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

In re:	)	
Hawaii Electric Light Company, Inc.	)	PSD Appeal Nos. 01-24 through 01-29
PSD/CSP Permit No. 0007-01-C	)	

ORDER DENYING MOTION FOR RECONSIDERATION

Before the Board is the Keahole Defense Coalition's ("KDC") motion seeking reconsideration of the Board's Order Denying Review entered in the above-referenced matter on November 27, 2001 (the "Order"). *In re Hawaii Electric Light Co., Inc.*, PSD Appeal Nos. 01-24 through 01-29 (EAB, Nov. 27, 2001), 10 E.A.D. __ (hereinafter "*HELCO II*"). KDC timely filed its motion for reconsideration on December 7, 2001. For the following reasons, we deny KDC's motion.

I. *BACKGROUND*

Six petitions were filed with the Board seeking review of certain conditions of a prevention of significant deterioration ("PSD") permit decision, Permit No. 0007-01-C (the "Permit"), issued by the State of Hawaii Department of Health ("DOH") on July 25, 2001, pursuant to a federal delegation. The Permit was issued to Hawaii Electric Light Company, Inc. ("HELCO") and would authorize HELCO to expand its Keahole Generating Station in Kona on the Big Island of Hawaii. The proposed expansion consists of constructing and operating two 20-MW combustion turbines with heat recovery steam generators, one 16-MW steam turbine, and a 235-horsepower emergency diesel fire pump.

In an earlier proceeding involving this proposed expansion, the Board had remanded this matter for further consideration on two issues. *In re Hawaii Electric Light Co., Inc.,* PSD Appeal Nos. 97-15 through 97-23 (EAB, Nov. 25, 1998), 8 E.A.D. ___. In its remand order, the Board directed DOH : (1) to provide an updated air quality impact report incorporating current sulfur dioxide ("SO_2") and particulate matter ("PM") data; and (2) to either provide sufficient explanation of why the carbon monoxide ("CO") and ozone ("O_3") data used in its air quality analysis

were 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. *Id.* DOH completed the remand proceeding on July 25, 2001, and issued on that date a revised PSD permit decision which was based on a new air quality analysis using 12 months of new background data for SO_2, PM_{10}, CO, and O_3.

The six petitions filed in response to DOH's revised PSD permit decision raised issues principally relating to the data used in an ambient air quality analysis, which was prepared by DOH. DOH describes its analysis of the ambient air quality and source impacts in its "Ambient Air Quality Impact Report." DOH originally completed this 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 after remand, Supplement C (Aug. 4, 1999), and Supplement D (Dec. 27, 2000). *See* Administrative Record Exhibits M.10-M.15. In our Order, we determined that the petitioners did not satisfy the requirements for showing that DOH made a clearly erroneous finding of fact or conclusion of law, or

that review is otherwise warranted. *HELCO II*, PSD Appeal Nos. 01-24 through 01-29.

In the motion before the Board, KDC requests that the Board revisit its determination to deny review of an issue KDC raised regarding the PSD Class II increment for PM_{10}. In our Order, the Board denied review of this issue on the grounds that it had not been preserved for review. *See* KDC's Motion at 1; *HELCO II*, slip op. at 12.

II. *DISCUSSION*

A. *Standards for Motions for Reconsideration*

Motions for reconsideration are authorized by 40 C.F.R. § 124.19(g), which provides that the motion shall be filed within ten (10) days after service of the final order and "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." Reconsideration is generally reserved for cases in which the Board is shown to have made a demonstrable error, such as a clearly erroneous mistake of law or fact. *See In re Steel Dynamics, Inc.*, PSD Appeal No. 01-03, at 2 (EAB, May 7, 2001) (Order Denying COW's Motion for

Reconsideration and Stay of Decision); *In re Hawaii Electric Light Company, Inc.,* PSD Appeal Nos. 97-15 through 97-22, at 6 (EAB, Mar. 3, 1999) (Order Denying Motion for Reconsideration); *In re Arizona Municipal Storm Water NPDES Permits,* NPDES Appeal No. 97-3, at 2 (EAB, Aug. 17, 1998) (Order Denying Motion for Reconsideration).

The filing of a motion for reconsideration "should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions." *In re Hawaii Electric Light Co., Inc.*, at 6 (citing *Arizona Municipal,* at 2) (Order Denying Motion for Reconsideration); *In re Southern Timber Products, Inc.*, 3 E.A.D. 880, 889 (JO 1992). A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider. *Arizona Municipal,* at 2 (Order Denying Motion for Reconsideration); *see also Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) ("Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have

been adduced during the pendency of the [original] motion. * * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.") (citation omitted).

