

BEFORE THE ADMINISTRATOR  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

_____ )	
IN THE MATTER OF: )	
)	
HU HONUA BIOENERGY FACILITY )	ORDER RESPONDING TO
PEPEEKEO, HAWAII )	PETITIONER’S REQUEST THAT
)	THE ADMINISTRATOR
)	OBJECT TO ISSUANCE OF
PERMIT No. 0724-01-C )	STATE OPERATING PERMIT
)	
ISSUED BY THE CLEAN AIR BRANCH )	
FOR THE HAWAII DEPARTMENT OF HEALTH )	PETITION No. IX-2011-1
)	
_____ )	

**ORDER GRANTING IN PART AND DENYING IN PART**  
**PETITION FOR OBJECTION TO PERMIT**

**I. INTRODUCTION**

The United States Environmental Protection Agency (EPA) received a Petition (the Petition) dated August 26, 2011, from Preserve Pepe’eekeo Health & Environment (the Petitioner) pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661d(b)(2), and 40 C.F.R. § 70.8(d), titled “Petition Requesting That the Administrator Object to Issuance of the Proposed Title V Operating Permit for Hu Honua Bioenergy, LLC” (Petition). The Petition requests that the EPA object to the title V operating permit proposed by the Clean Air Branch (CAB), Environmental Management Division, Hawaii Department of Health (HDOH), for the Hu Honua Bioenergy Facility (Hu Honua) in Pepeekeo, Hawaii (Proposed Permit).<sup>1</sup> On August 31, 2011, HDOH issued a final permit for Hu Honua, identified as Covered Source Permit (CSP) Number 0724-01-C, pursuant to Hawaii Administrative Rules (H.A.R.), Title 11, Chapter 60.1, Air Pollution Control (Final Permit).<sup>2</sup> Hu Honua is a proposed biomass electricity generating facility.

---

<sup>1</sup> In its Petition, the Petitioner references a “Revised Draft Permit,” a “Draft Permit,” and a “proposed title V permit.” *See e.g.*, Petition at 1, 3, 5. In referencing permits other than the Proposed Permit, the EPA’s understanding is that the Petition is addressing a version of the permit other than the final permit since the final permit was issued after the Petitioner submitted its Petition. In this Order, we will refer to the Proposed Permit when generally discussing the Petitioner’s request that the EPA object to Hu Honua’s title V permit, and we will note the specific version of the permit that we are referencing as needed.

<sup>2</sup> Hawaii uses the term “covered source” to refer to all title V (part 70) major sources, all sources subject to a requirement under the Prevention of Significant Deterioration (PSD) program, and sources subject to a standard under section 111 or section 112 of the CAA. *See e.g.*, H.A.R. § 60.1-1 (definition of “covered source”).

The Petitioner requests that the Administrator object to the Proposed Permit because the Petitioner alleges that the Proposed Permit does not comply with the CAA and implementing regulations at 40 C.F.R. Part 70. The Petitioner raises thirteen Claims in its Petition as bases for the Administrator to object to the Proposed Permit. Each Claim is explained further in Section IV of this Order.

This Order contains the EPA's response to the Petition. Based on a review of the Petition, other relevant materials, including the Final Permit, permit record, and relevant statutory and regulatory authorities, and as explained below, I grant in part and deny in part the Petition requesting that the EPA object to the Hu Honua title V Proposed Permit.

## **II. STATUTORY AND REGULATORY FRAMEWORK**

Section 502(d)(1) of the CAA, 42 U.S.C. § 7661a(d)(1), requires each state to develop and submit to the EPA an operating permit program to meet the requirements of title V of the CAA. The state of Hawaii originally submitted its title V program governing the issuance of operating permits on December 20, 1993. *See* 59 *Fed. Reg.* 37957 (July 26, 1994). The EPA granted interim approval of Hawaii's title V program on December 1, 1994, and granted full approval on November 30, 2001. 59 *Fed. Reg.* 61549; 66 *Fed. Reg.* 62945; 40 C.F.R. Part 70, Appendix A. The program is now codified in H.A.R., Title 11, Chapter 60.

All major stationary sources of air pollution and certain other sources are required to apply for title V operating permits that include emission limitations and other conditions as necessary to assure compliance with applicable requirements of the CAA, including the requirements of the applicable State Implementation Plan (SIP). CAA §§ 502(a) and 504(a), 42 U.S.C. §§ 7661a(a) and 7661c(a). The title V operating permit program does not generally impose new substantive air quality control requirements (referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting and other requirements to assure sources' compliance with applicable requirements. 57 *Fed. Reg.* 32250, 32251 (July 21, 1992). One purpose of the title V program is to "enable the source, States, EPA, and the public to understand better the requirements to which the source is subject, and whether the source is meeting those requirements." *Id.* Thus, the title V operating permit program is a vehicle for ensuring that air quality control requirements are appropriately applied to facility emission units and for assuring compliance with such requirements.

Applicable requirements for a new major stationary source or for a major modification to a major stationary source include the requirement to obtain a preconstruction permit that complies with applicable new source review (NSR) requirements. For major sources, the NSR program is comprised of two core types of preconstruction permit programs. Part C of the CAA establishes the Prevention of Significant Deterioration (PSD) program, which applies to areas of the country, such as Pepeekeo, Hawaii, that are designated as attainment or unclassifiable for the national ambient air quality-standards (NAAQS). CAA §§ 160-169, 42 U.S.C. §§ 7470-7479. Part D of the Act establishes the nonattainment NSR program, which applies to areas that are designated as nonattainment with the NAAQS. At issue in this Order is the PSD part of the NSR program, which requires a major stationary source in an attainment area to obtain a PSD permit before beginning construction of a new facility or undertaking certain modifications. CAA § 165(a)(1),

42 U.S.C. § 7475(a)(1). The analysis under the PSD program must address two primary and fundamental elements (among other requirements) before the permitting authority may issue a permit: (1) an evaluation of the impact of the proposed new or modified major stationary source on ambient air quality in the area, and (2) an analysis ensuring that the proposed facility is subject to Best Available Control Technology (BACT) for each pollutant subject to regulation under the Act. CAA §§ 165(a)(3), (4), 42 U.S.C. §§ 7475(a)(3), (4); 40 C.F.R. § 52.21(j), (k).

The EPA has two largely identical sets of regulations implementing the PSD program: one set, found at 40 C.F.R. § 51.166, contains the requirements that state PSD programs must meet to be approved as part of a SIP. The other set of regulations, found at 40 C.F.R. § 52.21, contains the EPA's federal PSD program, which applies in areas without a SIP-approved PSD program. Because Hawaii's SIP lacks an approved PSD program, the applicable requirements governing the issuance of PSD permits in Hawaii are the federal PSD regulations at 40 C.F.R. § 52.21. *See* 40 C.F.R. § 52.632. Accordingly, the applicable requirements of the Act for new major sources or major modifications in Hawaii include the requirement to comply with PSD requirements under 40 C.F.R. § 52.21. *See, e.g.*, 40 C.F.R. § 70.2.<sup>3</sup> Although the EPA Region 9 delegated administration of the PSD program to Hawaii, 48 *Fed. Reg.* 51682 (Nov. 10, 1983); 54 *Fed. Reg.* 23978 (June 5, 1989), PSD permits issued by HDOH are federal permits.<sup>4</sup>

State and local permitting authorities issue title V permits pursuant to the EPA-approved title V programs. Under CAA section 505(a), 42 U.S.C. § 7661d(a), and the relevant implementing regulations at 40 C.F.R. § 70.8(a), states are required to submit each proposed title V operating permit to the EPA for review. Upon receipt of a proposed permit, the EPA has 45 days to object to final issuance of the proposed permit if the EPA determines that the proposed permit is not in compliance with applicable requirements or the requirements of the Act. 42 U.S.C. § 7661d(b)(1); *see also* 40 C.F.R. § 70.8(c) (providing that the EPA will object if the EPA determines that a proposed permit is not in compliance with applicable requirements or requirements under 40 C.F.R. Part 70).

If the EPA does not object to a permit on its own initiative, section 505(b)(2) of the Act and 40 C.F.R. § 70.8(d) provide that any person may petition the Administrator, within 60 days of the expiration of the EPA's 45-day review period, to object to the permit. The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). Section 505(b)(2) indicates the Administrator "shall grant or deny such petition

---

<sup>3</sup>Under 40 C.F.R. § 70.1(b), "[a]ll sources subject to [the title V regulations] shall have a permit to operate that assures compliance by the source with all applicable requirements." "Applicable requirements" are defined in 40 C.F.R. § 70.2 to include "(1) [a]ny standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the [Clean Air] Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in [40 C.F.R.] part 52; (2) [a]ny term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act."

<sup>4</sup>Appeals of those permits are accordingly governed by 40 C.F.R. § 124.19 and are heard exclusively by the Environmental Appeals Board. Furthermore, 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 C.F.R. § 124.15.

within 60 days after the petition is filed.” This provision does not direct how the Administrator must address the individual issues in each petition, thus providing the EPA with discretion in determining the best approach for addressing individual issues in each petition. The EPA may consider the complexity of the issues, the inter-relatedness of the issues, agency resources, public participation opportunities, source-specific considerations and other relevant factors in deciding the most appropriate approach for addressing the issues in each petition. *See also In the Consolidated Environmental Management, Inc. – Nucor Steel Louisiana*, Petition Nos. VI-2010-02 and VI-2011-03 at 11 (March 23, 2012) (*Nucor I Order*) (“Section 505(b)(2) does not specify whether the EPA must respond initially to all of the issues raised in a petition....the Act does not explicitly require that, nor does it foreclose the EPA from granting a petition based on one or more threshold issues where those issues potentially affect the analysis or disposition of other issues in the petition.”).

In response to such a petition, the Act requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the Act. 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(c)(1); *see also New York Public Interest Research Group, Inc. (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2d Cir. 2003). Under section 505(b)(2) of the Act, the burden is on the petitioner to make the required demonstration to the EPA. *MacClarence v. EPA*, 596 F.3d 1123, 1130-33 (9th Cir. 2010); *Sierra Club v. Johnson*, 541 F.3d 1257, 1266-1267 (11th Cir. 2008); *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677-78 (7th Cir. 2008); *Sierra Club v. EPA*, 557 F.3d 401, 406 (6th Cir. 2009) (discussing the burden of proof in title V petitions); *Whitman*, 321 F.3d at 333 n.11; *In the Consolidated Environmental Management, Inc. – Nucor Steel Louisiana*, Petition Nos. VI-2011-06 and VI 2012-07 at 4-8 (June 19, 2013) (*Nucor II Order*) (explaining the petitioner’s demonstration burden). In evaluating a petitioner’s claims, the EPA considers, as appropriate, the adequacy of the permitting authority’s rationale in the permitting record, including the response to comments. If, in responding to a petition, the EPA objects to a permit that has already been issued, the EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures set forth in 40 C.F.R. §§ 70.7(g)(4) and (5)(i) - (ii), and 40 C.F.R. § 70.8(d).

### **III. BACKGROUND**

#### **A. Facility**

A more detailed description of Hu Honua is included in HDOH’s Initial Covered Source Permit Review Summary, dated August 2011 (Final Permit Review Summary).<sup>5</sup> In summary, Hu Honua is located in Pepeekeo, Hawaii, on a 2,557-acre site on the Big Island of Hawaii. “The Hu Honua Bioenergy facility will generate electricity for Hawaii Electric Light Company, Inc. (HELCO) and consists of a 407 MMBtu/hour boiler<sup>6</sup>, a steam turbine generator, and an 836 kilowatt (kW) emergency generator.” *Id.* at 2. Hu Honua will have a net power output of 21.5 megawatts (MW)

---

<sup>5</sup> Part 70 requires permitting authorities to prepare a “statement of basis” for each title V permit. 40 C.F.R. § 70.7(a)(5). A “permit review summary” prepared and issued by HDOH in conjunction with a covered source permit is the functional equivalent of a statement of basis.

<sup>6</sup> “MMBtu” means one million British thermal units.

to the grid. *Id.* at 1. “Hu Honua is proposing to burn biomass in the form of wood in the boiler and burn 100% biodiesel during startups and as a supplemental fuel during low-load operation of the boiler. An 836 kW electrical generator will be operated only during emergencies and will only combust 100% biodiesel.” *Id.* at 1.

## **B. Permit History**

On August 28, 2009, Hu Honua submitted an application for a new covered source permit (Permit Application)<sup>7</sup> to HDOH to re-start operations at the facility, which had previously ceased operation on December 31, 2004. Final Permit Review Summary at 2. On August 13, 2010, HDOH released a Draft Permit for public comment. On December 27, 2010, Hu Honua submitted a revised application (Revised Permit Application) to HDOH.<sup>8</sup> On February 17, 2011, HDOH released a Revised Draft Permit for a second round of public comment. After the end of the second public comment period on March 21, 2011, HDOH made significant changes to the Revised Draft Permit before submitting the Proposed Permit to the EPA on May 19, 2011. The EPA’s 45-day review period on the Proposed Permit ended on July 5, 2011. During its 45-day review period, the EPA did not object to the Proposed Permit, but did send a letter to HDOH dated June 30, 2011, with several comments on the Proposed Permit (EPA Letter).<sup>9</sup> The Petitioner timely filed its Petition on August 26, 2011, within the 60-day window following the EPA’s 45-day review period, which ended on September 6, 2011. *See* CAA § 505(b)(2), 42 U.S.C. § 7661d(b)(2). On August 31, 2011, HDOH issued the Final Permit and the Final Permit Review Summary, which included Addendum A (HDOH’s summary of and its responses to public comments received during the second public comment period, or “2011 RTC”) and Addendum B (HDOH’s response to the EPA Letter, or “HDOH Response to EPA Letter”). It is the EPA’s understanding that on September 1, 2011, HDOH announced on its website and Hu Honua announced on its website that the Final Permit had been issued.

