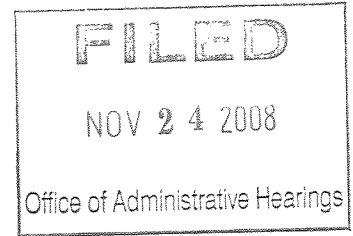


**COMMONWEALTH OF KENTUCKY
OFFICE OF ADMINISTRATIVE HEARINGS
ENERGY AND ENVIRONMENT CABINET
FILE NO. DAQ-29109-039**



KENTUCKY MOUNTAIN POWER, LLC.

PETITIONER

VS. **HEARING OFFICER'S REPORT AND RECOMMENDED
SECRETARY'S FINAL ORDER**

ENERGY AND ENVIRONMENT CABINET

RESPONDENT

and

SIERRA CLUB

INTERVENING RESPONDENT

* * * * *

I. INTRODUCTION / BACKGROUND

In this action, which is before the undersigned Hearing Officer upon the parties' cross-motions for summary disposition, Kentucky Mountain Power, LLC (KMP) challenges the Energy and Environmental Cabinet's (Cabinet's) determinations made respectively on January 17, 2008, and March 6, 2008, that: i) KMP's Prevention of Significant Deterioration (PSD) permit to construct a 600 megawatt (MW) coal-fired electrical generating power plant in Knott County, Kentucky, has expired due to KMP's failure to meet the construction requirements required by law to maintain the PSD permit's validity; and ii) KMP's renewal application for its final Title V Operating Permit and Final Phase II Acid Rain Permit for the same proposed coal-fired power

plant should be terminated for KMP's failure to timely respond to the Cabinet's Notices of Deficiencies (NODs) concerning said renewal application.

KMP was originally issued these permits by the Cabinet's Division of Air Quality (DAQ) on May 4, 2001. In Kentucky, the Title V operating permit program and the PSD construction permit program for major air pollution sources, like this proposed coal fired power plant of KMP, are issued as a combined permit but the operating portion of the permit expires after five years. Thereafter, a permittee is authorized to continue operations under an "application shield" if a timely and complete application for renewal of the permit has been filed with DAQ. KMP did file a timely application for renewal in this case, which was probably sufficiently complete for application shield purposes (a complex issue), but which issue is moot (and need not and is not resolved herein) since nothing had been constructed to operate under the permit and nothing was being constructed to operate during the time DAQ was actually processing KMP's renewal application. Over the strong objection of KMP, the Sierra Club (Sierra) has been allowed to intervene into this action as an Intervening Party Respondent and supports the Cabinet's determinations. (Collectively, the Cabinet and Sierra will be referred to as Respondents).

All parties have argued that there are no disputed issues of material facts for their respective motions and that they are entitled to summary disposition as a matter of law. The undersigned agrees that there are no disputed issues of material fact and that summary disposition can be recommended as a matter of law. The standards for summary disposition are set out fully in the Conclusions of Law, below.

After first summarizing the construction requirements to maintain a PSD construction permit's validity in the next section of this report, the undersigned will then provide an executive

summary of his recommendation and its bases that the Respondents' motions for summary disposition should both be granted, and that Petitioner KMP's motion for summary disposition should be denied.

II. SUMMARY OF CONSTRUCTION REQUIREMENTS

In summary, construction authority under a PSD permit automatically expires if any of the following events occur: i) construction of the source does not commence within 18 months of approval of the permit; ii) construction is discontinued for a period of 18 months or more; or iii) construction is not completed within a reasonable time. See 401 KAR 51:017 Section 16(2)(a) for these requirements.¹ However, under Section 16(2)(b) of this regulation, the Cabinet may extend the 18 month period of the regulation "upon a satisfactory showing that an extension is justified" and in the present case, the Cabinet did extend the original 18-month period for commencement of construction by another 18 months. The legitimacy of this extension request by KMP and its approval by the Cabinet are not an issue in this proceeding. Thus, the initial deadline date for commencement of construction in this case is agreed to be May 4, 2004, which is a full three years following issuance of the permit.

