

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

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

REQUEST FOR STAY OF PROCEEDINGS

At the July 19, 2010 status conference in this case, the City and County of Honolulu (CCH) explained that, because it and Region 9 have settled all the issues at stake on appeal, the Board should stay the appeal pending approval and entry of the Consent Decree embodying the parties' settlement. CCH appreciates the opportunity afforded by the Board to present its position at the status conference and now formalizes its position in this request for a stay of proceedings. CCH also asks that, if the Board denies the stay, it allow at least 10 days from its denial before issuing a decision on the merits of CCH's appeal. That will permit the federal district court in Hawaii — which has jurisdiction over three cases resolved by the Consent Decree and which has supervised the settlement negotiations — to consider the impact of the Board's decision not to stay this case despite the settlement.

As CCH explained at the status conference, a decision in this case could jeopardize the Consent Decree. Region 9 does not dispute that risk; at the status

conference, it instead contended that the benefits of a decision outweigh that risk. *See* July 19, 2010 Status Conference Tr. at 22. That position is inconsistent with the Consent Decree, which expressly provides for the dismissal of CCH's appeal to avoid a determination and further litigation. In any event, Region 9 provided no basis to discount the risk that a decision would pose to the Consent Decree. Some of the most difficult and controversial aspects of the settlement have been the City's agreement to upgrade its two largest wastewater treatment plants to secondary treatment and the schedules for the upgrades. Any way the Board resolves the appeal could provide ammunition to the settlement's opponents — those who think it requires too much from CCH, and those who think it does not require enough. A decision in this case, if rendered during the Consent Decree approval process, needlessly risks an irreparable injury to CCH. Accordingly, CCH requests that the Board stay this appeal pending entry of the Consent Decree.

Although Region 9 has told the Board that it does not oppose a stay of proceedings, it also has offered three reasons why it “would value issuance” of a decision in this case. *See* EPA Region 9 Supplement To July 6, 2010 Joint Status Report at 2. Those reasons all lack merit.

First, there no longer is “a live and genuine controversy between the Region and CCH.” *Id.* The controversy on appeal ended — temporarily — when CCH, in the Consent Decree, agreed to adopt secondary treatment and to withdraw its appeal of the denial of its 301(h) waivers. Once the Consent Decree is approved and entered, the controversy will be ended permanently. While the settlement could yet be derailed (at which point, the controversy would revive), at present

Region 9 and CCH have come to terms and are not active adversaries (except insofar as they disagree over whether to stay this appeal). Region 9 confessed as much at the status conference: even after its novel effort to differentiate between a controversy regarding secondary treatment and a controversy “regarding EPA’s 301(h) decisions which are before the Board” (there is no difference), the Region nonetheless admitted that, with respect to the latter, “there would be adversity between the parties” only if the settlement fell apart, leaving this case to “continue.” July 19, 2010 Status Conference Tr. at 8.

Second, CCH does not have enough knowledge to contest the Region’s speculation that resolving this case “may affect decision-making on another pending petition.” EPA Region 9 Supplement To July 6, 2010 Joint Status Report at 2. Even so, that is no reason not to stay this temporarily (and likely permanently) moot case. If the same issues are raised in another case, the Board can address them there rather than issue an advisory opinion here.

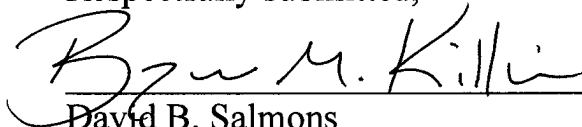
Finally, while it is true that “entry of the final Consent Decree remains uncertain,” *id.*, that uncertainty weighs in favor of a stay, not an immediate decision. Region 9 seems to believe that the Board should stay proceedings only if entry of the Consent Decree were certain. In fact, if entry of the Consent Decree were certain, CCH would withdraw its appeal, obviating the need for a stay. A stay of proceedings is precisely the appropriate course when a case is likely, but not certainly, moot, because a stay would maintain the status quo that drove the parties to settle yet not prevent the Board from rendering a decision if the settlement ultimately falls through.

In addition, it bears emphasis that the Consent Decree resolves far more than the issues before the Board; it also resolves several other issues at stake in cases pending before federal district court in Hawaii. That court has been involved in the settlement process and its efforts would be substantially undercut by any action that could undermine the process for finalizing and enforcing the Consent Decree. This is yet another consideration that strongly favors staying any issuance of a decision by the Board until the Consent Decree process has been completed. At a minimum, the Board should permit the federal district court whose proceedings are also bound up with the Consent Decree to consider the possible impact issuance of the Board's decision could have on the settlement.

CCH therefore renews its request that the Board stay this appeal until the process for finalizing the Consent Decree has been completed. CCH further requests that the Board, if it denies CCH's stay request, delay rendering a decision on the merits of CCH's appeal for at least 10 days to permit the federal district court in Hawaii to consider whether the Region's conduct and whether a decision by the Board warrant a stay to preserve the Consent Decree.

DATED: July 22, 2010

Respectfully submitted,



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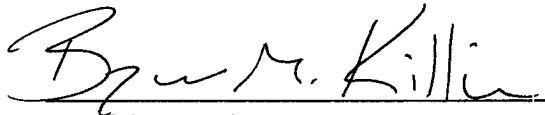
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Request for Stay of Proceedings was sent this 22d day of July, 2010, by email, to the following:

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