## **C. Timeliness of Petition**

Pursuant to the CAA, if the EPA does not object during its 45-day review period, any person may petition the Administrator within 60 days after the expiration of the 45-day review period to take such action. CAA § 505(b)(2); 42 U.S.C. § 7661d(b)(2). Thus, any petition seeking the EPA’s objection to the Proposed Permit was due on or before September 6, 2011. The Petition, dated August 26, 2011, was received by the EPA on August 30, 2011. Thus, the EPA finds the Petitioner timely filed its Petition.

---

<sup>7</sup> HDOH refers to its title V program as the “covered source” program. That term is defined in HDOH’s regulations (HAR §11-60.1-1) and delineates the universe of stationary sources subject to title V permitting in Hawaii. The program is an integrated permitting program in which a source’s title V and preconstruction requirements are addressed in a single permitting process. HDOH implements provisions of both its own regulations and federal PSD regulations (40 C.F.R. § 52.21) in issuing permits to its covered sources. *See* Hawaii Department of Health – Clean Air Act Title V Operating Permit Program Evaluation, Final Report, conducted by the U.S. Environmental Protection Agency, Region 9 (September 28, 2010).

<sup>8</sup> HDOH’s permit record references several other submittals of additional information between August 2009 and February 2011. *See, e.g.*, Final Permit Review Summary.

<sup>9</sup> We discuss specific elements of the EPA Letter as appropriate in the EPA Responses in Section IV of this document.

#### IV. EPA DETERMINATIONS ON CLAIMS RAISED BY THE PETITIONER

##### A. CLAIM 1: The Administrator Must Object Based on Issues Raised by the EPA Itself

**Petitioner's Claim.** The Petitioner claims that the CAA “precludes EPA from deferring to state authority regarding the adequacy of a Title V permit.” Petition at 5, *citing* CAA § 505(b)(2),<sup>10</sup> and *Whitman*, 321 F.3d at 333. The Petitioner points to the EPA Letter as evidence of such “impermissible deferral” since the EPA Letter “falls short of ‘objecting’ to Hu Honua’s Draft Permit, rather deferring to [HDOH] to add final permit conditions...to ensure, on an on-going basis, that Hu Honua is not a major source of CO and HAPs...” Petition at 5. The Petitioner asserts that H.A.R. § 11-60-1-90(1) “specifically requires permits contain ‘emission limitations and standards, including operational requirements and limitations to assure compliance with all applicable requirements at time of permit issuance.” *Id.* (emphasis in original). The Petitioner asserts that the “Revised Draft Permit that the EPA and the public reviewed does not contain operational requirements and limitations to assure compliance with all applicable requirements, and [the EPA Letter] acknowledge[s] this fact in identifying additional conditions that [HDOH] must add to the final permit to ensure on an on-going basis that Hu Honua is not a major source of CO and HAPs.” *Id.* at 5-6 (emphasis in original). The Petitioner therefore concludes, “[w]here, as here, the draft permit is inadequate, EPA has a duty to object (CAA § 505(b)(2); *Whitman*, 321 F.3d at 333).” *Id.* at 6.

**EPA's Response.** For the reasons provided below, I deny the Petitioner's request for an objection to the Proposed Permit on this claim.

The EPA finds that the Petitioner's claim is moot because, as explained later in this Order with respect to Claims 2, 4 and 8, the EPA is granting the Petitioner's claims regarding ensuring compliance with applicable criteria pollutant and hazardous air pollutant (HAP) regulations. The Petitioner's Claim 1 contends that the EPA should have objected to the Proposed Permit based on these specific issues (i.e., ensuring compliance with applicable PSD and MACT requirements). In this Order, the EPA is granting the Petitioner's request that it object to issues regarding PSD and MACT requirements as raised in Claims 2, 4 and 8 of the Petition. Therefore, no further response on the issues raised in Claims 2, 4 and 8 is necessary. And, I find that Claim 1 of the Petition is moot.

I also deny the Petitioner's request for an objection to the Proposed Permit on this claim on the alternative basis that the Petitioner may not raise this claim in a title V petition. This is not a claim that the title V permit is out of compliance with the requirements of the Act; rather, the Petitioner is making a separate claim that the EPA had a duty to object to the Proposed Permit as a result of the EPA Letter. That is not a proper claim to raise in a petition submitted under CAA § 505(b)(2). Under § 505(b)(2), a petitioner must demonstrate that “the *permit* is not in compliance with the requirements” of the CAA before the EPA will object to the permit. *See* 42 U.S.C. § 7661d(b)(2) (emphasis added). Under § 505(b)(2) of the Act, the burden is on the

---

<sup>10</sup> Petitioner cites to CAA § 505(b)(2) as support for its assertions in this claim. We note, however, that CAA § 505(b)(2) contains the EPA's authority to object to a permit in response to a petition filed with the Administrator, while § 505(b)(1) contains the EPA's authority to object to a permit during the EPA's 45-day review period.

petitioner to make the required demonstration to the EPA. *MacClarence*, 596 F.3d at 1130-33; *Sierra Club v. Johnson*, 541 F.3d at 1266-1267; *Citizens Against Ruining the Environment*, 535 F.3d at 677-78; *Sierra Club v. EPA*, 557 F.3d at 406; *Whitman*, 321 F.3d at 333 n.11. Here, the Petitioner's claim is not based on a substantive flaw with the Proposed Permit, or a procedural flaw with how the permitting authority processed the permit, as required by CAA § 505(b)(2). *See also* 40 C.F.R. § 70.8(c) and (d). Instead, it appears this claim is based on contentions regarding the EPA's obligations to act under a separate provision of the CAA. The title V petition process is not the appropriate forum to challenge such actions or inactions.

I also deny the Petitioner's request for an objection to the Proposed Permit on this claim on the alternative basis that the Petitioner has not demonstrated that the EPA had an obligation to object to the Proposed Permit. Even if this is a proper claim to be raised in a title V petition, the Petitioner does not demonstrate how the EPA Letter qualifies as the requisite determination that would trigger the EPA's obligation to object to the Proposed Permit. Section 505(b)(1) and 40 C.F.R. § 70.8(c)(1) govern when the EPA must object to a permit as a result of its 45-day review. The Petitioner does not demonstrate how the EPA Letter constitutes the Administrator's determination under these provisions. Instead, the Petitioner cites H.A.R. §11-60.1-90(1) as requiring the EPA to object to the Proposed Permit because the Petitioner seemingly views the EPA Letter as evidence that the Proposed Permit does not contain "all applicable requirements at the time of permit issuance." Petition at 5-6. The Petitioner does not explain how this provision, which apparently governs the contents of HDOH's final covered source permits, applies to an EPA decision-making process on the Proposed Permit.

Moreover, we find that the Petitioner's reliance on *NYPIRG v. Whitman* is inapposite because the court in that case considered a different statutory provision in a different context from this Petition, i.e., whether CAA § 505(b)(2) requires the EPA to object to a permit in response to a petition from the public. *Whitman*, 321 F.3d at 332-334. Here, the EPA was commenting on a Proposed Permit during its 45-day review period under CAA § 505(b)(1), and the Petitioner has not demonstrated why it was inappropriate for the EPA to issue a comment letter instead of objecting to the Proposed Permit.

For the foregoing reasons, I deny the Petition as to this claim.

## **B. CLAIM 2: The Permit Fails to Ensure Compliance with Criteria Air Pollutant Emission Limits**

***Petitioner's Claim.*** The Petitioner contends generally that the Proposed Permit "fails to ensure compliance with criteria air pollutant emission limits," that the major source threshold of 250 tons per year (tpy) would have been exceeded if the CO emissions estimate had been based on a more accurate CO emissions factor, and that sources over this threshold are subject to PSD requirements. Petition at 6.

The Petitioner makes four sub-arguments related to this claim as to whether Hu Honua is a major source. *See generally* Petition at 6-10. First, the Petitioner contends that the "draft permit underestimates CO emissions." Petition at 6 (listed as Claim 2A in the Petition). Citing the EPA Letter, the Petitioner asserts, among other things, that it has not been sufficiently established that

Hu Honua's boiler will not be a major source of CO. *Id.*; *see also* EPA Letter at 3. The Petitioner contends that Hu Honua's CO potential to emit (PTE) as calculated in the Revised Permit Application underestimates CO emissions because it used an emission factor for biodiesel fuel (which is used to start up the boiler) that is based on limited and low-quality data and on steady-state operations, thus underestimating boiler CO emissions during startup. *Id.* at 7, citing the Revised Permit Application at 11. In addition, the Petitioner claims that Hu Honua's calculated CO emissions "omit [CO] emissions during shutdown or upset conditions." *Id.* at 8. The Petitioner points out that the total annual estimated CO emissions are 246.4 tpy, which is just 3.6 tpy below the 250 tpy major source threshold. *Id.* at 6, 8. The Petitioner further states that "[a]ctual emissions of CO are likely to exceed the PSD threshold when accounting for startup, shutdown, and upset conditions." *Id.* at 8.

Second, the Petitioner claims that "the permit lacks enforceable conditions limiting biodiesel usage." *Id.* at 9 (listed as Claim 2C in the Petition). The Petitioner states that "[a]bsent adequate fuel usage limits and monitoring provisions, the Revised Draft Permit fails to ensure that [Hu Honua] is a synthetic minor source." *Id.*

Third, the Petitioner contends that Hu Honua does not qualify as a synthetic minor source because "the Revised Draft Permit lacks federally enforceable conditions to ensure compliance with emission limitations for CO and NO<sub>x</sub>." *Id.* at 9<sup>11</sup> (listed as Claim 2D in the Petition.) The Petitioner claims that "after the fact testing" and "imposition of subsequent controls" is "inappropriate" because "the facility's emissions will not be known, and permit limitations cannot be enforced until after initial startup and after a violation occurs." *Id.* at 9-10. The Petitioner additionally asserts that "[s]ince the State has failed to properly quantify projected emissions and secure adequate initial and on-going emissions, and to impose practically and federally enforceable emission limitations, EPA cannot adequately enforce these limitations and thus must object to this permit." *Id.* at 10.

Fourth, the Petitioner claims that "the draft permit fails to include emissions limitations and monitoring for [sulfur dioxide (SO<sub>2</sub>)]." *Id.* at 8-9 (listed as Claim 2B in the Petition). Pointing to requirements that title V permits incorporate emission limits and standards and contain sufficient periodic monitoring, the Petition claims that "[t]he Draft Permit contains neither emission limits nor monitoring provisions" for SO<sub>2</sub> emissions from biofuels combustion from the boiler. *Id.* at 8.<sup>12</sup> The Petitioner further explains that Hu Honua calculated annual SO<sub>2</sub> emissions of 39.2 tpy

---

<sup>11</sup> Citing the EPA Letter and citing EPA guidance on potential to emit found in three memoranda "dated January 25, 1995 and restated August 25, 1996 and July 10, 1988." Petition at 9. While the Petition does not provide titles or authors for these memoranda, the intended references appear to include: "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)," John S. Seitz, Director, Office of Air Quality Planning and Standards (January 25, 1995); "Extension of January 25, 1995 Potential to Emit Transition Policy," John S. Seitz, Director, Office of Air Quality Planning and Standards, and Robert I. Van Heuvelen, Director, Office of Regulatory Enforcement (August 27, 1996); "Second Extension of January 25, 1995 Potential to Emit Transition Policy and Clarification of Interim Policy," John S. Seitz, Director, Office of Air Quality Planning and Standards, and Eric V. Schaeffer, Director, Office of Regulatory Enforcement (July 10, 1998).

<sup>12</sup> Citing H.A.R. §§ 11-60.1-90(1) and 11-60.1-90(7)(B), 40 C.F.R. §§ 70.6(a)(3) and 71.6(a)(3), and the EPA's Periodic Monitoring Guidance (pp. 3-4). While the Petition does not provide titles or authors for this memorandum, the intended reference appears to be: Eric V. Schaeffer, Director, Office of Regulatory Enforcement, and John S. Seitz, Director, Office of Air Quality Planning and Standards, "Periodic Monitoring Guidance for Title V Operating Permits Programs" (September 15, 1998).



based on an emission rate of 0.028 lb/MMBtu and a maximum heat input of 2,800,000 MMBtu/year, and claims that “the Draft Permit contains no provisions to monitor SO<sub>2</sub> and, thus, lacks a trigger for the adjustment of sorbent injection if the SO<sub>2</sub> emission rate of 0.028 lb/MMBtu were exceeded.” *Id.* The Petitioner asserts that without emission limitations and adequate compliance monitoring, the facility’s SO<sub>2</sub> emissions “may exceed the major source significance threshold for SO<sub>2</sub> emissions of 40 tons [per] year set in H.A.R. § 11-60.1-1, which would require a [Best Available Control Technology (BACT)] analysis for SO<sub>2</sub>.” *Id.* at 8-9.

