

No. 10-72575

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CITY AND COUNTY OF HONOLULU,
Petitioner,

v.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND
ENVIRONMENTAL APPEALS BOARD,**
Respondents.

On Petition for Review of
of the Environmental Appeals Board

**EPA's Response to Petitioner's Emergency
Motion for Administrative Stay and For Stay
Or Injunction Pending Appeal**

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Table of Contents

INTRODUCTION	1
I. STATUTORY AND REGULATORY BACKGROUND	2
A. The Clean Water Act	2
B. The Part 124 Regulations	3
II. FACTUAL AND PROCEDURAL BACKGROUND	3
A. The District Court Enforcement Action	4
B. EAB Review	5
STANDARD OF REVIEW	8
ARGUMENT	9
I. THIS COURT LACKS JURISDICTION	9
A. The CWA Fails to Confer Jurisdiction for Honolulu’s Claims.	9
B. The Collateral Order Doctrine Is Inapplicable.	10
C. The All Writs Act Does Not Provide Jurisdiction In This Case. .	12
II. EVEN ASSUMING, ARGUENDO, THAT JURISDICTION EXISTS, HONOLULU’S CLAIM FAILS	14
A. Honolulu’s Alleged “Injury” Is Entirely Speculative.	14
B. Honolulu Can Dismiss Its EAB Petition, thus Avoiding an EAB Decision.	16
C. Honolulu Has Shown No Likelihood of Success on the Merits. ..	17
D. Honolulu’s Approach Would Undermine Both the Public Notice Process and Judicial Review of the Proposed Settlement.	19
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

<i>Alliance for Wild Rockies v. Cottrell</i> , No. 09-35756, 2010 WL 2926463 (9th Cir. July 28, 2010)	9
<i>American Paper Institute v. EPA</i> , 882 F.2d 287 (7th Cir. 1989).....	10
<i>Appalachian Energy Group v. EPA</i> , 33 F.3d 319 (4th Cir. 1994).....	10
<i>Boise Cascade Corp. v. EPA</i> , 942 F.2d 1427 (9th Cir. 1991)	10
<i>Cal. Pharmacists Ass’n v. Maxwell-Jolly</i> , 563 F.3d 847 (9th Cir. 2009).....	9
<i>In re Cal. Power Exch. Corp.</i> , 245 F.3d 1110 (9th Cir. 2001)	13
<i>Charlesbank Equity Fund II v. Blinds To Go, Inc.</i> , 370 F.3d 151 (1st Cir. 2004)	15
<i>City of Los Angeles v. Lyons</i> , 461 U.S. 95 (1983)	15
<i>Cohen v. Beneficial Industrial Loan Corp.</i> , 337 U.S. 541 (1949).....	10, 11
<i>In re Desert Rock Energy Company</i> , PSD Appeal Nos. 08-03 to -06, (EAB Sept. 24, 2009)	17
<i>Digital Equipment Corp. v. Desktop Direct</i> , 511 U.S. 863 (1994)	12
<i>Dismas Charities, Inc. v. U.S. Dep’t of Justice</i> , 401 F.3d 666 (6th Cir. 2005).....	20
<i>F.T.C. v. Standard Oil Co.</i> , 449 U.S. 232 (1980)	11
<i>Firestone Tire & Rubber Co. v. Risjord</i> , 449 U.S. 368 (1981)	12
<i>Goldie's Bookstore, Inc. v. Superior Court</i> , 739 F.2d 466 (9th Cir. 1984)	15
<i>Ikelionwu v. United States</i> , 150 F.3d 233 (2d Cir. 1998)	18

