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. 09-07
NPDES Permit Nos. HI0020117 & HI0020877	)	

ORDER DENYING REVIEW

I. *Introduction*

Under section 301(h) of the Clean Water Act ("CWA" or "Act"), municipal wastewater treatment facilities that discharge effluent into deep ocean waters may, in some instances, receive variances from "secondary treatment" pollution control requirements that otherwise apply to such sources. Since the early 1990s, the City and County of Honolulu ("CCH") has operated its two principal wastewater treatment facilities – the Honouliuli Wastewater Treatment Plant and the Sand Island Wastewater Treatment Plant – pursuant to such variances. During CCH's most recent round of requests for renewals of these variances, Region 9 of the U.S. Environmental Protection Agency denied the requests.

On February 9, 2009, a group of professional engineers (Messrs. James K. Honke, Hans J. Krock, James S. Kumagai, and Victor D. Moreland; collectively the "Moreland Group") filed a petition for review of the two final decisions. *See* Letter to Environmental Appeals Board from Moreland Group (dated Feb. 7, 2009) ("Petition"). At the request of the Environmental Appeals Board ("Board"), the Region filed a response to the Moreland Group's petition on August 17, 2009. *See* Response to Petition for Review (dated Aug. 14, 2009).

II. *Issues on Appeal*

The Board must decide whether, under 40 C.F.R. § 124.19(a), the Moreland Group has established clear error, abuse of discretion, or other grounds for a grant of review of the Region's decisions to deny CCH's two CWA section 301(h) variance requests.

III. *Summary of Decision*

For the reasons stated below, the Board concludes that the Moreland Group has failed to identify clear error, abuse of discretion, or other grounds for a grant of review of the two variance denials. Accordingly, the Board denies the petition for review.

IV. *Procedural History*

The Region issued tentative (draft) versions of its decisions on CCH's applications on March 27, 2007, and December 7, 2007, respectively. In each case, the Region decided not to renew the variance because, in its view, the facility was unable to satisfy all the requirements of section 301(h). The Region found that, contrary to CWA § 301(h)(9), neither facility could meet applicable water quality standards for ammonia nitrogen, whole effluent toxicity, chlordane, or dieldrin, or, for Honouliuli alone, enterococcus bacteria, after initial mixing in the waters surrounding or adjacent to the points at which the effluent is discharged. The Region also determined that, contrary to CWA § 301(h)(2), CCH failed to demonstrate that its discharges would not interfere with the attainment or maintenance of water quality that assures the protection and propagation of a balanced, indigenous population of fish, shellfish, and wildlife, and of water quality that allows recreation. For these reasons, the Region did not judge the Honouliuli and Sand Island facilities qualified for further variances from the CWA's secondary treatment requirements.

After holding public hearings and accepting public comments on the tentative decisions, the Region issued its final decisions on January 5, 2009, denying the section 301(h) waivers for the two facilities on the grounds just summarized. *See* U.S. EPA Region 9, *[Final] Decision of the Regional Administrator on CCH's Honouliuli Wastewater Treatment Plant Application for a Modified NPDES Permit Under Section 301(h) of the Clean Water Act* (Jan. 5, 2009) (A.R. H.1.2); U.S. EPA Region 9, *[Final] Decision of the Regional Administrator on CCH's Sand Island Wastewater Treatment Plant Application for a Modified NPDES Permit Under Section 301(h) of the Clean Water Act* (Jan. 5, 2009) (A.R. H.1.2). The Region also published responses to the comments submitted during the public comment periods. *See, e.g.*, U.S. EPA Region 9, *Response to Comments from the Public, Honouliuli Wastewater Treatment Plant* (Jan. 5, 2009) (A.R. H.1.6) [hereinafter H-RTC]; U.S. EPA Region 9, *Response to Comments from the Public, Sand Island Wastewater Treatment Plant* (Jan. 5, 2009) (A.R. S.1.6) [hereinafter SI-RTC].

