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

----- :  
In re: :  
 :  
City & County of Honolulu :  
Sand Island Wastewater Treatment Plant : NPDES  
Honouliuli Wastewater Treatment Plant : Appeal No.  
 : 09-01  
NPDES Permit Nos. HI0020117 & HI0020877 :  
 :  
----- :

Washington, D.C.

Thursday, November 19, 2009

The following pages constitute the oral arguments before the Environmental Appeals Board, held pursuant to notice, at the U.S. Environmental Protection Agency, 1201 Constitution Avenue, Northwest, Washington, D.C., before Erick M. Thacker, RPR, of Capital Reporting Company, a Notary Public in and for the District of Columbia, commencing at 3:00 p.m.

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1 With me is Stephen Sweeney from the Office of General  
2 Counsel.  
3 JUDGE STEIN: I believe that the city and  
4 county of Honolulu is going to proceed first, and if I  
5 understand correctly, you have 45 minutes for argument,  
6 and are you reserving any time for rebuttal?  
7 MR. SALMONS: Yes, Your Honor. We'd like to  
8 reserve ten minutes for rebuttal. Thank you, Your  
9 Honors. May it please the Board? I'm David Salmons,  
10 and I will address the issues of mixing zones, the  
11 application of Sections 301(h)(9) and (h)(2), the  
12 region's refusal to consider disinfection to address  
13 the bacteria exceedances at Honouliuli.  
14 My colleague, Mr. Zener, will address specific  
15 issues related to chlordane, Whole Effluent Toxicity,  
16 bacteria, dieldrin, and the motion to supplement the  
17 record.  
18 If it pleases the board, I'd like to begin  
19 with the issues of mixing zones. And to put that issue  
20 in context, it's important to recall that for 20 years,  
21 the region had permitted the plants at issue in this  
22 case to operate without secondary treatment. And in

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1 1988, it specifically stated in its tentative decisions  
2 granting the waivers that the state's EPA approved  
3 mixing zone or ZOM, rather than the federal mixing zone  
4 or ZID, quote, takes precedence, close quote, in  
5 determining compliance with all state water quality  
6 standards, except for biochemical oxygen depletion and  
7 total suspended solids, which are the specific  
8 pollutants for which the secondary treatment waiver is  
9 being sought.  
10 The region suddenly changed that long-standing  
11 view in its tentative decisions in these cases. But  
12 its current position is both contrary to law and  
13 arbitrary and capricious.  
14 JUDGE STEIN: Am I correct however in  
15 understanding that the ZOMs that were approved were  
16 approved for only a subset of pollutants?  
17 MR. SALMONS: Well, what I would say, Your  
18 Honor, is that the permit that I believe you're  
19 referring to, if you take, for example, the Honouliuli  
20 permit -- this is at H-12-1172 in the record -- it  
21 identifies specific parameters that had to be met at  
22 the ZID, and it only included light efficient -- excuse

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1 me -- light extinction coefficient, turbidity and  
2 dissolved oxygen.  
3 And then it identified specific parameters  
4 that needed to be met at the ZOM, and there it includes  
5 total nitrogen, ammonium nitrogen, and some others.  
6 What that leaves are what are the toxic substances.  
7 And for those, the permit contains a specific dilution  
8 factor that is to be used since those are not actually  
9 measured at an area in the ambient waters; instead are  
10 measurements that are taken at the end of the pipe --  
11 JUDGE SHEEHAN: You didn't challenge those  
12 limits, did you, those findings?  
13 MR. SALMONS: Well, I do think we did with  
14 regard to this issue of whether the Zone of Initial  
15 Dilution or the state approved mixing zone is relevant.  
16 And I think it's important to remember -- and EPA's own  
17 technical standards document bears this out -- that  
18 when calculating the dilution factor for things like  
19 chlordane and dieldrin and WET testing, you start with  
20 some conception of what the mixing zone is, because the  
21 goal is for that dilution factor to give you a result  
22 that mirrors what would be a measurement at the edge of

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1 the mixing zone, and so, to the extent that the  
2 dilution factors that were actually applied by the  
3 region in this case for those toxic substances differs  
4 from the permit, and they do in each instance, their  
5 differences in part, we believe, reflect this  
6 distinction between using the mixing zone that's  
7 approved by EPA by the state in using the ZID. And if  
8 you look at the record, Your Honors, with regard to,  
9 for example, chlordane and dieldrin and WET testing in  
10 both Honouliuli and Sand Island final decisions, you'll  
11 see that the region specifically says that the dilution  
12 factor that they used was intended to measure those  
13 pollutants at the ZID or to reflect the measure that  
14 would --  
15 JUDGE STEIN: Is this argument now that  
16 you're giving to us addressed in your briefs, or is  
17 this yet a new argument that you're making as to why  
18 some of these other pollutants may have ZOM-like  
19 characteristics?  
20 MR. SALMONS: Well, Your Honor, I don't think  
21 it's a new argument. I think what I'm attempting to do  
22 is respond to Your Honor's question as to whether our

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1 ZID/ZOM arguments that are clearly presented we believe  
2 were made below and are made in our briefs, whether  
3 those apply to only those pollutants that are  
4 identified in the permit as being measured at the ZOM,  
5 or if they also would incorporate these other toxic  
6 substances. We think it's clear from the record that  
7 that -- if there's a legal error, we're correct about  
8 that, that the region was required to use the state EPA  
9 approved mixing zone.

10 JUDGE SHEEHAN: But I think the region  
11 challenges your assertion that the ZID argument for the  
12 toxics was made in your comments below. Can you point  
13 out in the record where you did make the ZID argument  
14 in the comments, your comments?

15 MR. SALMONS: Certainly, Your Honor, and I  
16 think this goes to an issue that the region is very  
17 aggressive about, in our view, and that is reading our  
18 comments very narrowly as to -- we would submit trying  
19 to avoid meaningful review of what is fundamentally a  
20 significant policy change that they have adopted in the  
21 decisions in this case.

22 What happened was, once the tentative decision

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1 came down and indicated that there was -- there were  
2 going to be violations and that the waiver application  
3 was going to be denied based on measurements at the ZID  
4 in response to that in our comments, and this is the --  
5 if the Court wants to follow along, this is at H-2-24  
6 and -25 -- and what we said was that the tentative  
7 decision reflects a change without explanation or  
8 justification, a deviation from what the position was  
9 taken in 1988, and then it quotes the position from  
10 1988 which we believe is reflected in an appropriate  
11 interpretation of the regulations --

12 JUDGE SHEEHAN: It doesn't sound like you're  
13 arguing the regulatory scheme, though, there; you're  
14 just making a general assertion of error without  
15 arguing the law?

16 MR. SALMONS: I'm sorry. I'm not sure I  
17 understand.

18 JUDGE SHEEHAN: It doesn't sound like you're  
19 arguing on the basis of regulations there.

20 MR. SALMONS: Well, I think that there was  
21 still some question at this point, I believe, in the  
22 minds of Honolulu exactly why the region had so

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1 dramatically changed their position. And so what they  
2 said was, you know, you made an unjustified change, and  
3 it quotes the language from 1988 that says that the --  
4 quote, the ZOM would take precedence in determining  
5 compliance with state water quality standards and that  
6 the Zone of Initial Dilution would apply for parameters  
7 only for which the applicant is requesting a variance,  
8 i.e., BOD and TSS.

9 So the position that the region had previously  
10 taken, which we believe is the position that's required  
11 under the statute and the regulations, is that you have  
12 to use the state approved mixing zone, and the only  
13 possible exception is for the pollutants for which you  
14 are seeking a modified permit, and that, in this case,  
15 is BOD and suspended solids.

16 JUDGE REICH: Could I go back to the dilution  
17 factor issue? I share a little bit of what I think was  
18 Judge Stein's puzzlement about the argument, because  
19 having read your briefs, I don't remember seeing it  
20 being argued that way. I mean, clearly, you argued the  
21 issue about which mixing zone was appropriate, but I  
22 don't remember seeing this argument about the dilution

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1 factor. Where in the permit is the dilution factor  
2 specified, using either one?

3 MR. SALMONS: I don't have the responsive  
4 permit handy, and I apologize for that.

5 JUDGE REICH: Are you saying that if one  
6 looked at the dilution factor and knew what they were  
7 looking at, that it is clearer that that dilution  
8 factor has to correspond to measuring at the edge of  
9 the ZOM rather than the ZID, that there's no question  
10 that that's what was intended by the dilution factor?

11 MR. SALMONS: Well, Your Honor, if one were  
12 to look -- if one were to look at the final decisions  
13 in these cases -- and we can just go through them. I'm  
14 happy to do that, and we can start with Honouliuli.  
15 And if we look, for example, at chlordane -- this is  
16 page 63 of the final decision for Honouliuli -- it says  
17 that when the long-term efficient dilution value of 412  
18 to 1 is applied to these three sample results, the  
19 concentration of chlordane in the receiving water at  
20 the ZID is calculated to be -- and then it provides the  
21 specific calculation -- and that 412 to 1 is a  
22 different dilution factor than was specified in the

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1 permit.  
2 And so our point is that to the extent that  
3 reflects an attempt to mirror the dilution at the ZID  
4 as opposed to the state-approved ZOM, which we would  
5 submit are inherent in the dilution factors that are  
6 contained in the permit, that our argument about why  
7 the ZOM controls applies to those pollutants as well.  
8 And I would respectfully disagree that that's not clear  
9 from our brief. I believe our brief was clear that our  
10 arguments with regard to ZID/ZOM apply to all of the  
11 pollutants in this case with the exception of bacteria.  
12 JUDGE REICH: I think that was clear. What I  
13 think was not clear was that one could determine that  
14 there was, in fact, a mixing zone for pollutants other  
15 than the ones specifically listed by looking at the  
16 dilution factor. I don't believe that was clear.  
17 MR. SALMONS: Well, and I guess what I would  
18 say, Your Honor, is that if the Court agrees, if the  
19 board agrees with our arguments with regard to the  
20 state mixing zone and that the state mixing zone is the  
21 appropriate mixing zone -- the EPA approved state  
22 mixing zone -- is the appropriate mixing zone to use in

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1 the 301(h)(9) analysis. Well, then the question  
2 becomes, you know, how much of the region's  
3 determinations are -- have to be reconsidered in light  
4 of that legal error?  
5 JUDGE REICH: In your view, since you  
6 referenced (h)(9), as I read your argument, does (h)(9)  
7 apply to anything beyond the pollutants for which a  
8 waiver was requested?  
9 MR. SALMONS: I think it does, Your Honor.  
10 What I would say is that (h)(9) requires more broadly a  
11 predictive judgment on the part of the region and the  
12 EPA as to whether -- if the variance is permitted -- as  
13 to whether the effluent that would be discharged at  
14 that time would generally be in compliance with the  
15 act's criteria. And the region agrees and I think  
16 everyone concedes that the state water quality  
17 standards which have been approved by EPA --  
18 JUDGE REICH: So that's not limited to BOD  
19 and TSS in this case?  
20 MR. SALMONS: I don't think that -- I don't  
21 think that the (h)(9) analysis is limited only to BOD.  
22 At least, that's certainly not a position we have

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1 argued. What we have argued, Your Honor, is that when  
2 undertaking that (h)(9) analysis and asking the  
3 question, will the discharge comply with the federal  
4 criteria, that it doesn't make any sense to disregard  
5 the state mixing zone which was approved by EPA  
6 precisely with that criteria in mind.  
7 JUDGE STEIN: But how do you square that with  
8 the language of the regulation in 125.62, which clearly  
9 makes reference to, "At the time the modification  
10 becomes effective, the applicant's outfall and diffuser  
11 must be located and designed to provide adequate  
12 initial dilution, dispersion, and transport of  
13 wastewater such that the discharge does not exceed at  
14 and beyond the Zone of Initial Dilution?"  
15 I see nothing in that regulation that gives  
16 room for the argument that you're making, and when I  
17 look at the 1994 preamble, when commentators a broader  
18 interpretation, EPA in the 1994 preamble spoke to that  
19 issue. So the difficulty I'm having with your argument  
20 is understanding how it can be squared with the  
21 language in the regulation and the '94 preamble.  
22 MR. SALMONS: Thank you, Your Honor. I'm

