IN RE MAUI ELECTRIC COMPANY

PSD Appeal No. 98–2

ORDER DENYING REVIEW

Decided September 10, 1998

Syllabus

Before the Board is a petition seeking review of certain conditions of a prevention of significant deterioration ("PSD") permit, Permit No. 0067–01–C (the "Permit"), issued by the State of Hawaii's Department of Health ("DOH"). The Permit was issued to Maui Electric Company, Ltd. ("MECO"). The petitioner is Waimana Enterprises, Inc. ("Waimana").

The Permit would authorize MECO to expand its Maalaea Generating Station located in Maalaea, Maui (the "Station"). The proposed expansion consists of constructing and operating two 20 megawatt ("MW") combustion turbine generators, identified as M17 and M19 ("Units M17 and M19"). MECO had initially applied for a permit to expand the Station to include three new generators, including Units M17 and M19 and a steam powered generator, to be operated in so-called combined cycle mode. However, MECO subsequently amended its application, requesting that the construction and permitting be considered in two phases, with Phase 1 being the construction and operation of Units M17 and M19 in "simple cycle" mode. The Permit, as issued by DOH, would authorize operation of Units M17 and M19 in simple cycle mode and specifies that fuel oil no. 2 shall be Best Available Control Technology ("BACT") for control of sulfur dioxide ("SO_2") and water injection shall be BACT for control of nitrogen oxides ("NO_x").

Waimana argues that the Permit should require naphtha fuel as BACT for control of SO_2 and selective catalytic reduction ("SCR") as BACT for control of NO_x. Both DOH and U.S. EPA Region IX filed responses in opposition to Waimana's Petition.

Held: (1) Review of DOH's SO_2 BACT determination is denied because (a) Waimana's arguments based on an alleged inconsistency between this Permit and a PSD permit previously issued to Kawaihae Cogeneration Partners ("KCP") and Waimana's arguments based on an alleged inconsistency with the Region's prior statements regarding the availability of naphtha were not raised during the public comment period and, therefore, will not be considered as a basis for review of DOH's SO_2 BACT decision, and (b) Waimana's argument based on DOH's own statements regarding the availability of naphtha fail to show any clear error in DOH's responses to comments.

(2) Review of DOH's BACT determination for control of NO_x is denied because Waimana's arguments fail to show clear error in DOH's determination that SCR is not demonstrated for use in single cycle operation of Units M17 and M19, and Waimana's arguments fail to show that it was clear error for DOH to require re-evaluation of BACT upon conversion to combined cycle operation in Phase 2 of MECO's project, rather than specifying now that SCR will be required as BACT upon conversion.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Stein:

Before the Board is a petition seeking review of certain conditions of a prevention of significant deterioration ("PSD") permit, Permit No. 0067–01–C (the "Permit"), issued by the State of Hawaii's Department of Health ("DOH").[1] The Permit was issued to Maui Electric Company, Ltd. ("MECO"). The petitioner is Waimana Enterprises, Inc. ("Waimana").[2] Waimana contends that the Permit should be reviewed by the Board because certain of the Permit's conditions are clearly erroneous and/or involve an improper exercise of discretion.

I. *BACKGROUND*

The Permit was issued by DOH on January 6, 1998, and would authorize MECO to expand its Maalaea Generating Station located in Maalaea, Maui (the "Station"). The proposed expansion consists of constructing and operating two 20 megawatt ("MW") simple cycle combustion turbine generators, identified as M17 and M19 (the "Project" or "Units M17 and M19"). The Station currently has five 2.5 MW diesel engine generators, six 5.6 MW diesel generators, four 12.5 MW diesel generators, two 20 MW combustion turbines with a heat recovery steam generator, one 18 MW steam turbine generator, and one 600 kilowatt ("KW") emergency black start diesel engine unit. DOH Response to Petition for Review ("DOH Response") at 1.

---

[1] DOH administers the PSD program in Hawaii pursuant to a delegation of authority from U.S. EPA Region IX (the "Region"). Because DOH acts as EPA's delegate in implementing the federal PSD program within the State of Hawaii, the Permit is considered an EPA-issued permit for purposes of federal law, and is subject to review by the Board pursuant to 40 C.F.R. § 124.19. *In re Kawaihae Cogeneration Project,* 7 E.A.D. 107, 109 n. 1 (EAB 1997). *In re Commonwealth Chesapeake Corp.,* 6 E.A.D. 764, 765 n.1 (EAB 1997); *In re West Suburban Recycling and Energy Center,* L.P., 6 E.A.D. 692, 695 n.4 (EAB 1996) ("For purposes of Part 124, a delegate State stands in the shoes of the Regional Administrator [and must] follow the procedural requirements of Part 124. * * * A permit issued by a delegate is still an 'EPA-issued permit;' * * *.") (quoting 45 Fed. Reg. 33,413 (May 19, 1980)).

[2] The original petition for review was filed under the name of Kawaihae Cogeneration Partners. After DOH filed a motion to dismiss the petition and after full briefing by all parties, the Board entered an order directing counsel for Kawaihae Cogeneration Partners and Waimana to amend the petition to name Waimana as the petitioner. *In re Maui Electric Co.*, PSD Appeal No. 98–2 (EAB, Apr. 3, 1998) (Order on Motion to Dismiss). That amendment was filed on April 10, 1998.

The public was given notice and an opportunity to comment on the draft permit (the "Draft Permit") between May 16, 1997, and June 21, 1997. DOH Response at 2. In addition, a public hearing was held on June 19, 1997. *Id*. Waimana submitted comments regarding the Draft Permit to DOH during the public comment period. *See* Letter from Rodney Kaulupali to Dr. Lawrence Miike of DOH (June 20, 1997) (the "Comment Letter").

