



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

January 29, 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: NPDES Appeal No. 09-01

Dear Ms. Durr:

Enclosed please find the original and five copies of EPA Region IX's Response to Motion for Extension of Time to File Petitions for Review, with one attachment, in the above-referenced case.

A copy is also being sent via Federal Express to Messrs. David Salmons and Robert Zener of Bingham McCutchen, who filed the motion on behalf of City and County of Honolulu.

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 blue ink that reads "Suzette E. Leith".

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

Enclosure: EPA Region IX's Response, with attachment

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

_____)	
In the matters of:)	
)	
City and County of Honolulu's)	
Sand Island Wastewater Treatment)	NPDES Appeal No. 09-01
Plant Application for Modified)	
NPDES Permit Under Section 301(h))	
of the Clean Water Act)	
NPDES Permit No. H10020117)	
)	
City and County of Honolulu's)	
Honouliuli Wastewater Treatment)	
Plant Application for Modified)	
NPDES Permit under Section 301(h))	
of the Clean Water Act)	
NPDES Permit No. HI0020877)	
_____)	

**EPA REGION IX'S RESPONSE TO MOTION FOR EXTENSION OF TIME
TO FILE PETITIONS FOR REVIEW**

Region IX of the Environmental Protection Agency (Region IX or the Region) files this response to the motion filed by City and County of Honolulu (CCH) dated January 23, 2009, requesting that the Environmental Appeals Board (Board or EAB) issue an order granting a 30-day extension of time, up to and including March 11, 2009, to file petitions for review of Final Decisions of the Regional Administrator denying CCH's requests for modified NPDES permits under section 301(h) of the Clean Water Act for CCH's Sand Island wastewater treatment plant and Honouliuli wastewater treatment plant. Alternatively, CCH requested permission to file summary petitions for

review on the current due date of February 9, 2009, followed by supplemental briefs on March 11, 2009. CCH's motion and request were received by Region IX on January 26, 2009. CCH argues that good causes exists for an extension and that the Region will not be prejudiced by such an extension.

The Region opposes CCH's motion for an extension of time to file its petitions. Region IX disagrees that CCH has demonstrated good cause to justify an extension from filing by the February 9, 2009, date specified in the regulations. However, the Region does not object to CCH's proposal to file summary petitions for review by February 9, 2009, followed by supplemental briefs on March 11, 2009. Region IX agrees that, under CCH's alternative proposal, the Region would not be prejudiced.

As discussed in the case cited by CCH in its motion, *In re: Town of Mansfield, Massachusetts*, NPDES Appeal No. 07-03 (Order Denying Review, March 27, 2007), the Board will relax a filing deadline only where special circumstances exist. Special circumstances have been found where mistakes by the permitting authority have caused the delay, when the permitting authority has provided misleading information, when the delay stems from extraordinary events such as natural disasters, or from causes not attributable to the petitioner. On the other hand, the Board wrote in *Town of Mansfield*, having to conduct legal and technical research in preparation for an appeal does not, without more, fall into the category of circumstances the Board would consider "special."

In its motion, CCH does not attempt to argue that any of the special circumstances identified in *Town of Mansfield* exist. Instead, CCH primarily argues that an extension should be granted for precisely the reason the Board denied in *Town of Mansfield* – to allow CCH more time for legal and technical research. Though Region IX does not claim

to be prejudiced by allowing CCH one additional month to file its petition, the Region is not aware of any cases¹ in which the Board has granted a motion to allow a late filing solely on the grounds of lack of prejudice to an EPA Region, without any finding of special circumstances. Thus, Region IX submits that CCH has not presented grounds for an extension of the filing deadline specified in the regulations.

Nevertheless, the Region does not object to the alternative procedure proposed by CCH, in which CCH would file summary petitions by February 9, 2009, identifying all the issues that it is raising to challenge the Regional Administrator's decisions, but would have an additional month, until March 11, 2009, to file supplemental briefs. One of the Region's concerns when CCH originally asked Region IX for an unspecified extension of time to file its petition (see attached letter from Carrie Okinaga to Suzette Leith dated January 13, 2009), was that in the absence of a timely petition (either by CCH or any other party) filed with the EAB by February 9, 2009, the decisions CCH wishes to challenge would become final. Once final, the Regional Administrator's decisions could not be challenged at the EAB or in an Article III court. In order to avoid that result, Region IX reasoned that it would need to undertake further proceedings pursuant to 40 CFR Parts 122 and 124, including possible modification of the decision, in order to change the effective date of the decision. On the other hand, if CCH filed its petitions by February 9, 2009, the final decisions would automatically be stayed pursuant to 40 CFR 124.15(b)(2), and such action would not be necessary.

¹ The Board's decision in *In re: Arecibo & Aguadilla Wastewater Treatment Plants*, NPDES Appeal Nos. 02-09 & 03-05, 12 E.A.D. 97, 144-145 (EAB, March 10, 2005), acknowledged that unusual, if not unique, circumstances may justify relief from procedural deadlines in agency regulations, but the Board did not elaborate on the range of such justifiable circumstances.

