

Capital Reporting Company
Hearing 11-19-2009

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

ORIGINAL

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In re: : :
: : :
City & County of Honolulu : :
Sand Island Wastewater Treatment Plant : NPDES
Honouliuli Wastewater Treatment Plant : Appeal No.
: 09-01
NPDES Permit Nos. HI0020117 & HI0020877 : :
: :
-----:

Washington, D.C.

Thursday, November 19, 2009

The following pages constitute the oral arguments before the Environmental Appeals Board, held pursuant to notice, at the U.S. Environmental Protection Agency, 1201 Constitution Avenue, Northwest, Washington, D.C., before Erick M. Thacker, RPR, of Capital Reporting Company, a Notary Public in and for the District of Columbia, commencing at 3:00 p.m.

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1 A P P E A R A N C E S

2 On behalf of the Environmental Appeals Board:

3 Judge Edward E. Reich

4 Judge Charles J. Sheehan

5 Judge Kathie A. Stein

6

7 On behalf of the U.S. Environmental Protection Agency:

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3 ROBERT V. ZENER, ESQUIRE

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9 ALSO PRESENT:

10 Eurika Durr, Clerk of the Board

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C O N T E N T S

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ORAL ARGUMENT

PAGE

By Mr. Salmons

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By Ms. Leith

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REBUTTAL ARGUMENT

By Mr. Salmons

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

2 MS. DURR: The Environmental Appeals Boards
3 for the United States Environmental Protection Agency
4 is now in session for oral argument. In re: City &
5 County of Honolulu, Sand Island Wastewater Treatment
6 Plant, Honouliuli Wastewater Treatment Plant, Permit
7 Nos. HI0020117 and HI0020877, NDPES Appeal No. 09-01.
8 Honorable Judges Edward Reich, Kathie Stein, Charles
9 Sheehan presiding.

10 Will you please turn off all cell phones and
11 recording devices?

12 JUDGE STEIN: Good morning, counsel. Can
13 everyone hear me? If counsel could please state their
14 name for the record and the party they represent.

15 MR. SALMONS: Thank you, Your Honor. I'm
16 David Salmons. I represent the city and county of
17 Honolulu. This is Bob Zener.

18 MS. LEITH: I'm Suzette Leith for the EPA
19 Region 9. Can you hear me?

20 JUDGE STEIN: Actually, not very well.

21 MS. LEITH: I'm Suzette Leith from EPA Region
22 9, Office of Regional Counsel, representing Region 9.

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1 With me is Stephen Sweeney from the Office of General
2 Counsel.

3 JUDGE STEIN: I believe that the city and
4 county of Honolulu is going to proceed first, and if I
5 understand correctly, you have 45 minutes for argument,
6 and are you reserving any time for rebuttal?

7 MR. SALMONS: Yes, Your Honor. We'd like to
8 reserve ten minutes for rebuttal. Thank you, Your
9 Honors. May it please the Board? I'm David Salmons,
10 and I will address the issues of mixing zones, the
11 application of Sections 301(h)(9) and (h)(2), the
12 region's refusal to consider disinfection to address
13 the bacteria exceedances at Honouliuli.

14 My colleague, Mr. Zener, will address specific
15 issues related to chlordane, Whole Effluent Toxicity,
16 bacteria, dieldrin, and the motion to supplement the
17 record.

18 If it pleases the board, I'd like to begin
19 with the issues of mixing zones. And to put that issue
20 in context, it's important to recall that for 20 years,
21 the region had permitted the plants at issue in this
22 case to operate without secondary treatment. And in

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1 1988, it specifically stated in its tentative decisions
2 granting the waivers that the state's EPA approved
3 mixing zone or ZOM, rather than the federal mixing zone
4 or ZID, quote, takes precedence, close quote, in
5 determining compliance with all state water quality
6 standards, except for biochemical oxygen depletion and
7 total suspended solids, which are the specific
8 pollutants for which the secondary treatment waiver is
9 being sought.

10 The region suddenly changed that long-standing
11 view in its tentative decisions in these cases. But
12 its current position is both contrary to law and
13 arbitrary and capricious.

14 JUDGE STEIN: Am I correct however in
15 understanding that the ZOMs that were approved were
16 approved for only a subset of pollutants?

17 MR. SALMONS: Well, what I would say, Your
18 Honor, is that the permit that I believe you're
19 referring to, if you take, for example, the Honouliuli
20 permit -- this is at H-12-1172 in the record -- it
21 identifies specific parameters that had to be met at
22 the ZID, and it only included light efficient -- excuse

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1 me -- light extinction coefficient, turbidity and
2 dissolved oxygen.

3 And then it identified specific parameters
4 that needed to be met at the ZOM, and there it includes
5 total nitrogen, ammonium nitrogen, and some others.
6 What that leaves are what are the toxic substances.
7 And for those, the permit contains a specific dilution
8 factor that is to be used since those are not actually
9 measured at an area in the ambient waters; instead are
10 measurements that are taken at the end of the pipe --

11 JUDGE SHEEHAN: You didn't challenge those
12 limits, did you, those findings?

13 MR. SALMONS: Well, I do think we did with
14 regard to this issue of whether the Zone of Initial
15 Dilution or the state approved mixing zone is relevant.
16 And I think it's important to remember -- and EPA's own
17 technical standards document bears this out -- that
18 when calculating the dilution factor for things like
19 chlordane and dieldrin and WET testing, you start with
20 some conception of what the mixing zone is, because the
21 goal is for that dilution factor to give you a result
22 that mirrors what would be a measurement at the edge of

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1 the mixing zone, and so, to the extent that the
2 dilution factors that were actually applied by the
3 region in this case for those toxic substances differs
4 from the permit, and they do in each instance, their
5 differences in part, we believe, reflect this
6 distinction between using the mixing zone that's
7 approved by EPA by the state in using the ZID. And if
8 you look at the record, Your Honors, with regard to,
9 for example, chlordane and dieldrin and WET testing in
10 both Honouliuli and Sand Island final decisions, you'll
11 see that the region specifically says that the dilution
12 factor that they used was intended to measure those
13 pollutants at the ZID or to reflect the measure that
14 would --

15 JUDGE STEIN: Is this argument now that
16 you're giving to us addressed in your briefs, or is
17 this yet a new argument that you're making as to why
18 some of these other pollutants may have ZOM-like
19 characteristics?

20 MR. SALMONS: Well, Your Honor, I don't think
21 it's a new argument. I think what I'm attempting to do
22 is respond to Your Honor's question as to whether our

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1 ZID/ZOM arguments that are clearly presented we believe
2 were made below and are made in our briefs, whether
3 those apply to only those pollutants that are
4 identified in the permit as being measured at the ZOM,
5 or if they also would incorporate these other toxic
6 substances. We think it's clear from the record that
7 that -- if there's a legal error, we're correct about
8 that, that the region was required to use the state EPA
9 approved mixing zone.

10 JUDGE SHEEHAN: But I think the region
11 challenges your assertion that the ZID argument for the
12 toxics was made in your comments below. Can you point
13 out in the record where you did make the ZID argument
14 in the comments, your comments?

15 MR. SALMONS: Certainly, Your Honor, and I
16 think this goes to an issue that the region is very
17 aggressive about, in our view, and that is reading our
18 comments very narrowly as to -- we would submit trying
19 to avoid meaningful review of what is fundamentally a
20 significant policy change that they have adopted in the
21 decisions in this case.

