



Via email

ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Easley Combined Utilities,
Petitioner

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NPDES Appeal No. 06-10

In re: NPDES Permit No. SC0039853

**EASLEY COMBINED UTILITIES' OPPOSITION TO EPA NOTICE OF
INTENT TO WITHDRAW AND REQUEST FOR RELIEF**

Petitioner Easley Combined Utilities files this opposition to EPA's December 21, 2006 Notification of Intent to Withdraw and requests that the Board either (1) decide the Petition without EPA's response or (2) grant EPA's request to stay the proceedings subject to the conditions Easley requests below.

BACKGROUND

Easley filed its Petition for Review of the subject NPDES permit with the Environmental Appeals Board on August 25, 2006, challenging four issues from the NPDES permit reissued by the U.S. Environmental Protection Agency Region IV ("EPA") on July 28, 2006. EPA afforded itself considerable time in issuing the permit, resulting in EPA issuing only a three-year instead of five-year permit to Easley. Thus, Easley has already been prejudiced by EPA's significant delay even before the initiation of this appeal. It now turns out that that was only the beginning of EPA's delays.

The Board subsequently requested EPA's response to the Petition by October 13 – a generous six weeks to respond to four straightforward issues. The parties' Joint Motion to Stay the Petition was filed on October 12. The Joint Motion was based on an EPA request for time to coordinate on the issues with EPA Headquarters and the South Carolina Department of Health and Environmental Control, and the potential for discussions that could lead to resolution of the NPDES permit issues. The Board subsequently granted the parties' Joint Motion to Stay the Petition and requested EPA's response to the Petition by November 13.

EPA then filed a unilateral Motion to Stay the Petition on November 9 seeking to stay the entire Petition, and stating that EPA would propose a permit modification to remove the flow limits from the NPDES permit that Easley challenged. Easley objected to a stay of the three non-flow issues and the Board denied EPA's motion. The Board stayed only the flow issue. The Board then ordered EPA to finally file its response to Easley's Petition on the three non-flow issues by December 22, 2006, providing EPA with almost six more weeks to prepare the response to just three issues.

ARGUMENT

Rather than responding by December 22 as ordered by the Board, EPA now seeks to simply withdraw the three non-flow issues from the Board's consideration based upon EPA's cryptic and undefined commitment to "prepare a draft permit modification addressing the portions so withdrawn."

Easley objects to EPA's request because we question whether EPA will actually republish anything and if they do intend to republish these conditions, EPA has given neither Easley nor the Board any indication of what these conditions will be.

Along with its notification, EPA now divulges to the Board a four month permit modification process that stands in stark contrast to the 60-day stay sought in EPA's November 9 motion regarding the flow limit modification. In fact, we note that EPA committed to give the Board an update on its progress to remove the flow limit on December 19. EPA apparently has neither initiated the flow modification process nor provided the Board with any update on its progress.

The Board's Order Denying Motion for Stay of Proceedings and Establishing Briefing Deadline ("Stay Denial Order") set a briefing deadline on the remaining issues after finding that "Region IV has failed to establish good cause to support a further stay in the appellate proceedings...." Stay Denial Order at 2. With the Board already having found that EPA has failed to establish good cause for any further stay of this proceeding, we don't understand why EPA has been unable to publish a modification notice regarding the flow issue in the almost seven weeks since it committed to the Board to do so. EPA's failure would now compel the Board to give EPA more time than EPA asked for and was given in its previous requests.

Moreover, despite EPA's request on November 9 for a stay to allow additional time for settlement discussions, we received no settlement communications from EPA's

November 9 request until December 18 when EPA notified Easley that it would file its notice to withdraw.¹

EPA seeks alternative relief – either that the Board dismiss the case without prejudice or stay the appeal until the permit modification process is complete.

Easley objects to any dismissal as being patently unfair. Easley would prefer to have the Board simply decide the three non-flow issues based upon the Petition for Review given EPA's repeated refusal to respond and the lack of any settlement communication about what EPA intends to republish regarding the three non-flow issues.

