

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

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

EPA REGION 9 SUPPLEMENT TO JULY 6, 2010 JOINT STATUS REPORT

The United States Environmental Protection Agency, Region 9 (“Region 9” or “the Region”), respectfully submits this Supplement to the July 6, 2010 Joint Status Report in response to the July 12, 2010 Order Regarding Status Conference (“Order”). In this Order, the Board directed the parties to “provide the Board with meaningful information to assist the Board in its determination of whether or not to stay this case because of the prospects or pendency of settlement” that addresses secondary treatment for the wastewater treatment systems owned and operated by the City and Counsel of Honolulu (“CCH”).

On July 14, 2010, the City Council approved the final settlement, and its terms have now been made public. Attached hereto are relevant excerpts from the unsigned Consent Decree (July 14, 2010 version). [Attachment A.¹] Paragraphs 30, 31, 95 and 103 provide meaningful information to assist the Board in its determination of whether to stay the proceeding. Paragraphs 30 and 31 provide that CCH shall “withdraw any pending appeal” of Region 9’s

¹ A copy of the entire unsigned Consent Decree is being separately filed with the Board.

denial of CCH's applications for renewal of its Clean Water Act ("CWA") section 301(h) modified permits for the Honouliuli and Sand Island wastewater treatment plants, respectively, "no later than 30 Days after the Effective Date of the Consent Decree" (defined in Paragraph 95 as the date the Court enters the Decree), and that CCH will upgrade these plants to provide secondary treatment. Paragraph 103 provides for a period of public comment on the Consent Decree after it is lodged, of not less than thirty days (in accordance with 28 C.F.R. §50.7).

The Region appreciates the Board's investment of resources in its consideration to date of the complex issues that are before it in this matter, and does not wish to have the Board expend further resources unnecessarily. Therefore, the Region would not oppose a stay in this matter in order to conserve the Board's limited resources and prioritize other matters in its pending docket.² However, if the Board were very close to finalizing a decision in this matter prior to learning of the potential settlement, then the Region would value issuance of that decision for three reasons: entry of the final Consent Decree remains uncertain; the pendency of CCH's un-withdrawn petition represents a live and genuine controversy between the Region and CCH; and the Region, presumably like the Board, has expended significant resources on the matter contested and resolution of the Petition may affect decision-making on another pending petition.

First, as laid out in the Joint Status Report filed July 6, 2010 in this matter, the Consent Decree must be approved and executed by all the parties, which include the United States Department of Justice, the State of Hawai'i, and a group of non-governmental environmental

² One of the other matters directly relates to CCH's Petition. Parties other than CCH have filed a separate Petition with the Board challenging the Region's denial of CCH's 301(h) applications. The Petitioners *In the Matter of the City and County of Honolulu Sand Island Wastewater Treatment Plant and Honouliuli Wastewater Treatment Plant*, NPDES Appeal No. 09-07 (the "Moreland Petition"), James K. Honke, Hans J. Krock, James S. Kumagai, and Victor D. Moreland are not parties to the settlement approved by the City Council on July 14, 2010. Withdrawal of CCH's Petition would not render the Moreland Petition moot.

organizations. Thereafter, the Consent Decree will be lodged with the Court, after which it would be made available for public comment as described above. Once public comments have been received, the United States will consider the comments. If the United States believes that the comments do not raise any issues rendering the Consent Decree inappropriate, inadequate or improper, the Department of Justice will file with the Court a motion for entry of the Consent Decree, along with the Government's response to any comments received. The Court would then consider the motion, any comments received, and the United States' responses thereto and will decide, in its discretion, whether or not to enter the Decree.³ In some instances, where a potential Consent Decree is particularly controversial, a Court may schedule a hearing on the Motion for Entry.

In the perhaps unlikely event that the public comment period were to raise new facts or circumstances that the governments had not considered in developing the Consent Decree, the United States and the State of Hawai'i have reserved the right to "withdraw or withhold consent if comments regarding this Consent Decree disclose facts or considerations indicating that this Consent Decree is inappropriate, improper or inadequate." Attachment A, Paragraph 103. The Region is aware that the tentative settlement is not without controversy⁴ and does not take for granted that the parties are on a smooth path to entry of the Consent Decree and CCH's subsequent termination of any appeal of the Region's 301(h) denials. Because there is a degree of uncertainty as to whether the Consent Decree will take effect, the Region believes that it

³ Based on past experience, Region 9 estimates that the process to get the Consent Decree entered likely will last between three to four months.