22 What happened was, once the tentative decision

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1 came down and indicated that there was -- there were
2 going to be violations and that the waiver application
3 was going to be denied based on measurements at the ZID
4 in response to that in our comments, and this is the --
5 if the Court wants to follow along, this is at H-2-24
6 and -25 -- and what we said was that the tentative
7 decision reflects a change without explanation or
8 justification, a deviation from what the position was
9 taken in 1988, and then it quotes the position from
10 1988 which we believe is reflected in an appropriate
11 interpretation of the regulations --

12 JUDGE SHEEHAN: It doesn't sound like you're
13 arguing the regulatory scheme, though, there; you're
14 just making a general assertion of error without
15 arguing the law?

16 MR. SALMONS: I'm sorry. I'm not sure I
17 understand.

18 JUDGE SHEEHAN: It doesn't sound like you're
19 arguing on the basis of regulations there.

20 MR. SALMONS: Well, I think that there was
21 still some question at this point, I believe, in the
22 minds of Honolulu exactly why the region had so

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1 dramatically changed their position. And so what they
2 said was, you know, you made an unjustified change, and
3 it quotes the language from 1988 that says that the --
4 quote, the ZOM would take precedence in determining
5 compliance with state water quality standards and that
6 the Zone of Initial Dilution would apply for parameters
7 only for which the applicant is requesting a variance,
8 i.e., BOD and TSS.

9 So the position that the region had previously
10 taken, which we believe is the position that's required
11 under the statute and the regulations, is that you have
12 to use the state approved mixing zone, and the only
13 possible exception is for the pollutants for which you
14 are seeking a modified permit, and that, in this case,
15 is BOD and suspended solids.

16 JUDGE REICH: Could I go back to the dilution
17 factor issue? I share a little bit of what I think was
18 Judge Stein's puzzlement about the argument, because
19 having read your briefs, I don't remember seeing it
20 being argued that way. I mean, clearly, you argued the
21 issue about which mixing zone was appropriate, but I
22 don't remember seeing this argument about the dilution

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1 factor. Where in the permit is the dilution factor
2 specified, using either one?

3 MR. SALMONS: I don't have the responsive
4 permit handy, and I apologize for that.

5 JUDGE REICH: Are you saying that if one
6 looked at the dilution factor and knew what they were
7 looking at, that it is clearer that that dilution
8 factor has to correspond to measuring at the edge of
9 the ZOM rather than the ZID, that there's no question
10 that that's what was intended by the dilution factor?

11 MR. SALMONS: Well, Your Honor, if one were
12 to look -- if one were to look at the final decisions
13 in these cases -- and we can just go through them. I'm
14 happy to do that, and we can start with Honouliuli.
15 And if we look, for example, at chlordane -- this is
16 page 63 of the final decision for Honouliuli -- it says
17 that when the long-term efficient dilution value of 412
18 to 1 is applied to these three sample results, the
19 concentration of chlordane in the receiving water at
20 the ZID is calculated to be -- and then it provides the
21 specific calculation -- and that 412 to 1 is a
22 different dilution factor than was specified in the

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1 permit.

2 And so our point is that to the extent that
3 reflects an attempt to mirror the dilution at the ZID
4 as opposed to the state-approved ZOM, which we would
5 submit are inherent in the dilution factors that are
6 contained in the permit, that our argument about why
7 the ZOM controls applies to those pollutants as well.
8 And I would respectfully disagree that that's not clear
9 from our brief. I believe our brief was clear that our
10 arguments with regard to ZID/ZOM apply to all of the
11 pollutants in this case with the exception of bacteria.

12 JUDGE REICH: I think that was clear. What I
13 think was not clear was that one could determine that
14 there was, in fact, a mixing zone for pollutants other
15 than the ones specifically listed by looking at the
16 dilution factor. I don't believe that was clear.

17 MR. SALMONS: Well, and I guess what I would
18 say, Your Honor, is that if the Court agrees, if the
19 board agrees with our arguments with regard to the
20 state mixing zone and that the state mixing zone is the
21 appropriate mixing zone -- the EPA approved state
22 mixing zone -- is the appropriate mixing zone to use in

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1 the 301(h)(9) analysis. Well, then the question
2 becomes, you know, how much of the region's
3 determinations are -- have to be reconsidered in light
4 of that legal error?

5 JUDGE REICH: In your view, since you
6 referenced (h)(9), as I read your argument, does (h)(9)
7 apply to anything beyond the pollutants for which a
8 waiver was requested?

9 MR. SALMONS: I think it does, Your Honor.
10 What I would say is that (h)(9) requires more broadly a
11 predictive judgment on the part of the region and the
12 EPA as to whether -- if the variance is permitted -- as
13 to whether the effluent that would be discharged at
14 that time would generally be in compliance with the
15 act's criteria. And the region agrees and I think
16 everyone concedes that the state water quality
17 standards which have been approved by EPA --

18 JUDGE REICH: So that's not limited to BOD
19 and TSS in this case?

20 MR. SALMONS: I don't think that -- I don't
21 think that the (h)(9) analysis is limited only to BOD.
22 At least, that's certainly not a position we have

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1 argued. What we have argued, Your Honor, is that when
2 undertaking that (h)(9) analysis and asking the
3 question, will the discharge comply with the federal
4 criteria, that it doesn't make any sense to disregard
5 the state mixing zone which was approved by EPA
6 precisely with that criteria in mind.

7 JUDGE STEIN: But how do you square that with
8 the language of the regulation in 125.62, which clearly
9 makes reference to, "At the time the modification
10 becomes effective, the applicant's outfall and diffuser
11 must be located and designed to provide adequate
12 initial dilution, dispersion, and transport of
13 wastewater such that the discharge does not exceed at
14 and beyond the Zone of Initial Dilution?"

15 I see nothing in that regulation that gives
16 room for the argument that you're making, and when I
17 look at the 1994 preamble, when commentators suggested a
18 broader interpretation, EPA in the 1994 preamble spoke to
19 that issue. So the difficulty I'm having with your argument
20 is understanding how it can be squared with the
21 language in the regulation and the '94 preamble.

22 MR. SALMONS: Thank you, Your Honor. I'm

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1 happy to address that. Our position -- and we think
2 this is the best reading of the regulation -- is that
3 when -- when the regulation 125.62 makes reference to
4 all applicable water quality standards that that
5 reference to applicable is essentially defined in the
6 prior section of the regulation in 125.61, which said,
7 "There must exist a water quality standard or standards
8 applicable to the pollutant(s) for which a section
9 301(h) modified permit is requested" -- and it
10 identifies BOD, suspended solids, and pH --

11 JUDGE REICH: Now I'm really confused.

12 JUDGE SHEEHAN: So BOD and TSS set the bounds
13 for where measurement occurs --

14 MR. SALMONS: Well --

15 JUDGE SHEEHAN: -- in all -- for all
16 pollutants?

17 MR. SALMONS: Well, I think that the
18 requirement -- just to be clear, it's in Section .61 of
19 the regulations -- it doesn't say where those
20 measurements are to be taken. .62 of the regulations,
21 that provision says that the applicable water quality
22 standards have to be satisfied at the ZID, and we're

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1 not disputing that in this case. What we are saying is
2 that applicable there doesn't mean all water quality
3 standards. It's a reference to the standards that are
4 applicable to the pollutants for which the waiver is
5 sought, so the rest are satisfied at the ZOM.

6 JUDGE REICH: Then if you can help me kind of
7 put this all together, because my understanding --
8 correct me if you don't think it's right -- is that
9 125.62(a), in the language you're looking at, basically
10 is the language that's intended to implement (h)(9).

11 MR. SALMONS: Well, no, Your Honor, and I
12 think that is an important point. That is clearly not
13 correct. The language we're talking about that makes
14 reference to the satisfaction of all applicable water
15 quality standards at the ZID, that language goes back
16 for a decade or more before (h)(9) was even in the
17 statute.

