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February 9, 2009

**VIA HAND DELIVERY**

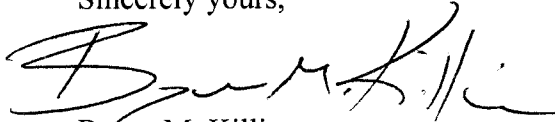
Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1341 G Street, N.W.  
Suite 600  
Washington, D.C. 20005

Dear Clerk:

Enclosed, please find an original and five copies of the Consolidated Petitions for Review in Appeal filed on behalf of the City and County of Honolulu.

Please date stamp one copy of the Petition and return to the Courier.

Sincerely yours,

  
Bryan M. Killian

Enclosures

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

Bingham McCutchen LLP  
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20006-1806

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A/72825942.1

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

In the matters of:

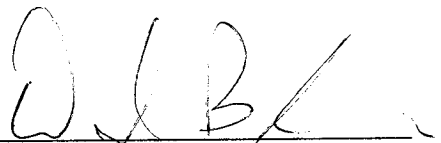
City and County of Honolulu's Sand  
Island Wastewater Treatment Plant  
Application for Modified NPDES Permit  
Under Section 301(h) of the Clean Water  
Act (NPDES Permit No. HI0020117)

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 TO CONSOLIDATE  
PETITIONS FOR REVIEW IN  
APPEAL NPDES NO. 09-01**

The City and County of Honolulu (CCH) hereby requests that the EAB consolidate its consideration of the petitions for review in the above cases. CCH believes that, because the issues involved in both cases substantially overlap, consolidation would be expedient. Region 9 apparently agrees. *See* EPA Region 9's Response To Motion For Extension Of Time To File Petitions For Review, at 4 (January 29, 2009) (consolidation "would be a reasonable course of action").

RESPECTFULLY SUBMITTED February 9, 2009.



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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Consolidated Petitions For Review and Motion To Consolidate Petitions For Review were sent by Federal Express to the below listed persons on this 9th day of February, 2009.

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

A handwritten signature in black ink, appearing to read 'D. Salmons', written over a horizontal line.

David Salmons

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

In the matters of:

City and County of Honolulu's Sand  
Island Wastewater Treatment Plant  
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Act (NPDES Permit No. HI0020877)

**CONSOLIDATED PETITIONS  
FOR REVIEW IN APPEAL NPDES  
NO. 09-01**

The City and County of Honolulu (CCH), pursuant to 40 C.F.R. § 124.19(a), hereby petitions for review of two Final Decisions of the Regional Administrator, Region 9, denying CCH's requests for variances under Section 301(h) of the Clean Water Act from the Act's secondary treatment requirements. 33 U.S.C. § 1311(h).

By order of February 2, 2009, the Environmental Appeals Board granted CCH leave to file summary petitions for review on or before February 9, 2009, identifying all the issues CCH wishes to raise, and then to file supplemental briefs on or before March 11, 2009, presenting argument and information supporting those issues.

**STATEMENT OF FACTS**

CCH operates two wastewater treatment plants that discharge primary treated wastewater through deep ocean outfalls into the Pacific Ocean — the Sand Island and Honouliuli Plants. Both plants operate under National Pollutant Discharge Elimination System (NPDES) permits that, per Section 301(h) of the Clean Water Act, exempt 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.

The history of the two plants' permits is as follows:

*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 recommending 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. While the reapplication was pending, a modified permit was issued in February 1995. 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 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 applied for a 301(h) variance for its Honouliuli wastewater treatment plant. CCH submitted a reapplication in 1983. A tentative decision recommending 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 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.