<i>Jarrow Formulas, Inc. v. Nutrition Now, Inc.</i> , 304 F.3d 829 (9th Cir. 2002).....	18
<i>Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.</i> , 342 U.S. 180 (1952)	14
<i>Kittel v. Thomas</i> , 610 F.3d 1115 (9th Cir. 2010).....	18
<i>Kokkonen v. Guardian Life Ins. Co. of America</i> , 511 U.S. 375 (1994).....	9
<i>Landis v. N. America Co.</i> , 299 U.S. 248 (1936)	14
<i>Lands Council v. McNair</i> , 537 F.3d 981 (9th Cir. 2008).....	9
<i>Metadure Corp. v. United States</i> , 6 Cl. Ct. 61 (1984)	14
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985)	11
<i>Muir v. Ala. Educ. Tel. Comm’n</i> , 656 F.2d 1012 (5th Cir. 1981).....	16
<i>Officers for Justice v. Civil Serv. Comm’n</i> , 688 F.2d 615 (9th Cir. 1982)	20
<i>In re Peabody W. Coal Co.</i> , CAA Appeal No. 10-01, (EAB Aug. 13, 2010)	14
<i>Public Utility Commissioner of Or. v. Bonneville Power Admin.</i> , 767 F.2d 622 (9th Cir. 1985).....	13
<i>Rhode Island v. EPA</i> , 378 F.3d 19 (1st Cir. 2004)	11
<i>Stanley v. University of S. Cal.</i> , 13 F.3d 1313 (9th Cir. 1994)	9
<i>Steel Co. v. Citizens for a Better Env’t</i> , 523 U.S. 83 (1998)	9
<i>Tillamook Country Smoker, Inc. v. Tillamook County Creamery Ass’n</i> , 465 F.3d 1102 (9th Cir. 2006).....	18
<i>Tri-Star Pictures, Inc. v. Leisure Time Productions</i> , 17 F.3d 38 (2d Cir. 1994).....	18

United States v. County of Muskegon, 298 F.3d 569 (6th Cir. 2002).....20

United States v. Denedo, 129 S. Ct. 2213 (2009)13

CONSTITUTION

U.S. Const., art. III18

STATUTES

28 U.S.C. § 129112

Clean Water Act, 33 U.S.C. §§ 1251-1387:

33 U.S.C. § 1251(a)2

33 U.S.C. § 1311(a)2

33 U.S.C. § 1311(b)(1)(B)2

33 U.S.C. § 1311(h)2

33 U.S.C. § 13422

33 U.S.C. § 1342(a)2

33 U.S.C. § 1369(b)(1).....9, 10

REGULATIONS

28 C.F.R. § 50.7(a).....19

40 C.F.R. §§ 1.25(e), 22.30.....1

40 C.F.R. § 124.191

40 C.F.R. § 124.19(a).....3

40 C.F.R. § 124.19(b) & 22.30(b).....18

40 C.F.R. § 124.19(c).....	3, 18
40 C.F.R. § 124.19(f)	3
40 C.F.R. § 124.64(b)	3
40 C.F.R. §§ 125.56--125.68	2
40 C.F.R. § 125.59(i)(4)(i).....	2
40 C.F.R. § 125.59(i)(5).....	3
40 C.F.R. Pt. 133.....	2
FEDERAL REGISTER	
75 Fed. Reg. 49,949 (Aug. 16, 2010)	5

INTRODUCTION

Even apart from the fact that this Court lacks jurisdiction, this is a meritless case. The City and County of Honolulu (“Honolulu”) not only has the unfettered ability to achieve the relief it seeks through its own voluntary actions, but also could potentially have obtained relief administratively several months ago if it had timely sought such relief from the United States Environmental Protection Agency’s Environmental Appeals Board (“EAB”).¹ Instead, Honolulu delayed; as a consequence, it now seeks an extraordinary injunction prohibiting the EAB from concluding a case *that Honolulu filed and could voluntarily withdraw*. Moreover, Honolulu’s allegations of harm are based on sheer speculation about the impact that the EAB’s eventual decision *might* have on a district court’s consideration of a lodged consent decree in a separate enforcement action against Honolulu.

The injunction Honolulu seeks would prevent both the public and the district court from having the benefit of and reviewing an EAB opinion that may be relevant to the issue before the district court: whether the proposed consent decree is in the public interest. Though the district court is not required to review the EAB decision, prohibiting the EAB from releasing its decision not only interferes with the EAB’s process, but would be inconsistent with the purpose of court

¹ The EAB is part of EPA and is the Agency’s final decision maker in areas within its jurisdiction, including permit and enforcement appeals. See 40 C.F.R. §§ 1.25(e), 22.30, 124.19 (defining the role of the EAB).

review and the process by which the public is given an opportunity to comment on a lodged consent decree before final entry. Honolulu’s request for an emergency injunction is unsupported by law or fact, is based on conjecture, and is contrary to the public interest. It must be denied.

