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

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

ORDER DENYING STAY OF PROCEEDINGS

On July 22, 2010, the City and County of Honolulu ("CCH") filed a request to stay proceedings in the above-captioned case, pending approval and entry of a consent decree in long-standing litigation before the United States District Court for the District of Hawaii. That litigation has recently led to a proposed settlement that includes conditions directing CCH to install, over a period of years, secondary treatment technology at its Honouliuli and Sand Island Wastewater Treatment Plants. Another condition specifies that, upon final entry of the consent decree, CCH will withdraw its petition in the matter pending before the Environmental Appeals Board ("Board"), denoted NPDES Appeal No. 09-01, which challenges the U.S. Environmental Protection Agency's denial of renewed waivers of secondary treatment at CCH's two plants.

At this writing, CCH's petition before the Board is still a live matter, because CCH has not yet moved to withdraw it. Both CCH and EPA Region 9, the permitting authority, have advised the Board that the proposed District of Hawaii consent decree must go first through a public review process and thereafter be approved by a federal judge before the settlement can become final. At least theoretically, this process could upend part or all of the settlement

agreement. Both parties recognize a risk that a Board decision could pose to the pending settlement but disagree as to the extent of that risk.

Because of the risk, CCH seeks a stay. The Region does not oppose a stay but states that it would "value" issuance of a decision, for three reasons: (1) entry of a final consent decree remains uncertain; (2) NPDES Appeal No. 09-01 is still a "live and genuine controversy" between CCH and the Region; and (3) all participants have expended significant resources litigating the appeal, and its resolution could affect Agency decision making in other similar types of cases.[1] Supp. to Joint Status Rep. at 2, 4 (filed July 16, 2010). CCH argues to the contrary that "[a] decision in this case, if rendered during the Consent Decree approval process, needlessly risks an irreparable injury to CCH." Req. for Stay of Proc. at 2 (filed July 22, 2010).

The Board questions CCH's contention. If the risks were so significant, surely CCH would have notified the Board of the nearness of settlement and sought a stay long before now, and surely CCH would have done so on its own motion rather than in response to the Board's inquiries about press reports of a settlement.

After oral argument in NPDES Appeal No. 09-01 on November 19, 2009, the Board proceeded with internal deliberations on the many complex issues presented in the appeal. By June 2010, the Board found itself nearing release of a decision in the case. At the end of June,

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[1] The Region explains that, whichever way the Board rules on CCH's petition, adjudication of issues presented will provide "useful direction" to the Region and other regions similarly situated, all of whom must continue administering CWA section 301(h) requirements. Supp. to Joint Status Rep. at 4. The Region points out that seven facilities presently operating pursuant to CWA § 301(h) waivers are situated in Region 9. *Id.* at 4 n.5; Status Conf. Tr. at 8-9. Two of these, operated by the Guam Water Works Authority, are already the subject of appeals to the Board. Two others, in American Samoa, recently received tentative denial decisions from the Region and could be the subjects of appeal. Status Conf. Tr. at 8-9.

however, the Board independently learned, through these press reports, that CCH, Region 9, and other parties had reached a tentative settlement of federal court litigation over CCH's sewage treatment system. The Board's orders directing the filing of a joint status report and scheduling a status conference, for July 19, 2010, soon followed.

In a status report filed July 6, 2010, CCH and the Region expressly declined to discuss the specific terms of the settlement, noting that at that time the terms were both tentative and confidential. The parties stated that if the settlement terms were made public prior to the Board's July 19th status conference, they would be prepared to discuss the impacts the terms might have on NPDES Appeal No. 09-01. Joint Status Rep. at 2-3 (filed July 6, 2010). Otherwise, apparently, they would not. Following the Board's issuance of a further order on July 12th, expressing the Board's displeasure with the lack of meaningful information provided to the Board thus far, on July 16, 2010, the Region filed a unilateral supplement to the joint status report. In this document, the Region informed the Board that the settlement terms had been made public on July 14, 2010; included a copy of relevant pages of the proposed consent decree; and provided reasons why it would find a Board decision instructive and helpful to its administration of the CWA section 301(h) program. *See* Supp. to Joint Status Rep. CCH remained silent during this time.

At the status conference on July 19, 2010, CCH explained the delicate balancing of interests that have gone into this settlement, noting that it would not want to risk anything at this juncture that might jeopardize the agreement.[2] Status Conf. Tr. at 14-17. CCH also countered

[2] CCH apparently never considers that the Board's analysis of the fundamental legal issues might actually be of value to reviewers and the supervisory court in their consideration of the proposed consent decree.

the Region's three reasons for valuing a Board decision, claiming that: (1) the uncertainty surrounding the proposed consent decree would needlessly be increased by the injection of a Board decision in NPDES Appeal No. 09-01; (2) the Board appeal is no longer a "live and genuine controversy" because of the settlement in principle of the federal litigation, which, once finalized, will moot the Board appeal; and (3) all litigation that settles at this stage involves much work that is seemingly fruitless, but that reason by itself cannot provide a legitimate basis for risking the failure of this settlement agreement. *Id.* at 11-14. Finally, CCH seemed to indicate that, rather than fearing the "irreparable injury" it now alleges in its request for a stay, it was "largely an oversight" that CCH had not earlier informed the Board of the ongoing settlement negotiations. *Id.* at 20. Three days after the status conference, CCH filed its formal request for stay.

Upon careful consideration of all competing factors, including the alleged risk a Board decision might pose to the parties' pending settlement and the value a Board decision could have in this complex area of law,[3] the Board hereby **DENIES** the request for a stay of proceedings in NPDES Appeal No. 09-01. Barring unanticipated circumstances, the Board will see its nearly completed decision making process through to completion. The Board is not insensitive, however, to CCH's concern about possibly having to file a petition to preserve appeal rights in federal court, should the Board deny review in this case. *See* Status Conf. Tr. at 19, 21. In light of this concern, on the day the Board renders a ruling in this appeal, it expects to stay the

[3] As alluded to in notes 1-2, *supra*, there is a paucity of law in the CWA § 301(h) context. To date, the Board has decided only one other such case. *See In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97 (EAB 2005). At present, the CCH appeal and appeals of Region 9's recent decisions for the Guam Water Works Authority facilities are pending on the Board's docket, and similar types of appeals may be forthcoming.

effective date of the ruling until such time as the District of Hawaii settlement is either finally entered or disapproved, or until it otherwise becomes clear that it is no longer appropriate to continue the stay of the effective date of the Board's decision. The Board's ruling on NPDES Appeal No. 09-01 – be it a denial of review, a decision on the merits without remand, a remand, or a mixture of these outcomes – will not constitute notice of "final agency action" under 40 C.F.R. § 124.19(f)(1) until such time as the Board explicitly, by order, lifts its stay of the effective date. *Cf. In re Envtl. Disposal Sys., Inc.*, UIC Appeal No. 07-03, at 8-9 n.4 (EAB Aug. 25, 2008) (Order Denying Motion for Reconsideration and Granting Stay).

To that end, the Board requests that the Region and CCH keep it apprised, on a quarterly basis beginning October 1, 2010 (and continuing January 1, 2011, April 1, 2011, July 1, 2011, October 1, 2011, and so on as needed), as to the ongoing status of the proceedings relating to approval for the consent decree.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: August 16, 2010

By: Kathie A. Stein

Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Denying Stay of Proceedings** in the matter of *City & County of Honolulu*, NPDES Appeal No. 09-01, were sent to the following persons in the manner indicated:

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Annette Duncan
Secretary