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

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

SURREPLY IN OPPOSITION TO PETITION FOR REVIEW

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Region 9 of the United States Environmental Protection Agency ("Region 9" or "the Region") respectfully submits to the Environmental Appeals Board ("Board") this Surreply in Opposition to the Petition for Review filed by City and County of Honolulu ("CCH" or "Petitioner") in the above-captioned matter, in accordance with the schedule in the Board's Order Denying Stay and Establishing Further Briefing Schedule of June 12, 2009. The Petition seeks review of the Region's decisions to deny CCH's requests 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"), 33 U.S.C. 1311(h), and to issue National Pollutant Discharge Elimination System ("NPDES") permits that incorporate the modified limits.[1]

Many of the points raised in CCH's Reply were addressed in the Region's Response and will not be repeated here. The Region submits this Surreply to address

[1] Allowing the modified limits is also informally referred to as granting a 301(h) "variance" or "waiver."

new points raised in the Reply, and to provide clarification and context for the relevant issues.

ARGUMENT

CCH introduces its Reply with allegations that the Region's decisions are contrary to Congress's alleged intent that section 301(h) be "a means for easing restrictions," and that the Region "has converted the 301(h) waiver proceeding into a device for enforcing a self-created federal version of state water quality standards …." Pet.Rep.Br. at 2.

These assertions misinterpret both section 301(h) and the Region's responsibilities in implementing it. Section 301(h) must be read in the context of the overall purpose of the CWA, which is to protect water quality.[2] While 301(h) allows EPA to waive and authorize less-stringent technology-based effluent limitations for biological oxygen demand ("BOD"), suspended solids ("SS"), and pH, this is permitted only when the discharge will meet water quality standards and will not interfere with protection of water quality. "To qualify for a section 301(h) modification, the applicant must demonstrate that the plant will meet a separate set of standards designed to protect the environment." *In re Arecibo & Aguadilla Regional Wastewater Treatment Plants*, 12 E.A.D. 97, 100 (EAB 2005). The Act specifically provides that a 301(h) modified permit cannot be issued unless the discharger demonstrates, to the satisfaction of EPA, that water quality protective of aquatic life and recreation will not be adversely affected and that all water quality standards will be met after initial dilution.

[2] Indeed, it has been stated that the addition of section 301(h) in 1977 reflected "a return … to regulation of pollution by means of scrutiny of the impact of the polluter's discharge on the receiving waters." *Natural Resources Defense Council v. EPA*, 656 F. 2d 768, 774 (D.C. Cir. 1981).

In short, the Region's actions faithfully implement the requirements of CWA section 301(h) and do not convert the process into anything more than what the CWA and implementing regulations require. The Region's CWA 301(h) decisions in this matter implement the Congress' direction that the Act's provisions assure continued protection of water quality.

I. Comment-and-Response Process

The fundamental nature of the comment-and-response process is a pervasive concern in this proceeding, in which CCH misinterprets its obligation as a commenter and the Region's responsibility in responding to comments. EPA regulations require the Region to invite public comment on its proposed permitting decisions, to consider the comments received, and to respond to the comments received. 40 CFR 124.10, 124.11, 124.17. The purpose of public comment is to assist the agency in making an informed decision, to provide notice and opportunity to be heard to the public, and, by giving affected parties an opportunity to develop and present evidence in the record to support any objections to a decision, to enhance the quality of judicial review. *Small Refiner Lead Phase-down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

Also underlying the comment-and-response process is "the public interest in expedition and finality," *Small Refiner Task Force* at 547, because the Region's opportunity to address concerns with the draft decision before it becomes final "promot[es] the Agency's longstanding policy that most permit issues should be resolved at the regional level, and provid[es] predictability and finality to the permitting process." *Arecibo* at 116. The comment-and-response process is not open-ended and is not meant to unduly prolong the decision-making process. An agency's responses generally do not

trigger a new round of comments, although there may be circumstances where, based on the comments, the agency makes a substantial enough change in the decision that a new round of comment may be necessary. In general, where the final decision is a logical outgrowth of the proposed decision, further public comment is not necessary. *Small Refiner Task Force*, at. 547; *D.C. Water and Sewer Authority*, NPDES Appeal No. 05-02 (EAB March 19, 2008), slip op. at 61. As discussed in the *Small Refiner Refiner Task Force* case, EPA has some authority to take a final action that differs in some particulars from the proposed one, as "[a] contrary rule would lead to the absurdity that … the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary." *Small Refiner Task Force* at 546-7, citing *International Harvester Co. v. Rickelshaus*, 478 F. 2d 615, 632 n. 51 (D.C.Cir. 1973). A final permit need not be identical to the draft permit; indeed "that would be antithetical to the whole concept of notice and comment." *D.C. Water and Sewer Authority*, NPDES Appeal No. 05-02 (EAB March 19, 2008), quoting *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002). It is, the Board has stated, "the expectation that the final [decisions] will be somewhat different and improved from the [decisions] as originally proposed by the agency." *Id.*

The Board explained the logical outgrowth test in the NPDES permit context in *D.C. Water and Sewer Authority*, NPDES Appeal No. 05-02 (EAB March 19, 2008), holding that to determine whether a final permit is a logical outgrowth of a draft permit,

> The essential inquiry focuses on whether interested parties reasonably could have anticipated the final [decision] from the draft permit. In determining this, one of the most salient questions is whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its [decision].

D.C. Water and Sewer, slip op. at 61, quoting *NRDC,* 279 F.3d at 1186.

As discussed below, these general principles relate directly to many of the points raised by CCH in its Reply.

A. Adequacy of Response

CCH's Reply Brief claims the Region did not adequately respond to certain specific comments submitted during the public comment period related to whole effluent toxicity ("WET") testing and test results related to the pesticides chlordane and dieldrin. CCH asserts that the decisions should be remanded to the Region for more comprehensive responses.

