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ENVIR. APPEALS BOARD

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December 13, 2007

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: Essroc San Juan Inc.
NPDES Permit No. PR0001163

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

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

In re:)
Essroc San Juan Inc.)
NPDES Permit No. PR0001163)

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APPEAL PURSUANT TO 40 C.F.R. § 124.19

COMES NOW, Essroc San Juan Inc. (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 June 21, 2007, the Environmental Quality Board (EQB) issued a draft Water Quality Certificate (WQC). The Appellant participated in the WQC public comment process. The Appellant submitted timely comments to the draft WQC on August 27, 2007.
2. On September 28, 2007, EQB issued a final WQC, whose finality is subject to reconsideration. The Appellant filed a timely Motion for Reconsideration on October 22, 2007.
3. On November 1, 2007, EQB issued a Resolution ruling that it will entertain the Motion for Reconsideration. The Motion for Reconsideration currently is being entertained and pending resolution under the jurisdiction of EQB.
4. On August 24, 2007, the Environmental Protection Agency (EPA) issued a draft NPDES permit, which incorporates the draft WQC. The Appellant participated in the NPDES permit public comment process. The Appellant submitted timely comments to the draft NPDES permit on September 19, 2007, including but not limited to the fact that the WQC upon which the draft NPDES permit was based was not yet final.

5. On November 20, 2007, EPA issued a final NPDES permit, which was signed on October 19, 2007 with a proposed effective date of December 1, 2007, which incorporates the WQC which currently is pending reconsideration under the jurisdiction of EQB.

PETITION

The NPDES permit incorporates conditions of a WQC which currently is pending reconsideration under the jurisdiction of EQB; thus, the WQC and/or the conditions subject to reconsideration are not final. 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 that the Essroc NPDES Permit be withdrawn or, in the alternative, that the conditions subject to reconsideration with EQB be stayed until the WQC becomes final and the NPDES is revised accordingly.

ARGUMENT

I. EPA SHOULD NOT HAVE ISSUED A FINAL NPDES PERMIT WHILE THE WQC IS PENDING RECONSIDERATION UNDER THE JURISDICTION OF EQB

EPA erred by issuing a final NPDES permit on November 20, 2007,¹ when on October 22, 2007 Appellant already had filed a Motion for Reconsideration on the WQC, which motion had been notified to EPA; and on November 1, 2007 EQB had already issued a Resolution ruling that it will entertain the Motion for Reconsideration, which had also been notified to EPA.

The Clean Water Act requires that NPDES permits include the contaminant limitations and conditions required to comply with state water quality standards. EPA may not issue an NPDES permit unless the state has either issued a WQC or waived the right to issue one. 40 CFR § 124.53(a). On December 12, 2007, EPA promulgated water quality standards for Puerto Rico which state that the final determination to issue or deny a WQC is “subject to the reconsideration procedure established in Law 170 of August 12, 1988, *Ley de Procedimiento Administrativo Uniforme del Estado Libre Asociado de Puerto Rico (3 LPR 2165)*.” 72 Fed. Reg. 70517 (December 12, 2007), 40 CFR § 131.42(a)(7). In the preamble of this final rule EPA specifically states that petitioners have the ability to seek reconsideration before the WQC decision becomes final.

The EQB has not yet concluded the WQC process; hence, it has not waived its right to issue such WQC. By issuing a final NPDES permit barely nineteen (19) days after the EQB

¹ Note that the permit indicates that it was signed on October 19, 2007, clearly within the twenty (20) day period afforded to the Appellant to file its reconsideration request pursuant to Commonwealth law. See, 12 LPR § 8002f(a)(4) and 3 LPR § 2165. Moreover, the permit has a stated effective date of December 1, 2007, merely eleven (11) days after it was received by the Appellant.

Resolution stating that it was reconsidering the WQC, EPA has proceeded with arbitrary and unreasonable timing. See, Puerto Rico Sun Oil Company v. EPA, 8 F.3d 73 (1st. Cir. 1993). Moreover, EPA has proceeded against its own policy, which recognizes that a WQC under reconsideration by EQB is not final.

II. EPA SHOULD NOT HAVE ISSUED A FINAL NPDES PERMIT WHICH EFFECTIVE DATE OF PERMIT PRECEDES THE 30 DAY PERIOD TO FILE AN APPEAL

EPA erred by issuing a final NPDES permit on November 20, 2007 with a stated effective date of permit of December 1, 2007. The final permit decision shall become effective 30 days from the date of service of the notice of issuance. Within this thirty (30) day period after service, the final permit decision may be appealed. 40 CFR § 124.19. The NPDES permit cannot be effective prior to becoming final.