I. STATUTORY AND REGULATORY BACKGROUND

A. The Clean Water Act

Congress enacted the Clean Water Act (“CWA”) “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Under the CWA, no person may discharge pollutants into waters of the United States without a permit authorizing the discharge. *See* 33 U.S.C. §§ 1311(a), 1342(a). Section 402 of the Act establishes the National Pollutant Discharge Elimination System (“NPDES”), which helps ensure compliance with water quality standards and requires municipal treatment plants to achieve effluent limits based upon secondary treatment. 33 U.S.C. § 1342; 33 U.S.C. § 1311(b)(1)(B); 40 C.F.R. Part 133 (EPA’s Secondary Treatment Regulations). CWA § 301(h) authorizes the EPA Administrator to allow a variance from secondary treatment provisions for certain ocean discharges when required conditions are met. 33 U.C.S. § 1311(h); 40 C.F.R. §§ 125.56--125.68.

B. The Part 124 Regulations

Procedures for making CWA § 301(h) determinations are governed by EPA regulations at 40 C.F.R. Part 124. See 40 C.F.R. §§ 125.59 (i)(4)(i) (section 301(h) modifications are to be issued in accordance with Part 124) and 125.59(i)(5) (appeals of such determinations are governed by Part 124). An Agency decision to deny a CWA § 301(h) variance may be appealed under 40 C.F.R. § 124.19. See 40 C.F.R. § 124.64(b). Within 30 days after issuance of a final permit decision, including a decision granting or denying a request for variance from secondary treatment requirements, any person who filed comments or participated in the public hearing on the draft decision may petition the EAB for review of the decision. 40 C.F.R. § 124.19(a). Within a reasonable time following the filing of the petition for review, the Board must issue an order granting or denying the petition for review. *Id.* § 124.19(c). For purposes of judicial review, final agency action occurs when a final permit decision is issued and agency review processes under 40 C.F.R. §124.19 are exhausted. *Id.* § 124.19(f).

II. FACTUAL AND PROCEDURAL BACKGROUND

Honolulu operates two wastewater treatment plants that discharge effluent into the Pacific Ocean, and it has repeatedly sought EPA variances from secondary

treatment authorizing these discharges. EAB Dkt. 1 at 1; Dkt. 9 at 6-7.² This action involves an active EAB petition filed by Honolulu in March of 2009, *see* EAB Dkt. 9, and a separate district court CWA enforcement action filed against Honolulu by both the United States and the State of Hawaii that seeks to resolve persistent discharge violations. *See United States of America and State of Hawaii v. City and County of Honolulu*, No. 94-0765 DAE-KSC (D. Haw.) (the “Enforcement Action”).

A. The District Court Enforcement Action

The initial complaint in the Enforcement Action was filed on October 3, 1994, and settled by entry of a consent decree in 1995. Enf. Dkt. 1³ (Initial Complaint); Enf. Dkt. 22 (Order Entering Initial Consent Decree). The 1995 Consent Decree did not deal with the issue of secondary treatment. In January 2006, several environmental groups moved to intervene in that case, arguing that Honolulu is violating the 1995 Consent Decree, and intervention was ultimately granted. *See* Enf. Dkt. 31-4 (Intervention Motion); Dkt. 33 (Intervenor Complaint); Dkt. 91 (Granting Intervention). After prolonged settlement

² Citations to “EAB Dkt.” are available through the EAB webpage, found at <http://www.epa.gov/eab/>. The docket can be found by linking to “EAB Dockets” along the left-hand margin, then linking to “Active Dockets” and to appeal number NPDES 09-01 filed on 1/23/09. The direct link to this docket is: http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/f22b4b245fab46c6852570e6004df1bd/99a758a45758e34c8525754c0067868d!OpenDocument

³ “Enf. Dkt.” refers to the docket in the Enforcement Action.

discussion, in June 2010 a settlement in principal was reached and a proposed consent decree was lodged with the district court on August 10, 2010, that, if entered, would resolve both outstanding enforcement claims and provide for upgrades to secondary treatment. Enf. Dkt. 98.