While the specific allegations are discussed in separate sections below, the Region notes that as a general matter, EPA regulations and Board decisions allow the Region flexibility in responding to comments. The specific requirements in EPA regulations are concise: The Region needs to specify which provisions, if any, of the draft permit have been changed and the reasons for the change, and "briefly describe and respond to all significant comments … raised during the public comment period…." 40 CFR 124.17(a). The Board has held that a region need not respond to each comment in an individualized manner, need not respond in precisely the form presented, and the response does not have to be of the same length or detail as the comment. *In re NE Hub Partners, L.P.,* 7 E.A.D. 561, 581, 583 (EAB 1998) (finding the Region's response documents acceptable, even though shorter than the comments and without individualized responses, "especially in light of the call for brevity in the regulation.") The absence of a "direct response" was not grounds for granting review where the

permitting authority's "general explanation of its decision in its response to comments was sufficient to articulate the basis for its decision". *In re Kendall New Century Dev.*, 11 E.A.D. 40, 50 n. 13 (EAB 2003). See also *Peabody Western Coal Co.*, 12 E.A.D. 22, 42 n. 47 and 50 n.69. (EAB 2005). In the matter of *Steel Dynamics*, 9 E.A.D. 165, 191 (EAB 2000), the Board declined to remand a decision where, although the Region had failed to provide a certain explanation in its response to comments, its determination was apparent from the record. The Board noted that for there to be a remand, "there must be a compelling reason to believe that the omissions led to an erroneous permit determination…" *Id.* at 191.

B. Finality in the Region's Decision-Making Process

1. New Issues/Commenting with Specificity

The regulations require that persons who seek review of a permit decision "must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the comment period." 40 CFR 124.13. Allowing a petitioner to raise a new argument for the first time on appeal, when such concerns should have been brought to the attention of the permitting authority during the comment period, would leave the permitting process open-ended, "frustrating the objective of repose and introducing intolerable delay." *In re Cherry Point*, 12 E.A.D. 209, 220 (EAB 2005). Likewise, comments need to be raised with specificity. The Region should not be compelled to divine the scope and nuances of a commenter's concern beyond the comment presented during the comment period. See Resp.Br. at 24. Expansion of comments through subsequent advocacy of counsel is akin to raising a comment for the first time on appeal. The commenter is obliged to raise its concerns

with specificity, including with examples or hypothetical scenarios to explain the points made if necessary; the Region should not be required to "figure out" what the commenter is saying.

Here, parts of the CCH Reply can be charitably described as attempts to "clarify" the comments it made during the public comment period and/or attempts to "relate" generalized (or tangentially related) comments actually raised during the comment period to arguments in CCH's briefs.[3] The NPDES administrative appeal process, however, is not the place to clarify what the commenter meant; the commenter is obliged to do so in the comment itself. The Board has explained that, "[i]t is not sufficient for the petitioner to have raised a more general or related argument during the public comment period." *In re Mille Lacs Wastewater Treatment Facility,* 11 E.A.D. 356, 376 (EAB 2004). "The Board has repeatedly found objections raised only in a general manner during the comment period insufficient to support review or more specific objections in the petition." *In re Westborough and Westborough Treatment Plant Board,* 10 E.A.D. 297. 304 (EAB 2002).

Finally, issues to be challenged need to be raised in the Petition for Review.[4] The Board should not consider new issues raised for the first time in a Reply, because the opportunity to raise such new issues is waived by the failure to present them in the Petition. The Board has held that even arguments in a Reply that "raise substantive nuances that are not set forth in the petition … constitute, in essence, 'late-filed appeals' because they could have been raised in the petition but were not so raised." *Keene*, slip op. at 20.

[3] See, e.g., discussions below in sections IIIA, IIIC, IV, and VIIIC below.

[4] See, e.g. discussions in sections IIIC and D below.

2. New Submissions

In its separate Motion to Supplement Record on Appeal, CCH proffers new documents to include in the administrative record. The Region is responding to these submissions separately in its Response to CCH's Motion and will not repeat its arguments here, other than to reiterate the general principles that the administrative record for the final decision is considered complete on the date the final permit is issued (*Keene*, slip op. at 22), that documents submitted subsequent to permit issuance cannot be considered part of the record, *Id.*, and that "[i]t is the exceptional case in which data developed after the issuance of a final permit will be deemed substantial enough to warrant a reopening of the permitting record. If it were otherwise, the permitting processes provided under existing statutory and regulatory authorities might never be brought to an end." *Id*. at 23.

In its Motion to Supplement, CCH's proffer of the new documents is tantamount to an attempt to extend the permitting process indefinitely. For example, as discussed in section VIII.C below, the new affidavit, declaration, and supporting documents regarding dieldrin could and should have been submitted during the public comment period if CCH wanted them considered. The purpose of the comment period is hardly served if a commenter can bring forth documents supporting an argument made during the comment period only after the agency has considered, but not accepted, the argument based on the few supporting documents that *were* submitted during the comment period. In addition, CCH is proffering documents relating to new legislation aimed at changing Hawaii's water quality standards. As discussed in the Region's Response to the Motion to Supplement and more specifically in the sections below regarding chlordane and

disinfection, this permitting process should not be prolonged based on speculation that water quality standards may change. Neither the public interest in informed agency decisions, nor the administrative efficiency to be achieved through finality, would be served by consideration of those documents in this proceeding.

II. Potential Changes to Water Quality Standards

In its Motion to Supplement, CCH has proffered a bill passed by the Hawaii legislature and signed by the Governor purporting to change State water quality standards for toxic pollutants, including chlordane and dieldrin, and for bacteria, along with some of the testimony supporting the bill. In its Motion, CCH argues that the Board should consider that legislation and supporting testimony in its review. As discussed in the Region's Response to the Motion to Supplement, the Board may take official notice of such governmental documents to the extent relevant. These documents, however, post-date the Region 9 decisions, and thus were not before the Region when the decisions were made. More importantly, however, the documents do not affect the validity of the Region's decisions and should not be grounds for a remand.

In analyzing whether a facility qualifies for a CWA 301(h) modified permit, EPA evaluates the proposed discharge against existing water quality standards, not hypothetical revised standards that may become the applicable standards in the future. Although the Hawaii bill purports to revise the State's water quality standards, revised water quality standards do not become applicable for the purposes of the Clean Water Act unless and until approved by EPA. CWA section 303(c)(3), 33 U.S.C. § 1313(c)(3), 40 CFR 131.21(c). The revised water quality standards proffered by CCH in its brief -- limiting the bacteria criteria to the portion of the waters between the surface and a depth

of 33 meters (100 feet), and revising the numeric criteria for certain toxic pollutants to conform to the federal CWA section 304(a) recommended criteria – have not even been submitted to EPA for review and approval.[5] It is speculative when or if they will be submitted, and what action EPA will take on them. Thus, the Board need not and should not consider the legislation during this proceeding.

The Board also should reject CCH's implied suggestion that the Agency should defer a decision in this proceeding pending future action relating to the legislation. At the time of application, or at least prior to action on a Region's tentative decision, any applicant for a CWA section 301(h) modified permit must demonstrate its ability to satisfy all the 301(h) criteria. Even assuming any proposed revised water quality standards are submitted, approved by EPA, and the Region agreed that certain of the findings in the 301(h) decisions should be altered based on revised standards, such an outcome would not affect all of the findings upon which the Region found that CCH had failed to make the demonstrations required for renewal of the CWA section 301(h) modified permits.

