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ENVIRONMENTAL PROTECTION AGENCY ENV. APPEALS BOARD

ENVIRONMENTAL APPEALS BOARD

STATUS CONFERENCE

In Re:

City & County of Honolulu
Sand Island Wastewater
Treatment Plant

NPEDS Appeal No.
09-01

Honouliuli Wastewater
Treatment Plant

Permit Numbers HI0020117
& HI0020877

Tuesday, June 9, 2009
Washington, DC

The status conference came to order at
3:00 p.m. in the Administrative Courtroom,
Room 1152, of 1201 Constitution Avenue, NW.

Before:

The Honorable Kathie A. Stein,
Environmental Appeals Board Judge

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ORIGINAL

APPEARANCES:

On Behalf of the Petitioner:

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Also Present:

Michelle Wenzel, Esq. Board Counsel
Ericka Durr, Clerk of the Board

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

2 3:00 p.m.

3 CLERK DURR: All rise. The
4 Environmental Appeals Board of the United
5 States Environmental Protection Agency is now
6 in session for a status conference In Re: City
7 and County of Honolulu, Sand Island Wastewater
8 Treatment Plant, Honouliuli Wastewater
9 Treatment Plant, Permit Numbers HI0020117 and
10 HI0020877. NPEDS Appeal No. 09-01.

11 The Honorable Judge Kathie Stein
12 presiding. Please be seated.

13 JUDGE STEIN: Good morning,
14 counsel.

15 I would like to see if we could
16 begin this proceeding -- I know we have some
17 people hooked up remotely and we have some
18 people here in the courtroom, if people could
19 go around the room starting here in the
20 courtroom and state their appearances, and
21 also let me know who will be the principal
22 spokesperson for each party.

1 Why don't we begin with
2 Petitioner.

3 MR. SALMONS: Thank you, Judge
4 Stein. My name is David Salmons. I represent
5 the City and County of Honolulu in this
6 matter, and I'll be the principal spokesperson
7 on our side.

8 I can introduce the folks that are
9 with us remotely.

10 JUDGE STEIN: Sure.

11 MR. SALMONS: We have Robert Zener
12 also at my law firm, Bingham McCutchen. He's
13 dialing in from our New York office. He had
14 an oral argument up there today in the Second
15 Circuit.

16 JUDGE STEIN: Okay.

17 MR. SALMONS: And Kathleen Kelley
18 from the City and County of Honolulu is
19 participating in Honolulu.

20 JUDGE STEIN: Terrific. EPA, good
21 afternoon.

22 MR. SWEENEY: Stephen Sweeney from

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1 the Office of General Counsel, the Water Law
2 Office. Also on the phone is Suzette Leith
3 from Office Regional Counsel, Region IX, who
4 will be the principal spokesperson.

5 JUDGE STEIN: Is she appearing
6 remotely or just by telephone?

7 MR. SWEENEY: Oh, I'm sorry. She's
8 appearing by video, yes, as well.

9 JUDGE STEIN: Okay. With me today
10 is Michelle Wenzel, who is the lead board
11 counsel on this matter. And I've asked her to
12 sit up with me just to make sure that I don't
13 forget any needed questions.

14 The reason I scheduled the status
15 conference is that the Request For a Stay is
16 somewhat unusual. And usually a Request For
17 a Stay is to enable the parties to settle the
18 matter, and we've received a Request For a
19 Stay of a considerable period of time in order
20 for another piece of litigation to proceed.

21 And based on both the Board
22 regulations and Board case law in this area,

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1 I would be less than candid if I didn't say
2 that in order to add documents to the
3 administrative record, there's a fairly high
4 threshold. It's obviously not an impossible
5 threshold, but it is a high threshold. And in
6 that regard, the Dominion Energy case, I
7 believe from 2006, that the Board dealt at
8 length with some of those issues.

9 So, while I'm not unmindful of the
10 fact that the Region did not oppose this
11 particular request, the Board is interested in
12 moving this case forward.

13 And given that it is a somewhat
14 complex matter given the length of the
15 petitions, and it's a matter in which I think
16 the board would anticipate holding oral
17 argument, my inclination going into this is to
18 give the Petitioner, say, a period of about 30
19 days to file a reply brief. And if at some
20 subsequent point they feel it's appropriate to
21 file a Motion to Supplement based on
22 particular documents, they can file that

1 motion without prejudice to the Region's right
2 to oppose that motion, but I'm very
3 disinclined to hold up this litigation pending
4 the Federal Court litigation.

5 I wanted to give both sides the
6 opportunity to explain to me things that may
7 not be apparent from the papers before us, but
8 I did want to tell you that's how I'm leaning
9 going into this. I'm envisioning possibly
10 holding oral argument possibly August,
11 possibly September, something along those
12 lines.