B. EAB Review

In 1995 and 2003, Honolulu sought to renew its variances from secondary treatment requirements to allow it to continue discharging into the Pacific Ocean without secondary treatment. EAB Dkt. 9 at 7. EPA Region 9 denied both variance requests on January 5, 2009. *Id.* Shortly thereafter, Honolulu filed an administrative appeal of those denials with the EAB. This is the very administrative action the resolution of which Honolulu seeks to enjoin. EAB Dkt. 9. The issues before the EAB have long been fully briefed, and oral argument was held on November 19, 2009. The case has been ripe for an EAB ruling since then.

The Enforcement Action consent decree was published in the Federal Register on August 16, 2010; the public comment period closes September 15, 2010. 75 Fed. Reg. 49,949. In June 2010 the EAB discovered through press reports not only that a tentative settlement had been reached, but that the tentative settlement might require the imposition of secondary treatment at the Honolulu treatment plants. EAB Dkt. 67. The EAB immediately ordered both Honolulu and EPA Region 9 to file a status report by July 6, 2010, advising on the potential

impacts of the tentative settlement on the pending EAB petition; the Board set a status conference for July 19. *Id.* at 2. The Board noted that the failure of the parties to provide this information previously “has deprived the Board of information necessary for the Board’s prioritization of cases and its efforts to effectively manage its docket, and may adversely affect the timing of other cases awaiting Board resolution.” *Id.* at 1.

On July 6, Honolulu and EPA Region 9 filed a joint status report stating that they had reached “a settlement in principle of all the parties’ enforcement claims” that included provisions requiring Honolulu to upgrade its facilities to include secondary treatment. EAB Dkt. 69 at 2. Both the Region and Honolulu, however, represented that the pending settlement was “both tentative and confidential” and could not be discussed in the status report. *Id.* Significantly, neither the Region nor Honolulu requested a stay of the administrative proceedings at that time, even though an EAB decision could have issued at any time.

In a July 12, 2010 Order, the EAB responded by reiterating its concern that the EAB had invested considerable staff and judicial time to a complex matter that may become unnecessary to decide, and repeated its prior warning that the Honolulu and EPA Region 9 must provide “meaningful information to assist the Board in its determination of whether or not to stay this case.” EAB Dkt. 71 at 2. On July 16, 2010, the Region filed a supplemental status report discussing why it

would value an EAB decision. EAB Dkt. 75-80. The Region did *not* request a stay; rather, it stated that “it would be appropriate for the Board to issue a decision promptly if doing so would not require significant additional work, rather than to stay this proceeding.” EAB Dkt. 80 at 3-4. The Region also highlighted the fact that Honolulu “did not voluntarily withdraw the Petition after review of the Region’s response filings [in the EAB action] or after oral argument and has not done so to date. Thus, a live and genuine controversy over Region 9’s decision-making in both Petitions remains pending before the board.” EAB Dkt. 80 at 4. Significantly, Honolulu neither joined EPA’s report nor filed a supplemental status report of its own, and did not, even at this point, request a stay.

At the July 19th status conference, EPA Region 9 reiterated its position that, though it would not oppose a stay, it would value an EAB decision. EAB Dkt. 87 at 7-8, July 19th Transcript (attached as Ex. A). For the first time, however, Honolulu represented that it would prefer a stay of EAB proceedings because a decision could “risk increasing opposition to the settlement agreement.” Ex. A at 10-11, 13. Honolulu was also concerned that if an EAB decision were issued prior to approval of the Enforcement Action consent decree, it could be forced to file a protective petition for review before this Court to preserve its rights. Ex. A at 19, 21. On July 22, 2010, sixteen days after the issue was initially raised, *sua sponte*, by the EAB, Honolulu filed a Request for Stay of Proceedings. EAB Dkt. 84.