18 And if the Court looks, for example, at the
19 1986 version of the regulations -- now, there's a
20 difference in numbering. It's .60 and 61 instead of 61
21 and 62, but what you'll find, Your Honor, is exactly
22 this same language that makes reference to all

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1 applicable water quality standards being satisfied at
2 the ZID when (h)(9) was not even in the statute, and I
3 don't think it's disputed --

4 JUDGE REICH: But --

5 MR. SALMONS: -- how the EPA construed
6 that --

7 JUDGE REICH: So if I want to find in the
8 regulations where (h)(9) is implemented, where would I
9 find that?

10 MR. SALMONS: Well, what the -- what the EPA
11 did after (h)(9) was added to the statute in terms of
12 amendments to the regulations is in .62. It adds -- it
13 added (ii) to (a)(1). So it added the reference that
14 where there is not a state approved water quality
15 standard, you have to comply with the federal criteria,
16 and that carries back up to the reference to the ZID --
17 at the ZID. And again we do not dispute --

18 JUDGE REICH: So you're saying that A -- when
19 you talk about two, are you talking about (ii) or --

20 MR. SALMONS: That's correct. So if -- for
21 example, in 40 CFR 125.62, (A) refers to physical
22 characteristics of the discharge. (a)(1) is the

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1 statement that makes reference to the ZID. (a)(1)(i)
2 says all applicable water quality standards, so those
3 have to be satisfied at the ZID. We read those as a
4 reference to the water quality standards that have just
5 been defined in .61.

6 JUDGE SHEEHAN: But didn't EPA in its '91
7 rulemaking tie 125.62(a)(1) to 301(h)(9), all of it?

8 MR. SALMONS: Well, I think it's difficult to
9 understand exactly what occurred at that time, to be
10 honest with you. And to be clear, this is not a model
11 of clarity. I will concede that. We're trying to do
12 the best we can with this, but I think given the
13 history of it, it's hard to read applicable as being
14 anything other than a reference to .61, which has been
15 defined as applicable.

16 And what they did after (h)(9) was added to
17 the statute, they amended it to say, if you do not have
18 approved state water quality standards, then you have
19 to apply -- you have to satisfy the federal criteria at
20 the ZID --

21 JUDGE REICH: All right. So --

22 MR. SALMONS: -- and we agreed with that.

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1 JUDGE STEIN: So (a)(ii) there, if I
2 understand what you're saying now, was, in fact, the
3 language added to address (h)(9)?

4 MR. SALMONS: Yes, Your Honor.

5 JUDGE REICH: Okay. That uses the word
6 "applicable," right?

7 MR. SALMONS: It does. Yes, Your Honor.

8 JUDGE REICH: It does? And you indicated
9 earlier that in your view, (h)(9) is not limited to TSS
10 and BOD, so presumably, the word "applicable" there has
11 broader meaning, so why should we read it in (i) right
12 above it more narrowly?

13 MR. SALMONS: Well --

14 JUDGE REICH: It's the same word.

15 MR. SALMONS: Well, with respect, I think
16 that's because .61 defines it for you, and it defines
17 what are the applicable water quality standards that
18 have to be met at the ZID. Historically, that is
19 exactly the language that was here before (h)(9) was
20 even added to the statute, and everybody understood the
21 reference to all --

22 JUDGE REICH: But being that you argue in

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1 your brief that if language is amended then you need to
2 kind of look at the language after it's amended and
3 assume that, you know, what was there before doesn't
4 necessarily carry forward, and it seems to me that if
5 you're looking for something that helps define what
6 applicable is in (i), then it is probably at least or
7 more logical to look at what's in (ii), then to go back
8 and look at 61, which is a different section all
9 together.

10 MR. SALMONS: Well, I think the history of it
11 suggests that they're more connected than that, Your
12 Honor. And I guess I would say that, again, this is
13 not a model of regulatory clarity, and if you step back
14 and ask yourself, what is the point of (h)(9), the
15 point of (h)(9) is to insure that there's going to be
16 general compliance with the federal criteria.

17 And the region has not come forward with any
18 suggestion -- and with respect, I don't think it's
19 possible that the state approved mixing zone satisfies
20 the criteria of the statute. That's precisely why it
21 was approved, and so the question then becomes, why
22 would you ignore that and why would you adopt a

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1 different --

2 JUDGE SHEEHAN: But the ZOM was only adopted
3 for certain pollutants, not for all pollutants, right
4 --

5 MR. SALMONS: Well --

6 JUDGE SHEEHAN: -- pollutant by pollutant
7 permit?

8 MR. SALMONS: -- for all the pollutants that
9 are at issue here, we think the ZOM was a factor in
10 defining whether there's an exceedance or not for those
11 --

12 JUDGE SHEEHAN: The ZOM is still set permit
13 by permit, right?

14 MR. SALMONS: Well, there -- I'm sorry, I
15 couldn't hear you.

16 JUDGE SHEEHAN: Under Hawaii standards, the
17 ZOM is set permit by permit?

18 MR. SALMONS: The procedure -- and this is
19 again consistent with the technical support document
20 that the region relies on -- it specifies that as a
21 general matter with -- along with the state water
22 quality standards -- in fact, this is at S-2-4161.

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1 This is a quote from the technical manual.

2 It says that the Clean Water Act allows mixing
3 zones at the discretion of the state. EPA recommends
4 that states have a definitive statement in their
5 standards on whether or not mixing zones are allowed,
6 which was done here. Where mixing zone provisions are
7 part of the state standards, the state should describe
8 the procedures for defining mixing zones, which is
9 again, during the water quality standard approval
10 process, there's a procedure that's set forth for
11 defining the mixing zones in the --

12 JUDGE STEIN: How do you square that with the
13 language in the '94 preamble, which specifically
14 refused to adopt the position that state standards were
15 going to trump the ZID? There's specific language.
16 There's a specific discussion in comments. EPA
17 responds to those comments, takes a position that
18 appears to me to be different than the position you're
19 arguing, and as far as I know, that issue wasn't
20 challenged.

21 MR. SALMONS: Well, with respect, I don't
22 think that language is that clear, and I think there

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1 are other statements around that time that cut the
2 other way. And then, again, I think that this comes
3 down to a question of what is at best, less than fully
4 clear regulatory language that is the result of
5 amendments over time as the act has changed. I think,
6 at a minimum, the region's position is that the term
7 "applicable" has changed over time, and it --

8 JUDGE STEIN: Maybe the region made an error
9 in the earlier permit. I'm not sure that the language
10 in the regulation has changed, and when I look at -- I
11 think it's 125.62 through -- I don't know if it's
12 (a)(3) or (3) -- where it says that the requirements of
13 paragraphs (a)(1) and (2) apply in addition to and do
14 not waive or substitute for the requirements in 125.61.

15 MR. SALMONS: Well, that's right, Your Honor,
16 but that is -- I mean, just again, to remind the Court,
17 romanette (ii), that's a reference to when there is no
18 state approved water quality standards. It's not a
19 reference --

20 JUDGE STEIN: What about (a)(1)?

21 MR. SALMONS: Well, (a)(1) is when there's a
22 reference to where there are state approved water

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1 quality standards, and it says you have to comply with
2 the applicable ones, you have to satisfy it at the ZID,
3 and we're discussing what applicable means. I do
4 think -- just again, I would urge the Court if -- to
5 the extent that there's some uncertainty with regard to
6 this regulatory language, I think the important thing
7 to do is to go back to the statute and to ask the
8 question, why would Congress want to disregard state
9 approved mixing zones when they have been carefully
10 designed by -- EPA's own technical document says this --
11 through a multistep process that takes into account
12 precisely these same types of economic -- excuse me --
13 environmental concerns.