***EPA’s Response.*** I grant the Petitioner’s request for an objection to the Proposed Permit on this claim. I grant specifically in regard to the Petitioner’s contention that HDOH has failed to ensure that the synthetic minor limits for CO and NO<sub>x</sub>, which were intended to restrict CO and NO<sub>x</sub> PTE below the major source threshold of 250 tpy, are enforceable as a practical matter.<sup>13</sup> However, as explained more fully below, in light of this grant, I am not resolving other issues raised by the Petitioner in Claim 2.

HDOH implements the PSD program under a delegation agreement with the EPA. Under the governing provisions in 40 C.F.R. § 52.21(b)(4), the calculation of a facility’s PTE for purposes of determining whether the facility triggers PSD requirements for a particular pollutant includes consideration of “[a] physical or operational limitation on the capacity of the source to emit [the] pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, ...if the limitation or the effect it would have on emissions is federally enforceable.”<sup>14</sup> In other words, “if a permit applicant agrees to an enforceable limit that is sufficient to restrict PTE, the facility’s PTE is calculated based on that limit.” *In the Matter Of Cash Creek Generation, LLC*, Order on Petition No. IV-2010-4 at 15 (June 22, 2012) (*Cash Creek Order*).

In this case, Hu Honua agreed to accept source-wide CO and NO<sub>x</sub> emission limits of less than 250 tpy, see Final Permit, Section C.6, which along with other permit requirements, were intended to ensure that CO and NO<sub>x</sub> PTE remained below the major source threshold and thus avoid applicability of PSD requirements.<sup>15</sup> Therefore, an EPA objection is warranted if the Final

---

<sup>13</sup> The EPA uses the term “synthetic minor” in this Order to reflect the fact that Hu Honua accepted operational and emissions limits in order to restrict its PTE for purposes of avoiding applicability of major source PSD and MACT requirements, as explained in more detail below. The EPA’s use of this term in this sense is not intended to affect HDOH’s conclusion that the source was not a “synthetic minor source” but rather a major source as defined in H.A.R. §§ 11-60.1-1 because the PTE for CO and NO<sub>x</sub> exceeded 100 tons per year. Final Permit Review Summary at 7.

<sup>14</sup> Although the federal definition of PTE for PSD includes the term “federally enforceable,” following two court decisions, *National Mining Association v. EPA*, 59 F.3d 1351 (D.C. Cir.1995), and *Chemical Manufacturers Ass’n v. EPA*, No. 89-1514, 70 F.3d 637 and 1995 U.S. App. LEXIS 39215 (D.C. Cir. 1995), the EPA clarified that the term “federally enforceable” as used in relation to the definition of PTE for the federal PSD program in 40 C.F.R. § 52.21(b)(4) should be read to mean “federally enforceable or legally and practicably enforceable by a state or local air pollution control agency.” John Seitz, Director, Office of Air Quality Planning and Standards, and Robert Van Heuvelen, Director, Office of Regulatory Enforcement, “Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit” (Jan. 22, 1996), at 3. The term “federal enforceability” has also been interpreted to require practical enforceability. *See, e.g., In re Shell Offshore, Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit*, 13 E.A.D. 357 at 394, n.54 (EAB 2007).

<sup>15</sup> *See* Final Permit, Attachment II, Section C.8 (“This source is exempt from a [PSD] review ... due to the emission limits in Attachment II, Special Conditions Nos. C.6 ....”). Also, in response to a comment that if Hu Honua were

Permit does not impose enforceable limits on the source's CO and NO<sub>x</sub> emissions such that source-wide emissions remain below 250 tpy, the applicable threshold for determining whether Hu Honua is a major stationary source for PSD purposes. 42 U.S.C. § 7479(1) (defining "major emitting facility"); 40 C.F.R. 52.21(b)(1)(i)(b) (defining "major stationary source"). To effectively limit Hu Honua's CO and NO<sub>x</sub> PTE to less than 250 tpy, the CO and NO<sub>x</sub> emissions limits included in Section C.6 of the Final Permit must apply at all times to all actual emissions, and all actual CO and NO<sub>x</sub> emissions must be considered in determining compliance with the respective limits. *See Cash Creek Order* at 15 (finding that a VOC limit was not enforceable as a practical matter where the state agency "failed to provide a reasoned explanation for how the compliance demonstration method associated with the VOC emissions limit, which is used to determine compliance with the source-wide VOC limit, accounts for all actual VOC emissions"). The Final Permit for Hu Honua states that "CO and NO<sub>x</sub> emissions from the facility, including during boiler startups and shutdowns, shall not equal or exceed 250 tons per year, on any rolling twelve-month (12-month) period." Final Permit, Section C.6. However, the Final Permit does not specify how the facility's CO and NO<sub>x</sub> emissions shall be determined or measured for assessing compliance with these CO and NO<sub>x</sub> emission limits in Section C.6, and it is unclear whether all actual CO and NO<sub>x</sub> emissions must be considered in determining compliance with these limits, including emissions during other non-startup/shutdown operating conditions referenced in the permit, such as periods of "malfunction" or "upset conditions." *See, e.g.,* Final Permit, Sections F.3, F.8. and F.9.

The EPA notes that the Final Permit does contain a condition in Section E.14 providing that the "permittee shall calculate and record the CO and NO<sub>x</sub> emissions from the facility, including during boiler startups and shutdowns, on a monthly and rolling twelve-month (12-month) basis." Final Permit, Section E.14. The EPA additionally notes that the Final Permit requires submission of semi-annual monitoring report forms that include "CO and NO<sub>x</sub> emissions from the facility on a monthly and rolling twelve-month (12-month) basis." Final Permit, Section F.6.a.vi. The Final Permit does not specify, however, how the CO and NO<sub>x</sub> emissions shall be calculated for purposes of these two conditions or what information such calculations would be based upon.<sup>16</sup> Nor does the Final Permit specifically connect the reports in Section F.6.a.vi. to determining compliance with the CO and NO<sub>x</sub> emission limits in Section C.6. In addition, these conditions do not clearly provide that all actual facility CO and NO<sub>x</sub> emissions should be considered in determining compliance with the CO and NO<sub>x</sub> emission limits in Section C.6 and do not clearly state that emissions during other non-startup/shutdown operating conditions referenced in the permit (such as malfunction or upset) must be included in determining compliance with those

---

permitted as a synthetic minor source instead of as a PSD source the CO and NO<sub>x</sub> PTE limits would need to be made practicably enforceable, HDOH explained: "The permit has been revised with PSD emission caps for CO and NO<sub>x</sub> in Attachment II, Special Condition No.C.6., monitoring and recordkeeping requirements in Attachment II, Special Condition No.E.14, and additional semiannual reporting requirements to include the data in Attachment II, Special Condition No. F.6.a.vi." 2011 RTC, Addendum B. at 3. In the Final Permit Review Summary, HDOH explained: "To ensure that PSD is not triggered, the permit limits the annual heat input to 2,800,000 MMBtu/yr. .... In addition to the annual heat input limit of 2,800,000 MMBtu/yr for the boiler, the permit also requires that the CO and NO<sub>x</sub> emissions from the facility, including during boiler startups and shutdowns, shall not exceed 250 tons per year, on any rolling twelve-month (12-month) period." Final Permit Review Summary at 6. *See also id.* at 4 (determining that PSD is a "non-applicable requirement").

<sup>16</sup> The EPA notes that the EPA Letter included a comment on adding conditions requiring the use of CEMS data to verify compliance with the annual CO and NO<sub>x</sub> emissions limitations. *See* EPA Letter at 4.

limits. In addition, Section F.6.a.vi does not clearly state that emissions during startup and shutdown (as well as emissions during other non-startup/shutdown operating conditions) must be included in the semi-annual reports or in determining compliance with the CO and NO<sub>x</sub> emission limits in Section C.6.

In addition, the EPA notes that the Final Permit does not appear to contain any monitoring or recordkeeping requirements that would allow for calculation or consideration of any CO and NO<sub>x</sub> emissions associated with the operation of the emergency generator at the facility in determining compliance with the CO and NO<sub>x</sub> emission limits in Section C.6. Because, as currently provided in the Final Permit, the overall emission limits for CO and NO<sub>x</sub> in Section C.6. state that the source “shall not equal or exceed” 250 tpy, those facility-wide limits would be ineffective at ensuring that the source remains below the 250 tpy major source PSD threshold if any emission unit at the facility that emitted CO or NO<sub>x</sub> was not covered by those limits and/or not subject to sufficient monitoring, recordkeeping, and reporting to ensure that those limits were enforceable as a practical matter.

Moreover, as defined for PSD purposes, PTE encompasses “the maximum capacity of a stationary source to emit a pollutant under its physical and operational design.” 40 C.F.R. § 52.21(b)(4). Thus, emissions from all emission units that are part of the source’s physical and operational design must be included in calculating PTE for purposes of determining PSD applicability, including emission units that have been designated as “insignificant activities.”<sup>17</sup> Similarly, the EPA has previously explained that when a source accepts a source-wide PTE limit for a pollutant, all actual emissions of that pollutant from the source must be considered in determining compliance with the limit.<sup>18</sup> Although HDOH treated the emergency generator as an “insignificant activity” under H.A.R. § 11-60.1-82(f)(5),<sup>19</sup> that provision makes clear that a generator cannot qualify as an insignificant activity if it would trigger PSD review based on its PTE. H.A.R. § 11-60.1-82(f)(5)(B). Accordingly, the emergency generator’s actual CO and NO<sub>x</sub> emissions must be considered in determining the permit’s compliance requirements.

The EPA acknowledges that Hu Honua accepted a fuel consumption limit on the boiler of 2,800,000 MMBtu/yr in an effort “to ensure that plant utilization does not exceed the stated emission levels in the permit application and PSD thresholds are not exceeded.” *See* 2011 RTC, Addendum A at 11; *see also* Final Permit, Section D.1.a.iii. However, CO and NO<sub>x</sub> emissions at the facility are a function of both fuel consumption (MMBtu/yr) and the CO and NO<sub>x</sub> emissions rate (lb/MMBtu). The permit contains two short term emission limits (lb/MMBtu) for CO and one for NO<sub>x</sub> from the boiler (see Final Permit, Section C.1), and HDOH explained that

---

<sup>17</sup> This is consistent with the EPA’s guidance explaining how to calculate PTE for emergency generators, as the EPA would not have needed to provide this guidance if the EPA believed that emissions from emergency generators did not need to be considered in PTE calculations. *See* John Seitz, Director, Office of Air Quality Planning and Standards, “Calculating Potential to Emit (PTE) for Emergency Generators” (Sept. 6, 1995) (available at <http://www.epa.gov/region07/air/title5/t5memos/emgen.pdf>). This is also consistent with 40 C.F.R. § 70.5(c), which provides that a title V application “may not omit information needed to determine the applicability of, or to impose, any applicable requirement.”

<sup>18</sup> *See, e.g., Cash Creek Order* at 15; *In the Matter of Kentucky Syngas, LLC*, Order on Petition No. IV-2010-9 at 29-30 (*Kentucky Syngas Order*) (June 22, 2012).

<sup>19</sup> *See* Final Permit Review Summary at 3.

multiplying these emission limits by the 2,800,000 MMBtu/yr limit shows that the facility will not exceed 250 tpy for CO and NO<sub>x</sub>. *See* Final Permit Review Summary at 6. However, the Final Permit explicitly provides that the Section C.1 emission limits for NO<sub>x</sub> and one of those limits for CO do not apply during boiler startup and shutdown.<sup>20</sup> *See* Final Permit, Section C.2. Thus, HDOH has not provided a basis in the record to conclude that the 2,800,000 MMBtu per year heat input limit will ensure that CO and NO<sub>x</sub> emissions from the facility will not exceed 250 tpy. Because the relevant short-term CO and NO<sub>x</sub> emission limits do not apply at all times, they do not ensure that the emission rate from fuel consumption at the boiler will not exceed the lb/MMBtu levels that HDOH used to explain why the 2,800,000 MMBtu/yr limitation would ensure that CO and NO<sub>x</sub> emissions will not exceed 250 tpy.

For the reasons described above, I am granting the Petition regarding the Petitioner's claim that the synthetic minor limits for CO and NO<sub>x</sub> limits are not enforceable as a practical matter.

