

BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

_____)	
IN THE MATTER OF:)	
)	
THOROUGHbred GENERATING COMPANY,)	PETITION NO. IV-2003-2
L.L.C.)	
)	
MUHLENBERG COUNTY, KENTUCKY)	
TITLE V/PSD AIR QUALITY PERMIT)	
# V-02-001)	
)	
ISSUED BY THE KENTUCKY)	
DIVISION FOR AIR QUALITY)	
_____)	

ORDER DENYING PETITION FOR OBJECTION TO PERMIT

On January 24, 2003, the United States Environmental Protection Agency (EPA) received a petition from the Natural Resources Defense Council (NRDC), the Sierra Club, Valley Watch, the National Parks Conservation Association (NPCA), the Kentucky Environmental Foundation, the Ohio Valley Environmental Coalition, and Elizabeth and Hannah Crowe (Petitioners) pursuant to section 505(b)(2) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7661d(b)(2). The Petition requests that EPA object to the merged CAA construction/operating permit issued by the Kentucky Division for Air Quality (KDAQ or Division) on October 11, 2002, to Thoroughbred Generating Company (a subsidiary of Peabody Energy (Peabody)) for the proposed Thoroughbred Generating Station (TGS) located in Muhlenberg County, near Central City, Kentucky. The permit (#V-02-001) was a merged CAA prevention of significant deterioration (PSD) construction permit and a CAA title V operating permit issued by KDAQ pursuant to Kentucky's Administrative Regulations (KAR) at 401 KAR 52:020 (title V regulations) and 51.017 (PSD regulations).

Petitioners have requested that the Administrator object to the TGS permit because they allege that, both procedurally and substantively, the permit violates the CAA, EPA's Part 70 regulations, and the Commonwealth of Kentucky's state implementation plan (SIP). Specifically, Petitioners assert that Peabody mislead EPA and the public on crucial issues regarding the coal source for the facility; that KDAQ failed to provide adequate procedures for public notice and participation; that the TGS permit fails to ensure against degradation of air quality; that the TGS permit fails to require best available control technology (BACT) for sulfur dioxide (SO₂), nitrogen oxides (NO_x), and condensable particulate matter (PM) emissions; and that the permit fails to require maximum achievable control technology (MACT) for mercury.

On December 15, 2008, Thoroughbred Generating Company relinquished the permit at issue in the Petition. Letter from Dianna Tickner, President of Thoroughbred Generating

Company to John Lyons, Director of KDAQ (attached as Exhibit 1). This relinquishment included the PSD and title V portions of the permit. On December 17, 2008, EPA was informed that KDAQ was terminating ongoing review of the permit (pursuant to the 5-year title V renewal process). E-mail from John Lyons, Director of KDAQ to Gregg Worley, EPA Region 4 (attached as Exhibit 2). For these reasons, I need not reach the substantive issues raised in the Petition. At this point, there is no permit about which EPA could object, and as a result, the instant Petition is now moot.

Based on a review of all the information before me, I deny the Petitioners' request for the reasons set forth in this Order

I. STATUTORY AND REGULATORY FRAMEWORK

Section 502(d)(1) of the Act, 42 U.S.C. § 7661a(d)(1), calls upon each state to develop and submit to EPA an operating permit program intended to meet the requirements of CAA title V. The Commonwealth of Kentucky originally submitted its title V program governing the issuance of operating permits in 1993, and EPA granted full approval on October 31, 2001. 66 *Fed. Reg.* 54953. The program is now incorporated into Kentucky's Administrative Regulations at 401 KAR 52:020. 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 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 (which are referred to as "applicable requirements"), but does require permits to contain monitoring, recordkeeping, reporting, and other conditions to assure compliance by sources with existing applicable requirements. 57 *Fed. Reg.* 32,250, 32,251 (July 21, 1992) (EPA final action promulgating Part 70 rules). One purpose of the title V program is to enable the source, EPA, states, and the public to better understand the applicable requirements to which the source is subject and whether the source is complying with those requirements. Thus, the title V operating permit program is a vehicle for ensuring that existing air quality control requirements are appropriately applied to facility emission units and that compliance with these requirements is assured.