13 This case is obviously not going
14 to be decided tomorrow. We've just received
15 the Region's brief, and it's a considerably
16 lengthy brief, so our interest isn't just in
17 plowing through the issues.

18 It seemed to me from the papers I
19 looked at, that the documents that the
20 Petitioner was claiming were relevant, might
21 be relevant to only a subset of the arguments
22 anyways.

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1 But with that said, perhaps, Mr.
2 Salmons, you may want to comment further on
3 the proposed approach.

4 MR. SALMONS: Certainly, Your
5 Honor. I guess I would state at the outset
6 that we are flexible. And if the Court would
7 like us to file our reply sooner than the
8 October time that the parties had agreed to,
9 we can certainly do that. I would suggest
10 perhaps the second week of July as an
11 appropriate time for that given the length of
12 the response brief that we're responding to.

13 I certainly share Your Honor's
14 concern that this is a complex case, and we
15 were planning on moving for oral argument in
16 the case. So, I'm grateful that the Board is
17 already ahead of us there. This certainly
18 seems like that kind of a case and these kinds
19 of issues for us.

20 As to the timing, this was worked
21 out between the parties, I think, in part,
22 because of resource and staff concerns at

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1 Region IX, and because of our belief that
2 there will in fact be documents that come out
3 of the FOIA litigation that will be relevant
4 and warrant consideration in these
5 proceedings.

6 We have no problem with
7 bifurcating the reply brief and then having
8 supplemental briefs that would address any of
9 those documents that we feel warrants the
10 Board's attention once that comes about.

11 The important thing from our
12 standpoint, is that we have the opportunity to
13 do that before the Board issues a final
14 decision in this case. We think it would just
15 streamline the proceedings going forward and
16 it makes sense to resolve any of those record
17 issues before this case is finally resolved
18 before the Board.

19 And certainly an argument in -- my
20 guess is September might work better than
21 August given how schedules often work out
22 during that time frame, but I think that is

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1 certainly something that we are comfortable
2 with if that's the way the Board would like to
3 proceed.

4 To give you the reasons for it, I
5 think, again, is that we felt like that there
6 would be material from the FOIA litigation
7 that would be relevant and we wanted the
8 opportunity to put that forward. I believe
9 Region IX's concerns was primarily staffing
10 and resources.

11 There is a pretty aggressive
12 schedule going forward in that FOIA
13 litigation. The Summary Judgement -- expected
14 Summary Judgement Brief by Region IX will be
15 filed June 17th. Our responses will be due
16 mid July. And I think everyone expects, and
17 the District Court has indicated that she will
18 rule promptly, and I think we expect a
19 decision by around August.

20 We think, again, that's one of the
21 reasons why it was nice to be able to have the
22 ability to finally resolve any potential

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1 record issues because of the schedule. And
2 the District Court has sufficiently expedited
3 it and we think we'll actually be able to
4 resolve this promptly.

5 JUDGE STEIN: Are you anticipating
6 that the FOIA litigation will be resolved
7 based on Summary Judgement Motions?

8 MR. SALMONS: I think we do, yes.
9 I mean of course you never know for sure, but
10 I think that is our expectation. I assume
11 that Region IX would largely concur with that.

12 I would just add with regard to
13 that, that the District Court has indicated in
14 considering the likelihood of success on the
15 merits in that proceeding, that the City and
16 County of Honolulu has made a substantial
17 showing and is likely to succeed on the claims
18 of privilege that have been asserted in that
19 case, and that documents are likely to be
20 produced and, again, we think relevant.

21 Some of the FOIA-related documents
22 are already things that we have cited in our

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1 Petition for Review and have been responded to
2 in the Region's brief, and we think that there
3 will be more of those kinds of materials and
4 would want the ability to present them to the
5 Board.

6 JUDGE STEIN: Right. I mean I
7 don't have a problem with allowing some kind
8 of an opportunity for Petitioners to file a
9 motion to supplement the record within some
10 reasonable period of time, but I am not
11 willing to sort of marry this litigation to
12 the FOIA litigation.

13 And even if documents are produced
14 under the FOIA litigation, there would still
15 need to be a showing that those particular
16 documents ought -- this is an administrative
17 record case. So, you would still need to make
18 a showing of why those documents ought to be
19 part of the administrative record which flows
20 more from what the Region relied on and what's
21 in 124.18, the necessary -- necessarily every
22 document that you may think you may be

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1 entitled to under FOIA.

2 But let me --

3 MR. SALMONS: May I add one more
4 thing, Your Honor --

5 JUDGE STEIN: Sure.

6 MR. SALMONS: -- if I may? And,
7 first, let me just say I completely understand
8 and agree that that is our burden of showing
9 that and I think we'll be prepared to do that.