DOH prepared a summary of the comments received during the comment period and provided written responses to the comments. *See* Summary of Comments and Department of Health Responses Draft Permit for Maui Electric Company, Ltd. (Oct. 22, 1997) ("Response to Comments"). DOH made four changes to the Draft Permit in response to comments received during the public comment period, and it made one "in-house" change unrelated to the public comments and testimony received. DOH Response at 2. In October 1997, DOH submitted the Permit to U.S. EPA Region IX,[3] and the Region determined that the permit was "eligible for issuance" in December 1997.[4]

In January 1998, DOH issued its decision to grant the Permit and on February 9, 1998, the petition for review of the Permit was filed. *See* Petition for Review of PSD/CSP Permit (the "Petition"). In the Petition as amended,[5] Waimana objects to the Permit on the grounds that, according to Waimana, the conditions of the Permit specifying the best available control technology ("BACT") for sulfur dioxide ("SO_2") and nitrogen oxides ("NO_X") are less stringent than the conditions specified in a PSD permit issued to Kawaihae Cogeneration Partners ("KCP"),[6] and that such conditions "are clearly erroneous and result from an improper exercise of discretion on an important policy." Petition at 2. Waimana objects that the

---

[3] Pursuant to the Region's delegation agreement with Hawaii, the Region retains the authority to concur on DOH's determinations of what constitutes "best available control technology" for the control of regulated pollutants in PSD permits issued by DOH, and to concur on DOH's evaluation of air impact modeling analyses. Amended Delegation Agreement, 54 Fed. Reg. 23,978 (June 5, 1989).

[4] The Certified Index to the Administrative Record ("Certified Index") prepared by DOH states that the Region confirmed that the Region's review period under the delegation agreement had expired and stated that "EPA was unable to review [the] permit, however, [the] permit is eligible for issuance." Certified Index at 7. In its response to the Petition, the Region, however, states that it "has reviewed DOH's response to the petition for review and continues to concur with the permit issued by DOH to Maui Electric Company." EPA Region 9's Response to the Petition for Review at 1.

[5] For a description of the amendment, *see supra* note 2.

[6] KCP is a limited partnership, comprised of four partners. Two of Waimana's wholly owned subsidiaries are partners in KCP. Order on Motion to Dismiss at 6.

Permit should require burning of naphtha fuel as BACT for control of SO_2 emissions and should require use of selective catalytic reduction ("SCR") as BACT for control of NO_X emissions.

Both DOH and the Region have filed responses in opposition to Waimana's petition for review of the Permit. DOH argues that Waimana's petition must be denied because: "(1) the petition fail[s] to establish that [DOH]'s decision to grant the permit was based on clear error of fact or law; (2) the petition fail[s] to establish the existence of an important policy matter or exercise of discretion warranting review by this Board; or (3) the issues raised in the petition were not raised during the public comment period, and therefore were not preserved for review." DOH's Response at 4. The Region filed a response to supplement the DOH's Response "and to clarify Region 9's position with respect to certain issues raised on appeal." EPA Region 9's Response to the Petition for Review (the "Region's Response") at 1.

For the reasons stated below, we conclude that Waimana has failed to sustain its burden of showing that review by this Board of the Permit's BACT conditions for SO_2 and NO_X is warranted.

II. *DISCUSSION*

A. *Statutory, Regulatory and EPA Guidance Background and Standard of Review*

1. *Statutory and Regulatory Requirements*

The Clean Air Act ("CAA") established the PSD program to regulate air pollution in certain areas, known as "attainment" areas, where air quality meets or is cleaner than the national ambient air quality standards ("NAAQS"), as well as areas that cannot be classified as "attainment" or "non-attainment" ("unclassifiable" areas). CAA §§ 160–169, 42 U.S.C. §§ 7470–7479; *see In re EcoEléctrica*, L.P., 7 E.A.D. 56, 59 (EAB 1997); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 766–767 (EAB, Feb. 19, 1997). The NAAQS are "maximum concentration 'ceilings' measured in terms of the total concentration of a pollutant in the atmosphere." U.S. EPA, New Source Review Workshop Manual (Draft, Oct. 1990) ("Draft Manual") at C.3. NAAQS have been set for six criteria pollutants: SO_2, particulate matter, NO_X, carbon monoxide, ozone, and lead. *See* 40 C.F.R. §§ 50.4–50.12. The pollutants at issue in this case are SO_2 and NO_X.

The CAA and the PSD regulations require, among other things, that new major stationary sources and major modifications of such sources employ the "best available control technology," or BACT, to minimize emissions of regulated pollutants. CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2). The PSD regulations define BACT in part as follows:

> [BACT] means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under [the CAA] which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

40 C.F.R. § 52.21(b)(12).

2. *EPA Guidance Regarding BACT*

EPA's Office of Air Quality Planning and Standards issued the New Source Review Workshop Manual (Draft, Oct. 1990), also known as the Draft Manual, as a guidance document for use in conjunction with new source review workshops and training, and to guide permitting officials with respect to PSD requirements and policy. Although it is not accorded the same weight as a binding Agency regulation, the Draft Manual has been looked to by this Board as a statement of the Agency's thinking on certain PSD issues. *See*, e.g., *EcoEléctrica*, 7 E.A.D. at 59 n.3; *In re Masonite Corp.*, 5 E.A.D. 551, 558 n.8 (EAB 1994).

Under the guidance of the Draft Manual, permit issuers use a "top-down" method for determining BACT:

> The top-down process provides that all available control technologies be ranked in descending order of control effectiveness. The PSD applicant first examines the most stringent—or "top"—alternative. That alternative is established as BACT unless the applicant demonstrates, and the permitting authority in its informed judgment agrees, that technical considerations, or energy, environmental,

> or economic impacts justify a conclusion that the most stringent technology is not "achievable" in that case.

Draft Manual at B.2.

The Draft Manual provides for a five-step procedure for implementing the top-down analysis. The first step is to identify all "available" control options. Draft Manual at B.5. Here, the term "available" is defined to mean "those air pollution control technologies or techniques with a practical *potential* for application to the emissions unit and the regulated pollutant under evaluation." *Id.* (emphasis added).

The second step, which as discussed below was central to DOH's BACT analysis for SO_2 and NO_X emissions in the present case, is to eliminate "technically infeasible" options. *Id.* at B.7. This step involves first determining for each technology whether it is "demonstrated," which means that it has been installed and operated successfully elsewhere, and if not demonstrated, then whether it is "available" and "applicable." Under the second step of the top-down analysis, the term "available" is used to refer to whether the technology is commercially available. *Id.* at B.17. An available technology is considered to be "applicable" if it can be installed and operated on the source type under consideration. *Id.* Technologies identified in step one but that are not demonstrated and either not available or not applicable are eliminated under step two from further analysis.