⁴ The Moreland Petition itself is evidence of the controversy concerning the need for secondary treatment, and secondary treatment is only one aspect of the comprehensive tentative settlement. Furthermore, one of the Moreland Petitioners, Hans Krock, appeared at the City Council hearing on the settlement and voiced opposition to the settlement. It is anticipated that Mr. Krock and others will avail themselves of the opportunity to comment on the Consent Decree during the public comment period to further express their opposition.

would be appropriate for the Board to issue a decision promptly if doing so would not require significant additional work, rather than to stay this proceeding pending entry of the Consent Decree.

Second, the Region takes seriously CCH's right to due process in having its appeal considered without interruption or delay based on the uncertainties of any settlement in principle being finalized. CCH did not voluntarily withdraw the Petition after review of the Region's response filings or after oral argument and has not done so to date. Thus, a live and genuine controversy over Region 9's decision-making in both Petitions remains pending before the Board.

Third, the Region invested substantial resources-- primarily technical and legal staff time and effort --over a number of years to respond to CCH's applications for renewal of the CWA Section 301(h) modified permits. Because the issues presented by the applications were complicated, both technically and legally, the resources required were significant. Regardless of the outcome of the Board's decision-making on the issues presented, whether the Board denies review, remands issues to the Region, or some combination of the two, adjudication of issues presented will provide useful direction to the Region⁵, which continues to administer CWA section 301(h) requirements, as well as other Regions⁶ similarly situated. Petitioners aggrieved by decisions of the Board retain a right of judicial appeal (which would be waived if the Consent

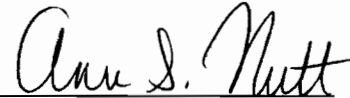
⁵ Besides the two WWTPS that are the subject of this appeal and the two WWTPs that are the subject of consolidated appeals *in the Matter of Guam Water Works Authority's Northern District Sewage Treatment Plant* and *in the Matter of Guam Water Works Authority's Northern District Sewage Treatment Plant*, NPDES Appeal Nos. 09-15 and 09-16, there are five other WWTPs in Region 9 that currently have 301(h) waivers from secondary treatment.

⁶ The positions taken by the Region before the Board were closely coordinated with the Office of General Counsel for, among other things, the purposes of assuring consistency with the direction of the national program.

Decree is entered); Regions do not. Region 9 is therefore prepared to abide by any decision of the Board in this Petition, which challenges Regional decision-making after a considerable investment in resources.

Respectfully submitted,

July 6, 2010



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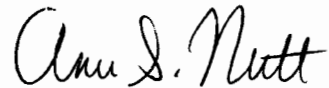
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the EPA Region 9 Supplement to July 6, 2010 Joint Status Report and Attachment thereto was filed electronically with the Environmental Appeals Board and a copy was e-mailed to:

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July 16, 2010



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,
et. al.,
Plaintiffs,

v.

CITY AND COUNTY OF
HONOLULU,

Defendant.

Civil No. 94-00765 DAE-KSC

CONSENT DECREE

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WHEREAS:

Plaintiff, the United States of America, by the authority of the Attorney General of the United States and through its undersigned counsel, acting at the request of and on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), and Plaintiff State of Hawaii, acting at the request of and on behalf of the State of Hawaii Department of Health (“DOH”) (collectively, the United States and the State of Hawaii are referred to herein as the “Governments”), have filed a Supplemental Complaint in this action against Defendant City and County of Honolulu (“CCH”), seeking civil penalties and injunctive relief pursuant to the Clean Water Act (“CWA” or the “Act”) and State law. The Supplemental Complaint alleges that CCH is violating the Act and State law by discharging untreated sewage from its Wastewater Collection System without a permit. The Supplemental Complaint further alleges that CCH is violating the Act and State law by discharging sewage from its Sand Island and Honouliuli Wastewater Treatment Plants in violation of National Pollutant Discharge Elimination System (“NPDES”) permits regulating discharges from these facilities.