B. *KDC's Motion*

KDC's Motion seeks reconsideration of our conclusion that KDC had failed to meet the threshold requirements for Board consideration on its issue regarding PSD Class II increment for PM_{10}. In our Order, we noted that DOH did not receive any comments on the issue of PSD increment consumption for PM_{10} during the public comment periods held after remand and that this issue was readily ascertainable. *HELCO II*, slip op. at 12. Thus, the issue was not preserved for review since the permitting procedural requirements found at 40 C.F.R. part 124 require that a petitioner demonstrate that each issue raised in the petition had been previously raised during the public comment period or was not reasonably ascertainable at that time. 40 C.F.R. § 124.13 and 124.19(a).

Now, KDC argues that 40 C.F.R. § 52.21(c) exempts KDC from the foregoing permitting procedural requirements. According to

KDC, "[t]he regulations do not require the public to complain about the violation within a certain time frame before compliance becomes mandatory." KDC's Motion at 1-2. While less than perfectly clear, KDC's argument seems to be that compliance with the substantive permitting requirements in 40 C.F.R. § 52.21(c) is mandatory and thus the right to raise objections to any alleged inconsistency between the permit and the regulation is not limited by the permitting procedures in part 124.

Contrary to KDC's position, which would render the part 124 regulations relating to appeals essentially meaningless, petitioners are required to make these threshold showings in order to preserve their right to appeal. *See* 40 C.F.R. § 124.13 and 124.19. As we explained in our Order, "[t]he 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." *HELCO II*, slip op. at 11 (citation omitted). While it is true that a permit must conform to all applicable PSD requirements, this obligation does not give KDC the right to bypass the requirements enumerated in 40 C.F.R. part 124 for petitioning the Board to review any condition of a permit decision. While the Board has authority to dispense with the procedural requirements if justice so requires, no such

circumstance has been demonstrated here. *See In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 763 n.11 (citing *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (Agency may relax procedural rules when the ends of justice so require it)). Indeed, as discussed below, KDC's comment is based largely on its misunderstanding of the data presented in the respective supplements.

Also, KDC disagrees with our conclusion that the PSD Class II PM_{10} increment issue was "readily ascertainable." KDC's Motion at 2. KDC asserts that the more recent supplements (Supplements C and D) to DOH's Ambient Air Quality Impact Report do not contain tables on increment consumption, thereby hampering its ability to recognize and comment on the increment issue during the public comment period. Additionally, KDC asserts that the public notice associated with Supplement D "contained erroneous and misleading information, which were not readily detectable to ordinary citizens at that time." *Id.* at 2.

We are not persuaded by KDC's argument that the issue regarding the PSD Class II increment for PM_{10} was not reasonably ascertainable at the time of the public comment period. The tables and analysis on increment consumption appear in Supplement

A to DOH's Ambient Air Quality Impact Report, and, as noted in KDC's motion, DOH has continued to rely on its PSD increment analysis in Supplement A during the time period following remand. KDC's Motion at 2. DOH's March 6, 2001 notice of public hearing on draft permit requested comments on the draft permit and the Ambient Air Quality Impact Report generally. Administrative Record Exhibit M.5 (Notice of Public Hearing On Draft Permit for HELCO (Mar. 6, 2001)); *see HELCO II*, slip op. at 26. Nothing in the notice requesting public comment suggested that any of the Supplements to the Ambient Air Quality Impact Report, including in particular, Supplement A, were ineligible in any respect for public comment. Thus, DOH's March 6, 2001 notice for public comment encompassed the PSD increment analysis in Supplement A -- an analysis that had been available for review since September 28, 1995. As a consequence, any arguments the petitioner had regarding DOH's PSD increment analysis were certainly reasonably ascertainable during the comment periods following the Board's remand order in 1998 and should have been raised at that time.

KDC also argues that the PSD increment table included in the March 2001 notice contained "erroneous and misleading information." KDC's Motion at 2. Specifically, KDC argues that

DOH incorrectly listed 37 Fg/m^3 as the PM_{10} PSD Class II increment limit instead of 30 Fg/m^3.

However, KDC is incorrect in its understanding that the 37 Fg/m^3 limit was intended to apply to PM_{10}. Rather, the notice of public hearing referred to by KDC included a table that listed the PSD Class II 24-hour limit for *particulate matter*, not *PM_{10}*, as 37 Fg/m^3.[1] Administrative Record Exhibit M.5 at 2. While DOH's March 2001 notice could have been better crafted, DOH and HELCO explain in their joint response that the table in the March 2001 notice does not, as KDC believes, reference an incorrect PSD increment limit for PM_{10}. Rather the table – a duplicate of Table 5 in the original Ambient Air Quality Impact Report – correctly indicates that the 24-hour standard for particulate matter, of which PM_{10} is a subset, is 37 Fg/m^3, consistent with the

