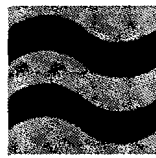


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ENVIR. APPEALS BOARD

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August 25, 2006

By Federal Express

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

In re: NPDES Permit No. SC0039853
Easley Combined Utilities, Petitioner
Petition for Review

Dear Ms. Durr:

Enclosed for filing in your usual manner are the original and five copies of the subject Petition for Review, including an original and three copies of Exhibits. We appreciate your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Richard H. Sedgley', written in a cursive style.

Richard H. Sedgley

Cc: Joel D. Ledbetter, P.E., General Manager
Easley Combined Utilities
F. Paul Calamita, Esq.

treatment plant, a Publicly Owned Treatment Works (“POTW”) in Easley, South Carolina. Easley filed comments on the draft NPDES Permit, as well as comments on prior informal versions of the draft. Easley, as the permittee, is adversely affected by the NPDES Permit decisions challenged herein because it will be subject to potential legal liability for any violation of the Permit conditions and will be subject to additional expenses required for compliance with such conditions, without resulting environmental benefit.

2. The NPDES Permit. Petitioner operates the Middle River POTW pursuant to and in accordance with NPDES Permit Number SC0039853 (Exhibit A (excerpts)). Petitioner refers to documents and other materials from EPA’s administrative record as the “Record.”
3. Reissuance. The NPDES Permit was reissued to Easley as stated above. Easley received the final reissued Permit by U.S. Mail.
4. Jurisdiction. This Petition for Review is pursuant to 40 C.F.R. 124.19.
5. NPDES Permit Conditions Challenged. Easley petitions for review of four conditions of the NPDES Permit. Easley raised the issues presented in its comments on the draft Permit. The challenged conditions are the following.
 - A. Effluent flow limitations of 3.5 million gallons per day (“mgd”) monthly average and 3.75 mgd weekly average. Permit Part I.A.1.
 - B. Effluent total suspended solids concentration and mass limitations. Permit Part I.A.1.
 - C. Effluent fecal coliform daily maximum limitation. Permit Parts I.A.1 & 6.
 - D. Instream macroinvertebrate assessment. Permit Part III.C.

6. Legal Errors – Flow Limitations. Petitioner alleges the following as to EPA’s reissuance of the Permit with numeric limitations on the volume of POTW effluent.
- A. No legal basis exists under either federal or South Carolina law for numeric limitations on the volume of POTW effluent.
 - B. Flow limitations were not proposed by EPA when the Permit was drafted or issued for public notice and comment. EPA Draft Permit (May 1, 2006) (Exhibit B (excerpts)).
 - C. 401 Certification. The June 12, 2006 Certification by the South Carolina Department of Health and Environmental Control (“DHEC”) on EPA’s draft Permit, pursuant to 33 U.S.C. 1341, stated “Flow Limits to be added to all discharge Monitoring Pages Monthly Average 3.5 MGD, Weekly Average 3.75 MGD” (the “401 Certification”). DHEC 401 Certification (Exhibit C). Significantly, no legal authority was cited for such requirement in the 401 Certification or otherwise by DHEC.
 - D. Despite the failure to cite any authority, in response to the State’s Certification, EPA added the specified flow limits to the Permit noting they were based solely on the 401 Certification.
 - E. 401 Certifications of draft permits, where the state finds a condition more stringent than those in the draft to be necessary, must “cite the [federal Clean Water Act] or state law references upon which that condition is based.” Failure to do so “waives the right to certify with respect to that condition.” 40 C.F.R. 124.53(e)(2).

- F. Because the 401 Certification cited no legal authority for a requirement for numeric limitations on the volume of POTW effluent, by operation of law DHEC waived the right to certify as to that condition. Accordingly, EPA committed clear legal error in including this limit.
- G. Notably, the State's failure to cite authority to support the proposed addition of the flow limits was not a casual oversight. The South Carolina agency did not cite any authority to support the flow limits because it could not. South Carolina law does not authorize the imposition of flow limits in NPDES permits for POTWs. See *The Commissioners of Public Works, et al. v. SCDHEC*, Case No. 2005-CP-08-250, in the Court of Common Pleas for Berkeley County (Exhibit D) ("South Carolina Flow Decision"). In that decision, the Honorable Thomas L. Hughston, Jr., concluded as follows:

The [South Carolina Department of Health and Environmental Control] Board erred in concluding that the Department has authority to impose flow limits in NPDES permits. At present, the Department lacks any express authority, either in statute or regulation, to impose flow limits. South Carolina Flow Decision at 14.

