

HORAK, LLLC  
A Limited Liability Law Company  
John G. Horak 7571  
P.O. Box 10374  
Honolulu, HI 96816  
Phone: (808) 735-5366  
Fax: (808) 735-5399  
Email: johnh@horaklllc.com

**ORIGINAL**

Attorney for Plaintiff  
PRESERVE PEPE‘EKEO HEALTH AND  
ENVIRONMENT

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAI‘I**

PRESERVE PEPE‘EKEO HEALTH  
AND ENVIRONMENT, a Hawai‘i  
nonprofit unincorporated association

Plaintiff,

vs.

GINA MCCARTHY, UNITED  
STATES ENVIRONMENTAL  
PROTECTION AGENCY

Administrator,

Defendant.

) CIVIL NO.  
)  
) COMPLAINT FOR INJUNCTIVE  
) AND DECLARATORY RELIEF;  
) EXHIBIT 1

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COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

JURISDICTION, NOTICE AND VENUE

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 as a federal question, and 42 U.S.C. § 7604(a)(2) as an action arising under the Clean Air Act (“CAA” or “Act”).
2. On June 5, 2015 Plaintiff PRESERVE PEPE‘EKEO HEALTH AND ENVIRONMENT (“PPHE”) provided Defendant GINA MCCARTHY, Administrator at the United States Environmental Protection Agency (“EPA”), with its notice of intent (“NOI”) to file suit for violations of Section 505 of the Act (42 U.S.C. § 7661d) thus fulfilling the requirement of the Act that at least sixty days elapse between serving notice on the Administrator and the commencement of this action (42 U.S.C. § 7604(b)). (See Notice Letter, Attached as Exhibit 1). More than sixty days have elapsed since service of the NOI and the violations complained of are continuing.
3. Venue lies in the District of Hawai‘i pursuant to 28 U.S.C. § 1391(e)(1), which permits a civil action against an officer or employee of the United States, or any agency thereof, to be brought in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.

NATURE OF THE ACTION

4. This is an action brought under the CAA's "Citizens' Suit" provisions to compel Defendant McCARTHY to take a non-discretionary action. Thus this court has subject matter jurisdiction over the claim set forth herein pursuant to 42 U.S.C. § 7604(a)(2), and the authority to award attorney's fees pursuant to 42 U.S.C. § 7604(d). This case does not concern federal taxes, is not a proceeding under 11 U.S.C. §§ 505 or 1146, and does not involve the Tariff Act of 1930. Thus, this court has authority to order the declaratory relief requested pursuant to 28 U.S.C. § 2201. If the Court orders declaratory relief, 28 U.S.C. § 2202 authorizes this Court to issue injunctive relief. Plaintiff seeks a declaratory judgment and injunction compelling Administrator MCCARTHY to take final action to grant or deny the petition filed by PPHE on September 13, 2014 ("Petition"). The Petition seeks EPA's final action objecting to the Title V operating permit ("Permit") issued by the Environmental Management Division of the Clean Air Branch ("CAB"), Hawai'i Department of Health ("HDOH"), for the Hu Honua Bioenergy Facility ("Facility") proposed in Pepe'ekeo Hawai'i. Defendant has failed to comply with a non-discretionary duty to grant or deny the Petition within 60 days after filing as required pursuant to 42 U.S.C. § 7661d(b)(2).

PARTIES

5. Plaintiff PPHE is a nonprofit association recognized under Hawai‘i’s Uniform Unincorporated Nonprofit Association Law (HRS Chapter 429) and has principal offices in Pepe‘ekeo, Hawai‘i. PPHE is dedicated to promoting public health and welfare by protecting and enhancing air quality on the Island of Hawai‘i.

