

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

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

RESPONSE TO MOTION TO SUPPLEMENT RECORD ON APPEAL

The United States Environmental Protection Agency, Region 9 (“Region 9” or “the Region”), respectfully submits this Response to Opposition to the Motion to Supplement Record on Appeal filed in the above-captioned matter by the City and County of Honolulu (“CCH”) on March 30, 2010. The Region objects to the Motion to Supplement the Record on Appeal (“Motion”), although the Region notes that, because the documents are official government documents, the Environmental Appeals Board (“EAB” or “Board”) may take official notice of the documents.

The Region objects to supplementation of the record with documents generated after the decision on review, and thus created after the closure of the administrative record upon which the Region’s contested decisions were based. The Region also objects to CCH’s reiteration, in its Motion at 1-2, of arguments made in its earlier filings. Issues relating to these predicted revisions of the State of Hawaii’s water quality standards were raised and addressed in earlier filings by both parties, therefore the existence of newly-created documents relevant to those

issues should, at most, be brought to the EAB's attention with nothing more than a progress report on such revisions and not accompanied by renewal of earlier arguments.

As the Region pointed out in its earlier Response to Motion to Supplement Record on Appeal, filed herein on August 17, 2009 ("August 17 Response"), Board precedent for taking official notice of documents created after the relevant region makes a decision exclusively involved documents added to the administrative record by the region in response to comments (August 17 Response at 4). The documents now proffered by CCH do not fit this category; nevertheless, if the EAB's review of CCH's Petition for Review in this matter would be informed by these documents, Region 9 would not oppose its taking official notice of them.

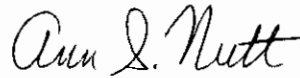
Regarding CCH's proffered Item A, a letter from Laurence Lau, Hawaii Department of Health, to Alexis Strauss, Region 9, dated February 16 2010, with attachments, the Region notes that the Board should only take official notice of the fact that the State has submitted a formal request for approval of chlordane¹ and dieldrin water quality standards revisions. Until the Region has acted to approve these revisions, the revisions are not in effect for purposes of the Clean Water Act ("CWA"). 40 C.F.R. 131.21(c). The Region does not repeat here its substantive arguments concerning the relevance of these proposed revisions to the Region's decisions to deny CCH's applications for modifications to permits for the Sand Island and Honouliuli Wastewater Treatment Plants pursuant to CWA Section 301(h) ("the 301(h) decisions"), which are the subjects of CCH's Petitions for Review in this matter. However, Region 9 notes, for the Board's convenience, the Region's discussion of this issue in its Surreply in Opposition to Petition for Review ("Surreply") at 11-12. (See also discussion of chlordane in

¹ The proposed revision to the chlordane criterion that is included in Item A is adoption of EPA's national CWA 304(a) criterion for chlordane. The proposed chlordane revision included in Item B is merely correction of a typographical error in the State of Hawaii's current chlordane criterion.

Region 9's Response to Petition for Review at 107-112, and Surreply at 25-26.) Likewise, concerning Item B, a letter from Alexis Strauss, Region 9, to Laurence Lau, Hawaii Department of Health dated March 19, 2010, approving revised chlordane and enterococcus criteria, copies of which are also included in Item B, the Region notes that it addressed the relevance of these revisions to the 301(h) decisions in its Surreply at 12, n.5, and 22.

The Region respectfully urges that the Board deny the instant Motion to Supplement Record on Appeal, and that, should the Board take official notice of the documents, it should consider them in light of arguments set forth in the parties' briefs on the Petition for Review.

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