14 JUDGE STEIN: But as I read the legislative
15 history, what Congress said was that we are going to
16 allow for a waiver of secondary treatment in certain
17 carefully defined circumstances, and that there was
18 legislative history, if I recall -- and I can't recall
19 the specific piece of history -- that talked about that
20 this should not be interpreted expansively.

21 And if you're going to allow a waiver from
22 requirements that otherwise apply to all facilities or

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1 all POTWs, isn't it rational that in order to obtain a
2 waiver that you might have to comply with potentially
3 more stringent criteria if you're going to be allowed
4 out of a major requirement? So I just don't see
5 Congress speaking to that issue.

6 I see the statutory language, which is
7 consistent with the ZID. I see more explanation in the
8 ninety -- you know -- four regulations as to what was
9 intended by the ZID, and I don't see -- I think the
10 language of the reg as to what the ZID is is pretty
11 clear. I mean, I understand you've got an argument
12 about what is applicable and what's not applicable. I
13 have difficulty understanding some of the references to
14 metals and fecal coliform bacteria in the regs if your
15 definition of applicable applies.

16 MR. SALMONS: Your Honor, if I may start to
17 address some of those concerns, and there are, I think
18 several in Your Honor's question there, and I would
19 start where I think Your Honor has started, with the
20 statute, and I would make the following two points.

21 The first is that the entire thrust of the
22 Clean Water Act -- and Congress certainly understood

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1 this when it added the 301(h) process -- the entire
2 thrust is for the encouragement of, the development of,
3 and deference to EPA approved state water quality
4 standards. And the whole point of the waiver process
5 of 301(h) is to recognize that there are potentially
6 crushing cost burdens on jurisdictions along the
7 coastal areas, where the issue can be adequately
8 addressed through dilution.

9 And Congress certainly was aware that mixing
10 zones are an inherent part of state water quality
11 standards. Everybody agrees. The region has made this
12 very clear that the reference to the federal criteria
13 in (h)(9) includes reliance on EPA approved water
14 quality standards, and with respect, I see no reason to
15 distinguish between state approved mixing zones and
16 state approved water quality standards. They've been
17 through essentially the same approval process.

18 JUDGE STEIN: But as I understand the Hawaii
19 mixing zone concept, it's not -- it's site specific,
20 and it is pollutant specific, and it is limited in
21 time, so it's not that if you get a mixing zone for
22 permit one, you're entitled to permit -- a mixing zone

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1 in permit two. The way you're describing the mixing
2 zone it sounds like, you know, this applies to all
3 facilities under all circumstances, and I'm not sure
4 that's an accurate reflection of what the Hawaii mixing
5 zone --

6 MR. SALMONS: Well, there are two steps to
7 the process, Your Honor, and I think, as you
8 understand. The first is the approval of the concept
9 of the mixing zone in the first instance through the
10 water quality standard approval process, and that's --

11 JUDGE SHEEHAN: It's case by case. That's
12 Judge Stein's point.

13 MR. SALMONS: First, there is the approval of
14 the water quality standards that include the procedures
15 for the mixing zone, then permit by permit --

16 JUDGE STEIN: But the procedures or the
17 possibility of a mixing zone --

18 MR. SALMONS: But they set forth the standard
19 for measuring the features of it and how the process
20 for determining it --

21 JUDGE SHEEHAN: If they're saying that there
22 should be a ZOM.

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1 MR. SALMONS: Well, that's part of it, yes.

2 But here's what I would take away from that, Your
3 Honors, and I think that is important. And that is,
4 that if the region has concerns about the adequacy or
5 appropriateness of a state mixing zone, it is fully
6 able to address any concerns that it's not sufficiently
7 protective of environmental concerns through the
8 approval process of the water quality standard in the
9 first instance, and then through the specific permit
10 approval processes. There's no reason to give the
11 region now a third opportunity to come in and to say
12 that the state mixing zone is inadequate and to adopt
13 what is essentially a hybrid federal standard.

14 JUDGE SHEEHAN: Well, can the state change
15 its mind -- can the feds change their minds, if they
16 want?

17 MR. SALMONS: I'm sorry. I couldn't hear
18 you.

19 JUDGE SHEEHAN: Can the region change its
20 mind over time?

21 MR. SALMONS: Well, there are procedures to
22 do that through the water quality standard approval

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1 process and through the permitting process. It hasn't
2 done so here, and there's been no suggestion in any of
3 the pleadings that Hawaii's mixing zone is inadequate
4 to protect environmental concerns or is inadequate to
5 fulfill the criteria of the Clean Water Act. And that,
6 after all, everybody agrees, is the whole point of
7 (h) (9). The question as to (h) (9) is, will the
8 discharge of effluent generally be in compliance with
9 federal criteria?

10 JUDGE REICH: (h) (9) uses the term "after
11 initial mixing."

12 MR. SALMONS: Yes, Your Honor.

13 JUDGE REICH: What is your understanding of
14 the word "initial" in the term "initial mixing."

15 MR. SALMONS: Well, we believe that is
16 intentionally broad to include both state approved
17 mixing zones when the mixing zone -- excuse me -- when
18 the state water quality standards are in existence and
19 a federal mixing zone when they are not. And so we
20 think Congress used the term "initial mixing" as
21 opposed to, you know, the Zone of Initial Dilution or
22 something like that precisely because it recognized

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1 that there are, if you will, two types of mixing zones.
2 There are state approved mixing zones, and then there
3 are federal mixing zones, and the mixing zone should
4 follow the water quality standards.

5 JUDGE SHEEHAN: How about the fact that
6 125.58 (dd) defines ZID as the region of initial
7 mixing?

8 MR. SALMONS: I'm sorry?

9 JUDGE SHEEHAN: It seems like initial mixing
10 and ZID are the same thing.

11 MR. SALMONS: No, I don't think that's true,
12 and I don't think there's any suggestion in the
13 statutory text or its history --

14 JUDGE SHEEHAN: Well, I'm quoting 58(dd),
15 125.

16 MR. SALMONS: I'm sorry. This is the
17 regulation you're talking about?

18 JUDGE SHEEHAN: Yes, right.

19 MR. SALMONS: Well, yes, the regulation
20 defines the ZID --

21 JUDGE SHEEHAN: As the region of initial
22 mixing, back to (h)(9) arguably.

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1 MR. SALMONS: Well, I mean, again, I don't --
2 I think that that's not the proper reading.

3 JUDGE SHEEHAN: Well, there seems to be a
4 correlation between (h)(9) and the ZID.

5 MR. SALMONS: Well, to be sure, there are
6 times when the ZID is the proper mixing zone under
7 (h)(9). We're not saying that you can never use the
8 ZID when you're applying an (h)(9) analysis --

9 JUDGE REICH: No, but I think --

10 MR. SALMONS: -- when there is no state
11 mixing zone, but the question is, what do you do when
12 there is an EPA approved state mixing zone? The same
13 would be true with regard to --

14 JUDGE STEIN: And how do you --

15 MR. SALMONS: I'm sorry.

16 JUDGE STEIN: How do you -- if you're right,
17 then how do you read the language in 125.62(a) broadly
18 enough to encompass the state mixing zone concept? My
19 problem is that your interpretation doesn't appear to
20 fit within the scope of 125.62(a) if we reject your
21 interpretation of the definition of applicable.

22 And I understand how it fits if we accept that

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1 applicable only applies to the pollutants for which you
2 are seeking a waiver, but if we were to reject that
3 point of view, how does your interpretation square with
4 125.62(a)?