- H. This is exactly the scenario that 40 C.F.R. 124.53(e)(2) seeks to protect against in the first place – where a state seeks to have EPA add an illegal condition to a federal permit through a state certification. The requirement that the state specify state authority to support conditions proposed for addition to a federal permit is an essential public safeguard that was intended to protect both EPA and permittees from the very abuse that occurred in this instance.

- I. Further, because the purported 401 Certification was the sole legal basis claimed for the Permit requirement, there was no valid legal basis for the requirement for numeric limitations on the volume of POTW effluent.
- J. No Other Legal Basis. Notwithstanding EPA's stated sole basis for the requirement, there is no other available legal basis for numeric limitations on the volume of POTW effluent. Effluent limitations in NPDES permits for POTWs must be based on either (1) technology-based "Secondary Treatment" requirements, 40 C.F.R. 122.44(a)(1), or (2) water quality-based requirements developed to bring about or continue attainment of state water quality standards, *id.* 122.44(d)(1).
- K. Secondary treatment requirements do not include numeric limitations on volume of POTW effluent. *Id.* 133.102.
- L. There is no applicable water quality standard for or relating to volume of POTW effluent. S.C. Code of Regulations R. 61-68 & App. Water Classifications and Standards.
- M. Conclusion. EPA properly did not include flow limits in the draft Permit for public notice. However, EPA then committed clear legal error in adding flow limits to the Permit based upon the State's Certification. The Certification was invalid because it did not specify an authority for flow as mandated by 40 C.F.R. 124.53(e)(2). Thus, as to the flow limits, the Board should reverse and remand the Permit to EPA because the State waived its Certification pursuant to the mandatory requirements in 40 C.F.R. 124.53(e)(2).

7. Legal Errors – Effluent Total Suspended Solids Concentration and Mass

Limitations. Petitioner alleges the following as to EPA’s reissuance of the Permit with incorrect numeric limitations on effluent total suspended solids (“TSS”) concentration and mass.

- A. POTW effluent limitations must be predicated on either Secondary Treatment or any more stringent requirements necessary for attainment of water quality standards, as addressed in section 6.J above.
- B. Secondary Treatment specifies monthly and weekly average TSS limitations less stringent than those imposed in the Permit, generally 30 milligrams per liter (“mg/l”) monthly average and 45 mg/l weekly average. 40 C.F.R. 133.102. There is no South Carolina water quality standard for TSS. S.C. Code of Regulations R. 61-68 & App. Water Classifications and Standards.
- C. EPA predicates the TSS limitations on (1) “Best Professional Judgement” (“BPJ”), Exhibit B, “EPA Response to Easley Letter” page 1 & Amendment to the Fact Sheet (EPA July 31, 2006) (Exhibit E); and (2) TSS limitations from the prior DHEC-issued NPDES permit and a claim that “antibacksliding” prohibits the relaxation of the limitations, EPA draft Permit Fact Sheet at 5 (Exhibit F (excerpts)).
- D. Best Professional Judgement. A reference to BPJ does not represent independent EPA authority to establish permit requirements. Rather, BPJ refers to EPA authority under 33 U.S.C. 1342(a)(1)(B) to establish “conditions [EPA] determines are necessary to carry out the provisions of

this chapter [Clean Water Act]” in the absence of promulgation of applicable technology requirements or development of applicable water quality-based requirements. While EPA may in an appropriate circumstance exercise a measure of professional judgement in the establishment of permit limitations, all limitations must be either valid technology requirements or valid water quality-based requirements. The TSS limitations challenged here are neither, and a claim that EPA exercised BPJ does not represent valid legal authority.

- E. Antibacksliding. The prior DHEC-issued NPDES permit included 21 mg/l monthly average and 30 mg/l weekly average (and derivative mass) TSS limitations identical to those imposed here by EPA. EPA further stated in its Permit Fact Sheet that antibacksliding prohibits a change in the TSS limitations to the applicable Secondary Treatment requirements. Exhibit F at 5.
- F. Antibacksliding prohibits the relaxation of certain technology limitations developed on the basis of BPJ, but only when such relaxation would be to later effluent limitations guidelines promulgated under 33 U.S.C. 1314(b). 33 U.S.C. 1342(o)(1); see also 40 C.F.R. 122.44(l)(2). The requested Secondary Treatment TSS limitations are not based upon any such section 1314(b) effluent limitations guidelines, and the statutory antibacksliding requirement therefore places no restriction on a change to the requested Secondary Treatment limitations.