HDOH can respond to this objection by revising the Final Permit to ensure that the source-wide CO and NO<sub>x</sub> emission limits of less than 250 tpy in Section C.6 are enforceable. In doing so, HDOH should clarify in the Final Permit that those limits apply at all times to all actual facility CO and NO<sub>x</sub> emissions and that all actual CO and NO<sub>x</sub> emissions must be considered in determining compliance with those limits, and make any changes or clarifications necessary to the measures for determining compliance with those limits, including monitoring, recordkeeping, and reporting provisions, to ensure that those limits are enforceable as a practical matter. Under this approach, HDOH would also need to revise the Final Permit to clarify that CO and NO<sub>x</sub> emissions from the emergency generator must be included in determining whether the facility has exceeded the source-wide CO and NO<sub>x</sub> emission limits of less than 250 tons per year and add any necessary monitoring, recordkeeping, or reporting for the CO and NO<sub>x</sub> emissions from the emergency generator. Alternatively, HDOH may utilize another approach, consistent with the applicable PSD program, to ensure that PSD is not triggered for CO or NO<sub>x</sub> (including consideration of the emergency generator emissions) or it could respond to this objection by requiring Hu Honua to comply with the PSD requirements for CO and NO<sub>x</sub>. In addition, the EPA notes that although the Final Permit contains various monitoring, recordkeeping and reporting requirements in Sections E and F related to steam load, wood fuel use, wood heat input, wood sampling and analysis, biodiesel fuel meters, as well as other related requirements, the Final Permit is unclear regarding how annual fuel consumption will be determined for purposes of determining compliance with the 2,800,000 MMBtu/yr limit. In addressing this objection, assuming that HDOH retains this limit, it should also clarify in the permit specifically how compliance with this 2,800,000 MMBtu/yr limit will be calculated, including specifying how heat input will be determined for biodiesel.

Because this grant focuses on the adequacy of the synthetic minor limits that were intended to restrict the facility's PTE to minor source levels for PSD purposes, along with the monitoring, recordkeeping and reporting to ensure compliance with those limits, I am not resolving the separate issues raised in this claim of the Petition, including those regarding how the facility's

---

<sup>20</sup> With respect to the other CO short term emissions limit, Section C.2 of the Final Permit simply states the "CO emission limit shall be based on a 3-hour average when conducting the performance test required in Attachment II, Special Condition No. G.1.a." Section G.1.a of the Final Permit states that the permittee "shall not conduct performance tests during periods of startup, shutdown or malfunction."

PTE was calculated for PSD purposes. *See Cash Creek Order* at 15; *Kentucky Syngas Order* at 30. In response to this grant, HDOH may take steps to ensure that the CO and NO<sub>x</sub> PTE limits are enforceable as a practical matter. If HDOH does so, PTE for CO may be calculated based on the CO limit, obviating concerns about the initial PTE calculations, and concerns about the enforceability of the CO and NO<sub>x</sub> PTE limits would be addressed. Depending on HDOH's response to this objection, several issues raised in Claim 2 could be moot or substantively different. Thus, as explained above, it is an appropriate exercise of the EPA's discretion and a reasonable use of agency resources to not resolve those issues. In particular, for these reasons, I am not resolving the separate issues in the Petition regarding: the CO PTE calculation and CO emission factors as raised in pages 6-8 of the Petition; the Petitioner's contentions related to the lack of enforceable conditions limiting biodiesel usage as raised on page 9 of the Petition; and the other issues concerning enforceability of the CO and NO<sub>x</sub> limits and post-issuance testing and controls to limit CO and NO<sub>x</sub> emissions as raised on pages 9-10 of the Petition. *See Kentucky Syngas Order* at 30; *Cash Creek Order* at 15.

With respect to the Petitioner's assertions that the Draft Permit failed to include emissions limitations and monitoring for SO<sub>2</sub>, as raised in pages 8-9 in the Petition, the Petitioner suggests that without emission limits and adequate monitoring for SO<sub>2</sub>, Hu Honua's emissions may exceed the 40 tpy "major source significance threshold" for SO<sub>2</sub> "set in H.A.R. § 11-60.1-1," which would trigger the need for a BACT analysis for SO<sub>2</sub>. Petition at 8-9. To the extent that the Petitioner is asserting a claim about applicability of federal BACT requirements, the EPA notes that because PSD is implemented under a delegation agreement in Hawaii, the significance threshold for SO<sub>2</sub> for purposes of determining whether a new major stationary source in Hawaii has a BACT requirement under the PSD program would be found in 40 C.F.R. § 52.21(b)(23)(i). Thus, at the time Hu Honua's Final Permit was issued, any determination of whether Hu Honua was subject to a federal BACT requirement for SO<sub>2</sub> would have been made with reference to the significant emissions rate in 40 C.F.R. § 52.21(b)(23)(i). The EPA further notes that the Final Permit does include an emission limit for SO<sub>2</sub>, and SO<sub>2</sub> is also addressed in some of the source testing requirements. *See* Final Permit Section C.1 (limiting SO<sub>2</sub> emissions from the boiler to 0.028 lb/MMBtu) and Section G.1.a and G.2 (addressing SO<sub>2</sub> in boiler performance testing).

If, in response to the objection described above, HDOH takes steps to ensure that the Final Permit contains restrictions on CO and NO<sub>x</sub> PTE that are legally and practicably enforceable and that have the effect of restricting sourcewide CO and NO<sub>x</sub> PTE below 250 tpy, Hu Honua would not be a major source for PSD purposes, so analysis regarding the applicability of federal requirements for SO<sub>2</sub> for major sources would be unnecessary. Alternatively, to the extent that the Petitioner is asserting that a minor source limit was deficient or that a minor source requirement was not satisfied, that claim, as applicable, could be moot if HDOH responds to the grant in this claim by permitting Hu Honua as a PSD source. If HDOH takes steps to ensure that Hu Honua's PSD synthetic minor limits are legally and practicably enforceable, any claims relating to minor NSR requirements would be more appropriately addressed if and when HDOH assesses whether any applicable SIP-approved minor source requirements should be included in a revised permit.

Because this issue could be moot or substantively different depending on HDOH's response to my objection in this claim, I am not resolving the issues raised on pages 8-9 of the Petition

related to SO<sub>2</sub>. As explained above, it is an appropriate exercise of the EPA's discretion and a reasonable use of agency resources to not resolve this claim. Depending on how HDOH revises the permit in light of this grant, I suggest that HDOH also consider the technical issues raised in Claim 2 with respect to SO<sub>2</sub>, as applicable, particularly whether SO<sub>2</sub> monitoring is required to ensure that SO<sub>2</sub> emissions do not exceed the 0.028 lb/MMBtu limit in Section C.1.

### **C. CLAIM 3: The Permit Fails to Ensure Compliance with BACT Requirements for CO**

***Petitioner's Claim.*** The Petitioner asserts that BACT is required for CO because "Hu Honua's CO calculated emissions of 245.4 tons/year exceed the significance level of 100 tons/year established by H.A.R. § 11-60.1-1." Petition at 10. The Petitioner then asserts that the CO emission limit contained in the permit "is not BACT." *Id.* Citing to the definition of BACT in H.A.R. § 11-60.1-1, and in CAA § 169(3), 42 U.S.C. § 7479(3), as well as to several title V Orders, the Petitioner contends: "While "Hu Honua's BACT Analysis purports to follow the "top-down" process, the BACT analysis of CO is incomplete" because: (1) "the emission limitation identified as BACT excludes startup and shutdown" without explaining why such exclusion is appropriate; and (2) "the analysis identifies significantly lower CO emission limits at another facility... but does not describe... why Hu Honua could not achieve comparable emissions." *Id.* at 10-11. The Petitioner therefore asserts "the [BACT] analysis is legally inadequate." *Id.* at 11.

***EPA's Response.*** Since I am granting the Petitioner's request for an objection to the Proposed Permit based on Claim 2, I am not resolving the Petitioner's request for an objection to the Proposed Permit on this claim. As explained in the response to Claim 2, the EPA is granting the Petition regarding the synthetic minor limits for CO because the EPA has determined that the limits in the Final Permit that were intended to restrict CO PTE below the major source threshold are not practicably enforceable. In response to that grant, HDOH may take steps to ensure that those limits are practicably enforceable. If HDOH takes steps to ensure that the Final Permit contains restrictions on CO PTE that are legally and practicably enforceable and that have the effect of restricting source-wide CO PTE below 250 tpy, Hu Honua would not be a major source of CO. At the time the Final Permit was issued, the only federal BACT requirement that could have applied to Hu Honua would have been the BACT requirement under the PSD program in 40 C.F.R. § 52.21. If Hu Honua is not a major source of CO, analysis regarding the applicability of federal requirements for major sources of CO to Hu Honua would be unnecessary. Alternatively, to the extent that the Petitioner is asserting that a minor source limit was deficient, that claim, as applicable, would be moot if HDOH treats Hu Honua as a major source. If HDOH takes steps to ensure that Hu Honua's PSD synthetic minor limits are legally and practicably enforceable, any claims relating to minor NSR requirements would be more appropriately addressed if and when HDOH assesses whether any applicable SIP-approved minor source requirements should be included in a revised permit.

Accordingly, I am not resolving this claim. As described in Section II., the CAA affords the EPA discretion in deciding how it responds to each title V petition. In this instance, some questions could be moot and others could be substantively different depending on HDOH's response to the issues upon which the EPA grants in this Order. Thus, it is an appropriate exercise of the EPA's

discretion and a reasonable use of agency resources to not resolve this claim. I suggest that when HDOH revises the permit in light of my grant on Claim 2, HDOH consider the specific technical issues raised in Claim 3 in those revisions, as applicable.

#### **D. CLAIM 4: The Permit Fails to Ensure Compliance with Hazardous Air Pollutant Emission Limits**

***Petitioner's Claim.*** The Petitioner contends generally that HAP emissions from Hu Honua “would result in [Hu Honua] exceeding the 25 tpy major source threshold” if the HAP emissions estimate had been based on more accurate HCl and acrolein emissions factors. Petition at 11-12. The Petitioner asserts Hu Honua “avoid[s] numerous requirements applicable to major HAP sources,” which results in “a seriously flawed permit that is wholly incapable of ensuring compliance with section 112 of the CAA.” *Id.* at 12.

The Petitioner makes four sub-arguments related to this claim and to whether Hu Honua is a major source of HAP. *See generally* Petition at 11-14. First, the Petitioner asserts Hu Honua “calculated [an emission factor for HCl] by picking favorable, low chlorine numbers from the range of test surveys” of eucalyptus wood test data as opposed to using AP-42 emission factors.<sup>21</sup> *Id.* at 12 (listed as Claim 4A in the Petition). The Petitioner alleges “[t]he permit limits are based on chlorine concentration of 0.03%, when an average of the 6 eucalyptus samples included in Table 2-A of Appendix D showed an average chlorine concentration of 0.12%, and a high of 0.434% in rose gum bark.” *Id.* The Petitioner also alleges that “Hu Honua skewed the chlorine concentration of Project feedstock and emissions by omitting the highest concentration feedstock – rose gum bark – and including the lowest concentration – rose gum without bark – even though the Revised Draft Permit includes bark in the boiler’s feedstock.” *Id.* The Petitioner asserts that using a higher emission factor “that is more representative of the boiler’s feedstock” would considerably increase the HCl PTE and would likely have resulted in Hu Honua “exceeding the major source threshold for HAPs of 25 tpy.” *Id.*

Second, the Petitioner asserts that emissions for acrolein were based on emission factors from the Maine Department of Environmental Protection (Maine DEP), which do not take into account tropical eucalyptus as a common feedstock. Petition at 12-13 (listed as Claim 4B in the Petition). The Petitioner states “EPA Region IX expressed serious concern regarding the accuracy of the Maine DEP emission factor,” quoting the EPA Letter, which noted the absence of source test requirements in the permit “to verify that the proposed emission factor is accurate for wood combustion at Hu Honua.” *Id.* at 13. The Petitioner asserts “if the HAP calculation had been based on the AP-42 emission factor for acrolein, acrolein emissions would be 5.6 tpy and total HAPs would be 29 tpy, which exceeds the HAP major source threshold.” *Id.* The Petitioner asserts “[b]ecause the accuracy of the Maine DEP emission factor with respect to eucalyptus feedstock for Hu Honua is not verified, the more conservative AP-42 emission factor must be used in the PTE calculations.” *Id.*

Third, citing to the periodic monitoring requirements of 40 C.F.R. §§ 70.6(a)(3) and 71.6(a)(3), and the EPA’s Periodic Monitoring Guidance, as well as H.A.R. § 11-60.1-90(7)(B), the

---

<sup>21</sup> AP-42, *Compilation of Air Pollutant Emission Factors*, has been published since 1972 as the primary compilation of the EPA's emission factor information.

Petitioner asserts the Revised Draft Permit “fails to include adequate assurances that the irregular fuel source... will be monitored at sufficient frequencies to assure achievement of the emissions limitations.” Petition at 13 (listed as Claim 4C in the Petition). The Petitioner states that “EPA Region IX commented that an initial source test and annual source testing is required to ensure that emissions from Hu Honua do not exceed the major source thresholds of 10 tpy and 25 tpy for all HAPs.” Petition at 13. The Petitioner asserts that initial and annual source testing is not sufficient; instead, the Petitioner asserts that “because the wood fuel stock is naturally variable, more frequent source testing – preferably continuous – is required for all HAPs (not only HCL-see Special Condition E.7.)” *Id.* The Petitioner asserts such monitoring is necessary to “provide sufficiently reliable and timely information for determining compliance.” *Id.* at 13, *citing* to 42 U.S.C. § 7661c(b). The Petitioner asserts that because the Revised Draft Permit fails to include such monitoring, “it fails to ensure the facility’s compliance with emission limits.” *Id.* at 14.

