



PO Box 1890
Guayama, PR 00785
tel 787 866 8117
fax 787 866 8139
www.aespuertorico.com

May 28, 2015

Mr. Weldin F. Ortiz Franco
President
Environmental Quality Board
Cruz A. Matos Environmental Agencies Building
San José Industrial Park
1375 Ponce de León Ave.
San Juan, Puerto Rico 00926-2404

**RE: AES Puerto Rico L.P.
Resolutions R-15-6-5 and R-14-27-20**

Dear Mr. Ortiz:

I write on behalf of AES Puerto Rico L.P. (AESPR).

We are disappointed by the approach the Environmental Quality Board (EQB) has taken in the above matter. As we outlined for you when we met two weeks ago, AESPR submits that EQB's continued demand that AESPR obtain a DS-2 permit is contrary to commonwealth and federal law. We reached out to offer a path forward to resolve this dispute through negotiation and compromise, but you have refused. Your actions have left us no choice but to assert our rights in court.

AESPR reliably produces more than 15% of the electricity for Puerto Rico at the lowest cost on the island. Regrettably, your unwarranted policies are putting our continued economically beneficial production of electricity at risk. As you know, in the course of producing that electricity, AESPR produces coal combustion residuals ("CCRs"), and AESPR has contracts in place now that could ensure the CCRs we have stored and will produce will be used beneficially within a regulated landfill. Specifically, AESPR uses CCRs generated in the energy producing process to produce Dry Ash, which we supply to sanitary landfill systems to solidify non-hazardous liquid waste. AESPR also uses CCRs to manufacture an aggregate marketed under the trade name AgremaxTM ("Agremax"). AESPR also supplies Dry Ash for solidification of nonhazardous liquid wastes, and Agremax for use as a daily cover material, and or to solidify nonhazardous liquid wastes, in landfills subject to all EQB sanitary landfill rules, as well as all federal requirements under subtitle D of the Resource Conservation and Recovery Act (RCRA).

We acknowledge that EQB has properly supported these beneficial uses through specific operating permits and by EQB Resolution. *E.g.*, EQB Resolution R-14-27-20 (September 2, 2014) ("The use of CCR's as daily cover material is authorized solely in cells of SLS's

authorized to operate by the EQB that have a composite or geosynthetic material liner and comply with the design and operation criteria laid down in Title 40, Part 258 of the Code of Federal Regulations under Subtitle D of the RCRA and Chapter IV of the Regulation for the Management of Non Hazardous Wastes adopted by EQB on November 1997 ("1997 Regulations"), as amended.) This support is entirely appropriate, however, as beneficial use of CCRs as a substitute for other materials conserves natural resources and reduces the costs that landfill operators would otherwise pass on to the Puerto Rican consumer. Moreover, as a daily cover material, Agremax has other added benefits which are expected to reduce operating costs and extend the life of the limited subtitle D landfill space in Puerto Rico. These are valuable to the public and EQB should continue to support them.

However, we submit to you that seeking to restrict that beneficial use by requiring AESPR to apply for and obtain a DS-2 permit is unlawful. Most simply, AESPR is not creating a material to be discarded. It is producing a product to be used beneficially – and for which it has contracts to supply the material for approved beneficial uses. In that context, commonwealth law is absolutely clear: If a material is not going to be discarded, then it is not a waste. Hence, CCRs produced by AESPR cannot be a waste that requires a DS-2 permit. There are other reasons on which we will elaborate in our court filings.

Federal law is equally clear. Only last month, on April 17, 2015 EPA published its CCR Rule establishing regulatory requirements governing the beneficial use of CCRs. In that Rule, EPA gave its support to the continued beneficial use of CCRs – and drew a very bright line distinction between a solid waste and CCRs used beneficially by providing a definition of “beneficial use” in the Rule. *See* EPA CCR Rule, 80 Fed. Reg. 21302, 21309 (the EPA CCR Rule “provides a definition of beneficial use to distinguish between beneficial use and disposal”).¹ By explicitly distinguishing between beneficial use and disposal, EPA made abundantly clear that activities that meet the definition of beneficial use are not a waste material that is subject to the CCR Rule.² Furthermore, according to EPA, CCRs that never have been discarded would not be considered solid wastes under the existing RCRA regulations.³

Nonetheless, AESPR hereby submits the DS-2 Permit Application and Plan required by EQB in Resolutions R-15-6-5 and R-14-27-20. AESPR is submitting both filings solely in a protective manner, without accepting EQB’s determinations that the AESPR facility is subject to Rule 642 and/or Rule 646⁴ of Puerto Rico’s Solid Wastes Regulation and that AESPR must apply for and

¹ 40 C.F.R. § 257.53 (defining the “beneficial use of CCR”).