On August 16, 2010, the EAB issued an Order denying Honolulu's request. EAB Dkt. 89. The EAB noted that the petition was still live, and that if the risk of an EAB decision were so grave, Honolulu "would have notified the Board of the nearness of settlement and sought a stay long before now, and surely would have done so on its own motion rather than in response to the Board's inquiries about press reports of a settlement." EAB Dkt. 89 at 2. The EAB also noted that Region 9 believed a decision would be helpful to its administration of section 301(h) of the CWA. *Id.* at 3. In response to Honolulu's concern that it would be forced to file a protective petition for review if a decision issued, however, the EAB proposed a solution: it stated that on the day it issued its decision, it would expect also to stay the effective date of its ruling until *after* the district court acted on the Enforcement Action consent decree, thus the EAB's decision would not constitute "final agency action" for purposes of the judicial review provisions of the CWA, and Honolulu would not have to file a protective petition for review. EAB Dkt. 89 at 4-5.

Honolulu sought review of the EAB's August 16, 2010 Order on August 20, 2010.

STANDARD OF REVIEW

Honolulu seeks an emergency injunction. It must therefore demonstrate: (1) "that irreparable harm is likely to result in the absence of the injunction"; and (2) "that serious questions going to the merits were raised and the balance of

hardships tips sharply in the [movants'] favor.” *Alliance for Wild Rockies v. Cottrell*, No. 09-35756, 2010 WL 2926463 at 7-8 (9th Cir. July 28, 2010) (quoting *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc)). In addition, the Court considers whether issuance of a stay will substantially injure other interested parties, and where the public interest lies. *See Cal. Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 849-50 (9th Cir. 2009). Preliminary injunctions are disfavored in the Ninth Circuit, and should only be issued where the facts and law, combined, clearly favor such relief. *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1326 (9th Cir. 1994).

ARGUMENT

I. THIS COURT LACKS JURISDICTION

“It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Thus, the first and fundamental question presented by every case brought to the federal courts is whether the court has jurisdiction to hear it. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998). Jurisdiction is absent here.

A. The CWA Fails to Confer Jurisdiction for Honolulu’s Claims

This Court’s jurisdiction to hear challenges to agency actions under the CWA is established by the Act’s judicial review provision, 33 U.S.C. § 1369(b)(1),

which provides for judicial review of only certain specified agency actions. The limitations of Section 1369(b)(1) are well-defined. *See Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1431-32 (9th Cir. 1991) (“Section 1369(b)(1) specifically grants courts of appeals jurisdiction to review only certain EPA actions taken with respect to each of the requirements of the Act. . . . Such specificity demonstrates that Congress did not intend court of appeals jurisdiction over all EPA actions taken pursuant to the Act.”); *Appalachian Energy Group v. EPA*, 33 F.3d 319, 322 (4th Cir. 1994); *American Paper Inst. v. EPA*, 882 F.2d 287, 289 (7th Cir. 1989). Interlocutory EAB orders granting or denying motions to stay are *not* among the agency actions identified in Section 1369(b)(1), and therefore the Court lacks jurisdiction to review the EAB’s August 16 Order. The CWA is clear: review by the Courts of Appeals is available *only* in the finite circumstances enumerated in Section 1369(b)(1); thus, this Court lacks jurisdiction over Honolulu’s claims.

B. The Collateral Order Doctrine Is Inapplicable.

Honolulu concedes that the EAB’s denial of its stay request is “not classic final agency action,” but still argues that this Court has jurisdiction under Section 1369(b)(1) pursuant to the collateral order doctrine. Petition at 3. Honolulu is wrong. The collateral order doctrine applies to a very small class of cases which (1) “finally determine claims”; (2) “of right separable from, and collateral to, rights asserted in the action”; that, (3) are effectively unreviewable on appeal from a final

judgment. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

“Tentative orders” that are subject to change do not satisfy this test. *Rhode Island v. EPA*, 378 F.3d 19, 25-26 (1st Cir. 2004). Similarly, actions that are not *plainly distinct* from a final NPDES permitting decision do not satisfy the test. *Id.* at 25.

