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	)	

RESPONSE TO MOTION TO SUPPLEMENT RECORD ON APPEAL

Region 9 of the United States Environmental Protection Agency ("Region 9" or "the Region") respectfully submits to the Environmental Appeals Board ("Board") this Response to Motion to Supplement Record on Appeal ("Motion to Supplement") filed by City and County of Honolulu ("CCH" or "Petitioner") in the above-captioned matter, in accordance with the schedule in the Board's Order Granting Motion to File Response to Motion to Supplement Record of July 30, 2009. The Motion to Supplement seeks to expand the record before the Board in CCH's Petition with five sets of documents. The Region does not object to the Board taking notice of the first and last sets of documents, which are official documents generated by the State of Hawaii. Regarding the remaining three sets of documents, the Region objects to their inclusion in the administrative record before the Board in this matter for one or more of the following reasons: the document post-dates the Region's decision and was generated by CCH for the purposes of the Petition; the document already is in the administrative record; the document could have been submitted by CCH during the public comment period but was not; and/or the document is not relevant to the issues presented.

STANDARD OF REVIEW

The administrative record includes documents upon which an agency relied, directly or indirectly, when it takes an action (i.e., as of the date of that action). *See generally Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). The Board has identified principles that it uses to guide its decisions on motions to supplement the administrative record or otherwise affect the documents it will consider upon review of a petition before it. *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 490, 516-528 (EAB 2006) at 14. Of the principles relevant to CCH's Motion to Supplement, the Board has explained that (and why) it will not supplement the record with certain documents, specifically, post decisional material, *id.* at 518-520, as well as documents already in the record, *id.* at 517, and documents that otherwise would reflect internal Agency discussions, *id.* at 525.

In the past, the Board has on occasion considered documents not included in the administrative record by the Region at the time of decision-making when the Board considers that decision at the appellate stage. In an administrative analogue to judicial notice, the Board has characterized its consideration of such documents as "official notice." *In re Arecibo & Aguadilla Regional Wastewater Treatment Plants*, 12 E.A.D. 97, 145 n86 (EAB 2005) (taking "official notice" of official public documents)(citations omitted).

In a subsequent decision in the *Dominion Energy Brayton Point* matter, the Board further identified other categories of documents that the Board may consider in support of arguments made in a Petition for Review. *See Dominion Energy Brayton Point*, 13 E.A.D. ____ , slip. op. at 15 (EAB Sept. 27, 2007)(2007 Brayton Point Decision). Noting that the Board has observed that the appellate review process can serve as a petitioner's first opportunity to question the validity of material added to the administrative record in response to comment, citing *Dominion*

Energy Brayton Point, LLC, 13 E.A.D. at 516, the Board identified past instances when it had considered newly submitted materials in the course of evaluating the merits of a petition. *Dominion Energy Brayton Point*, 13 E.A.D. ____ , slip. op. at 15 (citing *In re Metcalf Energy Ctr.*, PSD Appeal Nos. 01-07 & 01-08, at 22 n 13 (EAB Aug. 10 2001)(pre-decisional public testimony about data model); *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 797 n.65 (EAB 1995)(pre-decisional documents); *In re Three Mountain Power, L.L.C.*, PSD Appeal No. 01-05, at 2-3 (EAB Apr. 25, 2001)(post-decisional analysis not considered based on remand to State board and parties agreed to re-open administrative record).

DOCUMENTS SUBJECT TO MOTION TO SUPPLEMENT

Other than the official government documents of which the Board may take official notice (Exhibits A and E, as discussed below), the Board should strike the documents subject to the Motion to Supplement from the record on appeal.