Fourth, the Petitioner notes Hu Honua’s permit application reported total HAP emission at 23.8 tpy, which are “very close to the HAP Major Source threshold of 25 tons.” Petition at 14 (listed as Claim 4D in the Petition). The Petitioner alleges “if Hu Honua had applied the AP-42 emission factors to HCl, acrolein, or both, [Hu Honua’s] emissions would exceed the 25 tpy major source threshold for MACT applicability.” *Id.*

***EPA’s Response.*** I grant the Petitioner’s request for an objection to the Proposed Permit on this claim. I grant specifically in regard to the Petitioner’s contentions that the Proposed Permit fails to ensure that individual and total HAP emissions will be below the respective 10 and 25 tpy major source thresholds. While HDOH included synthetic minor limits for HAP in the Final Permit, which were intended to restrict HAP PTE below the individual HAP major source threshold of 10 tpy and the total HAP major source threshold of 25 tpy<sup>22</sup>, these limits are not enforceable as a practical matter. As explained more fully below, in light of this grant, I am not resolving some of the issues raised by the Petitioner in Claim 4.

Under the governing provisions of CAA § 112(a) and 40 C.F.R. § 63.2, the calculation of a source’s PTE for purposes of determining whether the source triggers requirements for major stationary sources of HAP includes consideration of “any physical or operational limitation on the capacity of the stationary source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, .... if the limitation or effect it would have on emissions is federally enforceable.”<sup>23</sup> *See also* H.A.R. § 11-60.1-1. As we have stated, “if a permit applicant agrees to an enforceable limit that is sufficient to restrict PTE, the facility’s PTE is calculated based on that limit.” *Cash Creek Order* at 15. In this case, Hu Honua agreed to accept source-wide individual HAP and

---

<sup>22</sup>As HDOH explained in the Final Permit Review Summary: “To ensure that the facility remains an area source for HAPs, the permit requires the total of all HAPs emissions and any individual HAP emissions from the facility, including during boiler startups and shutdowns, shall not exceed 25 tons per year and 10 tons per year, respectively, on any rolling twelve month period.” Final Permit Review Summary at 7; *see also* 2011 RTC at 6.

<sup>23</sup>The definition of PTE for HAP in 40 C.F.R. § 63.2 includes the term “federally enforceable.” Consistent with the court decisions, *National Mining Association v. EPA*, 59 F.3d 1351 (D.C. Cir.1995) and *Chemical Manufacturers Ass’n v. EPA*, No. 89-1514, 70 F.3d 637 (D.C. Cir. 1995), permit terms to limit HAP emissions must be federally enforceable. The term “federal enforceability” has also been interpreted to require practical enforceability. *See* John Seitz and Robert Van Heuvelen, “Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit” (Jan. 22, 1995) at 2- 3.



total HAP emission limits of less than 10 tpy and less than 25 tpy, respectively. *See* Final Permit, Section C.7. Therefore, an EPA objection regarding whether Hu Honua’s Final Permit ensures compliance with requirements for major stationary sources of individual HAP and total HAP is warranted if the permit does not impose enforceable limits on the source’s individual and total HAP emissions such that source-wide emissions remain below 10 tpy for individual HAP and 25 tpy total HAP, the applicable thresholds for determining whether Hu Honua is a major stationary source of HAP. 42 U.S.C. § 7412(a)(1); 40 C.F.R. § 63.2; H.A.R. § 11-60.1-1.

To effectively limit Hu Honua’s individual HAP and total HAP PTE to less than 10 and 25 tpy, respectively, as specified, the individual and total HAP emission limits in Section C.7 of the Final Permit must apply at all times to all actual emissions, and all actual individual and total HAP emissions must be considered in determining compliance with the respective limits. *See Cash Creek Order* at 15 (finding that a VOC limit was not enforceable as a practical matter because the state agency “failed to provide a reasoned explanation for how the compliance demonstration method associated with the VOC emissions limit, which is used to determine compliance with the source-wide VOC limit, accounts for all actual VOC emissions”). The Final Permit for Hu Honua states that “the total of all HAPs emissions and any individual HAP emissions from the facility, including during boiler startups and shutdowns, shall not equal or exceed 25 tons per year and 10 tons per year, respectively, on any rolling twelve-month (12-month) period.” Final Permit, Section C.7. However, the Final Permit does not specify how the facility’s individual HAP and total HAP emissions shall be determined or measured for assessing compliance with these individual HAP and total HAP emission limits in Section C.7, and it is unclear whether all actual individual HAP and total HAP emissions must be considered in determining compliance with these limits, including emissions during other non-startup/shutdown operating conditions referenced in the permit, such as periods of “malfunction” or “upset conditions.” *See, e.g.*, Final Permit, Sections F.8, F.9, and F.3.

The EPA notes that the Final Permit does contain a condition in Section E.15 providing that the “permittee shall calculate and record the total of all HAPs and all individual HAP emissions from the facility, including during boiler startups and shutdowns, on a monthly and rolling twelve-month (12-month) basis.” *See* Final Permit, Section E.15. The EPA additionally notes that the Final Permit requires submission of semi-annual monitoring report forms that include “the total of all HAPs emissions and the largest individual HAP emissions from the facility on a monthly and rolling twelve-month (12-month) basis.” Final Permit, Section F.6.a.vii. However, the Final Permit does not specify how the total HAP and individual HAP emissions shall be calculated for purposes of these two conditions or what information such calculations would be based upon. Nor does the Final Permit specifically connect the calculations in Section F.6.a.vii to determining compliance with the individual HAP and total HAP emission limits in Section C.7. In addition, these conditions do not clearly provide that all actual source-wide total HAP and individual HAP emissions should be considered in determining compliance with the total HAP and individual HAP emission limits in Section C.7 and do not clearly state that emissions during other non-startup/shutdown operating conditions referenced in the permit (such as malfunction or upset) must be included in determining compliance with those limits. In addition, Section F.6.a.vii does not clearly state that emissions during startup and shutdown must be included in determining compliance with the total HAP and individual HAP emission limits in Section C.7.

The EPA further notes that the Final Permit does not appear to contain any monitoring or recordkeeping requirements that would allow for calculation or consideration of any total HAP and individual HAP emissions associated with the operation of the emergency generator at the source in determining compliance with the total HAP and individual HAP emission limits in Section C.7.

Moreover, as defined for purposes of determining whether a stationary source is a major source of HAP, PTE encompasses “the maximum capacity of a stationary source to emit a pollutant under its physical and operational design.” 40 C.F.R. § 63.2; H.A.R. § 11-60.1-1. Thus, emissions from all emission units that are part of the source’s physical and operational design must be included in calculating PTE for purposes of determining HAP major source applicability, including emission units that have been designated as “insignificant activities.”<sup>24</sup> Similarly, the EPA has previously explained that when a source accepts a source-wide PTE limit for a pollutant, all actual emissions of that pollutant from the source must be considered in determining compliance with the limit.<sup>25</sup> Although HDOH treated the emergency generator as an “insignificant activity” under H.A.R. § 11-60.1-82(f)(5), that provision states that a generator cannot qualify as an insignificant activity if it would trigger a covered source review based on its PTE for HAP. H.A.R. § 11-60.1-82(f)(5)(B). Accordingly, the emergency generator’s actual total HAP and individual HAP emissions must be considered in determining whether Hu Honua is subject to various requirements.

For these reasons, I am granting the Petition regarding the Petitioner’s claim that “the permit fails to ensure [Hu Honua’s] compliance with emission limits,” for all individual HAP and total HAP in Section C.7. of the Proposed Permit, and accordingly cannot ensure that emissions from Hu Honua do not exceed the major source threshold of 10 tpy for each HAP and 25 tpy for all HAP.

HDOH can respond to this objection on this claim by revising the Final Permit to ensure that the source-wide total HAP and individual HAP emission limits of less than 25 tpy and 10 tpy, respectively, in Section C.7 are enforceable. To do so, HDOH should clarify in the Final Permit that those limits apply at all times to all actual source-wide individual HAP and total HAP emissions and that all actual individual HAP and total HAP emissions must be considered in determining compliance with those limits. HDOH should also make any changes or clarifications necessary to the measures for determining compliance with those limits, including monitoring, recordkeeping, and reporting provisions, to ensure that those limits are enforceable as a practical matter. In identifying in the Final Permit the measures for determining compliance with the individual HAP and total HAP emission limits, HDOH should specify how the actual annual total HAP and individual HAP emissions will be calculated, including what, if any, emission rates determined pursuant to Section G.1.c.i. would be used and how calculations using such

---

<sup>24</sup> This is consistent with the EPA’s guidance explaining how to calculate PTE for emergency generators, as the EPA would not have needed to provide this guidance if the EPA believed that emissions from emergency generators did not need to be considered in PTE calculations. *See* John Seitz, *Calculating Potential to Emit (PTE) for Emergency Generators* (Sept. 6, 1995) (available at <http://www.epa.gov/region07/air/title5/t5memos/emgen.pdf>). This is also consistent with 40 CFR § 70.5(c), which provides that a title V application “may not omit any information needed to determine the applicability of, or impose, any applicable requirement.”

<sup>25</sup> *See, e.g., Cash Creek Order* at 15; *Kentucky Syngas Order* at 29.

rates would ensure that actual annual total HAP and individual HAP emissions remain below the respective 25 and 10 ton per year limits.

Under this approach, HDOH could revise the Final Permit to clarify that all actual individual HAP and total HAP emissions from the source, including emissions during all actual operational scenarios and from the emergency generator, must be included in determining whether the source has exceeded the source-wide individual HAP and total HAP emission limits of less than 10 tpy and 25 tpy, respectively, and add any necessary monitoring, recordkeeping, or reporting for the individual HAP and total HAP emissions from the boiler and the emergency generator. Alternatively, HDOH may utilize another approach, consistent with H.A.R. § 11-60.1-5 and Hawaii's approved title V program, to ensure that major stationary source requirements are not triggered for individual HAP or total HAP, or it could respond to this objection by requiring Hu Honua to comply with applicable major stationary source requirements.

Accordingly, as described above, I am granting the Petitioner's claim that the Proposed Permit fails to ensure that individual and total HAP emissions will be below the respective 10 tpy and 25 tpy major source thresholds. To ensure that it does, the synthetic minor limits for individual and total HAP emissions in Section C.7 of the Final Permit must be enforceable as a practical matter. In response to this grant, HDOH may take steps to ensure that the individual and total HAP PTE limits apply to all source-wide emissions and are enforceable as a practical matter in order to address concerns about the enforceability of those limits. When the Final Permit is so modified, PTE for individual and total HAP emissions may be calculated based on the HAP limits. Depending on HDOH's response to this objection, several issues raised in Claim 4 could be moot or substantively different. Thus, it is an appropriate exercise of the EPA's discretion and a reasonable use of agency resources to not resolve those issues. For these reasons, I am not resolving the separate issues in the Petition regarding: whether Hu Honua used appropriate emission factors in determining potential HCL and acrolein emissions and whether Hu Honua would exceed the major stationary source threshold of 25 tpy of total HAP raised on pages 11-13 and 14 of the Petition. *See Kentucky Syngas Order* at 30; *Cash Creek Order* at 15.

#### **E. CLAIM 5: The Baghouse is Not Adequately Described or Monitored**

***Petitioner's Claim.*** The Petitioner contends "the Revised Draft Permit fails to ensure continuous compliance with the proposed BACT limits for PM as required by Condition C.4." Petition at 14. In support of its arguments, the Petitioner states that the Revised Draft Permit "fails to include an adequate description of the baghouse (e.g. number of bags, capacity) or any conditions specifying maintenance and inspection requirements for baghouse operations." *Id.* The Petitioner also asserts that initial and annual source tests and the continuous opacity monitoring system (COMS) are inadequate to assure compliance with the PM BACT limits. *Id.*

***EPA's Response.*** I deny the Petitioner's request for an objection to the Proposed Permit on this claim. This claim does not appear to be based on the Proposed Permit. *See, e.g.,* 40 C.F.R. §§ 70.7(c) and (d). In the Petition, this claim does not cite to the Proposed Permit, but refers only to the Revised Draft Permit. The claim does not address many relevant terms and conditions in the Proposed Permit that describe the baghouse and relevant monitoring requirements for controlling PM emissions. For example, the Petitioner does not address the following requirements that were

included in the Proposed Permit: (1) section A.1.a.i, which describes the type of Electrostatic Precipitator (ESP) and Baghouse to be used at the facility as a “B & W Pulse Jet Fabric Filter or equivalent;” (2) section D.2.a, which states that the permittee shall not operate if a problem affecting PM control efficiency of the ESP and/or baghouse could cause the ESP and/or baghouse to operate outside the respective normal range; (3) sections D.2.b-d, which contain further routine maintenance requirements to ensure the ESP and baghouse are operating properly; (4) section E.12, which requires the facility to install a pressure drop meter on the baghouse, which is to be monitored and recorded daily; and (5) sections F.6.a.iii-iv, which require further semi-annual monitoring and recordkeeping of the ESP and baghouse. *See* Proposed Permit, Attachment II. The EPA notes these same requirements are also included in the Final Permit.