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[5] These potential changes are not included in the one package of standards revisions that Hawaii Department of Health (HDOH) has submitted to Region 9 (in July 2009) for approval. The submitted package contains only two proposed amendments. The first would change the human health numeric criterion for chlordane from 0.000016 ug/L to 0.00016 ug/L to correct "an inadvertent typographical error made in the adoption of [the current criterion]". It would not change the criterion to the less stringent 0.00081 ug/L that CCH urges should be used (see section VII below). The second amendment would relax the enterococcus (bacteria) requirements within 300 meters (1000 feet) of shore, changing the current geometric mean limit in those waters of 7 colony forming units (cfu)/100ml to 35 cfu/100ml enterococcus and the single sample maximum from 100 cfu/100ml to 104 cfu/100ml.. Neither of the changes that have been submitted to the Region would materially affect either of the 301(h) decisions, nor do they address any of the issues raised by CCH in its Petition. As discussed in the final decisions, CCH's discharges would exceed the "corrected" chlordane criterion of 0.00016 mg/L, so the findings that that criterion would not be met would not change. Doc. H.1.2, p. H-01-66, Doc. S.1.2, p. S-01-54. On the other hand, the final decisions determined that CCH could meet the existing, more stringent bacteria criteria within 300 meters of shore, so the amendment that has been submitted to the Region to relax criteria in that area would not affect the findings in either 301(h) decision. Doc. H.1.2, p. H-01-61. A copy of the HDOH letter submitting this package to Region 9 is attached here as exhibit A and is also available at HDOH's website at: http://hawaii.gov/health/environmental/env-planning/wqm/wqrev.html.

III. Zones of Initial Dilution and Zones of Mixing

As discussed in its Response, the Region appropriately found that CCH had not demonstrated that its discharges would meet applicable water quality standards after initial mixing in the receiving waters, and therefore did not satisfy the requirements of CWA section 301(h)(9). The Region's analysis and conclusions were based on the implementing regulations, and did not conflict with Hawaii's regulations regarding mixing zones. For attainment of the water quality criteria for bacteria and ammonia nitrogen, which were measured in the receiving waters, the Region's decisions determined that under EPA's regulations, standards needed to be attained at the zone of initial dilution (ZID), but also explained that even if the State zone of mixing (ZOM) used in the prior permits for those pollutants were considered, the applicable water quality standards would not be met. Other parameters – WET, chlordane, and dieldrin – were analyzed using samples from the effluent and initial dilution calculations, which CCH is not challenging.[6]

While the Region's Response addressed most of the issues raised in CCH's Reply, and though new issues cannot be raised in a reply that are not raised in an opening petition, the Region here replies to new issues raised in the CCH Reply to assist the Board in its consideration of the matter.

[6] CCH in its Reply states that Region 9 impermissibly found chlordane and dieldrin concentrations violated water quality standards at the ZID "according to calculations approximating water quality at the ZID." Pet.Rep.Br. at 3. As discussed in the Region's Response Brief, chlordane and dieldrin are measured in the effluent, and the concentrations are then adjusted based on critical initial dilution so that they can be compared to the State's water quality standards. Resp.Br. at 28-30, 47-48. The critical initial dilution calculations are similar to measuring conditions at the physical location of the ZID, in that both are intended to reflect concentrations "after initial mixing." In that respect, CCH's characterization of critical initial dilution is correct. However, CCH has not challenged EPA's calculation of critical initial dilution, nor the use of the calculated critical initial dilution in analyzing whether chlordane and dieldrin standards can be met. Thus, the arguments that CCH raises as to the Region's analysis of compliance with standards at the ZID do not challenge the Region's conclusions with respect to the critical dilution values assumed to deterime attainment of either the chlordane or dieldrin criteria.

A. Failure to Raise Issues in Comments

CCH attempts to rebut the Region's assertion that certain issues should not be heard as they were not raised specifically during the comment period[7] by stating that CCH's opening brief "responds to the new argument Region 9 propounded (reliance on the EPA regulation) only after the comment period closed." Pet.Rep.Br. at 6. CCH implies that, prior to responding to comments, the Region had not disclosed its intention to evaluate attainment of water quality standards at the ZID based on EPA's regulation at 40 CFR 125.62(a). Any such implication is belied by the two tentative decisions, which specifically indicate that the Region analyzed attainment of all water quality standards at the ZID *based on the regulation at 40 CFR 125.62(a).* See, e.g., Sand Island tentative decision document (TDD), Doc. S.1.7, p. S-01-306 (general finding), p. S-01-334 (pollutants analyzed in TDD), and p. S-01-350 (specifically regarding ammonia nitrogen, where the Region explained that it had to analyze whether standards were met at the ZID, even though the existing permit included a ZOM, because of 40 CFR 125.62(a)). See also, Honouliuli TDD, Doc. H.1.7, p. H-01-370 (pollutants analyzed in TDD) and p. H-01-390 (nutrients). The Region fairly apprised the public, as of the time of its tentative decisions, that it interpreted the regulation at 40 CFR 125.62(a) to apply to water quality criteria for all the pollutants discussed in the tentative decisions, not just BOD and SS. As such, interested persons were obliged to submit comments challenging that interpretation during the public comment period or risk waiver of the issue for further challenge.

[7] See discussion of issues not raised in comments in Region's Response Br. at 34-35.

CCH failed to comply with the requirement to raise all reasonably ascertainable issues during the comment period as to many of its arguments regarding the ZID. (See discussion of comments and arguments, Response Br. at 34-35), and the Board should dismiss these arguments for that reason.

B. <u>Ammonia Nitrogen and Bacteria Levels at the ZOM</u>

In the Reply, instead of responding directly to the Region's record-based conclusion that the CCH data indicate non-attainment of the ammonia nitrogen criteria at both plants and the bacteria criteria at Honouliuli at the zone of mixing (ZOM) developed by the State (for the expired, administratively continued permits), CCH urges the Board to remand so that the Region would be required to invite public comment on the "brand new position" that ZOM exceedances by themselves indicate water quality standards would not be met (Pet.Rep.Br. p. 7). CCH states that if it prevails on its argument that data at the ZID should not be considered, reliance on the unchallenged ZOM data alone would be changing the bases of the decisions sufficiently that a remand should be ordered so that the public could comment on the "decisions actually rendered rather than the decisions that might have been," citing to *In re Mille Lacs Wastewater Treatment Facility*, NPDES Appeal No. 01-16 (EAB Sept. 3, 2002). Pet.Rep.Br. at 6-7.

