

**BINGHAM**

Bryan M. Killian  
Direct Phone: 202.373.6191  
Direct Fax: 202.373.6001  
bryan.killian@bingham.com

JAN 23 2009 9:47

U.S. ENVIRONMENTAL PROTECTION AGENCY  
ENVIRONMENTAL APPEALS BOARD

January 23, 2009

**VIA HAND DELIVERY**

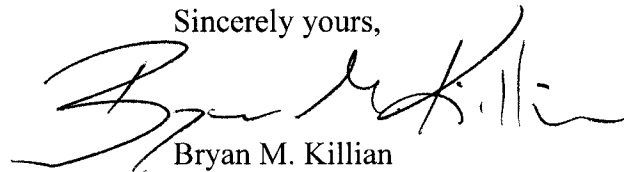
Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1341 G Street, N.W.  
Suite 600  
Washington, D.C. 20005

Dear Clerk:

Enclosed, please find an original and one copy of the Motion for Extension of Time to File Petitions for Review filed on behalf of the City and County of Honolulu. Also enclosed are copies of the pertinent Regional Administrator's Final Decisions.

Please date stamp the second copy of the motion and return to the courier.

Sincerely yours,



Bryan M. Killian

Boston  
Hartford  
Hong Kong  
London  
Los Angeles  
New York  
Orange County  
San Francisco  
Santa Monica  
Silicon Valley  
Tokyo  
Walnut Creek  
Washington

Enclosures

Bingham McCutchen LLP  
2020 K Street NW  
Washington, DC  
20006-1806

T 202.373.6000  
F 202.373.6001  
bingham.com

RECEIVED  
EPA REGIONAL OFFICE  
HONOLULU  
FEB 11 2009

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

ENVIRONMENTAL APPEALS BOARD

In the matters of:

City and County of Honolulu's Sand  
Island Wastewater Treatment Plant  
Application for Modified NPDES Permit  
Under Section 301(h) of the Clean Water  
Act (NPDES Permit No. HI0020117)

City and County of Honolulu's  
Honouliuli Wastewater Treatment Plant  
Application for Modified NPDES Permit  
Under Section 301(h) of the Clean Water  
Act (NPDES Permit No. HI0020877)

**MOTION FOR EXTENSION OF TIME  
TO FILE PETITIONS FOR REVIEW**

Pursuant to 40 C.F.R. §§ 22.7 and 124.19, petitioner City and County of Honolulu (CCH) moves for a 30-day extension of the time, up to and including March 11, 2009, in which to file petitions for review of two separate Final Decisions of the Regional Administrator denying CCH's requests seeking variances for two wastewater treatment plants from the Clean Water Act's secondary treatment requirements. Alternatively, CCH requests permission to file summary petitions for review on the current due date, February 9, 2009, followed by supplemental briefs on March 11, 2009.

**INTRODUCTION**

CCH operates two wastewater treatment plants that discharge into the Pacific Ocean — the Sand Island and Honouliuli plants. Before January 5, 2009, both plants operated under National Pollutant Discharge Elimination System (NPDES) permits that, per Section 301(h) of the Clean Water Act, exempted them from complying with the Act's secondary treatment requirements. On January 5, the EPA Regional Administrator

entered two separate Final Decisions, effective February 9, 2009, denying CCH's requests to continue the variances. Both Final Decisions are lengthy (well in excess of 100 pages) and are accompanied by extensive administrative records involving highly technical and disputed data. Without an extension, petitions for review of both Final Decisions are due February 9, 2009. See 40 C.F.R. § 124.19(a).

The facts about the two plants, the procedural history of their permits, and the Regional Administrator's January 5th Final Decisions are quite different.<sup>1</sup> Even so, similar fundamental errors affect both Decisions. Although it has not yet finally decided on all the issues it will appeal, CCH presently believes it might file a consolidated petition for review, which focuses on those errors. To do so in a way that keeps the complicated issues clear while still addressing issues unique to each plant, CCH requests an additional 30 days to prepare for EAB review. The additional time is necessary in light of the length and complexity of the two Final Decisions, their simultaneous schedule, and the prejudice CCH will suffer without the extra time. Although EPA declined to consent to an extension, EPA will not be prejudiced by one. Accordingly, the EAB should grant CCH's motion to extend the filing deadline until March 11, 2009. See

---

<sup>1</sup> *Sand Island Plant:* In 1979, CCH applied for a 301(h) variance from the Clean Water Act's secondary treatment requirements for its Sand Island wastewater treatment plant. CCH submitted a reapplication in 1983. A tentative decision granting the variance was issued in 1985. CCH obtained a 301(h)-modified NPDES permit in 1990. CCH reapplied for the Sand Island variance in 1994. In 1998, CCH's reapplication was granted and a new 301(h)-modified permit was issued. That permit was set to expire in 2003 but has been administratively extended since. In May 2003, CCH reapplied for a 301(h) variance for the Sand Island plant. In December 2007, EPA issued a Tentative Decision Document recommending the variance be denied. On January 5, 2009, the Regional Administrator entered a final decision denying CCH's request for a 301(h) variance for Sand Island.