5 MR. SALMONS: I'm -- I apologize. I'm having
6 a hard time following what part of my argument you're
7 knocking out that I have to respond to, and I don't --
8 I just didn't follow --

9 JUDGE STEIN: Let's assume, hypothetically,
10 that if the board were to conclude that applicable
11 water quality standards --

12 MR. SALMONS: Right.

13 JUDGE STEIN: -- means basically all water
14 quality standards.

15 MR. SALMONS: So you agree that if you were
16 to hold that --

17 JUDGE STEIN: (inaudible).

18 MR. SALMONS: Right. You'd have to satisfy
19 all water quality -- all applicable --

20 JUDGE STEIN: Right. In other words, in
21 looking at the ZID language in 125.62, we're not just
22 looking at two pollutants.

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1 MR. SALMONS: Right.

2 JUDGE STEIN: We're looking at a broader set.
3 So how is it that your argument about the ZOM can fit
4 into the language about the ZID in 125.62(a) -- does
5 your argument rise or fall on our acceptance of your
6 argument about applicable?

7 MR. SALMONS: Well, I guess I would -- we
8 argue in two steps. One, we argue that applicable
9 ought not to be read the way the region does.
10 Historically, there's a problem with that since
11 applicable was there before (h)(9) was. We think that
12 it's a reference to 61.

13 If you were to disagree with that, then we
14 would argue that the regulation is inconsistent with
15 (h)(9), and if you were to disagree with that, then
16 obviously, on that issue, we would not prevail.

17 JUDGE SHEEHAN: Wasn't it the time to
18 challenge that long ago if the regulation is invalid?

19 MR. SALMONS: Well, you know, that's another
20 of what I would refer to as an aggressive assertion of
21 waiver on the part of the region. At the time they say
22 we would have been required to bring that challenge,

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1 they had the same interpretation of the regulation that
2 we do, and we had always had our waiver applications
3 granted.

4 I'm not sure how we could conceivably have had
5 either standing or a ripe claim at that time to
6 challenge their adoption of that regulatory language on
7 the theory that they might someday change their
8 interpretation of it and it would come back to hurt us
9 20 years later. I mean, that's just -- to me, is just
10 --

11 JUDGE SHEEHAN: Well, arguing the way it's
12 interpreted is different from whether it's valid or
13 not.

14 MR. SALMONS: Well, that -- but if --

15 JUDGE SHEEHAN: If -- you were speaking of
16 regulation invalidity.

17 MR. SALMONS: Well, right. As I understood
18 Your Honor's question, they raised -- this statutory
19 provision that says you have to challenge certain
20 regulatory language within 120 days within its
21 adoption, and we didn't do that. If we're going to
22 make the argument that the regulations here are

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1 invalid, and my only point is, we couldn't possibly
2 have brought that challenge at the time. We weren't
3 injured by the adoption of that regulatory language.

4 They would have come to court and said, no, we
5 interpret it the same way you do, and you haven't
6 been -- you know, there's no likelihood it's going to
7 be applied against you in some negative way. I think
8 that that just shows that that can't possibly be the
9 right reading of that statutory provision. I would
10 like to say, if I could, a few words about
11 disinfection, because --

12 JUDGE REICH: Before you do, I have one last
13 question about how to read 125.62. If I understood
14 what you had said earlier, then applicable under (ii)
15 is broader than applicable under (i), and yet, the
16 language that Judge Stein read from earlier that talks
17 about discharge does not exceed at or beyond the zone
18 of initial dilution is -- seems to be a predicate for
19 both of those. There's a colon, and there's a one and
20 a two, so I don't understand why that does not say that
21 anything that falls into (ii) as well as (i) cannot
22 exceed at or beyond the Zone of Initial Dilution.

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1 MR. SALMONS: Well, I generally agree with
2 Your Honor on the structure of that provision. Where I
3 would differ, I think, from what was the premise of
4 your question, is that, again, we read (a)(1) to be a
5 reference to the applicable water quality standard --

6 JUDGE REICH: I understand.

7 MR. SALMONS: (inaudible) -- at the (a)(2) --

8 JUDGE REICH: -- more broadly.

9 MR. SALMONS: -- we read that as a reference
10 to federal criteria when there is no state approved
11 water quality standards. That's the only thing that
12 (a)(2) covers, and so it says you have to satisfy the
13 following things at the ZID, applicable water quality
14 standards, which we should say is .61 water quality
15 standards, and federal criteria if there is no state
16 approved standard. And again, we would agree with
17 that.

18 So I don't think we have a problem with the
19 plain terms of the regulation. I can understand that
20 this is not clear language and that reasonable minds
21 might disagree. I would then urge the Court to go back
22 to the statutory purpose and the general structure of

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1 (h) (9) and to understand that state standards, EPA
2 approved state standards including mixing zones, are
3 exactly what are encouraged here, and that there are
4 other mechanisms for the region to deal with mixing
5 zones that may be problematic, and that this isn't
6 necessary to do so in an (h) (9) analysis where the real
7 question is, are you generally compliant with federal
8 criteria?

9 And then lastly -- and I think this goes to a
10 point that Your Honor made Judge Stein with regard
11 to -- with regard to the fact that you're seeking a
12 waiver of otherwise generally applicable requirements,
13 and I guess I view that the other way. It seems to me
14 that what Congress was clearly concerned with here were
15 potentially devastating and, at least at a minimum,
16 very significant costs that would be incurred by
17 multiple jurisdictions, and when -- precisely because
18 of their ability to mix and dilute the primary treated
19 effluent, there ought to be a lessening of the burden.
20 In those circumstances, it doesn't make sense, we would
21 argue, to have a more strict standard than would apply
22 generally to permit compliance and the like.

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1 And if there is a problem with the mixing zone
2 or some result that's not agreeable in the application
3 of it through permitting processes and others, the
4 region can come up with a tailored fix. It could say,
5 okay, you need to treat -- you know, more pretreatment
6 for this pollutant or something like that. Here, it's
7 an on-off trigger for potentially hundreds of millions
8 or billions of dollars cost, and I think that makes it a
9 very blunt instrument to change the standard, so --

10 JUDGE STEIN: I have a couple questions
11 before you address your last point.

12 MR. SALMONS: Yes.

13 JUDGE STEIN: Is there anything in the record
14 that reflects whether or not Hawaii provided any kind
15 of state certification in conjunction with this waiver
16 or application for this particular waiver?

17 MR. SALMONS: Whether there was a state
18 certification, Your Honor? I'm not sure the answer. I
19 believe the answer to that -- and I will do my best to
20 look at the record when I sit down, Your Honor. I
21 believe the answer to that is that that would have been
22 the next step if the region had issued a tentative

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1 decision that was favorable to the process. I believe
2 it's at that point that that's done, but I'm not
3 positive about that, so I will check.

4 JUDGE STEIN: My second question is with
5 regard to 125.62(a)(4), I believe, that talks about
6 evaluating compliance with (a)(1)(i), and (a)(2) based
7 on conditions reflecting maximum periods -- reflecting
8 periods of maximum stratification and during other
9 periods when discharge characteristics, water quality,
10 biological seasons or oceanographic conditions indicate
11 more critical situations may exist.

12 Could you explain how that particular
13 provision of the regulation squares with the arguments
14 you're making to us?

15 MR. SALMONS: Well, if I'm understanding you
16 correctly, Your Honor, I think it would apply -- that
17 that provision would apply when you're dealing with
18 the -- what we refer to as the applicable water quality
19 standards, i.e., BOD and suspended solids, and it would
20 apply when you're applying the federal criteria when
21 there's no state water quality standard that has been
22 approved, but it wouldn't apply otherwise, at least not

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1 by its terms.

