



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

August 14, 2009

VIA OVERNIGHT EPA POUCH

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

Re: City and County of Honolulu's Sand Island Wastewater Treatment Plant and
Honouliuli Wastewater Treatment Plant
Permit Nos. HI0020117 and HI0020877; NPDES Appeal No. 09-07

Dear Ms. Durr:

Enclosed please find the original and five copies of EPA Region 9's Response to Petition for Review in the above-referenced case.

Copies are also being provided to Petitioner Victor D. Moreland and counsel for City and County of Honolulu David Salmons. We are also sending to Mr. Moreland a copy of Region 9's Response to Petition for Review in Appeal No. 09-01, and a copy of the disk with the administrative records for the two permit decisions.

My contact information is as follows: direct telephone: (415) 972-3884; office FAX: (415) 947-3570; email: leith.suzette@epa.gov. Do not hesitate to contact me if there are questions.

Sincerely yours,

A handwritten signature in cursive script that reads "Suzette E. Leith".

Suzette E. Leith
Assistant Regional Counsel (ORC-2)

Enclosures: Response to Petition for Review, NPDES Appeal No. 09-07 (original and five copies); Certificate of Service

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

In re:)	
)	
City & County of Honolulu)	NPDES Appeal No. 09-07
Sand Island Wastewater Treatment Plant)	
Honouliuli Wastewater Treatment Plant)	
)	
NPDES Permit Nos. HI0020117 & HI0020877)	
)	

RESPONSE TO PETITION FOR REVIEW

As directed on July 29, 2009, Region 9 of the United States Environmental Protection Agency (“EPA” or “the Region”) respectfully submits to the Environmental Appeals Board (“Board”) this Response to the Petition for Review filed by James K. Honke, Hans J. Krock, James S. Kumagai, and Victor D. Moreland (collectively, “Moreland Petitioners”) in the above-captioned matter. The Moreland Petitioners seek review of the Region’s decisions to deny requests of the City and County of Honolulu (“CCH”) for renewal of modifications of the secondary treatment requirements for publicly owned treatment works (“POTWs”) for its Sand Island and Honouliuli Wastewater Treatment Plants (“Sand Island” and “Honouliuli” respectively) pursuant to Section 301(h) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1311(h), and to issue National Pollutant Discharge Elimination System (“NPDES”) permits that incorporate the modified limits.

The Region’s decisions being challenged in this proceeding are the same as those challenged by CCH in NPDES Appeal No. 09-01. The statutory and regulatory background for

CWA 301(h) and the factual background for EPA's permit decisions are set forth in the Region's Response to Petition for Review filed in Appeal No. 09-01 and will not be repeated here.¹

Region 9 denied CCH's requests because CCH had not demonstrated the Honouliuli and Sand Island facilities' proposed discharges would comply with the statutory requirements set forth in CWA section 301(h) to meet water quality standards and ensure water quality protective of aquatic life and recreation.

Region 9's decisions denying the 301(h) requests for the Honouliuli and Sand Island facilities were issued on January 6, 2009. In issuing the decisions, the Region indicated petitions for review could be filed by February 9, 2009. Doc. S.1.1, H.1.1.² According to the Board's letter to the Region dated July 29, 2009, the Moreland Petitioners filed their Petition on February 9, 2009. Therefore, the Region does not question the timeliness of the filing.

The Moreland Petitioners filed comments on the tentative decisions for both the Honouliuli and Sand Island facilities. Doc. H.2.89, S.2.74. Therefore, the Region does not challenge the Moreland Petitioners' compliance with that component of the filing requirements of 40 C.F.R. 124.19(a).

In their Petition, the Moreland Petitioners assert that the Region "cavalierly dismissed" their comments on the basis of protecting the public health and the total environment at the least cost, both financially and with regard to detrimental secondary impacts on the environment. The balance of the Petition presents general statements about actions, consequences, and decision-

¹ A copy of this document is being sent to Petitioner Moreland.

² The Administrative Record citations refer to document numbers and pages on the AR indexes and CD that were attached to the Region's Response brief in Case no. 09-01. Each document is included on the CD as a separate PDF document, and can be accessed by clicking on the number on the CD. A copy of the CD is being sent to Petitioner Moreland.

making, without specifying issues to be adjudicated by the Board or conditions at issue as prescribed by the regulation at 40 C.F.R. 124.19(a).

