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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
ENVIRONMENTAL APPEALS BOARD

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In re :  
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SOUTH CAROLINA ELECTRIC & GAS : Appeal No. 06-09  
:  
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1201 Constitution Avenue, NW.  
Washington, D.C.

Thursday, November 8, 2007

The HEARING in this matter began at  
approximately 10:32 a.m. pursuant to notice.

BEFORE:

JUDGE KATHIE A. STEIN

1 APPEARANCES:

2 On behalf of Environmental Protection Agency:  
 3 EURIKA DURR, ESQUIRE  
 Board of Environmental Appeals  
 4 United States Environmental Protection Agency  
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 On behalf of SC Electric & Gas:

11  
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1 P R O C E E D I N G S

2 MS. DURR: The Environmental  
3 Protection Agency is now in session for the  
4 status conference in re South Carolina  
5 Electric and Gas Company. Docket No.  
6 SC00457752. MPDS Appeal No. 06-09.  
7 Honorable Judge Kathy Stein presiding.  
8 Please.

9 JUDGE STEIN: Good morning. Before  
10 we get started, my screen is not on for some  
11 reason up here. We're having a moment of  
12 technical difficulties before we get started.

13 (Pause)

14 JUDGE STEIN: Good morning,  
15 Counsel. I'm Judge Stein, and with me is  
16 Nivea Berrios, the counsel that the board  
17 assigned to this case.

18 If the parties could introduce  
19 themselves, beginning with Region IV.

20 MR. MANCUSSI-UNGARO: Yes, this is  
21 Philip Mancussi-Ungaro from EPA Region IV.  
22 And I'm by myself today.

1 MS. PARTLOW: And I'm Beth Partlow  
2 with the Law Firm of Ogletree Deakins on  
3 behalf of South Carolina Electric and Gas  
4 Company, and I have an associate from our  
5 office, Vick Pyle, in the room with me.

6 JUDGE STEIN: Thank you for  
7 appearing, Counsel.

8 As you know, the board has ordered  
9 a status conference in this case, and the  
10 principal purpose of the status conference is  
11 that this is a matter that's been on our  
12 docket for a considerable period of time and  
13 the board has granted several stays or  
14 requests for extensions of time over the last  
15 year, almost year and a half at this point.

16 And the board was under the  
17 impression that we are on a path to  
18 resolution of this matter, and in the last  
19 status report that was filed with the board,  
20 there was a reference to the need to conduct  
21 a reasonable potential analysis. And that  
22 led the board to wonder whether we were

1 really on the path to resolution, that we had  
2 been under the impression we were, so we  
3 thought that it would be useful to have each  
4 of the parties address that.

5           And, as I had understood it, there  
6 were a couple of issues in the case, in the  
7 limits relating to manganese and iron had  
8 been resolved. There was an issue regarding  
9 the mercury limit, which in the status report  
10 prior to that most recent one, we had been  
11 led to believe had been resolved, and now we  
12 have some questions.

13           So, why don't we hear first from  
14 Region IV and then from counsel for South  
15 Carolina Electric?

16           MR. MANCUSSI-UNGARO: Okay. Just  
17 by way of background, you are correct. There  
18 were several issues that were raised in the  
19 original petition, and we were able to  
20 dispense the iron and manganese ones  
21 throughout the process.

22           We also had come to an agreement on

1 mercury. The reason we were more detailed in  
2 this more recent status report was that  
3 during the discussions on mercury, we looked  
4 at several approaches, but over that period  
5 of time, since SCE & G had been continuing to  
6 collect data on mercury and their discharge  
7 and realize that the data was coming back  
8 clear whereas in the past, they had had some  
9 problems with the mercury limits.

10           And I'll defer to Ms. Partlow to  
11 discuss what happened over time, but it  
12 became apparent to us that with the data  
13 looking as clean as it was, that if we a  
14 three-year period of time and three years of  
15 data, then we could do a new reasonable  
16 potential analysis, and, hopefully, lead to  
17 conclusion that no mercury limit was needed.

18           And, just today, we got the interim  
19 results back on the most recent data, so we  
20 needn't now have three years worth of data.

21           A subsequent issue or a related  
22 issue to this is the 401 certification.

1 South Carolina, the way their system is set  
2 up is that the state -- okay, I'm hearing a  
3 slight echo. I was pausing for a second.

4           When a state issues a  
5 certification, it has to be approved by the  
6 board before it's final, the DHEC board.

7           What happened in this case, there  
8 was an appeal of that certification prior to  
9 the board approving it, therefore, the state  
10 certification as it related to iron,  
11 manganese, and mercury was appealed and was  
12 not effective. However, in order to dispense  
13 with that issue, we've agreed that in the  
14 permit that we planned to issue, we will  
15 include a re-opener provision under our  
16 regulations that allow us to revisit that  
17 certification issue when it becomes final.