Under section 505(a), 42 U.S.C. § 7661d(a), of the CAA and the relevant implementing regulations (40 CFR § 70.8(a)), states are required to submit each proposed title V permit to EPA for review. Upon receipt of a proposed permit, EPA has 45 days to object to final issuance of the permit if it is determined not to be in compliance with applicable requirements or the requirements of title V. 40 CFR § 70.8(c). If EPA does not object to a permit on its own initiative, section 505(b)(2) of the CAA provides that any person may petition the Administrator, within 60 days of the expiration of EPA's 45-day review period, to object to the permit. 42 U.S.C. § 7661d(b)(2), *see also* 40 CFR § 70.8(d). In response to such a petition, the CAA requires the Administrator to issue an objection if a petitioner demonstrates that a permit is not in compliance with the requirements of the CAA. 42 U.S.C. § 7661d(b)(2); *see also* 40 CFR

§ 70.8(c)(1), *New York Public Interest Research Group (NYPIRG) v. Whitman*, 321 F.3d 316, 333 n.11 (2nd Cir. 2003). Under section 505(b)(2), the burden is on the petitioner to make the required demonstration to EPA. *Sierra Club v. Johnson*, 541 F.3d 1257, 1266-1267 (11th Cir. 2008), *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 677-678 (7th Cir. 2008) (both discussing the burden of proof in title V petitions); *see also NYPIRG*, 321 F.3d at 333 n.11. If, in responding to a petition, EPA objects to a permit that has already been issued, EPA or the permitting authority will modify, terminate, or revoke and reissue the permit consistent with the procedures set forth in 40 CFR §§ 70.7(g)(4) and (5)(i) - (ii), and 40 CFR § 70.8(d).

II. BACKGROUND

Overview of the Proposed Facility

The TGS, as proposed, would have been a 1,500 megawatt (MW) pulverized coal-fired electric generating facility in Muhlenberg County, near Central City, Kentucky. The facility would have consisted of two 7,443 million British thermal units (mmBtu)/hour pulverized coal (PC) boilers, which would have operated with a total nominal output capacity of 750 MW each. The TGS would have been located approximately 46 miles west/northwest of Mammoth Cave National Park and approximately 37 miles from the Indiana border on a tract of 2,700 acres of formerly mined lands. The area has been designated by EPA, under CAA Section 107(d), 42 U.S.C. § 7407(d), as attainment or unclassifiable for all of the NAAQS.

Pertinent Permitting History

KDAQ received a merged PSD/title V permit application from Peabody for the TGS on March 1, 2001. The Division determined that the application was administratively complete on April 23, 2001. A revised application was submitted on October 26, 2001. On January 9, 2002, KDAQ published a public notice providing for a 30-day public comment period on the TGS's initial PSD/title V permit (1st draft permit). A public hearing was held on February 12, 2002, and Petitioners submitted comments on the 1st draft permit. Due to concerns in part related to the completeness of the first public notice and in part related to the incorporation of additional terms and conditions, KDAQ issued a 2nd draft PSD/title V permit and published a second public notice on June 19, 2002. A second public hearing was held on July 25, 2002. KDAQ also extended the public comment period on the second draft for 30 days beyond the second public hearing (to August 24, 2002) and Petitioners again submitted comments. KDAQ subsequently issued a final PSD/proposed title V permit for the TGS on October 11, 2002, and a revised final title V permit on December 6, 2002, respectively.

In addition to requesting that EPA object to the TGS permit, Petitioners also challenged the TGS permit administratively through the Kentucky administrative appeal process. The lengthy administrative appeal process, which concluded with an Order by the Secretary of Kentucky's Environmental and Public Protection Cabinet on April 11, 2006, resulted in a revised final permit issued by KDAQ on May 10, 2006. Several issues were further appealed to the lower court level in Kentucky (the Franklin Circuit Court) which issued an order remanding certain portions of the permit back to KDAQ on August 6, 2007. *Sierra Club v. Commonwealth of Kentucky Environmental and Public Protection Cabinet*, Case No. 06-CI-00640 (Franklin

Circuit Court Civil Branch II Division, August 6, 2007). KDAQ, among other parties, sought review of the Franklin Circuit Court's decision before the Kentucky Court of Appeals, which resulted in a September 19, 2008, decision reversing the Franklin Circuit Court and reinstating the Cabinet Secretary's April 11, 2006, decision. *Commonwealth of Kentucky Environmental and Public Protection Cabinet v. Sierra Club*, Case No. 2007-CA-001723-MR, (Ky. Ct. App. September 19, 2008). At this time, the permit challenge is ongoing in the Kentucky court system.