Alternatively, Easley does not object to a stay pending the permit modification process as long as the Board imposes the following two safeguards:

First, we believe the Board should impose a schedule for EPA to complete the modification process. EPA has represented that "the entire [modification] process can take up to four months." EPA Memorandum at 3. While EPA previously only sought a 60-day extension to process the flow modification, we are willing to agree to up to four months as long as appropriate milestones are established for the period. For example, EPA should be required to publish for comment the modification proposal within 45 days and complete the process within four months of the Board's order. Moreover, EPA should be required to report to the Board on its progress after 60 days.

¹ Easley feels that Region IV has ignored it throughout this process. It was only after the Petition for Review was filed that EPA Region IV became motivated to dig into these issues and they did so by immediately seeking a stay to coordinate with EPA Headquarters. If coordination with EPA Headquarters was necessary, they should have engaged in such coordination during the two years they took issuing the permit and certainly before they responded to our formal comments on the draft permit and took final agency action by issuing the permit. Easley fails to understand EPA's inability to respond to the three outstanding issues raised in the Petition for Review and how EPA can simply continue to extend this process. Easley feels it has been denied due process.

Second, we are concerned that EPA may intend to republish the same three non-flow conditions and, thereby, simply start this tortuous process all over again. Accordingly, we urge the Board to require EPA to immediately disclose to the Board and Easley what it will propose in this modification for the three non-flow conditions. If the conditions are the same, the Board should not stay the appeal and either (1) decide the issues based upon the Petition for Review or (2) require EPA to answer the Petition within seven days. If the Board finds EPA's proposed modifications to truly reflect "the concerns raised in Easley's petition", EPA Memorandum at 2, then EPA's requested opportunity to republish may be appropriate.

We urge the Board to impose these two safeguards, especially in light of the fact that EPA's errors, which led to the incorrect permit terms and the need to republish, will continue to harm Easley because a withdrawal of the conditions will continue in place the same provisions that are administratively continued from the prior permit. Thus, 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. Therefore, it is essential that EPA commit to (1) what it will republish and (2) when it will take final action on the permit modification.

Finally, we believe it is too late for EPA to seek to withdraw the remaining three issues because the Board's November 24 Order Denying Motion for Stay of Proceedings and Establishing Briefing Schedule effectively took review of all four contested conditions. Thus, EPA's opportunity for withdrawal has passed. We urge the Board to clarify its November 24 ruling in this light in response to EPA's notice of withdrawal.

CONCLUSION AND REQUEST FOR RELIEF

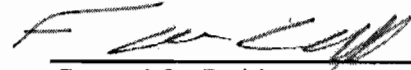
The Board's Order Denying Motion for Stay of Proceedings and Establishing Briefing Deadline clearly retained jurisdiction over the flow issue in this appeal. The Board also set a briefing deadline on the remaining issues after finding that "Region IV has failed to establish good cause to support a further stay in the appellate proceedings...." Stay Denial Order at 2.

In light of EPA's Notice of Withdrawal, we urge the Board to clarify that its November 24, 2006 Order took jurisdiction over all four issues in this appeal such that EPA cannot simply withdraw from consideration the three non-flow issues. This is the legally correct, fair, and appropriate result in Easley's efforts to appeal the conditions at issue after all this time.

Moreover, we urge the Board not to dismiss the appeal but, instead, to either (1) decide the three non-flow issues based upon the Petition for Review or (2) grant EPA's alternative relief requested and retain jurisdiction over the non-flow issues. If the Board elects to take the latter approach, we urge the Board to impose the two safeguards that we outline above.

EPA wants to pick up its ball and simply declare a "mulligan" almost three years after the Agency elected to issue this permit. Respectfully, absent a clear and timely commitment to (1) remove the flow limits and (2) process changes to the three non-flow conditions that address Easley's concerns raised in the Petition for Review, we think the Board should make EPA play their ball where it lies, instead of pocketing it.

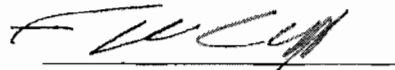
Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that on this 27th day of December, 2006 I delivered this Opposition to EPA Notice of Intent to Withdraw Portions of NPDES Permit by email and with five copies by Federal Express for December 28, 2006 delivery to U.S. Environmental Protection Agency, Clerk of the Board, Environmental Appeals Board, Colorado Building, 1341 G Street, N.W., Suite 600, Washington, D.C. 20005. I further served this response by email 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 27th day of December, 2006.

A handwritten signature in black ink, appearing to read 'F. Mancusi-Ungaro', is written over a horizontal line.

Counsel