A. NPDES Permits for Other Treatment Plants in Hawaii

CCH proffers two NPDES permits issued by the Hawaii Department of Health for the publicly owned treatment plants serving Kailua and Waianae, Hawaii, respectively. These permits predate issuance of the Region's decisions subject to the Petition. The administrative record already contains the most recent NPDES permits for these two facilities. Doc. H.9.3, pp. H-09-52 – H.09-86; Doc. S.9.1, pp. S-09-01 – S.-09-46. Because the Board can take official notice of these two public documents generated by a government body,[1] the Region does not object to the Board's consideration of them in its adjudication of the CCH Petition to the extent such expired permits may be marginally relevant to the issues presented.

[1] In Exhibits to its Response to the original CCH Petition, the Region attached portions of two additional NPDES permits in response to the two NPDES permits subject to this Motion to Supplement. Because the Board may take official notice of such documents, the Region did not prepare a separate motion to introduce the documents for consideration by the Board in this appellate stage.

B. Affidavit of Jeremiah Bishop

CCH proffers an affidavit signed by Jeremiah Bishop (Bishop Affidavit) that post-dates the Region's decisions subject to the Petition, and in the second and third paragraph, describes the pre-decisional analyses for dieldrin conducted by Mr. Bishop to support the CCH applications. Paragraphs 6 and 7 of the Bishop Affidavit present substantive argument regarding the relative suitability of an unapproved EPA analytic testing procedure over an approved procedure. CCH argues that it presented the Bishop Affidavit in its opening Petition to rebut conclusions presented by the Region in response to comments, that the Board's consideration of the Bishop Affidavit is appropriate under the standard announced by the Board in the 2007 Brayton Point Decision, and that it should not have been required to anticipate "all of the innumerable ways Region 9 could have fallaciously responded to CCH's comments and rebutted them in advance." Motion to Supplement at 7. The Bishop Affidavit does not meet the standard announced in the 2007 Brayton Point Decision.

As a threshold matter, the Region notes that, in the Board precedents cited in footnote 11 (on page 11) of the 2007 Brayton Point Decision, what the Board had allowed was post-decisional supplementation of the record with a document that existed prior to the decision. The Bishop Affidavit post-dates the Region's decisions on review. The Bishop Affidavit, signed March 6, 2009, presumably was prepared at the direction of CCH counsel for the purposes of the administrative appellate litigation. The CCH Petition cites to the Bishop Affidavit to support legal arguments regarding dieldrin measurements with scientific rebuttal of portions of the Region's response to comments.

The Bishop Affidavit does not meet the standard announced by the Board in the 2007 Brayton Point Decision because it does not respond to "new materials added to the record by the

Region in response to comments." *Dominion Energy Brayton Point*, 13 E.A.D. ____ , slip. op. at 15. On the dieldrin measurement issue, the Region did not "add new materials" in response to comment. The Region merely responded to comments. To the extent any "new material" was added to the record, that material *was* the response to comment. If a commenter makes a comment, it is "reasonably ascertainable" that the Region will respond to the comment. The Board should not expand its existing precedent on material considered by the Board at the appellate stage to include documents like the Bishop Affidavit.

CCH's argument, Motion to Supplement at 7, that it could not have anticipated how the Region would respond, is not relevant to the question of whether an issue or issues were reasonably ascertainable at the time CCH prepared its comments, and thus required to be raised during the comment period. 40 CFR 124.13. Neither the administrative record regulations at 40 CFR 124.9, 124.17(b), or 124.18(b), nor Board precedents require, as CCH suggests, that commenters must "rebut fallacious responses to comment,"[2] but the regulations at 40 CFR 124.13 do oblige a commenter to raise reasonably ascertainable issues with specificity. When a CWA 301(h) applicant submits data in an application, the applicant does so for the purposes of making a demonstration. It is incumbent on the applicant to make that demonstration. If EPA's tentative decision rejects the demonstration,[3] then it is incumbent on an aggrieved party to respond during the comment period so as to re-support its demonstration. CCH's reliance on the Bishop Affidavit to expand and add nuance to its comment about the sensitivity of different testing procedures should not be considered by the Board in its consideration of the Petition.

[2] The Region does not concede that it fallaciously responded to comments.

