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BEFORE THE ENVIRONMENTAL APPEALS BOARD

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ENVIR. APPEALS BOARD

WASHINGTON, D.C.

ORDER SCHEDULING STATUS CONFERENCE

IN THE MATTER OF:

CITY AND COUNTY OF HONOLULU, : NPDES Appeal No.

SAND ISLAND WASTEWATER : 09-01

TREATMENT PLANT :

HONOULIULI WATEWATER :

TREATMENT PLANT :

NPDES Permit No. :

HI0020117 :

NPDES Permit No. :

HI0020877 :

Monday,
July 19, 2010

Administrative Courtroom
Room 1152
EPA East Building
1201 Constitution Avenue, NW
Washington, DC

The above-entitled matter came on
for hearing, pursuant to notice, at 3:00 p.m.

BEFORE:

THE HONORABLE KATHIE A. STEIN,
ENVIRONMENTAL APPEALS JUDGE

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ALSO PRESENT:

Michelle Wenisch, Board Counsel
Eurika Durr, Clerk of the Board

T-A-B-L-E O-F C-O-N-T-E-N-T-S

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P-R-O-C-E-E-D-I-N-G-S

3:00 P.M.

MS. DURR: All right, the Board of the United States Environmental Protection Agency is now in session for a status conference in re: City and County of Honolulu, permit numbers HI0020117 and HI0020877, NPDES Appeal number 09-01. Honorable Judge Kathie Stein presiding. Please turn off all cell phones, and no recording devices allowed. You may be seated.

JUDGE STEIN: Good morning, counsel. With me on the bench here is Michelle Wenisch, who is one of the senior counsel for the board, who is assisting in this particular matter.

And if we could take a few moments, perhaps starting here and going out to Region IX in Hawaii, just so that I am familiar with everybody who's present, and who they are representing. Why don't we start with the City and County of Honolulu?

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1 MR. SALMONS: Yes, Your Honor.
2 Would you like me to stand, or just --

3 JUDGE STEIN: No, that's fine.

4 MR. SALMONS: Okay. I am David
5 Salmons, for the City and County of Honolulu.
6 With me is my associate Bryan Killian.

7 JUDGE STEIN: Okay.

8 MR. SALMONS: And then we have on
9 teleconference from Honolulu, I believe,
10 Kathleen Kelly, from the City and County of
11 Honolulu.

12 JUDGE STEIN: Okay.

13 MR. SWEENEY: Stephen Sweeney,
14 from the Office of General Counsel. With me
15 at counsel's table is Lee Schroer, and in
16 Region IX, presenting on behalf of the Region
17 today is Ann Nutt.

18 JUDGE STEIN: Thank you,
19 everybody. I appreciate your appearance here,
20 and I appreciate also both the joint status
21 report, and the supplemental status report
22 that Region IX filed on Friday, I believe.

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1 Has everybody had an opportunity to see that
2 supplemental status report?

3 MR. SALMONS: Yes, Your Honor.

4 JUDGE STEIN: But the supplemental
5 status report that Region IX provided was very
6 helpful to the Board in having a sense of what
7 the board should be thinking about in this
8 case. And I want to give each side an
9 opportunity to let us know their views,
10 particularly the City and County of Honolulu.

11 I think this is probably clear
12 from the orders that we've issued in this
13 case, the Board has invested a considerable
14 amount of time in this matter. It's always
15 hard to predict at what point a decision will
16 emanate from the Board, since there's
17 obviously a panel of three, but I think it's
18 fair to say that we're not at the beginning of
19 our review of this matter.

20 And obviously that's why it was so
21 important to us to try to figure out where are
22 we, is this matter being settled, is there

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1 nonethelesss a value to our proceeding?

2 So why don't we start first with
3 hearing any additional views from the Agency
4 and Region IX, and then we'll hear from the
5 City and County of Honolulu.

6 MS. NUTT: Good morning, Your
7 Honor. This is Ann Nutt. I am here for the
8 Region. And I think we pretty much laid out
9 in our supplemental status report to the joint
10 status report what our position is. I think,
11 basically, we would say that we appreciate
12 that this is the Board's decision to make, and
13 it's not ours.

14 We really tried to provide
15 information that would assist the Board in
16 making a decision as to -- deciding whether or
17 not to issue its decision. We don't oppose
18 the stay, particularly if a decision was not
19 really on the verge of being ready to be
20 issued.

21 So, that being said, we would
22 value the issuance of a decision, because

1 there are some uncertainties about a
2 settlement going final. We don't want to
3 overplay the uncertainties, because we intend
4 to make every effort to ensure that it does go
5 through, it's entered by the judge and becomes
6 final, in which case a decision in this matter
7 would not have been necessary.