*Honouliuli Plant:* In 1979, CCH also applied for a 301(h) variance for its Honouliuli wastewater treatment plant. CCH submitted a reapplication in 1983. A tentative decision granting the variance was issued in 1988. Based on that variance, CCH obtained a 301(h)-modified NPDES permit in 1991, which was set to expire in 1996 but has been administratively extended since. In 1995, CCH applied to have the permit reissued, and the application was updated in 2000 and 2004. In March 2007, EPA issued a Tentative Decision Document recommending the variance be denied. On January 5, 2009, the Regional Administrator entered a final decision denying CCH's request for a 301(h) variance for Honouliuli.

40 C.F.R. § 22.7 (the EAB may grant an extension of time for filing any document “upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties.”). In the alternative, the EAB should permit CCH to file supplemental briefs by March 11, 2009, after CCH files summary petitions for review by February 9, 2009. See *In re Town of Marshfield, Mass.*, Order Denying Review at 8 n. 10, NPDES 07-03, available at 2007 WL 1221207 (EAB, March 27, 2007) (“The Town could have filed a timely petition identifying all the issues on appeal and moved for an extension of time to file a supplemental brief to support the issues raised in the petition. The Board has, on occasion and for good cause shown, granted this kind of motion and entertained such supplemental briefs.”).

## **ARGUMENT**

### **I. CCH Has Good Cause For A 30-Day Extension.**

A slight 30-day extension will allow CCH fully to prepare for review. The two Final Decisions and Responses To Comments issued on January 5, 2009, are long and technically complicated. The Honouliuli Final Decision has 150 pages of reasoning and supporting data; the Sand Island Final Decision has 110 pages. The great detail of the Decisions and Responses To Comments covers a wide range of substantive issues. For the Honouliuli plant, EPA’s Response To Comments addressed 89 comments, and for the Sand Island plant, EPA responded to 82 comments. While some of the issues have been percolating since at least the 2007 Tentative Decision Documents recommending denial of CCH’s variances, there are many issues original to the January 5th filings. For example, EPA’s lengthy discussion of Whole Effluent Toxicity testing (*see* Sand Island Response To Comments at pp. 30-43; Honouliuli Response To Comments at pp. 39-58)

makes new arguments, as does its discussion of the appropriateness of geometric mean measurements (*see* Sand Island Response To Comments at pp. 58-63). In order to give full consideration to each issue presented in the Final Decisions and Responses To Comments, CCH, its experts, and its attorneys need more than the 30 days prescribed by the rules to file a consolidated petition for review. Under the circumstances, the risk that CCH will be prejudiced in the absence of an extension is substantial.

CCH plans to put those 30 days to good use. Although it has not yet finally decided on the issues it will appeal, CCH already envisions consolidating its petitions for review because a few fundamental errors affect both of the Regional Administrator's Final Decisions. A consolidated petition will take additional time to prepare at the outset, especially because it will still have to address other issues unique to each plant. But it will ultimately save CCH, EPA, and the EAB time and resources by eliminating duplicative issues.

A one-month extension is reasonable. It mimics the amount of time CCH and its representatives would have had to prepare separate petitions for review if EPA had not issued the Final Decisions on the Sand Island and Honouliuli variances on the same day. Until now, both plants' permits have been on independent schedules. *See* n. 1, *supra*. If they had continued that way, CCH would have had two separate 30-day timeframes — a total of 60 days — to petition for review of each Final Decision.

A 30-day extension, in sum, effectively maintains the status quo, ensures that CCH will not be pressed to overlook potentially worthwhile appellate issues, and will likely result in a concise, consolidated petition for review.