In step three of the top-down analysis, the remaining control technologies (not eliminated in step two) are ranked and then listed in order of control effectiveness for the pollutant under review, with the most effective alternative at the top. *Id.* at B.7. In the fourth step of the analysis, the energy, environmental, and economic impacts are considered and the top alternative is either confirmed as appropriate or is determined to be inappropriate based on a demonstration "that circumstances exist at the source which distinguish it from other sources where the control alternative may have been required previously, or that argue against the transfer of technology or application of new technology." *Id.* at B.29.

Finally, under step five of the Draft Manual's guidance, the most effective control alternative not eliminated in step four is selected as BACT. *Id.* at B.53. In the present case, Waimana contends that naphtha should have been selected as BACT for controlling SO_2 emissions and SCR should have been selected as BACT for controlling NO_X emissions.

3. *Standard of Review*

The Board's review of PSD permitting decisions is governed by 40 C.F.R. part 124, which "provides the yardstick against which the Board must measure" petitions for review of PSD and other permit decisions. *Commonwealth Chesapeake*, 6 E.A.D. 764, 769 (EAB 1997) (quoting *In re Envotech*, L.P., 6 E.A.D. 260, 265 (EAB 1996)). Pursuant to those regulations, a decision to issue a PSD permit will ordinarily not be reviewed unless the decision is based on either 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); *accord*, e.g., *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 113–14 (EAB 1997); *EcoEléctrica*, 7 E.A.D. at 60–61; *Commonwealth Chesapeake*, 6 E.A.D. at 769. The preamble to section 124.19 states that the Board's power of review "should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional [State] level * * *." 45 Fed. Reg. 33,412 (May 19, 1980); *accord Kawaihae*, 7 E.A.D. at 113–14.

The burden of demonstrating that review is warranted rests with the petitioner challenging the permit decision. 40 C.F.R. § 124.19(a); *accord*, e.g., *Kawaihae*, 7 E.A.D. at 114; *EcoEléctrica*, 7 E.A.D. at 61; *Commonwealth Chesapeake*, 6 E.A.D. at 769. As part of this burden of demonstrating that review is warranted, "the petition must contain a demonstration that all reasonably ascertainable issues raised therein were first raised during the public comment period." *In re Essex County (N.J.) Resource Recovery Facility*, 5 E.A.D. 218, 223–224 (EAB 1994); *accord In re Broward County*, 4 E.A.D. 705, 714 (EAB 1993). Section 124.19(a) also requires that a petitioner both state the objections to the permit that are being raised for review and explain why the permit decision maker's previous response to those objections (i.e., the decision maker's basis for the decision) is clearly erroneous or otherwise warrants review. *See Kawaihae*, 7 E.A.D. at 114; *see also In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995).

B. *BACT for Sulfur Dioxide (SO_2)*

Waimana requests that the Board review the Permit's BACT requirement for controlling SO_2 emissions, which specifies that MECO may burn fuel oil no. 2 in combustion turbines M17 and M19. Waimana objects that the Permit should require burning of naphtha fuel. It argues that review is warranted because, according to Waimana, the conditions of the Permit specifying BACT for controlling SO_2 emissions are less stringent than the conditions specified in a PSD permit issued to KCP and that "[n]ot requiring the same level of compliance for similar projects located in the same geographical area, utilizing the same technology and being built in the

same time period is arbitrary, capricious and an abuse of discretion." Petition at 3.

Waimana further argues that naphtha fuel is cost effective, available and technically feasible. *Id.* In support of its arguments that naphtha fuel is cost effective and available, Waimana cites a letter from David Howekamp, Director Air and Toxics Division, Region IX to DOH dated February 6, 1996 (the "Howekamp Letter").[7] As further support of its contention that naphtha is available, and in support of its contention that naphtha is technically feasible, Waimana cites DOH's own BACT analysis set forth in the Ambient Air Quality Impact Report (May 3, 1997) (the "AAQ Report").[8]

As discussed below, we deny Waimana's request for review of the Permit's conditions specifying BACT for the control of SO_2 emissions because many issues that Waimana seeks to raise on appeal were not raised during the public comment period, and because Waimana has not shown that DOH's responses to the comments that were raised regarding naphtha's availability and technical feasibility contain clear error.

1. *Objections That Were Not Raised During the Comment Period Will Not Be Considered in Support of the Petition*

In the Petition, Waimana raises a variety of arguments that were not raised during the public comment period. Waimana's primary argument on appeal is that the Permit's conditions for BACT to control SO_2 emissions are inconsistent with, or contrary to, the PSD permit issued to KCP. Specifically, Waimana argues that DOH's determination in this case that naphtha has a questionable long-term availability is contrary to DOH's determination with respect to the KCP permit, and Waimana argues that the KCP permit determined that naphtha fuel is cost effective. Waimana's Petition at 2–3. Waimana also argues that DOH made inconsistent cost determinations in that, in this case, "DOH relied heavily on the lack of existing fuel facilities on Maui able to handle naphtha" and "[i]n determining that KCP is required to burn naphtha, DOH also considered the lack of fuel facilities able to handle naphtha at the port of Kawaihae [Big Island of Hawaii]." *Id.* at 3. Waimana also supports its argument that naphtha is

---

[7] The Howekamp Letter was sent by the Region to DOH in connection with the PSD permit application of Hawaii Electric Light Company with respect to its proposed power plant at Keahole on the Big Island of Hawaii.

[8] The AAQ Report contains DOH's description of MECO's project, DOH's BACT analysis, and DOH's ambient air quality impact assessment. The AAQ Report is listed as item H.6 in the Certified Index.

both cost effective and available by citing the Howekamp Letter. None of these arguments, however, will be considered by us because Waimana failed to raise them during the public comment period in this case.

Pursuant to 40 C.F.R. §§ 124.13 and 124.19, "the petition must contain a demonstration that all reasonably ascertainable issues raised therein were first raised during the public comment period." *In re Essex County (N.J.) Resource Recovery Facility*, 5 E.A.D. 218, 223–224 (EAB 1994); *accord In re Broward County*, 4 E.A.D. 705, 714 (EAB 1993).[9] "[T]he purpose of these regulations is to ensure that all matters are first raised with the permit issuer. In this manner the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary." *Essex County*, 5 E.A.D. at 224 (quoting *In re Union County Resource Recovery Facility*, 3 E.A.D. 455, 456 (Adm'r 1990)).