- G. The federal NPDES regulations established an antibacksliding provision that predated the statutory antibacksliding provision. 40 C.F.R. 122.44(l), 49 Fed. Reg. 37998-38001 (Sept. 26, 1984); 33 U.S.C. 1342(o), Public Law 100-3 (Jan. 28, 1987). Because the statutory provision addressed antibacksliding fully and in more detail than the prior regulation, and because there would have been no purpose served by the statutory provision if the regulation were to have remained in effect, the statutory provision superceded the regulation. EPA recognized this in 1989 when it modified the technology-based antibacksliding provisions to mirror the statute, reserving the water quality-based provisions, and noting that the 1987 statutory changes “supplement or supercede existing regulatory requirements.” 54 Fed. Reg. 246 (Jan. 4, 1989).
- H. Notwithstanding the above, if the Board were to conclude that 40 C.F.R. 122.44(l) establishes a more stringent antibacksliding requirement for technology-based limitations, the regulation also includes an applicable exception. That exception is addressed in section 7.L below.
- I. Antibacksliding further prohibits certain relaxations of water quality-based permit limitations based on 33 U.S.C. 1311(b)(1)(C) (state water quality standards) or 33 U.S.C. 1313(d) or (e) (Total Maximum Daily Loads or state continuing planning processes). 33 U.S.C. 1342(o)(1). The prior permit TSS limitations were based on neither state water quality standards, a Total Maximum Daily Load, or a state continuing planning process. Therefore, to the extent that EPA takes the position that the prior TSS

limitations were water quality-based, antibacksliding would not prohibit the requested Permit change.

- J. As to EPA's prior antibacksliding regulation, Petitioner incorporates the matters set forth in sections 7.G and H above. For the legal reasons stated, the regulatory water quality-based antibacksliding provision has been superceded; and, in the alternative, there is an applicable exception.
- K. Accordingly, because the Permit TSS limitations at issue were not based on any of the Clean Water Act provisions cited in sections 7.F or I immediately above, the general antibacksliding provision does not prevent the change in Permit TSS limitations requested by Easley.
- L. Antibacksliding Exception. If, notwithstanding the above, the antibacksliding provisions of 33 U.S.C. 1342(o)(1) or 40 C.F.R. 122.44(l) were viewed as restricting the change in Permit TSS limitations requested by Easley, an exception would apply. A permit with respect to which the general antibacksliding provision applies may be made less stringent on reissuance if "technical mistakes or mistaken interpretations of law were made in issuing the permit under [1342(a)(1)(B) (BPJ)]." 33 U.S.C. 1342(o)(2)(B)(2); 40 C.F.R. 122.44(l)(2)(i)(B)(2). Because EPA predicates the TSS limitations on BPJ, an exception applies if the previous TSS limitations were based on a technical mistake or mistaken interpretation of law.
- M. The previous DHEC-issued NPDES permit capped TSS mass limitations, in view of increased facility capacity, by reducing TSS concentration

limitations to the numbers at issue. Letter, EPA to Easley at 1-2 (Mar. 16, 2006) (Exhibit G); Letter, Easley to EPA at 2 (Apr. 6, 2006) (Exhibit H); see also Letter, Easley to EPA at 1-2 (May 26, 2006) (Exhibit I) (objecting to TSS limitations). EPA stated that it was “holding the line” in response to an impaired waters listing under 33 U.S.S. 1313(d). Exhibit G at 1.

- N. The impaired waters listing applicable to the receiving waters segment is for biological impairment. No specific cause of such impairment is identified. See Draft 2006 303(d) List: The State of South Carolina’s 2006 Integrated Report Part I: Listing of Impaired Waters. http://www.scdhec.gov/water/pubs/06_303d.pdf. No Total Maximum Daily Load procedure has been done, and no other procedures or analyses identify or even suggest TSS as a possible source of any biological impairment.
- O. No federal legal requirement authorizes a “holding the line” procedure as announced by EPA, in the complete absence of information relating the pollutant at issue to biological impairment for which the cause is unknown.
- P. In fact, Easley has tested benthic communities above and below its discharge for years. These data reveal no impact attributable to the entire POTW effluent, much less the TSS discharges alone. Instream Macroinvertebrate Assessment Summary (Exhibit J).
- Q. It was arbitrary and capricious for EPA to limit TSS in the manner described, with no procedure or analyses identifying or even suggesting

TSS as a possible source of any biological impairment. This is especially true in the face of upstream and downstream testing of Easley's receiving stream that revealed no discernable impact attributable to Easley's discharge. Exhibit J. Accordingly, the TSS limitations at issue in the prior NPDES permit were based on both technical mistakes and mistaken interpretations of law, and the antibacksliding exception cited allows the Permit change requested by Easley.

