

**IN RE HAWAII ELECTRIC LIGHT COMPANY, INC.**

PSD Appeal Nos. 01-24 through 01-29

***ORDER DENYING REVIEW***

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Decided November 27, 2001

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## Syllabus

Six petitions for review were filed with the Environmental Appeals Board (the "Board") challenging a Prevention of Significant Deterioration ("PSD") permit decision issued by the Hawaii Department of Health ("DOH") to Hawaii Electric Light Company, Inc. ("HELCO"). The permit decision would authorize HELCO to expand its existing facility at the Keahole Generating Station in Kona on the island of Hawaii. This matter has been before the Board previously. In response to petitions filed in late 1997 challenging an earlier permit decision, the Board issued an order denying review of most of the issues raised on appeal, but remanded DOH's permit decision on two issues. The Board directed DOH: (1) to provide an updated air quality impact report incorporating current sulfur dioxide ("SO<sub>2</sub>") and particulate matter ("PM") data; and (2) to either provide a sufficient explanation of why the carbon monoxide ("CO") and ozone ("O<sub>3</sub>") data used in its air quality analysis are reasonably representative of the air quality in the area to be affected by the expansion or perform a new air quality analysis based on either on-site data or other data shown to be representative of the air quality in the area to be affected by the expansion. *See In re Hawaii Elec. Light Co., Inc.*, 8 E.A.D. 66 (EAB 1998). DOH completed the remand proceedings on July 25, 2001, issuing on that date a revised PSD permit decision which was based on a new air quality analysis using 12 months of new data for SO<sub>2</sub>, PM, CO, and O<sub>3</sub>. The Board has received six petitions opposing this revised permit decision.

The Petitioners raise a number of objections. These include: objections to the ambient air quality data that HELCO collected for use in the revised Ambient Air Quality Impact Report based principally on the choice of the location at which the data were collected; challenges to DOH's use of the data collected for a confirmatory study; allegations that some data used in the Ambient Air Quality Impact Report were not current; and challenges that DOH improperly limited the scope of the public comment on remand.

Held: Review is denied on all grounds. With respect to the issues regarding the data used in the Ambient Air Quality Impact Report, the Board finds that the Petitioners failed to identify clear error or any other reasons for the Board to grant review. DOH required HELCO to gather new ambient air quality data, and the record in this matter adequately supports the location chosen to collect these data.

Likewise, review of the confirmatory study is also denied. Petitioners failed to show clear error or any other reason for the Board to grant review on this issue. The Board finds no legal authority barring such a confirmatory study, which was required merely to provide added assurance that the location chosen for gathering the new air quality data was representative of the areas of maximum impact of the expansion. Moreover, while nothing in

the regulations prohibits DOH from requiring such a study, the confirmatory study itself is not governed by the regulatory requirements for pre-construction monitoring, nor were the data from the confirmatory study used in the air quality analysis. Thus, contrary to Petitioners' arguments, the regulations for pre-construction monitoring do not apply to the collection of data for the confirmatory study.

Review of the Petitioner's challenge regarding the currentness of the data is also denied. The Board finds no fault with the data collected and holds that the data does qualify as "current" data.

Finally, with respect to Petitioners' argument that DOH improperly limited the scope of public comment in a certain notice issued during the remand proceedings, Petitioners' objections are rendered moot by DOH's subsequent notice for public comment, which requested comments on the entire draft permit and the Ambient Air Quality Impact Report.

All other issues raised do not meet the threshold or jurisdictional requirements necessary for Board consideration.

***Before Environmental Appeals Judges Edward E. Reich, Scott C. Fulton, and Ronald L. McCallum.***

***Opinion of the Board by Judge Reich:***

**I. BACKGROUND**

***A. Factual and Procedural Background***

The State of Hawaii Department of Health ("DOH")<sup>1</sup> issued in 1997 a Prevention of Significant Deterioration ("PSD") permit decision to Hawaii Electric Light Company, Inc. ("HELCO") to authorize HELCO to expand its Keahole Generating Station in Kona on the island of Hawaii. The proposed expansion will consist of two 20-megawatt combustion turbines with heat recovery steam generators, one 16-megawatt steam turbine, and a 235-horsepower emergency diesel fire pump (collectively the "Project"). Nine petitions to review the permit decision were filed with the Environmental Appeals Board ("EAB" or "Board") in November and December of 1997. On November 25, 1998, the Board issued an order

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<sup>1</sup> DOH is a state agency with federally delegated authority to issue PSD permits pursuant to the Clean Air Act ("CAA") § 165, 42 U.S.C. § 7475, and a 1989 delegation agreement with Region IX of the U.S. Environmental Protection Agency ("EPA"), 54 Fed. Reg. 23,978 (June 5, 1989). See 40 C.F.R. § 52.21(u) ("Delegation of authority"). Under this agreement, EPA Region IX must concur on DOH's evaluation of the air impact modeling analyses which are required as part of the permit application. 54 Fed. Reg. at 23,979. Since DOH acts as EPA's delegate, the permit is considered an EPA-issued permit and is subject to review by this Board. *In re Three Mountain Power, LLC*, 10 E.A.D. 39 (EAB 2001).

denying review of most of the issues raised in the petitions, but also remanding DOH's permit decision for further consideration on two issues. *In re Hawaii Elec. Light Co., Inc.*, 8 E.A.D. 66 (EAB 1998) (hereinafter "*HELCO I*"). The Board directed DOH to reopen the permit proceedings to: (1) provide an updated air quality impact report incorporating current sulfur dioxide ("SO<sub>2</sub>") and particulate matter ("PM") data; and (2) either provide a sufficient explanation of why the carbon monoxide ("CO") and ozone ("O<sub>3</sub>") data used in its air quality analysis are reasonably representative of the air quality in the area to be affected by the Project or perform a new air quality analysis based on either on-site data or other data shown to be representative of the air quality in the area to be affected by the Project.

In response to the remand, HELCO initially provided DOH with the following existing continuous monitoring data: SO<sub>2</sub> data collected at the Konawaena monitoring station, 27 kilometers ("km") southeast of the Project; PM data from the Keahole Airport, 2 km west of the Project; and CO data from the Kapolei monitoring station. HELCO submitted these data to DOH in lieu of site-specific monitoring data, characterizing the submitted data as representative of the ambient air present in the areas affected by the proposed modification. In addition to these data, HELCO also collected six months of new O<sub>3</sub> data from its Huehue monitoring station located 5.5 km east-northeast of the Project.

