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

In re:	)	
Hawaii Electric Light Company, Inc.	)	PSD Appeal Nos. 97-15 through 97-22
PSD/CSP Permit No. 0067-01-C	)	

ORDER DENYING MOTION FOR RECONSIDERATION

Before the Board are three motions seeking reconsideration of our Order Denying Review in Part and Remanding in Part entered in the above-referenced matter on November 25, 1998 (the "Remand Order"). The three motions are as follows: (1) Hawaii Electric Light Company, Inc. ("HELCO") filed a motion for reconsideration on December 7, 1998;[1] (2) Kawaihae Cogeneration Partners ("KCP") filed a motion for reconsideration on December 8, 1998;[2] and (3) the Keahole Defense Coalition ("KDC") filed its motion for

[1] *See* Hawaii Electric Light Company, Inc.'s Motion for Reconsideration of Order Denying Review in Part and Remand in Part, Decided November 25, 1998 *and* Memorandum in Support of Motion (respectively, "HELCO's Motion" and "HELCO's Memorandum").

[2] *See* Kawaihae Cogeneration Partners' Motion for Reconsideration of Order Denying Review in Part and Remanding in Part Decided November 25, 1998*, and* Kawaihae Cogeneration Partners' Memorandum in Support of Motion for Reconsideration of Order Denying Review in Part and Remanding in Part Decided November 25, 1998 (respectively, "KCP's Motion" and "KCP's Memorandum").

reconsideration on December 11, 1998.[3] HELCO has also filed an opposition to both KCP's Motion and KDC's Motion.[4] In addition, KCP, Richard Tanzella ("Mr. Tanzella"), Jerry Rothstein ("Mr. Rothstein") and Peggy Ratliff ("Ms. Ratliff") have filed oppositions to HELCO's Motion.[5] For the following reasons we deny each of these motions for reconsideration.[6]

I. *BACKGROUND*

[3]*See* Motion to Address Items in Our Petition (PSD 97-16) for Review of Hawaii Electric Company's (HELCO) Covered Source Permit No. 0007-01-C on which the Board Remained Silent in Its November 25, 1998 Order Denying Review in Part and Remanding in Part ("KDC's Motion").

[4]*See* Hawaii Electric Light Company, Inc.'s Memorandum in Opposition to Motions for Reconsideration of Order Denying Review in Part and Remanding in Part, Decided November 25, 1998 ("HELCO's Opposition").

[5]*See* Kawaihae Cogeneration Partners' Memorandum in Opposition to Hawaii Electric Light Company's Motion for Reconsideration of Order Denying Review in Part and Remanding in Part, Decided November 25, 1998 ("KCP's Opposition"); Reply in Opposition to HELCO's Motion for Reconsideration of Order Denying Review in Part & Remanding in Part, Decided November 25, 1998 ("Tanzella's Opposition"); Reply in Opposition to HELCO's Undated Motion for Reconsideration of Order Denying Review in Part & Remanding in Part, Decided Nov. 25, 1998 ("Rothstein's Opposition"); Letter from Peggy J. Ratliff dated December 14, 1998 ("Ratliff's Opposition").

[6]We have also received numerous submissions of copies of news articles, letters and other miscellaneous documents, which have been submitted with little or no explanation of their relevance or citation to where such documents may be found in the record. Our decision today is not based upon such documents except to the extent expressly stated herein.

The Remand Order addressed nine petitions seeking review of certain conditions of a prevention of significant deterioration ("PSD") permit, Permit No. 0007-01-C (the "Permit"), granted by the State of Hawaii Department of Health ("DOH"). The Permit was issued to HELCO and would authorize HELCO to expand its Keahole Generating Station in Kona on the Big Island of Hawaii (the "Station"). The proposed expansion consists of constructing and operating two 20-MW combustion turbines ("Units CT-4 and CT-5") with heat recovery steam generators, one 16-MW steam turbine ("Unit ST-7"), and a 235-horsepower emergency diesel fire pump (collectively, the "Project").