2 JUDGE STEIN: And what does it mean? What do
3 you think this regulation means?

4 MR. SALMONS: I'm not entirely sure, Your
5 Honor. I'm not trying to (inaudible) --

6 JUDGE STEIN: Okay. Well, I have a chance to
7 ask you --

8 MR. SALMONS: -- it's not a regulation that
9 we have focused on, I think, to any great length, nor
10 has the region in any great length.

11 JUDGE REICH: Yeah, just trying to nail this
12 down in my mind -- if for 125.62(i), we look for
13 guidance as to what applicable means by looking back to
14 125.61; for (ii), where do you look for guidances as to
15 what the word applicable there means?

16 MR. SALMONS: Well, I think you don't really
17 have to, Your Honor, because I think there, the only
18 relevant question is whether there are EPA approved
19 water quality standards, and I think that'll usually be
20 clear. And it says that if there are -- excuse me --
21 it says that if there are not EPA approved water
22 quality standards --

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1 JUDGE REICH: I'm just trying to understand
2 the structure of the regulation --

3 MR. SALMONS: Right.

4 JUDGE REICH: -- whether you think it's
5 relevant here or not.

6 JUDGE SHEEHAN: I had a question about
7 whether the measurement would occur at the ZID or the
8 ZOM under (ii).

9 MR. SALMONS: Well, our reading of (ii), Your
10 Honor, would yield the following result, which is that
11 if there is a state approved water quality standard,
12 (ii) doesn't apply, and you would measure that at the
13 ZOM. If there is not, the federal standard would
14 apply, and you would measure that at the federal mixing
15 zone or the ZID. So we would generally -- our reading
16 of this harmonizes in that way pretty consistently that
17 if -- that the mixing zone follows this standard. If
18 it's state, then it's state. If it's federal, it's
19 federal.

20 I would like to just say a few words
21 about disinfection, because we view that as a very
22 important part of this appeal, and I think the critical

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1 thing I would say about that -- the critical thing I
2 would say about that is that the region takes the
3 position that because the application for the 301(h)
4 waiver did not specifically mention disinfection as an
5 alternative, that it, therefore, was relieved of any
6 obligation to consider it.

7 And I think the most -- the most clear and
8 straight forward reason as to why that's incorrect is
9 that 301(h)(9), as everyone agrees, requires a
10 predictive judgment as to what the water quality
11 standard will be under a waiver if it's granted in the
12 future, and the permit that was already in place for
13 Honouliuli specifically required the implementation of
14 disinfection. If the results of the Sand Island trial
15 were positive and if --

16 JUDGE SHEEHAN: What about the .62
17 requirement that the applicant give a demonstration of
18 why it would work?

19 MR. SALMONS: Well, that's what Sand Island
20 --

21 JUDGE SHEEHAN: But it's a different
22 facility.

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1 MR. SALMONS: It is a different facility, but
2 the permit -- and just to be clear, this is -- this is
3 pages 63 and -- excuse me. I'm reading the wrong
4 thing. This is from H1-189, which is the section of
5 the permit for Honouliuli. It says that "If the
6 results of the Sand Island monitoring program indicate
7 that disinfection of the Sand Island Wastewater
8 Treatment Plant effluent shall be required,
9 disinfection of the Honouliuli Wastewater Treatment
10 Plant shall also be required."

11 I gave you the wrong cite, Your Honor. That's
12 at H12-1228 of the record. So if the permit for
13 Honouliuli very clearly stated that if the results of
14 the Sand Island monitoring program are positive,
15 indicating the disinfection is going to be required at
16 Sand Island -- and, you know, this presupposes that you
17 have -- otherwise have bacteria violations, then you
18 must include disinfection at Honouliuli. And so for
19 that reason alone, without even getting into whether it
20 was required to amend the application or not, in making
21 that predictive judgment, we submit it's arbitrary and
22 capricious to ignore what is otherwise a clear permit

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1 requirement.

2 If there are exceedances -- and we have arguments
3 as to why the bacteria exceedances, in fact, don't exist, but
4 if there are exceedances, we're already required given
5 the positive result at Sand Island to include
6 disinfection, and it's arbitrary and capricious to
7 ignore that fact in making the 301(h) waiver
8 determination. If there are no further questions, Your
9 Honors --

10 JUDGE STEIN: I'm going to ask one final
11 question.

12 MR. SALMONS: Yes.

13 JUDGE STEIN: 125.61 refers to applicable
14 water quality standards. 125.62(a)(1) refers to all
15 applicable water quality standards. What in your mind
16 is the difference between applicable and all
17 applicable?

18 MR. SALMONS: I don't see a difference
19 between them, and I would point Your Honor to the fact
20 that the same language -- as I understand it, the same
21 language was in the regulations up until 1986 when
22 (h)(9) wasn't in the statute, and it still had the same

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1 reference, and it was clearly understood as being a
2 reference to the water quality standards that are
3 identified in .61 as being applicable.

4 And again, I would just emphasize that this is
5 not a construction of the regulation that we have
6 ginned up out of whole cloth. This is, in fact, how the
7 region interpreted their regulations for a very long
8 time. Thank you, Your Honors.

9 JUDGE STEIN: I think, at this point, you're
10 out of time.

11 MR. SALMONS: That's fine.

12 JUDGE STEIN: If you have any issues you need
13 covered, you can cover it on rebuttal.

14 MR. SALMONS: Very well.

15 MS. LEITH: Good afternoon. I'm Suzette
16 Leith with the Region 9 Office of Regional Counsel.
17 There's a lot to talk about before I get into the ZID
18 and ZOM, and maybe, if we have time, some of the other
19 issues. I want to make one general comment about
20 301(h) -- 301(h) in general and why this proceeding is
21 different from the typical permit proceeding that comes
22 here, and that is that in 301(h), Congress specifically

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1 set forth specific criteria that a discharger had to
2 meet in order to get a variance. They have to meet all
3 these criteria.

4 In other words, unless the region finds that
5 the applicant meets all these criteria, there's just no
6 authority for the EPA to grant a 301(h) variance.
7 Here, the region analyzed mounds of data, and they
8 found that there was multiple reasons why the variance
9 couldn't be granted under 301(h)(9). Both discharges
10 failed to meet water quality standards for toxicity,
11 for chlordane, for dieldrin, for ammonia, and also that
12 the Honouliuli discharge failed to meet standards for
13 bacteria, and under 301(h)(2), that both discharges
14 could interfere with the attainment of water quality --
15 protective of aquatic life and recreation. So unless
16 this board finds that all those regions were in error,
17 the applicants still do not qualify for a variance, and
18 the two decisions should be upheld.

19 Turning, then -- I guess I will start with the
20 ZID and the ZOM, which is where most of the briefs are.
21 Although, as a preliminary, there is one overriding
22 practical issue which Your Honors discussed, and that

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1 is, from a practical standpoint, the legal issues may
2 not even affect the final results here. One thing that
3 we didn't get into before during City & County of
4 Honolulu's argument is the fact that for ammonia and
5 for bacteria at Honouliuli -- ammonia at both plants
6 and bacteria at Honouliuli, the record shows
7 exceedances at the ZOM as well as at the ZID, so even
8 if the ZOM controlled for those, they still don't meet
9 water quality standards.

10 JUDGE STEIN: How do you respond to the
11 argument that CCH made, which is that was not the basis
12 for the region's decision? So if, in fact, we were to
13 ground any decision by this board on the fact that
14 there were exceedances at the ZOM as well, that's
15 inconsistent with the record in this case.