R. Conclusion. For these reasons, EPA's failure to specify Secondary Treatment limits in the reissued Permit is clear legal error.

8. Legal Errors – Fecal Coliform Daily Maximum Limitation. Petitioner alleges the following as to EPA's reissuance of the Permit with numeric limitations for effluent fecal coliform concentration without a provision reflecting the ten percent exception of South Carolina law.

- A. EPA predicates the Permit fecal coliform daily maximum limitation on the South Carolina water quality standard. The standard provides "the stated value of 400/100 ml for fecal coliform shall be used as daily maximum number for calculating permit effluent limitations." S.C. Code of Regulations R. 61-68(E)(14)(c)(9) (emphasis added).
- B. The Record reflects that the meaning of the "for calculating" language in the South Carolina water quality standard and DHEC's routine manner of applying that standard in NPDES permits is to use the 400/100 ml number, but to provide that no more than 10% of monthly samples may exceed 400. Easley Comment Letter at 1-2 (Oct. 21, 2005) (Exhibit K).

- C. The Record reflects that EPA has agreed that the foregoing is the proper application of the state water quality standard. Exhibit G at 2.
- D. Notwithstanding the above, EPA's Fact Sheet (Exhibit F) and the final Permit (Exhibit A) reflect EPA's decision to apply the 400 standard without the 10% provision. EPA predicates that decision on the requirements of the previous NPDES permit, and a claim that antibacksliding prevents the requested change. Easley objected to that EPA position. Exhibit H at 3-4.
- E. EPA correctly characterizes the fecal coliform limitation as a water-quality based (human health) requirement.
- F. Antibacksliding. Antibacksliding prohibits certain relaxations of water quality-based permit limitations based on 33 U.S.C. 1311(b)(1)(C) (state water quality standards) or 33 U.S.C. 1313(d) or (e) (Total Maximum Daily Loads or state continuing planning processes). 33 U.S.C. 1342(o)(1).
- G. Notwithstanding the above, such water quality-based permit limitations may be made less stringent "in compliance with [33 U.S.C. 1313(d)(4)]." Id. That Clean Water Act provision requires wasteload allocations adequate to maintain or achieve state water quality standards.
- H. The Permit limitation at issue applies at the end-of-pipe and is set at the level of the state water quality standard. It is a wasteload allocation which by definition achieves the standard. Because of this, antibacksliding does not prohibit the requested change to the Permit limitation.

- I. Antibacksliding Exception. Although not necessary in light of the above, antibacksliding further provides for certain exceptions to the general rule, 33 U.S.C. 1342(o)(2), including the exception for prior technical or legal mistakes addressed in section 7.L above. In the Record, EPA alleges without any analysis that the prior NPDES permit limitation was not the result of a technical or legal mistake. Exhibit B, EPA Response to Easley Letter page 2. That decision is without support in the Record and is legally incorrect.
 - J. Best Professional Judgment. The EPA draft and final Permits also reflect an EPA position that its fecal coliform decision is based on BPJ. For the reasons stated in section 7.D above, BPJ is not a valid basis for the limitation at issue.
 - K. Conclusion. For these reasons, EPA's daily maximum fecal coliform limitation should either have used the "400" value for calculating the daily limit rather than simply specifying 400 as the limit or it should have included the 10% provision of the state water quality standards with the 400 daily maximum limit. Simply imposing 400 as the daily maximum ignored a key part of the implementation requirement from the State's regulation and is clear legal error.
9. Legal Errors – Instream Macroinvertebrate Assessment. Petitioner alleges the following as to EPA's reissuance of the Permit with a requirement for an annual instream macroinvertebrate assessment.