18           So, at this point, we're in the  
19 position to move forward with the permit, but  
20 we were waiting for this one last point and  
21 then the analysis that's associated with it.

22           JUDGE STEIN: Do you have a

1 reasonable estimate of how long it will take  
2 you to conduct the analysis and make a  
3 determination?

4 MR. MANCUSSI-UNGARO: I will defer  
5 to Beth on the lab analysis, but, in terms of  
6 analyzing the data, they will use the same  
7 process that we use to do reasonable  
8 potential, and it's our understanding that my  
9 program client, Carrie Doshell, will be  
10 working with the SCE & G staff person on the  
11 RP analysis so they can be in agreement on  
12 it. We think that can be done by probably  
13 mid-December, then once that's done, we have  
14 to public notice the permit.

15 And Beth and I talked this morning  
16 about the issue with 401 certification. In  
17 the State of South Carolina, they have to put  
18 certifications out for a 60-day notice  
19 period.

20 Now, my experiences in South  
21 Carolina that we can ask for expedited 401  
22 certification and we need to talk to DHEC



1 about that process since they will be  
2 certifying a permit that now potentially has  
3 no mercury limit in it, whereas the past  
4 certification, they weren't questioning the  
5 mercury value because they had a different  
6 value than EPA had.

7           And, so, we still have to resolve  
8 that issue with them. And that's why we  
9 asked until the end of January in order to  
10 get a final permit out the door.

11           JUDGE STEIN: Is the end of January  
12 realistic?

13           MR. MANCUSSI-UNGARO: In my  
14 opinion, it's realistic.

15           JUDGE STEIN: Let me hear from  
16 counsel from South Carolina at this point.

17           MS. PARTLOW: Thank you, Your  
18 Honor. I don't disagree with anything that  
19 Mr.

20           Mancussi-Ungaro has said. We are  
21 at this position; it is an unusual thing for  
22 EPA to be issuing an MPDES permit to a

1 discharger in South Carolina, but there was a  
2 period of time during which South Carolina's  
3 right to issue MPDES permits was temporarily  
4 withdrawn by EPA, and EPA took over the  
5 issue, accept some MPDES permits, and that's  
6 why this one comes under the context of an  
7 MPDES permit issued by EPA with a 401 water  
8 quality certification being issued by the  
9 state.

10           So, SCE & G disagree with two sets  
11 of limits at the MPDES permit filed this  
12 appeal. One was iron and manganese, and, as  
13 the court has recognized, we have resolved  
14 the iron and manganese issue.

15           The remaining issue was the issue  
16 of mercury where we, SCE & G, contended that  
17 the limit was wrongfully set. But what has  
18 become apparent is that the best way to  
19 resolve this is to reach agreement on  
20 reasonable potential with the new data. And  
21 we believe that we are going to jointly reach  
22 the conclusion that there is no reasonable

1 potential to violate water quality standards  
2 for mercury and that the permit will be able  
3 to be issued with that conclusion.

4           The only issue that will be left  
5 out there in the permit is the issue of the  
6 state's 401 certification, and the permit  
7 will have to be reopened to add that feature  
8 when the state is finished with the 401  
9 certification process, but I do not see an  
10 amendment if EPA believes that it can  
11 actually get the permit out within about 30  
12 days, I don't see any reason we can't have  
13 this thing wrapped up by the end of January.  
14 And when that revised permit is done to SCE &  
15 G, we'll withdraw --

16           JUDGE STEIN: I'm a little confused  
17 on the question of the state certification.  
18 Am I correct in understanding that if a new  
19 reasonable potential analysis were done and  
20 EPA were to agree with your client that no  
21 mercury limit was needed, that a new  
22 certification would be required?

1 MS. PARTLOW: I don't know what  
2 South Carolina would do. I think they would  
3 have to issue a new certification based on  
4 the revised permit, but I would expect it to  
5 look very much like the certification they  
6 have out already.

7 JUDGE STEIN: Has South Carolina  
8 been a party to the discussions about the  
9 fact that you may be headed towards a place  
10 where they may be no mercury limit at all?  
11 Are they familiar with that?

12 MS. PARTLOW: I don't know the  
13 answer to that. Philip may.

14 MR. MANCUSI-UNGARO: Yes. We've  
15 been keeping South Carolina in the loop on  
16 the process we're going through.

17 JUDGE STEIN: How is it that EPA  
18 can issue a permit without a certification?

19 MR. MANCUSI-UNGARO: The way our  
20 regulations are written when it comes to 401  
21 certification is it presumed that a  
22 certification would be issued valid and then

1 challenged subsequent to that.

2 In this case because of the way  
3 DHEC's procedure is set up, the certification  
4 is challenged before it becomes the final  
5 affective certification. And, so, the way we  
6 read the regulations is that because there is  
7 no final adjudication of the 401  
8 certification, we can issue the permit and  
9 include a re-opener so the certification  
10 could be -- the process could go to fruition  
11 and then any conditions necessary could be  
12 included in the permit at that time.