The nine petitions raised issues generally falling into three categories. First, several petitioners, including KDC, requested that the Board review DOH's NO_x "netting" analysis. By the netting analysis, the NO_x emissions increases from the Project were considered along with certain source-wide "creditable contemporaneous" emissions decreases, resulting in a "net" change in emissions that was less than the PSD significance level of 40 tons per year ("tpy") set forth in 40 C.F.R. § 52.21(b)(23). Because the net emissions increase did not exceed the applicable PSD significance level, the Project was found by DOH to be exempt from the requirement to use BACT for control of NO_x emissions. In the Remand Order, we determined that the petitioners did not satisfy the requirements for showing, with respect to the netting analysis, that DOH made a

clearly erroneous finding of fact or law, or that review is otherwise warranted. KDC's Motion requesting reconsideration of this determination is discussed in Part II.B below.

In the second of the three categories, KCP's petition requested that the Board review the Permit's conditions specifying BACT for controlling SO_2 emissions. These Permit conditions provide that HELCO may burn fuel oil no.2 in Units CT-4 and CT-5. In its petition, KCP argued that low sulfur naphtha fuel was improperly eliminated from consideration as BACT, and KCP cited the PSD permit issued to KCP as evidence that naphtha is cost-effective. In the Remand Order, we denied KCP's request for review of the SO_2 BACT conditions, holding that KCP did not show clear error in DOH's determination to eliminate naphtha due to uncertainty regarding naphtha's long-term availability, and that the determination regarding availability was sufficient to eliminate naphtha as BACT without considering issues of cost-effectiveness. Remand Order at 23-34. KCP's Motion requesting reconsideration of this determination is discussed in Part II.C below.

Finally, several petitions sought Board review of the ambient air quality and source impacts analysis, which concluded that the Project will not cause or contribute to a violation of the National Ambient Air Quality Standards ("NAAQS"). These petitions argued, among other things, that the background ambient air quality data used in the analysis for SO_2, particulate

matter, CO and O_3 were not representative of the air quality in the areas that would be impacted by emissions from the Project. It was argued that the data were either out of date or drawn from an unrepresentative location. In the Remand Order, we found that DOH's responses to comments regarding the currentness of the SO_2 and particulate matter data were not adequate in certain respects and, therefore, we remanded the Permit to DOH to prepare an updated air quality impact report incorporating current SO_2 and particulate matter data. We also found that DOH's responses to comments regarding the location representativeness of the CO and O_3 data were not adequate, and we remanded to DOH to supplement its responses to comments or to perform a new air quality analysis based on data that are representative of the air quality in the requisite locations. Although HELCO did not seek to participate in the briefing on the petitions for review, it has now moved for reconsideration of our findings that DOH's responses to comments were not adequate. HELCO's Motion is considered in Part II.D below.

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 mistake of law or fact. *See In re Arizona Municipal Storm Water NPDES Permits,* NPDES Appeal No. 97-3, at 2 (EAB, Aug. 17, 1998) (Order Denying Motion for Reconsideration); *In re Gary Development Co*, RCRA (3008) Appeal No. 96-2, at 2 (EAB, Sept. 18, 1996) (Order Denying Motion for Reconsideration); *In re Mayaguez Regional Sewage Treatment Plant*, NPDES Appeal No. 92-23, at 2 (EAB, Dec. 17, 1993) (Order Denying Reconsideration and Stay Pending Reconsideration or Appeal).

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." *Arizona Municipal,* at 2; *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; *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 Was Untimely*

KDC's Motion must be dismissed because it was untimely. As noted above, a reconsideration motion must be filed within ten (10) days after service of the order. 40 C.F.R. § 124.19(g). An additional three (3) days, however, is added when the service is by mail. *Id.* at § 124.20(d). In this case, the Remand Order was served by mail on November 25, 1998. Accordingly, the time for filing motions for reconsideration expired on December 8, 1998, thirteen days after November 25, 1998. Because KDC's Motion was not received by this office until, December 11, 1998, three days after the expiration of such time, it was untimely and is hereby denied.