As discussed in the Response, the Region's analysis of the ZID issue was reasonable, necessary, consistent with the Clean Water Act and EPA regulations, and should be upheld. But even if the Board were to disagree, the *Mille Lacs Wastewater Treatment Facility* decision does not support CCH's position that remand would be necessary to analyze "the decisions actually rendered." In *Mille Lacs Wastewater Treatment Facility*, a different agency (not EPA) had issued, subsequent to EPA's permit

decision, a new determination – that EPA had not considered -- that significantly changed the basis for EPA's jurisdiction to issue the permit in question; the other cases cited by CCH generally involved new regulatory rationales for a decision put forth at the EAB.

Here, the Region's position is not new. More importantly, remand with an order directing the Region to reconsider the ZOM data for ammonia and bacteria is unnecessary; the Region already considered that data, as discussed in the two final decisions. (Regarding ammonia, see Response brief p. 47 and citations to record therein; regarding Honouliuli bacteria, see Honouliuli final decision document (FDD), Doc. H.1.2, p. H-01-61.) Remand would also not be necessary to allow additional public comment, as the ZOM data were discussed in the tentative decisions and included in the administrative record when the Region invited public comment on the tentative decisions. For Sand Island, the only ammonia data available were from the ZOM, and all the relevant exceedances were at the ZOM (and predicted to also be at the ZID). Doc. S.1.7, p. S-01-349-352. At Honouliuli, the tentative decision clearly stated that water quality standards for bacteria were not met at the ZOM. Doc. H.1.7, p. H-01-380.[8] Additional public comment on this point would merely enable CCH to cure the procedural barriers to challenging the Region's decision on an issue that CCH waived by failing to comment initially.

Thus, even if the Board were to find for CCH that attainment of water quality standards is not measured in the ZID, and essentially order the Region to disregard some of the data it considered, the situation would be akin to those involving the logical outgrowth principle – a final decision with some changes from the proposed decision, but

[8] As to the ammonia nitrogen criteria, the Honouliuli decision did not state a separate conclusion as to the ZOM data, but indicated the ZOM exceedances in Tables 21-24, p. H-01-447-8.

one in which the changes are a logical outgrowth of the proposed decision. In such situations, a remand to provide opportunity for further comments is not necessary.

Consistent with the *Steel Dynamics* case above, for there to be a remand, there must be a compelling reason to believe there had been an erroneous permit determination, *Steel Dynamics* at 191 – and here there would not be. The Board should dismiss CCH's remand suggestion regarding the Region's conclusions based on data demonstrating non-attainment of water quality criteria at the edge of the State ZOM.

C. "Standards Not Related to Secondary Treatment"

Another new issue in the Reply is the blanket assertion that "[t]o condition a 301(h) waiver on compliance with water quality standards unrelated to and unaffected by secondary treatment would be arbitrary and, hence, unlawful." Pet.Rep.Br. at 16. This is an entirely new argument that was not raised in either the comments or CCH's opening Petition, and it should not be considered, both because it was not raised in comments, and, being raised now, is an untimely petition. But if this issue is considered, consideration of water quality standards for specific pollutants that may otherwise be removed by a secondary treatment plant that meets secondary treatment standards for pollutants that describe gross removals (e.g., BOD5, which is the total biochemical oxygen demand of all oxygen-depleting substances measured over five days, and TSS, which measures total particulate removal, including solid particulates to which other specific pollutants may adsorb) is entirely inconsistent with text and purposes of CWA section 301(h) itself, as well as the long-standing implementation regulations.

D. Pollutants Measured in the Effluent

Finally, the Reply Brief argues that, because the existing permits incorporate limits that apply at the State's ZOM, the State ZOM should be used to determine initial dilution for all relevant pollutant criteria, except where the permits specify otherwise, Pet.Rep.Br. at 9, citing to the pages in the permits stating that certain water quality criteria cannot be exceeded beyond the ZID (Doc. S.12.2., p. S-12-128; Doc. H.12.4, p. H-12-1172). CCH argues that neither permit "tethers the ZOM … to particular water quality standards." Pet.Rep.Br. at 9. CCH's argument constitutes a "substantive nuance … not set forth in the Petition" and thus a late appeal that should be dismissed for that reason. *Keene*, slip op. at 20. In addition, the argument is contradicted by language in the permits. Just as the permits specify certain water quality standards to be met at the ZID (on the pages cited by CCH), they use similar language to describe the specific water quality criteria that cannot be exceeded beyond the ZOM: nutrients, pH, temperature, and salinity. Doc. S.12.2, p. S-12-129; Doc. H.12.4, p. H-12-1172-3. There is no basis to interpret the permit terms as applying the ZOM to unspecified pollutants. Other pollutants are measured in the effluent, and there is no mention of either ZID or ZOM as to those pollutants. Doc. S.12.2, p. S-12-117; Doc. H.12.4, p. H-12-1170.

IV. Disinfection

CCH 's Reply suggests that it in fact proposed amending its Honouliuli application to include disinfection, but that the Region rejected the proposed amendment. Pet.Rep.Br. at 23. CCH offers only its own comments as evidence of this proposal, without addressing why the regulations applicable to modification of permit applications

and submission of new information (40 CFR 125.59(d)(3), (f)(2)(i) or (ii), and (g)(2)) would not apply. *Id.* CCH's comments speak for themselves:

> …EPA fails to acknowledge that disinfection could be used to control bacterial concentrations in the discharge if they prove to be a potential public health and/or recreational problem. Further, EPA makes no reference to disinfection as a common industry practice for controlling bacterial concentrations.

Honouliuli comment C5.3, Doc. H.1.5, p. H-01-168. And,

> …[E]ven if CCH were exceeding the criteria in a manner that could be attributed to the outfall, EPA is also ignoring the fact that bacterial concentrations can be controlled through disinfection (if the ultimate decision on the part of EPA and HDOH is that bacterial concentrations need to be reduced). …. CCH can accomplish effective disinfection of the current HWWTP effluent without secondary treatment.

Honouliuli comment C21, Doc. H.1.5, p. H-01-188.