We have generally required a demonstration that the issue to be reviewed on appeal was specifically raised during the public comment period. *See*, e.g., *In re Florida Pulp and Paper Assoc.*, 6 E.A.D. 49, 54–55 (EAB 1995) (holding that comment regarding one aspect of testing of sludge required by an NPDES permit was not sufficient to preserve for appeal the general question of authority to require any sludge testing); *In re Amoco Oil Co.*, 4 E.A.D. 954, 975 (EAB 1993) (holding that argument regarding whether the EPA needed information that was required to be provided as a RCRA permit condition was not preserved for appeal where comment only raised issue regarding the burden of providing the information); *In re Pollution Control Indus. of Ind., Inc.*, 4 E.A.D. 162, 166–169 (EAB 1992) (holding that comments on two particular aspects of testing requirement of an RCRA permit were not sufficient to raise general objection to any testing requirement).

In the present case, Waimana's arguments regarding the alleged inconsistency between the two permits and DOH's underlying factual determinations were reasonably ascertainable prior to the expiration of the public comment period; however, the issues upon which Waimana now seeks review were not raised in its comments. DOH issued its decision granting the KCP permit in October 1996, and we issued our decision denying review of the KCP permit in April 1997. *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107 (EAB 1997). Thus, the conditions of the KCP permit and DOH's underlying analysis and findings were ascertainable as early as October 1996, and in any event were fully ascertain-

[9] For an issue to be preserved for review, it is not necessary for the petitioner to show that the issue was raised by the petitioner, only that the issue was raised by someone during the public comment period. *See Kawaihae*, 7 E.A.D. at 127 n.27.

able no later than April 1997. However, Waimana's comments submitted in June 1997 did not argue that the Draft Permit's conditions for controlling SO_2 were inconsistent with the KCP permit. Waimana also did not state any objection to the AAQ Report or the Permit based on any alleged inconsistency in DOH's cost analysis with respect to the capacity for handling naphtha at the fuel facilities at the two ports.[10]

Although Waimana did not argue that the Draft Permit's conditions for controlling SO_2 were inconsistent with the KCP permit, it did refer to the KCP permit in its Comment Letter and it did make general reference to the KCP project as background to its comments regarding SO_2 emissions. However, those references were not sufficient to raise the issues that Waimana now seeks to have us review on appeal. In particular, Waimana referred to the KCP permit in its comments regarding BACT for controlling NO_x emissions set forth in a separate section of the Comment Letter where there was no discussion of SO_2 emissions. Comment Letter at 2. Because that reference to the KCP permit was in another section of the Comment Letter, it was not sufficient to apprise DOH that Waimana sought to challenge the Draft Permit's conditions for controlling SO_2 based on any alleged inconsistency with the terms of the KCP permit.

Waimana also made general reference to the KCP project as background to its specific comments regarding SO_2 emissions. Waimana stated that it is proposing to build a generation facility at Kawaihae on the island of Hawaii. Comment Letter at 1. It stated further that it has had "discussions with the two local major fuel suppliers regarding supply of naphtha to the proposed project in Kawaihae." *Id.* at 2. Waimana described those discussions and its objections to DOH's SO_2 BACT analysis for the MECO Permit as follows:

> Both suppliers have indicated that naphtha can be delivered at an equivalent cost of diesel on a BTU basis without any additional cost for inter-island barging over the cost of barging diesel (except for increased volume). Therefore, we question the incremental cost of $1,816,525 for inter-island barging that was provided in the BACT analysis.

Id. Waimana also stated that "[c]urrently fuel suppliers ship a large amount of naphtha overseas for consumption." *Id.* Although these comments raise

[10] Waimana also has not shown that these issues were raised by any other person during the public comment period, and based on our review of the record, there is no indication that these issues were raised by another commenter.

two specific issues regarding DOH's analysis of naphtha's availability and cost effectiveness, the general reference to the KCP project, which was stated as a background explanation showing how Waimana developed its knowledge regarding the specific issues, was not sufficient to apprise DOH that Waimana believed that the KCP permit had already determined that naphtha is available and cost effective.[11]

In addition, the specific issue regarding naphtha's cost effectiveness raised in Waimana's comments was not the same issue it now argues should be reviewed on appeal. In particular, the objection stated in the Comment Letter was based on the estimated increase in annualized cost for inter-island barging. Comment Letter at 2. However, DOH's estimated increase in annualized cost of inter-island barging was separately itemized from the estimate of the increase in annualized cost for "fuel terminalling." AAQ Report at 18.[12] There was no suggestion in the comments that Waimana objected that DOH's estimate of the costs for terminals or fuel facilities was too high or that the estimate was inconsistent with the analysis underlying the KCP permit. Thus, Waimana's comments did not raise the issue regarding the costs for fuel facilities that it now seeks to have reviewed on appeal.

Moreover, it deserves repeating that, although the comments quoted above did raise the general issue of whether naphtha is available from fuel suppliers, which Waimana also requests that we review on appeal and which we discuss in the following part of this opinion, Waimana's comments did not contain any suggestion that the KCP permit had already determined that naphtha is available; nor was there any suggestion that any such determination made in the KCP permit should be followed in this case.[13] The general background reference to the KCP

---

[11] Contrary to Waimana's argument, DOH decided in the KCP case "not to select naphtha as BACT because of concerns for long-term availability and cost of the fuel on the island." *Kawaihae*, 7 E.A.D. at 131 (noting that KCP had offered to burn low sulfur fuel for the first two years, but that naphtha was not determined to be BACT).

[12] The AAQ Report estimated the increase in annualized cost of inter-island barging at $1,816,525 and the cost of fuel terminalling at $992,543. AAQ Report at 18.