C. *KCP's Motion Shows that the Remand Order Was Correctly Decided*

KCP's Motion, which was timely filed, seeks reconsideration of our conclusion that KCP had failed to show clear error in DOH's rejection of naphtha from consideration as BACT due to uncertainty regarding naphtha's availability. In the Remand Order, we considered and rejected KCP's argument that DOH's elimination of naphtha was "‹contrary to DOH and EPA's

requirement that [KCP] burn naptha [*sic*] for at least the first two years.'" Remand Order at 26 (quoting KCP's Petition at 16). Now, KCP argues that reconsideration is warranted because "[i]n reviewing HELCO's permit, DOH did not apply the same standard of review and determination of BACT as it took in review of the [KCP] PSD/CSP Permit No. 0001-01-C." KCP's Motion at 2-3. KCP argues that DOH considered the same evidence of availability in making the BACT determination in both the KCP case and the present case, and that DOH applied a different (presumably more stringent) standard of review when considering that evidence in the KCP case. These arguments for reconsideration must be rejected because we did not misapprehend KCP's argument the first time, and KCP's arguments for reconsideration do not show that we made a manifest error of fact or law.

In the Remand Order, we held that KCP's petition failed to show any inadequacy in DOH's response to comments. In particular, we noted that DOH's response to comments is supported by this Board's decision in the KCP case. DOH's response to comments stated that "[a]lthough other proposed power generating facilities, Enserch Development Company (EDC) and Kawaihae Cogeneration Partners (KCP), are proposing to use naphtha, the DOH determined that naphtha was not BACT for these proposed power generating facilities." Remand Order at 27-28 (quoting 1997 Response to Comments at 27). This response to comments is supported by our decision in the KCP case, where we noted that

"ultimately [DOH] decided not to select naphtha as BACT because of concerns for long-term availability." *In re Kawaihae Cogeneration Project*, PSD Appeal Nos. 96-9 to 96-11, 96-14 & 96-16,, slip op. At 33 (EAB, Apr. 28, 1997), 7 E.A.D. __. Thus, there is no inconsistency in DOH's conclusion in both cases: naphtha was found not to be BACT.

Nevertheless, KCP argues that DOH applied a different level of scrutiny to the KCP project, and that KCP consequently "felt compelled to ‹offer' to use naphtha for the first two years." KCP's Motion at 3. This argument must be rejected on the grounds that a motion for reconsideration is not "an opportunity to reargue the case in a more convincing fashion." *Arizona Municipal*, at 2. The documents KCP has attached to its motion and its argument raise an issue that was only obliquely stated in KCP's petition, without any supporting documentation. KCP should have made its best case in its petition and is deemed to have waived submission of this material by its late submission in the form of a motion for reconsideration.[7] Accordingly, KCP's Motion is hereby denied.

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[7]Moreover, the documents submitted by KCP in support of its motion for reconsideration do not show any error in DOH's concern regarding the long-term availability of naphtha. Those documents show that KCP shared the same concern and that KCP objected to an unqualified finding of naphtha as BACT in connection with its permit application. *See, e.g.,* Letter from Gary Rubenstein on behalf of KCP to Wilfred K. Nagamine, Manager Clean Air Branch, DOH (May 21, 1996) at 1; *see also* Draft Letter from Gary Rubenstein on behalf of KCP to Wilfred K. Nagamine, Manager Clean Air Branch, DOH (May 8, 1996) at 1 (stating KCP's concern).

D. *HELCO's Motion Also Shows that the Remand Order Was Correctly Decided*

HELCO seeks reconsideration of our conclusion that DOH's responses to comments regarding the ambient air quality and source impacts analysis were not adequate in several respects. In the Remand Order, we found that DOH's responses to comments regarding the currentness of the SO_2 and particulate matter data failed to adequately respond to the petitioner's comments "that there was a significant change in the pattern of [volcanic] eruption in 1985 or 1986 from one of periodic eruptions to an almost continuous effusive eruption." Remand Order at 44-45. We therefore remanded the Permit to DOH to prepare an updated air quality impact report incorporating current SO_2 and particulate matter data. In the Remand Order we also found that DOH's responses to comments regarding the location representativeness of the CO and O_3 data failed to adequately explain why data drawn from Hilo on the windward, east side of the Big Island are representative of the air quality at the Station. We therefore remanded the Permit to DOH to supplement its responses to comments or to perform a new air quality analysis based on data that are representative of the air quality in the requisite locations. HELCO now seeks reconsideration of these determinations.