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1 happy to address that. Our position -- and we think  
2 this is the best reading of the regulation -- is that  
3 when -- when the regulation 125.62 makes reference to  
4 all applicable water quality standards that that  
5 reference to applicable is essentially defined in the  
6 prior section of the regulation in 125.61, which said,  
7 "There must exist a water quality standard or standards  
8 applicable to the pollutant(s) for which a section  
9 301(h) modified permit is requested" -- and it  
10 identifies BOD, suspended solids, and --  
11 JUDGE REICH: Now I'm really confused.  
12 JUDGE SHEEHAN: So BOD and TSS set the bounds  
13 for where measurement occurs --  
14 MR. SALMONS: Well --  
15 JUDGE SHEEHAN: -- in all -- for all  
16 pollutants?  
17 MR. SALMONS: Well, I think that the  
18 requirement -- just to be clear, it's in Section .61 of  
19 the regulations -- it doesn't say where those  
20 measurements are to be taken. .62 of the regulations,  
21 that provision says that the applicable water quality  
22 standards have to be satisfied at the ZID, and we're

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1 not disputing that in this case. What we are saying is  
2 that applicable there doesn't mean all water quality  
3 standards. It's a reference to the standards that are  
4 applicable to the pollutants for which the waiver is  
5 sought, so the rest are satisfied at the ZOM.  
6 JUDGE REICH: Then if you can help me kind of  
7 put this all together, because my understanding --  
8 correct me if you don't think it's right -- is that  
9 125.62(a), in the language you're looking at, basically  
10 is the language that's intended to implement (h)(9).  
11 MR. SALMONS: Well, no, Your Honor, and I  
12 think that is an important point. That is clearly not  
13 correct. The language we're talking about that makes  
14 reference to the satisfaction of all applicable water  
15 quality standards at the ZID, that language goes back  
16 for a decade or more before (h)(9) was even in the  
17 statute.  
18 And if the Court looks, for example, at the  
19 1986 version of the regulations -- now, there's a  
20 difference in numbering. It's .60 and 61 instead of 61  
21 and 62, but what you'll find, Your Honor, is exactly  
22 this same language that makes reference to all

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1 applicable water quality standards being satisfied at  
2 the ZID when (h)(9) was not even in the statute, and I  
3 don't think it's disputed --  
4 JUDGE REICH: But --  
5 MR. SALMONS: -- how the EPA construed  
6 that --  
7 JUDGE REICH: So if I want to find in the  
8 regulations where (h)(9) is implemented, where would I  
9 find that?  
10 MR. SALMONS: Well, what the -- what the EPA  
11 did after (h)(9) was added to the statute in terms of  
12 amendments to the regulations is in .62. It adds -- it  
13 added (ii) to (a)(1). So it added the reference that  
14 where there is not a state approved water quality  
15 standard, you have to comply with the federal criteria,  
16 and that carries back up to the reference to the ZID --  
17 at the ZID. And again we do not dispute --  
18 JUDGE REICH: So you're saying that A -- when  
19 you talk about two, are you talking about (ii) or --  
20 MR. SALMONS: That's correct. So if -- for  
21 example, in 40 CFR 125.62, (A) refers to physical  
22 characteristics of the discharge. (a)(1) is the

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1 statement that makes reference to the ZID. (a)(1)(i)  
2 says all applicable water quality standards, so those  
3 have to be satisfied at the ZID. We read those as a  
4 reference to the water quality standards that have just  
5 been defined in .61.  
6 JUDGE SHEEHAN: But didn't EPA's in its '91  
7 rulemaking tie 125.62(a)(1) to 301(h)(9), all of it?  
8 MR. SALMONS: Well, I think it's difficult to  
9 understand exactly what occurred at that time, to be  
10 honest with you. And to be clear, this is not a model  
11 of clarity. I will concede that. We're trying to do  
12 the best we can with this, but I think given the  
13 history of it, it's hard to read applicable as being  
14 anything other than a reference to .61, which has been  
15 defined as applicable.  
16 And what they did after (h)(9) was added to  
17 the statute, they amended it to say, if you do not have  
18 approved state water quality standards, then you have  
19 to apply -- you have to satisfy the federal criteria at  
20 the ZID --  
21 JUDGE REICH: All right. So --  
22 MR. SALMONS: -- and we agreed with that.

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1 JUDGE STEIN: So (a)(ii) there, if I  
2 understand what you're saying now, was, in fact, the  
3 language added to address (h)(9)?  
4 MR. SALMONS: Yes, Your Honor.  
5 JUDGE REICH: Okay. That uses the word  
6 "applicable," right?  
7 MR. SALMONS: It does. Yes, Your Honor.  
8 JUDGE REICH: It does? And you indicated  
9 earlier that in your view, (h)(9) is not limited to TSS  
10 and BOD, so presumably, the word "applicable" there has  
11 broader meaning, so why should we read it in (i) right  
12 above it more narrowly?  
13 MR. SALMONS: Well --  
14 JUDGE REICH: It's the same word.  
15 MR. SALMONS: Well, with respect, I think  
16 that's because .61 defines it for you, and it defines  
17 what are the applicable water quality standards that  
18 have to be met at the ZID. Historically, that is  
19 exactly the language that was here before (h)(9) was  
20 even added to the statute, and everybody understood the  
21 reference to all --  
22 JUDGE REICH: But being that you argue in

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1 your brief that if language is amended then you need to  
2 kind of look at the language after it's amended and  
3 assume that, you know, what was there before doesn't  
4 necessarily carry forward, and it seems to me that if  
5 you're looking for something that helps define what  
6 applicable is in (i), then it is probably at least or  
7 more logical to look at what's in (ii), then to go back  
8 and look at 61, which is a different section all  
9 together.  
10 MR. SALMONS: Well, I think the history of it  
11 suggests that they're more connected than that, Your  
12 Honor. And I guess I would say that, again, this is  
13 not a model of regulatory clarity, and if you step back  
14 and ask yourself, what is the point of (h)(9), the  
15 point of (h)(9) is to insure that there's going to be  
16 general compliance with the federal criteria.  
17 And the region has not come forward with any  
18 suggestion -- and with respect, I don't think it's  
19 possible that the state approved mixing zone satisfies  
20 the criteria of the statute. That's precisely why it  
21 was approved, and so the question then becomes, why  
22 would you ignore that and why would you adopt a

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1 different --  
2 JUDGE SHEEHAN: But the ZOM was only adopted  
3 for certain pollutants, not for all pollutants, right  
4 --  
5 MR. SALMONS: Well --  
6 JUDGE SHEEHAN: -- pollutant by pollutant  
7 permit?  
8 MR. SALMONS: -- for all the pollutants that  
9 are at issue here, we think the ZOM was a factor in  
10 defining whether there's an exceedance or not for those  
11 --  
12 JUDGE SHEEHAN: The ZOM is still set permit  
13 by permit, right?  
14 MR. SALMONS: Well, there -- I'm sorry, I  
15 couldn't hear you.  
16 JUDGE SHEEHAN: Under Hawaii standards, the  
17 ZOM is set permit by permit?  
18 MR. SALMONS: The procedure -- and this is  
19 again consistent with the technical support document  
20 that the region relies on -- it specifies that as a  
21 general matter with -- along with the state water  
22 quality standards -- in fact, this is at S-2-4161.

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1 This is a quote from the technical manual.  
2 It says that the Clean Water Act allows mixing  
3 zones at the discretion of the state. EPA recommends  
4 that states have a definitive statement in their  
5 standards on whether or not mixing zones are allowed,  
6 which was done here. Where mixing zone provisions are  
7 part of the state standards, the state should describe  
8 the procedures for defining mixing zones, which is  
9 again, during the water quality standard approval  
10 process, there's a procedure that's set forth for  
11 defining the mixing zones in the --  
12 JUDGE STEIN: How do you square that with the  
13 language in the '94 preamble, which specifically  
14 refused to adopt the position that state standards were  
15 going to trump the ZID? There's specific language.  
16 There's a specific discussion in comments. EPA  
17 responds to those comments, takes a position that  
18 appears to me to be different than the position you're  
19 arguing, and as far as I know, that issue wasn't  
20 challenged.  
21 MR. SALMONS: Well, with respect, I don't  
22 think that language is that clear, and I think there

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1 are other statements around that time that cut the  
2 other way. And then, again, I think that this comes  
3 down to a question of what is best, less than fully  
4 clear regulatory language that is the result of  
5 amendments over time as the act has changed. I think,  
6 at a minimum, the region's position is that the term  
7 "applicable" has changed over time, and it --  
8 JUDGE STEIN: Maybe the region made an error  
9 in the earlier permit. I'm not sure that the language  
10 in the regulation has changed, and when I look at -- I  
11 think it's 125.62 through -- I don't know if it's  
12 (a)(3) or (3) -- where it says that the requirements of  
13 paragraphs (a)(1) and (2) apply in addition to and do  
14 not waive or substitute for the requirements in 125.61.  
15 MR. SALMONS: Well, that's right, Your Honor,  
16 but that is -- I mean, just again, to remind the Court,  
17 romanette (ii), that's a reference to when there is no  
18 state approved water quality standards. It's not a  
19 reference --  
20 JUDGE STEIN: What about (a)(1)?  
21 MR. SALMONS: Well, (a)(1) is when there's a  
22 reference to where there are state approved water

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1 quality standards, and it says you have to comply with  
2 the applicable ones, you have to satisfy it at the ZID,  
3 and we're discussing what applicable means. I do  
4 think -- just again, I would urge the Court if -- to  
5 the extent that there's some uncertainty with regard to  
6 this regulatory language, I think the important thing  
7 to do is to go back to the statute and to ask the  
8 question, why would Congress want to disregard state  
9 approved mixing zones when they have been carefully  
10 designed by -- EPA's own technical document says this  
11 through a multistep process that takes into account  
12 precisely these same types of economic -- excuse me --  
13 environmental concerns.

14 JUDGE STEIN: But as I read the legislative  
15 history, what Congress said was that we are going to  
16 allow for a waiver of secondary treatment in certain  
17 carefully defined circumstances, and that there was  
18 legislative history, if I recall -- and I can't recall  
19 the specific piece of history -- that talked about that  
20 this should not be interpreted expansively.

21 And if you're going to allow a waiver from  
22 requirements that otherwise apply to all facilities or

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1 all POTWs, isn't it rational that in order to obtain a  
2 waiver that you might have to comply with potentially  
3 more stringent criteria if you're going to be allowed  
4 out of a major requirement? So I just don't see  
5 Congress speaking to that issue.

6 I see the statutory language, which is  
7 consistent with the ZID. I see more explanation in the  
8 ninety -- you know -- four regulations as to what was  
9 intended by the ZID, and I don't see -- I think the  
10 language of the reg as to what the ZID is is pretty  
11 clear. I mean, I understand you've got an argument  
12 about what is applicable and what's not applicable. I  
13 have difficulty understanding some of the references to  
14 metals and fecal coliform bacteria in the regs if your  
15 definition of applicable applies.

16 MR. SALMONS: Your Honor, if I may start to  
17 address some of those concerns, and there are, I think  
18 several in Your Honor's question there, and I would  
19 start where I think Your Honor has started, with the  
20 statute, and I would make the following two points.

21 The first is that the entire thrust of the  
22 Clean Water Act -- and Congress certainly understood

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1 this when it added the 301(h) process -- the entire  
2 thrust is for the encouragement of, the development of,  
3 and deference to EPA approved state water quality  
4 standards. And the whole point of the waiver process  
5 of 301(h) is to recognize that they are potentially  
6 crushing cost burdens on jurisdictions along the  
7 coastal areas, where the issue can be adequately  
8 addressed through dilution.

9 And Congress certainly was aware that mixing  
10 zones are an inherent part of state water quality  
11 standards. Everybody agrees. The region has made this  
12 very clear that the reference to the federal criteria  
13 in (h)(9) includes reliance on EPA approved water  
14 quality standards, and with respect, I see no reason to  
15 distinguish between state approved mixing zones and  
16 state approved water quality standards. They've been  
17 through essentially the same approval process.

