sept. 25, 2006)(Shearouse Ad. Sh. No. 36 at 46)(“In order to promulgate a regulation, the APA generally requires a state agency to give notice of a drafting period during which public comments are accepted on a

proposed regulation; conduct a public hearing on the proposed regulation overseen by an administrative law judge or an agency's governing board; possibly prepare reports about the regulation's impact on the economy, environment, and public health; and submit the regulation to the Legislature for review, modification, and approval or rejection.") (citing S.C. Code Ann. §1-23-110 to -160 (2005 and Supp. 2005))."

Commissioners of Public Works, et. al v. SCDHEC, Opinion No. 4186 (January 23, 2007)(emphasis added).

Thus, it makes no sense for EPA to have given South Carolina another 30 days to certify on the basis of some unsupported and illogical hope that there will be an intervening change in State law regarding South Carolina's lack of authority to impose flow limits.

Easley must particularly disagree with EPA's assertion in its Report to the Board that it has "taken all necessary actions within its control" to meet the Board's required May 15 date for final permit action. For EPA to have issued the permit on May 15, it would have needed South Carolina to have published its proposed 401 certification no later than the first week of April. That is the last opportunity for the State to hold its 30-day comment period and still leave a couple of days to get the certification to EPA in time for EPA to make any permit changes and issue the final on May 15. When the State did not publish its certification in the first few days of April, EPA was on notice that they would not be able to meet the May 15 deadline. This was just days after EPA's April 2 report to the Board which indicated everything was on track. Easley wonders why EPA did not check with the State before filing its April 2 update to the Board to ensure the State was imminently going to publish its certification. The whole purpose of the status reports ordered by the Board was to identify precisely such potential obstacles.

We think EPA should have alerted Easley and the Board no later than the first week of April that the permit issuance date was in jeopardy because the State had not published its certification by early April. At that time, EPA should – in our view – have involved Easley and the Board in its decision whether to grant the State an additional 30-days for certification or whether EPA should simply find that the State has waived its right to certify for flow.

While EPA may not have wanted to have its discretion subjected to the Board's oversight, Easley would have appreciated the opportunity to discuss this issue with the Board and EPA before EPA took unilateral action that has now frustrated the agreed upon schedule in this case.

After all, that schedule and reporting were established in light of the extensive delays by EPA in issuing the permit in question – which made it a three year instead of five year permit to begin with - compounded by EPA's series of delays in prosecuting this appeal.

All that said, unless the Board can order EPA to withdraw its extension for State certification and rule that the State waived its right to certify the permit, EPA's unilateral action will now compel a new schedule. In particular, we have to agree with EPA that the Board's order for EPA to Respond by May 31, 2007 to Easley's August 2006 Petition for Review no longer makes any sense. Accordingly, it appears to us that the Board is now compelled to give EPA more time.

REQUEST FOR CASE MANAGEMENT HEARING

Because EPA did not consult with the Board before unilaterally deciding to give the State of South Carolina more time to certify the permit modification, the Board's schedule in this matter will have to change yet again as the deadline for EPA to respond to Easley's Petition for Review by May 31, 2007 no longer makes sense. In light of the foregoing, Easley requests a case management hearing before an Environmental Appeals Board Judge in Washington. The purpose of the case management hearing will be to prevent further delays and additional requests for extensions of time, and to establish a binding schedule for the resolution by the Board of the remaining permit issues.

Easley is a very small utility which has been adversely impacted financially by this drawn out and tortured permitting process for what should have been a simple permit renewal. We note that no end is in sight with EPA suggesting in its May 14 Status Report that Easley should be required to file a new Petition for Review once EPA gets around to issuing the permit modification. Given these increasing costs and the fact that an end date continues to be elusive, Easley believes that Counsel for the parties should appear in person before the Judge in Washington so that a final schedule can be established. Easley's counsel can be available on any day of the weeks of June 4 or June 11, 2007 for such a hearing. We request that the Board schedule the case management hearing after EPA's counsel has had an opportunity to provide any avoid dates.

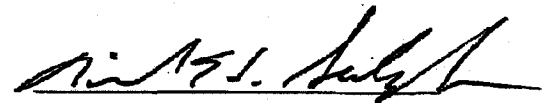
Respectfully submitted,


Counsel for Petitioner

F. Paul Calamita
Richard H. Sedgley
AquaLaw PLC
801 East Main Street
Richmond, Virginia 23219
804/716-9021
804/716-9022 (fax)
dick@aqualaw.com

CERTIFICATE OF SERVICE

I certify that on this 18th day of May, 2007 I delivered this Petitioner's Response to EPA Third Status Report and Request for Case Management Hearing by facsimile and U.S. Mail with five copies to U.S. Environmental Protection Agency, Clerk of the Board, Environmental Appeals Board (MC 1103B), Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460-0001. I further served this Response by facsimile and U.S. Mail to Philip G. Mancusi-Ungaro, Esq., U.S. Environmental Protection Agency, Region IV, Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta Georgia 30303-8960 this 18th day of May, 2007.



Counsel