While the Region does not consider CCH to have articulated the type of special circumstances that would justify extending the filing deadline, the Region recognizes that given the simultaneous issuance of both decisions, it may be that consolidation of petitions for review, as CCH suggests, would be a reasonable course of action. Additionally, as CCH states, if the Regional Administrator had issued the decisions on separate dates, the parties would not have had to prepare briefs addressing two complex and lengthy decisions on the same time schedule. For these reasons, Region IX recognizes that it may be necessary for petitioners, the Region, and any parties granted intervenor status to seek reasonable extensions of various deadlines throughout the EAB process due to the number and technical complexity of the issues and the simultaneous briefing of two petitions.

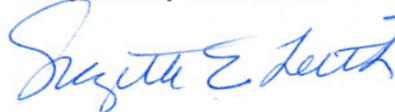
As stated in the Region's response to CCH's request for an unspecified extension of the regulatory deadline by which to file a petition challenging the Regional Administrator's decisions (see attachment to CCH's motion dated January 23, 2009), both of the permits subject to the Regional Administrator's action have been administratively extended for some time, with lengthy delays in the process. The expired and administratively extended permits were issued for the Sand Island and Honouliuli wastewater treatment plants in 1998 and 1991, respectively, and do not reflect currently applicable requirements. For example, certain relevant water quality standards became effective after issuance of the expired and administratively extended permits, e.g. bacterial water quality standards published at 40 C.F.R. 131.41(e)(2). Given the many years that have passed since the permits expired, the Region believed, and continues to believe, that further delays in concluding the CWA section 301(h) decision-making

response to CCH's open-ended extension request. ~~The Region now considers, however,~~
the more targeted alternative proposal in the January 23, 2009 submission, whereby CCH
would file its petitions by February 9, 2009, but would be allowed an additional month to
submit supplemental briefs, to be more reasonable.

For these reasons, EPA opposes CCH's request for an extension to file its
petitions, but does not oppose its request for an extension until March 11, 2009, to file
supplemental briefs, so long as the summary petitions briefly identifying the issues (and
bases) for any of the various challenges that CCH may raise are filed by February 9,
2009.

Dated: 1/29/2009

Respectfully submitted,



Suzette E. Leith
Office of Regional Counsel
EPA – Region IX (ORC-2)
75 Hawthorne St.
San Francisco, CA 94105
Tel: (415) 972-3884
Fax: (415) 947-3570
EMAIL?

Of counsel:
Stephen J. Sweeney
Office of General Counsel (2355A)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Attachment

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU

530 SOUTH KING STREET, ROOM 110 • HONOLULU, HAWAII 96813
TELEPHONE: (808) 768-5193 • FAX: (808) 768-5105 • INTERNET: www.honolulu.gov



MUFI HANNEMANN
MAYOR

CARRIE K. S. OKINAGA
CORPORATION COUNSEL

DONNA M. WOO
FIRST DEPUTY CORPORATION COUNSEL

January 13, 2009

Suzette Leith, Esq.
United States Environmental
Protection Agency, Region 9
75 Hawthorne Street
San Francisco, California 94105

Dear Ms. Leith,

This follows up on the conversations you had with our office on Thursday, January 8 and Monday, January 12, regarding the City's request that EPA agree to an extension of time for the City to seek review of the EPA's final decisions denying 301(h) variances for the Sand Island and Honouliuli Wastewater Treatment Plants. Currently, the deadline for filing a request for review to the Environmental Appeals Board is set for February 9, 2009.

As you know, the City, the EPA, and the State of Hawaii are in the midst of global settlement negotiations regarding collection system and treatment plant upgrades. It would be beneficial to all parties if the City could devote its time and attention to these negotiations, and have some opportunity to evaluate its progress and direction, before having to submit its petitions for review.

The City has maintained, and having reviewed the final decisions and responses to comments, continues to maintain, that it is compelled to challenge the final decisions as scientifically, technically, and legally erroneous in the absence of any acceptable options. However, in light of Administrator Nastri's public statements, and the statements in the EPA's response to comments, that the EPA is willing to work with the City to establish a realistic schedule that takes into account collection system priorities, we would like to explore any possibility that we can limit, through negotiation, our areas of disagreement and the scope of any petitions for review. Given that the City has been operating under the Sand Island and Honouliuli permits for 10 and 17 years, respectively, and the final decisions themselves do not identify any imminent threat of harm presented by the treatment plant discharges, we believe that the public interest would be best

Suzette Leith, Esq.
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served by a limited extension of the appeal deadline so that we may meaningfully explore potential areas of compromise. We would prefer not to engage in immediate and full-scale litigation unless it is absolutely necessary, particularly when the litigation will involve such a breadth of complex issues as our 301(h) applications present.

Moreover, given the extended period of time EPA required to review the City's responses to the Tentative Decisions and prepare its Final Decisions, and the complexity and magnitude of the issues involved, the City believes that it would be inequitable and unfairly prejudicial to the City to be forced to prepare both of its petitions in such a short timeframe. For this reason, also, a reasonable extension of time is warranted.

Rob Mullaney and Hugh Barroll can give you an idea of when we hope to conclude our negotiations, and we ask for an extension consistent with that time frame.

Thank you for considering the City's request, and I look forward to your response at your earliest convenience.

Very truly yours,



CARRIE K.S. OKINAGA
Corporation Counsel

CKSO:KAK:mw

cc: Robert Mullaney, Esq.
Hugh Barroll, Esq.

08-01870/56321

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Motion for Extension of Time to File Petitions for Review was sent by Federal Express to the below listed persons on this 29th day of January 2009:

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


Suzette E. Leith