18 JUDGE STEIN: But as I understand the Hawaii  
19 mixing zone concept, it's not -- it's site specific,  
20 and it is pollutant specific, and it is limited in  
21 time, so it's not that if you get a mixing zone for  
22 permit one, you're entitled to permit -- a mixing zone

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1 in permit two. The way you're describing the mixing  
2 zone it sounds like, you know, this applies to all  
3 facilities under all circumstances, and I'm not sure  
4 that's an accurate reflection of what the Hawaii mixing  
5 zone --

6 MR. SALMONS: Well, there are two steps to  
7 the process, Your Honor, and I think, as you  
8 understand. The first is the approval of the concept  
9 of the mixing zone in the first instance through the  
10 water quality standard approval process, and that's --

11 JUDGE SHEEHAN: It's case by case. That's  
12 Judge Stein's point.

13 MR. SALMONS: First, there is the approval of  
14 the water quality standards that include the procedures  
15 for the mixing zone, then permit by permit --

16 JUDGE STEIN: But the procedures on the  
17 possibility of a mixing zone --

18 MR. SALMONS: But they set forth the standard  
19 for measuring the features of it and how the process  
20 for determining it --

21 JUDGE SHEEHAN: If they're saying that there  
22 should be a ZOM.

8 (Pages 26 to 29)

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1 MR. SALMONS: Well, that's part of it, yes.  
2 But here's what I would take away from that, Your  
3 Honors, and I think that is important. And that is,  
4 that if the region has concerns about the adequacy or  
5 appropriateness of a state mixing zone, it is fully  
6 able to address any concerns that it's not sufficiently  
7 protective of environmental concerns through the  
8 approval process of the water quality standard in the  
9 first instance, and then through the specific permit  
10 approval processes. There's no reason to give the  
11 region now a third opportunity to come in and to say  
12 that the state mixing zone is inadequate and to adopt  
13 what is essentially a hybrid federal standard.  
14 JUDGE SHEEHAN: Well, can the state change  
15 its mind -- can the feds change their minds, if they  
16 want?  
17 MR. SALMONS: I'm sorry. I couldn't hear  
18 you.  
19 JUDGE SHEEHAN: Can the region change its  
20 mind over time?  
21 MR. SALMONS: Well, there are procedures to  
22 do that through the water quality standard approval

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1 process and through the permitting process. It hasn't  
2 done so here, and there's been no suggestion in any of  
3 the pleadings that Hawaii's mixing zone is inadequate  
4 to protect environmental concerns or is inadequate to  
5 fulfill the criteria of the Clean Water Act. And that,  
6 after all, everybody agrees, is the whole point of  
7 (h)(9). The question as to (h)(9) is, will the  
8 discharge of effluent generally be in compliance with  
9 federal criteria?  
10 JUDGE REICH: (h)(9) uses the term "after  
11 initial mixing."  
12 MR. SALMONS: Yes, Your Honor.  
13 JUDGE REICH: What is your understanding of  
14 the word "initial" in the term "initial mixing."  
15 MR. SALMONS: Well, we believe that is  
16 intentionally broad to include both state approved  
17 mixing zones when the mixing zone -- excuse me -- when  
18 the state water quality standards are in existence and  
19 a federal mixing zone when they are not. And so we  
20 think Congress used the term "initial mixing" as  
21 opposed to, you know, the Zone of Initial Dilution or  
22 something like that precisely because it recognized

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1 that there are, if you will, two types of mixing zones.  
2 There are state approved mixing zones, and then there  
3 are federal mixing zones, and the mixing zone should  
4 follow the water quality standards.  
5 JUDGE SHEEHAN: How about the fact that  
6 125.58 (dd) defines ZID as the region of initial  
7 mixing?  
8 MR. SALMONS: I'm sorry?  
9 JUDGE SHEEHAN: It seems like initial mixing  
10 and ZID are the same thing.  
11 MR. SALMONS: No, I don't think that's true,  
12 and I don't think there's any suggestion in the  
13 statutory text or its history --  
14 JUDGE SHEEHAN: Well, I'm quoting 58(dd),  
15 125.  
16 MR. SALMONS: I'm sorry. This is the  
17 regulation you're talking about?  
18 JUDGE SHEEHAN: Yes, right.  
19 MR. SALMONS: Well, yes, the regulation  
20 defines the ZID --  
21 JUDGE SHEEHAN: As the region of initial  
22 mixing, back to (h)(9) arguably.

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1 MR. SALMONS: Well, I mean, again, I don't --  
2 I think that that's not the proper reading.  
3 JUDGE SHEEHAN: Well, there seems to be a  
4 correlation between (h)(9) and the ZID.  
5 MR. SALMONS: Well, to be sure, there are  
6 times when the ZID is the proper mixing zone under  
7 (h)(9). We're not saying that you can never use the  
8 ZID when you're applying an (h)(9) analysis --  
9 JUDGE REICH: No, but I think --  
10 MR. SALMONS: -- when there is no state  
11 mixing zone, but the question is, what do you do when  
12 there is an EPA approved state mixing zone? The same  
13 would be true with regard to --  
14 JUDGE STEIN: And how do you --  
15 MR. SALMONS: I'm sorry.  
16 JUDGE STEIN: How do you -- if you're right,  
17 then how do you read the language in 125.62(a) broadly  
18 enough to encompass the state mixing zone concept? My  
19 problem is that your interpretation doesn't appear to  
20 fit within the scope of 125.62(a) if we reject your  
21 interpretation of the definition of applicable.  
22 And I understand how it fits if we accept that

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1 applicable only applies to the pollutants for which you  
2 are seeking a waiver, but if we were to reject that  
3 point of view, how does your interpretation square with  
4 125.62(a)?  
5 MR. SALMONS: I'm -- I apologize. I'm having  
6 a hard time following what part of my argument you're  
7 knocking out that I have to respond to, and I don't --  
8 I just didn't follow --  
9 JUDGE STEIN: Let's assume, hypothetically,  
10 that if the board were to conclude that applicable  
11 water quality standards --  
12 MR. SALMONS: Right.  
13 JUDGE STEIN: -- means basically all water  
14 quality standards.  
15 MR. SALMONS: So you agree that if you were  
16 to hold that --  
17 JUDGE STEIN: (inaudible).  
18 MR. SALMONS: Right. You'd have to satisfy  
19 all water quality -- all applicable --  
20 JUDGE STEIN: Right. In other words, in  
21 looking at the ZID language in 125.62, we're not just  
22 looking at two pollutants.

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1 MR. SALMONS: Right.  
2 JUDGE STEIN: We're looking at a broader set.  
3 So how is it that your argument about the ZOM can fit  
4 into the language about the ZID in 125.62(a) -- does  
5 your argument rise or fall on our acceptance of your  
6 argument about applicable?  
7 MR. SALMONS: Well, I guess I would -- we  
8 argue in two steps. One, we argue that applicable  
9 ought not to be read the way the region does.  
10 Historically, there's a problem with that since  
11 applicable was there before (h)(9) was. We think that  
12 it's a reference to 61.  
13 If you were to disagree with that, then we  
14 would argue that the regulation is inconsistent with  
15 (h)(9), and if you were to disagree with that, then  
16 obviously, on that issue, we would not prevail.  
17 JUDGE SHEEHAN: Wasn't it the time to  
18 challenge that long ago if the regulation is invalid?  
19 MR. SALMONS: Well, you know, that's another  
20 of what I would refer to as an aggressive assertion of  
21 waiver on the part of the region. At the time they say  
22 we would have been required to bring that challenge,

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1 they had the same interpretation of the regulation that  
2 we do, and we had always had our waiver applications  
3 granted.  
4 I'm not sure how we could conceivably have had  
5 either standing or a ripe claim at that time to  
6 challenge their adoption of that regulatory language on  
7 the theory that they might someday change their  
8 interpretation of it and it would come back to hurt us  
9 20 years later. I mean, that's just -- to me, is just  
10 --  
11 JUDGE SHEEHAN: Well, arguing the way it's  
12 interpreted is different from whether it's valid or  
13 not.  
14 MR. SALMONS: Well, that -- but if --  
15 JUDGE SHEEHAN: If -- you were speaking of  
16 regulation invalidity.  
17 MR. SALMONS: Well, right. As I understood  
18 Your Honor's question, they raised -- this statutory  
19 provision that says you have to challenge certain  
20 regulatory language within 120 days within its  
21 adoption, and we didn't do that. If we're going to  
22 make the argument that the regulations here are

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1 invalid, and my only point is, we couldn't possibly  
2 have brought that challenge at the time. We weren't  
3 injured by the adoption of that regulatory language.  
4 They would have come to court and said, no, we  
5 interpret it the same way you do, and you haven't  
6 been -- you know, there's no likelihood it's going to  
7 be applied against you in some negative way. I think  
8 that that just shows that that can't possibly be the  
9 right reading of that statutory provision. I would  
10 like to say, if I could, a few words about  
11 disinfection, because --  
12 JUDGE REICH: Before you do, I have one last  
13 question about how to read 125.62. If I understood  
14 what you had said earlier, then applicable under (ii)  
15 is broader than applicable under (i), and yet, the  
16 language that Judge Stein read from earlier that talks  
17 about discharge does not exceed at or beyond the zone  
18 of initial dilution is -- seems to be a predicate for  
19 both of those. There's a colon, and there's a one and  
20 a two, so I don't understand why that does not say that  
21 anything that falls into (ii) as well as (i) cannot  
22 exceed at or beyond the Zone of Initial Dilution.

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1 MR. SALMONS: Well, I generally agree with  
2 Your Honor on the structure of that provision. Where I  
3 would differ, I think, from what was the premise of  
4 your question, is that, again, we read (a)(1) to be a  
5 reference to the applicable water quality standard --  
6 JUDGE REICH: I understand.  
7 MR. SALMONS: (inaudible) -- at the (a)(2) --  
8 JUDGE REICH: -- more broadly.  
9 MR. SALMONS: -- we read that as a reference  
10 to federal criteria when there is no state approved  
11 water quality standards. That's the only thing that  
12 (a)(2) covers, and so it says you have to satisfy the  
13 following things at the ZID, applicable water quality  
14 standards, which we should say is .61 water quality  
15 standards, and federal criteria if there is no state  
16 approved standard. And again, we would agree with  
17 that.  
18 So I don't think we have a problem with the  
19 plain terms of the regulation. I can understand that  
20 this is not clear language and that reasonable minds  
21 might disagree. I would then urge the Court to go back  
22 to the statutory purpose and the general structure of

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1 (h)(9) and to understand that state standards, EPA  
2 approved state standards including mixing zones, are  
3 exactly what are encouraged here, and that there are  
4 other mechanisms for the region to deal with mixing  
5 zones that may be problematic, and that this isn't  
6 necessary to do so in an (h)(9) analysis where the real  
7 question is, are you generally compliant with federal  
8 criteria?  
9 And then lastly -- and I think this goes to a  
10 point that Your Honor made Judge Stein with regard  
11 to -- with regard to the fact that you're seeking a  
12 waiver of otherwise generally applicable requirements,  
13 and I guess I view that the other way. It seems to me  
14 that what Congress was clearly concerned with here were  
15 potentially devastating and, at least at a minimum,  
16 very significant costs that would be incurred by  
17 multiple jurisdictions, and when -- precisely because  
18 of their ability to mix and dilute the primary treated  
19 effluent, there ought to be a lessening of the burden.  
20 In those circumstances, it doesn't make sense, we would  
21 argue, to have a more strict standard than would apply  
22 generally to permit compliance and the like.

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1 And if there is a problem with the mixing zone  
2 or some result that's not agreeable in the application  
3 of it through permitting processes and others, the  
4 region can come up with a tailored fix. It could say,  
5 okay, you need to treat -- you know, more pretreatment  
6 for this pollutant or something like that. Here, it's  
7 an on-off trigger for potentially hundreds of millions  
8 or billions of dollars cost, and I think that makes it a  
9 very blunt instrument to change the standard, so --  
10 JUDGE STEIN: I have a couple questions  
11 before you address your last point.  
12 MR. SALMONS: Yes.  
13 JUDGE STEIN: Is there anything in the record  
14 that reflects whether or not Hawaii provided any kind  
15 of state certification in conjunction with this waiver  
16 or application for this particular waiver?  
17 MR. SALMONS: Whether there was a state  
18 certification, Your Honor? I'm not sure the answer. I  
19 believe the answer to that -- and I will do my best to  
20 look at the record when I sit down, Your Honor. I  
21 believe the answer to that is that that would have been  
22 the next step if the region had issued a tentative

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1 decision that was favorable to the process. I believe  
2 it's at that point that that's done, but I'm not  
3 positive about that, so I will check.  
4 JUDGE STEIN: My second question is with  
5 regard to 125.62(a)(4), I believe, that talks about  
6 evaluating compliance with (a)(1)(i), and (a)(2) based  
7 on conditions reflecting maximum periods -- reflecting  
8 periods of maximum stratification and during other  
9 periods when discharge characteristics, water quality,  
10 biological seasons or oceanographic conditions indicate  
11 more critical situations may exist.  
12 Could you explain how that particular  
13 provision of the regulation squares with the arguments  
14 you're making to us?  
15 MR. SALMONS: Well, if I'm understanding you  
16 correctly, Your Honor, I think it would apply -- that  
17 that provision would apply when you're dealing with  
18 the -- what we refer to as the applicable water quality  
19 standards, i.e., BOD and suspended solids, and it would  
20 apply when you're applying the federal criteria when  
21 there's no state water quality standard that has been  
22 approved, but it wouldn't apply otherwise, at least not