1. *SO_2 and Particulate Matter Data*

With respect to the SO_2 and particulate matter data, HELCO argues that the Board made mistakes of both fact and law. First, HELCO argues that "emissions from the volcano need not be considered in determining the background levels of SO_2 and particulate matter." HELCO's Motion at 2. Citing a U.S. EPA guidance document, referred to herein as the "Identification and Use Guideline,"[8] HELCO argues as follows:

> EPA does not consider natural and unpredictable sources of emissions, such as volcanoes, in establishing "representative" background concentrations. Instead, such sources are considered "exceptional" and are not included in background concentrations.

Id. This argument must be rejected because it does not appear to have been made anywhere in the record of this proceeding and, in particular, this argument was not part of DOH's basis for its decision as expressed in its responses to comments.[9]

Moreover, the cited guideline does not stand for the proposition that volcanic eruptions necessarily should be

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[8]*See* Guideline on the Identification and Use of Air Quality Data Affected by Exceptional Events, U.S. EPA office of Air and Radiation Office of Air Quality Planning and Standards Monitoring and Data Analysis Division (July 1986).

[9]Many of the petitioners have responded to HELCO's Motion by stating, and providing support for the proposition, that "[t]he classification of volcanic eruption on the Island of Hawaii as an exceptional event would be absurd." KCP's Opposition at 1; *see also* Tanzella Opposition at 1; Rothstein Opposition at 1-2; Ratliff Opposition at 3. We need not delve into these matters at this time as DOH has not stated that exceptionalness of the volcanic eruption was a basis of its decision and the petitioners' argument and supporting documents do not appear to have been made a part of the record.

excluded from background ambient air concentration data. The Identification and Use Guideline was prepared in response to a very specific concern and its guidance is narrowly tailored to address that concern. It notes that "[i]n some cases in the past, air quality data collected during these ‹exceptional’ events have not been submitted to the National Air Data Bank * * *" due to states’ concerns that the data may be mis-used. Identification and Use Guideline § 1. To address this concern, the Identification and Use Guideline describes procedures for "flagging" data influenced by so-called "exceptional" events and states as follows with respect to use of such "flagged" data:

> The guideline’s general policy is to allow consideration of excluding flagged data from use in regulatory actions. The actual exclusion of the use of flagged data would only be allowed if, as a result of a public review process, the responsible government agency e.g., the State Air Agency during the State regulatory process, and the U.S. EPA during the Federal review/approval process, determines that the data are inappropriate for use in a specific regulatory activity. *This consideration for exclusion of flagged data carries with it no prior presumption towards use or non-use of flagged data*.
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> * * * * * * *
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> The guideline has no regulatory or legal significance regarding use of any air quality data. Use or non-use of air quality data, whether flagged or not, must be subjected to full public disclosure and rulemaking procedures.
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> The criteria for identification of "exceptional events" are designed to be expansive enough to encompass most good faith claims by State and local agencies of when data should be considered for special

> treatment. *It is not intended to reflect EPA's views on the validity of these claims*.

Id. (emphasis added).

This extended quote shows that the purpose of the Identification and Use Guideline was to establish a procedure for "flagging" data that are subject to claims for exclusion, without prejudging whether the data should be excluded from any specific analysis. It expressly states that the decision to exclude data must be made in the context of the specific action and only after full notice and comment on the proposed exclusion. Our decision in the Remand Order is fully consistent with this guidance as we held that DOH's response to comments failed to explain the basis for its decision not requiring data from the time period in question.