[3] CWA section 301(h) authorizes issuance of modified permits "if the applicant demonstrates to the satisfaction of the Administrator" that nine criteria will be met. 33 U.S.C. § 1311(h).

C. Declaration of Kenneth Tenno

As with the Bishop Affidavit, CCH proffers a declaration signed by Kenneth Tenno, (Tenno Declaration) that post-dates the Region's decisions subject to the Petition, but includes data sheets that were in CCH's possession prior to (and thus during) the comment period. Mr. Tenno is the Director of the CCH Water Quality Laboratory and supervised the collection and shipment of test samples of the CCH effluents for analytic measurements for dieldrin. CCH purports to offer the Tenno Declaration to rebut a portion of a response to comment questioning whether CCH had actually "split samples," based on the summary data and incomplete, unexplained back-up data sheets submitted with the CCH applications. Unlike the Bishop Affidavit, the Tenno Declaration does not attempt to present substantive argument, but rather appears to be submitted merely to complete the incomplete data submission identified by the Region in response to comment. CCH proffers this material not for consideration by the Board during the appellate stage, but rather as an actual supplementation of the administrative record with material that it could have and should have submitted prior to decision-making by the Region.

Supplementation of the administrative record with the Tenno Declaration is not warranted because CCH could have reasonably ascertained that the data sheets appended to the Tenno Declaration should have been submitted to the Region by the close of the comment period at the latest. CCH did submit some data sheets (evidencing its reasonable ascertainment of its obligation to do so), but the data sheets were incomplete and the absence of some data sheets was not self-explanatory.[4] CCH's attempt to cure its failure to submit all of the data to support its

[4] The Region's Surreply responds to the merits of CCH's Response arguments regarding the adequacy of EPA's response to comments relating to split samples and includes a short discussion of data submitted in CCH's comments during the public comment period.

demonstration of attainment of the water quality criteria for dieldrin by moving to add the complete data set as a supplement to the record "in response to" the Region's response to comment should be rejected.

D. Region 9 Memorandum

CCH proffers an unsigned, undated draft of a memorandum to file prepared by two EPA Region 9 employees, Jacques Landy and David Stuart (Region 9 Memorandum). The signed version of this document (dated March 22, 1991) appears in the administrative record as H.21.49 at p. H-21-467. Under Board precedent, the proffered Region 9 Memorandum should not be added to the administrative record and the Board should not consider it on appeal because the document is already in the record. *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. at 517. To the extent the proffered draft includes hand written notes, such notes[5] represent internal discussions that the Board has indicated should not clutter the record. *Id.* at 525.

E. Recent Hawaii Legislation and Supporting Testimony

CCH proffers recent legislation signed by the Governor and supporting testimony in response to the Region's claim that "its decision is necessary to enforce Hawaii's judgment concerning protection of Hawaii citizens."[6] Motion to Supplement at 11. The Region agrees that the Board may take official notice of these governmental documents in its adjudication of the Petition to the extent relevant.[7]

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[5] The text from the Region 9 Memorandum upon which CCH seeks to rely is not in the handwritten notes on the document proffered by CCH.

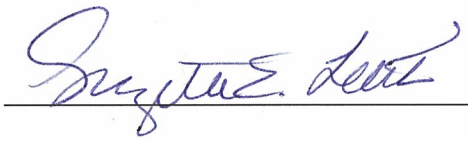
[6] CCH's proffer does not cite to the pages in the Region's brief presumably paraphrased.

[7] The Region's response regarding the lack of relevance to the current Petition of the Hawaii legislation and supporting testimony is presented it the Surreply.

REMEDY AND CONCLUSION

The Board has explained that documents that it declines to add to the administrative record are considered stricken from the record on appeal. *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. at 511 & n30. Accordingly, the Board should strike the Bishop Affidavit, the Tenno Declaration, and the Region 9 Memorandum from the record on appeal.

Respectfully submitted,



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