III. EXECUTIVE SUMMARY OF RECOMMENDATION; BACKGROUND ARGUMENTS AND FACTS; AND BASES FOR RECOMMENDATION

A. Executive summary of recommendation

After carefully considering the record for summary disposition in the light most favorable to KMP, the undersigned concludes that: i) the Cabinet's determination must be affirmed that

¹ For the reasons explained in the Conclusions of Law below, the undersigned rejects KMP's argument that this expiration is not automatic, but instead requires notice and hearing rights under the permit revocation procedures established at 401 KAR 50:060 prior to being effective. The Cabinet's failure to follow these procedural rules is the gravamen of KMP's own motion for summary disposition challenging issuance of the Cabinet determinations. Thus, KMP's motion must be denied.

KMP's PSD permit has expired due to KMP's failure to meet the construction requirements required by law to maintain the PSD permit's validity; and ii) that since KMP has not constructed any of the facilities proposed in its original permit and cannot by law construct any such facilities now without first obtaining a new PSD permit, the Cabinet's determination to terminate KMP's renewal application must also be affirmed regardless of the issues concerning the adequacy and timeliness of KMP's responses to the NODs issued by the Cabinet during its processing of KMP's renewal application, as there is nothing to operate and a new combined PSD/Title V permit must be obtained before any construction can now occur. Thus, if KMP desires to continue to proceed with this project, it must pursue a new combined Title V/PSD/Phase II Acid Rain permit, which will require an updated best available control technology analysis (BACT) to be performed.

B. Background arguments and facts

For purposes of these cross-motions only, the undersigned assumes that KMP met its initial "commencement" of construction requirements following permit issuance on May 4, 2001, as that issue was not expressly raised in the Respondents' motions as a separate basis for determining KMP's permit expired. Sierra, at least, would argue a failure by KMP to timely commence construction as a separate basis for permit expiration if this matter proceeds to hearing, but did not pursue this argument in its dispositive motion. As to the Cabinet's position on timely commencement, on May 9, 2006, the Cabinet made a determination that KMP continued to meet its ongoing construction requirements using a "commencement" type of analysis even though the May 10, 2004 deadline for commencement had already passed. "Commence"[ment] is a defined regulatory term which can be satisfied by the permittee entering

into “binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator to undertake a program of actual construction of the source to be completed within a reasonable time.” See 401 KAR 51:001 Section 1(46). KMP is also arguing a “commencement” type of analysis, based on the existence of a contract to construct the plant, for not only meeting its commencement obligation, but for also meeting the two separate additional ongoing construction obligations which are, again, to not discontinue construction for any 18 month period and to complete the project within a reasonable time. KMP is also arguing that the Cabinet’s May 9, 2006 determination that KMP’s construction authority was valid is a superior final determination to the January 17, 2008 determination challenged herein that KMP’s construction authority has expired. Thus, while the parties have not sought a ruling on whether the first prong (“commencement”) of the construction requirements is met on this record, the commencement analysis permeates this proceeding.

The assumption that KMP timely commenced construction is best supported by KMP’s entry into a February 4, 2004 contract with a specified contractor consortium for engineering, procurement, and construction of the proposed plant (the EPC contract). However, this assumption is stronger if the EPC contract can be construed consistent with the terms of a preliminary contract entered on October 10, 2003 (the CATS contract or contract agreement and terms sheet to negotiate an EPC contract), which contract contained a deadline for actual construction to proceed by December 31, 2006, or that KMP would be obligated to pay the contractor a sum of \$71,000,000. (The undersigned actually concludes this would be necessary for the EPC contract to be sufficient to satisfy the commencement requirements). It was the assumption that said deadline and penalty provision would be carried over to the final EPC

contract (which was not provided to the Cabinet until this litigation) that led to the May 9, 2006 determination by the Cabinet that KMP's construction authority continued on that date.²