In supplement C to its Ambient Air Quality Report,<sup>2</sup> DOH preliminarily determined that the foregoing data submitted by HELCO were current and representative of the background concentrations of pollutants in the area affected by the Project. *See* Certified Administrative Record Exhibit M.14 (Ambient Air Quality Impact Report Supplement C (Aug. 4, 1999)) ("Admin. Rec. Ex."). DOH took public comment and held a public hearing on its preliminary determinations on October 7, 1999.

Responding to the comments received, DOH and EPA Region IX required HELCO to collect 12 months of site-specific air monitoring data at an appropriate monitoring station for the four pollutants (SO<sub>2</sub>, PM, CO and O<sub>3</sub>) to establish background concentrations. After evaluating potential locations for monitoring, HELCO and DOH determined that the Huehue site was the best available location for this monitoring. HELCO performed a new air quality analysis using the new monitoring data it collected at the Huehue monitoring station.

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<sup>2</sup> DOH describes its analysis of the ambient air quality and source impacts in its "Ambient Air Quality Report." DOH originally completed its Ambient Air Quality Report on September 28, 1995, but has subsequently modified its original report through a series of supplements: Supplement A (Sept. 28, 1995); Supplement B (Dec. 18, 1996 and July 30, 1997); Supplement C (Aug. 4, 1999); and Supplement D (Dec. 27, 2000). *See* Administrative Record Exhibits M.10-M.15 ("Admin. Rec. Exs.").

At the request of DOH and EPA Region IX, HELCO also performed what it refers to as a confirmatory study. The State of Hawaii Department of Health and Hawaii Electric Light Company, Inc.'s Memorandum of Law in Opposition to Petitions for Review at 8 ("Jt. Memo in Opposition to Petitions"). The purpose of the confirmatory study was to compare data from a site closer to the maximum impact area than the Huehue site to the Huehue monitoring station's data so that DOH and EPA Region IX could "assure that the Huehue air concentrations truly represented background." *Id.* (This closer site allegedly was available for short-term monitoring only.)

In order to conduct this confirmatory study, a monitoring site had to be identified. After evaluating the potential sites for short-term air quality monitoring, HELCO recommended and DOH agreed that the Kakahiaka site was the best short-term monitoring site closest to the area most affected by the proposed Project.<sup>3</sup> For this confirmatory study, HELCO submitted two months of data collected at the Kakahiaka monitoring site and compared that data with the data collected concurrently at the Huehue monitoring site to determine whether the data sets were similar. As discussed in detail below, the confirmatory study determined that the data sets were similar, thus confirming the representativeness of the Huehue data.

DOH held an additional public hearing and took comments on its revised Ambient Air Quality Impact Report Supplement D (Admin. Rec. Ex. M.15). *See* Admin. Rec. Ex. M.9 (Public Comment Period and Public Hearing of March 6, 2001, Summary of Public Comments and Testimony Received on Supplement D). On July 25, 2001, DOH issued its revised PSD permit decision to HELCO, and on August 1, 2001, DOH sent all interested parties notice of the permit issuance. Admin. Rec. Ex. N.4.

The Board has received six petitions opposing for various reasons this permit decision. On August 28, 2001, PSD Appeal Nos. 01-24 through 01-26 were filed with the Board. The following day, PSD Appeal Nos. 01-27 and 01-28 were filed. The last petition, PSD Appeal No. 01-29, was filed with the Board on August 31, 2001.<sup>4</sup> The Board has consolidated for decision these six petitions. On October 15, 2001, DOH and HELCO filed a joint response to the petitions for review. *See* Jt. Memo in Opposition to Petitions. Along with the joint response, HELCO filed motions requesting status as an intervenor in the proceeding and requesting that the proceeding be expedited. The Board has also received Peti-

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<sup>3</sup> For additional details on the Kakahiaka monitoring site see Part II.C.1.

<sup>4</sup> The Petitioners and corresponding appeal numbers are: Michael J. Matsukawa and Peggy J. Ratliff (PSD Appeal No. 01-24), Marie Aguilar (PSD Appeal No. 01-25), Philip Mosher (PSD Appeal No. 01-26), Keahole Defense Coalition (PSD Appeal No. 01-27), Richard Tanzella (PSD Appeal No. 01-28), and Jerry Rothstein (PSD Appeal No. 01-29).

tioners Peggy Ratliff and Michael Matsukawa's objections to HELCO's motion to intervene and to HELCO's motion for expedited review on October 26, 2001.<sup>5</sup> Additionally, the Board received objections to HELCO's motion to intervene from Petitioner Marie Aguilar and Petitioner Philip Mosher<sup>6</sup> and an objection to HELCO's motion for expedited review from Petitioner Keahole Defense Coalition.<sup>7</sup> On October 18, 2001, the Board granted HELCO's motion to intervene and to expedite the proceedings. *See* Order Granting Motion to Intervene and to Expedite (Oct. 18, 2001). For the reasons set forth below, the Board denies further review of the permit decision.

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<sup>5</sup> Prior to receiving these objections, the Board had already issued an order granting both HELCO's motion to intervene and HELCO's motion to expedite the proceedings in this matter. *See* Order Granting Motion to Intervene and to Expedite (Oct. 18, 2001). As discussed below, we see no reason to change our order in light of the objections submitted by Petitioners Matsukawa and Ratliff.

The Petitioners base their objections to HELCO's motion to intervene and motion to expedite on an incorrect interpretation of our letter sent to DOH requesting that it prepare a response to the petitions in this matter. Our letter to DOH establishes timelines by which DOH must submit its response to petitions. This letter, however, does not address any issues regarding HELCO's right to intervene or right to request an expedited proceeding. Therefore, Petitioners' objections, which are based solely on our letter to DOH, fail to provide any basis for denying HELCO's motions. Moreover, as our October 18, 2001 Order states, HELCO, as the permittee, did indeed have a legitimate reason to participate in this proceeding.

<sup>6</sup> *See* Petitioner Marie Aguilar's Objections to Hawaii Electric Light Co., Inc.'s Motion to Intervene ("Aguilar's Objections"); Petitioner Philip Mosher's Objections to Hawaii Electric Light Co., Inc.'s Motion to Intervene ("Mosher's Objections").

Both filings ask that HELCO not be allowed to intervene in this proceeding. Petitioner Aguilar believes that HELCO deliberately waited until the "day before the final deadline to request Intervenor status." However, there is no such "deadline" to request intervenor status. The Board agrees that if a party wishes to participate in a proceeding, the Board should receive its request to participate as early as possible. However, HELCO's request does not appear to the Board to be tardy or, as Petitioner Aguilar suggests, in conflict with the Board's procedures.

Petitioner Mosher objects to HELCO's motion to intervene for reasons similar to those raised by Petitioners Matsukawa and Ratliff and is similarly rejected. *See supra* note 5.