6. PPHE has members, supporters and directors who live, work, and pursue recreational activities in the immediate vicinity of the Facility. PPHE’s members, supporters and directors will be adversely affected by excessive emissions of air pollution resulting from the Permit’s failure to ensure compliance with the Act, Federal Operating Permit regulations at 40 Code of Federal Regulations Part 70, the Hawai‘i State Implementation Plan (“SIP”), State permitting and other applicable requirements. These adverse effects include the direct, negative health impacts caused by exposure to air pollutants, as well as numerous indirect harms, e.g. lost economic and educational opportunities that are a corollary to direct health impacts. The EPA has found that populations like PPHE’s members, supporters and directors suffer increased rates of asthma and other respiratory ailments, and higher morbidity as a result of exposure to air pollutants like those emitted from the Facility. PPHE’s members, supporters and directors, and their children, alter their daily routines in response to the Facility’s

pollution, including reducing physical exercise and recreation, additional and/or prolonged periods of time indoors, and increased frequency of school and employment absenteeism. Children are generally more susceptible to injury from exposure to air pollution. PPHE's members, supporters and directors live in Hawai'i, in part, to enjoy the quality of outdoor experiences that require clean and safe air quality.

7. Defendant's failure to take timely final action on the Petition has interfered with the Act's requirement that all major sources of criteria pollutants and hazardous air pollutants have specific, justified and enforceable emissions limitation that prevent excessive air pollution and protect the public's health and welfare interests. PPHE has demonstrated that the Permit conditions fail to ensure compliance with applicable emissions limitations, among other requirements, and endangers, as described above, the health and welfare of the community represented by PPHE. Defendant's failure to take timely final action on the Petition has allowed the owners/operators of the Facility to commence construction, and ultimately bring their Facility online. Thus, PPHE has been and will continue to be adversely affected and irreparably injured by Defendant's failure to comply with the Act.

8. Defendant GINA MCCARTHY is sued in her official capacity as EPA Administrator, and as the person with ultimate authority over and responsibility to respond to PPHE's Petition.

TITLE V OF THE CLEAN AIR ACT AND HAWAI'I'S PERMIT PROGRAM

9. Congress passed the Act in 1970 to abate air pollution, enhance air quality, and to protect the public health and welfare. 42 U.S.C. § 7401(b). Congress directed EPA to improve our Nation's air quality and required EPA to identify those air pollutants that endanger public health and welfare. 42 U.S.C. § 7408(a).

10. Title V of the CAA as amended in 1990 requires that states develop a federally approvable permit program that applies to major sources of air pollution. In response, Hawai'i promulgated Title 11, Chapter 60.1 of the Hawai'i Administrative Rules ("HAR"), establishing that an Air Pollution Control Permit is required prior to constructing, re-constructing, modifying or operating a stationary air pollution source or air pollution control equipment.

11. A permit issued pursuant to Title V of the Act ("Title V Permit") violates the Act if it fails to ensure compliance with applicable requirements. 42 U.S.C. § 7661c(a), CAA § 504(a). This includes, but is not limited to, any standard or other requirement under Sections 111 and 112 of the Act; any standard or other requirement provided for in the applicable implementation plan; and any

standard or other requirement of the regulations promulgated to protect stratospheric ozone under Title VI of the Act. 40 C.F.R. § 70.2.

12. The Administrator has a non-discretionary duty to object to Title V Permits that fail to meet the minimum requirements of the Act. If the Administrator does not object to the issuance of a Title V Permit, any person may petition the Administrator to take such action. 42 U.S.C. § 7661d(b)(2). PPHE's Petition to the EPA alleged that: i) HDOH failed to provide adequate opportunities for public participation; ii) the permit violates 40 C.F.R. 70.7(a)(5) for failure to include a Statement of Basis ("SOB"); iii) the permit includes provisions that are not federally (or practically) enforceable; iv) the Potential to Emit ("PTE") figures are unjustified; v) HDOH failed to provide adequate reasoning and support for its decisions; and vi) that the permit suffers additional legal infirmities. The Petition requests EPA object to the Permit and order HDOH to commence permitting processes for the Facility as a Major Source.