CCH's comments do not evidence an actual proposal to install and operate a disinfection system so that its modified discharge would meet CWA section 301(h) criteria, much less an attempt to comply with the requirements for submitting new information in 40 CFR 125.59(g)(2).[9]

CCH attempts to bootstrap the Region's response to its comments as evidence that the Region must have interpreted its comments as a proposal to amend the application because the Region's response included a discussion of the regulations regarding amendment of applications and indicated that CCH had not met those requirements. Pet.Rep.Br. at 23. A few sentences in the Region's response, however, cannot transform two brief references to disinfection in CCH's comments into a request or proposal to revise its application, especially when that would require the Region to ignore all the

[9] Indeed, CCH's comments regarding disinfection are not significantly different from Honouliuli comment P23 and Sand Island comment P35, which suggest the hypothetical possibility of a longer outfall as an alternative to secondary treatment. Doc. S.1.6, p. S-01-209; Doc. H.1.6, p. H-01-271.

regulations related to requests to submit data (40 CFR 125.59(g)(2)), amending applications (40 CFR 125.59(f)(2)(i) or (f)(2)(ii)), and proposals for an improved discharge (40 CFR 125.62(e)). This argument, moreover, ignores the remainder of the Region's response, which indicates why the Region did not consider the comment to constitute an actual proposal to disinfect: Disinfection was not presented in either the CCH application (for Honouliuli), nor in CCH's subsequent clarification of the range of possible discharge scenarios used to evaluate the effectiveness of what CCH did propose. Doc. H.1.5, p. H.01-189.

The contingent language in the comment quoted above "(if the ultimate decision…)" further demonstrates that CCH simply was not actually proposing to amend its application. Indeed, CCH nearly concedes as much in its Reply, writing that requiring it to comply with formal amendment procedures "would unfairly sandbag CCH" and essentially require it to choose between contesting "alleged violations" or proposing remedies. Pet.Rep.Br. at 27.[10] The Board should reject CCH's argument on this issue as an attempt to mask its own intransigence regarding compliance with the application regulations.

[10] The Honouliuli situation in certain respects contrasts with the circumstances presented in the *Arecibo* case, where Region II had granted a CWA section 301(h) modified permit based partly on changes to the facility that petitioners (who opposed the Region's decision) argued constituted an impermissible change to the application. In *Arecibo*, the Board upheld the Region's use of its discretion to consider the changes that had been made to the facility, and to grant the modified permit. In certain respects the Honouliuli situation is similar, in that in 2003 Region 9 requested that CCH update its application to include changes that had in fact been made at the plant, which CCH did. Doc. H.12.8. But while the *Arecibo* decision contains language that a permit issuer has discretion to impose permit conditions different from what had been proposed in the application, any such discretionary authority certainly would not compel Region 9 to treat the vague language in CCH's Honouliuli comments as a proposal to disinfect. The *Arecibo* facility had not only revised its application, it had actually installed the improvements that resulted in meeting the 301(h) criteria. *Arecibo* at 118. At Honouliuli, CCH has not only not installed disinfection process treatment units, it has not even proposed a plan to do so.

V. Bacteria geometric mean (Honouliuli)

A. Recent Data Based on 3-6 Samples per Month

CCH's Reply raises the *Mille Lacs* "decision actually rendered" argument here, too, in response to the fact that even if the Board were to discount geometric mean data at Honouliuli based on only one sample per month, the data from 2007-8, all based on 3-6 samples per month, consistently show exceedances of the bacteria geometric mean criterion at the Honouliuli plant. CCH claims that basing the decision only on the 2007-8 data would be changing the basis of the decision sufficiently that EPA needs to reconsider whether the 2007-8 data by themselves are sufficient to justify denial of the variance. Pet.Rep.Br. at 30.

As with the ZID/ZOM issue, the *Mille Lacs* case does not support CCH's position. As noted above, *Mille Lacs* involved a brand new document issued subsequent to the EPA's decision that significantly changed the basis for EPA's jurisdiction to issue the permit. Here, however, there would be no reason for a remand ordering the Region to consider the import of geometric mean data from 2007-2008, as the Region already considered that data, as discussed in the final Honouliuli decision. See Response Br. at 72, 77; Honouliuli FDD, Doc. H.1.2, p. H-01-52-56, esp. conclusion p. H-01-54, 56 that water quality standards were not met.[11]

[11] CCH does not argue that remand here would be appropriate to give CCH and the public an opportunity to comment on the 2007-8 data, as it does with regard to ZOM data. The Region agrees that a remand would not be appropriate for that reason. Even if the earlier data based on less frequent sampling were disregarded, the Region's findings on the Honouliuli bacteria geometric mean based on the 2007-2008 data would be a logical outgrowth of its findings in the tentative decision that the facility could not meet this bacteria criterion. The public was adequately on notice of the Region's tentative conclusion that no matter how the geometric mean was measured, the Honouliuli facility could not meet it. Honouliuli TDD, Doc. H.1.7, p. H-01-375-381. Where new data confirms tentative findings, a remand to provide an additional notice-and-comment period is not necessary. Judicial case law regarding additional confirmatory data added to the administrative record after proposal is based on the principles of both "logical outgrowth" and "harmless error." *See e.g. American Coke and Coal Chemicals Inst. v. EPA*, 452

B. Recent Legislation

CCH attempts to buttress its request for a remand of the bacteria geometric mean issue by indicating that if the bacteria findings were remanded, Region 9 could then consider the recently-passed legislation to change Hawaii's water quality standards for bacteria. As discussed above, however, the change to which CCH alludes – limiting the scope of the standards to 33 meters (100 feet) below the surface – has not even been submitted to EPA for approval (see footnote 5 above).[12] As discussed above in section II, this potential change should not be considered in this proceeding.[13]

VI. WET

CCH persists in its Reply that the Region did not adequately respond to a comment that "had questioned why *T. gratilla* was considered reliable as a test species for whole effluent toxicity for purposes of eligibility for a 301(h) variance, when it had not been considered reliable enough for purposes of determining compliance with the Sand Island permit." Pet.Rep.Br. at 35, citing Sand Island comment C32, Doc. S.1.5, p.

F.3d 930, 938-940 (D.C. Cir. 2006)(logical outgrowth); *Chamber of Commerce v.SEC*, 443 F.3d 890, 900-904 (D.C. Cir. 2006)(harmless error); *Community Nutrition Inst. v. Block*, 749 F.2d 50, 57-58 (D.C. Cir. 1984)("It is impossible to perceive why correction of an asserted deficiency in earlier studies – which correction confirms the accuracy of those studies – should give rise to an additional opportunity to comment.").

[12] Though the Region objects to CCH's Motion to Supplement the administrative record to include the new legislation, and though CCH did not raise the issue of the legislation in its opening Petition, thus waiving any such arguments now, the Region notes that it did respond to a comment in the Sand Island proceeding below regarding the possibility of a revision of this type to water quality standards for bacteria. Doc. S.1.5, p. S-01-136 & 137. The Board may take official notice of the new legislation in its appellate stage review, but the legislation post-dates the Region's decision on review and is not relevant to this proceeding.