III. EPA SHOULD NOT HAVE IMPOSED WQC PERMIT LIMITS AND CONDITIONS WHICH HAVE NOT BECOME FINAL FOR FECAL COLIFORMS AND TOTAL COLIFORMS

EPA erred by issuing a final NPDES permit on November 20, 2007 and imposing permit limits and conditions for fecal coliforms and total coliforms. The permit limits and conditions for said parameters are part of Appellant's Motion for Reconsideration which currently is being entertained and pending resolution under the jurisdiction of EQB. Thus, said limits and conditions have not become final.

IV. EPA SHOULD NOT HAVE IMPOSED WQC PERMIT LIMITS AND CONDITIONS WHICH HAVE NOT BECOME FINAL FOR BOD5, COLOR, SULFIDE, SULFATE AND SURFACTANTS

EPA erred by issuing a final NPDES permit on November 20, 2007 and imposing permit limits and conditions for BOD5, color, sulfide, sulfate and surfactants. The permit limits and conditions for said parameters are part of Appellant's Motion for Reconsideration which currently is being entertained and pending resolution under the jurisdiction of EQB. Thus, said limits and conditions have not become final.

V. EPA SHOULD NOT HAVE ISSUED A DRAFT NPDES PERMIT WITHOUT EQB HAVING ISSUED A FINAL WQC

EPA erred by giving Public Notice on August 24, 2007, to inform the public and applicant, that it had prepared a draft NPDES Permit No. PR0001163. At that time, EQB had only issued a draft WQC. The Clean Water Act requires that NPDES permits include the contaminant limitations and conditions required to comply with state water quality standards.

EPA may not issue an NPDES permit unless the state has either issued a WQC or waived the right to issue one. 40 CFR § 124.53(a). At that time EQB had not yet concluded the WQC process; hence, it had not waived its right to issue such WQC.

On December 12, 2007, EPA promulgated water quality standards for Puerto Rico which state that the final determination to issue or deny a WQC is "subject to the reconsideration procedure established in Law 170 of August 12, 1988, *Ley de Procedimiento Administrativo Uniforme del Estado Libre Asociado de Puerto Rico (3 LPRA 2165)*." 72 Fed. Reg. 70517 (December 12, 2007), 40 CFR § 131.42(a)(7). In the legislative history of this final rule EPA specifically states that petitioners have the ability to seek reconsideration before the WQC decision becomes final.

VI. THE EPA ERRORS ABOVE DENY APPELLANT DUE PROCESS OF LAW

The public and applicant have specific and distinct rights under the applicable state WQC and federal NPDES permit laws and regulations. Under state laws and regulations the public and the applicant have the right to comment, request a hearing, reconsideration and judicial review before the state action becomes final. Likewise, under federal laws and regulations the public and the applicant have the right to comment, request a hearing and appeal. By publishing and seeking comments on a draft NPDES permit and issuing a final NPDES permit, when EQB has not yet concluded the WQC process and the WQC is under reconsideration by EQB, EPA impairs and negatively affects the rights of the public and the applicant under both state and federal laws and regulations.

Review and appeals of permit limitations and conditions attributable to the State certification shall be made only through the applicable procedure of the State. 40 CFR § 124.55(e). In the Commonwealth of Puerto Rico, these procedures include the opportunity to file a motion for reconsideration with EQB. 12 LPRA § 8002f(a)(4), 3 LPRA § 2165. Issuing a final NPDES permit which incorporates the conditions of a WQC that is not yet final voids and moots the availability of the reconsideration mechanism at EQB, and at the same time deprives the permittee of the only forum available to it for review of such conditions. This constitutes a denial of due process under the Fifth Amendment to the Constitution of the United States and Article II, § 7 of the Constitution of the Commonwealth of Puerto Rico.

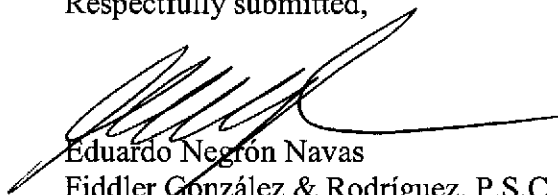
Moreover, the timing of EPA's issuance of the NPDES permit (which had been executed almost one month before such date) appears to be unreasonable. The EPA proceeded with the issuance of the NPDES permit barely nineteen (19) days after the EQB Resolution stating that it was reconsidering the WQC, which Resolution was notified to the federal agency. Such timing of EPA's action is arbitrary and unreasonable. See, Puerto Rico Sun Oil Company v. EPA, *supra*.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests this Board to grant review of this case and order EPA to withdraw the Essroc NPDES Permit PR0001163. In the alternative, those conditions set forth in the NPDES permit based upon a WQC which is not final should be stayed.

In San Juan, Puerto Rico, this December 13, 2007.

Respectfully submitted,



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