13 And the other option is to consider  
14 the state's failure to certify within the  
15 60-day period as a waiver and the EPA does  
16 not like to do that because we want to give  
17 the state the chance to have that  
18 opportunity.

19 JUDGE STEIN: Am I correct in  
20 understanding that -- well, I'm not sure what  
21 I understand, but assuming that you go down  
22 the path of doing this reasonable potential

1 analysis and concluding no mercury limit is  
2 needed, is it EPA's intention to seek a new  
3 certification from the state?

4 MR. MANCUSI-UNGARO: EPA would seek  
5 a new certification from the state to address  
6 the mercury issue now that we believe -- we  
7 want to give the state the opportunity to  
8 review the same analysis that we have done.  
9 The difference is that is that the data  
10 that's been collected over the past three  
11 years did not have any what we call hits for  
12 mercury whereas prior to that period of time,  
13 there were some issues.

14 Now, I know SCE & G has been  
15 working hard in looking at the process to try  
16 to understand where the mercury was coming  
17 from, and I'll defer to Ms. Partlow for that  
18 aspect.

19 JUDGE STEIN: I mean, I now have a  
20 clearer understanding, but don't you need to  
21 build into this, the time in terms of  
22 issuance of a new permit, the time for South

1 Carolina to issue a new certification?

2 MR. MANCUSI-UNGARO: Yes, we do.

3 And that is --

4 JUDGE STEIN: And you believe the  
5 end of January --

6 MR. MANCUSI-UNGARO: -- built into  
7 our timeframe.

8 JUDGE STEIN: -- the end of January  
9 will be sufficient for that process?

10 MR. MANCUSI-UNGARO: I'm sorry; I  
11 was having a hard time hearing it.

12 JUDGE STEIN: And you believe the  
13 end of January will be sufficient for that  
14 process?

15 MR. MANCUSI-UNGARO: Yes, I do.

16 JUDGE STEIN: So, if the board were  
17 to enter an order essentially extending the  
18 stay until January 31, that would be  
19 satisfactory to EPA?

20 MR. MANCUSI-UNGARO: Yes, it would.

21 JUDGE STEIN: And, Ms. Partlow,  
22 would that satisfy your concerns, as well?

1 MS. PARTLOW: Yes, that would be  
2 satisfactory to SCE & G, but I don't want to  
3 leave a misleading impression. If the state  
4 issues an N(?) - 401 certification that has  
5 conditions that SCE & G disagrees with. And  
6 I will tell you there were two issues in the  
7 MPDES permit that we challenged and were  
8 actually three in the certification. So that  
9 if South Carolina issues a 401 certification  
10 on the new permit that we disagree with, we  
11 will have to challenge the new 401  
12 certification, and that really is the reason  
13 that we have proposed for the EPA - MPDES  
14 permit, that it contain an explicit notice  
15 that the permit has to be reopened to  
16 incorporate whatever conditions are there  
17 from the 401 - certification.

18 JUDGE STEIN: I see. My main  
19 concern at this point is keeping this case  
20 moving forward as expeditiously as possible.  
21 At the same time, it's important for the  
22 board if we get to a place where some of



1 these deadlines are not going to be met, it's  
2 important for us to know that prior to the  
3 time that we're bumping up against the end of  
4 January.

5 Let me confer for just a moment  
6 with Ms. Berrios and see if she has any  
7 further questions.

8 I think what we will do is we will  
9 enter an order extending the stay until  
10 January 31. And I will get a written order  
11 out. It probably won't get out until  
12 sometime next week, but you should assume  
13 that we'll be entering an order extending the  
14 stay until January 31. And I think I would  
15 like to get a status report from the parties  
16 probably by January 31 as such to whether  
17 you're on track; you expect to be on track in  
18 terms of that deadline. It doesn't need to  
19 be a lengthy report, but something along  
20 those lines.

21 Does that work for everybody?

22 MS. PARTLOW: That's fine with us,

1 Your Honor.

2 MR. MANCUSI-UNGARO: Yes, Your  
3 Honor. That's fine with us, also.

4 JUDGE STEIN: Okay. Well, I thank  
5 you very much for appearing this morning.  
6 It's actually very helpful to understand  
7 kind of what the sort of change in terms of  
8 the mercury limit was. We just couldn't  
9 figure it out from the papers, but I thank  
10 you for your time and I wish you luck in the  
11 weeks ahead.

12 Thank you.

13 MS. PARTLOW: Thank you.

14 MR. MANCUSI-UNGARO: Thank you.

15 MS. DURR: This session of the  
16 Environmental Appeals Board now stands  
17 adjourned.

18 (Whereupon, at 10:49 a.m., the  
19 HEARING was adjourned.)

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