By not addressing these control technologies and maintenance and recording requirements in the Proposed Permit, the Petitioner has not demonstrated that these and other requirements in the Proposed Permit are insufficient to ensure that the boiler will meet its PM limits. In other words, the Petitioner has not demonstrated that the Proposed Permit “is not in compliance with the requirements of [the CAA.]” CAA § 505(b)(2). The EPA interprets the “demonstration” requirement in CAA § 505(b)(2) as “placing the burden on the Petitioner to supply information to the EPA sufficient to demonstrate the validity of the objection raised to the title V permit,” *In the Matter of Luminant Generation Co. – Sandow 5 Generating Plant*, Order on Petition Number VI-2011-05 at 9 (Jan. 15, 2013) (*Luminant Order*); *see also MacClarence*, 596 F.3d at 1131 (affirming denial of a petition where the petitioner had not provided legal reasoning, evidence, and references to support the claim). The Petitioner’s general assertion that the Revised Draft Permit fails to ensure compliance with PM limits is conclusory and without supporting information, thus falling short of demonstrating “the validity of the objection raised” in the Petition. *Luminant Order* at 9. The Petitioner states that the Revised Draft Permit “fails to ensure continuous compliance with the proposed BACT limits for PM as required by C.4,” but only cites to the March 21, 2011, Pless comment letter as evidence for this claim. *See* March 21, 2011 Pless Letter at 6. However, the comment letter contains no additional supporting information for the Petitioner’s position. The letter lists “example” requirements taken from permits for other biomass facilities with baghouses, without explaining why these example provisions would be more effective for ensuring that Hu Honua’s boiler will meet its PM limits. HDOH actually included some of these “example” provisions in the Proposed Permit, which the Petitioner did not address in its Petition.

For the foregoing reasons, I deny the Petition as to this claim.

#### **F. CLAIM 6: The Permit Fails to Ensure Compliance with Applicable HAR and SIP Requirements**

***Petitioner’s Claim.*** The Petitioner asserts the permit “does not comply with” H.A.R. § 11-60.1-179 and Hawaii’s SIP because “the Permit fails to ensure [Hu Honua] will not emit HAPs and criteria air pollutants at levels injurious to human health.” Petition at 15. The Petitioner states that H.A.R. § 11-60.1-179 “prohibits the emission of HAPs from any stationary source in quantities that contribute to an ambient air concentration that endangers human health, and provides that any new major source of hazardous air pollutants must demonstrate that emissions

of HAPs from the source will not contribute to any significant ambient concentrations of HAPs.” *Id.* at 14-15 (emphasis in original). The Petitioner also states that Hawaii’s SIP “similarly prohibits any person from permitting or causing air pollution, defined as ‘the presence in the outdoor atmosphere of one or more air pollutants in such quantities and duration as is or tends to be injurious to human health or welfare.’” *Id.* at 15, citing H.A.R. §§ 11-60-17, 11-60-1 (def. “Air Pollution”). The Petitioner asserts Hu Honua “severely underestimated its emissions of both HAPs and criteria air pollutants, and accordingly the modeling underestimated the facility’s health risk.” *Id.* The Petitioner also states that “the accuracy of the meteorological data used in the modeling is questionable, given that it was collected at Hilo Airport and not Pepe’okeo,” where Hu Honua will be operating. *Id.* The Petitioner insists Hu Honua “provides no support for [its] assertion” that “wind flow patterns are comparable” between the two locations. *Id.*

***EPA’s Response.*** I deny the Petitioner’s request for an objection to the Proposed Permit on this claim. Regarding whether the Proposed Permit fails to comply with the prohibition on HAP emissions contained in H.A.R. § 11-60.1-179, this provision is a state only requirement and not a part of Hawaii’s SIP; therefore, it is not an applicable requirement for purposes of title V and not subject to review in a title V petition. *See* 40 C.F.R. § 70.2.

Regarding whether the Proposed Permit fails to comply with the general prohibition on air pollution contained in H.A.R. § 11-60-17 (renumbered as H.A.R. § 11-60.1-2 in 2012 (*see* 77 *Fed. Reg.* 25084)), the Petitioner has not demonstrated that the Proposed Permit is not in compliance with the applicable requirements of the Act. The EPA has pointed out in numerous orders that, in particular cases, general assertions or allegations did not meet the demonstration standard. *See, e.g., Luminant Order* at 9; *In the Matter of BP Exploration (Alaska) Inc., Gathering Center #1*, Order on Petition Number VII-2004-02 at 8 (Apr. 20, 2007) (*BP Alaska Order*); *In the Matter of Chevron Products Co., Richmond, Calif. Facility*, Order on Petition No. IX-2004-10 at 12, 24 (Mar. 15, 2005) (*Chevron Order*). Also, if the petitioner did not address a key element of a particular issue, the petition should be denied. *See, e.g., In the Matter of Public Service Company of Colorado, dba Xcel Energy, Pawnee Station*, Order on Petition Number: VIII-2010-XX at 7–10 (June 30, 2011) (*Pawnee Order*); *In the Matter of Georgia Pacific Consumer Products LP Plant*, Order on Petition No. V-2011-1 at 10–11, 13–14 (July 23, 2012) (*Georgia Pacific Order*). Here, the Petitioner only makes general assertions and fails to analyze the actual elements of the provision. H.A.R. § 11-60.1-2 contains a general prohibition against “air pollution or ...the emissions of any regulated or hazardous air pollutants without first securing approval in writing” from HDOH. The Petitioner does not demonstrate how the Proposed Permit fails to ensure compliance with this provision. For example, the Petitioner does not identify which “air pollutant,” as defined in H.A.R. § 11-60.1-1, Hu Honua is emitting inconsistent with the general prohibition, nor does it allege that Hu Honua is doing so without “approval in writing” from HDOH. Moreover, general assertions regarding inappropriate use of meteorological data and wind flow patterns are not adequate to demonstrate that the permit is inconsistent with the general prohibition on air pollution in the SIP. *See MacClarence*, 596 F.3d at 1131-1133; *Luminant Order* at 9; *Chevron Order* at 12, 24; *In the Matter of Transalta Centralia Generation, LLC*, Order on Petition Regarding Permit No. SW98-8-R3 at 4-8 (April 28, 2011) (*Transalta Order*); *In the Matter of Hercules, Inc.*, Order on Petition Number: IV-2003-01 (November 10, 2004) (*Hercules Order*).

Additionally, the Petitioner did not address the information in the record, which was available to the Petitioner during the permit review period, concerning the ambient air quality modeling for criteria pollutants for this permit. *See, e.g.* Permit Application at 17-30; Revised Permit Application at 29-45; Draft Permit Review Summary and Revised Draft Permit Review Summary at 13-16. The Petitioner also provides no additional information regarding why the wind flow patterns at Hilo International Airport would not be appropriate for use in Hu Honua's modeling analysis. Furthermore, the Petitioner does not demonstrate that the use of airport data is inconsistent with the EPA's Guidelines on the use of meteorological data in Appendix W of 40 C.F.R. part 51. *See Kentucky Syngas Order* at 41 (denying title V petition issue where petitioners failed to acknowledge or reply to state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient).

For the foregoing reasons, I deny the Petition as to this claim.

### **G. CLAIM 7: The Permit Fails to Ensure Compliance with MACT Requirements**

***Petitioner's Claim.*** The Petitioner claims that Hu Honua is a major source of HAP and is therefore "required to obtain from [HDOH] an approved MACT determination according to one of the review options specified in the applicable regulation." Petition at 15, *citing* 40 C.F.R. § 63.43; H.A.R. §§ 11-60.1-174, 11-60.1-175. The Petitioner also alleges "[b]ecause Hu Honua "artificially reduced its HAP emission thresholds to avoid Major Source classification, no MACT determination was sought." *Id.*

***EPA's Response.*** Since I am granting the Petitioner's request for an objection to the Proposed Permit based on Claim 4, I am not resolving the Petitioner's request for an objection to the Proposed Permit on this claim. As explained in the response to Claim 4, the EPA is granting the Petition regarding the HAP limits because the EPA has determined that the limits in the Final Permit that were intended to restrict HAP PTE below the major source thresholds<sup>26</sup> are not practicably enforceable. In response to that grant, HDOH may take steps to ensure that those limits are practicably enforceable. When HDOH takes steps to ensure that the Final Permit contains restrictions on HAP PTE that are legally and practicably enforceable and that have the effect of restricting source-wide HAP PTE below 10 tpy for individual HAP and 25 tpy for total HAP, Hu Honua would not be a major source of HAP. If Hu Honua is not a major source of HAP, analysis regarding the applicability of federal requirements for major sources of HAP to Hu Honua would be unnecessary. Accordingly, I am not resolving this claim. As described in Section II., the CAA affords the EPA with discretion in deciding how it responds to each title V petition. In this instance, some questions could be moot and others could be substantively different depending on HDOH's response to the issues upon which the EPA grants in this Order. Thus, it is an appropriate exercise of the EPA's discretion and a reasonable use of agency resources to not resolve this claim. Depending on how HDOH revises the permit in light of my grant on Claim 4, I suggest that HDOH consider the specific issues raised in Claim 7 in those revisions, and make any necessary changes to the permit or permit record.

---

<sup>26</sup>As HDOH explained in the Final Permit Review Summary: "To ensure that the facility remains an area source for HAPs, the permit requires the total of all HAPs emissions and any individual HAP emissions from the facility, including during boiler startups and shutdowns, shall not exceed 25 tons per year and 10 tons per year, respectively, on any rolling twelve month period." Final Permit Review Summary at 7; *see also* 2011 RTC at 6.

## H. CLAIM 8: The Permit Impermissibly Exempts Startup and Shutdown from Emission Limits

**Petitioner's Claim.** The Petitioner alleges that “the Revised Draft Permit fails to ensure compliance with applicable requirements” because Condition C.2 of the Revised Draft Permit fails to require compliance with emission limits on the boiler for NO<sub>x</sub>, VOC, CO, and HCl during boiler startup and shutdown. Petition at 15-16. The Petitioner contends that this exemption violates requirements of federal and state law. *Id.* at 15-16, citing *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008); CAA §§ 110(a) and 504(a); EPA’s Memorandum re Vacatur of Startup, Shutdown, and Malfunction Exemption (July 22, 2009); and H.A.R. § 11-60.1-16 (which the Petitioner states “requires reporting of ‘deviations’”). The Petitioner also contends that the exemption in Condition C.2 “improperly excludes a significant portion of the facility’s emissions that must be included in the permit for purposes of calculating [PTE] and the applicability of Major Source procedures and requirements, including PSD and MACT requirements.” *Id.* at 16.

**EPA Response:** Since I am granting the Petitioner’s request for an objection to the Proposed Permit based on Claims 2 and 4, I am not resolving the Petitioner’s request for an objection to the Proposed Permit on this claim as it relates to the PTE calculations, but I am granting with respect to the Petitioner’s claim regarding the exemption in Section C.2 because the permit record does not provide an adequate rationale for this exemption that would allow the EPA to evaluate whether it is consistent, or not, with federal law, in light of the applicable requirements and requirements of title V for Hu Honua.

With respect to the PTE calculations for CO, NO<sub>x</sub>, and HCl, the Petitioner claims that Section C.2 “improperly excludes a significant portion of the facility’s emissions that must be included in the permit for purposes of calculating the potential to emit and the applicability of Major Source procedures and requirements, including PSD and MACT requirements.” Petition at 16. As explained above, the EPA is granting on Claims 2 and 4 because it has determined that the synthetic minor limits in the Final Permit for CO, NO<sub>x</sub>, individual HAP and total HAP emissions are not practicably enforceable. In response to that grant, HDOH may take steps to ensure that those source-wide limits are practicably enforceable such that Hu Honua is neither a major stationary source for PSD nor a major source of HAP. 42 U.S.C. §§ 7412(a)(1), 7479(1); 40 C.F.R. § 52.21(b)(1)(i)(b); 40 C.F.R. § 63.2. If it does so, the Petitioner’s claims relating to PTE calculations for CO, NO<sub>x</sub> and HCl would be irrelevant, as PTE could be determined based on those enforceable limits. *See* 40 C.F.R. § 52.21(b)(4); 40 C.F.R. § 63.2; *Cash Creek Order* at 15. Because these issues could be moot or substantively different depending on HDOH’s response to the issues upon which the EPA grants in this Order, it is an appropriate exercise of the EPA’s discretion and a reasonable use of agency resources to not resolve this claim, as explained above.

As regards the Petitioner’s claim that the PTE calculations for VOC excluded emissions that should have been included in such calculations, as raised on page 16 of the Petition, the EPA notes that HDOH calculated VOC PTE at 39.2 tpy and thus determined that VOC was below the significance level defined in HAR §11-60.1-1 and that a BACT analysis was not required. Final Permit Review Summary at 5. To the extent that the Petitioner’s VOC PTE claim concerns applicability of a federal BACT requirement, the EPA notes that at the time Hu Honua’s Final

Permit was issued any determination of whether Hu Honua was subject to a federal BACT requirement would have been made with reference to the significant emissions rate under 40 C.F.R. § 52.21(b)(23). If, in response to the objection described above for Claim 2, HDOH takes steps to ensure that the Final Permit contains restrictions on CO and NO<sub>x</sub> PTE that are legally and practicably enforceable and that have the effect of restricting sourcewide CO and NO<sub>x</sub> PTE below 250 tpy, Hu Honua would not be a major source for PSD purposes, so analysis regarding the applicability of federal requirements based on VOC emissions for major sources would be unnecessary. Alternatively, to the extent that the Petitioner is claiming that a minor source limit was deficient or that a minor source requirement was not satisfied for VOC, that claim, as applicable, could be moot if HDOH responds to the objection on Claim 2 by permitting Hu Honua as a PSD source. Because this issue could be moot or substantively different depending on HDOH's response to my objection in Claim 2, it is an appropriate exercise of the EPA's discretion and a reasonable use of agency resources to not resolve this claim, as explained above.

