

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

In re:

Essroc San Juan Inc.

NPDES Permit No. PR0001163

EAB Appeal Number NPDES 07-20

**JOINT MOTION FOR STAY OF PERMIT APPEAL PENDING EXECUTION OF CONSENT
ORDER**

Region 2 of the United States Environmental Protection Agency ("the Region") and Essroc San Juan Inc. ("Essroc"), jointly request that the Environmental Appeals Board ("EAB") grant a 45-day additional stay of the permit appeal proceedings in the above captioned matter.

By Order dated April 9, 2008, the EAB stayed the Region's time for responding to the petition until May 22, 2008, pending settlement negotiations.

During the time afforded by the EAB's afore-mentioned Order, the parties engaged in conversations pertaining to the details of the agreement in principle and in drafting the administrative Consent Order that memorializes the parties' agreement.


The parties agreement in principle between remains in full effect. On April 23, 2008 counsel for the parties met in San Juan, Puerto Rico to further develop the details of the agreement in principle and to develop the content of the Consent Order.

Attached please find a draft version of the Consent Order which will be finalized and executed by the parties. In order to finalize and execute the Consent Order, the parties request a 45-day additional stay to complete the drafting and execution of the Agreement on Consent and moving for dismissal.

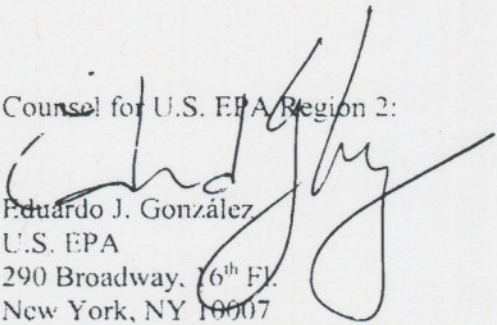
For the reasons set forth above, the parties respectfully request that their Joint Motion for Stay of Permit Appeal Pending Execution of Agreement on Consent be granted and that the EAB extend the deadline for the Region's response to July 3, 2008.

Respectfully submitted, this May 19, 2008.

Counsel for Essroc San Juan Inc.:


Eduardo Negron Navas
Fidell Gonzalez & Rodriguez, P.S.C.
P.O. Box 363507
San Juan, Puerto Rico 00936-3507
enegron@fgriaw.com
Tel. 787.759.3106
Fax. 787.753.4237

Counsel for U.S. EPA Region 2:


Eduardo J. Gonzalez
U.S. EPA
290 Broadway, 16th Fl.
New York, NY 10007
gonzalez.eduardoj@epa.gov
Tel. 212-637-3223
Fax. 212-637-3202

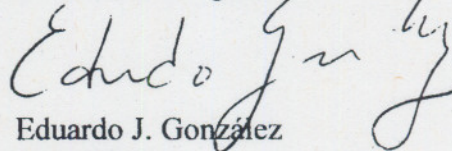
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing JOINT MOTION FOR STAY OF PERMIT APPEAL PENDING EXECUTION OF CONSENT ORDER in the matter of Essroc San Juan Inc. NPDES Permit No. PR0001163, Appeal No. EAB Appeal Number NPDES 07-20, were served by United States First Class Mail on the following persons, this 20 day of May, 2008:

Counsel for Apellant
Eduardo Negrón Navas
Fiddler González & Rodríguez, PSC
PO Box 363507
San Juan, Puerto Rico 00936-3507
enegron@fgrlaw.com
Tel. 787.759.3106
Fax 787.753.4237

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

Counsel for Region 2:



Eduardo J. González
U.S. EPA
290 Broadway, 16th Fl.
New York, NY 10007
gonzalez.eduardoj@epa.gov
Tel. 212-637-3223
Fax. 212-637-3202

Date: _____

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2
290 Broadway
New York, New York 10007-1866

In the Matter of:

Essroc San Juan Inc.
NPDES Permit No. PR0001163

Proceeding pursuant to §308 and §309(a) of the
Clean Water Act, 33 U.S.C. §1318 and §1319(a)

Consent Order
CWA-02-200 -

The following ORDER is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by the Clean Water Act, 33 U.S.C. §1251 et seq. (“the Act”), which authority has been duly delegated to the Regional Administrator of Region 2, EPA, and since further re-delegated to the Director, Division of Enforcement and Compliance Assistance, Region 2, EPA.

STATUTORY AND REGULATORY FRAMEWORK

1. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into navigable waters except in compliance with, among other things, a NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.
2. Section 402(a) of the CWA, 33 U.S.C. § 1342(a) provides the Administrator of the EPA (“Administrator”) with authority to issue a NPDES permit that authorizes the discharge of pollutants into waters of the United States, provided that all discharges meet the applicable requirements of Section 301 of the CWA, 33 U.S.C. § 1311, or such other conditions as the Administrator determines are necessary to carry out the provisions of the CWA.
3. Section 402(a)(2) of the CWA, 33 U.S.C. § 1342(a)(2), provides that EPA shall prescribe conditions for such permits to assure compliance with the requirements of Section 402(a)(1), including conditions on data and information collection, reporting, and other such requirements as EPA deems appropriate.
4. Under Section 402 of the CWA, 33 U.S.C. §§ 1342, on November 15, 1990, the Administrator promulgated regulations relating to the control of storm water discharges, at 40 C.F.R. § 122.26.