² 40 C.F.R. § 257.50(g) (“This subpart does not apply to practices that meet the definition of a beneficial use of CCR.”); *see also* 80 Fed. Reg. 21355.

³ *Id.* at 21347.

⁴ Rule 646 of the Solid Waste Regulation provides that it applies to solid waste facilities that are in violation of any of the requirements of the Solid Wastes Regulation. Nonetheless, in Resolution R-13-14-15 EQB determined that AESPR is not in violation of the requirements of the Solid Waste Regulation.

Mr. Weldin F. Ortiz Franco
May 28, 2015
Page 3

obtain a DS-2 permit because it produces CCRs. AESPR specifically disputes those determinations and reserves all rights to challenge relevant aspects of EQB Resolutions R-15-6-5 and R-14-27-20, including in relation to the EQB's order to AESPR to file a DS-2 Permit and a Plan.

Cordially,



Manuel Mata
President

AESPR: EQB Resolution R-15-6-5 Plan

AESPR hereby submits the Plan required by the Puerto Environmental Quality Board (“EQB”) in Resolutions R-15-6-5. AESPR is submitting both the DS-2 permit application and the Resolution R-15-6-5 Plan, solely in a protective manner, without accepting EQB’s determinations that the AESPR facility is subject to Rule 642 and/or Rule 646¹ of Puerto Rico’s Solid Wastes Regulation and that AESPR must apply for and obtain a DS-2 permit because it produces CCRs. AESPR specifically disputes those determinations and reserves all rights to challenge relevant aspects of EQB Resolutions R-15-6-5 and R-14-27-20, including in relation to the EQB’s order to AESPR to file a DS-2 Permit and a Plan.

The coal combustion residues (CCR) produced in the AESPR plant are recovered and processed within the same AESPR plant in a continuous manufacturing procedure to manufacture two main products. These products are Dry Ash and a manufactured aggregate, commercially known as Agremax™. Dry Ash, which is produced at AESPR by mixing Fly Ash and Bottom Ash in silos, is used by sanitary landfill systems in Puerto Rico to solidify non-hazardous liquid waste. Agremax™, which is manufactured at AESPR by hydrating, curing, compacting and scarifying Dry Ash, is an aggregate that has been used in the construction industry as a structural fill and as a road subbase material. Agremax™ is also very useful as a daily cover material in sanitary landfill systems.

AESPR only processes its own CCR to manufacture products that are beneficially used in both Puerto Rico and the mainland United States. As such, AESPR does not dispose of CCR; rather, CCR is beneficially used by end users. Furthermore, AESPR does not receive CCR from external sources to be processed within AESPR. AESPR solely processes its own CCR within the plant. As such, AESPR reaffirms that the CCR produced by AESPR that is beneficially used is not a solid waste, and that AESPR it is not a solid waste facility subject to Rule 642 of the Solid Waste Regulation.

EQB R-15-6-5 Plan

- a) Specific measures to control fugitive dust generated by CCR inside the facility such as wetting the CCR pile, and during transportation.**

The specific measures to control fugitive dust inside the facility and during transportation are those described in (1) AESPR’s Title V Permit, EQB Permit No. PFE-TV-4911-30-0703-1130, which was issued to AESPR on November 15, 2011, and (2) the draft Coal Combustion Residuals and Agremax™ Dust Control Plan prepared by AESPR under the requirements of the Administrative Order on Consent, Docket No. CWA-02-2015-3102 (March 2015) entered into by AESPR and Region 2 of the United States Environmental Protection Agency (“EPA”) regarding the AESPR facility (“March 2015 AOC”). Copies of the Title V permit and draft Dust Control Plan are included with the DS-2 Permit application protectively filed with EQB,

¹ Rule 646 of the Solid Waste Regulation provides that it applies to solid waste facilities that are in violation of any of the requirements of the Solid Wastes Regulation. Nonetheless, in Resolution R-13-14-15 EQB determined that AESPR is not in violation of the requirements of the Solid Waste Regulation.

provided that the Dust Control Plan may be revised by AESPR in accordance with EPA's evaluation and approval process under the March 2015 AOC and resubmitted to EQB.