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[1]In the 1990 amendments to the CAA, Congress gave EPA authority to substitute increment limits using maximum allowable increases in particulate matter with an aerodynamic diameter smaller than or equal to 10 micrometers ("PM_{10}") for increment limits in terms of PM. 42 U.S.C. § 7476(f). In 1993, EPA promulgated regulations that changed the allowable federal increment in Class II areas from a 24-hour maximum of 37 Fg/m^3 for PM to a 24-hour maximum of 30 Fg/m^3 for PM_{10}. 58 Fed. Reg. 31622 (June 3, 1993). According to DOH and HELCO in their response, there was no corresponding change in Hawaii's particulate matter increment requirement. Opposition of DOH and HELCO to Motion for Reconsideration at 4. HELCO is therefore subject to both the federal PM_{10} increment requirement and the state PM increment requirement.

requirements of state law. Opposition of DOH and HELCO to Motion for Reconsideration at 9. Thus, the allegedly "erroneous" information contained in the notice is, in fact, accurate.[2]

Accordingly, we are unpersuaded by KDC's arguments that the PSD Class II increment issue was not reasonably ascertainable during the comment periods. KDC's motion for reconsideration must be rejected because it does not show that we made a manifest error of fact or law.

Moreover, even if the Board had found this issue to be properly preserved, KDC has not shown that the PSD Class II increment for PM_{10} has been violated in this matter. KDC's attempt to use the 34 Fg/m^3 maximum concentration figure from Supplement D's Table 1 and 2 of the Ambient Air Quality Impact Report to support its argument that HELCO has violated the 30 Fg/m^3 PSD Class II increment limit for PM_{10} reflects a misunderstanding of the purpose of Supplement D and the data presented therein. The tables in Supplement D show the calculations used to determine compliance with the State Ambient

[2]In any event, if KDC believed the information contained in the March 2001 notice to be erroneous or misleading, because it was inconsistent with the tables in the Ambient Air Quality Impact Report, KDC should have raised that concern during the comment period.

Air Quality Standards ("SAAQS"). Administrative Record Exhibit M.15 at 12-13. Specifically, the maximum concentration figure, 34 Fg/m^3, cited by KDC was calculated in order to determine whether PM_{10} emissions from the Keahole expansion project would cause or contribute to an exceedance of the National Ambient Air Quality Standards ("NAAQS") or SAAQS for PM_{10}.[3]

As HELCO and DOH explain in their joint response to KDC's motion, the calculations used to evaluate compliance with SAAQS and NAAQS are fundamentally different from the calculations used to evaluate compliance with PSD increments. For instance, the PSD increment analysis and the NAAQS analysis begin at different places. The PSD increment limit must be determined by using a "baseline" concentration. Generally, the baseline concentration is the ambient concentration for a particular pollutant existing at the time that the first complete PSD permit application affecting the area is submitted. US EPA Office of Air Quality Planning, New Source Review Workshop Manual at C.3 (Oct. 1990) (hereinafter "NSR Draft Manual"). Compliance with the PSD increment is determined by comparing the increase in pollutant

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[3]The NAAQS and the SAAQS for PM_{10} are identical in this instance. DOH determined that the additional concentration of PM_{10} associated with the Keahole expansion project PM_{10} (34 Fg/m^3) would not cause or contribute to an exceedance of the NAAQS or SAAQS for PM_{10}.

concentration over a baseline concentration. *See* 40 C.F.R. § 52.21(c). As DOH and HELCO explain in their response, the increment-consuming sources of pollutants "are those stationary sources that have increased or added emissions of the criteria pollutants after the increment baseline of ambient air concentration has been determined (the baseline data)." Opposition of DOH and HELCO to Motion for Reconsideration at 8. Furthermore, the analysis for PSD increment limits also includes the notion of "expanding" the limit through emission reductions that take place after the applicable baseline date. NSR Draft Manual at C.10.

On the other hand, a NAAQS analysis does not require a baseline for determining compliance. Rather the NAAQS is simply the projected total concentration of a particular pollutant in the ambient air of the affected area. The ambient air quality calculation "focuses on the total concentration of the pollutant in the ambient air after construction of the project and compares that concentration to the health-based NAAQS standard." Opposition of DOH and HELCO to Motion for Reconsideration at 7.

Thus the analysis used to determine compliance with a PSD increment is different from the analysis used to evaluate

compliance with the NAAQS, and it is simply incorrect to use the maximum concentration figure cited by KDC, which was calculated for evaluating compliance with a SAAQS, in a PSD increment calculation.

III. *CONCLUSION*

For the foregoing reasons, the motion for reconsideration of our Order filed by KDC is denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD[4]

Dated: 01/29/02 By: /s/

Edward E. Reich
Environmental Appeals Judge

[4]The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Reconsideration in the matter of Hawaii Electric Light Company, Inc., PSD Appeal Nos.01-24 through 01-29, were sent to the following persons in the manner indicated:

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/s/
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