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

In the Matter of:

Honolulu Resource
Recovery Facility, PSD Appeal No. 86-8
Applicant

REMAND

Sierra Club, Conservation Council for Hawaii, American Lung Association of Hawaii, Life of the Land, and Joseph Singer (Petitioners) jointly request review of a Prevention of Significant Deterioration (PSD) permit determination that will authorize the City and County of Honolulu to construct the Honolulu Resource Recovery Facility (H-Power), a municipal waste burner. [SEE FOOTNOTE 1] A final decision to issue a permit was made on November 17, 1986, by the Hawaii Department of Health (HDOH), with EPA Region IX's concurrence, pursuant to a delegation agreement between Region IX and HDOH. HDOH's action in issuing the permit is subject to the review provisions of 40 CFR Section 124.19, (See Footnote 2) because the

[FOOTNOTE 1]: Hiroji Abe also submitted a petition for review dated December 20, 1986, which this office received on December 30, 1986. The rules require that petitions for review of a permit determination be filed within 30 days of issuance (plus mailing time). 40 CFR Sections 124.19 and 124.20. In this case a petition had to be postmarked by December 20, 1986. The record contains no evidence of when Mr. Abe mailed the petition, but the fact that the petition was not received until December 30 leads to a conclusion that the petition is untimely. Accordingly, the petition is dismissed. Additionally, I note that Mr. Abe does not raise any issues not encompassed by Petitioner's petition for review.

[FOOTNOTE 2]: All references to the Code of Federal Regulations (CFR) are to the 1986 edition.

permit is deemed to be an EPA-issued permit under EPA rules, 40 CFR Section 124.41; 45 Fed. Reg. 33,413 (May 19, 1980). Until review is completed the H-Power facility is without an effective permit and therefore is not authorized to begin construction.

Petitioners protest issuance of the permit because they believe it does not require, as it is suppose to, use of the best available control technology (BACT) for sulfur dioxide (SO2) (See Footnote 3) and because they believe the permitting authority did not evaluate the impact of the SO2 control technology on unregulated pollutants, as required by North County Resource Recovery Associates, PSD Appeal No. 85-2 (June 3, 1986). In response to the petition for review, Region IX states that it has reevaluated the record and considered new information on municipal waste incineration, and now concludes that the BACT determination for H-Power may not be appropriate. In view of the Region's response and after considering the petition for review and the various responses, I agree with the Region that HDOH's BACT determination for SO2 may be inappropriate. Also, the analysis required by North County of the impact of controls on emissions of unregulated pollutants appears to be inadequate. Therefore, I am remanding the concurrence to the Region for reconsideration.

[FOOTNOTE 3] Although Petitioners also declare that the BACT determination for particulate matter and hydrochloric acid is unlawful, their petition only addresses the BACT determination for SO2 and fails to provide any supporting arguments for these other claims. For this reason, the Region and HDOH direct their responses to the SO2 BACT determination and this remand concerns only the SO2 BACT determination.

Discussion

Before a major new facility can be constructed in an area that is meeting the National Ambient Air Quality Standards (NAAQS), [SEE FOOTNOTE 4] the owner must obtain a PSD permit to construct and operate the facility. 42 U.S.C. Sections 7470-79. The Clean Air Act conditions permit issuance on a showing that the proposed facility will employ BACT for each regulated pollutant emitted from it in significant amounts. 42 U.S.C. Section 7475. Section 169 of the Act defines BACT as an "emission limitation reflecting the maximum degree of reduction" that the "permitting authority" on a "case- by-case basis, taking into account energy, environmental, and economic impacts and other costs" determines is "achievable." 42 U.S.C. Section 7479(3). EPA Region IX delegated its authority to issue PSD permits to HDOH in 1983, subject to the Region's concurrence on BACT determinations for the first five permits. 48 Fed. Reg. 51,682 (November 10, 1983).

H-Power, a resource recovery facility that will burn municipal solid waste and generate electricity from this process, is the first source to receive a permit determination from HDOH under the delegation. HDOH made a final decision to issue a permit for H-Power on November 14, 1986, and EPA signed the permit to concur in the BACT determination on November 17, 1986. Pursuant to Section 124.15, a final permit decision becomes effective 30 days after service of

[FOOTNOTE 4]: H-Power will be located in an area designated as being in attainment of the SO2 NAAQS. 40 CFR Section 81.312.

notice of the decision unless review is requested under Section 124.19. Petitioners requested review under Section 124.19 in a timely manner; [SEE FOOTNOTE 5] thus the permit decision is not effective.

The events leading to the HDOH permit decision need not be detailed here; the highlights will suffice.