<sup>7</sup> Due to postal system delays, the Board only received Keahole Defense Coalition's letter, which was dated October 23, 2001, on November 13, 2001. In its letter, Keahole Defense Coalition argues that HELCO's motion should not be granted because HELCO has caused much of the delay in the permitting process by not complying with the intent of the CAA and because there is not an urgent power supply need requiring the proposed expansion. Keahole Defense Coalition Letter at 1-2 (Oct. 23, 2001). While the Keahole Defense Coalition letter arrived after the order granting the motion to expedite had already been issued, we find the letter unpersuasive in any event. As we stated in our order, "[i]t is the Board's practice to assign permit appeals under 40 C.F.R. part 124 involving new source construction the highest priority. Of course, any such priority consideration must be consistent with the Board's obligation to give appropriate consideration to the issues presented to it for resolution." Order Granting Motion to Intervene and to Expedite at 2 (Oct. 18, 2001).

## B. Statutory and Regulatory Background

The Clean Air Act PSD requirements, CAA §§ 160-169, 42 U.S.C. §§ 7470-7492, are implemented through a regulatory process that requires preconstruction permits for new and modified major stationary sources. See 40 C.F.R. § 52.21. PSD permitting requires that several important analyses be performed and taken into consideration when drafting a permit. At issue in the matter before us is the air quality analysis for the permit. 40 C.F.R. § 52.21(m) (“Air quality analysis”). The primary purpose of an air quality analysis is to determine whether a proposed project would cause or contribute to violations of national ambient air quality standards (“NAAQS”) or PSD increments.<sup>8</sup>

The NAAQS are the “maximum concentration ‘ceilings’” for pollutants, which are “measured in terms of the total concentration of a pollutant in the atmosphere.” U.S. EPA Office of Air Quality Planning, New Source Review Workshop Manual at C.3 (Oct. 1990) (hereinafter “Draft Manual”).<sup>9</sup> NAAQS have been identified for certain criteria pollutants: sulfur oxides,<sup>10</sup> particulate matter,<sup>11</sup> nitrogen oxides, carbon monoxide, and lead. 40 C.F.R. §§ 50.4-.12. In the instant case, SO<sub>2</sub>, PM<sub>10</sub>, CO and O<sub>3</sub> are at issue.

The PSD program also requires compliance with any applicable PSD increment, which is the maximum allowable increase in concentration that is allowed to occur above a baseline concentration for a particular pollutant. 40 C.F.R. § 52.21(c) (“Ambient air increments”); Draft Manual at C.3. The PSD increment

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<sup>8</sup> Under the regulations implementing the PSD program, all owners or operators of new major stationary sources or major modifications must demonstrate that

allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions \* \* \*, would not cause or contribute to air pollution in violation of: (1) Any national ambient air quality standard \* \* \* ; or (2) Any applicable maximum allowable increase over the baseline concentration in any area.

40 C.F.R. § 52.21(k). Compliance with this two-pronged requirement is demonstrated through the air quality analysis.

<sup>9</sup> The Draft Manual was issued as a guidance document, and although it is not a binding rule, we have looked to it as a statement of the Agency’s thinking on certain PSD issues. See *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 129 n.13 (EAB 1999) (citing *In re Maui Elec. Co.*, 8 E.A.D. 1, 5 (EAB 1998).)

<sup>10</sup> To determine compliance with the NAAQS, sulfur oxides are measured in the air as SO<sub>2</sub>. 40 C.F.R. § 50.4(c).

<sup>11</sup> To determine compliance with the NAAQS, particulate matter is measured in the air as particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers or “PM<sub>10</sub>” 40 C.F.R. § 50.6(c).

was designed to accommodate economic growth and increased pollution associated with such growth while placing limits on new pollution. *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 148 (EAB 1999).

The air quality analysis must include continuous air quality monitoring data “gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part.” CAA § 165(e)(2), 42 U.S.C. § 7475(e)(2). Moreover, the CAA states that “[s]uch data shall be gathered over a period of one calendar year preceding the date of application for a permit \* \* \*.” *Id.*

Pursuant to the PSD regulations, the air quality analysis must include analysis of the existing ambient air quality and the modeled source impact. As previously noted, this analysis must demonstrate that the combination of these two data sets will not “cause or contribute to air pollution in violation of: (1) Any national ambient air quality standard in any air quality control region; or (2) Any applicable maximum allowable increase over the baseline concentration in any area.” 40 C.F.R. § 52.21(k). The regulations also echo the statutory requirement that

[i]n general, the continuous air quality monitoring data that is required shall have been gathered over a period of at least one year and shall represent at least the year preceding receipt of the application, except that, if the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), that data that is required shall have been gathered over at least that shorter period.

40 C.F.R. § 52.21(m)(1)(iv).

Additionally, EPA has prepared a guide that assists in conducting an ambient air quality monitoring program. *See Ambient Monitoring Guidelines for Prevention of Significant Deterioration (PSD)*, EPA-450/4-87-007 (May 1987) (hereinafter “Ambient Monitoring Guidelines” or “Guidelines”).<sup>12</sup> Existing air quality data used in the air quality analysis must be representative of air quality in any area that may be affected by the proposed Project’s emissions. *Id.* §§ 2.2 and 2.4. To determine whether existing data are representative, three factors must be evaluated: monitor location, quality of the data, and currentness of the data. *Id.* § 2.4.

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<sup>12</sup> The Ambient Monitoring Guidelines were created by EPA as guidance for source owners and operators as well as permit issuers to assist them in developing an ambient air quality analysis for PSD permit applications. *See Ambient Monitoring Guidelines* § 1. As guidance, these Guidelines do not have the force of law.

The Ambient Monitoring Guidelines further explain that “existing monitoring data should be representative of three types of areas: (1) the location(s) of the maximum concentration increase from the proposed source or modification, (2) the location(s) of the maximum air pollutant concentration from existing sources, and (3) the location(s) of the maximum impact area, i.e., where the maximum pollutant concentration would hypothetically occur based on the combined effect of existing sources and the proposed new source or modification.” *Id.* § 2.4.1.

When a source decides or, as here, is directed to perform site-specific monitoring in lieu of relying on existing representative air quality data, the Guidelines provides that “[t]he number and location of monitoring sites will be determined on a case-by-case basis by the source owner or operator and reviewed by the permit granting authority.” *Id.* § 3.2. The Guidelines instruct the source to first determine the general location or locations for the maximum air quality concentrations from the proposed source or modification and then to determine the location for the maximum air quality levels from existing sources. These two location determinations should then be compared to each other to determine a third location called the “maximum impact area.” *Id.* § 3.2.1. The Guidelines indicate that “monitoring should then be conducted in or as close to these [three] areas as possible,” with the proviso that in some cases “two or more of these locations may coincide and thereby reduce the number of monitoring stations.” *Id.* However, as the Guidelines suggest, it is sometimes not possible to place monitors at these precise locations:

In some cases, it is simply not practical to place monitors at the indicated modeled locations. Some examples may include over open bodies of water, on rivers, swamps, cliffs, etc. The source and the permit granting authority should determine on a case-by-case basis alternative locations.