[13] In the Order on Motion to Dismiss, it was noted that the Comment Letter questioned "the methods proposed in the draft permit for controlling sulfur dioxide and nitrogen oxide[s]," Order on Motion to Dismiss at 11, and that the central allegation in the Petition regarding consistency was expressed as a concern in the Comment Letter. *Id.* at 10. Those observations, however, were made based upon a general review of the Petition and the Comment Letter looking to whether KCP and Waimana had a joint interest. Those observations did not purport to reflect the specific issue-by-issue analysis required by the

Continued

project was not sufficient to raise these issues.[14] Because these issues were not raised during the public comment period, they will not be considered as a basis for review of the Permit now on appeal.[15]

Waimana also cites the Howekamp Letter for the proposition that the Region allegedly has stated that naphtha is "available," Petition at 3 and n.2, thereby seeking review of DOH's finding that naphtha has an uncertain long-term availability. We reject Waimana's reliance on the Howekamp Letter because Waimana made no reference to the Howekamp Letter in its comments regarding BACT for control of SO_2 emissions. *See* Comment Letter at 2. Although Waimana made reference in its comments regarding DOH's NO_x analysis to a letter dated February 6, 1996 from the Region to DOH, which we assume was intended to refer to the Howekamp Letter, this reference in the discussion of BACT for NO_x was not sufficient to raise issues with respect to the SO_2 BACT determination discussed in a separate section of Waimana's Comment Letter. Accordingly, we also will not consider Waimana's argument that the Howekamp Letter shows that DOH committed clear error in its findings regarding BACT for controlling SO_2 emissions. Next, we consider Waimana's arguments that were raised both during the public comment period and in its Petition.

---

regulations and our prior opinions for determining whether each issue was properly preserved for review on appeal. Thus, notwithstanding any contrary suggestion in the Order on Motion to Dismiss, we have determined that Waimana did not raise in its comments the issue of consistency between the KCP permit's conditions for controlling SO_2 emissions and the conditions of the Permit issued to MECO, nor did Waimana raise any issue regarding DOH's analysis of the cost for fuel facilities to handle naphtha.

[14] This case presents an example supporting the requirement that the permit issuer should have an opportunity, prior to review on appeal, to respond to comments by either modifying the permit or explaining why a modification is not appropriate. *See*, e.g., *Essex County*, 5 E.A.D. at 224. In its response to the Petition, DOH has replied to Waimana's arguments regarding the KCP permit by stating that "MECO's source-specific cost parameters were higher than KCP's due to the inherent infrastructure differences between the two sites," DOH's Response at 8, and DOH has attached to its Response supporting evidence from the record of KCP's case. *See generally*, *id*. at 5–9. DOH also provides extensive documentation and argument showing that its analysis in this case is not inconsistent with its analysis of similar issues in the KCP case. *Id*. No doubt DOH would have provided such material in its Response to Comments had these issues been raised during the public comment period. However, because the issues were not raised by Waimana during the public comment period, we will not consider them on appeal and need not consider the adequacy of DOH's reply provided in DOH's Response to the Petition.

[15] Likewise, we will not consider Waimana's arguments regarding the application by Enserch Development Corporation for a PSD permit as such arguments were not raised during the public comment period.

2. *Waimana Has Not Sustained Its Burden of Showing Clear Error in DOH's Analysis of Naphtha's Availability and Technical Feasibility*

Waimana argued generally during the public comment period, and now in its Petition, that naphtha fuel is "available and technically feasible" as BACT for controlling SO_2 emissions. Petition at 3. Waimana cites DOH's own BACT analysis set forth in the AAQ Report as showing that naphtha is available and technically feasible.[16] However, we deny review because Waimana has not sustained its burden of showing that DOH's responses to the comments regarding the issues of availability and technical feasibility contain clear error.

Waimana argues that because the AAQ Report concluded that naphtha is technically feasible, DOH erred in rejecting naphtha as BACT for controlling SO_2 emissions. Waimana is correct that the AAQ Report did conclude that naphtha is technically feasible. Specifically, the AAQ Report states as follows:

> The use of naphtha fuel in combustion turbine generators, units M17 & M19 is considered technically feasible. This alternative however, currently cannot be deemed BACT due to uncertainties with naphtha's long-term availability.

AAQ Report at 19. However, it is important to note that DOH concluded that naphtha is technically feasible because DOH determined that "the required revisions to the facility do not appear unreasonable." *Id.* at 17. Both this determination regarding the reasonableness of the required revisions to the facility and the facts regarding the issue of availability were discussed under the heading of "Technical Feasibility." *Id.* at 17–18. Thus, in the sense of whether naphtha can be used in the same type of combustion turbines, the AAQ report did conclude that naphtha is technically feasible, although it also discussed questions regarding the long-term availability of naphtha under the same general heading of "Technical Feasibility."

The Draft Manual's guidelines for step two of the BACT analysis recognize that it may be feasible from a technical perspective to install a technology on a facility, but that the technology may still be rejected on the grounds that it is not available. The guidelines for step two generally

[16] As noted above, Waimana stated in its comments that fuel suppliers ship a large amount of naphtha overseas for consumption. Comment Letter at 2. DOH made a similar observation in the AAQ Report at 17 regarding the potential availability of naphtha.

look to whether the technology is both "available" and "applicable." Draft Manual at B.17.[17] To determine whether a control technology is "applicable," the permit issuer considers the question of whether the technology "may reasonably be deployed on or applicable to the source type under consideration." Draft Manual at B.18. In the present case, as noted above, DOH answered this question in the affirmative by stating that naphtha can be burned in the type of combustion generators to be used by MECO. AAQ Report at 17. Thus, Waimana is correct that DOH determined that naphtha is technically feasible, but only in the sense that it is "applicable." This determination, however, does not complete the analysis of feasibility under step two because the Draft Manual's guidance directs that the permit issuer should also consider the question of "availability." Draft Manual at B.17. Thus, the fact that DOH concluded that naphtha is technically feasible does not show that DOH erred by eliminating naphtha out of concern regarding its long-term availability.

Waimana, however, also contends that the AAQ Report shows that DOH clearly erred in its determination regarding naphtha's availability. We reject this contention because we do not find any clear error in the AAQ Report's conclusions, or DOH's responses to comments, regarding naphtha's availability.