8 But until it happens, we believe
9 that the controversy is still alive on the
10 permit appeal, and frankly we would benefit
11 from the decision, because it would provide
12 instruction on how the Board makes its
13 decision on certain issues that are at issue
14 in this case that could affect other 301(h)
15 cases.

16 It would be instructive to know
17 how the Board would rule on several of the
18 issues presented in this appeal. We have, as
19 you know, two other 301(h) decisions on appeal
20 before the Board now, in Guam. There are five
21 other 301(h) modified permits in effect now in
22 the region, and two of them are in American

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1 Samoa. And the Region has issued tentative
2 decisions to deny in those. So, I think
3 that's pretty much where we are in the Region.

4 JUDGE STEIN: Well, I really want
5 to tell you that the Board very much
6 appreciated the supplemental status report,
7 because it provided us a lot of information
8 that we didn't have, that helps put this
9 matter in context for the Board. So we
10 appreciate that.

11 Is there anything else, Mr.
12 Sweeney, that you'd like to add?

13 MR. SWEENEY: Nothing further to
14 add, Your Honor.

15 JUDGE STEIN: Okay. Counsel?

16 MR. SALMONS: Yes, Your Honor.
17 Thank you. I do think that the City and
18 County of Honolulu has a different perspective
19 in terms of what the proper course of action
20 is for the Board at this stage. We feel like
21 the best course of action, the most
22 appropriate and the most reasonable -- and we

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1 certainly respect the fact that the Board has
2 put a lot of effort into this, and understand
3 the desire to, perhaps, see it to a
4 conclusion.

5 But we do think that, given that
6 the parties have reached an agreement in
7 terms, that the City Council has approved that
8 agreement, and that there are remaining steps
9 that we are concerned not be complicated in
10 any way through the potential publication of
11 an opinion.

12 We think the best course of action
13 at this point is to stay the proceedings, wait
14 to issue any decision in this case, until we
15 know for sure whether the settlement becomes
16 final.

17 If it does, then the case is over
18 and pursuant to the agreement we will move to
19 dismiss our appeal. If it doesn't, then of
20 course the Board should issue any decision
21 that it has. And I guess I would just briefly
22 address the three reasons that Region IX

1 propounds as to why the Board should issue its
2 decision. And I'll take them one at a time.

3 The first is, they say that the
4 entry of the final consent decree remains
5 uncertain. And while I think that is
6 certainly true, it's that uncertainty that
7 causes us to prefer that the Board not issue
8 its decision, because we don't want to do
9 anything that will increase the uncertainty.

10 And to the extent there is
11 uncertainty, I think the proper course is to
12 wait and see. If it plays out so that there,
13 in fact, is no consent decree, then the Board
14 can issue its decision at that time, and the
15 six-month delay will really -- or whatever the
16 delay may be, the weeks or months that it will
17 be, would have not done anything to frustrate
18 the effort the Board has put into the case
19 already.

20 If, in fact, the case has settled,
21 and that becomes final, then there is no need
22 for the Board's opinion, and so the

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1 uncertainty, in and of itself, is not a reason
2 to issue an opinion now. If anything, I think
3 the uncertainty supports waiting and seeing
4 whether there's a need for an opinion.

5 The second point that they raise
6 is that there is still a live and genuine
7 controversy between the Region and the City
8 and County of Honolulu. And I guess I
9 disagree with that as a substantive matter,
10 there clearly is not. We have reached an
11 agreement in principle in terms of the issues
12 related to this proceeding.

13 While it is a technical matter
14 that it is not final yet, there is not an
15 ongoing disagreement or dispute between the
16 parties as to how they should act going
17 forward. We, in fact, have reached that
18 agreement. And we just are waiting for that
19 to become final.

20 And then the third reason is this
21 point about the amount of work that's been
22 done and the impact on future cases, which

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1 again, while we certainly appreciate that a
2 lot of work has gone into this case by
3 everyone concerned, including the City and
4 County of Honolulu, that's true in all
5 litigation that settles at this stage.

6 And I don't think that's a reason
7 in and of itself to issue a decision when the
8 parties have agreed to settle. And I don't
9 know enough about the other cases the Region
10 has in mind to have much of an opinion as to
11 whether anything in this decision is likely to
12 impact that. I don't think it's particularly
13 likely, but I don't know.

14 But at the end of the day, I think
15 that's not a reason to potentially risk
16 increasing opposition to the settlement
17 agreement as it works its way through the
18 approval process.

19 So what remains to be done is, I
20 think as Your Honor may know from the
21 agreement that was filed on Friday, is that it
22 needs to be executed by all of the parties

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1 concerned. And then there's a public notice
2 period, and then a response to those notices,
3 and then it will be submitted to the District
4 Court in Honolulu to become final.

