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November 17, 2006

By Federal Express and Email

Eurika Durr, Clerk of the Board  
Environmental Appeals Board  
U.S. Environmental Protection Agency  
Colorado Building  
1341 G Street, N.W.  
Suite 600  
Washington, D.C. 20005

Re: NPDES Appeal No. 06-10  
Easley Combined Utilities, Petitioner  
Response to EPA Motion to Stay

Dear Ms. Durr:

Enclosed for filing in your usual manner are the original and five copies of Petitioner's Response to EPA Motion to Stay. 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.

**ENVIRONMENTAL APPEALS BOARD**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

Easley Combined Utilities,	)	
Petitioner	)	
	)	
	)	NPDES Appeal No. 06-10
In re: NPDES Permit No. SC0039853	)	
_____	)	

**RESPONSE TO EPA MOTION TO STAY**

Petitioner Easley Combined Utilities' Petition for Review of the subject NPDES permit was filed 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.

The Board subsequently requested EPA's response by October 13. 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.

With this background, EPA's November 9 Motion to Stay the Petition states that EPA will propose a permit modification to remove the flow limits from the NPDES permit that Easley challenged, addressing one of the four issues. EPA further states that

it is in the interests of judicial economy for the Board to stay these proceedings to process the modification “and any other modifications that may be necessary” and “to continue to discuss with [Easley] the three other issues.” For the following reasons, Easley requests that the Environmental Appeals Board deny EPA’s Motion and decide this NPDES permit appeal on the pleadings.

**Judicial Economy and Easley’s Right of Review Do Not Favor a Stay**

EPA states that judicial economy is served by allowing it to modify the NPDES permit as to one of four issues “and any other modifications that may be necessary.” No basis is provided to believe that a settlement or partial settlement of the remaining issues is likely, and Easley is aware of no such basis. In the absence of specific settlement proposals there is no reason to conclude that the three permit issues will not have to be eventually decided by the Board. Mere delay is not equivalent to judicial economy; and judicial economy is not served by allowing this matter to remain stayed pending later resolution, while the challenged permit conditions are also effectively stayed pursuant to the NPDES regulations.

Easley, of course, has a legal right to the review of agency action that it believes to have been inconsistent with legal requirements. NPDES permit modification with South Carolina Clean Water Act section 401 certification and public comment is likely to take at least six months if the modification is begun immediately. However, EPA also states that it may include other issues in the same modification if the parties reach agreement. Because such negotiations have not even begun, EPA’s statement suggests an even longer process. Even if the modification were started immediately, the permit, which EPA issued with a reduced three year term, would be ten months old by the time

the modification was issued. The timeframe for review that EPA's Motion anticipates presents a significant risk that a final decision on the challenged permit provisions would not be issued until half of the permit term has run. The possibility of additional delays in permit modification or other procedural steps presents the possibility that the challenged permit issues may not be resolved before EPA issues the next reissuance at which point the current appeal could be considered moot. This process would effectively remove from Easley the opportunity for review of government action that Easley considers to be inconsistent with law. The invocation of "judicial economy" does not justify this result.

#### **Governmental Coordination Should Have Occurred Previously**

The earlier Joint Motion to Stay suggested that EPA needed to coordinate the Petitioner's "Best Professional Judgment" and antibacksliding legal points with EPA Headquarters and South Carolina DHEC. EPA was provided 30 days for that coordination. Further, the permit reissuance process was lengthy, with EPA forwarding a draft permit and draft Fact Sheet to Easley in September, 2005, ten months before permit issuance. Petition for Review Ex. B, page 1. The parties engaged in substantial discussions of permit conditions and the underlying BPJ, antibacksliding and other regulatory provisions both before and after the draft permit. That was the timeframe during which EPA should have done the necessary inter- and intra-governmental coordination. EPA's failure to do that work in a timely manner, which might have avoided the necessity for this permit challenge, does not now justify a stay of this matter.

#### **No Settlement Discussions Have Been Initiated**

The Joint Motion to Stay the Petition was further supported by the statement that the parties "believe that discussions between the parties would be beneficial to the review

of these issues, and have the potential to result in resolution of some of the issues.”

Unfortunately, no settlement discussions occurred after the Board granted the Joint Motion. Counsel for EPA contacted counsel for Easley on November 8, two business days (considering the November 10 holiday) before EPA’s response was due to the Board. Although there was at that time some discussion between counsel of the remaining three issues, no settlement possibility was apparent.

Therefore, there is no basis to believe that the parties will engage in substantive discussions of settlement as to the remaining three issues, and the possibility of settlement does not support EPA’s Motion.

**The Environmental Appeals Board Should Decide This Matter on the Pleadings**

Accordingly, further delay in these proceedings does not lead to judicial economy, and a further stay will prejudice Easley’s right to review of its Petition. EPA has been given nearly three months to respond to the Petition for Review, and has now waived the right to respond. We regret the family difficulties that counsel has experienced. However, this permit challenge should be addressed without further delay, and Easley respectfully requests that the Board proceed to consider and decide this matter on the Petition for Review and the record. Easley would not object to the Board withholding review of the challenged flow condition, based on EPA’s commitment to a permit modification. However, the Board should retain jurisdiction as to that issue pending EPA action.

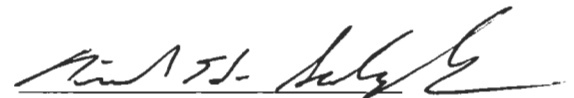
Respectfully submitted,

  
Counsel for Petitioner

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### **CERTIFICATE OF SERVICE**

I certify that on this 17th day of November, 2006 I delivered this Response to EPA Motion to Stay by email and with five copies by Federal Express for November 20 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 17th day of November, 2006.

A handwritten signature in black ink, appearing to read "Richard H. Sedgley", written over a horizontal line.

Counsel