*Id.* § 3.2.3.

## II. DISCUSSION

### A. *Standard of Review*

These proceedings are governed, in part, by the regulations in part 124.40 C.F.R. part 124 (“Procedures for Decisionmaking”). As we have held repeatedly, the preamble to section 124.19 cautions that “the power of review should be only sparingly exercised” and “most permit conditions should be finally determined at the [permitting authority] level.” 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 743-44 (EAB 2001) (hereinafter “SDI II”); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127 (EAB



1999). The rules for issuing and modifying a PSD permit provide that “any person who filed comments on that draft permit or participated in the public hearing may petition the \* \* \* Board to review any condition of the permit decision.” 40 C.F.R. § 124.19(a) (2001). The petitioner must demonstrate that each issue raised in the petition had been raised previously during the public comment period or was not readily ascertainable at that time. 40 C.F.R. § 124.13; *SDI II*, 9 E.A.D. at 744. Further, the Board will deny review of a PSD permit unless the permit condition at issue is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a); *In re Three Mountain Power, LLC*, 10 E.A.D. 39 (EAB 2001); *In re Zion Energy, L.L.C.*, 9 E.A.D. 70 (EAB 2001).

The petitioner has the burden of demonstrating that review is warranted by stating his or her reasons in support of review, including an explanation of why the permit issuer’s prior response, if any, to the petitioner’s objections to the draft permit is clearly erroneous, an abuse of discretion, or otherwise warrants review. *SDI II*, 9 E.A.D. at 744. It is not sufficient to merely repeat the objections made during the public comment period.

#### B. *The Petitions*

As noted above, each petition must meet certain threshold requirements in order to justify consideration on the merits of the petition. Although the six petitions for review were all timely filed, petitioners must also demonstrate that each issue raised in their respective petitions had been previously raised in public comments. *See* 40 C.F.R. § 124.13. This requirement ensures that the permitting authority has an opportunity to address the issue prior to appeal. *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 212 (EAB 2000); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999). As we mentioned above, the permitting authority should generally make the final determination in these permitting issues. Accordingly, it is important that the permitting authority have an opportunity to address issues concerning the permit prior to the Board’s review.

Two of the issues raised in these appeals fail to make this threshold showing. One of these issues concerns the PSD Class II increment for PM<sub>10</sub>. Two Petitioners assert in their appeals that DOH had used two different values for the predicted PM<sub>10</sub> emissions from the proposed source, and that doing so constituted error. *See* PSD Appeal Nos. 01-27, 01-29. While this issue was readily ascertainable during the public comment periods held after remand, DOH did not receive any comments on this issue and therefore was not afforded an opportunity to respond to the objection. *See* 40 C.F.R. § 124.13; Jt. Memo in Opposition to Petitions at 29-30. Thus, this issue does not meet the basic threshold requirements for Board consideration.

Similarly, one petition argues that the Huehue monitoring station cannot be used because it is not located in “ambient air.”<sup>13</sup> PSD Appeal No. 01-28 at 5. After examining the record, we find no comment which raises this concern during the two comment periods on remand.<sup>14</sup> Thus, this issue fails to meet the basic threshold requirements needed to justify the Board’s consideration. 40 C.F.R. § 124.19(a). The issues that survive that initial threshold for Board consideration are discussed below.

### C. *Ambient Air Quality Data*

#### 1. *Background*

As discussed above, the CAA requires that an analysis be conducted “of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.” CAA § 165(e)(1), 42 U.S.C. § 7475(e)(1). In order to satisfy this requirement, the Guidelines suggest that the source owner may either use appropriate existing data<sup>15</sup> or site-specific monitoring. In the present case, HELCO initially submitted existing data for the Ambient Air Quality Impact Report. However, subsequent to comments received at the October 7, 1999 public hearing, DOH and EPA Region IX required HELCO to collect 12 months of new monitoring data in lieu of using already existing data for SO<sub>2</sub>, PM, CO and O<sub>3</sub>. See Memo in Opposition to Petitions at 5; Admin. Rec. Ex. M.15 at 2 (Ambient Air Quality Impact Report Supplement D).

To determine the appropriate locations for the 12 months of ambient air quality monitoring, HELCO performed a study which identified the locations of the maximum impacts. See Admin. Rec. Ex. K.5 (Location Selection of the Pre-Construction Air Quality and Meteorological Monitoring Station for Keahole Units CT-4 & CT-5 (June 1999)) (hereinafter “Location Selection Study”). The Location Selection Study first identified the Ambient Monitoring Guidelines criteria used for determining where to locate air quality monitoring sites. From there, HELCO used a model to determine where the maximum impact areas from the Project occur. HELCO found that the maximum impacts occur in areas which

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<sup>13</sup> Petitioner Tanzella references the regulatory definition of “ambient air” at 40 C.F.R. § 50.1, which defines ambient air as “that portion of the atmosphere, external to buildings, to which the general public has access.” He argues that the public did not have access to Huehue and therefore Huehue was an improper ambient air monitoring site.

<sup>14</sup> The comment Petitioner cites as raising the issue pertains to a comment that objects that the monitoring station was not located at the actual site of the proposed project. This comment does not raise the issue relating to whether the Huehue monitoring station falls within the definition of ambient air. See Admin. Rec. Ex. M.9 at 8.

<sup>15</sup> See *supra*, Part I.B.

would not support a monitoring station because those areas are either government land, conservation land, or residential areas. Admin. Rec. Ex. K.5 at 3. In the Location Selection Study, HELCO explained that government and residential lands are impractical as monitoring sites because:

[T]he government land surface is rugged prehistoric lava flows from the northwest rift of Hualalai consisting of 5% a[']a and 95% pahoehoe lava.[<sup>16</sup>] This area does not have any improvements, including roads. \* \* \* Locating a monitor on government lands would require a potentially lengthy and potentially unsuccessful permitting process for the air quality station and other necessary improvements (including access roads and power lines). \* \* \* The zoning & deed restrictions preclude locating an air quality monitoring station in the residential areas.