Honolulu challenges the EAB’s denial of a motion to stay proceedings that were initiated and are being maintained *by Honolulu*. The EAB’s Order is part of the process to resolve Honolulu’s administrative appeal and does not itself resolve *any* legal issue. The Supreme Court faced a similar issue in *F.T.C. v. Standard Oil Co.*, 449 U.S. 232 (1980). In *Standard Oil* the Court held that a Federal Trade Commission decision to issue an administrative complaint against oil companies was not reviewable as a “collateral order” because the administrative complaint was “a step toward, and will merge in, the [agency’s] decision on the merits.” *Id.* at 246. Similarly, the EAB’s decision not to stay its own process is nothing more than a step toward final resolution of Honolulu’s own administrative appeal, and will merge into the EAB’s final decision. *Compare Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (holding that the doctrine applies where a summary judgment denial of sovereign immunity conclusively determines defendant’s claim).

If Honolulu’s argument was carried to its natural extent, it would allow parties to file interlocutory challenges to a wide range of decisions necessary to the orderly administration of any docket, eviscerating the purpose of the finality rule.

Section 1291 of the Judicial Code confines appeals as of right to those from “final decisions.” 28 U.S.C. § 1291. This final judgment rule promotes efficient judicial administration while at the same time emphasizing the deference appellate courts owe to a district judge’s decisions on the many questions of law and fact that arise before judgment. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). The Supreme Court has repeatedly emphasized that the collateral order doctrine is a narrow exception. *See Digital Equip. Corp. v. Desktop Direct*, 511 U.S. 863, 868 (1994). Thus, it is not surprising that the doctrine is only applied where the right a party seeks to vindicate outweighs the significance of the finality principle set out in Section 1291. *Id.* at 868-84. In *Digital Equipment* the Supreme Court ultimately found that a district court’s refusal to enforce a settlement agreement that would shelter a party from a lawsuit did not outweigh the finality principal. *Id.* at 884. Similarly, Honolulu’s ill-defined concerns that an EAB decision could lead to arguments that might undermine a proposed consent decree do not outweigh the interests in achieving finality in the EAB appeal. The collateral order doctrine does not apply here.⁴

C. The All Writs Act Does Not Provide Jurisdiction In This Case.

⁴ Petitioner’s reliance on *Rhode Island* is misplaced. Though *Rhode Island* did extend the *Cohen* test in an administrative context, the First Circuit ultimately determined that the doctrine was inapplicable to the denial of a motion to intervene, finding that an end-of-case appeal adequately protected the interests of the proposed intervenor. 378 F.3d at 29.

Honolulu argues that the All Writs Act provides this Court with an alternative source of jurisdiction. Petition at 5; Stay Mot. at 1. It is settled that the All Writs Act does *not* provide a separate basis for jurisdiction, but instead authorizes federal courts to issue writs “in aid of” their existing jurisdiction. *See United States v. Denedo*, 129 S. Ct. 2213, 2222 (2009) (the All Writs Act “does not advance the inquiry into whether jurisdiction exists”). The Act is not a source of subject matter jurisdiction, but rather provides for extraordinary relief – such as the issuance of a writ of mandamus – in support of *established* jurisdiction. *Id.*

Honolulu cites *Pub. Util. Comm’r of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 630-31 (9th Cir. 1985), for the proposition that the court has “undisputed” jurisdiction to issue a writ of mandamus. Petition at 5. *Bonneville Power* is inapposite because the court in that case issued a writ in conjunction with its review of a challenge of *final* agency action, because the challenged agency action was final, jurisdiction existed independently. *Id.* at 628. The All Writs Act also allows this Court to issue mandamus relief when necessary to protect its “prospective jurisdiction,” *see In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1119 (9th Cir. 2001), but Honolulu does not – and indeed cannot – argue that such protection is necessary or applicable in this case.

The EAB, through its inherent case-management authority, clearly has authority to determine whether or not to stay its own proceedings. *See Kerotest*

Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183-84 (1952) (“Necessarily, an ample degree of discretion. . . must be left to the lower courts.”); *Metadure Corp. v. United States*, 6 Cl. Ct. 61, 67 (1984) (allowing an administrative law judge similar discretion); *In re Peabody W.Coal Co.*, CAA Appeal No. 10-01, slip op. at 4-8 (EAB Aug. 13, 2010) (EAB has discretionary authority to manage its dockets). Allowing an interlocutory appeal of such a routine case-management decision would undermine the efficient functioning of the EAB. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket. . . . How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”). The EAB considered its own orderly processing of its workload and nonetheless determined that a stay was not appropriate. EAB Dkt. 67, 71 and 89. The All Writs Act clearly does not provide jurisdiction here, and an exercise of such jurisdiction would undermine the functioning of the EAB.