On December 15, 2008, Thoroughbred Generating Company relinquished the PSD/title V permit at issue in the Petition. Exhibit 1. Specifically, the Company stated that it, "has decided that it will not be going forward with the construction of the TGS in Muhlenberg County, Kentucky...An affiliate of [the Company], Kentucky Syngas, LLC, is concurrently submitting an application for an air emission [PSD/title V] permit to construct a coal-to-substitute natural gas conversion facility at the site." *Id.* On December 17, 2008, the relinquishment of the TGS permit was further confirmed by KDAQ. Exhibit 2.

III. PETITIONERS' JANUARY 24, 2003 PETITION IS MOOT

In the present circumstance, I am denying the Petition as moot because there is no permit about which to object. The permittee has relinquished the permit back to the permitting authority which is treating the permit as withdrawn. Since there is no title V permit for this facility, there is no basis about which Petitioners can "demonstrate [] to the Administrator that the permit is not in compliance with the requirements of [the CAA]." 42 U.S.C. § 7661d(b)(2). More specifically, the permit conditions at issue in the Petition no longer exist. EPA understands that an affiliate of the Thoroughbred Generating Company has already submitted an application to KDAQ for construction of a coal-to-substitute natural gas conversion facility at that site. Exhibit 1. However, at this point, there is no further action that EPA could take pursuant to the CAA, as requested by Petitioners in the January 2003 Petition, to object to the TGS permit. For these reasons, the instant Petition is now moot. *See, e.g., In re Tennessee Valley Authority*, Petition No. IV-2005-1 (Order on Petition) (October 20, 2006).

IV. CONCLUSION

For the reasons set forth above, and pursuant to Section 505(b) of the CAA and 40 CFR § 70.8(d), I hereby deny the Petition.

JAN - 8 2009

Dated

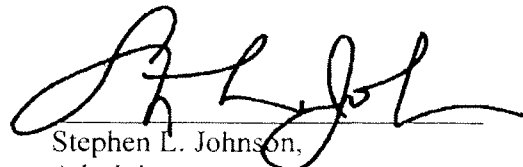

Stephen L. Johnson,
Administrator.

EXHIBIT 1

Thoroughbred Generating Company, LLC

701 Market Street, Suite 300
St. Louis, Missouri 63101
314-342-7613

December 15, 2008

Mr. John Lyons
Director
Kentucky Division for Air Quality
200 Fair Oaks Lane, First Floor
Frankfort, Kentucky 40601

DEC 15 2008

Dear Mr. Lyons:

1:30 PM
JSL

Thoroughbred Generating Company, LLC ("TGC") has decided that it will not be going forward with the construction of Thoroughbred Generating Station ("TGS") in Muhlenberg County, Kentucky. TGC relinquishes the Prevention of Significant Determination/Title V permit for the project. An affiliate of TGC, Kentucky Syngas, LLC, is concurrently submitting an application for an air emission permit to construct a coal-to-substitute natural gas conversion facility at the site. We appreciate the efforts of the Division for Air Quality in working with TGC to permit the TGS facility and in successfully defending the permits in the appeals brought by Sierra Club *et al.* Please call me if you have any questions.

Sincerely,

THOROUGHbred GENERATING COMPANY LLC



By: Dianna Tickner

Its: President

EXHIBIT 2



"Lyons, John (EEC)"
<John.Lyons@ky.gov>
12/17/2008 11:57 AM

To Gregg Worley/R4/USEPA/US@EPA

cc "Markin, Ben (EEC)" <Ben.Markin@ky.gov>, "Gosney, Ralph (EEC)" <ralph.gosney@ky.gov>, "Thomerson, Robin (EEC)" <robin.thomerson@ky.gov>, "Horne, John (EEC)" <John.Horne@ky.gov>, "Adams, Tom (EEC)" <Tom.Adams@ky.gov>

Subject Thoroughbred Generating Permit Renewal

Gregg, attached please find a letter from Thoroughbred Generating Company LLC, withdrawing their permit renewal application for construction/operation permit V-02-001 originally issued on October 11, 2002. The Division for Air Quality has officially terminated review of the renewal application.



Thanks. Thoroughbred Renewal App Withdrawal.pdf