

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF )  
KAWAIHAE COGENERATION )  
PROJECT ) ORDER RESPONDING TO PETITIONERS'  
 ) REQUEST THAT THE ADMINISTRATOR  
Permit No. 0001-01-C ) OBJECT TO ISSUANCE OF A STATE  
 ) OPERATING PERMIT  
 )  
 )  
\_\_\_\_\_ )

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

On December 24, 1996, the Environmental Protection Agency ("EPA") received petitions from Linda Dela Cruz, James Growney, and Jojo Tanimoto ("the Petitioners") requesting that EPA object to the issuance of a PSD/Covered Source Permit, No. 0001-01-C, to Kawaihae Cogeneration Partnership for the construction and operation of a power plant in Kawaihae, Hawaii (the "KCP Permit"). The KCP Permit, issued by the State of Hawaii Department of Health ("DOH") on October 24, 1996, constitutes both a construction permit issued pursuant to the Prevention of Significant Deterioration ("PSD") requirements of the Clean Air Act ("CAA" or "the Act"), 42 U.S.C. §§ 7470-7479, and a state operating permit issued pursuant to Title V of the Act, 42 U.S.C. §§ 7661-7661f.

Petitioners have requested that EPA object to the issuance of the KCP Permit pursuant to section 505(b)(2) of the Act. For the reasons set forth below, I deny Petitioners' requests.

**II. STATUTORY AND REGULATORY FRAMEWORK**

Section 502(d)(1) of the Act calls upon each state to develop and submit to EPA an operating permit program intended to meet the requirements of Title V. The State of Hawaii submitted a Title V program governing the issuance of operating permits (termed "Covered Source" permits by the State), which is contained in its Administrative Rules, Title 11, Chapter 60.1. On December 1, 1994, EPA granted interim approval to the State of Hawaii's Title V program. 55 Fed. Reg. 61,549; see also 61 Fed. Reg. 56, 368 (Oct. 31, 1996); 40 CFR Part 70, Appendix A. Major stationary sources of air pollution and other sources covered by Title V are required to obtain an operating permit that includes emission limitations and such other conditions as are necessary to assure compliance with applicable requirements of the Act. See CAA sections 502(a) & 504(a).

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

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

The appeal of a federal PSD permit decision is governed by the regulations at 40 CFR § 124.19. Authority to review federal PSD permits rests exclusively within the purview of the Environmental Appeals Board. 40 CFR S 124.19(a). Where a federal PSD permit is appealed to the Board, the permit is not effective and construction may not begin until the Board has disposed of the appeal. 40 CFR § 124.15

Because Hawaii's state implementation plan lacks an approved PSD program, the applicable requirements governing the issuance of PSD permits in Hawaii are the federal PSD regulations at 40 CFR § 52.21. See 40 CFR § 52.632. Although EPA Region IX delegated administration of the PSD program in Hawaii to the State, 48 Fed. Reg. 51,682 (Nov. 10, 1983); 54 Fed. Reg. 23,978 (June 5, 1989), PSD permits issued by Hawaii are federal permits. Appeals of those permits are accordingly governed by 40 CFR § 124.19 and are heard exclusively by the Environmental Appeals Board.

In light of the allocation of permit review authority outlined above, I decline to review the merits of any PSD issues raised in a petition to veto under Title V where EPA is the PSD permitting authority (either directly or by virtue of a delegation agreement with a state or local government) and a party desiring to contest PSD issues could have brought those issues to the Environmental Appeals Board under 40 CFR S 124-19. Instead, in such cases, I will dispose of Title V veto petitions

in a manner that preserves the Board's jurisdiction over PSD permit appeals.<sup>1</sup> In contrast, where a state or local government has a SIP-approved PSD program and the Environmental Appeals Board lacks jurisdiction to entertain PSD permit appeals, the merits of PSD issues are ripe for consideration in a timely veto petition under Title V.