[13] CCH acknowledges, Pet.Rep.Br. at 31, that even if this change were submitted to and approved by EPA, the data would still show exceedances of bacteria criteria at the Honouliuli facility. In addition to the information in Pet.Resp.Br. at 31, n.11, see information for ZID and ZOM surface samples at all ZID and ZOM stations, and for mid-depth samples at stations HB2, HB4, HB5, HM1, HM2 and HM4, in Tables 9a, 9b, 11a, 11b, 11d, and 11e, Doc. H.1.2, p. H-01-126-129, 133-4. (The depth range for mid-depth samples at these monitoring stations are all less than 33 meters from the surface. Doc. H.4.6, p. H-4-78-111; Doc. H.4.7, p. H-4-185-216.)

S-01-151-2.[14] CCH's argument represents a paraphrase of comment C32, which does not actually reference the concept of reliability, but instead argues that the Region "ignores EPA's express statement in the Permit" that *T. gratilla* not be used for regulatory compliance purposes, and, "[a]s such, it is an arbitrary and unjustified basis for EPA's tentative denial…." Doc. S.1.5, p. S-01-152. The Region agrees that it did not divine the intent underlying the comment as questioning the reliability of the test protocol, but, instead, as an argument that its analysis was constrained by specific provisions in the expired, administratively continued permit, and therefore responded that *T. gratilla* test results were used to determine whether the proposed discharge would meet water quality standards, not to determine permit compliance. Doc. S.1.5, p. S-01-152. In other parts of the comment responses, however, the Region explained that analyzing compliance with the existing permit limits was not the same as a projected analysis of whether a CWA section 301(h) modified discharge would meet water quality standards. See, e.g., response to Sand Island comment P153, Doc. S.1.6, p. S-01-254; response to Honouliuli comment P67, Doc. H.1.6, p. H-01-285.

To the extent any of the comments could be read as questioning the reliability of the *T. gratilla* test, the Region did provide comprehensive answers. See Doc. H.1.5, p. H-01-199 through 218; Doc. S.1.5, p. S-01-150 through 163. To the extent CCH is now asking the Region to "defend the rationality of having looser standards for 301(h) testing

[14] Although CCH asserts that the Region needs to explain why the *T. gratilla* test method is not used to measure compliance with the Sand Island permit, it fails to mention that its own current (expired but administratively continued) permit for the Honouliuli facility is different. In the existing Honouliuli permit, the WET tests with *T. gratilla* are, in fact, used to measure compliance with the permit. The Honouliuli permit states that compliance with the WET limits shall be determined with tests conducted with *C. dubia* (a flea) "and a Hawaiian Sea Urchin species." Doc. H.12.4, p. H-12-1177. CCH uses *T. gratilla* as the sea urchin species. Doc. H.1.2, p. H-01-69. CCH also fails to mention that CCH itself submitted *T. gratilla* data in its applications for the 301(h) variances in the course of attempting to make the statutory demonstrations required. See, e.g., Doc. H.12.8, p. H-12-1306 et seq.; Doc. S.12.4, p. S-12-232 et seq.

than for permit compliance testing," Pet.Rep.Br. at 36, CCH is essentially asking two questions: why is the *T. gratilla* test used in the 301(h) analysis, and why was the test not used to determine compliance with WET limits in many permits? The reason the Region used the *T. gratilla* test to determine whether the CCH discharges would comply with Hawaii's water quality standards for toxicity is simply because CCH used that test, along with the *C. dubia* test, to evaluate attainment of the Hawaii's water quality standards for WET in its permits. CCH generated extensive data and, as is apparent from the Region's response to the specific comments regarding the *T. gratilla* test, the Region found that data, and the test itself, to be reliable. The Region did not focus on the latter question regarding the reason the *T. gratilla* test was not consistently used to determine compliance with permit limits because that question was not presented to the Region during the comment period, nor is it especially relevant here.[15] In response to CCH's opening Petition that identified permits that did not include the test for permit compliance purposes, the Region identified other permits that did include the test for that purpose, which further substantiates the Region's earlier response on this point. Indeed, as noted in footnote 14, *T. gratilla* is the Hawaiian urchin species CCH uses, along with *C. dubia* (a flea) to determine permit compliance under the existing Honouliuli permit. Many NPDES permits issued by Hawaii do include *T. gratilla* testing to evaluate the toxicity of the permittee's effluent, either as a measure of permit compliance for which violations could lead to enforcement action, or as a trigger for a toxicity identification and/or reduction evaluation process, both of which lead to important consequences related to

[15] See, e.g. *Peabody Western Coal Company*, 12 E.A.D. at 51, noting that differences in permit requirements "is not surprising," and that permit terms "are established on a case-by-case basis, taking into consideration a multitude of factors …"

measured toxicity, and for which neither EPA nor HDOH require use of an "unreliable" test. This is the sort of "quintessentially technical" issue on which deference to the permit authority is especially appropriate. *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 570 (EAB 1998).

VII. Chlordane

In the 301(h) decisions, the Region determined that the CCH facilities could not meet the State's human-health water quality criterion for chlordane established and approved at a level of 0.000016 ug/L. In its Petition, CCH asserted that this was the incorrect standard, and that its discharges should have been compared to the recommended EPA CWA 304(a) criterion of 0.00081 ug/L. The Region's reasoning is simple and straightforward: The implementing regulations at 40 CFR 125.62(a)(1) require that applicants need to meet EPA-approved State water quality standards, and the federal 304(a) criteria are only analyzed if there is no directly corresponding state standard. In its Reply, CCH attempts to buttress its position by proffering new State legislation aimed at revising the State criterion, and expanding on some of its arguments in its original brief.

Attempting to address its facilities' exceedances of the chlordane criterion, CCH's Reply brief cites to the recent legislation discussed above for the proposition that "it is no longer true (if it ever was), that Hawaii believes a chlordane standard stricter than the federal criteria is necessary to protect the health of the citizens of the State." Reply Br. at. 46. As discussed above in Section II, this legislation is post-decisional and not part of the administrative record for the 301(h) decisions. And even were the Board to take official notice of it, the new legislation is not relevant to the Region's decisions. Water

quality standards that need to be analyzed for a 301(h) decision are those that have been adopted, approved, and are in effect -- not hypothetically revised future standards. Here, any change to set the Hawaii chlordane criterion the same as the CWA section 304(a) recommended criterion has not been submitted to EPA, let alone approved. See footnote 5 above.