II. EVEN ASSUMING, ARGUENDO, THAT JURISDICTION EXISTS, HONOLULU’S CLAIM FAILS

A. Honolulu’s Alleged “Injury” Is Entirely Speculative.

Honolulu’s irreparable injury argument relies entirely on a chain of guesses and suppositions. The “injury” Honolulu posits is that an EAB decision could threaten the basis for the parties’ district court settlement. Stay Mot. at 14.

Honolulu fails, however, to describe specifically *how* an EAB decision could threaten its settlement. This is understandable: the EAB has not yet finalized its decision, Honolulu cannot know what that decision will be, and no one knows if, or how, that yet-to-be-issued decision might impact entry of the settlement in the district court. See EAB Dkt. 87, Ex. A at 14-15 (Honolulu acknowledges that it does not know how the EAB will rule until the decision is issued).

Speculative injury cannot be the basis for a finding of irreparable harm sufficient to justify a stay. *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984) (finding that store would lose customers and goodwill was not based on factual allegations, and did not constitute irreparable harm); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983). Honolulu does claim, generally, that the Board's order *could* undermine the winning side's willingness to settle, and *could* provide opponents of settlement a basis for objection. While this might be true, it also might be false. Indeed, it is also possible that an EAB decision could be the decisive piece of evidence that convinces the district court that the settlement is eminently reasonable and that the decree should be entered. The EAB itself alludes to this possibility. EAB Dkt. 89 at 3, fn 2. In short, there is absolutely no analytical underpinning to Honolulu's conjecture, and such unsupported argument cannot support an injunction. See *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004) ("A finding of

irreparable harm must be grounded on something more than conjecture, surmise, or a party's unsubstantiated fears of what the future may have in store.”); *Muir v. Ala. Educ. Television Comm’n*, 656 F.2d 1012, 1023 n.21 (5th Cir. 1981) (mere conjecture cannot form the basis for an injunction).

B. Honolulu Can Dismiss Its EAB Petition, thus Avoiding an EAB Decision.

Though Honolulu has failed to demonstrate *any* injury, it could easily and unilaterally prevent the harm it fears simply by withdrawing its EAB Petition. Absent a pending petition, the EAB will not issue a ruling. Thus, Honolulu has absolute power to prevent the “injury” it fears. Instead, Honolulu waited a full eight months after its issues were fully briefed and argued to the EAB before even requesting a stay of proceedings. That stay request came nearly three weeks after the Board, *sua sponte*, raised the issue of a stay and requested a status report on the progress of Honolulu’s settlement after reading press accounts. Honolulu’s sudden, dire need to stay the EAB proceeding appears disingenuous given that this sense of urgency was utterly lacking over the last eight months, during which an EAB decision could have issued *at any time*. If Honolulu had truly been concerned with the potential impact of an EAB decision, it could have moved the EAB for a stay months ago, and it could withdraw its petition even today. Additionally, if the settlement is not entered, Honolulu has the right to appeal the final decision of the

EAB to this Court. To the extent that Honolulu would waive its right to appeal as part of the proposed consent decree, that decision is completely Honolulu's own and cannot be a basis for equitable action by this Court.

C. Honolulu Has Shown No Likelihood of Success on the Merits.

Honolulu's argument regarding its likelihood of success is largely based on its characterization of any EAB decision as an "advisory opinion." This approach ignores the facts of this case, disregards EAB practices generally, and muddies the distinction between the Board and a federal court.

Honolulu does not dispute that the case before the EAB constitutes a genuine case or controversy, so a decision here would not be "advisory." The EAB, as a matter of practice, declines to issue "advisory" opinions. *See, e.g., In re Desert Rock Energy Company*, PSD Appeal Nos. 08-03 to -06, slip op. at 32-33 (EAB Sept. 24, 2009). Honolulu's quarrel appears to be - in part - that the EAB decision may not be effective until after the conclusion of the consent decree approval process. Stay Mot. at 16. The EAB agreed to stay the effectiveness of its order to accommodate Honolulu concerns regarding appeal rights. EAB's August 16, 2010 Order, EAB Dkt 89 at 4-5; Ex. A at 18-19. If Honolulu prefers the EAB's decision be made effective immediately, they should make that request explicit.