b) Standards and metrics to control CCR

The CCR produced in the AESPR plant are controlled by collecting and processing the CCR within the same AESPR plant in a continuous manufacturing procedure to manufacture two main products. These products are Dry Ash and a manufactured aggregate, commercially known as Agremax™. Dry Ash, which is produced in AESPR by mixing Fly Ash and Bottom Ash in silos, is delivered for use by sanitary landfill systems in Puerto Rico to solidify non-hazardous liquid waste. The Dry Ash is held in silos before transfer to trucks for delivery to the landfills. Agremax™, which is manufactured in AESPR by hydrating, curing, compacting and scarifying Dry Ash, is an aggregate that has been used in the construction industry as a structural fill and as a road subbase material. Agremax™ is also very useful as a daily cover material in sanitary landfill systems. Agremax™ is held in inventory at the plant site before transfer to trucks for delivery for beneficial use. AESPR only processes its own CCR to manufacture products that are beneficially used in both Puerto Rico and the United States. In addition, any air emissions, including fugitive dust, are regulated by the EQB in accordance with the EQB-issued air permit number PFE-TV-4911-30-0703-1130 dated November 15, 2011 (EQB Air Permit). Further, stormwater runoff is managed by the AESPR facility in accordance with the requirements of EPA's Stormwater Multi-Sector General Permit No. PRR05BL65 (Stormwater Permit) and the March 2015 AOC.

c) Measures to assure compliance with the state regulations applicable to the control of CCR.

AESPR is not aware of any state regulations applicable to the control of CCR at the AESPR facility other than those related to air emissions already regulated through EQB Permit No. PFE-TV-4911-30-0703-1130 issued pursuant to the Regulation for the Control of Atmospheric Pollution. (There are also requirements imposed by EQB on AESPR through Resolutions R-14-27-20 and R-15-6-5 which AESPR has protectively addressed by this filing, but without accepting the applicability of Rule 642 and or Rule 646 of the Solid Wastes Regulation and by reserving all rights to file appropriate legal actions challenging aspects of those Resolutions).

d) Measures to assure compliance with the federal regulations applicable to the control of CCR.

In Resolution R-15-6-5, EQB does not specify which federal regulations applicable to the control of CCR to which it refers. Any applicable federal Clean Air Act requirements are addressed by AESPR's Title V Permit issued by EQB. Likewise, any applicable federal Clean Water Act requirements are addressed by measures taken by AESPR to comply with its Stormwater Permit, as well as specific provisions in the March 2015 AOC. With regard to the federal rule entitled "Disposal of Coal Combustion Residuals From Electric Utility" published by EPA in the Federal Register Vol. 80, No. 74 on April 17, 2015, (hereinafter, the "Federal CCR Disposal Rule"), see paragraph "f" below.

e) Description as to how AESPR will store, and dispose CCR generated at the facility in compliance with Resolution R-14-27-20.

There is no requirement in EQB Resolution R-14-27-20, or in the Solid Wastes Regulation, specifically related to storage of CCR. AESPR will, however, store CCR in accordance with applicable law before transferring the CCRs to trucks for delivery for beneficial use. AESPR does not dispose of CCR produced at its facility. Rather, CCR produced at the AESPR facility is beneficially used by end users in accordance with EQB Resolution R-14-27-20, and the EPA beneficial use criteria established in 40 CFR Part 257. If AESPR were to be authorized to dispose of CCR in Puerto Rico, then in the event that AESPR produces CCR that it does not supply for beneficial use, it would then dispose of CCRs in accordance with the provisions of the Solid Wastes Regulation applicable to the disposal of nonhazardous solid wastes, EQB R-14-27-20, and the Federal CCR Disposal Rule, as applicable.

f) Description as to how AESPR will store, and dispose CCR generated at the facility in compliance with the CCR Rule approved by EPA on December 19, 2014.

The CCR Rule was not published until April 17, 2015, *see* 80 Fed. Reg. 21302 (April 17, 2015), and any potentially applicable provisions are not effective for at least six months. As such, there is no legal requirement under the federal CCR Rule to provide this information to EQB at this juncture. Moreover, as stated above, AESPR does not dispose of CCR produced at its facility; rather, AESPR supplies CCR for beneficial used by end users. Nonetheless, as to the future temporary storage of CCR, AESPR will comply with Federal CCR Disposal Rule requirements as may be applicable before arranging to transport the CCR off-site.

g) Implementation Schedule

The CCR Rule was not published until April 17, 2015, *see* 80 Fed. Reg. 21302 (April 17, 2015), and any potentially applicable provisions are not effective for at least six months. As such, there is no federal legal requirement to provide the requested information to EQB at this juncture. In Resolution R-13-14-15, EQB determined that AESPR has not violated, nor is in violation of any of the provisions of the Solid Waste Regulation. According to Resolution R-14-27-20, AESPR needs only to submit a DS-2 Permit application. According to Resolution R-15-6-5, AESPR needs to submit a plan addressing the items outlined in Resolution R-15-6-5 as are addressed here by AESPR. Since AESPR is protectively submitting the DS-2 Permit application as required by EQB in Resolution R-15-6-5 and addressing the items outlined by EQB in Resolution R-15-6-5, there are no pending action items requiring an implementation schedule.