CCH, a county in the State of Hawaii, owns and operates a publicly owned treatment works (“POTW”) that collects, treats, and disposes of sanitary sewage for a large portion of the island of Oahu within the District of Hawaii. The Supplemental Complaint in this action addresses only violations associated with the Wastewater Collection System and two of the POTW’s Wastewater Treatment Plants (Sand Island and Honouliuli).

CCH does not admit any liability to the United States or the State for the transactions or occurrences alleged in the Supplemental Complaint.

On May 15, 1995, the Court entered a Consent Decree requiring CCH to undertake certain steps to remedy CWA violations alleged in the original Complaint filed in this action by the United States and the State of Hawaii on

October 3, 1994 (hereinafter, “the 1994 Complaint” and “the 1995 Consent Decree”). The 1995 Consent Decree required CCH to undertake specific actions to improve conditions in its Wastewater Collection System, through, among other things, implementing comprehensive collection system maintenance and capacity programs, and to undertake two Supplemental Environmental Projects (“SEPs”).

On May 24, 2007, Sierra Club, Hawai’i Chapter, Hawai’i’s Thousand Friends, and Our Children’s Earth Foundation (collectively, “Intervenors”) intervened in this action, subject to certain conditions established by this Court and described in May 4, 2007 Findings and Recommendations, entered by this Court on May 24, 2007.

On July 29, 2004, Intervenors filed a separate complaint under the citizen suit provision of the CWA, 33 U.S.C. § 1365, also based on spills from CCH’s Wastewater Collection System. Intervenors’ Complaint also included claims based on alleged violations of NPDES permits for CCH’s Sand Island and Honouliuli Wastewater Treatment Plants (“WWTPs”). Intervenors amended their complaint on January 10, 2005 (as amended, “Intervenors’ 2004 Complaint”).

In their continuing oversight over CCH’s Wastewater Collection System and Wastewater Treatment programs, the United States and the State filed a complaint against CCH on May 8, 2007, asserting a single CWA claim for injunctive relief as a result of a spill referred to as the Beachwalk Force Main Spill (the “2007 Complaint”). Concurrently with the filing of the 2007 Complaint, the United States and the State lodged a Stipulated Order to resolve the claim (the “2007 Stipulated Order”).

The Court entered the 2007 Stipulated Order on October 10, 2007. Intervenors also intervened in that action pursuant to a June 28, 2007 Findings and Recommendations, entered by this Court on July 26, 2007. The Court allowed intervention subject to certain conditions established by and described in a November 21, 2007 Findings and Recommendations, entered by this Court on

December 13, 2007.

The United States, the State, CCH, and the Intervenors (collectively, the “Parties”) have agreed that this Consent Decree will replace the 1995 Consent Decree and the 2007 Stipulated Order, and will terminate Intervenors’ 2004 Complaint, the 2007 Complaint, and all outstanding litigation and administrative compliance orders concerning CCH’s Wastewater Treatment Plants and Wastewater Collection System.

Intervenors agree to dismiss with prejudice their claims in intervention in this action and in United States of America, et al., v. City and County of Honolulu, Civ. No. 07-00235 DAE-KSC as well as their claims as plaintiffs in Sierra Club, et al., v. City and County of Honolulu, Civ. No. 04-00463 DAE-BMK (“2004 Case”) in consideration of the agreement and future actions required of CCH, which are reflected in the Memorandum of Understanding pertaining to SEPs in the 2004 Case, and in this Consent Decree. So as not to impede settlement, Intervenors’ claims for attorneys fees and costs are reserved until after the lodging of this Consent Decree, and will be resolved by Magistrate Judge Kevin Chang of this Court in accordance with applicable principles of law, provided that Intervenors bring a motion for such fees and costs within the time and otherwise in accordance with the Local Rules.

Pursuant to the terms of this Consent Decree, CCH will withdraw its appeals of EPA’s decisions to deny renewal of NPDES permits for the Sand Island WWTP and the Honouliuli WWTP that had previously been issued pursuant to CWA section 301(h). As a result, the State of Hawaii will have responsibility for issuing NPDES permits for these WWTPs that require compliance with effluent limitations consistent with secondary treatment requirements in 40 C.F.R. Part 133. Discharges from these WWTPs will not comply with secondary treatment effluent limitations [specifically, discharge parameters for total suspended solids (“TSS”) and biochemical oxygen demand (5-day) (“BOD5”)] until CCH Completes

Construction of the facilities required to be constructed pursuant to Paragraphs 30 and 31. The operation of the provisions set forth in Section VII (Compliance Requirements: Wastewater Treatment Plants) of this Decree is intended to resolve anticipated noncompliance with secondary treatment effluent limitations for TSS and BOD₅ and resolve any civil and administrative claims for failing to meet secondary treatment effluent limitations for TSS and BOD₅ until the final compliance milestones set pursuant to Paragraphs 30 and 31 for the Honouliuli and Sand Island WWTPs.