*Id.* HELCO then narrowed the choice of locations to three and explained why the Huehue substation alone was the best practical location for ambient air monitoring for the Project.<sup>17</sup>

HELCO's Huehue Substation is located approximately 5.5 km east-northeast of the Keahole Generating Station. The elevation of the substation is 567 m (1860 ft.) which is above stack top. Table and Figure 4-1 shows that the Huehue site has the highest impacts for all averaging periods except for the 3-hr averaging period. \* \* \* \* The windrose shown in Figure 2-1 shows that the Huehue Substation is downwind from the predominate winds into the terrain. The winds from the southwest quadrant make up the largest percentage of winds blowing into the terrain.

Therefore, the Huehue substation is the best alternative location for the Keahole preconstruction monitoring sta-

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<sup>16</sup> HELCO and DOH explain in their memo that "pahoehoe lava" is the Hawaiian word for hardened basaltic lava flows with a smooth or ropy surface texture and "a'a lava" means hardened lava flows that have a rough and jagged surface texture. *Jt. Memo in Opposition to Petitions* at 6 n.5 (citing *The Pocket Hawaiian Dictionary* (1975)).

<sup>17</sup> HELCO apparently determined that only one monitoring site location was necessary. *See* Admin. Rec. Ex. K.5. The Petitioners do not challenge DOH's reliance on this determination.

tion. This site is above the CT4/CT5 stack top and is near the predicted maximum CT4/CT5 impacts.

Admin. Rec. Ex. K.5 at 4.

HELCO submitted its recommendation for the Huehue monitoring site to DOH. DOH accepted HELCO's recommended monitoring site as the "best alternative monitoring site" and cited the Location Selection Study as supporting the recommendation. *See* Admin. Rec. Ex. M.15 at 3 (Ambient Air Quality Impact Report Supplement D (Dec. 27, 2000)).

DOH and EPA Region IX, in response to comments submitted during the first public comment period after remand, also required HELCO to complete an additional two-month confirmatory study<sup>18</sup> that was designed to ascertain whether the data collected at the Huehue monitoring site accurately represented the background concentrations of SO<sub>2</sub> and PM<sub>10</sub> for the areas affected by the Project. As DOH explained, the two data sets — the data from the confirmatory study monitoring site and the data from Huehue — would be compared to determine if "(1) there are short-term and long-term maximum concentration similarities, and (2) the concentration similarities justify the Huehue data being representative of the vicinity of the proposed project." *See* Admin. Rec. Ex. K.24 (Letter from W.K. Nagamine, DOH to S. Seu, HELCO (Jan. 5, 2000)).

As with the selection of Huehue, HELCO used the criteria listed in the Air Monitoring Guidelines to evaluate potential sites for the short-term comparative monitoring. *See* Admin. Rec. Ex. K.36 (Location Selection of the Additional Air Quality and Meteorological Monitoring Station (Feb. 28, 2000)). Since the confirmatory study was to be short-term only, it allowed consideration of sites deemed unacceptable for long-term monitoring. After analyzing several site options, HELCO recommended the Kakahiaka site for the confirmatory study and DOH agreed with HELCO's recommended site. DOH explained that Kakahiaka is located 1.9 km southeast of the Project, in closer proximity to the maximum impact areas, within the elevation range of the maximum impact points (300 to 600 ft) and accessible and appropriate for use during the two-month confirmatory study. *See* Admin. Rec. Ex. M.15 at 5-7.

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<sup>18</sup> DOH and HELCO explain that only a two-month time period was needed for this study since Hawaii's meteorological conditions do not vary significantly throughout the seasons. Admin. Rec. Ex. M.15 at 8.

HELCO used data from March 1, 2000 to April 30, 2000 for the two-month confirmatory study.<sup>19</sup> *Id.* at 7. After the data from Kakahiaka and Huehue were collected, HELCO analyzed the correlation of the two data sets. In advance of this analysis, DOH and EPA Region IX developed a pass-fail standard for the confirmatory study. According to this test, if the difference in maximum concentration of a pollutant at each site was less than 20 percent of the corresponding NAAQS, then the data passed the first test of the confirmatory study. *Id.* at 4-5. HELCO also compared plots and performed a statistical analysis to demonstrate if there was any correlation between the monitored data sets. *Id.* As the table below shows, the Kakahiaka and the Huehue data sets closely resemble each other. Indeed the concentrations from both sites differs only by 0.2 -1.7 % of the NAAQS.

<b>Pollutant, avg. time</b>	<b>Huehue max. (mg/m<sup>3</sup>)</b>	<b>Kakahiaka max. (mg/m<sup>3</sup>)</b>	<b>Differ- ence (mg/m<sup>3</sup>)</b>	<b>NAAQS (mg/m<sup>3</sup>)</b>	<b>% of NAAQS</b>
SO <sub>2</sub> , 3-hr	54.6	52.6	2.0	1,300	0.2
SO <sub>2</sub> , 24-hr	25.9	24.4	1.5	365	0.4
PM <sub>10</sub> , 24-hr	24.2	26.7	2.5	150	1.7

Admin. Rec. Ex. M.15 at 9.

Although DOH and EPA Region IX did not require HELCO to collect CO or O<sub>3</sub> data as part of the confirmatory study, HELCO did gather CO data at Kakahiaka.<sup>20</sup> The results of the comparison of CO data sets is similar to the results for PM<sub>10</sub> and SO<sub>2</sub> shown above.

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<sup>19</sup> HELCO actually collected data from the Kakahiaka monitoring station from February 5, 2000 to May 31, 2000. In the record, DOH explains that it elected not to include data collected after May 17, 2000 because both the Kakahiaka monitoring station and the Huehue monitoring station were audited on May 17, 2000 and any data collected subsequent to that date were unaudited. Admin. Rec. Ex. M.15 at 11.

<sup>20</sup> For reasons discussed below, HELCO was not required to collect O<sub>3</sub> data for the comparison study and did not do so. *See infra* Part II.C.3.

Pollutant, avg. time	Huehue max. (mg/m <sup>3</sup> )	Kakahiaka max. (mg/m <sup>3</sup> )	Differ- ence (mg/m <sup>3</sup> )	SAAQS (mg/m <sup>3</sup> )	% of SAAQS
CO, 1-hr	542	428	114	10,000	1.1
CO, 8-hr	260	321	61	5,000	1.2

*Id.* at 10.

## 2. *The Petitioners' Objections to Huehue Data*

Petitioners Aguilar, Mosher and Tanzella each seek review of DOH's use of the data collected at Huehue in the Ambient Air Quality Impact Report. Petitioners argue that the data collected at the Huehue monitoring site do not accurately represent the ambient air of the area most affected by the Project, and therefore DOH erred in its collection of and reliance upon the Huehue data to determine compliance with the CAA for the proposed Project.