## I. PSD ISSUES

Petitioners' Title V petitions contain a number of allegations which appear to challenge DOH's failure to comply with the requirement of the PSD program in issuing the consolidated PSD/operating permit at issue. In fact, Petitioners have made substantially identical allegations in appeals currently pending before the Environmental Appeals Board. See PSD Appeals Nos. PSD 96-10, PSD 96-11, & PSD 96-16. Petitioners' allegations regarding (1) baseline studies of air pollution; (2) studies of meteorological conditions; (3) air pollutant emissions (including sulfur, ammonia, ammonia compounds, lead and other dangerous chemicals) that will be released by the new KCP plant; (4) appropriate levels of sulfur in fuel; (5) consideration of background emissions; (6) consideration of environmental impacts; (7) the applicable ambient air quality standard; (8) the selection of Best Available Control Technology ("BACT") (including the use of Selective Catalytic Reduction ["SCR"], ammonia releases related to the use of SCR, and emission limits related to the selection of BACT); (9) greenhouse gas emissions; and (10) siting concerns, appear to relate to concerns that may arise in the issuance of construction permits required by EPA's PSD regulations.

Because of the Environmental Appeals Board's exclusive authority to review PSD determinations, I deny Petitioners' request that EPA object to the issuance of the KCP permit on the basis of those allegations identified above insofar as they relate to PSD issues. This disposition of the PSD issues is not intended to address the merits of Petitioners' claims regarding

---

1 Pursuant to section 504(f) of the Act, many states have exercised their authority to adopt a -permit shield- provision in their Title V permit program. In states which have adopted such a provision, compliance with the terms of the Title V permit is deemed compliance with the applicable requirements of the Act. Thus, a potential conflict could arise between the terms of a Title V permit purporting to grant authority to construct and operate and the Environmental Appeals Board's exclusive jurisdiction to review PSD issues. To enable the Board to fully consider the issues raised in a PSD appeal, I may have no alternative but to veto a permit in such cases. Potential conflicts of this nature could be avoided by the crafting of Title V permit programs in such a way that makes clear that PSD provisions are not effective while a PSD appeal is pending before the Board. Notably for purposes of my decision today, Hawaii's Title V program does not provide for a permit shield." See Hawaii Administrative Rules, Title 11, chapter 60.1.

PSD issues; plenary authority to do so remains with the Board. As noted above, until the Board disposes of the currently pending appeals, the KCP permit is not effective and construction may not begin.

## II. OTHER ISSUES

Petitioners Tanimoto and Growney allege that the KCP permit was improperly issued because it was issued under Hawaii Administrative Rules which are not part of the Hawaii SIP. However, the Act does not require that a state's Title V permitting program be incorporated into a SIP. Under section 502(d) of the Act, a state must simply have a program that is approved by EPA under Title V in order to issue Title V permits. As noted above, EPA has granted interim approval of the State of Hawaii's Administrative Rules governing the issuance of Covered Source permits as substantially fulfilling the requirements of Title V and 40 CFR part 70. The KCP permit was issued in accordance with these rules. Petitioners' requests for objection to the KCP permit with respect to this issue are thus denied.

Petitioners Tanimoto and Growney also claim that the public record provided by DOH was not complete and that the Kawaihae Cogeneration Partnership's application for a Title V permit was not submitted in the proper form. Petitioners, however, have failed to identify any examples of wrongdoing in support of their allegations. Because of Petitioners' failure to present any specific facts in support of their allegations of misconduct, the petitions are denied with respect to this claim.

In their Title V petitions, Petitioners have generally failed to identify the particular statutory or regulatory basis for their allegations. This has made it difficult to assess the exact nature of Petitioners' Title V claims with the exception of the matters addressed in the preceding two paragraphs. As to Petitioners' remaining allegations, to the extent any of these allegations relate to matters other than the PSD program, Petitioners have failed to identify any applicable requirements with which the permit is not in compliance. I accordingly deny the petitions for review and objection to the KCP permit with respect to these issues.

CONCLUSION

For the reasons set forth above, I deny the petitions of Linda Dela Cruz, James Growney, and Jojo Tanimoto requesting the Administrator to object to the issuance of the KCP permit pursuant to CAA section 505(b). Their PSD claims, currently pending before the Environmental Appeals Board, will be addressed by the Board.

MAR 10 1997

Date

Carol M. Browner  
Administrator