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EPA APPEALS BOARD

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COMPANY:	U.S. Environmental Protection Agency	DATE:	9/2/2008
FAX NUMBER:	(202) 233-0121	PAGES INCLUDING COVER:	13
RE:	EAB: Appeal No. NPDES 07-20 Essroc San Juan Inc. NPDES Permit No. PR0001163		

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Attached fax copy of Joint Motion for Disposition of Permit Appeal. The original was mail today via UPS.

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

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ENVIR. APPEALS BOARD

In the Matter of:

Essroc San Juan Inc.

NPDES Appeal 07-20

NPDES Permit No. PR0001163

JOINT MOTION FOR DISPOSITION OF PERMIT APPEAL

I. INTRODUCTION

Region 2 of the United States Environmental Protection Agency ("Region 2") and Essroc San Juan Inc. ("Essroc") jointly request that the Environmental Appeals Board ("EAB") dispose of Essroc's Permit Appeal, NPDES Appeal 07-20, consistent with the Parties' recommendations in Section IV below. This Joint Motion is based on agreements reached by the Parties as reflected in the accompanying Consent Order that has been duly executed by both Parties to this Motion.

II. PROCEDURAL BACKGROUND

On November 20, 2007, Region 2 issued to Essroc a National Pollutant Discharge Elimination System ("NPDES") Permit No. PR0001163 ("the 2007 Permit").

On December 14, 2007, Essroc filed a Petition for Review of several conditions in the 2007 Permit ("the Petition").

Commencing on February 7, 2008, the Board granted the Parties' various motions staying the proceedings until August 15, 2008, which stays have provided the Parties

with the opportunity to reach an agreement in principle, and memorialize and execute an administrative Consent Order resolving the issues raised in Essroc's Petition.

On September 2, 2008, the finalized Consent Order was duly executed by both Parties, a copy of which is hereby submitted as evidence of the resolution of the issues between the Parties.

III. NATURE OF THE SETTLEMENT

The Consent Order executed by the Parties provides the following:

1. The seven conditions contested by Essroc in its Petition will be stayed for a period of one year from the date of execution of the Consent Order; therefore, with regards to the seven contested conditions, Essroc will comply with the conditions of the previously effective 2001 Permit during the effective period of the Consent Order;
2. All other conditions of the 2007 Permit are not stayed and remain fully enforceable obligations; and,
3. Essroc agrees to file a motion with the EAB requesting the withdrawal of Essroc's permit appeal, which is being complied with through the filing of the instant motion.

Pursuant to the Consent Order, Region 2 has provided Essroc with temporary relief from the seven contested conditions which are the subject of Essroc's Petition for Review. These contested conditions will be stayed for one year, during which time Essroc will pursue resolution of its pending Reconsideration and Appeal of the Water Quality Certificate ("WQC") issued by Puerto Rico's Environmental Quality Board ("EQB").

During the term of the Consent Order, Essroc, as permittee, shall be entitled to request from Region 2 a modification of the 2007 Permit with respect to the seven stayed conditions should the EQB grant all, or part of, Essroc's Reconsideration and Appeal by deciding to revise the WQC. Region 2's evaluation of Essroc's request for modification

will be determined pursuant to 40 C.F.R. §§ 122.62 and 124.5, limiting their applicability to the cause for modification based on a revised certificate pursuant to 40 C.F.R. § 124.55(b). Essroc reserves the right to request an extension of the Consent Order's one-year stay of the contested conditions, and Region 2 reserves the right to entertain such a timely request if supported by a showing of good cause.

IV. REQUESTED RELIEF

Accordingly, the Parties request that the EAB, as it deems appropriate, dispose of Essroc's Petition by either of the following courses of action:

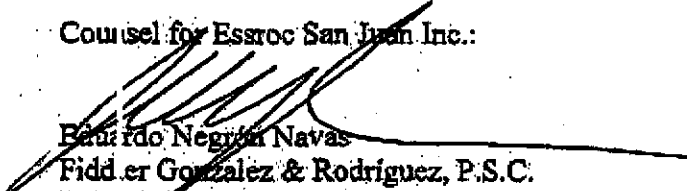
1. Dismiss Essroc's Petition subject to Essroc's ability to re-activate its Appeal in the event that (1) the EQB does not act on Essroc's Reconsideration and Appeal within the one-year stay in the Consent Order and (2) EPA reinstates the seven contested permit conditions; or,
2. Grant a one-year stay of these proceedings concurrent with the one-year stay in the Consent Order, during which time the Parties would submit to the EAB 180-day status reports describing the status of the EQB's Reconsideration and Appeal and any actions of the Parties in connection with those proceedings or the stayed permit conditions.