13. The Administrator is required to grant or deny Title V Petitions within 60 days after the petition is filed. 42 U.S.C. § 7661d(b)(2). More than 60 days has elapsed since PPHE filed its Petition and the Administrator has not taken action to grant or deny the Petition. Respondent and Defendant Administrator has a clear, present non-discretionary duty to act on PPHE's Petition.

14. Plaintiff has exhausted its administrative remedies and has no plain, speedy or adequate remedy in the ordinary course of law. Issuance of a writ is needed to avoid immediate, severe, and irreparable harm to Plaintiff, as well as residents and visitors to Pepe‘ekeo.

FIRST CLAIM FOR RELIEF

(Failure To Take Final Action on PPHE’s Title V Petition)

15. Paragraphs 1 through 14 are incorporated herein by reference.

16. To date, Defendant has not granted, denied or otherwise acted in response to PPHE’s Petition as required by law. 42 U.S.C. § 7661d. PPHE’s Petition was filed on September 13, 2014 and objected to the Title V Permit issued by HDOH and CAB for the Hu Honua Bioenergy Facility proposed for Pepe‘ekeo Hawai‘i.

17. Defendant has violated and is in violation of Section 505 of the Act by failing to perform this non-discretionary duty. 42 U.S.C. § 7661d.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Enter a declaratory judgment that Defendant GINA MCCARTHY failed to perform her non-discretionary duty by failing to take timely final action to grant or deny PPHE’s Petition objecting to the Facility’s Title V Permit;



2. Issue a writ of mandamus compelling Defendant to immediately take action to grant or deny the Petition, and publish this action in the Federal Register within 30 days of the Court's ruling;

3. Direct by injunction, pursuant to section 304(a) of the CAA (42 U.S.C. § 7604(a)), that Defendant take final action to grant or deny the Petition and publish this action in the Federal Register within 30 days of the Court's ruling;

4. Retain continuing jurisdiction to review Defendant's compliance with all judgments entered herein;

5. Issue such additional judicial determinations and orders that are necessary to effectuate the foregoing requests for relief;

6. Grant to Plaintiff the costs of litigation, including reasonable attorneys' and expert witness' fees pursuant to CAA Section 7604(d); and

7. Provide such other relief as the Court shall deem just and proper.

DATED: Honolulu, Hawai'i, 10/10/2015

/s/ John G. Horak  
John Horak  
Attorney for Plaintiff  
Preserve Pepe'ekeo Health and Environment

ENVIRONMENTAL LAW

June 5, 2015

Via Certified Mail (Return Receipt Requested)

Administrator Gina McCarthy  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

Re: Sixty Day Notice of Intent to File Clean Air Act Citizen Suit Based On Failure of EPA Administrator to Take Timely Final Action Regarding Petition to Object to Hawaii Covered Source Permit No. 0724-01-C (Title V)

Dear Administrator McCarthy:

This office represents Preserve Pepe'keo Health and Environment ("PPHE" or "Petitioners") in a matter before you concerning the Hu Honua Bioenergy, LLC ("Hu Honua") Title V operating permit. PPHE is organized to represent residents of Pepe'keo, including a disproportionate number of low income and minority ethnic persons as well as the public at large from industrial and similar activities that adversely affect the health and well being of the Pepe'keo community on the Big Island of Hawaii. The Hu Hunoa permit, as proposed by the State of Hawaii in covered Source Permit No. 0724-01-C, would result in the emissions of excessive amounts of air pollutants, including hazardous air pollutants, in violation of the Clean Air Act and threatening to cause degradation of air quality in the community of Pepe'keo and impart adverse health effects upon its residents, including Petitioners.

Pursuant to Section 304(b)(2) of the Clean Air Act, 42 U.S.C. § 7604(b)(2), and in accordance with 40 C.F.R. Part 54, Petitioners hereby submit this Notice of Intent to Sue. If no further action is forthcoming in the interim, sixty days after the date of this letter, we intend to file suit in U.S. District Court to redress your failure to take timely final action in response to the Petition submitted by this office on September 13, 2014 concerning the Hu Hunoa Title V Permit, CSP 0724-01-C.