The Parties seek to avoid further litigation and to work cooperatively on issues relating to CCH's Wastewater Treatment Plants and Wastewater Collection System by entering into this Consent Decree as set forth herein. Nothing in this Consent Decree shall be deemed an admission by any party of any fact or of any liability with respect to any issue addressed in the Consent Decree.

The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid further litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and 1367, and sections 309(b) and 505(a) of the Act, 33 U.S.C. §§ 1319(b), 1365(a), and the Court has jurisdiction over the Parties. Venue lies in this District pursuant to sections 309(b) and 505(c) of the Act, 33 U.S.C. §§ 1319(b), 1365(c), and 28 U.S.C. §§ 1391(b) and 1395(a) because this is the District in which CCH is located. For purposes of this Decree, or any action to enforce this Decree, Defendant consents to the Court's jurisdiction over this Decree and any such action and over Defendant and consents to venue in

the following: spill response procedures for appropriate staff; a requirement that each spill report identify (by asset number) a sewer pipe that causes a spill; a requirement that CCH report and issue a press release following a spill that complies with the Hawaii Administrative Rules; and spill volume estimating procedures, including start time based on receipt of notification or information from witnesses, visual estimates for small spills, analysis of duration and flow, on-site measurement of contained volume, and, to the extent appropriate, an engineering evaluation.

VII. COMPLIANCE REQUIREMENTS:
WASTEWATER TREATMENT PLANTS

30. **Honouliuli Wastewater Treatment Plant.** No later than 30 Days after the Effective Date of the Consent Decree, CCH shall withdraw any pending appeals of EPA's denial of its application for a permit pursuant to section 301(h) of the CWA for the Honouliuli WWTP. CCH shall Complete Construction of facilities necessary to comply with secondary treatment standards of the Act, as defined by 40 C.F.R. Part 133, for wastewater discharges from the Honouliuli WWTP by the compliance milestone of June 1, 2024, and shall meet the following interim compliance milestones.

a. By January 1, 2017, CCH shall execute a design contract and issue a notice to proceed with the design of all secondary treatment process facilities needed to comply with secondary treatment standards for wastewater discharges from the Honouliuli WWTP.

b. By January 1, 2019, CCH shall execute a construction contract (or contracts) and issue a notice (or notices) to proceed with construction of all secondary treatment process facilities necessary to comply with secondary treatment standards for wastewater discharges from the Honouliuli WWTP.

31. **Sand Island Wastewater Treatment Plant.** No later than 30 Days after the Effective Date of the Consent Decree, CCH shall withdraw any pending

appeals of EPA's denial of its application for a permit pursuant to section 301(h) of the CWA for the Sand Island WWTP. Unless the schedule is extended pursuant to Paragraph 31.d., CCH shall Complete Construction of facilities necessary to comply with secondary treatment standards of the Act, as defined by 40 C.F.R. Part 133, for wastewater discharges from the Sand Island WWTP by the compliance milestone of December 31, 2035, in accordance with the schedule set forth in subparagraphs a.-c.

a. As an interim compliance milestone, by January 1, 2019, CCH shall execute a design contract and issue a notice to proceed with the design of treatment process facilities needed to comply with secondary treatment standards for wastewater discharges from the Sand Island WWTP. The scope of the design contract may reflect phasing of necessary upgrades to the Sand Island WWTP, and may not include the detailed designs of all process facilities necessary to comply with secondary treatment standards.

b. By January 1, 2022, CCH shall execute a construction contract and issue a notice to proceed with construction of facilities that are part of its design to upgrade the Sand Island WWTP, in relation to compliance with secondary treatment standards. The scope of the construction contract may reflect phasing of necessary upgrades to the Sand Island WWTP, and may not include all process facilities necessary to comply with secondary treatment standards.

c. If the notice to proceed required by subparagraph b. did not authorize construction of all secondary treatment process facilities necessary to comply with secondary treatment standards for wastewater discharges from the Sand Island WWTP, as an interim compliance milestone, by January 1, 2030, CCH shall execute a construction contract (or contracts) and issue a notice (or notices) to proceed with construction of all secondary treatment process facilities necessary to comply with secondary treatment standards for wastewater discharges from the Sand Island WWTP.

the submission may request delivery by other means. Such a request does not affect the timeliness of the original submission.