5 And we will then withdraw our
6 appeal before the Board. And there's enough
7 left in that that we are concerned that we
8 preserve the status quo for now. The parties
9 have spent a lot of time and work going into
10 the settlement of this, as well as the
11 litigation.

12 And not just the parties here, but
13 this is a multi-party agreement that includes
14 the State, and the City and County, and non-
15 governmental organizations, and the Federal
16 Government. And we don't want to do anything
17 that might jeopardize that.

18 JUDGE STEIN: Are you in a
19 position to say how you believe -- I mean,
20 given that, as I understand the terms of the
21 settlement, the City and County of Honolulu
22 have agreed to put in secondary treatment and

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1 have negotiated with the Region for a time
2 period extending out for many years to do
3 that, how is it that the Board's issuance of
4 a decision would jeopardize that agreement?

5 MR. SALMONS: Well, it's --

6 JUDGE STEIN: But obviously
7 neither you know nor I know how the Board is
8 going to rule.

9 MR. SALMONS: Exactly, Your Honor.

10 JUDGE STEIN: So the Board could
11 rule in favor of Honolulu, it could rule in
12 favor of the Region, it could do a number of
13 things in between.

14 MR. SALMONS: And that's precisely
15 my point, I think the City and County is
16 primarily concerned with adding any additional
17 layers of uncertainty to the uncertainty that
18 currently is there.

19 And this is obviously a process
20 that was done through confidential
21 negotiations because of the fact that there
22 are groups and interested parties and others

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1 in the public that may not agree with
2 everything that's here. And they want to work
3 it out in substance.

4 There's a public notice process,
5 and depending on how some of those issues
6 could be resolved in an opinion, I could
7 imagine circumstances in which certain groups
8 that otherwise would be making objections to
9 the terms of the consent decree, their
10 arguments may be made stronger or more
11 relevant based on what was in the opinion, in
12 terms of whether, for example, this was a good
13 deal or not a good deal. Or whether it was
14 necessary or not necessary.

15 Again, it's hard to speculate. I
16 think if you start with the premise that we
17 all agree on, that there is some uncertainty
18 left in this process, I think that would cut
19 pretty consistently in favor of not doing
20 anything that would increase the uncertainty.

21 There is a lot of work and effort,
22 and I think a lot of fine balances and

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1 compromises that are reflected in that
2 agreement. And it has to go through this
3 approval process, and we don't want anything
4 that might potentially undermine it.

5 JUDGE STEIN: In the ordinary
6 course, when parties are engaging in a
7 settlement negotiation that may affect the
8 Board's decision, the parties come to us at an
9 early phase and ask us to stay our hand. So
10 this case obviously comes to us in a somewhat
11 different posture.

12 And that, obviously, will be among
13 the things that the Board will look at. If I
14 understand Region IX's report correctly, and
15 if I understand the record, there is, however,
16 another petition that is unaffected by the
17 parties' settlement. That there is another
18 challenge to the Region's action that the
19 Board would still need to rule on in any
20 event. Is that correct?

21 MR. SALMONS: I think the answer
22 to that is potentially. As I understand it,

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1 that's the Moreland Petition. I don't --

2 JUDGE STEIN: You're not a party
3 to this, so I don't want to go into much
4 detail.

5 MR. SALMONS: I don't think it was
6 fully briefed. I don't think it's been
7 presented to the Board. I don't think it's
8 ripe for a decision. And I don't think it
9 presents the same questions that our petitions
10 did.

11 And so I think there are
12 substantial differences, as well. Certainly
13 to the extent that that remains live, and the
14 Moreland Petitioners want to continue even
15 after there's been a settlement, that's
16 another question that remains to be seen. I
17 don't know the answer to that either.

18 That could potentially go forward,
19 but the issues that we raised would be
20 resolved by this settlement agreement. The
21 last thing I would just say, Your Honor, is
22 that it makes the process, I think, somewhat

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1 complicated and unusual if the Board were to
2 issue a decision now. And let's assume that
3 the remainder of the approval process takes
4 several months to play itself out.

5 Because of the uncertainty, the
6 City and County of Honolulu presumably --
7 whichever way it went, the losing party before
8 the Board may have to file a petition for
9 review with the Ninth Circuit in the interim,
10 just to preserve their rights in the event
11 that the settlement agreement did not become
12 final, but then ask for a stay immediately.

13 And I just think it looks
14 unusual, after it's publicly known that the
15 parties have reached an agreement, to have a
16 court, or a board, in these circumstances,
17 issue the decision. And it makes procedural
18 complications down the road that I think are
19 best avoided, to be frank.