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1 by its terms.  
2 JUDGE STEIN: And what does it mean? What do  
3 you think this regulation means?  
4 MR. SALMONS: I'm not entirely sure, Your  
5 Honor. I'm not trying to (inaudible) --  
6 JUDGE STEIN: Okay. Well, I have a chance to  
7 ask you --  
8 MR. SALMONS: -- it's not a regulation that  
9 we have focused on, I think, to any great length, nor  
10 has the region in any great length.  
11 JUDGE REICH: Yeah, just trying to nail this  
12 down in my mind -- if for 125.62(i), we look for  
13 guidance as to what applicable means by looking back to  
14 125.61; for (ii), where do you look for guidances as to  
15 what the word applicable there means?  
16 MR. SALMONS: Well, I think you don't really  
17 have to, Your Honor, because I think there, the only  
18 relevant question is whether there are EPA approved  
19 water quality standards, and I think that'll usually be  
20 clear. And it says that if there are -- excuse me --  
21 it says that if there are not EPA approved water  
22 quality standards --

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1 JUDGE REICH: I'm just trying to understand  
2 the structure of the regulation --  
3 MR. SALMONS: Right.  
4 JUDGE REICH: -- whether you think it's  
5 relevant here or not.  
6 JUDGE SHEEHAN: I had a question about  
7 whether the measurement would occur at the ZID or the  
8 ZOM under (ii).  
9 MR. SALMONS: Well, our reading of (ii), Your  
10 Honor, would yield the following result, which is that  
11 if there is a state approved water quality standard,  
12 (ii) doesn't apply, and you would measure that at the  
13 ZOM. If there is not, the federal standard would  
14 apply, and you would measure that at the federal mixing  
15 zone or the ZID. So we would generally -- our reading  
16 of this harmonizes in that way pretty consistently that  
17 if -- that the mixing zone follows this standard. If  
18 it's state, then it's state. If it's federal, it's  
19 federal.  
20 I would just like to just say a few words  
21 about disinfection, because we view that as a very  
22 important part of this appeal, and I think the critical

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1 thing I would say about that -- the critical thing I  
2 would say about that is that the region takes the  
3 position that because the application for the 301(h)  
4 waiver did not specifically mention disinfection as an  
5 alternative, that it, therefore, was relieved of any  
6 obligation to consider it.  
7 And I think the most -- the most clear and  
8 straight forward reason as to why that's incorrect is  
9 that 301(h)(9), as everyone agrees, requires a  
10 predictive judgment as to what the water quality  
11 standard will be under a waiver if it's granted in the  
12 future, and the permit that was already in place for  
13 Honouliuli specifically required the implementation of  
14 disinfection. If the results of the Sand Island trial  
15 were positive and if --  
16 JUDGE SHEEHAN: What about the .62  
17 requirement that the applicant give a demonstration of  
18 why it would work?  
19 MR. SALMONS: Well, that's what Sand Island  
20 --  
21 JUDGE SHEEHAN: But it's a different  
22 facility.

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1 MR. SALMONS: It is a different facility, but  
2 the permit -- and just to be clear, this is -- this is  
3 pages 63 and -- excuse me. I'm reading the wrong  
4 thing. This is from H1-189, which is the section of  
5 the permit for Honouliuli. It says that "If the  
6 results of the Sand Island monitoring program indicate  
7 that disinfection of the Sand Island Wastewater  
8 Treatment Plant effluent shall be required,  
9 disinfection of the Honouliuli Wastewater Treatment  
10 Plant shall also be required."  
11 I gave you the wrong cite, Your Honor. That's  
12 at H12-1228 of the record. So if the permit for  
13 Honouliuli very clearly stated that if the results of  
14 the Sand Island monitoring program are positive,  
15 indicating the disinfection is going to be required at  
16 Sand Island -- and, you know, this presupposes that you  
17 have -- otherwise have bacteria violations, then you  
18 must include disinfection at Honouliuli. And so for  
19 that reason alone, without even getting into whether it  
20 was required to amend the application or not, in making  
21 that predictive judgment, we submit it's arbitrary and  
22 capricious to ignore what is otherwise a clear permit

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1 requirement.  
2 If there are exceedances -- and we have as to  
3 why the bacteria exceedances, in fact, don't exist, but  
4 if there are exceedances, we're already required given  
5 the positive result at Sand Island to include  
6 disinfection, and it's arbitrary and capricious to  
7 ignore that fact in making the 301(h) waiver  
8 determination. If there are no further questions, Your  
9 Honors --  
10 JUDGE STEIN: I'm going to ask one final  
11 question.  
12 MR. SALMONS: Yes.  
13 JUDGE STEIN: 125.61 refers to applicable  
14 water quality standards. 125.62(a)(1) refers to all  
15 applicable water quality standards. What in your mind  
16 is the difference between applicable and all  
17 applicable?  
18 MR. SALMONS: I don't see a difference  
19 between them, and I would point Your Honor to the fact  
20 that the same language -- as I understand it, the same  
21 language was in the regulations up until 1986 when  
22 (h)(9) wasn't in the statute, and it still had the same

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1 reference, and it was clearly understood as being a  
2 reference to the water quality standards that are  
3 identified in .61 as being applicable.  
4 And again, I would just emphasize that this is  
5 not a construction of the regulation that we have  
6 ginned up out of whole cloth. This is, in fact, how the  
7 region interpreted their regulations for a very long  
8 time. Thank you, Your Honors.  
9 JUDGE STEIN: I think, at this point, you're  
10 out of time.  
11 MR. SALMONS: That's fine.  
12 JUDGE STEIN: If you have any issues you need  
13 covered, you can cover it on rebuttal.  
14 MR. SALMONS: Very well.  
15 MS. LEITH: Good afternoon. I'm Suzette  
16 Leith with the Region 9 Office of Regional Counsel.  
17 There's a lot to talk about before I get into the ZID  
18 and ZOM, and maybe, if we have time, some of the other  
19 issues. I want to make one general comment about  
20 301(h) -- 301(h) in general and why this proceeding is  
21 different from the typical permit proceeding that comes  
22 here, and that is that in 301(h), Congress specifically

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1 set forth specific criteria that a discharger had to  
2 meet in order to get a variance. They have to meet all  
3 these criteria.  
4 In other words, unless the region finds that  
5 the applicant meets all these criteria, there's just no  
6 authority for the EPA to grant a 301(h) variance.  
7 Here, the region analyzed mounds of data, and they  
8 found that there was multiple reasons why the variance  
9 couldn't be granted under 301(h)(9). Both discharges  
10 failed to meet water quality standards for toxicity,  
11 for chlordane, for dieldrin, for ammonia, and also that  
12 the Honouliuli discharge failed to meet standards for  
13 bacteria, and under 301(h)(2), that both discharges  
14 could interfere with the attainment of water quality --  
15 protective of aquatic life and recreation. So unless  
16 this board finds that all those regions were in error,  
17 the applicants still do not qualify for a variance, and  
18 the two decisions should be upheld.  
19 Turning, then -- I guess I will start with the  
20 ZID and the ZOM, which is where most of the briefs are.  
21 Although, as a preliminary, there is one overriding  
22 practical issue which Your Honors discussed, and that

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1 is, from a practical standpoint, the legal issues may  
2 not even affect the final results here. One thing that  
3 we didn't get into before during City & County of  
4 Honolulu's argument is the fact that for ammonia and  
5 for bacteria at Honouliuli -- ammonia at both plants  
6 and bacteria at Honouliuli, the record shows  
7 exceedances at the ZOM as well as at the ZID, so even  
8 if the ZOM controlled for those, they still don't meet  
9 water quality standards.  
10 JUDGE STEIN: How do you respond to the  
11 argument that CCH made, which is that was not the basis  
12 for the region's decision? So if, in fact, we were to  
13 ground any decision by this board on the fact that  
14 there were exceedances at the ZOM as well, that's  
15 inconsistent with the record in this case.  
16 MS. LEITH: The decisions -- the final  
17 decisions do clearly indicate that water quality  
18 standards were not met at the ZOM, so I think under  
19 there's a casino case, I think that counsel for CCH  
20 cited, under that one, even if the case doesn't say  
21 specifically, this is an alternative ground, if that  
22 can be fairly discerned from the decision, then it can

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1 be upheld. And here, for example, the ZOM violations  
2 at Sand Island -- all the violations, frankly, were at  
3 the ZOM because there wasn't monitoring at the ZID, and  
4 so it was clear that there were exceedances at the ZOM  
5 and --  
6 JUDGE STEIN: Was that the basis for your  
7 decision, the basis for the region's decision?  
8 MS. LEITH: The basis for the region's  
9 decision was that water quality standards would not be  
10 attained. The region did emphasize the ZID, because  
11 that's what the regulations say and that's what we were  
12 analyzing, so --  
13 JUDGE SHEEHAN: To put a slightly finer point  
14 on that, the water quality standards were to be  
15 attained at the ZID or at the ZOM?  
16 MS. LEITH: The main thing the region was  
17 analyzing was, could water quality standards be  
18 attained at the ZID. What the region also put in the  
19 decisions was, moreover, they're not even attained at  
20 the ZOM. And so, for example, CCH has raised the  
21 issue, should the public be able to comment on that,  
22 and our answer to that is that no, they shouldn't,

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1 because the tentative decisions clearly indicated all  
2 these exceedances at the ZOM, that could have been  
3 commented on.  
4 JUDGE REICH: Is there any level of technical  
5 judgment that goes into looking at the data that  
6 presumably showed exceedances at the ZOM in determining  
7 whether that data is conclusive enough or strong enough  
8 to either grant or deny a waiver?  
9 MS. LEITH: In general, is there technical  
10 judgment used to decide whether standards are met with  
11 a variety of data? I think the answer to that is yes,  
12 and I think CCH did point out, for example, for  
13 dissolved oxygen at one of the treatment plants, there  
14 were a couple of violations maybe ten years ago, but  
15 it's been clean ever since, and the region did discount  
16 those violations and find that that standard had been  
17 met --  
18 JUDGE REICH: So how do we know, even though  
19 there were allegedly, at least, violations at the ZOM  
20 that they would have been substantial enough to have  
21 justified denial of the waiver if that's what you had  
22 used as the decision criteria?

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1 MS. LEITH: Because the decision did  
2 specifically say standards were not met at the ZOM,  
3 even though the main thing -- you're right. The main  
4 thing the region looked at is were they made -- met at  
5 the ZID. There were also statements they were not met  
6 at the ZOM, and if the standards aren't met at the ZOM,  
7 then the waiver can't be granted. And to that extent,  
8 the region did make the technical decision that the  
9 exceedances at the ZOM were sufficient to come to a  
10 conclusion that the standards could not be met.  
11 The other issue for the other pollutants --  
12 the chlordane, dieldrin, toxicity was discussed a  
13 little bit, and there was one question about the  
14 dilution factor and where does that come from. It's  
15 discussed at length in the final decisions how it was  
16 calculated. I have the cite for the Honouliuli  
17 decision. It's document H.1.2, pages H0123 discusses  
18 how initial dilution is calculated, and it's things  
19 like the depth of the outfall, the tides, the water  
20 temperature, there are EPA approved models for how you  
21 figure initial dilution. You don't start with the  
22 physical ZID or ZOM and calculate back with the initial

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1 dilution numbers. You factor in these other critical  
2 factors, and I think there was also a question about --  
3 JUDGE REICH: But can I --  
4 MS. LEITH: Yeah.  
5 JUDGE REICH: If I understood what was said  
6 earlier, it sounded to me like I was hearing that the  
7 permit did, in fact, specify a dilution factor and the  
8 region, in fact, used a different dilution factor. Is  
9 that an accurate or an inaccurate statement?  
10 MS. LEITH: That is correct, and I'm not  
11 really prepared to say exactly why. I know part of the  
12 reason it was different was there was new data, for  
13 example, weather data. Part of the reason it was  
14 different is there are updated models, so there was a  
15 new model used. I'm pretty sure, but I can't cite  
16 chapter and verse on it, that it was not changing from  
17 back calculating from a ZOM to back calculating from a  
18 ZID. It was these other changes.  
19 And as Your Honors pointed out, CCH has not  
20 challenged the model that was used, the numbers that  
21 EPA came up with, and the reasons for finding the  
22 chlordane and dieldrin and effluent toxicity

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1 violations, at least as to the ZID and the ZOM.  
2 So with that, in terms of the practical  
3 issues -- getting to the legal issues, we've discussed  
4 125.62(a) at length. There was a question about, did  
5 EPA officially tie 125.62(a)(1) to 301(h)(9)? There's  
6 a quotation in our brief on page 39 from the 1991  
7 preamble to the proposed regs for 301(h) -- for the  
8 changes to 301(h), which included 301(h)(9), and that  
9 says "EPA interprets initial mixing to mean ZID  
10 (proposal 125.62(a)(1))." There may even more clear  
11 citations, but I couldn't find them in the few minutes  
12 we had. So there is a tie to 125.62(a), and frankly,  
13 if that doesn't interpret 301(h)(9), then I don't know  
14 what does.  
15 In terms of the word "applicable," I think  
16 that's been discussed a lot, frankly. If EPA when they  
17 wrote the regs had wanted to say 125.62 only applies to  
18 BOD and TSS, they would have said it -- they wouldn't  
19 have buried it in the word "applicable." I looked for  
20 the definitions. Applicable is not a term of art. In  
21 301(h)(9), it's used all over. Applicable pretreatment  
22 requirements, applicable requirements of this section,