Initially, HDOH issued a draft permit containing SO2 limits of 191 parts per million (ppm) and 349 lbs/hr (3-hour average) but requiring nothing in terms of technological emission controls for SO2. Region IX expressed its disapproval, taking the position that BACT for a municipal waste burner such as H-Power calls for use of a dry scrubber, since it would enable the facility to achieve SO2 emission limits of 30 ppm (approximately 80% removal efficiency). HDOH persisted, however, reiterating its position that local environmental, economic, and energy impacts support a conclusion that scrubbers are not required for H-Power. In the end the Region and HDOH reached a compromise

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[FOOTNOTE 5]: HDOH argues that the petition should be dismissed under Section 124.19 for failure to include a "demonstration" that the issues being raised in the petition were raised during the public comment period. The Region agrees that the petition does not include a statement to this effect, but points out that the exhibits submitted with HDOH's response show that the issues were indeed raised during the public comment period. So, the Region suggests that the Petitioners' failure to comply with this "technical" requirement is harmless error. I am inclined to agree with the Region. The purpose of the requirement is to inform the Administrator whether a petition for review meets the prerequisites for consideration, i.e., that the permit issuer had an opportunity to address the issue during the public comment period prior to issuing the permit. 40 CFR Section 124.13. Since the exhibits supplementing the responses by the parties indicate that Petitioners did raise the issues below, I see no harm caused by Petitioners' omission.

in a final permit decision that sets SO2 limits at 143 ppm and 349 lbs/hr on a 3-hour average (only a 25% reduction according to the Region) [SEE FOOTNOTE 6] to be met without scrubbers, by removing high-sulfur bearing materials prior to combustion of the waste. In addition, the permit provides for the later addition of a dry sorbet injection system if necessary to meet the emissions limits in the permit.

Based on a reevaluation of the record and new information on municipal waste incineration, [SEE FOOTNOTE 7] the Region now believes that HDOH's BACT determination may not be appropriate. The Region points out that 17 of 21 municipal waste burners in the Region will have scrubbers and of the remaining four, three will achieve SO2 control of over 90% efficiency. [SEE FOOTNOTE 8] Considering the difference in control efficiency between H- Power and these other resource recovery projects, the Region concludes that HDOH has not presented a compelling case that local factors are sufficient to warrant allowing a less effective control technology for

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[SEE FOOTNOTE 6]: HDOH asserts that 57% reduction of SO2 emissions will result from the 143 ppm rate.

[SEE FOOTNOTE 7]: According to EPA Region IX, the new information includes presentations at three recent conferences 1) the American Pollution Control Association Conference entitled "Burning Our Garbage: Issues and Alternatives," October 30-31, 1986 in San Francisco; 2) An EPA workshop on municipal waste combustion, December 9-10, 1986 in North Carolina; and 3) the "First National Regulatory Agency Resource Recovery Workshop" sponsored by the California Air Pollution Control Officers Association and Northeast States for Coordinated Air Use Management, January 15-17, 1987 in Los Angeles.

[FOOTNOTE 8]: The last project is small and will have SO2 emissions of 45 ppm.

H-Power. [SEE FOOTNOTE 9] Furthermore, the Region asserts that HDOH failed to analyze the impact of the proposed controls on unregulated pollutants as required by North County. [SEE FOOTNOTE 10] For these reasons, the Region requests the Administrator to grant review on the BACT determination.

Administrative review of PSD permit decisions is not usually granted unless the permit decision is clearly erroneous or involves an exercise of discretion or policy that is important and therefore should be reviewed by the Administrator as a discretionary matter. 40 CFR Section 124.19 . "This power of review should be only sparingly exercised . . . . " 45 Fed. Reg. 33,412 (May 19, 1980). The regulations envision that disputed permit conditions will be resolved for the most part at the regional level. Id. This is

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[FOOTNOTE 9]: Simply because most of the municipal waste burners in the Region will employ scrubbers for SO2 control does not, as a matter of law, compel a conclusion that H-Power must have scrubbers. See Northern Plains Resource Council v. U.S. EPA, 645 F. 2d 1349 (9th Cir. 1981); In the Matter of New York Power Authority, PSD Appeal No. 82-4 (Dec. 6, 1983). However, the fact that essentially all municipal waste burners will have scrubbers and because these scrubbers are effective in controlling emissions of potentially toxic organic and heavy metal pollutants, and acid gases other than SO2, demonstrates that the technology is available. Accordingly substantial and unique local factors must be shown to justify a less efficient control technology.