One argument asserts that the Huehue monitoring site is nonrepresentative because "most of the major growth, traffic, airport operations, construction, etc., is occurring at the elevation and area nearer the Keahole Generating Station, not at the Huehue Monitoring Station elevation." PSD Appeal No. 01-28 at 12. Another argument in a similar vein reasons that the Huehue monitoring station data do not show "site representativeness" because the data from the Huehue monitoring station shows less concentration of pollutants than the data used by DOH prior to the Board's remand. *See* PSD Appeal No. 01-25.

Petitioners Mosher and Tanzella also take issue with DOH's conclusion that the Huehue monitoring site is the best available monitoring location and argue that alternative locations closer to the maximum impact area could have been used. Petitioners also argue that DOH did not comply with the guidance of the Ambient Monitoring Guidelines. Specifically, Petitioner Tanzella asserts that DOH's enumerated reasons for not locating monitors on government and/or residential areas are unfounded and constitute clear error or otherwise warrant review.

Additionally, Petitioner Tanzella argues that the data collected from the Kakahiaka monitoring site should have been used in DOH's Ambient Air Quality Impact Report rather than the Huehue data. *See* PSD Appeal No. 01-28 at 4. He asserts that the Kakahiaka site could have been used as a long-term monitoring station. The petition goes on to assert that the record includes community members' offers to allow use of their property for monitoring. PSD Appeal No. 01-28 at 5. "HDOH offers no proof that the established neighborhood would have complained if the Kakahiaka Monitoring Station operated for only an additional 2 months or less." *See id.*

In response to Petitioners' assertions that the monitoring site for ambient air quality was improperly located at Huehue, DOH and HELCO cite the Ambient Monitoring Guidelines. Citing section 3.2.3 of the Ambient Monitoring Guidelines, HELCO and DOH emphasize that the Ambient Monitoring Guidelines give substantial deference to the source and the permit issuer to make location determinations on a case-by-case basis. Jt. Memo in Opposition to Petitions at 16.

The Board agrees that the Ambient Monitoring Guidelines give substantial deference to the permitting authority and the source in determining monitoring sites. Moreover, as DOH and HELCO point out, beyond the deference contemplated by the Ambient Monitoring Guidelines, the Board has repeatedly stated that absent compelling circumstances, it will defer to the permitting authority's decision on issues like the one at hand that depend upon technical expertise. *See In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 256 (EAB 1999) (citing *HELCO I*, 8 E.A.D. 66 (EAB 1998)); *In re Envotech, L.P.*, 6 E.A.D. 260, 284 (EAB 1996) ("absent compelling circumstances, the Board will defer to a Region's determination of issues that depend heavily upon the Region's technical expertise and experience."); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 147 (EAB 1999) (upholding permitting authority's exercise of discretion in exempting permit applicant's collection of pre-construction, on-site ambient air data or meteorological data). Here, the permitting authority has required the collection of site-specific monitoring data and has included documents in the record that provide an explanation of the location choice. *See* Admin. Rec. Ex. K.5, Admin. Rec. Ex. M.15.

In addition to the documents in the record cited above, the confirmatory sampling data collected at the short-term monitoring site, Kakahiaka, a site closer to the maximum impact area than Huehue, add support to DOH's contention that the Huehue monitoring site did accurately capture the background concentration levels of relevant pollutants. *See* Admin. Rec. Ex. K.36; Admin. Rec. Ex. K.53 (Addendum to the Location Selection of the Pre-Construction Air Quality and Meteorological Monitoring Station for Keahole Units CT-4 and CT-5 (June 27, 2000)); *see* Admin. Rec. Ex. M.8. at 26 (Public Comment Period and Public Hearing of October 7, 1999 Summary of Public Comments and Testimony Received on Supplement C of the Ambient Air Quality Impact Report for the Keahole Generating Station Units CT-4 and CT-5 Air Permit) ("The special study will determine if the Huehue data are representative by comparing the Huehue data to ambient air quality data collected in an area closer to the Project's point of maximum impact."); Admin. Rec. Ex. M.15 at 2. Thus, viewed in whole, the record supports DOH's selection of the Huehue monitoring site.

The Board is not persuaded by Petitioner Aguilar's argument that the Huehue monitoring site is not representative because the data collected at Huehue resulted in lower concentrations of pollutants than the previous data relied upon by DOH. This assertion alone does not demonstrate clear error on the part of

DOH. The record shows DOH has followed the regulatory requirements as well as the guidelines for determining monitor locations and has adequately explained those decisions in the record. In contrast, Petitioner Aguilar has failed to explain why DOH's determination is clearly erroneous or otherwise warrants review.

In response to the argument that the Keahole Generating Station's environment is much different than that of the Huehue area's environment, DOH and HELCO correctly state that "[t]he issue is not whether the long-term monitor is in a location comparable to the Project at Keahole Generating Station, but rather whether the long-term monitor is in a location comparable to the points of maximum impact." *Jt. Memo in Opposition to Petitions* at 18. As discussed above, the Ambient Monitoring Guidelines instruct that a monitor should be located in or as close to the maximum impact areas as possible. Ambient Monitoring Guidelines § 3.2.1. The Location Selection Study reveals that HELCO and DOH's decision-making process included assessing what sites were situated closest to the maximum impact areas. *See Admin. Rec. Ex. K. 5* at 3-4. We find no clear error in DOH's determination that the Huehue monitoring site was the optimal location under the circumstances.

Moreover, DOH's reasons for not using the Kakahiaka monitoring station's data in the Ambient Air Quality Impact Report were not clearly erroneous and do not otherwise warrant review. Petitioner Tanzella argues that HELCO's inability to collect four months of data for use in the air quality impact report was not proven. *See PSD Appeal No. 01-28* at 5. In fact, HELCO did collect approximately four months of data from this site.<sup>21</sup> *See Jt. Memo in Opposition to Petitions* at 10. However, we remain unconvinced that, even assuming the four months of data from Kakahiaka could have been used in DOH's Ambient Air Quality Impact Report, DOH would have committed clear error by not using these data in its report instead of the 12 months of data collected at Huehue. The relevant regulation states:

In general, the continuous air quality monitoring data that is required shall have been gathered over a period of at least one year \* \* \*, except that, if the Administrator [or permitting authority] determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), the data that is required shall have been gathered over at least that shorter period.