16 MS. LEITH: The decisions -- the final
17 decisions do clearly indicate that water quality
18 standards were not met at the ZOM, so I think under
19 there's a casino case, I think that counsel for CCH
20 cited, under that one, even if the case doesn't say
21 specifically, this is an alternative ground, if that
22 can be fairly discerned from the decision, then it can

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1 be upheld. And here, for example, the ZOM violations
2 at Sand Island -- all the violations, frankly, were at
3 the ZOM because there wasn't monitoring at the ZID, and
4 so it was clear that there were exceedances at the ZOM
5 and --

6 JUDGE STEIN: Was that the basis for your
7 decision, the basis for the region's decision?

8 MS. LEITH: The basis for the region's
9 decision was that water quality standards would not be
10 attained. The region did emphasize the ZID, because
11 that's what the regulations say and that's what we were
12 analyzing, so --

13 JUDGE SHEEHAN: To put a slightly finer point
14 on that, the water quality standards were to be
15 attained at the ZID or at the ZOM?

16 MS. LEITH: The main thing the region was
17 analyzing was, could water quality standards be
18 attained at the ZID. What the region also put in the
19 decisions was, moreover, they're not even attained at
20 the ZOM. And so, for example, CCH has raised the
21 issue, should the public be able to comment on that,
22 and our answer to that is that no, they shouldn't,

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1 because the tentative decisions clearly indicated all
2 these exceedances at the ZOM, that could have been
3 commented on.

4 JUDGE REICH: Is there any level of technical
5 judgment that goes into looking at the data that
6 presumably showed exceedances at the ZOM in determining
7 whether that data is conclusive enough or strong enough
8 to either grant or deny a waiver?

9 MS. LEITH: In general, is there technical
10 judgment used to decide whether standards are met with
11 a variety of data? I think the answer to that is yes,
12 and I think CCH did point out, for example, for
13 dissolved oxygen at one of the treatment plants, there
14 were a couple of violations maybe ten years ago, but
15 it's been clean ever since, and the region did discount
16 those violations and find that that standard had been
17 met --

18 JUDGE REICH: So how do we know, even though
19 there were allegedly, at least, violations at the ZOM
20 that they would have been substantial enough to have
21 justified denial of the waiver if that's what you had
22 used as the decision criteria?

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1 MS. LEITH: Because the decision did
2 specifically say standards were not met at the ZOM,
3 even though the main thing -- you're right. The main
4 thing the region looked at is were they made -- met at
5 the ZID. There were also statements they were not met
6 at the ZOM, and if the standards aren't met at the ZOM,
7 then the waiver can't be granted. And to that extent,
8 the region did make the technical decision that the
9 exceedances at the ZOM were sufficient to come to a
10 conclusion that the standards could not be met.

11 The other issue for the other pollutants --
12 the chlordane, dieldrin, toxicity was discussed a
13 little bit, and there was one question about the
14 dilution factor and where does that come from. It's
15 discussed at length in the final decisions how it was
16 calculated. I have the cite for the Honouliuli
17 decision. It's document H.1.2, pages H0123 discusses
18 how initial dilution is calculated, and it's things
19 like the depth of the outfall, the tides, the water
20 temperature, there are EPA approved models for how you
21 figure initial dilution. You don't start with the
22 physical ZID or ZOM and calculate back with the initial

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1 dilution numbers. You factor in these other critical
2 factors, and I think there was also a question about --

3 JUDGE REICH: But can I --

4 MS. LEITH: Yeah.

5 JUDGE REICH: If I understood what was said
6 earlier, it sounded to me like I was hearing that the
7 permit did, in fact, specify a dilution factor and the
8 region, in fact, used a different dilution factor. Is
9 that an accurate or an inaccurate statement?

10 MS. LEITH: That is correct, and I'm not
11 really prepared to say exactly why. I know part of the
12 reason it was different was there was new data, for
13 example, weather data. Part of the reason it was
14 different is there are updated models, so there was a
15 new model used. I'm pretty sure, but I can't cite
16 chapter and verse on it, that it was not changing from
17 back calculating from a ZOM to back calculating from a
18 ZID. It was these other changes.

19 And as Your Honors pointed out, CCH has not
20 challenged the model that was used, the numbers that
21 EPA came up with, and the reasons for finding the
22 chlordane and dieldrin and effluent toxicity

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1 violations, at least as to the ZID and the ZOM.

2 So with that, in terms of the practical
3 issues -- getting to the legal issues, we've discussed
4 125.62(a) at length. There was a question about, did
5 EPA officially tie 125.62(a)(1) to 301(h)(9)? There's
6 a quotation in our brief on page 39 from the 1991
7 preamble to the proposed regs for 301(h) -- for the
8 changes to 301(h), which included 301(h)(9), and that
9 says "EPA interprets initial mixing to mean ZID
10 (proposal 125.62(a)(1))." There may even more clear
11 citations, but I couldn't find them in the few minutes
12 we had. So there is a tie to 125.62(a), and frankly,
13 if that doesn't interpret 301(h)(9), then I don't know
14 what does.

15 In terms of the word "applicable," I think
16 that's been discussed a lot, frankly. If EPA when they
17 wrote the regs had wanted to say 125.62 only applies to
18 BOD and TSS, they would have said it -- they wouldn't
19 have buried it in the word "applicable." I looked for
20 definitions. Applicable is not a term of art. In
21 301(h)(9), it's used all over. Applicable pretreatment
22 requirements, applicable requirements of this section,

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1 applicable water quality standards. There is a
2 definition at 125.58(cc) that says water quality
3 standard means applicable water quality standards which
4 have been approved.

5 There's also a definition of applicable water
6 quality standards in the permit regs at 122.2. This
7 isn't 301(h), but 301(h) does require discharges to --
8 discharges to show that they can meet the permit regs,
9 too, and what that definition says is, basically,
10 applicable standards means all state standards to which
11 a discharge is subject under the Clean Water Act.

12 JUDGE STEIN: Do you know why, given that the
13 term "applicable standards and limitations" was defined
14 expressly in 122.2, why there is no comparable, you
15 know, definition that applies to this waiver process?

16 MS. LEITH: I don't know, other than --

17 JUDGE STEIN: Is there anything in the record
18 that will tell us?

19 MS. LEITH: I never found anything. I assume
20 it's just -- it was just not used as a term of art. It
21 just meant standards that apply. The way I interpreted
22 it when I first saw it and the way the permit writers

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1 or the people who did the analysis, it just meant
2 standards that apply to this discharge, meaning it
3 doesn't include fresh water standards. It doesn't
4 include estuary standards or standards that might apply
5 to a bay over here rather than the ocean over here, and
6 that's kind of the easiest definition of applicable.

7 In terms of EPA's interpretation, I'll talk
8 about the inconsistencies with the region in a minute,
9 but the EPA headquarters -- EPA's national policy has
10 always interpreted (h)(9) to require meeting all water
11 quality standards at the ZID. Probably the clearest --
12 the clearest sound bite on this is from the Amended
13 Technical Support Document, the ATSD, which came out in
14 1994 along with the new regs.

15 This is essentially the bible for both
16 applicants and for regions who are analyzing these
17 decisions, and what it says specifically is compliance
18 with criteria and standards such as standards for
19 nutrients, toxic pollutants, and coliform bacteria
20 concentrations at the edge of the ZID is necessary, and
21 that's pretty clear. You don't just have to comply
22 with BOD and TSS. You have to comply with all these

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1 other things.

2 And looking through the preambles I believe
3 Judge Stein mentioned, the preambles to the '94 regs --
4 and I actually spent most of time looking back at the
5 preambles to the '91 proposed regs. There's an
6 emphasis on the full range of water quality standards.
7 There's discussion of toxic metals, carcinogens, all
8 this in terms of 125.62, so it's pretty clear that EPA
9 thought 125.62 means all standards that apply to --
10 that apply to this discharge.