- A. Petitioner has conducted twice yearly instream assessments for five years. All of these tests evaluate upstream and downstream conditions. All of these tests reveal no discernable impact to the stream due to Easley's discharge. Exhibit J. These tests are expensive, on the order of \$2,000 per event.
- B. Petitioner asked EPA to remove the testing requirement or, at a minimum, reduce the frequency to twice during a five year permit term (from the current twice-yearly requirement). Exhibit H at 6; Exhibit I at 3.
- C. EPA retained the testing requirement but reduced it to annual instead of the twice-per-year frequency in the prior permit.
- D. EPA predicates the Permit requirement for annual instream macroinvertebrate assessments (1) as an aid in determining whether the discharge will be consistent with state water quality standards, Exhibit F at 13; Exhibit G at 4-5; (2) on BPJ, Exhibit G at 4-5; (3) on the assertion that the receiving water segment is listed as impaired pursuant to 33 U.S.C. 1313(d), Exhibit F at 13; and (4) on the DHEC 401 certification, Exhibit E at 1.
- E. Water Quality Standards Consistency. The simple claim that a particular water quality assessment procedure, involving substantial recurring expense for the permittee, will aid in determining whether the discharge will be consistent with state water quality standards does not rise to the level of a valid water quality-based NPDES permit requirement. The uncontested Permit requirements for and limitations on "Whole Effluent

Toxicity” and various conventional, nonconventional and toxic pollutant parameters, as well as the effluent data generation requirements of EPA’s permit reissuance regulations, 40 C.F.R. 122.21(j)(4) & (5), are what determine water quality standards consistency. See Exhibit H at 6; Exhibit I at 3.

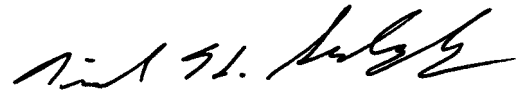
- F. Best Professional Judgement. For the reasons stated in section 7.D above, BPJ is not a valid basis for the limitation at issue.
- G. Impaired Waters Listing. The Record reflects that the receiving water segment is listed as impaired pursuant to 33 U.S.C. 1313(d), and the cause is unknown. Instream macroinvertebrate assessment procedures examine the number and species diversity of instream bottom-dwelling organisms. Such procedures do not purport to determine the cause of any reported impairment. See Rapid Bioassessment Protocols for Use in Streams and Wadeable Rivers: Periphyton, Benthic Macroinvertebrates, and Fish, Second Edition (EPA) <http://www.epa.gov/owow/monitoring/rbp/>. For this reason the assertion of the impaired waters listing is insufficient to support a requirement for a water quality assessment procedure, involving substantial recurring expense for the permittee.
- H. The Record reflects the fact that instream macroinverrtibrate assessments have been performed by Easley for five years (ten separate assessments). The Record further reflects the fact that this extensive body of data has not identified statistically significant differences in assessment results between assessment stations upstream and downstream of the permitted discharge.

See Exhibit J. For this additional reason, the assessment procedure has proven to be of no value in identifying a cause of the impaired waters listing, and the assertion of the impaired waters listing is, therefore, insufficient to support a requirement for a water quality assessment procedure.

- I. 401 Certification. The DHEC 401 Certification merely stated the Permit requirement, without any justification. Exhibit C (last page). In light of the lack of benefit reflected in the Record from the instream macroinvertebrate assessment procedure, particularly in light of the uncontested Permit requirements for and limitations on “Whole Effluent Toxicity” and various conventional, nonconventional and toxic pollutant parameters, the 401 Certification does not state a facially valid state law requirement for the challenged Permit requirement.
- J. Conclusion. For these reasons, EPA’s requirement for instream macroinvertebrate assessments was clear legal error and should be reversed.
- K. Easley Agrees to Waive a Stay of this Permit Requirement. The prior permit required twice annual instream macroinvertebrate assessment procedures, while the reissued Permit requires one per year. As to only this issue, if the Environmental Appeals Board grants the Petition for Review, Easley agrees to waive the stay provisions of 40 C.F.R. 124.16(a) and agrees to comply with the pertinent annual requirement in the reissued Permit while the Board decides whether to remove it altogether.

10. For the reasons stated herein, the reissuance by EPA of the Permit with the challenged conditions was based on findings of fact and conclusions of law that were clearly erroneous. In the case of the flow limits, EPA has blatantly disregarded the specific and mandatory requirement of 40 C.F.R. 124.53(e)(2) that the State specify the authority for its proposed inclusion of flow limits. The Board cannot allow EPA to blatantly disregard the important and detailed public safeguards provided by EPA's regulation with respect to this proposed limit. Accordingly, Easley prays that the Environmental Appeals Board grant its Petition for Review.

Respectfully submitted,

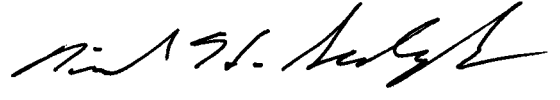


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CERTIFICATE OF SERVICE

I certify that on this 25th day of August, 2006 I delivered the Petition for Appeal with five copies and Exhibits with three copies by Federal Express 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.



Counsel