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1 applicable water quality standards. There is a  
2 definition at 125.58(cc) that says water quality  
3 standard means applicable water quality standards which  
4 have been approved.  
5 There's also a definition of applicable water  
6 quality standards in the permit regs at 122.2. This  
7 isn't 301(h), but 301(h) does require discharges to --  
8 discharges to show that they can meet the permit regs,  
9 too, and what that definition says is, basically,  
10 applicable standards means all state standards to which  
11 a discharge is subject under the Clean Water Act.  
12 JUDGE STEIN: Do you know why, given that the  
13 term "applicable standards and limitations" was defined  
14 expressly in 122.2, why there is no comparable, you  
15 know, definition that applies to this waiver process?  
16 MS. LEITH: I don't know, other than --  
17 JUDGE STEIN: Is there anything in the record  
18 that will tell us?  
19 MS. LEITH: I never found anything. I assume  
20 it's just -- it was just not used as a term of art. It  
21 just meant standards that apply. The way I interpreted  
22 it when I first saw it and the way the permit writers

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1 or the people who did the analysis, it just meant  
2 standards that apply to this discharge, meaning it  
3 doesn't include fresh water standards. It doesn't  
4 include estuary standards or standards that might apply  
5 to a bay over here rather than the ocean over here, and  
6 that's kind of the easiest definition of applicable.  
7 In terms of EPA's interpretation, I'll talk  
8 about the inconsistencies with the region in a minute,  
9 but the EPA headquarters -- EPA's national policy has  
10 always interpreted (h)(9) to require meeting all water  
11 quality standards at the ZID. Probably the clearest --  
12 the clearest sound bite on this is from the Amended  
13 Technical Support Document, the ATSD, which came out in  
14 1994 along with the new regs.  
15 This is essentially the bible for both  
16 applicants and for regions who are analyzing these  
17 decisions, and what it says specifically is compliance  
18 with criteria and standards such as standards for  
19 nutrients, toxic pollutants, and coliform bacteria  
20 concentrations at the edge of the ZID is necessary, and  
21 that's pretty clear. You don't just have to comply  
22 with BOD and TSS. You have to comply with all these

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1 other things.  
2 And looking through the preambles I believe  
3 Judge Stein mentioned, the preambles to the '94 regs --  
4 and I actually spent most of time looking back at the  
5 preambles to the '91 proposed regs. There's an  
6 emphasis on the full range of water quality standards.  
7 There's discussion of toxic metals, carcinogens, all  
8 this in terms of 125.62, so it's pretty clear that EPA  
9 thought 125.62 means all standards that apply to --  
10 that apply to this discharge.  
11 JUDGE REICH: Is there anything that explains  
12 the logic -- if I look at (h)(9) and I'm looking at a  
13 pollutant for which there is clearly a mixing zone, and  
14 it's not a pollutant for which secondary standards is  
15 relevant, why should my judgment as to secondary  
16 standards for a totally different pollutant depend on  
17 their meeting a more restrictive level for that  
18 pollutant than they presumably have to meet for normal  
19 compliance purposes?  
20 I mean, presumably, in approving a mixing  
21 zone, EPA made a judgment that it was acceptable  
22 environmentally to not really measure compliance until

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1 you reached that point, so what is the logic of  
2 worrying about the environmental effects between the  
3 ZID and the ZOM for those pollutants? I just don't  
4 understand, you know, what the purpose of it is and how  
5 that purpose has any relation to second -- waiver of  
6 secondary treatment or not.  
7 MS. LEITH: Well, if the question is, why  
8 would there be a more stringent standard under a 301(h)  
9 analysis than there might be under --  
10 JUDGE REICH: For the pollutants that have  
11 nothing to do with secondary treatment.  
12 MS. LEITH: The answer to that, I believe, is  
13 that when EPA promulgated its regs and EPA interpreted  
14 the Congressional intent that, yes, you can have a  
15 waiver of these specific technical standards, but  
16 you've got to make darn sure that water quality's  
17 protected, and in certain ways, the 301(h) regs are  
18 more stringent than your standard permit regs.  
19 One of these is this requirement for the ZID,  
20 and there's even a quote in our brief that I don't have  
21 off the top of my head from one of the early preambles  
22 that in order to be protective, EPA's requiring that

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1 standards be met not just under the conditions dictated  
2 by the state, but under the most stringent conditions  
3 possible.  
4 Another example is the requirement in 301 -- I  
5 mean 125.62, the one with the little I, about meeting  
6 water quality criteria where there is no corresponding  
7 state standard. That's something else you don't have  
8 to do in your standard permit, but that's something  
9 else that EPA when it promulgated its regs wanted to do  
10 to ensure that even if secondary treatment was not  
11 being required, water quality was still being  
12 protected, because that's essentially what the Clean  
13 Water Act is all about.  
14 A couple other comments on the ZID and the  
15 ZOM. There was discussion of Hawaii's mixing zone  
16 provisions, and I just wanted to reiterate one thing we  
17 pointed out in our brief, that the Hawaii mixing zone  
18 provisions specifically say that a zone of mixing for  
19 plants performing primary treatment must comply with  
20 301(h). In other words, you can't have a mixing zone  
21 that's inconsistent with what would be calculated under  
22 301(h), so --

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1 JUDGE STEIN: Where would we find that?  
2 MS. LEITH: It's in the -- it's in the Hawaii  
3 mixing zone regulations, and I don't have the exact  
4 citation for where it is. It's about two-thirds of the  
5 way through it. It's kind of buried in the middle of a  
6 paragraph. The brief has the citation for where it's  
7 found. So I think that that answers the question of  
8 was the region doing anything inconsistent with state  
9 mixing zone provisions, and certainly in Hawaii, no,  
10 because state mixing zone provisions recognize that  
11 under 301(h) conditions, the 301(h) regs are what  
12 count.  
13 JUDGE STEIN: You indicated that you were  
14 going to address the so-called flip in the region's  
15 position. Could you speak to that question?  
16 MS. LEITH: Okay, couple of things. One is  
17 that -- the Honouliuli tentative decision came out in  
18 1988, and I think the permit came out in 1991. The  
19 (h)(9) regs came into effect in 1994, so those were not  
20 there when the Honouliuli decision was written. I will  
21 acknowledge that the Sand Island decision also had a  
22 mixing zone in it, and that was subsequent to that.

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1 The only answer I can give to that -- well, a couple  
2 answers. One is, the region just didn't read the regs  
3 and didn't read the TSD quite well enough, and what  
4 really matters is what the regs say, what the national  
5 policy is, and that's what the region followed in the  
6 current decisions.  
7 JUDGE SHEEHAN: Yes, and to focus on one of  
8 the '94 rulemakings, I understood it from your briefs,  
9 the '94 rulemaking tracked what occurred in '91 and  
10 even back as far as 1979, so as early as '79, the ZID  
11 was the line in the sand, so to speak, on these  
12 matters, not only in '94.  
13 MS. LEITH: It should have been. It wasn't  
14 that clear. There was not a specific -- it wasn't that  
15 clear that it was. It was also a different decision  
16 that we were making, that the region was making back in  
17 1988. There was -- there was less water quality data,  
18 so there was a lot less analysis of water quality  
19 standards, so to the extent that the region made the  
20 wrong decision there, again, all I can say is, that's  
21 true. It was the wrong decision. That's no reason why  
22 the wrong decision should be made again now.

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1 JUDGE SHEEHAN: Although, to take it even  
2 more recently in time or further forward in time, as I  
3 understand it, in both Honouliuli and Sand Island TDDs,  
4 the Region that the state quality water standards had  
5 to be met at the ZOM for secondary treated effluent --  
6 no qualification, and then in the TDDs (sic) for each  
7 facility, you said that the standards -- state  
8 standards had to be met for -- at the ZOM for certain  
9 discharges, so as late as the final actions here, you  
10 seem to be thinking the ZOM for secondary treatment in  
11 the TDDs and then the reference to secondary treatment  
12 with that qualification was gone by the time of the  
13 final decision.  
14 JUDGE STEIN: And I thought the thing that  
15 you were referring to referred to the ZID, not being  
16 met at the ZOM but at the ZID --  
17 JUDGE SHEEHAN: ZOM... ZOM.  
18 MS. LEITH: I'm not sure what you're  
19 referring to. The two tentative decisions that were  
20 issued in 2007 were totally consistent with the final  
21 decisions that came out in 2009. I may have been  
22 talking about the 1988 tentative decision, but the 2007

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1 tentative decisions clearly said that standards had to  
2 be met at the ZID.  
3 Just a couple more points about the prior  
4 permits. The prior permits did have a zone of mixing  
5 for certain things, including nutrients, but as I think  
6 you all pointed out, the only standard that's at issue  
7 here that had a zone of mixing in the prior permit was  
8 ammonia, so to the extent the prior permits matter, it  
9 would only be for ammonia, and the next step there  
10 is -- and the ammonia standards were exceeded at the  
11 ZOM as well as at the ZID, so -- any more questions?  
12 JUDGE STEIN: Why was the ZID specified for  
13 three pollutants in each of the two permits, but not  
14 for other pollutants?  
15 MS. LEITH: For the pollutants that were  
16 measured in the effluent -- the ZID and the ZOM were  
17 actually used as monitoring stations. For pollutants  
18 that were measured in the effluent, such as chlordane  
19 and dieldrin, there was no ZID and there was no ZOM  
20 because what mattered was the initial dilution factor.  
21 And what those permits did, essentially, is the -- the  
22 actual permit requirements took into effect the

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1 dilution factor.  
2 For bacteria, it was not mentioned at all,  
3 because at the time the permits were issued, there were  
4 no bacteria standards in effect more than 1,000 feet  
5 from shore in Hawaii, so they -- there was frankly less  
6 worrying about what the conditions were more than  
7 1,000 feet from shore, which is where both the ZID and  
8 the ZOM would be. That changed in 2004 with the EPA  
9 promulgation of the Beach Act. The Beach Act rule  
10 which set standards for those areas.  
11 JUDGE SHEEHAN: I'm not sure if I understand  
12 the answer. The ZOM -- let me restate it -- if the ZOM  
13 were good enough for nutrients, et cetera, why wasn't  
14 it good enough for chlordane and dieldrin and the  
15 others? I thought that was Judge Stein's question.  
16 I'm not sure why that distinction between one set of  
17 pollutants versus another.  
18 MS. LEITH: I don't know. I wasn't around  
19 then. It may be that what CCH asked for was the ZOM  
20 for particular pollutants. Under the Hawaii regs, it's  
21 the discharger that asks, and I think it was because of  
22 where the monitoring was and for the chlordane and

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1 dieldrin, the issue was initial dilution calculations  
2 and modeling rather than a physical ZID or a ZOM, so --  
3 JUDGE STEIN: With respect to the ZOM mixing  
4 zone for ammonia nitrogen -- which as you mentioned,  
5 both permits in the case have a ZOM mixing zone for  
6 ammonia nitrogen and this occurred in the prior  
7 permit -- should those explicit requirements override  
8 the region's understanding of 301(h) with respect to  
9 where you measure compliance?  
10 MS. LEITH: Compliance in the permit or --  
11 JUDGE STEIN: For the 301(h) purposes.  
12 MS. LEITH: No. The permit requirements  
13 should not control. What controls is what the law  
14 says, what the reg says, and what the data say. For  
15 example, there may be a permit -- well, for example,  
16 with bacteria, there weren't violations of bacteria  
17 because they didn't have the standards in the permit.  
18 And the fact that there may not have been permit  
19 violations shouldn't control, looking forward, whether  
20 the discharges would comply with 301(h).  
21 JUDGE STEIN: I had asked a question of CCH  
22 regarding whether there was any certification by the

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1 state of Hawaii that could be found in the record with  
2 respect to the application for a variance.  
3 MS. LEITH: I don't think there was. That's  
4 addressed towards the end of both the final decisions.  
5 There's a section called compliance with other laws,  
6 and in order to get a variance, you need a  
7 certification from the state. You also need to show  
8 that you comply with the Endangered Species Act, things  
9 like that.  
10 Basically, we took the position that unless  
11 EPA's tentatively proposing to grant the variance, it's  
12 really irrelevant whether or not there's a state  
13 certification or not. I don't think there was, and I  
14 don't think the region used that as a ground -- I'm  
15 sure the region didn't use that as a ground for denial.  
16 We have a lot of other issues, and I can just address  
17 them sort of briefly.  
18 JUDGE STEIN: Can I ask one more question --  
19 MS. LEITH: Sure.  
20 JUDGE STEIN: -- before you move to your  
21 other issues?  
22 MS. LEITH: Sure.