The term "available" is used in step two of the Draft Manual's guidelines to refer to whether the technology "can be obtained by the applicant through commercial channels or is otherwise available within the common sense meaning of the term." Draft Manual at B.17. In an early PSD permit case, the Administrator stated that "[t]he question of availability for purposes of BACT is a practical, fact determination, using conventional notions of whether the technology can be put into use." *In re Pennsauken County, New Jersey, Resource Recovery Facility*, 2 E.A.D. 667, 671–672 (Adm'r 1988). In that case, the Administrator cited to Webster's dictionary definition of "available" as "that which can be 'used,' or is 'usable,' or can be 'got, had, or reached; * * * accessible.'" *Id.* at 672 n.13 (citing Webster's New World Dictionary of the American Language 96 (2d College ed. 1972)).

In the present case, although the AAQ Report does state that local refineries have reported sufficient inventories of naphtha to support a

[17] Although DOH does not expressly state that it eliminated naphtha from further consideration under the guidelines for step two of the top-down analysis, we note that the Draft Manual describes step two as considering "technical feasibility" of the potentially available control options, and the substance of DOH's analysis was set forth under the heading "Technical Feasibility." Thus, it appears that DOH intended to eliminate naphtha under step two of the guidelines.

project of Units M17 & M19's size, the AAQ Report also identified other information showing that the available inventory actually fluctuates from year to year and is not sufficient in some years. AAQ Report at 17. Specifically, DOH noted that the State Department of Business, Economic Development and Tourism (the "DOB") reported that for the years 1991 to 1995, naphtha production was between 950,000 to 2,100,000 barrels per year with excess or exported naphtha inventories of approximately 160,000 to 1,300,000 barrels per year. *Id*. Noting further that MECO's proposed project would require approximately 980,000 barrels per year, DOH concluded that "naphtha inventories for some years are insufficient to support the [MECO] project." *Id*. In its response to comments, DOH reiterated that the "[r]esearch showed that naphtha's island-wide inventory fluctuated from year to year, where inventories for certain years were insufficient to support the MECO M17 & M19 project." Response to Comments at 9.

We reject Waimana's reliance on the AAQ Report because Waimana has not shown in its Petition that DOH's response to comments is not adequate. *See,* e.g., *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 780 (EAB 1997) (petitioner failed to explain "why the State's response is clearly erroneous."); *In re Envotech, L.P.*, 6 E.A.D. 260, 268–269 (EAB 1996) (holding that the petitioner must demonstrate why the permit issuer's response to objections is clearly erroneous or otherwise warrants review). Waimana's Petition merely argues that the AAQ Report shows that "DOH has concluded * * * that local refineries have indicated suppliers ship a large amount of naphtha overseas for consumption." Petition at 3–4 (citing AAQ Report at 19). Waimana does not discuss DOH's response that it relied upon the contrary information set forth in the report prepared by the DOB, and Waimana fails to explain why it was clear error for DOH to rely upon the DOB report.

We have explained that "where an alternative control option has been evaluated and rejected, those favoring the option must show that the evidence 'for' the control option clearly outweighs the evidence 'against' its application." *In re Inter-Power of New York, Inc.*, 5 E.A.D. 130, 144 (EAB 1994) (emphasis in original). Here, DOH's analysis shows that DOH evaluated naphtha as a potential control option and rejected it based on questions regarding the long-term availability of naphtha in the local market. The AAQ Report analyzes both the information supporting DOH's conclusion and the contrary information referred to by Waimana, and DOH's Response to Comments states that DOH relied upon the DOB report in reaching its conclusion. Because Waimana has not attempted to demonstrate in its Petition why the information upon which it seeks to rely clearly outweighs the information reported by the DOB, Waimana has

failed to meet the requirement of showing that DOH's response is not adequate.

For the foregoing reasons, we deny Waimana's request that we review DOH's decision to eliminate naphtha from further consideration as BACT for control of SO_2 emissions based upon DOH's concern regarding naphtha's long-term availability.

C. *BACT for Nitrogen Oxides (NO_X)*

Waimana also objects to the Permit conditions regarding BACT for control of NO_X emissions on the grounds that, according to Waimana, DOH has not equally applied requirements for the installation of SCR technology. Waimana again contends that the conditions of the MECO Permit are inconsistent with the conditions of the PSD permit issued to KCP, here with respect to control of NO_X emissions. The Permit specifies that water injection is initially BACT for NO_X emissions, with the potential that additional controls may be added based on supplemental review in certain circumstances. Waimana contends that instead the Permit should require SCR as BACT for control of NO_X because (1) "EPA considers SCR as BACT to control the emissions of NO_X * * * for combined cycle combustion turbines," citing the Howekamp Letter; and (2) "it is also technically feasible to use SCR in combustion turbines being operated in two single cycle mode as demonstrated by KCP's permit." Petition at 4.[18] We deny review of the Permit's NO_X conditions because Waimana has failed to sustain its burden of showing clear error.

It is necessary to take a brief excursion into the nomenclature used to describe the various modes for operating combustion turbine generators in order to understand why Waimana's arguments do not show clear error in DOH's decision making. There are three modes of operating combustion turbine generators relevant to this case: "simple cycle," "combined cycle" and "cogeneration." *See* Letter from Patricia Uyehara Wong on behalf of MECO to Wilfred K. Nagamine of DOH (Nov. 27, 1996) (the

[18] Waimana also asserts that "DOH abused its discretionary authority, when it included conditions allowing a demonstration project controlled by MECO, itself, to determine the applicability of BACT." *Id.* at 4–5. However, Sections C.4.c and G, Attachment II of the Permit, which require a supplemental BACT determination upon completion of the demonstration project, were included in the Draft Permit, *see* Response to Comments at 2–4 (identifying changes from the Draft Permit that were incorporated in the Permit as finalized), and Waimana has not demonstrated that this issue regarding MECO's control over the demonstration project was raised during the public comment period. Therefore, it will not be considered now on appeal. *Essex County*, 5 E.A.D. at 224 (holding that issues not raised during the comment period will not be considered in support of a petition for review). *See supra* part II.B.1.

"Wong Letter") at 1. The relevant distinction between these modes of operation relates to the discharge of exhaust gases. "In simple cycle mode, exhaust gases from the turbine are ducted directly to the stack, without passing through a waste heat recovery boiler." *Id.* In contrast, in both cogeneration and combined cycle operation, "the exhaust passes through a waste heat recovery boiler, generating steam for power production or other purposes, before being released to the atmosphere." *Id.* Because exhaust from simple cycle operation is released directly to the stack without passing through a waste heat recovery boiler, "exhaust temperatures in true simple cycle mode are much higher than in cogeneration or combined cycle modes." *Id.* As discussed below, this distinction between the different modes of operating combustion turbine generators shows why Waimana's arguments fail to address the mode of operation required by the Permit in this case.