The Reply Brief also discusses fish consumption rates in Hawaii, arguing the information from Hawaii DOH in the administrative record "falls woefully short," is "now outdated," and "has been withdrawn." Pet.Rep.Br. at 50-1. Again, the new information pointed out by CCH is not in the administrative record. As discussed previously, Hawaii has not submitted the proposed change to 0.00081 ug/L in its water quality standards to EPA for approval, and CCH acknowledges in the Reply that "Hawaii still has the right to maintain its current standard." Pet.Rep.Br. at 51. Indeed, as discussed above, what Hawaii has submitted to EPA is the proposed standard correcting the alleged typographical error and changing the chlordane standard to 0.00016 ug/L, not the less stringent EPA recommended criterion of 0.00081 ug/L. If the State has changed its position as to what number is appropriate to protect persons eating Hawaii's fish, this is not at all clear, and is entirely beyond the scope of this proceeding.[16]

VIII. Dieldrin

In the final decisions, the Region found neither facility could meet State standards for the pesticide dieldrin. These findings were based on years of data, collected and submitted by CCH, using a method approved by EPA, included in the CWA section

[16] If the change relaxing the chlordane criterion to 0.00081 ug/L were submitted to and approved by EPA, data in the record would still show exceedances of chlordane standards at Sand Island Doc. S.5.11, p. S-05-232-2. The record does not indicate that discharges from the Honouliuli facility would interfere with attainment of the relaxed chlordane criterion (if approved) at the level of 0.00081 ug/L.

301(h) Amended Technical Support Document (TSD) and required in both permits, showing continual, significant exceedances. Doc. S.1.2, p. S-01-54, 56; Doc. S.1.2, p. H-01-67.

CCH does not contest that the data show exceedances, but instead targets the Region's responses to comments and the Region's response to a new issue raised by CCH on appeal regarding another Region 9 301(h) tentative decision. Because CCH concedes that the data it submitted demonstrates non-attainment of the dieldrin standards, the Board should dismiss CCH's challenge on this issue.

A. The Region's Response to Comments

The bulk of CCH's arguments concerning dieldrin assert that the Region did not adequately respond to CCH's comments that criticized the dieldrin test results (Pet.Rep.Br. at 54-62). EPA's responses, however, were comprehensive: The Region not only discussed why it could not and would not ignore years of data using the EPA-approved dieldrin testing method, but also explained why new data submitted by CCH during the comment period, using a different testing method, did not persuade the Region to essentially discard all the data submitted under the permit. Doc. H.1.5, p. H-01-194-199, Doc. S.1.5, p. S-01-145-149 (summarized in Resp.Br. at 113-116). In analyzing the adequacy of the responses, the Board need look no farther than the responses themselves.

B. Detection Limits

CCH replies that it had raised a valid question regarding the validity of the Region's conclusions regarding attainment of the dieldrin criteria because the results "were at or near the level of detection." Pet.Rep.Br. at 54. CCH also states: "[A]s CCH

explained in its comments, these test results were not submitted to show compliance with the permit, [17] but to raise a question as to the appropriateness of GC/ECD testing [i.e., Method 608, the one authorized in the permit and EPA regulations] for pesticides at the limit of that method's detection capability." Pet.Rep.Br. at 62.

Region 9 fully considered the issue of detection levels. Both responses to comments, as well as the Honouliuli tentative and final decisions, discuss the issue of detection limits – both the method detection limit (MDL) calculated by CCH's laboratory, and the higher "minimum limit" (ML) calculated by CCH's laboratory, which is considered to be an even more reliable indicator than the MDL that the results are accurate and not reflective of background "noise."[18]

CCH's laboratory calculated its MDL for dieldrin to be 0.004 ug/L, with a higher ML at 0.009 ug/L.[19] For Honouliuli, all three dieldrin samples reviewed in the tentative decision were above both the MDL and the higher ML of 0.009 ug/L, as were the three additional samples reviewed for the final decision. Doc. H.1.2, p. H-01-66. All the Sand Island dieldrin annual averages[20] exceeded the ML of 0.009 ug/L. Doc. S.1.2, p. S-01-

[17] Because the applicant has the burden of showing its discharges will satisfy all the 301(h) criteria, it is puzzling that CCH now says that the new data was submitted only to raise a question as to the data that had been submitted under the permit, but not to show compliance with the permit (or, apparently, with the CWA 301(h) statutory demonstration criteria).

[18] See Honouliuli tentative decision, Doc. H.1.7, p. H-01-383, final decision, Doc. H.1.2, p. H-01-64, response to comments, Doc. H.1.5, p. H-01-196; Sand Island response to comments, Doc. S.1.5, p. S-01-147; also Doc. H.2.4, p. H-02-1832 and Doc. S.2.6, p. S-02-4124 (defining ML) and 40 CFR Part 136 Appendix B (defining MDL).

[19] See Sand Island priority pollutant scans, e.g. Doc. S. 15.1, p. S-15-42, showing the dieldrin ML at 0.009 ug/L, and the MDL at 0.004 ug/L. Honouliuli reported only the ML; see, e.g., tentative and final decisions, Doc. H.1.7, p. H-01-383 and H.1.2, p. H-01-66; CCH priority pollutant scans, e.g. Doc. H.15.1, p. H-15-4.

[20] Hawaii water quality standards require that human health criteria for carcinogens (to protect fish consumption) be assessed as an average during any 12-month period. Doc. S.1.2, p. S-01-52.

54.[21] The fact that these results exceeded not only the MDL but also the higher ML refutes any notion that the Region's evaluation of compliance with the dieldrin standards was not based on reliable data, when results were documented above the MDL/ML calculations of CCH's own laboratory.

C. New Arguments, New Submissions

CCH asserts that consideration of the Tenno and Bishop statements proffered in its original Petition and its Motion to Supplement Record on Appeal is proper as a response to "questions first raised" in the Region's responses to comments. Pet.Rep.Br. at 56. The post-decisional Tenno and Bishop statements invite the Region and the Board to engage in a give-and-take process, submitting additional data and factual arguments in response to the problems pointed out by the Region with the new data submitted during the comment period. As discussed above in Section I, however, the comment-and-response process is not a give-and-take process; a commenter cannot continue to submit more information and documents that could have been submitted months ago and that are intended to cure defects that could have been predicted. See also Response to Motion to Supplement Record on Appeal. "[P]roceedings would never end if an agency's response to comments must always be made the subject of additional comments." *Community Nutrition Institute v. Block*, 749 F. 2d 50, 58 (D.C. Cir. 1984).

