

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN THE MATTER OF)
MAUI ELECTRIC COMPANY)
LTD.'S PROJECT) ORDER RESPONDING TO PETITIONER'S
Permit No. 0067-01-C) REQUEST THAT THE ADMINISTRATOR
OBJECT TO ISSUANCE OF A STATE
OPERATING PERMIT
_____))
_____)

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

On February 17, 1998, the Kawaihae Cogeneration Partners ("KCP" or "the Petitioner") filed a Petition requesting that the Environmental Protection Agency ("EPA") revise or revoke a PSD/Covered Source Permit, No. 0067-01-C, issued to Maui Electric Company, Ltd. ("MECO") for the construction and operation of two 20 megawatt ("MW") combustion turbine generators at MECO's Maalaea Generating Station at Maalaea, Maui, Hawaii ("the MECO Permit"). The MECO Permit, issued by the State of Hawaii Department of Health ("DOH") on January 6, 1998, constitutes both a construction permit issued pursuant to the Prevention of Significant Deterioration ("PSD") requirements of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7470-7479, and a state operating permit issued pursuant to Title V of the Act, 42 U.S.C. §§ 7661-7661f.

KCP has petitioned EPA to object to the MECO Permit pursuant to 40 CFR § 70.8(d). For the reasons set forth below, I deny KCP's request.

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act requires each state to develop and submit to EPA an operating permit program intended to meet the requirements of Title V. The State of Hawaii submitted a Title V program governing the issuance of operating permits (termed "Covered Source" permits by the State), which is contained in its Administrative Rules, Title 11, Chapter 60.1. On December 1, 1994, EPA granted interim approval to the State of Hawaii's Title V program. 59 Fed. Reg. 61,549; see also 61 Fed. Reg. 56, 368 (Oct. 31, 1996); 40 CFR Part 70, Appendix A. Major stationary sources of air pollution and other sources covered by

Title V are required to obtain an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. See CAA §§ 502(a) & 504(a).

Under section 505(b) of the CAA, the Administrator is authorized to review state operating permits issued pursuant to Title V and to veto permits that fail to comply with the applicable requirements of the Act. In particular, under section 505(b)(1) of the Act and the implementing regulations at 40 CFR § 70.8(c), EPA may object to the issuance of a Title V permit if it determines that the permit is "not in compliance with the applicable requirements of this Act, including the requirements of an applicable implementation plan." When EPA declines to veto a Title V permit on its own initiative, section 505(b)(2) provides that citizens may petition the Administrator to object to the issuance of a permit by demonstrating that the permit is not in compliance with applicable requirements. See 40 CFR § 70.8(d). For purposes of review by the Administrator pursuant to section 505(b), the applicable requirements include those of the relevant state or federal PSD program.

Sections 110(a)(2)(C) and 161 of the Act require each state to include a PSD program in its state implementation plan ("SIP"). If a SIP does not contain an approved PSD program, EPA promulgates a federal implementation plan, and the federal PSD regulations at 40 CFR § 52.21 governing permit issuance apply. EPA may in turn delegate its authority to the state to issue federal PSD permits on its behalf. See 40 CFR § 52.21(u).

Because Hawaii's state implementation plan lacks an approved PSD program, the applicable requirements governing the issuance of PSD permits in Hawaii are the federal PSD regulations at 40 CFR § 52.21. See 40 CFR § 52.632. Although EPA Region IX delegated administration of the PSD program in Hawaii to the State, 48 Fed. Reg. 51,682 (Nov. 10, 1983); 54 Fed. Reg. 23,978 (June 5, 1989), PSD permits issued by Hawaii are federal permits. Appeals of those permits are accordingly governed by 40 CFR § 124.19 and are heard exclusively by the Environmental Appeals Board. Furthermore, where a federal PSD permit is appealed to the Board, the permit is not effective and construction may not begin until the Board has disposed of the appeal. 40 CFR § 124.15

Because of the allocation of permit review authority to the Environmental Appeals Board in the case of federal PSD permits, I decline to review the merits of PSD issues with respect to such permits raised in a petition to veto under Title

V. As explained in two previous orders responding to petitions requesting EPA to object to DOH's issuance of a PSD/Covered Source Permit,

[W]here EPA is the PSD permitting authority (either directly or by virtue of a delegation agreement with a state or local government) and a party desiring to contest PSD issues could have brought those issues to the Environmental Appeals Board under 40 CFR § 124.19 . . . I will dispose of Title V veto petitions in a manner that preserves the Board's jurisdiction over PSD permit appeals. In contrast, where a state or local government has a SIP-approved PSD program and the Environmental Appeals Board lacks jurisdiction to entertain permit appeals, the merits of PSD issues are ripe for consideration in a timely veto petition under Title V.

In re Kawaihae Cogeneration Project (Order of the Administrator, March 10, 1997); In re Hawaii Electric Light Company Ltd.'s Project (Order of the Administrator, April 3, 1998).

II. PSD ISSUES

Under the PSD program, a physical change or change in the method of operation at a major stationary source which would result in a significant net emissions increase of any regulated pollutant constitutes a "major modification" of the source, and the owner or operator must obtain a PSD permit that meets the requirements of section 165 of the Act. See 40 CFR §§ 52.21(b)(2)(i) & 52.21(i)(2). In particular, the permit must require the application of the best available control technology ("BACT") to control emissions of pollutants emitted in significant amounts. 40 CFR § 52.21(j).

KCP's petition to object to the issuance of the MECO Permit alleges that the PSD permit's requirement of water injection and low sulfur fuel oil is not BACT for oxides of nitrogen and sulfur dioxide. KCP further objects that it is improper to determine the applicability of BACT based on a demonstration project that was being conducted by MECO.

Because of the Environmental Appeals Board's exclusive authority to review PSD determinations, including determinations regarding BACT, with respect to federal permits, I deny KCP's request that EPA revise or revoke the MECO Permit on the basis of the allegations relating to the BACT determination. As noted in

Kawaihae Cogeneration Project and the Hawaii Electric Light Company Project, such a disposition of PSD issues in an appeal under Title V is not intended to address the merits of a petitioner's claims regarding PSD issues.

In reaching this conclusion, I further note that the merits of KCP's claims with respect to the BACT determination reflected in MECO's permit have been addressed by the Environmental Appeals Board. See In re Maui Electric Co., PSD Appeal No. 98-2, slip op. (EAB, Sept. 10, 1998). KCP's corporate partner, Waimana Enterprises, Inc. ("Waimana") made substantially the same allegations made here in its appeal to the Board.¹ The Board has reviewed these allegations and denied Waimana's petition for review of the MECO permit. Id.

CONCLUSION

For the reasons set forth above, I deny KCP's petition requesting the Administrator to object to the issuance of the MECO Permit pursuant to CAA section 505(b).

Date

Carol M. Browner
Administrator

¹ In Maui Electric Co., Waimana was substituted as the petitioner in KCP's appeal to the Environmental Appeals Board requesting that the Board review the MECO permit. The Board authorized the substitution of Waimana for KCP, observing among other things, that (1) there is a close corporate relationship between the two entities, (2) U.S. EPA Region IX treated the two entities as the same entity, and (3) no party denied having used the names KCP and Waimana interchangeably. See In re Maui Electric Co., PSD Appeal No. 98-2 (Order on Motion to Dismiss) (EAB, Apr. 3, 1998).