V. *Analysis*

A. *Standard of Review*

Under the 40 C.F.R. part 124 permitting regulations, the Board ordinarily will not review decisions related to an NPDES permit – including grants or denials of section 301(h) variances – unless the decisions are based on clearly erroneous findings of fact or conclusions of law, or involve important matters of policy or exercises of discretion that warrant Board review.[1]

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[1] *See* 40 C.F.R. § 125.59(i)(4)(i) ("[a]ny section 301(h) modified permit shall[] * * * [b]e issued in accordance with the procedures set forth in 40 CFR part 124"); *id.* § 125.59(i)(5) ("[a]ppeals of section 301(h) determinations shall be governed by the procedures in 40 CFR part 124").

40 C.F.R. § 124.19(a); *see In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 115 (EAB 2005) (explaining that procedural rules governing the issuance of NPDES permits also apply to 301(h) determinations); *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 341-43, 345-47, 357 (EAB 2002) (remanding portions of NPDES permit pursuant to section 124.19(a)). The Board wields its power of permit review "sparingly," in keeping with Agency policy that most permit conditions be finally determined at the permit issuer's level. 45 Fed. Reg. at 33,412; *accord In re City of Moscow*, 10 E.A.D. 135, 141 (EAB 2001). Importantly, the petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a); *see, e.g., In re Dominion Energy Brayton Point Station, LLC*, 12 E.A.D. 490, 588-90 (2006) (remanding NPDES permit where petitioner established that permit issuer failed adequately to explain the maximum number of allowable monthly water temperature exceedances); *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 578-86 (EAB 2004) (remanding NPDES permit where petitioner raised substantial questions about representativeness of sampling data).

B. *The Moreland Group Failed to Meet the Standard for Review*

In its petition for review of the section 301(h) variance denials, the Moreland Group argues that the Region "cavalierly dismissed" its comments on the draft decisions, which, it asserts, it had presented in good faith and on the basis of protecting public health and the environment at the least cost, both financially and with regard to detrimental secondary impacts on the environment. Petition at 1. The Moreland Group had commented that construction of secondary treatment is akin to construction of a greenhouse gas factory and thus the costs

(including consideration of environmental costs) of denying CCH's section 301(h) waivers outweigh the benefits provided by any anticipated water quality improvement.

In response to the Moreland Group's comments (and to similar comments filed by others), the Region explained that the section 301(h) variance renewal process is driven by specific statutory criteria established by Congress, and those criteria do not include a weighing of secondary environmental impacts (such as greenhouse gases) or financial impacts. Those specific elements, the Region noted, therefore cannot affect a section 301(h) variance decision in the way the Moreland Group advocates. *See* H-RTC cmts. P2, P11, P22, P27, at 2-3, 7, 11-12, 13-14; SI-RTC cmts. P1, P4, P6, P14, P31-34, P44, at 2-4, 8, 14-16, 19. Despite this fact, the Region explained further:

> [I]t is EPA's objective to minimize any negative impacts and maximize beneficial impacts that might result from plant upgrades required by the CWA, and to share lessons learned from experience across the county to ensure that CCH is aware of available environmentally sound technologies. With respect to greenhouse gas emissions and energy demand, for example, many modern wastewater treatment plants utilize gases created during secondary treatment to generate electricity, thus reducing operating costs, energy demand, and emissions at wastewater treatment plants, as discussed in the December, 2006 EPA document, "Opportunities for and Benefits of Combined Heat and Power at Wastewater Treatment Facilities." Energy demands, potential emissions, and sludge volume are matters that will need to be reviewed in detail during the design of treatment plant upgrades. EPA intends to work with CCH to ensure that treatment plan upgrades are made in a manner that takes advantage of state-of-the-art energy efficiencies used throughout the [United States].

H-RTC cmt. P27, at 13-14; SI-RTC cmt. 44, at 19.

On appeal, the Moreland Group contends that the Region failed to perform "a rigorous evaluation of the costs and benefits of its action of denying" CCH's two variance applications.