11 JUDGE REICH: Is there anything that explains
12 the logic -- if I look at (h)(9) and I'm looking at a
13 pollutant for which there is clearly a mixing zone, and
14 it's not a pollutant for which secondary standards is
15 relevant, why should my judgment as to secondary
16 standards for a totally different pollutant depend on
17 their meeting a more restrictive level for that
18 pollutant than they presumably have to meet for normal
19 compliance purposes?

20 I mean, presumably, in approving a mixing
21 zone, EPA made a judgment that it was acceptable
22 environmentally to not really measure compliance until

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1 you reached that point, so what is the logic of
2 worrying about the environmental effects between the
3 ZID and the ZOM for those pollutants? I just don't
4 understand, you know, what the purpose of it is and how
5 that purpose has any relation to second -- waiver of
6 secondary treatment or not.

7 MS. LEITH: Well, if the question is, why
8 would there be a more stringent standard under a 301(h)
9 analysis than there might be under --

10 JUDGE REICH: For the pollutants that have
11 nothing to do with secondary treatment.

12 MS. LEITH: The answer to that, I believe, is
13 that when EPA promulgated its regs and EPA interpreted
14 the Congressional intent that, yes, you can have a
15 waiver of these specific technical standards, but
16 you've got to make darn sure that water quality's
17 protected, and in certain ways, the 301(h) regs are
18 more stringent than your standard permit regs.

19 One of these is this requirement for the ZID,
20 and there's even a quote in our brief that I don't have
21 off the top of my head from one of the early preambles
22 that in order to be protective, EPA's requiring that

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1 standards be met not just under the conditions dictated
2 by the state, but under the most stringent conditions
3 possible.

4 Another example is the requirement in 301 -- I
5 mean 125.62, the one with the little I, about meeting
6 water quality criteria where there is no corresponding
7 state standard. That's something else you don't have
8 to do in your standard permit, but that's something
9 else that EPA when it promulgated its regs wanted to do
10 to ensure that even if secondary treatment was not
11 being required, water quality was still being
12 protected, because that's essentially what the Clean
13 Water Act is all about.

14 A couple other comments on the ZID and the
15 ZOM. There was discussion of Hawaii's mixing zone
16 provisions, and I just wanted to reiterate one thing we
17 pointed out in our brief, that the Hawaii mixing zone
18 provisions specifically say that a zone of mixing for
19 plants performing primary treatment must comply with
20 301(h). In other words, you can't have a mixing zone
21 that's inconsistent with what would be calculated under
22 301(h), so --

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1 JUDGE STEIN: Where would we find that?

2 MS. LEITH: It's in the -- it's in the Hawaii
3 mixing zone regulations, and I don't have the exact
4 citation for where it is. It's about two-thirds of the
5 way through it. It's kind of buried in the middle of a
6 paragraph. The brief has the citation for where it's
7 found. So I think that that answers the question of
8 was the region doing anything inconsistent with state
9 mixing zone provisions, and certainly in Hawaii, no,
10 because state mixing zone provisions recognize that
11 under 301(h) conditions, the 301(h) regs are what
12 count.

13 JUDGE STEIN: You indicated that you were
14 going to address the so-called flip in the region's
15 position. Could you speak to that question?

16 MS. LEITH: Okay, couple of things. One is
17 that -- the Honouliuli tentative decision came out in
18 1988, and I think the permit came out in 1991. The
19 (h) (9) regs came into effect in 1994, so those were not
20 there when the Honouliuli decision was written. I will
21 acknowledge that the Sand Island decision also had a
22 mixing zone in it, and that was subsequent to that.

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1 The only answer I can give to that -- well, a couple
2 answers. One is, the region just didn't read the regs
3 and didn't read the TSD quite well enough, and what
4 really matters is what the regs say, what the national
5 policy is, and that's what the region followed in the
6 current decisions.

7 JUDGE SHEEHAN: Yes, and to focus on one of
8 the '94 rulemakings, I understood it from your briefs,
9 the '94 rulemaking tracked what occurred in '91 and
10 even back as far as 1979, so as early as '79, the ZID
11 was the line in the sand, so to speak, on these
12 matters, not only in '94.

13 MS. LEITH: It should have been. It wasn't
14 that clear. There was not a specific -- it wasn't that
15 clear that it was. It was also a different decision
16 that we were making, that the region was making back in
17 1988. There was -- there was less water quality data,
18 so there was a lot less analysis of water quality
19 standards, so to the extent that the region made the
20 wrong decision there, again, all I can say is, that's
21 true. It was the wrong decision. That's no reason why
22 the wrong decision should be made again now.

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1 JUDGE SHEEHAN: Although, to take it even
2 more recently in time or further forward in time, as I
3 understand it, in both Honouliuli and Sand Island TDDs,
4 the Region that the state quality water standards had
5 to be met at the ZOM for secondary treated effluent --
6 no qualification, and then in the TDDs (sic) for each
7 facility, you said that the standards -- state
8 standards had to be met for -- at the ZOM for certain
9 discharges, so as late as the final actions here, you
10 seem to be thinking the ZOM for secondary treatment in
11 the TDDs and then the reference to secondary treatment
12 with that qualification was gone by the time of the
13 final decision.

14 JUDGE STEIN: And I thought the thing that
15 you were referring to referred to the ZID, not being
16 met at the ZOM but at the ZID --

17 JUDGE SHEEHAN: ZOM... ZOM.

18 MS. LEITH: I'm not sure what you're
19 referring to. The two tentative decisions that were
20 issued in 2007 were totally consistent with the final
21 decisions that came out in 2009. I may have been
22 talking about the 1988 tentative decision, but the 2007

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1 tentative decisions clearly said that standards had to
2 be met at the ZID.

3 Just a couple more points about the prior
4 permits. The prior permits did have a zone of mixing
5 for certain things, including nutrients, but as I think
6 you all pointed out, the only standard that's at issue
7 here that had a zone of mixing in the prior permit was
8 ammonia, so to the extent the prior permits matter, it
9 would only be for ammonia, and the next step there
10 is -- and the ammonia standards were exceeded at the
11 ZOM as well as at the ZID, so -- any more questions?

12 JUDGE STEIN: Why was the ZID specified for
13 three pollutants in each of the two permits, but not
14 for other pollutants?

15 MS. LEITH: For the pollutants that were
16 measured in the effluent -- the ZID and the ZOM were
17 actually used as monitoring stations. For pollutants
18 that were measured in the effluent, such as chlordane
19 and dieldrin, there was no ZID and there was no ZOM
20 because what mattered was the initial dilution factor.
21 And what those permits did, essentially, is the -- the
22 actual permit requirements took into effect the

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1 dilution factor.

2 For bacteria, it was not mentioned at all,
3 because at the time the permits were issued, there were
4 no bacteria standards in effect more than 1,000 feet
5 from shore in Hawaii, so they -- there was frankly less
6 worrying about what the conditions were more than
7 1,000 feet from shore, which is where both the ZID and
8 the ZOM would be. That changed in 2004 with the EPA
9 promulgation of the Beach Act. The Beach Act rule
10 which set standards for those areas.

11 JUDGE SHEEHAN: I'm not sure if I understand
12 the answer. The ZOM -- let me restate it -- if the ZOM
13 were good enough for nutrients, et cetera, why wasn't
14 it good enough for chlordane and dieldrin and the
15 others? I thought that was Judge Stein's question.
16 I'm not sure why that distinction between one set of
17 pollutants versus another.

18 MS. LEITH: I don't know. I wasn't around
19 then. It may be that what CCH asked for was the ZOM
20 for particular pollutants. Under the Hawaii regs, it's
21 the discharger that asks, and I think it was because of
22 where the monitoring was and for the chlordane and