V. CONCLUSION

For the reasons set forth above, the Parties respectfully request that the EAB grant whichever proposed relief the Board deems appropriate based on the instant Joint Motion for Disposition of Permit Appeal.

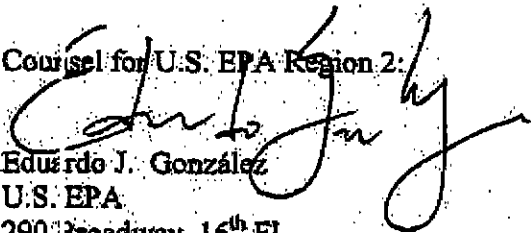
Respectfully submitted, this 2nd day of September, 2008.

Counsel for Essroc San Juan Inc.:



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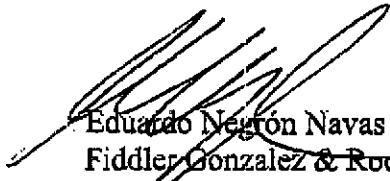
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing JOINT MOTION FOR DISPOSITION OF PERMIT APPEAL in the matter of Essroc San Juan Inc. NPDES Permit No. PR0001163, EAB Appeal No. NPDES 07-20, were served by Essroc First Class Mail on the following persons, this 2nd day of September, 2008:

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U.S. Environmental Protection Agency
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Date: September 2, 2008

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-02-2008-3162

CONSENT ORDER

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, Caribbean Environmental Protection Division, Region 2, EPA.

I. 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. Section 502(5) of the CWA, 33 U.S.C. § 1362(5), defines "person" to include "an individual, corporation, partnership [or] association."
5. 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.

6. 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."
7. 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."
8. 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."
9. 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"

II. FINDINGS

Respondent

10. Essroc San Juan Inc. ("Essroc") is a company organized under the laws of the Commonwealth of Puerto Rico.
11. Essroc is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).
12. 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.
13. Essroc's facility's Standard Industrial Classification Codes are 1422 (mineral mining and dressing) and 3241 (hydraulic cement).
14. 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.

The NPDES Individual Permit

15. The NPDES Individual Permit PR0001163 ("Individual Permit") authorizes Essroc 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.

16. Table A-1 of the Individual Permit contains effluent limits and monitoring requirements for Outfall 001.
17. Outfall 001 is a point source which discharges into an open ditch tributary to Honda Creek.
18. The open ditch tributary to Honda Creek is a water of the United States.
19. The Individual Permit became effective on October 1, 2001, and expired on June 30, 2005 ("the 2001 Permit"). Essroc filed a timely permit renewal application, therefore the Individual Permit was administratively extended and remained in effect until EPA re-issued the Permit.

NPDES Individual Permit Re-issuance

20. Essroc filed a timely permit renewal application on December 29, 2004.
21. 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.
22. On September 28, 2007 EQB issued a final WQC.
23. On October 22, 2007 Essroc filed a Motion for Reconsideration of the final WQC with the EQB.
24. On November 1, 2007 EQB issued a Resolution ruling that it was entertaining Essroc's aforementioned Motion for Reconsideration.
25. On August 24, 2007, EPA Region 2 issued a draft NPDES permit incorporating the EQB's WQC, while it was pending reconsideration.
26. Essroc participated in EPA's public comment process and submitted that the proposed NPDES Permit was based upon a WQC that was not final since it was pending reconsideration at the EQB.
27. On November 20, 2007, EPA re-issued the Essroc NPDES Permit ("the 2007 Permit") incorporating the EQB's WQC, which was still pending reconsideration at the EQB.
28. EPA's NPDES permit re-issuance became effective on December 1, 2007.