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1 JUDGE STEIN: Another question that I had  
2 posed to the city and county of Honolulu related to  
3 helping me understand Section 125.62(a)(4), I  
4 believe --  
5 MS. LEITH: Yeah.  
6 JUDGE STEIN: -- and I'm struggling to  
7 understand what that's all about. I didn't know if you  
8 might be able to enlighten me as to what that provision  
9 is supposed to mean.  
10 MS. LEITH: It's not something that I focused  
11 on. Looking at it today, it looks like what it's  
12 referring to is critical initial dilution. That when  
13 you figure the initial dilution, you look at, these are  
14 the factors that we did look at in figuring the initial  
15 dilution, and frankly, my understanding of the way it  
16 used to work was instead of having a physical -- well,  
17 right now, the technical support document talks about  
18 how to calculate the ZID, and it's basically the depth  
19 of the outfall and you use that or the depth of the  
20 water and you use that as the radius around the  
21 outfall.  
22 It used to be, you'd calculate the ZID using

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1 all these critical initial dilution factors, and then  
2 frankly, EPA had decided to simplify it, so I think  
3 that's what that all -- and that goes to the same issue  
4 of the regs wanting to be very conservative and making  
5 sure that standards will be met under the most -- what  
6 are they called -- the most critical conditions.  
7 JUDGE STEIN: [To other judges:] Before she  
8 turns to other issues, do you folks have any other  
9 questions? Okay.  
10 MS. LEITH: There's discussion -- another  
11 statutory construction issue about 301(h)(9) about  
12 whether it refers to just EPA water quality criteria,  
13 which is actually what the language says, or does it  
14 also refer to water quality standards. I think CCH  
15 essentially conceded that it refers to EPA water  
16 quality standards, certainly -- and criteria where  
17 there is no directly corresponding standard.  
18 This is an issue that CCH has raised as to  
19 chlordane, because frankly, the EPA-recommended  
20 criterion for chlordane is a lot less stringent than  
21 the Hawaii approved water quality standard. We think  
22 that's pretty clear in the regs. Again,

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1 125.62(a)(1)(i) standards, (i) -- (ii) is additional  
2 water quality criteria.  
3 I just wanted to mention a little bit about  
4 CCH's request that the board consider new standards  
5 which are part of some Hawaii legislation that was  
6 passed a few months ago. This was after the two final  
7 decisions, the Hawaii legislature passed a bill to  
8 amend the water quality standards. These have not yet  
9 been submitted to EPA. They're not the standards in  
10 effect. You look at the definition of water quality  
11 standards in 125.58(cc). It says water quality  
12 standards are the approved water quality standards, so  
13 frankly, these new standards that EPA has not even  
14 received yet just are not relevant to this decision.  
15 JUDGE REICH: Can I ask about water quality  
16 standards as they relate to (h)(2) as opposed to  
17 (h)(9)? If -- (h)(2), unlike (h)(9), doesn't contain  
18 an explicit reference to initial mixing. If the  
19 logic -- and correct me if it's not the logic -- of  
20 looking at water quality standards in (h)(2) is an  
21 assumption that the water quality standards are  
22 protecting these various values, unless they're

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1 exceeded by definition, you're not complying with  
2 (h)(2). Then, in that context, if there is a mixing  
3 zone associated with a particular pollutant that the  
4 state has adopted and EPA approved, why wouldn't, at  
5 least in that context, you look at that standard with  
6 the associated mixing zone, because presumably, EPA has  
7 again made a judgment there that there is no  
8 unacceptable environmental harm if you do not meet the  
9 standard until you reached the mixing zone?  
10 MS. LEITH: Well, there again, I think EPA  
11 regs for 125.62 do say at the ZID. I know the --  
12 JUDGE REICH: I'm going back to the statute.  
13 MS. LEITH: So the -- but then again, under  
14 (h)(2), it's these same regs, and I think they also do  
15 mention the ZID, and it goes back to the same  
16 requirement of being extra protective. The other point  
17 to make, is, again, with Hawaii, there is not a  
18 physical ZOM that Hawaii has not said standards don't  
19 have to be met within X amount, X feet of the discharge  
20 or anything like that. What Hawaii has is a process,  
21 and it does not --  
22 JUDGE REICH: But it has a process that has

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1 led to a permit that has defined for at least certain  
2 pollutants, a ZOM.  
3 MS. LEITH: It did, and that ZOM was bigger  
4 than the ZID, and looking back, we probably shouldn't  
5 have approved it back then.  
6 JUDGE SHEEHAN: And now that we're into  
7 (h)(2)'s territory for a moment, getting to CCH's  
8 argument about the fact that -- whether or not there's  
9 harm, if there's noncompliance, and noncompliance  
10 doesn't automatically mean environmental harm, and  
11 (h)(2)'s focus, of course, was on harm, the balance of  
12 indigenous population, recreational activities and so  
13 on -- is it your position if there is a compliance  
14 exceedance, there is automatic harm, (h)(2) type harm?  
15 MS. LEITH: (h)(2) does say -- it does not  
16 say it's simply current conditions. What it says is  
17 you have to have water quality which assures  
18 protection. So if you have standards that, for  
19 example, if you're looking to the BIP, Balanced  
20 Indigenous Population of fish, shellfish, aquatic life,  
21 and wildlife, you look at aquatic life standards. If  
22 there are aquatic life standards that aren't being met,

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1 then that's not water quality which assures the  
2 protection of a BIP. The way the --  
3 JUDGE SHEEHAN: When you say "aren't being  
4 met," does that mean a single exceedance or weeks or  
5 months? You did a lot of data gathering here, many of  
6 them over many years, and I'm wondering where that line  
7 is between, if you can help us understand it between  
8 when compliance is sufficient and when noncompliance is  
9 sufficient that it means environmental harm as  
10 understood by (h)(2).  
11 MS. LEITH: That's similar to the same  
12 question before. Is there ever a judgment call there?  
13 And I think there may be, but I don't think we were  
14 there here. For example, the toxicity numbers were so  
15 bad. The toxicity standard was exceeded almost all the  
16 time, and that's sufficient, I think, to say that you  
17 don't have water quality which is protective of a BIP.  
18 It may be -- it was probably a tougher call  
19 for some of the other standards, but, again, it's kind  
20 of a technical professional judgment call, and the  
21 region made that call. It set out in the tentative  
22 decision why it made the call. It specifically

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1 discussed all the factors, and that was something the  
2 public and CC -- including CCH could comment on.  
3 JUDGE REICH: Well, is it accurate to say --  
4 as I think CCH does say -- that the only real  
5 environmental harm that you relied on in making your  
6 determination under (h)(2) was the failure to meet  
7 water quality standards, or is there something beyond  
8 that?  
9 MS. LEITH: That was the primary basis for  
10 the (h)(2) decisions. The region acknowledged that the  
11 data were mixed. The region did carefully look at the  
12 data, the biological data on existing conditions, and  
13 looked at the water quality standards, including  
14 toxicity. This is consistent with the regs, the  
15 statute, the TSD. The region acknowledged that there  
16 were not actual demonstrations of currently existing  
17 harm.  
18 It also pointed out there are just inherent  
19 difficulties in biological sampling. For example, you  
20 look at algae blooms. You might look at them once a  
21 month, but that may not be when the algae's blooming.  
22 It's hard to take biological samples all the time; you

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1 just can't do it. Fish tissue samples, the fish swim  
2 in and out. You don't know which fish to sample. So  
3 we acknowledge there was a certain amount -- there's  
4 both an uncertainty regarding the biological data, and  
5 then the water quality standards violations were so  
6 clear that the region's decision was that (h)(2) was  
7 not met.

8 JUDGE SHEEHAN: You can see why that is not  
9 insubstantial issue, and it seems -- I'm looking at,  
10 particularly, pages 52 and 53 of your brief. Your  
11 findings, for example, on recreational fishing,  
12 dieldrin and chlordane could contribute to  
13 bioaccumulation, and with regard to the BIP, there are  
14 uncertainties in the data, algal blooms grows could be  
15 occurring -- very subjunctive phrasing -- when the  
16 cost, literally, is a lot of money for CCH to have to  
17 meet the standards. So it just sounds as if the region  
18 is a bit tentative when the consequences of their  
19 decision are enormous.

20 MS. LEITH: Well, I don't know if tentative's  
21 the word I'd use. It might be cautious. It might be  
22 precise. I think the region was trying to avoid saying

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1 there is evidence that -- of unacceptable  
2 concentrations in fish tissue, because there was not  
3 any -- you're right. There was not any evidence of  
4 that. However the way (h)(2) is written, you don't  
5 have to have actual evidence. You need to protect the  
6 water quality. And that's -- that's the way the Clean  
7 Water Act is written. You don't just wait for fish  
8 kills. Water quality standards are written to protect  
9 against things like fish kills, and that's why we have  
10 to look and see were these water quality standards  
11 being met, and the finding was that they were not, so  
12 we considered that very significant... very important.

13 JUDGE SHEEHAN: I understand that water  
14 quality is present and it's predictive, and predictive  
15 is, by definition, not absolutely certain, but it still  
16 seems as if there needs to be a certain rigor behind  
17 the agency's decisions when the consequences are so  
18 great for the regulated community. It just reads as if  
19 the region didn't really know but just gave it a good  
20 guess, and this is what it came up with.

21 MS. LEITH: Again, I wouldn't call it a good  
22 guess. I'd call it best professional judgment. I'd

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1 call it following the regs. The regs do say in -- I  
2 think it's -- 125.62(c), for example, gets into  
3 biological impact, and part one is water quality, and  
4 part two is to show that a BIP exists. You have to do  
5 both of those. There's guidance that EPA followed that  
6 says in analyzing adverse effects to marine life, use  
7 multiple lines of evidence, use chemical-specific, use  
8 toxicity, and use biological data. And the region's  
9 position is, just using one of those can't assure  
10 protection. Again, it was being very conservative, and  
11 that's how the region reads 301(h) and reads EPA's  
12 position through its regs and through all its  
13 preambles.

14 Bacteria, a couple issues, geometric means,  
15 CCH is challenging the region's finding that the  
16 Honouliuli plant couldn't achieve the geometric mean  
17 for bacteria, and again, what they're saying is --  
18 well, in one brief they said they're challenging the  
19 response to comments and in one they're challenging the  
20 finding itself. What they're really seeming to  
21 challenge is the approach in the tentative decision  
22 where the region, frankly, didn't have enough data to

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1 do a traditional geometric mean based on five or six  
2 samples a month.

3 The geometric mean is part of the standard  
4 that has to be met, and all the region had was  
5 generally one sample per month and sometimes even one  
6 sample per quarter, so the region did what it could to  
7 compare that data with the geometric mean. It looked  
8 at individual numbers. It calculated annual means. It  
9 calculated means at various depths, and all this  
10 pointed to the geometric mean not being achievable.

11 But probably most important there as we point  
12 out in our brief, after the tentative decision came  
13 out, between the tentative and the final decisions,  
14 there were two more years of data where there was a lot  
15 more monitoring. There were three to six samples a  
16 month. Traditional geometric means could be  
17 calculated, and it was not a close call. The  
18 exceedances were frequent. There were often quite  
19 large.