The Petition quotes Administrator Lisa P. Jackson that EPA decisions must be based on the best available science; that under the environmental laws, EPA has room to exercise discretion; and that EPA actions must be transparent. Moreland Petition at 1-2

The Petition raises two additional points. First, the Moreland Petitioners assert that the construction of a secondary treatment process is “akin to construction of a greenhouse gas factory.” Moreland Petition at 2. The Moreland Petitioners state that in responding to their comments, the Region took the position that it was not allowed any discretion in making its decisions. Id. The Moreland Petitioners assert that the Region has room to exercise discretion based on Administrator Jackson’s memorandum and based on Cost-Effectiveness Guidelines in Section 217 of the Act, and a statement from section 304(b)(1)(B) of the Act regarding best practicable control technology. Id. The Moreland Petitioners’ second point alleges that the Region has not performed a rigorous evaluation of the costs and benefits of its actions denying the Sand Island and Honouliuli applications. Id. at 2.

The Region did not “cavalierly dismiss” these comments. The Region thoughtfully and comprehensively responded to all of the Moreland Petitioners’ comments, including all comments related to greenhouse gases and costs. The first 12 pages of the Region’s Response to Comments from the Public on the Honouliuli plant respond to comments from the Moreland Petitioners. See Doc. H.1.6, p. H-01-260 et.seq, and p. H-01-326 identifying the Moreland Petitioners as commenter 84; see especially responses to comment P2 (Doc. H.1.6, p. H-01-261) regarding holistic approach; regarding greenhouse gases, responses to comments P11 (p. H-01-

266), P22 (p. H-01-270, and P27 (p. H-01-272); regarding costs, responses to comments C81-86 (Doc. H.1.5, p. H-01-253-256).

For Sand Island, the first 18 pages of the Region's Response to Comments from the Public responded to the Moreland Petitioners. Doc. S.1.6, p. S-01-195 et seq. and p. S-01-295 identifying the Moreland Petitioners as commenter 68. Regarding impacts of secondary treatment, see, for example, response to comment P1, Doc. S.1.6, p. S-01-195. Regarding greenhouse gases, see, for example, responses to comments P4 (Doc. S.1.6, p. S-01-196); P6 (p. S-01-197); P14 (p. S-01-201); P32-34 (p. S-01-207-209), and P44 (p. S-01-212). Regarding cost, see, e.g. responses to comments P15 (Doc. S.1.6, p. S-01-201) and C72 (Doc. S.1.5, p. S-01-186). Because the Moreland Petition does not identify specific error in the Region's responses, the Region cannot provide a more specific response other than to refer the Board to the relevant portions of the administrative record.

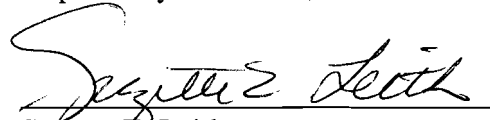
As discussed in the Region's responses, the Act does not allow EPA to issue or re-issue a CWA section 301(h) modified permit unless the criteria of the Act are satisfied. See, e.g., Doc. S.1.6, p. S-01-201. Neither cost nor greenhouse gas effects are among the 301(h) criteria that EPA must consider, and the Region did not have discretion to override its findings pertaining to the statutory criteria based on consideration of such issues, nor to balance the statutory criteria against cost or any other potential problems of secondary treatment. See, e.g. Doc. S.1.6, p. 195, 212; Doc. S.1.5, p. S-01-186.³

³ While the CWA does not direct EPA to consider factors such as cost or potential problems of secondary treatment in determining whether to re-issue a CWA section 301(h) modified permit, the Region noted in its responses its intent to consider such factors as the financial capability of CCH and other wastewater infrastructure needs in establishing schedules for achieving secondary treatment (e.g. Doc. S.1.5, p. 188), and its intent to work with CCH to minimize any negative impacts and maximize benefits that might result from plant upgrades, citing specifically to options in a 2006 EPA document regarding reducing emissions at wastewater treatment facilities (e.g., Doc. S.1.6, p. 196).

Thus, the Moreland Petition for Review does not raise any issues on which review is warranted, and review should be denied.

Dated: Aug 14, 2009

Respectfully submitted,



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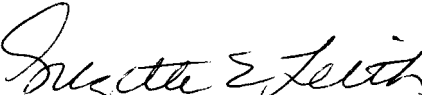
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Petition for Review was sent by regular mail on this 14th day of August, 2009 to:

Mr. Victor D. Moreland
1378 Mahiole Street
Honolulu, HI 96819-1748

Mr. David Salmons
Bingham McCutchen LLP
2020 K Street NW
Washington, DC 20006

Additionally, a true and correct copy of the Response to Petition for Review, Appeal No. 09-01, was sent to Mr. Moreland, and a CD containing the administrative records in the permit proceedings at issue was sent to Mr. Moreland by separate cover.


Suzette E. Leith