40 C.F.R. § 52.21(m)(1)(iv). Thus, under 40 C.F.R. § 52.21(m), discretion is given to the permitting authority to decide the adequate length of time in which

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<sup>21</sup> *See supra* note 19.



ambient air data collection should occur, with a clear preference for at least 12 months. We would be hard pressed to find clear error or abuse of discretion on the part of a permitting authority that required the generally accepted 12 months of data collection at an appropriate monitoring location. Additionally, we find that the record in this matter adequately explains DOH's reasons why the Kakahiaka monitoring site was not available for "long-term" monitoring. *See* Admin. Rec. Ex. 53 ("This Addendum demonstrates that Kakahiaka is not suitable for long-term monitoring primarily because of the six-month right-of-entry monitoring duration limitation imposed by the Hawaii Department of Land and Natural Resources."). Accordingly, Petitioner Tanzella has not met his burden of establishing clear error since the record adequately supports DOH's decision to use the data collected at the Huehue monitoring station for its analysis in the Ambient Air Quality Impact Report.

### 3. *Petitioners' Objections to the Kakahiaka Data*

In addition to the issues raised regarding DOH's use of data from Huehue, Petitioners Mosher, Keahole Defense Coalition, Tanzella, and Rothstein raise several issues regarding DOH's use of data compiled from the Kakahiaka monitoring site. These petitions assert that DOH erred since it did not follow the regulatory requirements and guidelines which require four months minimum testing for on-site ambient air monitoring, while Petitioner Mosher argues that DOH committed clear error because the Kakahiaka monitoring site was not representative. *See* PSD Appeal Nos. 01-26, 01-27, 01-28, 01-29.

Further, Petitioner Tanzella asserts that DOH has committed clear error because the PSD regulations do not allow confirmatory sampling. *See* PSD Appeal No. 01-28. Specifically, he argues that the testing protocol developed by DOH and EPA Region IX was not allowed under the Ambient Monitoring Guidelines. Further, this Petitioner argues that DOH committed clear error by relying on the non-regulatory confirmatory study to prove the Huehue site data were representative. "This sets a dangerous precedent when both the HDOH and USEPA Region 9 are permitted to use a non-federally regulated, non-authorized, no federal guideline similarity study when both agencies are charged with protecting the health and well being of the residents living in the impacted areas." *Id.* at 9. The Petitioner further asserts that since DOH did not require HELCO to collect O<sub>3</sub> data from Kakahiaka, DOH cannot conclude that the confirmatory study supports the conclusion that Huehue's data are representative of the affected area's ambient air quality for O<sub>3</sub>. *Id.* at 10.

The foregoing arguments reveal that the Petitioners who raised them did not understand the purpose of the data collection at the Kakahiaka monitoring station. As DOH and HELCO explain in their memorandum, the purpose of the data collection at Kakahiaka was "to confirm that the Huehue monitors were accurately measuring background concentrations even though they could not be ideally

placed in a maximum impact area.” Jt. Memo in Opposition to Petitions at 23; *see also* Admin. Rec. Ex. M.15; Admin. Rec. Ex. K.36. The data collected for the confirmatory study at Kakahiaka was not used in the Ambient Air Quality Impact Report’s background concentration analysis, but rather to ensure that the Huehue data which was used in the Ambient Air Quality Impact Report captured accurately the background concentrations in the areas affected by the proposed Project. Therefore, the regulatory requirements for pre-construction monitoring found at 40 C.F.R. § 52.21(m) do not apply to the collection of data for the confirmatory sampling. Petitioners have not demonstrated that the data obtained at Kakahiaka are somehow suspect nor have Petitioners established that DOH committed clear error by not requiring four months of monitoring data from Kakahiaka for its confirmatory testing.

The Board also denies review to Petitioner Mosher’s argument that the Kakahiaka site was not representative, because Mosher’s petition merely restates his earlier comments and does not explain why DOH’s response to his comments was clear error. In fact, the record does contain a sufficient explanation of DOH’s selection of the Kakahiaka site for its short-term confirmatory study. *See* Admin. Rec. Exs. at M.15, M.36, K.53.

The argument that DOH and EPA Region IX were not explicitly authorized to allow such a confirmatory sampling study, including the 20% similarity test, also misses the mark. DOH and EPA Region IX used this study as additional assurance that the Huehue monitoring station was indeed collecting data that would reflect the background pollutant concentration levels for the areas affected by the proposed Project. The Board is not troubled by DOH and EPA Region IX’s use of a confirmatory study since they had already presented in detail the reasons why the data from Huehue met the Air Monitoring Guidelines even without the confirmatory study. *See* Admin. Rec. Ex. K.5. We accept the explanation that the data collection at Kakahiaka was ordered “in an abundance of caution and to address the commenters’ concerns about Huehue.” Jt. Memo in Opposition to Petitions at 24. Nothing in the PSD regulations prohibits permitting authorities to require additional studies to support their permitting decisions nor do the regulations prohibit a permitting authority from creating testing criteria for such studies. Accordingly, we find no clear error on the part of DOH in requiring the confirmatory study in this matter or in establishing its 20% test criterion.<sup>22</sup>

Furthermore, Petitioner Tanzella has not demonstrated clear error with respect to his objection to the exclusion of O<sub>3</sub> data from the confirmatory study. As DOH explained in its response to comments, unlike other pollutants, O<sub>3</sub> is a regional pollutant and is not emitted directly into the atmosphere. Once in the at-

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<sup>22</sup> Any challenge to the testing criterion of 20% created by the permitting authorities as being too lenient is essentially mooted by the data sets matching within no greater difference than 1.7%.

mosphere O<sub>3</sub> requires an appreciable formation time. Thus, DOH explained that monitoring for small-scale variability from Huehue and Kakahiaka was not necessary. *See* Admin. Rec. Ex. M.8 at 28-30. The Petitioner did not address why DOH's response to his objection was clearly erroneous or otherwise warrants review. Given this, we decline review on this issue.

#### D. *Currentness of SO<sub>2</sub> and PM Data Collected for the Ambient Air Quality Impact Report*

One petition raises, albeit briefly, the allegation that HELCO failed to provide information concerning currentness of SO<sub>2</sub> and PM data as required by the Board's remand. *See* PSD Appeal No. 01-26. In response, DOH and HELCO point out that by using recently collected data at the Huehue monitoring station, DOH has addressed the Board's concerns regarding the currentness of the SO<sub>2</sub> and PM data. *See* Jt. Memo in Opposition to Petitions at 23.

As mentioned in the introduction, the Board's remand requested that DOH provide an updated Air Quality Impact Report incorporating current SO<sub>2</sub> and PM data. *HELCO I*, slip op. at 56. The PSD regulations discuss currentness of data in section 52.21(m)(1)(iv). In relevant part, it states that "the continuous air quality monitoring data that is required \* \* \* shall represent at least the year preceding receipt of the application \* \* \*." 40 C.F.R. § 52.21(m)(1)(iv). Similarly, HELCO and DOH cite to the Draft Manual which mirrors the regulatory language by stating "the data are to represent at least the 12-month period immediately preceding receipt of the PSD application."<sup>23</sup> Draft Manual at C.16. Certainly, the 12 months of SO<sub>2</sub> and PM (as well as CO and O<sub>3</sub>) data collected at the Huehue monitoring station from February 1, 1999 through January 31, 2000, and used in DOH's Ambient Air Quality Impact Report (Dec. 2000) qualifies as "current" data under the regulation. Thus, the Board finds no clear error on this issue.