20 For example, the geometric mean water quality  
21 standard is 35 colony-forming units, or CFU, of  
22 enterococcus for 100 milliliters. The results were

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1 often in the hundreds. A couple times, they were over  
2 100 as compared to 35. So it was very clear where that  
3 was not being met in the last two years, which  
4 confirmed the findings before, even though the  
5 geometric means were untraditional in those earlier  
6 years.  
7 And again, I just wanted to point out here in  
8 the reply what CCH is saying is that -- they don't seem  
9 to be challenging that these geometric means did not  
10 meet the bacteria standard. What they're saying is  
11 there ought to be a remand so the region can explain it  
12 better. And then, if you go back and look at the final  
13 decisions, the region clearly explained that standards  
14 were not being met in 2008 and in 2007, and I think  
15 that's clear that standards were not being met.  
16 There's no reason for a remand on that. That would be  
17 just a way of delaying the process, frankly.  
18 The disinfection issue that was discussed  
19 briefly by Mr. Salmons, one issue he raised was that  
20 the Honouliuli permit said that -- basically, if Sand  
21 Island requires disinfection, it will be required in  
22 Honouliuli, and my reaction to that is, well, then they

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1 should have proposed it. And disinfection was required  
2 at Sand Island starting in 1998. The 1998 permit  
3 included a compliance schedule for Sand Island to  
4 install disinfection equipment, so starting in 1998,  
5 CCH should have proposed disinfection.  
6 JUDGE SHEEHAN: But if you already said that  
7 in the Honouliuli permit that if Sand Island has it,  
8 that facility is going to get it. It sounds like it  
9 was already laid out. There was a path forward. You  
10 had already stated your intention in the region and  
11 that there was no need to go through the demonstration  
12 process.  
13 MS. LEITH: We couldn't have approved it  
14 without a demonstration. In order to have an approved  
15 discharge under the EPA regs, you have to do -- you  
16 have to do a lot of work.  
17 JUDGE SHEEHAN: But the Honouliuli permit  
18 didn't say that. That was, I think, their point, that  
19 it seemed to say that there's no need to produce the  
20 demonstration, because if it's good in Sand Island,  
21 it's going to be good here, end of discussion.  
22 MS. LEITH: I'm --

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1 JUDGE SHEEHAN: I know what the regs say, but  
2 it sounded like you were saying the regs need not be  
3 met here.  
4 MS. LEITH: Yeah, I know. I can't remember  
5 exactly what the permit said back in 1991. It may have  
6 been something like Department of Health -- Hawaii  
7 Department of Health can order it to go to  
8 disinfection. I can't quite remember that. I think  
9 that's in our brief somewhere. But in order to analyze  
10 whether a treatment plant qualifies for a 301(h)  
11 waiver, you have to look at the proposal of what the  
12 treatment plan is going to be, and if it's something  
13 different from what it is, they need to show that that  
14 improved discharge will meet it. Disinfection --  
15 JUDGE SHEEHAN: But again, you seem to give a  
16 green light -- your words were "will be," disinfection  
17 will be used at Honouliuli if it works at Sand Island  
18 without any need for that normal showing.  
19 MS. LEITH: I don't think once sentence in  
20 the permit saying -- again, I'm not sure. I may have  
21 misspoke when I said, well, I'm not exactly sure what  
22 the permit said. But again, I don't think -- even if

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1 it did, that certainly wouldn't waive the region's  
2 requirement to analyze whether the proposed discharge  
3 will meet standards, will meet the 301(h) requirements,  
4 and it wouldn't waive the requirement in -- I think  
5 it's 125.62(e) -- about if you're applying for an  
6 improved discharge, you need to show it's thoroughly  
7 planned and studied, lots of technical things.  
8 For example, there's different kinds of  
9 disinfection. There's UV disinfection. There's  
10 chlorination. The plant would have to decide which one  
11 it was going to use, and I think the '88 permit  
12 actually referred to chlorination, and then, as things  
13 evolved in the 90s, they decided to go with UV in Sand  
14 Island. And in terms of what you have to do to make a  
15 showing of an improved discharge, I just wanted to  
16 emphasize that CCH knew how to do this, because they  
17 did it for Sand Island.  
18 If you look at the Sand Island administrative  
19 record document S.19.32, it's a 421-page disinfection  
20 study from January of 2000. The next document,  
21 S.19.33, is a 98-page disinfection pilot study, so they  
22 knew what they had to do, and to say that a -- a

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1 statement in their comments, EPA -- that disinfection  
2 can address bacteria, to say that that is a proposal is  
3 just totally not in keeping with the regs, and the  
4 region just couldn't accept that as a proposal. It in  
5 no way showed that CCH even wanted to disinfect or that  
6 it would work.

7 JUDGE STEIN: I had a question about whether  
8 wet or dry water quality criteria applied for turbidity  
9 and nutrients. I thought that the Honouliuli permit  
10 specified that dry water quality applied, but in the  
11 final decision document, the region notes that CCH  
12 modified the receiving water designation from dry to  
13 wet, so which ones now apply, and was the old permit  
14 ever modified? I'm just trying to understand how this  
15 works.

16 MS. LEITH: Yeah. The -- so you're saying  
17 the '88 permit or the '91 permit is different from the  
18 decision here.

19 JUDGE STEIN: It appears to be.

20 MS. LEITH: I don't know if the permit was  
21 modified. I know there was a change. There was some  
22 changes, I think, in state water quality standards

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1 during the 90s and/or CCH made some changes. I don't  
2 remember that, frankly. I know it's discussed in the  
3 tentative decision and in the final decision, so it may  
4 be that wet was analyzed in '88 and dry was analyzed in  
5 2007. That doesn't seem to be anything CCH has  
6 contested, and I think they're the ones that did make  
7 the change.

8 Whole Effluent Toxicity, if we have some more  
9 time, this is -- toxicity is one of the big problems  
10 with both of these discharges. There's recurrent  
11 failure to meet the standards for toxicity, and I won't  
12 go into how the standard came about and how it's  
13 analyzed, but I think it's clear from the briefs.  
14 There were two species that were analyzed for toxicity,  
15 the flea and the urchin. The flea was a fresh water  
16 flea, and the discharge passed the flea test. It  
17 failed the urchin tests. Using multiple organisms is  
18 what you're supposed to do. There's EPA guidance.  
19 There's Hawaii guidance saying you really ought to use  
20 three organisms so that you can make sure to protect  
21 the most -- the most fragile of the organisms, the most  
22 sensitive, and here it would be the urchin, and

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1 frankly, the urchin's a lot more relevant because it's  
2 a native species, and it's a marine organism.

3 So CCH isn't contesting that the tests, using  
4 this urchin test, indicate exceedances, and they can't.  
5 At Sand Island something like three-quarters of the  
6 tests in the past ten years failed this test; at  
7 Honouliuli, it was like 60 to 70 percent. The standard  
8 was just not being met --

9 JUDGE SHEEHAN: Well, I think, again -- I  
10 agree I don't think their challenge is to the method  
11 used to produce the results or that the protocol wasn't  
12 subject to the inter-lab viability testing, and that  
13 the West Coast manual which should govern here does not  
14 include this test method, so what is your response to  
15 method used?

16 MS. LEITH: To the method used, my first  
17 response is I'd urge you all go back and look at the  
18 response to comments, because there are 19 pages in  
19 Sand Island and about 13 pages in Honouliuli --  
20 actually, I think I have that backwards. What CCH is  
21 doing is criticizing the response to comments, and the  
22 region responded very comprehensively.

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1 In terms of the questions you raised  
2 concerning the fact that the EPA -- or that the urchin  
3 test was not approved under Part 136 -- I think we  
4 mentioned that in our brief, and in the response that's  
5 kind of a red herring. Part 136 doesn't address  
6 toxicity tests for marine organisms in the Pacific  
7 Ocean. It just does not occupy the field there.  
8 Interlaboratory testing is not required. It was done.  
9 It -- what EPA said when they published the Whole  
10 Effluent Toxicity promulgation, which standardized some  
11 tests for East Coast and Gulf Coast species and fresh  
12 water species, it said that interlaboratory testing was  
13 a good tool, but it wasn't required.

14 There are some published species that have not  
15 undergone interlaboratory testing. The West Coast  
16 method, there's nothing that says that a test has to be  
17 included in the West Coast method. That's given as an  
18 example of certain permits that are not officially  
19 promulgated by EPA Headquarters -- I'm sorry, not  
20 certain permits -- certain types of tests which are  
21 acceptable on the West Coast.

22 So on the West Coast, which would include

22 (Pages 82 to 85)

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1 Hawaii, it's basically left to the discretion of the  
2 permit writer, and one of the points that EPA -- that  
3 the region made in its response to comments is that  
4 this urchin test has been pretty much the main test  
5 that's used in Hawaii permits for the past ten years.  
6 I see the red light. Should I explain a little bit  
7 more or do we pass the baton to --  
8 JUDGE STEIN: Why don't you just take about  
9 two minutes, and then we'll wrap it up and give CCH a  
10 little bit of extra time? So if you want to take two  
11 minutes, and then we'll wrap things up.  
12 MS. LEITH: Okay. I think -- just one more  
13 thing on the comments regarding the urchin test. There  
14 was also arguments about biological significance as  
15 opposed to statistical significance. We addressed that  
16 in the brief. The region bent over backwards to try  
17 and address those comments. They tied -- they quoted  
18 EPA studies about how WET tests accurately predict real  
19 world effects. They did additional testing, this PMSD  
20 procedure. And the other main point we make in the  
21 briefs is essentially by saying this test and this  
22 water quality standard -- this test doesn't predict

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1 real world effects, essentially, CCH is challenging the  
2 Hawaii water quality standard. Now, it's a little  
3 complicated to get into, so I'll kind of leave that for  
4 the briefs.  
5 Dieldrin we haven't touched on at all,  
6 basically, we've got a toxic pollutant violated nearly  
7 all the time at both treatment plants. The bottom  
8 line, the region analyzed a whole lot of data using an  
9 EPA-approved method that was specified in the permit.  
10 It was specified in the TSD. It also -- toxicity --  
11 CCH is saying -- they're trying to discredit their own  
12 data by doing these split samples that the region had a  
13 lot of problems with, and they're trying to submit  
14 additional data now where it too's late. That's kind  
15 of the bottom line on that one --  
16 JUDGE SHEEHAN: A question on that, that  
17 Method 608 was used -- you're saying Method 8270 wasn't  
18 used because it hadn't been approved, but as CCH points  
19 out, 8270 was used in Port Loma, and it's good enough  
20 for Port Loma, why wasn't it good enough here?  
21 MS. LEITH: Actually, it wasn't used in Port  
22 Loma. That was my mistake reading their brief. I

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1 thought that's what they were saying, and then in their  
2 reply brief, they said wait a minute, the region didn't  
3 read very carefully it wasn't used in Port Loma.  
4 Just bottom line, two things, a lot of what  
5 CCH is getting at is delay. They're asking for remand  
6 to consider standards that haven't been approved to  
7 consider decisions EPA clearly made, to consider  
8 proposals that weren't made, and there's lot of  
9 language in our brief that EPA's interpretation of  
10 301(h) is not meant to be a mechanism for delay, and  
11 the board has recognized an interest in finality and  
12 expedition. And then to reiterate the first comment  
13 that in order to get a 301(h) waiver, you have to  
14 demonstrate that all these criteria are met, and if you  
15 don't demonstrate that they're all met, then the EPA  
16 really doesn't have any authority to grant the waiver.  
17 Thank you.  
18 MR. SALMONS: Thank you, Your Honors. I will  
19 try and be brief. I realize that we have gone over,  
20 and I appreciate the Court's indulgence with the number  
21 of issues we've had to cover.  
22 If I could, I'd like to begin with some

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1 statements that were made with regard to the findings  
2 about ammonia nitrogen at Sand Island, and I think this  
3 goes to the question of whether a remand would be  
4 required if the Court were to agree with any of our  
5 arguments. And I think this is very important, and so  
6 if the Court were to refer to the Sand Island final  
7 opinion at pages 62 through 64, you'll see the  
8 discussion about ammonia nitrogen, and what it actually  
9 found is that, in 1999, there are some exceedances at  
10 the ZOM, and then otherwise, in later years, there are  
11 very few, depending on how you view the geometric mean.  
12 There's either only two, or there's a small  
13 number that's slightly larger than that, but the  
14 conclusion is that after -- between 2000 and 2006,  
15 there were not nearly as numerous or as consistent  
16 exceedances with regard to ammonium nitrogen as in  
17 1999. And then comes the conclusion on 63 and 64 with  
18 regard for ammonia nitrogen -- and this we think makes  
19 clear they were not relying on those hand small number  
20 of exceedances at the ZOM in actually denying the  
21 waiver at request here.  
22 What it says is that the Hawaii water quality

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1 criteria for ammonia nitrogen were exceeded in all  
2 depths in 1999, and the data shows that the exceedances  
3 of ammonia nitrogen criteria have persisted to a lesser  
4 extent in all three depths of the water column. Excuse  
5 me. It is likely that the number of exceedances at the  
6 ZID, where 301(h) regulations require attainment of  
7 water quality standards would be greater than the  
8 exceedances found at the current monitoring stations;  
9 therefore, the applicant has not demonstrated that it  
10 can consistently attain state water quality standards  
11 for ammonia nitrogen.

12 We think that it's clear that it's not a small  
13 number of exceedances at the ZOM on which they based  
14 their denial of the request. It is the inference that  
15 there must be more at the ZID; therefore, you -- we  
16 predict you're not going to be able to meet the  
17 standard. There has been no determination that if the  
18 ZOM were all that were required that we wouldn't be  
19 able to meet that ZOM going forward on a consistent  
20 basis.