With respect to the Petitioner's claim on pages 15-16 of the Petition that Section C.2 violates certain legal requirements because it fails to require compliance with the NO<sub>x</sub>, VOC, HCl, and CO emission limits on the boiler during boiler startup and shutdown, the EPA notes that it is not clear from the permit record what the legal basis is for the statement in Section C.2 that emission limits for NO<sub>x</sub>, VOC, HCl, and CO "shall be complied with at all times, except during boiler startup and shutdown." Final Permit, Section C.2. For this reason, the EPA is not able to readily determine whether this provision is consistent or inconsistent with federal law<sup>27</sup>, the applicable requirements, and the requirements of title V for Hu Honua. Because the permit and permit record do not provide a rationale in the record for this exemption, including a description of the legal basis for it, there is not sufficient information for the EPA and the public to be able to evaluate the exemption in Section C.2 in light of the applicable requirements and the requirements of title V. Accordingly, I am granting on this aspect of this claim. *Cf., e.g., Nucor I Order* (granting a title V petition where the information in the permit record did not give the EPA and the public sufficient information to determine whether the requirements of the SIP and of title V were met). When HDOH revises the permit in responding to the objection on Claims 2 and 4, if it decides to retain the emissions limits on the boiler currently in Section C.1 and the exemptions during periods of boiler startup and shutdown currently in Section C.2 for any pollutant, it must explain the basis and authority for any such exemption in the revised permit or permit record so that the EPA can evaluate whether it is consistent or inconsistent with federal law, in light of the applicable requirements and requirements of title V for Hu Honua.

#### **I. CLAIM 9: The Facility's Biomass Handling, Chipping and Storage Operation Does Not Qualify as an "Insignificant Activity"**

***Petitioner's Claim.*** The Petitioner asserts that Hu Honua's "biomass handling and chipping operations do not qualify as an 'insignificant activity' pursuant to H.A.R. § 11.60-82(f)(7), and associated emissions must therefore be included in [Hu Honua's] PTE." Petition at 16. The Petitioner states: "The Permit Review Summary fails to quantify emissions from [Hu Honua's]

---

<sup>27</sup> See *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008) (vacating startup and shutdown exemptions as violating the CAA's requirement that emissions standards or limitations must apply continuously).



chipper operations, and, thus, fails to demonstrate that [Hu Honua's] chipper operations would indeed satisfy the conditions of H.A.R. § 11.60-82(f)(7), specifically that emissions of particulate matter would not exceed the specified thresholds pursuant to Subsections (B) and (D)." *Id.* at 17. The Petitioner also contends "neither the Permit Review Summary nor the Draft Permit provide any information for [Hu Honua's] electric biomass chipping operation beyond stating that the chipper would operate within an enclosed building with a dust collector." *Id.* As a result, the Petitioner contends it is "impossible to estimate emissions from these activities." *Id.* The Petitioner cites to a biomass facility in Florida with "approximately twice the capacity as Hu Honua" and notes that its estimated PM emissions are 15.7 tpy of PM and 7.4 tpy of PM<sub>10</sub>. *Id.* Based on this information, the Petitioner concludes that a low estimate of biomass handling and chipping emissions from Hu Honua would be 7.8 tpy of PM and 3.7 tpy of PM<sub>10</sub>, which would exceed the 2 tpy significance threshold for PM for insignificant activities pursuant to H.A.R. § 11.60-82(f)(7)(D). *Id.* The Petitioner therefore asserts "the Revised Draft Permit is flawed for failing to include emissions from the [chipper operations] in [Hu Honua's] PTE." *Id.* at 18.

**EPA Response:** I deny the Petitioner's request for an objection to the Proposed Permit on this claim.

The Petitioner has not demonstrated that HDOH's treatment of the biomass handling, storage, and chipping operations (wood chipping operations) did not assure compliance with any applicable requirement under the CAA. The analysis in the Petition does not demonstrate that the wood chipping operations would not qualify as an "insignificant activity" under H.A.R. § 11-60.1-82(f)(7). The Petitioner provides an alternative PTE for PM from the wood chipping operations, but does not adequately explain why this alternative PTE is appropriate for estimating emissions at Hu Honua. Petition at 17. To develop the alternative PTE, the Petitioner relies only on the boiler size of a Florida facility, Adage Hamilton, to estimate Hu Honua PM emissions of 7.8 tpy of PM and 3.7 tpy of PM<sub>10</sub> from wood chipping operations. *Id.* However, boiler size alone is not adequate to determine PTE for this facility, and the Petitioner does not explain why the emission estimates from the Adage Hamilton facility are appropriate for determining emissions from Hu Honua, in light of other considerations, including Hu Honua's wood's moisture content, building enclosure, dust collection, or any aspect of Hu Honua's physical and operational design. For these reasons, the Petitioner has not demonstrated that the emissions from Hu Honua's wood chipping operations fail to qualify as an insignificant activity pursuant to H.A.R. § 11-60.1-82(f)(7). Even assuming Hu Honua must include the PM emissions from its wood chipping operations in its PTE calculation, the Petitioner has not discussed or analyzed how doing so would result in applicability of a requirement under the CAA that has not been addressed. Thus, the Petitioner has not demonstrated how HDOH's failure to include these emissions in Hu Honua's PTE in the Revised Draft Permit did not assure compliance with an applicable requirement under the CAA.

Also, as we discuss in more detail in our response to Claim 13, some relevant parts of the record were available during the public comment period, including the Revised Permit Application and the Permit Review Summary for the Revised Draft Permit. (Revised Draft Permit Review Summary). Those documents included some of HDOH's responses to the Petitioner's comments on this issue. For example, the Revised Permit Application clearly explained that only about 25-30 percent of the wood needed for the boiler is expected to be chipped onsite, that the wood

would be chipped in an enclosed building with dust control, and that contracts would limit the moisture control of the wood, further limiting PM<sub>10</sub> emissions. Revised Permit Application at 2-3. The Revised Draft Permit Review Summary also explained that the wood chipper would be operated in an enclosed building with a dust collector, and that the wood to be received would not have a moisture content greater than 45 percent, “thereby further limiting PM<sub>10</sub> emissions.” Revised Draft Permit Review Summary at 3. The Petitioner failed to address in the Petition the Revised Permit Application and HDOH’s reasoning in the Revised Draft Permit Review Summary concerning PM emissions from the wood chipping operations. *MacClarence*, 596 F.3d at 1123, 1130-33; *Sierra Club v. Johnson*, 541 F.3d at 1266-1267 ; *Citizens Against Ruining the Environment*, 535 F.3d at 677-78 ; *Sierra Club v. EPA*, 557 F.3d at 406; *In the Matter of Noranda Alumina, LLC*, Order on Petition No. VI-2011-04 at 20 (December 14, 2012) (*Noranda Order*) (denying title V petition issue where petitioners did not respond to state’s explanation in response to comments or explain why the state erred or the permit was deficient); *Kentucky Syngas Order* at 41 (denying title V petition issue where petitioners did not acknowledge or reply to state’s response to comments or provide a particularized rationale for why the state erred or the permit was deficient).

Additionally, the record contains other information on PM emissions from the wood chipping operations. As HDOH explained in its Response to Comments on the Draft Permit (2010 RTC), wood chipping emissions were approximated using emission factors from a biomass facility in Gadsden County, Florida, which used an emission factor of 0.002 lb per ton of wood chipped. 2010 RTC at 24, *citing* ADAGE Gadsden LLC Permit Application, Gadsden County, Florida, for a 55.5 MW Net Wood Biomass Electric Power Plant, January 2010. Using this emission factor, HDOH explained that it “conservatively assumed” that all wood would be chipped onsite, concluding that 0.5 tons per year of fugitive PM<sub>10</sub> would be emitted. HDOH thus estimated emissions of regulated pollutants from the wood chipper would be less than 2 tpy. In support of this conclusion, HDOH explained that wood chipping and handling will occur in a completely enclosed building, with dust control and covered conveyers; dust generation will be further limited by the high moisture content of the wood, while the wood chipper itself will be powered by steam and electricity, eliminating combustion generated air pollutants. 2010 RTC at 24. Thus, any assertions regarding the record failing to provide information for PM emissions from the wood chipping operation are now moot.

For the foregoing reasons, I deny the Petition as to this claim.

#### **J. CLAIM 10: The Permit Fails to Address Emissions from Trona or Lime and Ash Handling**

***Petitioner’s Claim.*** The Petitioner asserts “the Permit Review Summary did not include emissions from trona or lime handling or from ash handling.” Petition at 18. The Petitioner further asserts that “emissions that can be easily captured and vented through a stack (i.e. non-fugitive emissions), *e.g.*, particulate matter emissions from a storage silo captured via a vent filter, must be quantified and included in the Facility’s PTE.” *Id.*

***EPA’s Response.*** I deny the Petitioner’s request for an objection to the Proposed Permit on this claim. The Petitioner has not demonstrated that the Proposed Permit is not in compliance with

the Act. *See* 42 U.S.C. § 7661d(b)(2); *MacClarence*, 596 F.3d at 1131. The Petitioner does not identify any particular statutory or regulatory basis for its allegations. *Id.* at 1131 (“the Administrator’s requirement that [a title V petitioner] support his allegations with legal reasoning, evidence, and references is reasonable and persuasive”); *In the Matter of Murphy Oil USA, Inc.*, Order on Petition No. VI-2011-02 at 12 (Sept. 21, 2011) (*Murphy Oil Order*) (denying a title V petition claim, where petitioners did not cite any specific applicable requirement that lacked required monitoring). Specifically, the Petitioner has not identified any specific statutory or regulatory requirements applicable to trona or lime handling or ash handling emissions or that would have been applicable if emissions from those activities had been included in any of the PTE calculations. The Petitioner also fails to analyze or address the key elements related to the issue. *Pawnee Order* at 7–10; *Georgia Pacific Order* at 10–11, 13–14. For example, even assuming trona or lime handling or ash handling emissions generate PM emissions, the Petitioner provides no estimate of PM emissions that were omitted from consideration. In particular, while the Petitioner refers to PM emissions from a storage silo captured by a vent filter, it does not attempt to quantify PM emissions from any storage silo or other storage facility at the facility or explain how consideration of such emissions would have affected the determination of the regulatory requirements that apply to Hu Honua. Even assuming that such PM emissions were required to be included in Hu Honua’s PTE, the Petitioner does not demonstrate how such an omission in the Permit Review Summary would mean that the Proposed Permit is not in compliance with an applicable requirement under the CAA.

For the foregoing reasons, I deny the Petition as to this claim.

**K. CLAIM 11: [HDOH] Failed to Address Ammonia Slip and Sulfuric Acid Mist Emissions**

***Petitioner’s Claim.*** The Petitioner alleges “neither the Application nor the Permit Review Summary or the Draft Permit mention the ammonia slip emissions that would be associated with the proposed Nalco ROTAMIX selective non-catalytic reduction system (SNCR) (or equivalent) or the sulfuric acid mist emissions associated with biomass firing.” Petition at 18. The Petitioner alleges these emissions “must be quantified, permit limits must be set, and enforceable permit conditions must be developed.” *Id.*

***EPA’s Response.*** I deny the Petitioner’s request for an objection to the Proposed Permit on this claim.

Regarding the Petitioner’s claim that the “Application..., Permit Review Summary [and] the Draft Permit” do not address ammonia slip emissions, this issue is now moot as the Proposed and Final Permits do contain an ammonia slip limit for the urea injection system, as well as recordkeeping and performance testing requirements. *See* Proposed Permit and Final Permit, Section C.5 for ammonia slip emissions limit; Section E.11 for records of ammonia slip emissions; and Section G.2.i for ammonia slip performance testing.

Regarding sulfuric acid mist emissions, the Petitioner has not identified any requirement under the CAA that HDOH failed to address in the Proposed Permit. The Petitioner’s general assertion

is not sufficient to demonstrate that the Proposed Permit is not in compliance with the Act. *See MacClarence*, 596 F.3d at 1131; *also see Luminant Order* at 9; *BP Alaska Order* at 8; *Chevron Order* at 12, 24. The Petitioner has merely stated that conditions for sulfuric acid mist emissions from biomass firing must be added to the Proposed Permit, without providing any technical and legal basis for this claim, such as information concerning the amount of sulfuric acid mist emissions, the regulatory program under which sulfuric acid mist emissions must be addressed, or how the regulatory requirement applies to Hu Honua.

For the foregoing reasons, I deny the Petition as to this claim.