[FOOTNOTE 10]: HDOH does not claim that its BACT determination included an evaluation of the impact of the SO2 controls on unregulated pollutants; rather it argues that in the process of making a final permit decision, it evaluated the potential impact of unregulated pollutants emitted from H- power and revised the permit to "buffer these impacts" by including a requirement for higher combustion temperatures and longer retention time in the boilers. HDOH also added a term that requires compliance with any additional guidance developed as a result of the North County remand. HDOH claims this satisfies the requirement of North County.

particularly true for BACT determinations because they involve individualized consideration of the facts of each case. See In the matter of CertainTeed Corporation, PSD Appeal No. 81-2 (December 21, 1982). Given the limited purpose of this review and the fact that BACT determinations should be made, at least in the first instance, at the regional or local level, I am remanding the concurrence to the Region for reconsideration. Since the Region now expresses doubt about its concurrence on the BACT, I conclude that the proper course of action is for the Region to reconsider its decision and either find that the evidence supports its initial decision to concur or, if not, to make what it considers the correct determination. [SEE FOOTNOTE 11] The Region will have to determine whether the applicant has met its burden of demonstrating that significant technical defects, or substantial local economic, energy, or environmental factors or other costs warrant a control technology less efficient than scrubbers.

In reconsidering its concurrence the Region should consult with national or other regional level EPA program officials, and may obtain more information from HDOH or H-Power, perform additional analysis, or otherwise work with HDOH, as appropriate.

Footnote 11: HDOH points to the Region's official concurrence in the BACT determination and argues that the Region's current position is inconsistent with the delegation agreement. In making this argument, HDOH ignores the nature of the delegation agreement and the fact that it is subject to the permitting procedures in Part 124. The delegation agreement is not a private bond indenture or lease; it is an instrument for implementing a law enacted in the public interest. As stated a decade ago in an EPA permit proceeding:

(FOOTNOTE CONTINUED ON NEXT PAGE)

After such reconsideration, the Region is to issue a full report to the Administrator and the parties on its decision and the supporting reasons. Whatever the Region decides must be adequately supported by the existing administrative record and any supplements thereto. [SEE FOOTNOTE 12] If the Region decides to withdraw its concurrence, it must set out its own BACT determination and include a discussion of why the local factors raised by HDOH are not sufficient to justify the initial BACT determination.

[FOOTNOTE 11 CONTINUED]

> The Agency is the representative of the public interest and is not "an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection" at the hands of the Agency. [Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965) cert. denied 384 U.S. 941 (1966).] The courts have made clear that the Agency must take affirmative steps to obtain the information necessary to sound decisions under the statutes it administers, even at the cost of delay....

In re Public Service Company of New Hampshire, et. al. (Seabrook Station, Units 1 and 2), 10 ERC 1257, 1263 (1977). The instant case represents a situation where the Region retained authority in the delegation agreement to review and and concur in BACT determinations and now the Region expresses second thoughts about its concurrence. As Justice Frankfurter stated, "Wisdom too often never comes, and so one ought to reject it merely because it comes late." Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600, 69 S. Ct. 290, 293, 93 L Ed 259 (1948). Certainly, the Administrator, with his statutory responsibility to protect the environment, should look at the Region's concerns or, if appropriate, direct the Region to reconsider its decision to concur. The permit, after all, is not yet effective.

[FOOTNOTE 12] In its response to the petition, HDOH argues that 40 CFR Section 124.13 prohibits consideration of new information because this information is not part of the administrative record. I disagree. Section 124.13 directs parties objecting to any conditions of the draft permit to submit their comments during the public comment period.

[FOOTNOTE 12 CONTINUED NEXT PAGE]

After reviewing the Region's decision on remand and any responses by the parties, I will issue a ruling on the pettition for review. In the meantime, the pending petition for review will be held in abeyance.

During the time the Region is reconsidering its concurrence, the Region and HDOH may choose to negotiate revisions to the H-Power BACT determination and issue a new permit decision. If so, any revised permit decision, unless appealed, will become final within 30 days of service of notice to the Petitioners, the permit applicant, and any other parties previously entitled to notice under 40 CFR Section 124.15.

So ordered.

Lee M. Thomas
Administrator

Dated: June 27, 1987

[FOOTNOTE 12 CONTINUED]

It does not apply to the permitting authority or, in this case, to Region IX because of the Region's relationship to the permitting authority under the delegation agreement. Nor does Section 124.13 prohibit the Administrator from considering new information. In view of the Administrator's broad authority to review permit decisions, including the right to remand under Section 124.19, the Administrator has the power to direct the Regional Administrator or HDOH to consider new information and to seek further evidence on relevant points. See In the matter of 170 Alaska Placer Miners, More or Less, NPDES Appeal No. 79-1 (Mar. 10, 1980), In re Public Service Company of New Hampshire, et. al. (Seabrook Station, Units 1 and 2), 10 ERC 1257 (Decision of the Administrator, 1977).

CERTIFICATE OF SERVICE

I hereby certify that the copies of the foregoing Remand in the Matter of Honolulu Resource Recovery Facility, PSD Appeal No. 86-8, were served upon the following persons by 1st class mail, Postage prepaid:

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