Petition at 2. The Moreland Group continues to claim that the Region has discretion to conduct such evaluations in its analyses of CWA section 301(h) variance applications. As support for this proposition, the Moreland Group references a general policy memorandum issued to Agency employees by the present Administrator, which states 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. *Id.* at 1-2 (quoting Memorandum from Lisa P. Jackson, Administrator, U.S. EPA, to EPA Employees). The Moreland Group also references two CWA provisions that, in its judgment, indicate that EPA has positive authority to exercise discretion in its section 301(h) decisionmaking: (1) CWA § 217, 33 U.S.C. § 1297, which directs the Agency to ensure that any cost-effectiveness guidelines it adopts in certain contexts also provide for the identification and selection of cost-effective alternatives; and (2) CWA § 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B), which directs the Agency to consider certain costs and benefits in evaluating the "best practicable control technology" for point sources other than publicly owned treatment works. Petition at 2.

The applicable permitting rules, set forth in 40 C.F.R. part 124, require permit issuers to "[b]riefly describe and respond to all significant comments." 40 C.F.R. § 124.17(a)(2). As interpreted by the Board, this rule means that permit issuers must establish that they considered parties' comments but need not necessarily agree with the comments or change the permit terms or conditions to reflect them. *E.g.*, *In re Newmont Nev. Energy Investment, LLC*, 12 E.A.D. 429, 448 (EAB 2005); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 161 (EAB 1999); *In re NE Hub Partners, LP*, 7 E.A.D. 561, 583 (EAB 1998).

Upon consideration, the Board holds that the Moreland Group's arguments on appeal fail to meet the standard of review for this proceeding. First, the law makes plain that the only factors a permit issuer may base a section 301(h) variance decision upon are the ones the Region analyzed in its tentative and final decisions. *See* CWA § 301(h), 33 U.S.C. § 1311(h). None of the sources the Moreland Group raises on appeal counter the very specific standards EPA is directed to consider for secondary treatment variances. Accordingly, the Region did not err or abuse its discretion by failing, at this stage of the permitting process, to evaluate the factors of concern to the Moreland Group.

Second, the record clearly indicates that the Region adequately considered and responded to the Moreland Group's concerns about collateral environmental impacts of secondary wastewater treatment systems and the costs and benefits to the environment as a whole. The Region directly responded to these points, explaining that although these matters could not, as a matter of law, affect its decision to grant or deny a variance application, questions about collateral impacts and costs and benefits would all be of much importance during the permit implementation stage. *See, e.g.*, H-RTC cmts. P2, P11, P22, P27, at 2-3, 7, 11-12, 13-14; SI-RTC cmts. P1, P4, P6, P14, P31-34, P44, at 2-4, 8, 14-16, 19. A petitioner's dissatisfaction with a permit issuer's reasonable answer is not grounds for a grant of review of a permit decision. *E.g.*, *In re Envtl. Disposal Systems, Inc.*, 12 E.A.D. 254, 286-87 (EAB 2005) (holding that where administrative record establishes that permit issuer heard and evaluated concerns raised during comment period, petitioner's disagreement with permit issuer's conclusions "is not material" under applicable standard of review).

VI. *Conclusion*

In conclusion, the Board holds that the Moreland Group has failed to identify clear error, abuse of discretion, or other grounds for a grant of review of the two CWA § 301(h) variance denials.

VII. *Order*

For the foregoing reasons, the Board denies the Moreland Group's petition for review, denoted NPDES Appeal No. 09-07. So ordered.

ENVIRONMENTAL APPEALS BOARD[2]

Dated: 8/12/10

By: Kathie A. Stein

Kathie A. Stein
Environmental Appeals Judge

[2] The three-member panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, and Kathie A. Stein. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Denying Review** in the matter of *City & County of Honolulu*, NPDES Appeal No. 09-07, were sent to the following persons in the manner indicated:

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Date: AUG 12 2010

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Secretary