#### E. *The Scope of Public Comment*

Many of the petitions challenge that DOH improperly limited the scope of the public comment by its notice language stating that:

[A]ll public comments and testimony should pertain only to SUPPLEMENT C and the issues related to the currentness of the SO<sub>2</sub> and PM<sub>10</sub> data and the location representativeness of the CO and O<sub>3</sub> data. Comments and testimony

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<sup>23</sup> DOH and HELCO also cite to section 2.5.1 of the Air Monitoring Guidelines to support their argument that the SO<sub>2</sub> and PM data are current. However, this section appears to deal more with the length of time data collection should occur rather than how current the data should be.

not related to these issues will not be considered in these proceedings.

Letter from W. Nagamine, DOH to Interested Parties enclosing Notice of Public Hearing (Aug. 26, 1999); *see* PSD Appeal Nos. 01-24, 01-27, 01-29. In particular, one petition states “DOH’s Notice for the September 9, 1999 public hearing \* \* \* was instrumental in discouraging or preventing commenters from scrutinizing the information on PM<sub>10</sub> emissions and comparing them with the PSD Increment Consumption limits.” PSD Appeal No. 01-27 at 4; *see also* PSD Appeal No. 01-29.

While it is not clear to us that this notice improperly limited the scope of public comment, we note that a subsequent notice for public comment requested comments on the draft permit and the Ambient Air Quality Impact Report more generally. Admin. Rec. Ex. M.5 (Notice of Public Hearing On Draft Permit for HELCO (Mar. 6, 2001)). We agree with DOH and HELCO that the provision of a subsequent public comment period renders any issues regarding the August 1999 notice moot.

#### F. *Non-PSD Issues*

The remaining issues raised in the petitions for review fall outside the Board’s jurisdiction over PSD permit decisions. The Board’s jurisdiction to review PSD permits extends to those issues relating to permit conditions that implement the federal PSD program. In determining whether the Board has jurisdiction, we look at how the issue is framed by the petition. As we stated in *Knauf*:

[I]t is possible that some issues will still not warrant a grant of review, even if the issues have been properly preserved for review and the petitions contain sufficient specificity. Issues that are not covered by the PSD program fall into this category. The PSD review process is not an open forum for consideration of every environmental aspect of a proposed project, or even every issue that bears on air quality. \* \* \* The Board will deny review of issues that are not governed by the PSD regulations because it lacks jurisdiction over them.

*In re Knauf Fiber Glass GmbH*, 8 E.A.D. 121, 127 (EAB 1999).

Two petitions assert that DOH did not properly account for effects associated with sulfate aerosol, and that DOH’s response to comments, concluding that any increase in volcanic gases or “VOG” would be insignificant, used an incorrect assumption that most of the sulfate aerosols will be blown out to sea and will not

return to the land due to diurnal winds and the inversion layer. *See* PSD Appeal Nos. 01-24, 01-28.

As DOH and HELCO explain in their memorandum, sulfate aerosols are precursors to PM<sub>10</sub>. Therefore, regulation of sulfate aerosols is subsumed within the PM<sub>10</sub> standards. *Jt. Memo in Opposition to Petitions at 33-36.* Pursuant to the current PSD regulations, DOH directed HELCO to conduct an assessment of the proposed Project's effect on the NAAQS for PM<sub>10</sub>, as well as the Class II PSD Increment for PM<sub>10</sub>. Since sulfate aerosols are significant for PSD purposes only as precursors to PM<sub>10</sub>, and since DOH determined that the expansion of the facility would not cause an exceedance of the NAAQS or PSD increment for PM<sub>10</sub>, DOH did not require HELCO to further assess the effect of the proposed Project on sulfate aerosols in the area.

Recently, we denied review on an analogous issue. In *Tondu Energy Co.*, the Petitioners objected to the permit as failing to adequately protect public health, ostensibly because the regulations do not protect the public from particulate matter with an aerodynamic diameter of less than 2.5 micrometers. *In re Tondu Energy Co.*, 9 E.A.D. 710 (EAB 2001). In that case, the Board determined that the objection was essentially a challenge to the adequacy of the NAAQS and reminded the Petitioners that permit appeals are not appropriate fora for challenging Agency regulations. *Id.*, slip op. at 8-9 (citations omitted). In the matter before us today, we have a similar situation where petitions challenge the adequacy of the PM<sub>10</sub> NAAQS that address the health risks of sulfate aerosols. Thus, the Board denies review of this issue.

Another non-PSD issue raised involves HELCO's compliance history and DOH's alleged lack of enforcement of the state and federal CAA limits at the existing Keahole facility. *See* PSD Appeal Nos. 01-26, 01-29. This allegation is not grounds for challenging a decision in the permitting context.<sup>24</sup> As we explained in another permit matter, "[p]etitioners' generalized concerns regarding [permittee's] past violations do not, without more, establish a link to a 'condition' of the present permit modification, and thus do not provide a jurisdictional basis for the Board to grant review." *In re Laidlaw Env'tl. Servs.*, 4 E.A.D. 870, 882 (EAB 1993). We have also stated that "[t]his Board's role \* \* \* is to examine specific permit conditions that are claimed to be erroneous, not to address generalized concerns broadly directed toward the enforcement capabilities of this or any other regulatory agency." *In re Ecoeléctrica, L.P.*, 7 E.A.D. 56, 70 (EAB 1997). Thus, the request for review based on HELCO's alleged noncompliance and DOH's prior enforcement record at the Keahole facility must be denied.

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<sup>24</sup> Moreover, the issue of enforcement is clearly beyond the scope of this remand since the Board remanded only on two discrete issues involving the air quality analysis portion of the permit application. *See supra* I.A.

Another Petitioner argues that had DOH required HELCO to measure ozone at Kakahiaka, the state ambient air quality standard ("SAAQS") for O<sub>3</sub> would likely have been violated. This argument is beyond the scope of the Board's review since the SAAQS for O<sub>3</sub> is based in state law and is not a requirement of the federal PSD program. Accordingly, we deny review on this issue.

### **III. CONCLUSION**

For the reasons discussed above, the Board denies review with respect to all of the issues raised by the Petitioners.

So ordered.