#### **L. CLAIM 12: HDOH Failed to Directly Regulate and Evaluate the Impacts of PM<sub>2.5</sub> Emissions**

***Petitioner's Claim.*** The Petitioner asserts HDOH “must directly assess and regulate PM<sub>2.5</sub> emissions from [Hu Honua], even if it determines [Hu Honua] is not a major source of PM<sub>2.5</sub> or any other pollutant.” Petition at 18-19, *citing* 45 C.S.R. §§13-2.20.b, 13.2-24.b, 13-8.3, 14-2.79, 14.21.1.b; 70 *Fed. Reg.* 65984 (July 18, 1997); 70 *Fed. Reg.* 66043 (November 1, 2005); 73 *Fed. Reg.* 28321, 28344 (May 16, 2008). The Petitioner notes that PM<sub>2.5</sub> has significant public health impacts. Petition at 19-20. The Petitioner asserts that the Revised Draft Permit does not “directly regulate or evaluate emissions of PM<sub>2.5</sub> from [Hu Honua],” a criteria air pollutant, as required by the CAA. Petition at 21. The Petitioner asserts HDOH “failed to quantify the amount of PM<sub>2.5</sub> that would be emitted at the source,” and that the only mention of PM<sub>2.5</sub> is in the Permit Review Summary, which proposes a BACT emission limit for PM<sub>2.5</sub> of 0.025 lb/MMBtu. *Id.* The Petitioner states: “This purported ‘PM<sub>2.5</sub> emission limit’ is rendered meaningless by the Draft Permit’s failure to specify those limits and require any PM<sub>2.5</sub> monitoring.” *Id.* The Petitioner also asserts that there is “no analysis of whether the controls required for PM<sub>10</sub> also minimize PM<sub>2.5</sub>,” and “as a result, it is unclear whether the purported PM<sub>2.5</sub> emission limits are achievable, and they certainly are not enforceable.” *Id.* Finally, the Petitioner asserts it is “unacceptable as a matter of law and not technically justified” to use PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub> because “PM<sub>2.5</sub> and PM<sub>10</sub> are different pollutants that require different control measures.” *Id.*

***EPA Response:*** I deny the Petitioner’s request for an objection to the Proposed Permit on this claim.

As a general matter, the Petitioner makes various statements about the health effects of PM<sub>2.5</sub>, which do not represent a “claim” to which the EPA is responding. Petition at 19-20. Further, the Petitioner makes several statements regarding the NSR PM<sub>2.5</sub> Implementation Rule. Petition at 18-19. The rule speaks for itself and those portions of the Petition also do not raise an “issue” regarding the permit to which the EPA is responding.

The EPA has looked at a number of criteria in determining whether the petitioner has demonstrated noncompliance with the Act. One factor the EPA has examined is whether the petitioner has provided the relevant analyses and citations to support its claims. If the petitioner does not, the EPA is left to work out the basis for petitioner’s objection, contrary to Congress’ express allocation of the burden of demonstration to the petitioner in CAA § 505(b)(2). *See MacClarence*, 596 F.3d at 1131 (“the Administrator’s requirement that [a title V petitioner]

support his allegations with legal reasoning, evidence, and references is reasonable and persuasive”); *Murphy Oil Order* at 12 (denying a title V petition claim, where petitioners did not cite any specific applicable requirement that lacked required monitoring). Here, the Petitioner does not identify any applicable requirement that would mandate regulation of PM<sub>2.5</sub> emissions from Hu Honua if it is not a major source. Nor does the Petitioner identify any applicable requirement of the CAA that would require a “BACT PM<sub>2.5</sub> emission limit” or PM<sub>2.5</sub> emissions analysis. To the extent the Petitioner is attempting to claim that Hu Honua is a major stationary source on the basis of PM<sub>2.5</sub> emissions such that PSD requirements should apply, the Petitioner has not provided any data or information demonstrating that Hu Honua’s PM<sub>2.5</sub> emissions exceed major source thresholds. *See generally*, Petition at 18-22.

Additionally, to the extent that the Petitioner is attempting to claim that the PM<sub>10</sub> monitoring is inadequate to demonstrate compliance with emission limits, the Petitioner has not identified an applicable requirement for which the monitoring is inadequate. *Murphy Oil Order* at 12. The EPA also notes that HDOH revised the Final Permit to incorporate PM performance test requirements, in response to the EPA comments. *See* HDOH Response to the EPA Letter at 10. Specifically, the Final Permit at Sections G.2.e and G.3.e require the use of Method 5 for filterable PM, Method 202 for condensible PM and Method 201A for filterable PM<sub>10</sub>.

Finally, the Petitioner cites to the EPA’s final NSR PM<sub>2.5</sub> Implementation Rule, in which the EPA stated that states are obligated to address direct PM<sub>2.5</sub> and precursor emissions from both major and minor sources, but the Petitioner does not tie this rule to any applicable requirement or SIP requirement in place at the time the Final Permit was issued. Petition at 18-19. Therefore, any purported duty to revise Hawaii’s SIP to address PM<sub>2.5</sub> for minor sources is outside of the EPA’s review in this Title V Petition.

For the foregoing reasons, I deny the Petition as to this claim.

#### **M. CLAIM 13: [HDOH] Failed to Adequately Respond to Significant Public Comments**

***Petitioner’s Claim.*** The Petitioner asserts that HDOH “had an obligation to adequately respond” to four “significant” comments that the Petitioner raised during the public comment periods and that are incorporated into the Petition as Claims 9-12. Petition at 22, *citing In the Matter of Wisconsin Public Service Corporation’s JP Pulliam Power Plant*, Order on Petition V-2009-01 at 5 (June 28, 2010) (*Pulliam Power Plant Order*). The Petitioner states: “In her comments on the Revised Draft Permit, Dr. Pless identified four significant issues raised in her initial comments that [HDOH] failed to provide a direct response to.” *Id.* The four specific issues are as follows: (1) “failure to include emission limits and monitoring for biomass handling, chipping, and storage operation as a source of particulate matter emissions;” (2) failure to include emission limits and monitoring for trona or lime and ash handling as a source of particulate matter emissions;” (3) “failure to include emission limits and monitoring for sulfuric acid mist emissions;” and (4) “failure to include emission limits and monitoring for [PM<sub>2.5</sub>].” *Id.* The Petitioner contends that given HDOH’s “practice of iterative Permit revisions to address some public concerns,” the public has difficulty understanding “what comments are addressed in revisions and which are not.” Petition at 23. The Petitioner further contends that HDOH

“effectively wears out the opposition through their practice of serial, incremental [permit] revisions without a statement of basis or response to comments to explain the issues addressed, and those ignored, during the series of permit revisions that accompany [HDOH’s] review of controversial [permits].” *Id.* at 23.

***EPA’s Response.*** I deny the Petitioner’s request for an objection to the Proposed Permit on this claim. Each of the four issues raised in Claim 13 was also raised substantively as part of this Petition and are responded to in Claims 9 through 12 of this Order.

In addition, the Petitioner appears to be asserting that HDOH’s failure to provide any response to these comments resulted in the Proposed Permit not being in compliance with the Act. However, the EPA notes that HDOH did provide a response to these four issues. *See* 2010 RTC at 21, 24, 29, and 27, respectively, concerning HDOH’s responses on issues 1, 2, 3, and 4 in Claim 13. Thus, to the extent that the Petitioner contends that HDOH provided no response to the four comments, and this failure to respond is itself an inadequate response, the claim is moot, as HDOH did provide a response to all four comments in its 2010 RTC.

The Petitioner also contends that HDOH has a practice of making “serial, incremental” revisions to covered source permits without providing a statement of basis or response to comments concerning the permit revisions. The EPA’s response to this point is focused on the Hu Honua title V permit. For Hu Honua, the following items were available as part of the record during the first public comment period on the Draft Permit, consistent with H.A.R. § 11-60.1 and 40 C.F.R. § 70.7(h): (1) the Permit Application; (2) the Draft Permit Review Summary; and (3) the Draft Permit. Likewise, during the second public comment period on the Revised Draft Permit, in addition to the documents already noted, the following items were available to the public as part of the record, consistent with H.A.R. § 11-60.1 and 40 C.F.R. § 70.7(h): (1) the Revised Permit Application; the Revised Draft Permit Review Summary; (3) the Top-Down BACT Analysis for the Biomass Boiler; and (4) the Revised Draft Permit. The EPA notes that the Revised Draft Permit Review Summary, as well as the Revised Permit Application, also included updated information in response to the four specific comments raised during the first public comment period.<sup>28</sup> Thus, while the processes may appear “iterative” – the permitting rules specifically provide for new public comment opportunities as appropriate. Thus, there is nothing inherently unlawful about this process. In this case, HDOH provided additional opportunities consistent with its authority under the applicable requirements.

As a general matter, a “response to comment” (RTC) document is not included during the public comment period because comments have not yet been received. The Petitioner does not point to any Hawaii or EPA rule that requires permitting authorities to distribute a RTC when providing a second comment period. In this instance, the EPA appreciates the numerous opportunities for public comment provided by HDOH on the various iterations of Hu Honua’s title V permit. As

---

<sup>28</sup> *See* Revised Draft Permit Review Summary at 5 (PM<sub>10</sub> emissions 33.6 tpy); Revised Permit Application at 3 (concerning PM emissions from trona or lime handling and ash handling). Also, concerning sulfuric acid mist emissions, the Revised Draft Permit Review Summary explained that SO<sub>2</sub> emissions from the biomass-fired boiler were based on a sulfur content of 15 ppm in the fuel for S15 biodiesel and 100% conversion of sulfur to SO<sub>2</sub>. Revised Draft Permit Review Summary at 7. The Revised Permit Application also explained how SO<sub>2</sub> emissions were calculated. Revised Permit Application at 9.

HDOH stated in its 2011 RTC, the public participation opportunities provided were consistent with their own administrative rules and 40 C.F.R. Part 70. 2011 RTC at 37. HDOH also explained that it conducted a public hearing and extended the first comment period to 60 days, beyond the required 30 days, to accommodate community concerns. HDOH further explained that it limited the second public comment period to changes in the Revised Draft Permit, since the public already had sufficient time – 60 days versus the minimum 30 days – to provide comments on other matters during the first comment period on the Draft Permit. HDOH also noted that the second comment period extended beyond the required 30 days to 32 days for public participation. 2011 RTC at 37.

The EPA notes that we posted the Proposed Permit on our website on May 19, 2011, and that we posted the EPA Letter on our website on July 5, 2011. The Petitioner references the EPA Letter in the Petition. The EPA also notes that the 60-day petition period commenced on July 5, 2011, and ended on September 6, 2011.<sup>29</sup>

The EPA realizes that completing the title V permitting process generally requires substantial state agency staff efforts. The EPA also notes that HDOH made substantive changes to the Draft, Revised Draft, Proposed, and Final Permits, each of which were intended, by HDOH, to be responsive to public comments on prior versions of the permit. Even the Petitioner acknowledged that the iterative versions of the permit were to address public concerns. Petition at 23. As a matter of “best practice,” the EPA recommends that, when appropriate and possible from a state or local agency resources standpoint, state or local agencies provide their responses to comments at the time that they provide notice of opportunity to comment on a revised draft permit. Additionally, the EPA recommends that permitting authorities carefully consider when it is appropriate to provide the public with another opportunity to comment on a revised draft permit. This practice assures that the public has an opportunity to meaningfully participate in the permitting process, including the opportunity to comment on each permit revision.

Furthermore, the EPA notes that providing the entire record for a Proposed Permit at the beginning of the EPA’s 45-day review<sup>30</sup> period serves to enhance the EPA’s review of the Proposed Permit by providing a fuller understanding of the permitting history and the state’s rationale for its permitting decisions. Where the entire record is available at the beginning of the 45-day review period, the EPA has the benefit of understanding the permitting history and the state’s rationale for its permitting decisions. Likewise, where the entire record is available at the beginning of the public’s 60-day window to submit petitions to the Administrator, the public has the benefit of understanding the permitting history and the state’s rationale for its permitting decisions. Providing the entire record before the start of the public’s 60-day petition period would allow the public to better assess any issues with the permit that they may have identified. Where a state agency provides a record containing an adequately articulated rationale for its

---

<sup>29</sup> While the EPA is not relying upon these facts as the basis for its decision, the EPA notes that the Proposed and Final Permits, as well as the RTCs on the Draft, Revised Draft, and Proposed Permits were made available to the public on August 31, 2011, 6 days before the end of the 60-day petition period. The Petitioner submitted its Petition on August 26, 2011, 11 days before the end of the 60-day petition period.

<sup>30</sup> The EPA notes that the EPA’s 45-day review period begins when the permitting authority has provided the EPA with “the proposed permit and all necessary supporting information.” *See* 40 C.F.R § 70.8(c).

permitting actions, petitioners must demonstrate that such rationale is inadequate when petitioning the EPA to grant a claim. *See MacClarence*, 596 F.3d at 1132-33; *see also, e.g., In Noranda Order* at 20 (denying title V petition issue where petitioners did not respond to state's explanation in response to comments or explain why the state erred or the permit was deficient); *Kentucky Syngas Order* at 41 (denying title V petition issue where petitioners did not acknowledge or reply to state's response to comments or provide a particularized rationale for why the state erred or the permit was deficient).

For the foregoing reasons, I deny the Petition as to this claim.

## V. CONCLUSION

For the reasons set forth above and pursuant to CAA § 505(b)(2) and 40 C.F.R. § 70.8(d), I hereby grant in part and deny in part the Petition requesting that the EPA object to the Hu Honua title V Proposed Permit.

Date: 2/7/14

  
\_\_\_\_\_  
Gina McCarthy,  
Administrator