## II. EPA Will Not Be Prejudiced By A 30-Day Extension.

By letter dated January 16, 2009, EPA declined CCH's request for consent to an extension of the time in which CCH has to file petitions for review of the Regional Administrator's Final Decisions. (A copy of that letter is attached to this motion.) In its letter, EPA gave two reasons for declining. First, after observing that the permits have been "administratively extended for some time," EPA tied the delay to CCH, asserting that CCH failed to provide adequate data earlier in the proceedings and that CCH has already obtained extensions of time to comment on the Tentative Decision Documents. Second, EPA believes that consenting to extend the filing deadline would require it to modify the effective dates of Regional Administrator's January 5th Decisions.

Neither reason resonates,<sup>2</sup> but perhaps more importantly, neither shows how EPA would be prejudiced by a brief 30-day extension. There is no evidence of a pressing environmental or public need to adopt secondary treatment, and even if there were, CCH could not implement secondary treatment overnight. CCH's request for an additional 30

---

<sup>2</sup> EPA's first assertion is untrue and irrelevant. CCH did not cause EPA's lengthy delays in analyzing the applications. EPA, for instance, took over 16 months (for Honouliuli) and over 9 months (for Sand Island) to respond to CCH's comments to EPA's Tentative Decision Documents. Moreover, CCH's prior extensions to respond to the Tentative Decision Documents have not bearing on CCH's need for an extension now because, as already noted, the January 5th Decisions and Responses To Comments include a number of scientific and technical issues that were not addressed before. CCH must appeal the *final* decisions, not the *tentative* decisions. See *In Re: Dominion Energy Brayton Point, L.L.C. (Formerly Usgen New England, Inc.) Brayton Point Station*, Remand Order, NPDES 03-12, available at 2006 WL 3361084 (EAB, February 1, 2006) ("On appeal, it is not sufficient merely to repeat objections made during the comment period; rather, a petitioner must also demonstrate why the permit issuer's response to those objections (i.e., the permit issuer's basis for its decision) is clearly erroneous . . . Such demonstration must be specific and substantiated"); *In Re: Peabody W. Coal. Co.*, Order Denying Review, CAA No. 04-01, available at 2005 WL 428833 (EAB, Feb. 18, 2005) ("the petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations"); *In Re: Arecibo & Aguadilla*, Order Denying Review, NPDES Nos. 02-09 & 03-05, available at 2005 WL 627642 ("the petitioner must . . . explain why the permit issuer's previous response [to objections] evidences clear error, an abuse of discretion, or otherwise warrants review").

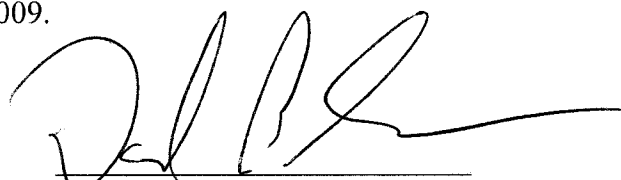
EPA's second assertion is also wrong. Whether or not EPA would need notice and comment to modify the effective dates of the orders, EPA would not even have to modify the orders if it agreed to CCH's extension request because the EAB can stay the orders upon granting CCH's extension — assuming, of course, they were not automatically stayed by 40 C.F.R. § 124.16.

days is reasonable under the circumstances and poses no risk of prejudice to EPA or anyone else.

### CONCLUSION

Because CCH has good reason for a one-month extension, and because EPA will suffer no prejudice by it, the EAB should grant CCH's request to extend the date for filing petitions for review in the Sand Island and Honouliuli matters until March 11, 2009. Alternatively, following the same procedure discussed in *In re Town of Mansfield, supra*, the EAB should give CCH until March 11, 2009, to file a supplemental brief that presents complete arguments in support of the issues identified in timely-filed, summary petitions for review. Because the alternative course would require CCH to identify all the issues for review by February 9, 2009, it does not go as far as a full 30-day extension toward addressing the reasons why CCH is seeking to extend the filing deadline. Even so, the alternative course greatly reduces the risk of prejudice to CCH presented by the current schedule.

RESPECTFULLY SUBMITTED January 23, 2009.




David Salmons  
Robert V. Zener  
BINGHAM MCCUTCHEN LLP  
david.salmons@bingham.com  
robert.zener@bingham.com  
2020 K Street NW  
Washington, DC 20006  
202-373-6000  
202-373-6001 (fax)

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion For Extension Of Time To File Petitions For Review was sent by Federal Express to the below listed persons on this 23d day of January, 2009.

Wayne Natri  
Regional Administrator  
United States Environmental Protection Agency  
Region 9  
75 Hawthorne Street  
San Francisco, CA 94105-3901



---

David Salmons