10 There is one other matter that I
11 would like to bring to your attention that may
12 affect the timing issues for this that's not
13 related to the FOIA litigation.

14 JUDGE STEIN: Uh-huh.

15 MR. SALMONS: And that concerns
16 recent statutory amendments that were passed
17 by the legislature in Hawaii amending the
18 water quality standards for the State of
19 Hawaii. And in particular, those amendments
20 do two things that we think are relevant to
21 these proceedings.

22 The first is that they revised the

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1 chlordane standard to conform with the Federal
2 2006 EPA criteria. Prior to these amendments,
3 Hawaii had a more stringent standard test for
4 chlordane.

5 The second is it did the same for
6 the dieldrin standard. And so both of those
7 going forward are now going to be the somewhat
8 higher Federal 2006 EPA criteria.

9 And under that standard, all of
10 the accedences with regard to chlordane would
11 go away, and some of the dieldrin ones would
12 as well.

13 That has been passed by the
14 legislature. It's pending for signature
15 before the Governor. It's expected that he
16 will sign that legislation by July 15th.

17 At the same time, the Department
18 of Health has been preparing regulations to
19 coincide with that legislation and it is our
20 understanding they expect to submit those to
21 EPA for approval sometime this summer, likely
22 at the end of the summer, which we think again

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1 will have an impact on some of the issues in
2 this case and may warrant the filing of a
3 supplemental brief as well.

4 So, those are the two main things
5 we think will affect the timing of the FOIA
6 litigation which we think will impact the
7 record, and then the change of these water
8 quality standards that will affect at least a
9 couple of the areas of violation that were
10 found.

11 JUDGE STEIN: Okay. Thank you.
12 I'd like to hear from Region IX at this point.

13 MS. LEITH: Hi. This is Suzette
14 Leith. Can you hear me now?

15 JUDGE STEIN: I can. I don't know
16 if we -- oh, yes, I can.

17 MS. LEITH: Okay. And I also
18 wanted to introduce Ann Nutt who is sitting
19 here with me. So, there are the two of us
20 from the Region.

21 Basically, we are fine with the
22 schedule you suggested of proceeding more

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1 rapidly than we had requested in the motion.
2 We do not feel that we're going to be losing
3 in the District Court on the FOIA case. We'll
4 be filing our Summary Judgement Motion next
5 week, and we do agree with what Mr. Salmons
6 said that we expect it to be decided on
7 Summary Judgement.

8 What we were thinking when we
9 agreed to the motion on extending the time, it
10 was a combination of workload and also a
11 desire to -- we thought it would be more
12 efficient to get the FOIA litigation out of
13 the way even though we don't think there will
14 be any documents coming out of it that would
15 properly go in the administrative record.

16 But, again, if your preference is
17 to proceed with a reply by the Petitioner, we
18 may be requesting a sur-reply depending on
19 what the reply says, but I think we can wait
20 on that. We would be fine with that schedule.

21 JUDGE STEIN: When do you
22 anticipate, and I realize you have no control

1 over the judge in the FOIA litigation, when do
2 you anticipate a ruling by the judge?

3 I mean is it -- your motion will
4 be filed June 17th. The opposition will be
5 filed a month later, I believe you said. So,
6 potentially August? Something like that?

7 MS. LEITH: We're anticipating
8 about the end of August based primarily on
9 what we hear from the Assistant United States
10 Attorney in Hawaii on how fast things like
11 this get decided. So, we have the same
12 anticipated time schedule that Mr. Salmons
13 mentioned.

14 JUDGE STEIN: I suppose it's
15 difficult for EPA to answer. Let me turn for
16 one quick second back to counsel for
17 Petitioner, Mr. Salmons.

18 Can you tell me how many of the
19 issues in this case you believe are affected
20 by the FOIA litigation or which issues?

21 MR. SALMONS: That's difficult for
22 me to do at this time, Your Honor. One of the

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1 things that has happened in that litigation,
2 is that along with the Summary Judgement
3 papers that we expect to be filed on the 17th,
4 there will be a bond index which we think will
5 give us a much better sense of the content of
6 some of these documents that are at issue.

7 I guess I would point out a few
8 things with regard to that, Your Honor. There
9 are materials that we cite in our Petition For
10 Review, in particular in Footnotes 14, 22 and
11 30, that relate to agency documents that came
12 out of FOIA request post the comment period
13 that we felt like were relevant to certain
14 matters in the case.