5. Under 40 C.F.R. § 122.26 (a)(1)(ii) and (c)(1) dischargers of storm water associated with industrial activity are required to apply for an individual permit or seek coverage under a promulgated storm water general permit.
6. Under 40 C.F.R. § 122.26(b)(14)(ii) and (iii), storm water associated with industrial activity includes storm water discharges associated with industrial activity from facilities identified under Standard Industrial Classifications 3241 and 1422, among others.
7. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines “person” to include “an individual, corporation, partnership [or] association.”
8. Section 502(6) of the CWA, 33 U.S.C. § 1362(6), defines “pollutant” to include, among other things, dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, chemical wastes, biological materials, heat, rock, sand, and industrial, municipal, and agricultural waste discharged into water.
9. Section 502(12) of the CWA, 33 U.S.C. § 1362(12), defines “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”
10. Section 502(14) of the CWA, 33 U.S.C. 1362(14), defines “point source” to include “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”
11. Section 502 (7) of the CWA, 33 U.S.C. 1362(7), defines “navigable waters” as “the waters of the United States, including the territorial seas.”
12. Section 502(11) of the CWA, 33 U.S.C. 1362(11), defines “effluent limitation” to include “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters”

FINDINGS

Respondent

13. Essroc San Juan Inc. (“Essroc”) is a company organized under the laws of the Commonwealth of Puerto Rico. Deleted: SSROC
14. Essroc is a “person” within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5). Deleted: SSROC
15. Essroc owns and operates a cement manufacturing facility (“facility”) located at Km. 26.7 of Puerto Rico Highway #2, in Espinosa Ward of the Municipality of Dorado, Puerto Rico, 00646, where it operates a cement kiln, produces cement and limestone, and supports other ancillary operations. The facility encompasses a quarry area of approximately 278 acres and a manufacturing area of approximately 75 acres. Deleted: SSROC

16. Essroc's facility's Standard Industrial Classification Codes are 1422 (mineral mining and dressing) and 3241 (hydraulic cement).

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17. Essroc's facility has three point source discharges regulated under two permits pursuant to the CWA. Two point sources are regulated under a storm water general permit and one point source is regulated under an individual permit.

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The NPDES Individual Permit

18. The NPDES Individual Permit PR0001163 ("Individual Permit") authorizes SSROC to discharge from Outfall 001 wastewaters from areas of the facility including the vehicle clean up station, mobile equipment repair shop, road automated sprinklers, watering truck, general cleaning, and storm water runoff from the facility.

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19. Table A-1 of the Individual Permit contains effluent limits and monitoring requirements for Outfall 001.

20. Outfall 001 is a point source which discharges into an open ditch tributary to Honda Creek.

21. The open ditch tributary to Honda Creek is a water of the United States.

22. The Individual Permit became effective on October 1, 2001, and expired on June 30, 2005. Essroc filed a timely permit renewal application, so the Individual Permit was administratively extended and remained in effect until EPA re-issued the Permit.

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NPDES Individual Permit Re-issuance

23. Essroc filed a timely permit renewal application on December 29, 2004.

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24. On June 21, 2007, Puerto Rico's Environmental Quality Board ("EQB") issued a draft Water Quality Certificate ("WQC"). Essroc participated in EQB's WQC public comment process.

25. On September 28, 2007 EQB issued a final WQC.

26. On October 22, 2007 Essroc filed a Motion for Reconsideration of the final WQC with the EQB.

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27. On November 1, 2007 EQB issued a Resolution ruling that it was entertaining Essroc's aforementioned Motion for Reconsideration.

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28. On August 24, 2007, EPA Region 2 issued a draft NPDES permit, which incorporated the EQB's draft WQC.

29. Essroc participated in EPA's public comment process and submitted that the proposed NPDES Permit was based upon a WQC that was not final because it was pending reconsideration at the EQB.

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30. On November 20, 2007 EPA re-issued the Essroc NPDES Permit which incorporated the EQB's WQC which was pending reconsideration at the EQB.

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31. EPA's NPDES permit re-issuance became effective on December 1, 2007.

Essroc's Permit Appeal and Settlement Negotiations

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32. On December 14, 2007, Essroc filed an Appeal, before the Environmental Appeals Board ("EAB"), of EPA's aforementioned NPDES permit re-issuance which became effective on December 1, 2007.

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33. In its Appeal, Essroc argues that the NPDES permit re-issued by EPA Region 2 incorrectly incorporated the WQC which was not final because it was pending reconsideration at the EQB. Essroc petitioned from the EAB to order EPA's permit to be withdrawn or that the conditions subject to reconsideration with EQB be stayed until the WQC became final and the NPDES permit revised accordingly.