Petitioner fundamentally misunderstands the distinction between the EAB and a federal court. *Federal Court* jurisdiction is limited to live cases and

controversies, and a federal court cannot initiate an action. *See* U.S. Const., art. III; *Kittel v. Thomas*, 610 F.3d 1115, 1117 (9th Cir. 2010). The EAB is not so constrained, and has full authority to choose, on its own initiative, to review permit conditions and administrative law judge decisions. 40 C.F.R. § 124.19(b) and 22.30(b). Once the EAB initiates review, stakeholders have an opportunity to file briefs, and the EAB issues a binding decision. *Id.* § 124.19(c), 22.30(b). The kind of interpretive activity engaged in by the EAB is the essence of what agencies do – issue opinions through rulemakings, adjudications, permit proceedings, letters, guidance, and otherwise, on what the laws they are charged with administering mean. Honolulu asks this Court to take the extraordinary step of bringing this routine business to a halt.

Honolulu’s claims also fail on the basis of laches. Laches is an equitable defense based on the maxim that equity does not protect those “who sleep on their rights.” *Ikelionwu v. United States*, 150 F.3d 233, 237 (2d Cir. 1998). “The equitable nature of laches necessarily requires that the resolution be based on the circumstances peculiar to each case.” *Tri-Star Pictures, Inc. v. Leisure Time Productions*, 17 F.3d 38, 44 (2d Cir. 1994). The test for laches is two-fold: first, was the Honolulu’s delay in bringing suit unreasonable? Second, was the Respondent prejudiced by the delay? *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 838 (9th Cir. 2002); *Tillamook Country Smoker, Inc. v.*

Tillamook County Creamery Ass’n, 465 F.3d 1102, 1108 (9th Cir. 2006). As described above, Honolulu failed to file any request for a stay over a period of eight months following briefing and argument before the EAB, thus allowing the EAB to expend significant time and attorney resources preparing an opinion on Honolulu’s appeal. Thus, Honolulu’s delay was unreasonable and the EAB has been harmed by that delay.

Because Honolulu has failed to show any likelihood of success on the merits, the Court should not enjoin the EAB.

D. Honolulu’s Approach Would Undermine Both the Public Notice Process and Judicial Review of the Proposed Settlement.

Honolulu’s position would use the authority of this Court to limit the amount of information available both to the public and to the District Court in considering whether the public interest favors entry of the consent decree. Pursuant to 28 C.F.R. § 50.7(a), the Department of Justice provides the public notice and an opportunity to comment on all proposed consent decrees that would “enjoin discharges of pollutants into the environment.” This policy is established to ensure that the comments, views and allegations of United States citizens and other stakeholders are considered prior to any motion for entry of a consent decree. *Id.* Courts have acknowledged that in the rulemaking context, the purpose of administrative notice and comment is “to get public input so as to get the wisest

rules.” *Dismas Charities, Inc. v. U.S. Dep’t. of Justice*, 401 F.3d 666, 680 (6th Cir. 2005). Honolulu, by attempting to limit the ability of the EAB to issue a substantive decision, seeks to deprive the public of information that may or may not be relevant to their consideration of the proposed consent decree.

The criteria a district court applies when deciding whether to approve and enter a proposed consent decree are whether “the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982). When assessing that standard for a settlement with the United States under the CWA, courts determine whether the proposed resolution is “consistent with the public interest.” *United States v. County of Muskegon*, 298 F.3d 569, 580-81 (6th Cir. 2002). The EAB decision may be relevant to the District Court’s assessment of the proposed Consent Decree. Allowing the public and the Court access to relevant information is strongly in the public interest, and weighs against an injunction.

CONCLUSION

Because this Court lacks jurisdiction, and because Honolulu has failed to satisfy the required elements for obtaining injunctive relief, its stay motion should be denied and the temporary stay should be immediately lifted.

Respectfully submitted,

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