15 That included issues concerning
16 the anticipated availability of disinfection
17 at the Honouliuli site, the proper
18 understanding of the geometric mean, as well
19 as the issue as to whether the ZID is the
20 appropriate mixing standard only for those
21 matters that specifically relate to secondary
22 treatment such as biochemical oxygen demand

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1 and total suspended solids as opposed to all
2 of the State water quality standards. Those
3 are the issues so far that FOIA-related
4 documents have been relevant to.

5 I think in the most recent
6 documents we received on May 28th, there are
7 some documents that relate to the WET test
8 standard that we think may warrant adding to
9 the record, but we're still reviewing that.

10 We received some documents on May
11 28th, and those are still being analyzed. And
12 then there's probably -- I think there are
13 probably about 200 -- I'm sorry, 120 documents
14 that in some form or another are still at
15 issue in the FOIA litigation. And so, it's
16 difficult to know for sure which issues
17 they'll be relevant to.

18 JUDGE STEIN: Okay. Region IX, did
19 you have anything else that you wanted the
20 Board to consider before we rule on this
21 particular motion?

22 MS. LEITH: I don't think so. I

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1 think just to clarify on the FOIA motion,
2 there are three FOIA requests at issue. Two
3 of them deal with documents EPA considered in
4 the tentative decisions for the two treatment
5 plants. I think there are about 50 documents
6 still at issue on those and there are things
7 like preliminary drafts, preliminary agency
8 staff people, e-mails back and forth. So,
9 they are the kind of things that we don't
10 think belong in the administrative record
11 under the Dominion Energy cases.

12 The other FOIA request deals with
13 documents back from the late 80s and 90s prior
14 to the current permit in Honouliuli, and I
15 think those were the ones Mr. Salmons was
16 referring to that they footnoted in the draft
17 in his original brief. Those, I don't --
18 there are probably 50 to 70 documents at issue
19 there.

20 Again, they are preliminary staff
21 discussions not about these tentative
22 decisions, but about the ones back in 1988 and

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1 1991. So, that's a fuller explanation of what
2 the documents are.

3 JUDGE STEIN: Okay. Well, I am
4 going to take this under -- unless there's
5 anything further from the Petitioner, I am
6 going to take this under advisement, but I'm
7 strongly inclined to go ahead and set a date
8 for the scheduling of the reply brief.

9 And if and as the FOIA litigation
10 proceeds, presumably there will be an
11 opportunity for that to have some resolution,
12 I think we'll go and schedule oral argument
13 for -- we've got some scheduling issues on the
14 Board, so I don't know if exactly it's going
15 to be September or not. But I am out for a
16 good part of July, so I can assure you it's
17 not going to be before then.

18 If we've got a reply brief coming
19 in potentially sometime soon, that's going to
20 have to be digested before the oral argument,
21 but I do think we'll be able to make progress.

22 But given the Dominion Energy

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1 case, that's something that I think
2 Petitioner's counsel ought to take a look at
3 if they haven't already.

4 But that is my inclination in
5 terms of proceeding, and we will get an order
6 out in the next couple of days as to how we're
7 going to proceed.

8 Is there anything else that we
9 need to hear from in terms of Petitioner?

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

12 JUDGE STEIN: Region IX, anything
13 else?

14 MS. LEITH: We're having trouble
15 getting the mute button out.

16 JUDGE STEIN: Okay.

17 MS. LEITH: Just two things. One,
18 if you would build in time for a possible
19 reply brief or a sur-reply or if you could go
20 ahead and agree that we could do it, we'd
21 really appreciate that.

22 JUDGE STEIN: Okay.

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1 MS. LEITH: The other thing is I'm
2 going to be on vacation September 28th through
3 the first couple of weeks in October.

4 JUDGE STEIN: Okay.

5 MR. SALMONS: Your Honor, I guess
6 we would request that they -- actually, that's
7 not part of the motion that's currently before
8 the Court. And if they would like to file a
9 sur-reply, I would suggest they make a motion
10 and we have the opportunity to respond to it.

11 JUDGE STEIN: Okay. Well, I can
12 assure you that oral argument will likely not
13 be the first two weeks of October, because I
14 have some business travel scheduled for then.
15 So, I will take this all under advisement and
16 we will issue a ruling within the next couple
17 of days, and I appreciate your participation
18 very much. Thank you.

19 MR. SALMONS: Thank you, Your
20 Honor.

21 MS. LEITH: Thank you.

22 CLERK DURR: All rise. This

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1 session of the Environmental Appeals Board now
2 stands adjourned.

3 (Whereupon, this matter was
4 adjourned at 3:22 p.m.)

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CERTIFICATE

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

Before: Environmental Protection Agency
Environmental Appeals Board

Date: June 9, 2009

Place: Washington, DC

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

Eric Hendrixson

Eric Hendrixson

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