MECO initially had applied for a permit to operate its project in so-called combined cycle. However, during the permitting process, MECO amended its application and requested that its construction of the Facility and the related permitting be considered in two phases, because completion of the first phase was needed as soon as possible to meet the electrical needs of Maui. Letter from William A. Bonnet on behalf of MECO to Wilfred K. Nagamine of DOH (Mar. 15, 1996) (the "Bonnet Letter") at 1. MECO described the two phases as "Phase 1 being installation and simple cycle operation of combustion turbine units M17 and M19, and Phase 2 being installation of heat recovery steam generators and steam turbine unit M18 to allow combined cycle operation." *Id.* MECO stated further that "[w]hen Phase 2 of the Maalaea project is permitted, MECO will update BACT for combined cycle operation and its analysis of combined cycle air quality impacts." *Id.* at 2. Subsequently, the Permit was issued to MECO for Units M17 and M19 providing for only simple cycle operation, Permit, Attachment 1, § A.1, and requiring a re-evaluation of ambient air quality impacts and BACT in the event of future development converting Units M17 and M19 to combined cycle operation. *Id.* at § A.3. Thus, the Permit issued by DOH to MECO only authorizes operation of Units M17 and M19 in simple cycle mode and does not authorize combined cycle operation.[19]

In eliminating SCR as BACT for NO_X in the Draft Permit, DOH initially stated in the AAQ Report that "[t]he SCR control technology was determined to be technically feasible, but not fully demonstrated for long-term

[19] In order to convert to combined cycle operation, MECO must therefore apply for a new permit or a permit modification taking into account the re-evaluation of the ambient air quality impacts and BACT for combined cycle operation, among such other matters as may be required by the regulations or the permitting authority.

operations on combustion turbine generators operating in simple cycle mode. It is for this reason, SCR was not accepted as BACT at this time." AAQ Report at 13 (emphasis added). The AAQ Report stated that "[f]or simple cycle operations, the SCR's effectiveness remains questionable." *Id.* at 11. The potential problems identified by the AAQ Report relate to the higher temperature of the exhaust from simple cycle operation when passing through the catalyst, including catalyst poisoning, formation of ammonium sulfate/bisulfate, and catalyst degradation. *Id.* at 10. In particular, the AAQ Report stated that "[h]igh temperatures can damage the catalyst and reduce its effectiveness." *Id.* Thus, DOH's reasons for elimination of SCR as BACT for controlling NO_x emissions in the Draft Permit related to the conditions associated with simple cycle operation of the Units M17 and M19 as contemplated by Phase 1 of the MECO project.

In its comments on the Draft Permit, Waimana raised two issues regarding DOH's BACT determination for controlling NO_x emissions. First, Waimana objected that even if SCR is not required to be used at the MECO Facility when Units M17 and M19 are operating in simple cycle mode, the permit should include a condition requiring the use of SCR if the turbines are converted to combined cycle operation. Comment Letter at 1. In particular, Waimana stated that the Region has determined that SCR is demonstrated for use during combined cycle operation and, therefore, "the permit conditions should state that if the plant is converted to combined cycle then SCR shall be used for control of NO_x emissions." Comment Letter at 1 and 2.

Second, Waimana objected that SCR has also been demonstrated for use in simple cycle mode and, therefore, SCR should be required as a condition of the permit even under the simple cycle operating mode authorized by the Permit. Comment Letter at 2. Waimana made reference to two forms of evidence in support of its contention that SCR has been demonstrated for use in simple cycle mode. First, Waimana stated that "[l]iterature from a number of SCR vendors * * * show that a high temperature SCR is available with vendor guarantees of performance." Comment Letter at 2. Second, Waimana stated that "two projects in the Sacramento Municipal Utility District (SMUD) of California have been permitted to operate in a simple cycle configuration utilizing high temperature SCR." *Id.*

In its response to comments, DOH acknowledged that SCR is deemed BACT for combustion turbines operating in combined cycle mode.[20] It

[20] The Region states that it continues to maintain that BACT for an oil-fired combined cycle turbine is SCR. Region's Response at 3.

stated, however, that it "did not choose to incorporate a specific condition to install SCR upon [the turbine's] conversion to combined cycle, because a BACT determination is made on a case by case basis for the time period the new project or modification is proposed." Response to Comments at 6. It further stated that "[t]o dictate a BACT determination made today for a future project may be obsolete by the time the future project is proposed, or may be inappropriate due to the specific circumstances of the project." *Id*. While DOH rejected the request for the addition of a specific condition to the Permit requiring use of SCR on conversion to combined cycle operation, DOH did modify the Permit by adding Special Condition No.A.3 requiring MECO to "re-evaluate the ambient air quality impacts and Best Available Control Technology for these units, even if a significant net emissions increase is not seen with this conversion." Permit, Attachment II § A.3.

DOH's Response to Comments also rejected Waimana's second comment in which Waimana asserted that SCR has been demonstrated for use in simple cycle mode. It stated "[a]lthough claims were made that the SCR has been used in simple cycle projects, operating conditions of those plants were found to be dissimilar with the MECO M17 & M19 project." *Id*. DOH stated that the two plants in Sacramento California "fire[] only natural gas or a natural gas and methane blend fuels containing very little fuel sulfur." *Id*. Thus, DOH issued the Permit with conditions for use of water injection, rather than SCR, to control NO_X emissions.[21]

Now, in its Petition, Waimana contends that the Permit should have required SCR as BACT for control of NO_X because (1) "EPA considers SCR as BACT to control the emissions of NO_X * * * for combined cycle combustion turbines," citing the Howekamp Letter; and (2) "it is also technically feasible to use SCR in combustion turbines being operated in two single cycle mode as demonstrated by KCP's permit." Petition at 4. We reject these arguments because Waimana has not shown any clear error in DOH's actions.