CCH seeks to justify saving the new data for the Petition stage with the rationale that test results are frequently submitted without certain backup data, citing to requirements in the Sand Island and Honouliuli permits. Pet.Rep.Br. at 57. "By initially

[21] Daily maximum concentrations reported for dieldrin in the Sand Island effluent exceeded the CCH laboratory's calculated ML value of 0.009 ug/L in 106 of 118 months. Doc. S.5.11, p. S-05-234-5.

submitting only the test results, while retaining the back-up data in case Region 9 requested it, CCH was merely following accepted practice." *Id.*[22] What may be accepted practice for routine submission of test results under a permit, using an accepted test method specified in the permit and regulations, does not justify failure to submit back-up data for test results from an alternative, non-approved method proffered in support of CCH's comment that results derived from the method used under the permit – which CCH had been submitting for years – should not be considered by the Region in evaluating whether CCH's discharges would meet water quality standards. The testing method that the Tenno and Bishop statement would support not only has not been specified in either permit, but it is also not an approved method for testing wastewater under EPA's test method regulations at 40 CFR Part 136. As discussed in Section I above, all reasonably ascertainable arguments need to be made in comments, and case law emphasizes the need for decisions to be made at the regional level. Given that CCH itself generated the data demonstrating non-attainment of the dieldrin standards, CCH could have reasonably ascertained what documents it should have presented to the Region to challenge those results. Because the Board (and courts) do not "perform a comparative evaluation of the scientific evidence," *NE Hub* at 568, n. 6, the Board should disregard the Tenno and Bishop statements in its consideration of the Petition on the dieldrin issues as untimely.

[22] Actually, CCH did not submit "only the results" in its comments. There was some data submitted, but the Region found it quite confusing. CCH's Honouliuli comments included graphs showing the bottom-line results from the comparative testing for the period April 24 through May 4, 2007 (Doc. H.2.1, p. H-02-99), a statement that supporting data could be found in the Appendix (Doc. H.2.1, p. H-02-40), and <u>some</u> data, but apparently only for the Method 8270 tests and apparently only for one (completely different) day, July 23, 2007. (Doc. H.221, p. H-02-270-278). For Sand Island, there were more data, such as laboratory data sheets with handwritten chain of custody sheets for the Method 8270 sampling, but not for the Method 608 part of the comparative testing. See Doc. S.2.2, p. S-02-387 et seq.

CCH's criticisms of the data generated using EPA Method 608, and its responses to the Region's criticisms of the alternate data submitted during the comment period, essentially constitute a proposal to substitute "new information" in its application,[23] using an alternative data set rather than the data CCH had actually submitted previously under its permit and application for renewal. As stated in *Peabody Western Coal Company*, 12 E.A.D. 22 (EAB 2005), the Board typically will not grant review where the record demonstrates merely "a difference of opinion or an alternative theory regarding a technical matter," 12 E.A.D. at 34 and 51 (citing *In re Haw. Elec. Light Co.*, 10 E.A.D. 291, 233 (EAB 2001), in which the Board deferred to the permit issuer's technical judgment in selection of monitoring data for its analysis). See also *NE Hub,* 7 E.A.D. 561 (EAB 1998), p. 568, n. 6 ("a court's review should not involve a comparative evaluation of the scientific evidence").

D. <u>Pt. Loma</u>

In the Reply brief, CCH criticizes the Region's response to the arguments raised in CCH's opening Petition concerning EPA's tentative decision to re-issue a CWA section 301(h) modified permit to a California POTW, Pt. Loma (San Diego). CCH states that the Region misinterpreted CCH's argument in the original Petition, and that CCH did not, in fact, argue that Pt. Loma used the non-approved testing method that CCH had proffered during the comment period. The Region now recognizes that it did, in fact, misunderstand CCH's argument, and that CCH was not asserting that the Pt. Loma facility used Method 8270 (the method for which CCH is proffering new data), rather than Method 608 (the EPA-approved method used by CCH in analyzing the

[23] The regulations at 40 CFR 125.59(d)(3) & (g)(2) describe requirements applicable to submission of "additional information" regarding CWA section 301(h) applications.

samples that were submitted under its permit and on which the Region based its findings). The Region now understands CCH to be asserting that because the laboratory used by the Pt. Loma facility did not achieve as low an MDL as the CCH laboratory, the Region should essentially disregard the Honouliuli and Sand Island data sets developed using EPA Method 608 in the interest of not penalizing CCH for using a laboratory capable of achieving higher quality results. CCH claims this would be similar to using the "percent minimun significant difference" (PMSD) analysis in whole effluent toxicity testing to avoid penalizing good laboratories.[24]

Reference to the PMSD procedure is, quite simply, mixing apples and oranges. The PMSD procedure is a specific procedure applicable to WET testing, not chemical testing for specific constituents. While the Region certainly agrees that use of the highest performing laboratories should be encouraged, any such a policy goal does not provide a basis for ignoring years of dieldrin data documenting long-term contributions to non-attainment of Hawaii's water quality criterion for dieldrin.[25]

The MDL of 0.004 ug/L calculated by the CCH laboratory is not especially low. Indeed, the "default" MDL calculated for EPA's Method 608 is 0.002 ug/L, a value lower than the MDL achieved by the CCH laboratory. See 40 CFR Part 136, appendix A, Table 1, Doc. H.5.2, p. H-05-31; Doc. S.5.2, p. S-05-31. As discussed above, the data evaluated by the Region in the 301(h) decisions for the CCH facilities exceeded not only

[24] PMSD is discussed in Response Br. at 16 and 96.

[25] The Region cannot determine whether CCH also is arguing that the Region's CWA 301(h) decisions regarding the CCH facilities were defective on grounds that the CCH plants and Pt. Loma are like facilities that were allegedly and arbitrarily treated differently. CCH has not proffered the Pt. Loma data and evaluation in CCH's Motion to Supplement Administrative Record. Even if this information were in administrative records supporting the Honouliuli and Sand Island decisions and/or a fair subject of which the Board could take administrative notice, the Pt. Loma data set and evaluation are not relevant for the basic question presented: whether Region 9 reasonably relied on extensive data submitted pursuant to CCH's permits to find the facilities could not meet the dieldrin criterion.

the MDL for the CCH laboratory, but the higher ML. There is simply no reason to eliminate any of this data.

CONCLUSION

For the reasons discussed above and in the Region's Response to Petition for Review, CCH's petitions for review should be denied.

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Respectfully submitted,

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