21 And, in fact, the data shows that there were  
22 relatively fewer exceedances in the more recent time

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1 period, which I think brings up another point with  
2 regard to the need for remand if we were to prevail on  
3 any of our issues, and that is that if you look at the  
4 conclusion for both of these decisions -- and  
5 Honouliuli it's on page 99, and Sand Island it's on  
6 page 82 -- they're essentially identical, except that  
7 Honouliuli include bacteria, but otherwise, the  
8 language is exactly the same.

9 And it says that the decision to deny the  
10 waiver application, quote, is based on findings that  
11 the proposed discharge would exceed water quality  
12 standards for bacteria, chlordane, dieldrin, Whole  
13 Effluent Toxicity, and ammonia nitrogen. And then what  
14 follows are, you know the statements which Your Honors  
15 referred to before -- that it could lead to  
16 bioaccumulation and the like. It's all based on those  
17 exceedances of those standards, and it's a cumulative  
18 determination. There's no way to tell on this record  
19 if some category of those exceedances were taken out,  
20 if bacteria, for example, was taken out at Honouliuli  
21 or if --

22 JUDGE STEIN: How do you respond to the

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1 region's argument, that as long as you don't meet one  
2 of the water quality standards, the region has no  
3 discretion to grant the waiver?

4 MR. SALMONS: Well, I just think that that's  
5 not a fair characterization given that what we're  
6 talking about here are -- and again, we have a variety  
7 of arguments that address the specific ones that I  
8 haven't had a chance to get into, but even assuming  
9 that some of those exist, it's not like every  
10 exceedance automatically results in a determination:  
11 you're not going to be able to comply with the standard  
12 in the future. It's not perfection, and there's always  
13 a judgment that's --

14 JUDGE STEIN: Well, is the standard that  
15 you're not going to be able to comply in the future or  
16 that at the time of the decision you're not complying?

17 MR. SALMONS: Well, the test -- I'm sorry.  
18 The test is at the time that the waiver that you are  
19 going to be discharging under the waiver, which would  
20 be for the period of time, if it's granted, for the  
21 five-year period that you'd be existing under the  
22 waiver application. And so it is that sort of

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1 predictive judgment, and I think that what you see  
2 here -- and this is -- I think goes to a broader point.

3 Honolulu has been discharging into these  
4 waters with this effluent for decades, and there's no  
5 physical evidence of any biological harm, so now we're  
6 fighting about these standards, and we're doing it with  
7 modified standards that reflect the state water quality  
8 standard and the federal ZID, because the region has  
9 decided -- I believe her terms were that they wanted to  
10 tighten up the standards. They didn't think -- they  
11 kind of regretted granting the state's mixing zone, but  
12 that's not what this is about.

13 Under (h)(9) -- first of all, there's no  
14 reference to applicable under (h)(9). That comes in  
15 the regulations. (h)(9) only refers to the federal  
16 statutory criteria, and they have not posited any  
17 explanation as to why the state mixing zone does not  
18 fully comport with the federal criteria.

19 The last thing I would just say is that  
20 this -- all of these issues we've been discussing, we  
21 think it's very clear that they were put at issue  
22 during the comment period, and they're appropriate for

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1 a decision by this board. And again, these are  
2 significant policy changes that have been adopted by  
3 the region. It may be the case that they caught  
4 Honolulu a little bit by surprise, but they did their  
5 best to respond at the time. They said clearly that  
6 you have to apply the ZOM for everything except for BOD  
7 and suspended solids, because that's the way you've  
8 always done it and because that's what's required.  
9 In our brief, we made clear that our arguments  
10 with regard to ZID/ZOM apply to all of the pollutants  
11 except for bacteria, which includes these pollutants  
12 for which a dilution factor has been used, and with  
13 regard to that, I would point the Court to the EPA's  
14 technical support document, what my friend on the other  
15 side referred to as their bible for these things, which  
16 defines in the discussion, for example, of WET  
17 testing -- and this is in the record at S02-4184. This  
18 is from the technical support manual, and it says it  
19 walks through step by step how do you determine the  
20 dilution factor when you're doing the WET test, and  
21 it's the same for these other toxics.  
22 And it says, Step 1, dilution determination.

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1 The initial step is to determine the dilution of the  
2 effluent at the edge of the mixing zone, assuming the  
3 state allows mixing zones. So we think that is clear  
4 that part of the determination that was made to change  
5 the dilution factor reflected this change by the region  
6 that it's the federal ZID instead of the state mixing  
7 zone that has to apply.  
8 JUDGE SHEEHAN: To this -- to the point about  
9 state versus federal standards and where the standards  
10 are measured, I found it a little bit anomalous that  
11 when you argued (h)(9), it was the state standards that  
12 were supreme. They reigned, and federal standards  
13 didn't come the into the picture. When you argued your  
14 chlordane point, you seemed to say that, well, it  
15 doesn't really matter what the state standards call  
16 for; it's the federal standards that have to govern  
17 here. So can you explain the seeming shift in  
18 emphasis?  
19 MR. SALMONS: I'm happy to, Your Honor, and I  
20 think, in fact, that it's consistent. What (h)(9)  
21 requires is compliance with the federal criteria of the  
22 act, and the region -- everyone agrees that the state

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1 standards, including the state mixing zone, reflect the  
2 federal criteria. Now, with regard to chlordane, the  
3 federal chlordane standard also reflects that federal  
4 criteria. And it's certainly the case that states can  
5 adopt higher standards, you know, standards that are  
6 higher than what the federal criteria would otherwise  
7 require, but the only thing (h)(9) requires is  
8 compliance with the federal criteria.  
9 If the federal criteria made it more strict,  
10 then Honolulu would be bound by that in showing that  
11 the federal criteria was satisfied. If the federal  
12 criteria shows that the state standard doesn't have to  
13 be as strict as it is in order to comply with the  
14 criteria, then all that the statute requires  
15 satisfaction of is the criteria. Does that make sense?  
16 JUDGE SHEEHAN: That clearly -- I'm not sure.  
17 The chlordane in the state standard is stricter than in  
18 the federal standard, so the state standard was tripped  
19 up -- was not met for chlordane, as I understand it,  
20 and your argument is, well, that's okay. Let's worry  
21 about just the federal standard, which is looser, less  
22 stringent. That's the one that should govern here.

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1 Don't worry about the state standard being --  
2 MR. SALMONS: In each --  
3 JUDGE SHEEHAN: -- not met.  
4 MR. SALMONS: In each case, Your Honor, what  
5 (h)(9) in our view requires is that you show that  
6 you're going to be in compliance with the federal  
7 criteria. That's what the statute requires, and I  
8 think that everybody agrees with that. The point we  
9 make with regard to state standards they agree with,  
10 which is that those state standards are approved  
11 specifically to comply with the federal criteria.  
12 That's also true for the state mixing zones.  
13 And there's no suggestion that the reason  
14 there is a ZID is because state mixing zones are  
15 unreliable or unprotective of environmental concerns,  
16 and if the region actually felt that there was a  
17 problem with the state mixing zone, it has ample  
18 avenues of recourse to tighten it up. It doesn't need  
19 the 301(h) waiver process as sort of a roaming grant of  
20 authority to go through regardless of permits,  
21 regardless of state water quality standards, and impose  
22 a higher burden. But when -- with regard to chlordane,

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1 there is a specific federal numerical standard. That  
2 standard, too, reflects the federal criteria of the  
3 act, and so if you comply with the federal criteria --  
4 JUDGE SHEEHAN: Even if the state standard,  
5 which is local, to meet local conditions, local  
6 designated uses, is more stringent?  
7 MR. SALMONS: That is our position, because  
8 the statute requires compliance with federal criteria,  
9 and I think there's no way to suggest that the federal  
10 chlordane standard doesn't comport with the federal  
11 criteria. And again, it's not inconsistent, I would  
12 suggest, Your Honor, because if the federal standard  
13 went the other direction -- if the federal standard  
14 instead of being more lax than the state standard was  
15 more stringent than the state standard, we would still  
16 say, under (h)(9), you have to comply with the federal  
17 standard in that instance, because that is what  
18 reflects the federal criteria. That's what the statute  
19 requires. Everybody agrees that the state -- as a  
20 general matter, if there's no inconsistent federal  
21 criteria, federal standard, everybody agrees that the  
22 state approved standards and mixing zone are consistent

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1 with the federal criteria, and therefore, they're a  
2 good proxy for the federal criteria in doing the (h)(9)  
3 analysis.  
4 JUDGE REICH: Getting back to something you  
5 were starting to talk about in terms of the dilution  
6 factor -- and it seems both parties do agree that the  
7 dilution factor that was used in the region's analysis  
8 was different from the one in the permit. Counsel for  
9 the region posited a number of possible reasons why  
10 that was the case. You were, I think, starting to say  
11 that it is clear -- were your words -- that it was, at  
12 least in part, attributable to the change in the way  
13 the mixing zone was used. When you say it is clear,  
14 does that mean that it is clear on the record? Or is  
15 there something documented in the record that explains  
16 this change that would allow us to get at why this  
17 change was made?  
18 MR. SALMONS: There is discussion in -- the  
19 short answer is it's not as clear in the decisional  
20 documents as would be nice, but there is language in  
21 both final decisions that discussed the dilution factor  
22 and the change in the dilution factor, and then there

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1 is the technical support document that the region  
2 referred to, which is also in the record, as evidence  
3 of how these things were calculated, and that's what  
4 I'm referring to when it says Step 1, you know,  
5 determine the mixing zone, because that's what your  
6 target is when you're doing the rest of the -- taking  
7 the rest of the factors into account with regard to the  
8 dilution factor.  
9 And again, I think if you step back and ask,  
10 what is the point of having the dilution factor, well,  
11 for these toxics, you're measuring them at the end of  
12 the pipe essentially, and everybody understands that  
13 you have to dilute it somehow, and you have to have a  
14 target in mind, you know, how much? And there are a  
15 lot of things that go into it in terms of, you know,  
16 assumptions about the plume, assumptions about  
17 temperature, assumptions about the flow and tides, but  
18 one of the key assumptions is, is there a mixing zone,  
19 and if so, what's the edge of it, because that's what  
20 you're shooting towards, and that's the best I've been  
21 able to do to try to understand it.  
22 And what -- the point I would make is that

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1 both the region and our comments in responses and  
2 briefing have focused on ZID/ZOM as a separate issue,  
3 because it is a separate issue, but it relates, as we  
4 have tried to make clear, to all the pollutants, except  
5 for bacteria. We're not making it with regard to  
6 bacteria. We have the disinfection argument there.  
7 And it at a minimum, I think it's -- from the technical  
8 documents clear that's part of how you determine the  
9 dilution factor. And if it's not clear whether it  
10 applies or not, then I think that would be an  
11 appropriate thing to take up on remand as well.  
12 JUDGE STEIN: Thanks. I just want to make  
13 one comment in closing and that is that we've heard a  
14 lot of argument today back and forth about issues that  
15 were and weren't preserved, and we've obviously asked a  
16 number of questions about the issues raised in the  
17 briefs, and the board, of course, has made no  
18 determination on the issue preservation question. And  
19 our asking these questions imply that we're leaning in  
20 one direction or another, but we wanted to get a full  
21 explanation of the arguments on the merits in the event  
22 that we reach the merits on all of the issues that have

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1 been raised.

2 I also wanted to commend the parties on the  
3 caliber of their briefs and on the caliber of their  
4 argument. I thought that the briefs were very helpful,  
5 lengthy, but they enabled us to understand the issues,  
6 and we appreciate the lengthy argument this afternoon,  
7 and at this point we stand adjourned. Thank you.

8 (Whereupon, the proceedings were  
9 concluded at 5:00 p.m.)

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1 CERTIFICATE OF NOTARY PUBLIC  
2 I, ERICK M. THACKER, the officer before whom the  
3 foregoing oral argument was taken, do hereby certify  
4 that the testimony appearing in the foregoing oral  
5 argument was taken by me in stenotype and thereafter  
6 reduced to typewriting by me; that said transcription  
7 is a true record of the proceedings; that I am neither  
8 counsel for, related to, nor employed by any of the  
9 parties to the action in which this was taken; and,  
10 further, that I am not a relative or employee of any  
11 counsel or attorney employed by the parties hereto, nor  
12 financially or otherwise interested in the outcome of  
13 this action.

14  
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21  
22

ERICK M. THACKER  
Notary Public in and for the  
District of Columbia

My commission expires:  
June 14, 2014

27 (Pages 102 to 103)

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10 further, that I am not a relative or employee of any  
11 counsel or attorney employed by the parties hereto, nor  
12 financially or otherwise interested in the outcome of  
13 this action.

14   
15 ERICK M. THACKER

16 Notary Public in and for the  
17 District of Columbia

18  
19  
20  
21 My commission expires:

22 June 14, 2014

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