With respect to Waimana's first argument in its Petition that EPA considers SCR as BACT for controlling NO_X emissions in combined cycle mode, Waimana has not identified any error in DOH's acknowledgment that SCR is presently considered BACT in combined cycle operations or in DOH's addition of Special Condition No.A.3 to the Permit requiring a

[21] The Region states that it concurs with the BACT requirements for controlling NO_X set forth in the Permit for simple cycle operation. Region's Response at 2 and 7 ("With respect to Phase 1 of the construction at Units M17 and M19, the Region does not at this time require SCR as BACT.").

new BACT determination and re-evaluation of ambient air quality impacts upon conversion to combined cycle operation. In light of the specific requirement set forth in Special Condition No.A.3 of the Permit requiring a re-evaluation upon conversion, we find no clear error in DOH's response that it would not be appropriate for DOH to make a BACT determination at this time for Phase 2 of MECO's project because the technology selected today may be "obsolete by the time the future project is proposed." Response to Comments at 6. Moreover, Special Condition No.A.3 and MECO's representations in the Bonnet Letter contemplate that issuance of this Permit for Phase 1 of MECO's project will not result in a lower level of pollution control upon conversion to combined cycle than would be appropriate for a combined cycle project.[22] Thus, Waimana has not shown any clear error in DOH's responses to Waimana's comments, and we therefore deny review of these issues. *See*, e.g., *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 780 (EAB 1997); *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996) (petitioner's arguments that fail to explain why the response to comments is erroneous, are rejected).

We also find that Waimana's second argument regarding the question of whether SCR should be deemed BACT for combustion turbines operated in simple cycle mode fails to show any clear error in DOH's decision making. In its Petition, Waimana has abandoned the arguments raised in its Comment Letter regarding vendor guarantees and the two projects in California showing that SCR is demonstrated in simple cycle mode. Thus, Waimana has implicitly acknowledged that DOH's responses to these issues were adequate. Instead, Waimana now contends that the KCP permit demonstrates that "it is also technically feasible to use SCR in combustion turbines being operated in two single cycle mode." Petition at 4.

As discussed above, the distinction between combined cycle and simple cycle operation as related to the viability of SCR technology has

[22] MECO's acknowledgment in the Bonnet Letter that another project located in Hawaii was in the process of determining BACT for combined cycle operation and its commitment in the same paragraph to update its BACT analysis for combined cycle operations at the time of conversion can only be read as a commitment that it will employ emissions control technology appropriate for a combined cycle operation, notwithstanding the prior issuance of the Permit for Phase 1. *See* Bonnet Letter at 1–2. The Region has expressed concern that the BACT analysis for Phase 2 of MECO's project "should, of course, analyze the viability of BACT using the same baseline for control costs that was established for Phase 1 of the MECO Permit," and that the Permit for Phase 1 does not establish the maximum emissions limit that would be allowed as BACT in combined cycle operation in Phase 2. *See* Region's Response at 4. In light of MECO's commitment in the Bonnet Letter described above, we would anticipate carefully scrutinizing any effort to use the prior issuance of the Permit for Phase 1 as a means of obtaining a less stringent BACT requirement on completion of Phase 2, if such issues are presented to us for review when they are ripe. However, we do not rule on the Region's concerns at this time.

formed an integral part of DOH's analysis in this case. *See*, e.g., AAQ Report at 2 (stating that "[t]he turbines will be operated in simple cycle mode. Future plans are to convert M17 & M19 to combined cycle operation, however the future change is not apart [sic] of this project."). Indeed, Waimana acknowledged this distinction by framing its comments in two sections of the Comment Letter, with one section discussing combined cycle operation and the other discussing simple cycle operation. Comment Letter at 1–2. Waimana's reference now in its Petition to the KCP permit, which it characterizes as demonstrating that SCR is feasible in "two single cycle," without any further explanation of the operating conditions of the KCP project and without any explanation as to what is meant by "two single cycle," is not sufficient to show that DOH committed clear error in determining that SCR is not demonstrated for simple cycle operation.

The absence of detail in Waimana's argument is striking in comparison with the Wong Letter contained in the record, which clearly states that there are significant differences between the simple cycle operation contemplated by the Permit in this case and the cogeneration operation of the KCP project. DOH also has stated in its Response to the Petition that "the circumstances and conditions at MECO's and KCP's facilities are different and cannot be compared" due to the differences between simple cycle and cogeneration. DOH Response at 12. Specifically, DOH explains as follows:

> The comparison between KCP's proposed facility and M17 and M19 is invalid and does not demonstrate a basis for review of the permit. Contrary to Waimana's assertion, the proposed KCP facility will not operate in true simple cycle mode. Rather, the KCP facility will operate in a cogeneration cycle combustion turbine application employing a heat recovery steam generator ("HRSG"). KCP's cogeneration cycle mode is different from the simple cycle mode of M17 and M19.

DOH's Response at 10 (citations omitted).

DOH explains further that "[i]n true simple cycle operations, there is typically no HRSG" and "[t]he exhaust temperatures of the simple cycle turbines, like those of M17 and M19, are generally high and outside the

operating windows of the SCR units." *Id*. at 11. Finally, DOH concludes as follows:

> Currently, MECO's M17 and M19 project is a true simple cycle operation and is not equipped with a HRSG. Exhaust temperatures from the simple cycle turbines could exceed the recommended operating range of the SCR. MECO's plans to operate the turbines as peaking units will further exacerbate operating conditions by subjecting the SCR to wide temperature swings and extreme thermal stresses. In short, the circumstances and conditions at MECO's and KCP's facilities are different and cannot be compared.

Id. at 12. These distinctions between the KCP project and MECO's Units M17 and M19 are consistent with the record in this case. *See* Wong Letter. In contrast, not only has Waimana failed to explain in its Petition why it believes that the two projects are similar, Waimana has also failed to identify (and we have not found) any support in the record for Waimana's contention that the projects are similar or that KCP's use of HRSG is not a valid distinction. Accordingly, Waimana's arguments in its Petition fail to show any clear error in DOH's analysis.

For the foregoing reasons, we deny Waimana's request that we review the Permit conditions specifying that water injection, not SCR, will be BACT for controlling NO_x emissions for this Permit for Phase 1 of MECO's project.

III. *CONCLUSION*

For the reasons set forth above, we deny Waimana's Petition for review of the PSD Permit issued by DOH to MECO.

So ordered.