XVII. EFFECTIVE DATE

95. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

XVIII. RETENTION OF JURISDICTION

96. The Court shall retain jurisdiction over this case until termination of this Consent Decree for the purpose of resolving disputes arising under this Consent Decree pursuant to Section XII (Dispute Resolution), entering orders modifying this Consent Decree pursuant to Section XIX (Modification), or effectuating or enforcing compliance with the terms of this Consent Decree.

XIX. MODIFICATION

97. The terms of this Consent Decree, including compliance schedules, may be modified, as provided in this Paragraph, by a subsequent written agreement signed by the United States, the State, and CCH. Time extensions and modifications to proposed project scopes shall not be construed as material modifications to this Consent Decree. Any non-material modifications to the Consent Decree may be made, without Court approval, by a written agreement signed by the United States, the State, and CCH, and shall be effective upon service to all the Parties; provided, however, the Intervenors may raise the issue of the materiality of the modification by invoking dispute resolution pursuant to Section XII (Dispute Resolution) of this Decree. When a modification constitutes a material modification to any term of this Consent Decree, the United States, the State, and CCH shall file a joint motion to modify the Consent Decree with the Court and shall provide notice to all Parties. The Intervenors may oppose a motion for material modification by filing with the Court and serving on all Parties a statement of position regarding any material modification. The Court shall apply the standard set forth in Paragraph 73 in deciding the dispute. Any material modification of this Consent Decree shall be effective upon approval by the Court.

may move the Court for approval of the Report. If CCH moves the Court, the standard set forth in Paragraph 72 shall apply. If the Court approves the Report, all obligations of this Consent Decree as to the Treatment Plant that is the subject of the Report shall terminate.

101. After the certifications submitted by CCH pursuant to Paragraph 99 and the Reports submitted pursuant to Paragraph 100 have been approved by either: (i) the Governments or (ii) the Court, CCH may submit a Request for Termination to the Parties. After receipt of the Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether CCH has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States, after consultation with the State and the Intervenors, agrees that the Consent Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Consent Decree.

102. If the United States, after consultation with the State and the Intervenors, does not agree that this Consent Decree may be terminated, CCH may invoke Dispute Resolution under Section XII of this Decree. However, CCH shall not seek Dispute Resolution under Section XII of any dispute regarding termination until 60 Days after service of its Request for Termination.

XXI. PUBLIC PARTICIPATION

103. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with 28 C.F.R. § 50.7. CCH shall also publish notice of the lodging and comment period, in a form approved by DOH and in a major Honolulu newspaper(s) as approved by DOH. CCH shall provide DOH with an affidavit indicating when and where the notice was published. The United States and the State reserve the right to withdraw or withhold consent if comments regarding this Consent Decree disclose facts or considerations indicating that this Consent Decree is inappropriate, improper, or inadequate. CCH and the Intervenors consent to entry of this Consent

Decree without further notice.

XXII. SIGNATORIES/SERVICE

104. Each undersigned representative of CCH, the State, the Intervenors, and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

105. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis.

106. Intervenors and CCH agree not to oppose entry of this Consent Decree by the Court or to challenge any provision of this Consent Decree, unless the United States notifies CCH in writing that it no longer supports entry of this Consent Decree.

XXIII. INTEGRATION

107. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree, and this Consent Decree supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than Deliverables that are subsequently submitted pursuant to this Consent Decree, no other document and no other representation, inducement, agreement, understanding, or promise constitutes any part of this Consent Decree or the settlement it represents, nor shall they be used in construing the terms of this Consent Decree.

XXIV. APPENDICES

108. The following appendices are attached to and part of this Consent Decree:

“Appendix A” is the Small Force Mains List;

“Appendix B” is the Large Force Mains List;

“Appendix C” is the Site-Specific Spill Contingency Plan;