20 JUDGE STEIN: I think I've got a
21 clear understanding.

22 MR. SALMONS: And I would just

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1 add, too, that I think Your Honor is right,
2 that the parties should have brought this to
3 the Board's attention sooner. And I regret
4 that we did not, I think that it was, on our
5 side, anyway, largely an oversight.

6 And I certainly understand and am
7 very sympathetic to the frustration the Board
8 must feel about that. But I do view that as
9 separate from the question of what's the best
10 thing to do now, in terms of issuing the
11 decision or not.

12 And I think, for the reasons we've
13 articulated, the safest, and the most
14 reasonable, and the most appropriate, and the
15 most common course in these circumstances is
16 to wait and see.

17 JUDGE STEIN: I'd like to give
18 Region IX and EPA Headquarters, if they want,
19 an opportunity to respond to the points that
20 have been raised by counsel for the City and
21 County of Honolulu.

22 MS. NUTT: This is Region IX. I

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1 think the one I would highlight to respond to
2 is whether or not there is a live controversy
3 that continues. It's an unusual position to
4 be in to be arguing that there is a
5 controversy, when we have a settlement.

6 And I think we're together on
7 that. The controversy does not concern the
8 settlement, but concerns the substance of the
9 issues regarding EPA's 301(h) decisions which
10 are before the Board. And should that
11 continue, there would be adversity between the
12 parties on that issue.

13 We're sympathetic, definitely, to
14 the potential for having to file a petition in
15 the Ninth Circuit. I don't think we want to
16 waste judicial resources, particularly, that
17 is, the due process that is afforded a
18 petitioner in these permit appeal proceedings.

19 So, certainly the Region would
20 work with CCH to do whatever they could to
21 provide for any stays or relief from a
22 rigorous briefing schedule in that, should

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1 that occur.

2 JUDGE STEIN: Does the Region
3 share the view of the City and County of
4 Honolulu that the Board's issuance of a
5 decision under such circumstances could
6 jeopardize the settlement?

7 MS. NUTT: I think we feel there's
8 less risk of that than, perhaps, the City
9 does. There is some risk. There is always
10 some risk. And I think we've kind of looked
11 at the risks and weighed them against the
12 benefits of having a decision issued, and
13 that's why we're taking the position that we
14 do.

15 JUDGE STEIN: I do think that one
16 of the issues the Board will look at is the
17 extent to which the issues that are present in
18 this case are likely to be present in other
19 301(h) cases.

20 We have had one 301(h) case
21 before, which was also fairly resource-
22 intensive, several years ago. We have other

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1 pending petitions in Guam, but I think --
2 obviously, we're a board of limited resources.
3 We have ten staff attorneys.

4 So if I tie up a staff attorney
5 for a year on this case, it isn't so much that
6 we've used ten percent of our resources, but
7 it's a question of what else we're not getting
8 to.

9 And I think that the Board has
10 been coming from, in terms of future cases and
11 wanting to know, is if there's a reasonable
12 chance that something is going to become moot,
13 it's generally preferable for us to know that
14 earlier in the process.

15 And nobody has crystal balls,
16 here, but generally in terms of juggling
17 different things going forward, I do think the
18 Board will take all of this into account.

19 I'll see if there are any
20 additional comments that either side would
21 like to make, but basically, what my plan
22 would be is to sit down with the other judges

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1 on the panel, following the conclusion of this
2 conference, and then make some decisions about
3 what we think is appropriate under the
4 circumstances.

5 Is there anything else from EPA
6 Headquarters? General Counsel's Office?

7 (No response.)

8 City and County of Honolulu?

9 MR. SALMONS: I don't think so,
10 Your Honor.

11 JUDGE STEIN: Well, I appreciate
12 your time, I appreciate your being present.
13 Now that I've seen your consent decree, I
14 appreciate the complexity of the issues.

15 And we will hope to issue
16 something in the near term. I am out of town
17 next week, so I don't know whether anything
18 will come down this week, or it may wait to
19 the following week.

20 But I appreciate your efforts very
21 much. Let me ask just one final question. I
22 think we have everything we need, and we

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1 appreciate everybody's time. Session is now
2 adjourned.

3 (Whereupon, the above-entitled
4 proceeding was concluded at 3:23 P.M.)
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CERTIFICATE

This is to certify that the foregoing transcript
in the matter of: City and County of Honolulu
Sand Island Wastewater Treatment
Plant and Honouliuli Wastewater
Treatment Plant

Before: Hon. Kathie A. Stein
Environmental Appeals Judge

Date: July 19, 2010

Place: Washington, D.C.

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

Sam Wojack
Sam Wojack