Second, HELCO argues that our remand of the SO_2 and particulate matter issues "contains significant mistakes of fact with respect to the relationship between volcanic emissions and ambient SO_2." HELCO's Motion at 4. Here, HELCO argues that we have failed to understand the chemical make-up of VOG. It argues that "VOG is not the same as SO_2, rather VOG is the result of the chemical transformation of SO_2 to other compounds after it leaves the volcano." *Id.* This argument is rejected because it relies on a definition of "VOG" that, although may be technically correct, is more narrow than used by the petitioners in their petitions. In footnote 27 of the Remand Order, we specifically

noted that the petitioners were not precise in *their* use of "VOG," but that they clearly intended to refer to "the large quantities of SO_2 emissions * * *." Remand Order at 43 n.27. Thus, the Remand Order was not based on a mistaken factual determination as to the chemical make-up of VOG, but instead properly addressed the real issue raised by the petitioners in this regard, that the volcanic activity had an impact on ambient concentrations of SO_2.[10] Accordingly, HELCO's request that we reconsider the remand of the SO_2 and particulate matter issues is hereby denied.[11]

2. *CO and O_3 Data*

With respect to the CO and O_3 data, HELCO seeks reconsideration of our determination that DOH had failed to

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[10]Significantly, DOH did not misunderstand the meaning of the petitioners' argument as DOH directly responded to the SO_2 issues in its response to the petitions.

[11]HELCO also argues that "[t]his Board accepted both data sets without reservation" when denying review of the permit issued to KCP. HELCO's Motion at 5. This argument mis-characterizes our decision in *In re Kawaihae Cogeneration Project*, PSD Appeal Nos. 96-9 to 96-11, 96-14 and 96-16, slip op. at 28-30 (EAB, April 18, 1997). This Board does not "accept" data. Instead, we review specific issues raised by the petitioners to determine whether the permit issuer has committed clear error or failed to adequately respond to comments on the issues raised. In the KCP case, none of the petitioners raised the detailed argument raised in this case regarding the change in volcanic activity affecting the representativeness of the older data. Our specific holding in the *Kawaihae* case was that "[p]etitioners have pointed to no flaw in DOH's approach to baseline monitoring, as outlined in DOH's response to comments." *Kawaihae Cogeneration,* slip op. at 29. In contrast, here the petitioners have pointed to an issue that was raised, but that did not receive an adequate response from DOH.

explain why it concluded that data from a regional site located in Hilo was representative of the air quality at the Station. HELCO argues that our finding was incorrect because "the record below does provide an explanation." HELCO's Motion at 5. HELCO states that "*HELCO* explained why this data set was used and why it was representative * * *." *Id.* at 5 (emphasis added). HELCO has attached to its motion copies of "HELCO's Response to Public Comments, dated January 6, 1995" and "HELCO's Response to Public Comments dated July 27, 1995." *Id.*

We reject this argument because *DOH* must respond to the comments and must explain *its* basis for its decision. The statements in the record made by *HELCO* do not constitute an expression of *DOH's* basis for its decision. Indeed, we note that in many respects DOH's responses to comments were significantly different, and more detailed, than the explanations offered by HELCO and, in particular, DOH did not adopt the specific explanations upon which HELCO now seeks to rely. Thus, although it is possible that DOH may have silently endorsed HELCO's response to comments, it is also entirely possible that DOH either rejected HELCO's explanations as inadequate or simply failed to consider the petitioners' comments. In any event, HELCO's arguments and the material it has submitted in support of its motion have confirmed our conclusion that *DOH's* responses to comments failed to adequately respond to the petitioners' comments regarding the location representativeness of the CO and

O_3 data. Accordingly, HELCO's request for reconsideration is hereby denied.

III. *CONCLUSION*

For the foregoing reasons, the motions for reconsideration of our Remand Order filed by KDC, KCP and HELCO are hereby denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 3/3/99

By: /s/
Ronald L. McCallum
Environmental Appeals Judge

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. 97-15 through 97-23, were sent to the following persons in the manner indicated:

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