## ISSUES PRESENTED FOR REVIEW

1. Whether the Regional Administrator's use of a narrow, purportedly federal mixing zone was contrary to law, where Hawaii's EPA-approved water quality standards provide for a less restrictive mixing zone. (Honouliuli and Sand Island permits)

The Regional Administrator largely based his denial of the variances upon finding violations of Hawaii's EPA-approved water quality standards at the boundary of a purportedly federal mixing zone that is smaller than Hawaii's EPA-approved mixing zone. To determine whether CCH is complying with its NPDES permits, EPA only requires CCH to comply with Hawaii's water quality standards at the edge of the state-defined mixing zone. EPA has no legal or rational basis for using a different, more restrictive mixing zone to determine whether CCH has satisfied the requirements for a secondary-treatment variance.

2. Whether the Regional Administrator erred as a matter of law in basing its denial of CCH's variance application on violations of water quality standards, including their measurement at the edge of a narrow, purportedly federal mixing zone, for which CCH was not seeking a variance. (Honouliuli and Sand Island permits)

CCH sought Section 301(h) variances for suspended solids and dissolved oxygen. The Regional Administrator denied the variances, not because it found violations of the water quality standards for suspended solids and dissolved oxygen, but because it found violations of other water quality standards. Never before had violations of those other standards been deemed relevant to CCH's variance applications, nor is there any basis for measuring compliance with those standards at the edge of a narrower mixing zone. The Regional Administrator's new position is unlawful and arbitrary and capricious.

3. Whether the Regional Administrator lawfully concluded that CCH had not shown that the proposed discharges would protect a balanced, indigenous population of shellfish, fish, and wildlife and would not otherwise cause environmental and recreational harm, as required by Section 301(h)(2). (Honouliuli and Sand Island permits)

Section 301(h)(2) requires EPA to consider the actual environmental effects of an ocean discharge in deciding whether an applicant is entitled to a secondary treatment variance. The actual biological data showed, among other things, that balanced, indigenous populations were thriving in the area of the outfall and that there had been no algal blooms. No biological data showed environmental or recreational harm. The Regional Administrator clearly erred in finding that CCH did not satisfy Section 301(h)(2), based on his conclusion that the alleged violations of Hawaii's water quality standards overrode the concededly favorable environmental data.

4. Whether the Regional Administrator gave adequate reasons, and had an adequate basis, for his change of position. (Honouliuli and Sand Island permits)

In several previous decisions, the Regional Administrator recommended the grant of a secondary treatment variance and approved permits issued pursuant to those recommendations. The Regional Administrator did not give adequate reasons, and did not have an adequate basis, for changing his position.

5. Whether the Regional Administrator gave adequate responses to significant questions raised in CCH's comments concerning the validity of test methods and measurements. (Honouliuli and Sand Island permits)

During the comment period, CCH raised several significant questions challenging the scientific and factual underpinnings of Region 9's adverse findings. These included: use of unapproved, unverified, or otherwise inappropriate test methods; reliance on testing for whole

effluent toxicity that ignored the biological significance of results; reliance on readings of pathogen violations at offshore locations (Honouliuli only); and incorrect use of geometric mean measurements. The Regional Administrator failed adequately to respond to these and other questions, and his findings were clearly erroneous.

6. Whether the Regional Administrator had a legally adequate basis for refusing to consider disinfection as an alternative treatment to address alleged pathogen violations.

(Honouliuli permit).

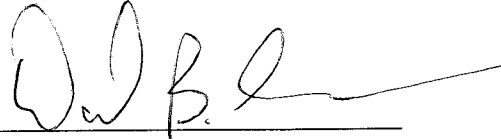
The Regional Administrator refused to consider disinfection as an alternative treatment to address alleged pathogen violations at Honouliuli on the ground that the permit application did not propose disinfection. That refusal was arbitrary and capricious and an abuse of discretion. CCH acted diligently in proposing disinfection, and its proposal was accompanied by new information not previously available.



## CONCLUSION

As will be further explained in the supplemental brief CCH will file on or before March 11, 2009, the Final Decisions of the Regional Administrator should be reversed and remanded for further consideration in light of the errors identified above.

RESPECTFULLY SUBMITTED February 9, 2009.



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