Petitioners and other members of the public commented on Hawaii's proposed action on CSP 0724-01-C, raising a number of issues concerning the adequacy of the analysis and the technical information and assumptions employed in calculating the emissions associated with the proposed activity as well as the types of control technology required by the permit's emissions limits. Rather than establishing specific, enforceable emissions limits, the permit allowed the source to test emissions after construction was completed and operations began to determine if emissions would not exceed major source thresholds. Comments by the public and EPA were addressed through modifications to the permit, but the revised permit was not circulated to the

MARC CHYTILO  
P.O. Box 92233 • Santa Barbara, California 93190  
Phone: (805) 682-0585 • Fax: (805) 682-2379  
Email: [Marc@lomcsb.com](mailto:Marc@lomcsb.com)

June 5, 2015

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public for additional comment, and instead adopted as revised, excluding the public and EPA's consideration of the revisions and the permit's adequacy as a whole. Section 505(b)(1) of the Clean Air Act and 40 Code of Federal Regulations § 70.8(d) require EPA to review this draft permit to determine if the permit contains provisions that are not in compliance with the Clean Air Act, and if EPA determines the permit is not in compliance, the Administrator shall object in writing within 45 days of receiving the proposed permit. If EPA does not object in the 45 day period, any person may petition the Administrator, asking the Administrator to object to the permit. The petition must be filed within 60 days of the end of the 45 day review period, and once filed, the Administrator must grant or deny such a petition within 60 days. § 505(b)(2).

When the Administrator took no action on the Hu Hunoa CSP 07245-01-C draft Title V permit within the 45 day review period, Petitioners timely submitted on September 13, 2014 a petition under § 505(b)(2) asking the Administrator to review the permit and grant their petition. The Administrator has taken no action by the 60<sup>th</sup> day following such submittal, and as such, has failed to perform a nondiscretionary duty imposed by the Clean Air Act. This letter formally notices the Administrator of Petitioners' demand for timely action on the petition for review of CSP 0724-02-C and the intention to file legal action to enforce the Administrator's obligations in this regard.

This Notice is submitted on behalf of Preserve Pepe'keo Health and Environment, Post Office Box 1019, Pepe'ekeo, Hawaii 96783. The full name and address of the person giving Notice is Marc Chytilo, Law Office of Marc Chytilo, Post Office Box 92233, Santa Barbara, California 93190, 805.682-0585, fax 805.682-2379, Email marc@lomcsb.com.

Sincerely,



Marc Chytilo

CC:

Mr. Jared Blumenfeld, Regional Administrator, USEPA Region IX (Courtesy Notice)  
Clients

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Preserve Pepe'ekeo Health and Environment, a nonprofit association recognized under Hawai'i law

(b) County of Residence of First Listed Plaintiff Hawai'i County (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

HORAK, LLLC (A Limited Liability Law Compan); P.O. Box 10374, Honolulu, HI 96816; (808) 735-5366; John G. Horak

DEFENDANTS

United States Environmental Protection Agency, Gina McCarthy, Administrator

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
3 Federal Question (U.S. Government Not a Party)
2 U.S. Government Defendant
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State
Citizen of Another State
Citizen or Subject of a Foreign Country
PTF DEF
Incorporated or Principal Place of Business In This State
Incorporated and Principal Place of Business In Another State
Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Motor Vehicle, Personal Injury, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District
6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 42 U.S.C. Section 7661d

Brief description of cause: Enforcement of EPA Administrator's non-discretionary duty to grant or deny petition alleging Clean Air Act violation

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$

CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

## INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

### Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.  
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.  
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.  
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.  
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.  
 Original Proceedings. (1) Cases which originate in the United States district courts.  
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.  
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.  
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.  
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.  
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.  
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.  
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.