Essroc's Permit Appeal and Settlement Negotiations

29. 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.
30. In its Appeal, Essroc argued that the 2007 Permit incorrectly incorporated the WQC which was not final since it was pending reconsideration at the EQB.
31. Essroc petitioned the EAB to order EPA's permit to be withdrawn or alternatively, that the conditions subject to reconsideration with EQB be stayed until the WQC became final and the NPDES permit was revised accordingly.
32. Essroc's Petition challenges seven specific conditions of the Permit, summarized in the following table:

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

33. Pursuant to several EAB orders granting stay of the proceedings, the parties engaged in settlement negotiations and reached an agreement in principle.
34. 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 to the Water Quality Certificate which are pending reconsideration are resolved by Puerto Rico's Environmental Quality Board.
35. 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 this Consent Order.
36. Based upon the facts and authorities cited above, Essroc and EPA agree to the ordered provisions below.

III. ORDERED PROVISIONS

In consideration of the above Findings, and a thorough investigation of all relevant facts, EPA and Essroc have 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:

37. The seven contested conditions described in paragraph 32, above, are stayed for a period of one year from the date of execution of this Consent Order.
38. During the effective period of this Consent Order, Essroc will comply with the conditions of the 2001 Permit with regards to the seven contested conditions.
39. All other conditions of the 2007 Permit are not stayed and remain fully enforceable obligations.
40. 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.

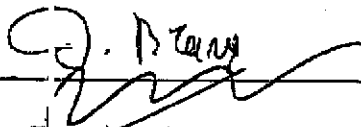
IV. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

41. EPA hereby reserves all of its statutory and regulatory powers, authorities, rights, and remedies, both legal and equitable, under the Act or implementing regulations, or under other federal laws, regulations, or permit conditions, including, but not limited to those available pursuant to:
 - a. 40 C.F.R. § 124.5, which provides that permits may be modified at the request of any interested person or at the Director's initiative, but only pursuant to 40 C.F.R. § 122.62, which provides a list of reasons or "causes" for modification, one of which must exist in order for the Director to modify the permit; and
 - b. 40 C.F.R. § 124.53, which provides that a State will be deemed to have waived its right to a water quality certification if that right is not exercised within a reasonable time, which, under Section 401(a) of the Act, 33 U.S.C. § 1141(a), is not to exceed one year.
42. This Consent Order is not a permit or a modification of any permit under any federal, state, or local laws or regulations. Defendant is responsible for achieving and maintaining complete compliance with all applicable federal, state, and local laws, regulations, and permits.
43. If, before the expiration of the one-year duration of this Consent Order, the EQB should grant all or part of Essroc's Reconsideration and Appeal by deciding to revise the WQC or issuing an Order, Essroc, as permittee, shall be entitled to request a modification of the 2007 Permit under 40 C.F.R. § 124.5, with regard to the seven contested conditions. EPA's evaluation of such request will be determined pursuant to 40 C.F.R. §§ 122.62 and 124.5, limiting their applicability to the cause for modification based on a revised certificate pursuant to 40 C.F.R. § 124.55(b).

V. GENERAL PROVISIONS

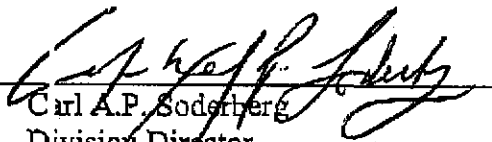
44. The Respondent waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during discussions with or to be served with and to reply to any memorandum or communication addressed to the Director or the Regional Administrator where the purpose of such discussion, memorandum, or communication 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.
45. 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.
46. Each party shall bear its own costs and attorneys' fees in connection with the action resolved by this Consent Agreement and Order.

RESPONDENT ESSORC SAN JUAN, INC.:

BY: 
Francisco Bravo
General Manager and VP

DATE: 08/14/08

COMPLAINANT US EPA, REGION 2:

BY: 
Carl A.P. Soderberg
Division Director
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San Juan, Puerto Rico 00907

DATE: 09/02/08