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34. Region 2 and Essroc jointly requested that the EAB grant a 45-day stay of the permit appeal proceedings. By Order dated February 7, 2008, the EAB stayed the Region's time for responding to the petition until April 7, 2008, pending settlement negotiations.

35. During the time provided by the EAB's order dated February 7, 2008, the parties engaged in settlement negotiations and reached an agreement in principle.

36. Pursuant to the agreement in principle between the parties, Region 2 has agreed to issue an Administrative Order on Consent which will provide Essroc with relief for the seven contested conditions which are the subject of Essroc's Petition for Review in the instant case, until the issues pertaining the Water Quality Certificate which are pending reconsideration are resolved by the Puerto Rico's Environmental Quality Board.

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37. Also pursuant to the agreement in principle between the parties, Essroc has agreed to withdraw the instant Petition for Review by timely filing with the EAB a motion for dismissal, upon execution of the above-mentioned Administrative Order on Consent.

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38. Based upon the facts and authorities cited above, Essroc and EPA agree to the ordered provisions below.

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¶

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Ordered Provisions

In consideration of the above Findings, a thorough investigation of all relevant facts, EPA and Essroc having agreed that settlement of this matter is in the public interest, and that entry of

this Consent Order without further litigation is the most appropriate means of resolving this matter;

NOW, THEREFORE, pursuant to the provisions of §309(a) of the Act, without adjudication of any issue of fact or law, and upon consent and agreement of the Parties, it is hereby agreed, and ordered as follows:

39. The seven contested conditions described below are stayed for a period of one year from the date of execution of this Consent Order, during the pendency of Essroc's reconsideration and appeal of EQB's WQC. Essroc's Petition challenges seven specific conditions of the Permit, summarized in the following table:

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Structure	Part	Permit Condition
Outfall 001	Table A-1	Fecal Coliforms
		Total Coliforms
		BOD5
		Color
		Sulfide
		Sulfate
		Surfactants

All other conditions of the Permit are not stayed and remain fully enforceable obligations.

40. Should EQB grant all or part of Essroc's reconsideration and appeal by deciding to revise the WQC or issuing an Order, the contested provisions granted by EQB will be further stayed until EPA revises the NPDES permit or issues and Order accordingly.
41. Within five business days from the execution of this Consent Order Essroc will file a motion with the EAB requesting the withdrawal of Essroc's permit appeal, without prejudice to Essroc's right to request re-activation of the appeal if that should prove necessary.

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General Provisions

42. The Respondent waives any right HE/SHE/IT may have pursuant to 40 C.F.R. § 22.8 to be present during discussions with or to be served with and to reply to any memorandum or communication addressed to the Director or the Regional Administrator where the purpose of such discussion, memorandum, or communication is to discuss a proposed settlement of this matter or to recommend that such official accept this Consent Agreement and issue the accompanying Final Order.
43. Nothing in this agreement shall be construed as prohibiting, altering or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of

Respondent's violation of this agreement or of the statutes and regulations upon which this agreement is based, or for Respondent's violation of any applicable provision of law.

44. This Consent Agreement and Order shall not relieve Respondent OF HIS/HER/ITS obligation to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state or local permit, nor shall it be construed to constitute EPA approval of the equipment or technology installed by Respondent, if any, in connection with the SEP undertaken pursuant to this Agreement
45. This Consent Agreement and Final Order constitutes a settlement by EPA of all claims for civil penalties pursuant to the Clean Water Act for the violations alleged in the Complaint. Nothing in this Consent Agreement and Final Order is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondent. Compliance with this Consent Agreement and Final Order shall not be a defense to any actions subsequently commenced pursuant to Federal laws and regulations administered by EPA, and it is the responsibility of Respondent to comply with such laws and regulations.
46. Each undersigned representative of the parties to this Consent Agreement certifies that he or she is fully authorized by the party represented to enter into the terms and conditions of this Consent Agreement and to execute and legally bind that party to it.
47. Each party shall bear its own costs and attorneys fees in connection with the action resolved by this Consent Agreement and Order

[to be inserted]

RESPONDENT:

BY: _____

DATE: _____

NAME OF SIGNATORY

TITLE OF SIGNATORY

COMPLAINANT:

Consent Order – Draft

5/20/08

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BY: _____

Carl A.P. Soderberg
U.S. EPA, Region 2
290 Broadway, 21st Floor
New York, New York 10007-1866

DATE: _____

III. FINAL ORDER

The Regional Administrator of the U.S. Environmental Protection Agency Region 2, ratifies the foregoing Consent Agreement. The Agreement entered into by the parties is hereby approved, incorporated herein, and issued as an Order. The effective date of this Order shall be the date of filing with the Regional Hearing Clerk, U.S. EPA Region 2, New York, NY.

Date

Alan J. Steinberg
Regional Administrator
United States Environmental
Protection Agency-Region 2
290 Broadway
New York, NY 10007-1866