² However, this provision was not carried over into the EPC contract. This is evident by reading the EPC contract itself but requires that the document be parsed through carefully in its entirety in an objective manner, as the undersigned has done in reviewing and deliberating on these cross-motions. This is a time consuming process. More important than the undersigned's reading of the contract, is that counsel for KMP not only conceded this point during oral argument, but actually argued strenuously for this very point apparently believing it somehow supported KMP's position in this case. (This was in response to Cabinet counsel's emphasis that there was no evidence this \$71 million dollar penalty had ever been paid by KMP for its failure to timely give the NTP). The Cabinet had clearly expected this penalty to be owed if the NTP had not been given as of December 31, 2006. This leaves the EPC contract with a completely unbridled discretionary date for commencement of the project with the permittee alone exercising the discretion, which is completely inconsistent with the express language of the regulations establishing the construction requirements and completely defeats the two primary purposes for those requirements, as those purposes are otherwise noted herein. It is clear that when the Cabinet made its May 9, 2006 determination of ongoing construction by KMP as to this project, which KMP is now attempting to rely upon as a final determination superior to the challenged determination at issue, that the documentation the Cabinet relied upon for said determination was the CATS documentation provided by KMP to the Cabinet, which established a deadline of December 31, 2006 for the NTP to be given and provided this substantial penalty would be obligated to be paid, if the NTP was not given by said deadline date. The penalty is now contemplated in the EPC contract to be paid only if KMP voluntarily withdraws from the project but the penalty, if still effective, is not tied to any failure by KMP to give the NTP by any specified date. (This also now results in an overwhelming inducement for KMP to never admit the project is dead regardless of the project's possible lack of viability otherwise). However, this is assuming the EPC contract is still a valid contract, which the undersigned questions but has assumed for purposes of the Cabinet's and Sierra's motions, since this is a disputed mixed issue of both fact and law, which now must be resolved in favor of KMP for purposes of these motions. The EPC contract calls for renegotiation of certain critical terms such as the construction schedule and the overall contract price, assuming the NTP was not given by July 31, 2004. It was not. There is no evidence of record of any further negotiations having taken place but there is evidence of record that further negotiation is needed. See e.g. April 20, 2006 letter from Black & Veatch's Executive Vice President stating his company, the lead contractor, would still "honor" the contract subject to renegotiation of these terms, as opposed to stating it was bound to do so. However, he references the date of the CATS agreement and not the date of the EPC contract in this letter. Finally, when the Cabinet sought documentation from KMP beginning in late 2005, and into early 2006 that construction was still ongoing after an additional 18 months had passed following the Cabinet's 2004 voiding its earlier 2004 determination that construction authority had lapsed, which is discussed further below, KMP did not provide the EPC contract itself but only copies of selected portions of the CATS agreement. (Any 18 month lapse of construction invalidates the PSD permit, even assuming "commencement" of construction had otherwise timely occurred. Thus, the Cabinet wanted a construction update 18 months following its earlier 2004 determination to assure construction was still ongoing, as required). The CATS agreement was more favorable to KMP's argument to meet the definition of "commencement" of construction, than the EPC contract which lacked any penalty for not meeting a specified commencement date or which actually had no actual required commencement date at all. As noted above, by KMP's current admission, the CATS agreement had already been replaced by the February 4, 2004 entered EPC contract. Yet, upon the Cabinet's request for documentation in late 2005 and early 2006, KMP provided portions of the superseded CATS agreement to the Cabinet, as opposed to the then allegedly effective EPC contract. This constituted significant misrepresentation to the Cabinet by KMP. An actual hard copy of the EPC contract was not provided to the Cabinet until this litigation had progressed to a significant degree. Thus, the undersigned concludes that KMP lacks clean hands to rely on either the July 12, 2004 determination (discussed further below), which was based on KMP's false/erroneous representation that an ongoing program of actual site construction had begun on April 28, 2004; or the May 9, 2006 determination, which was based on the provisions of the CATS agreement that stated the NTP would be given no later than December 31, 2006, or a substantial penalty of \$71 million would be owed by KMP, if that specific deadline for the NTP was not met. KMP provided this CATS

An alternative method allowed in the regulations to satisfy the commencement of construction requirements, as opposed to the contractual approach above, and which actually was the approach first argued by KMP at the very end of the commencement deadline (May 4, 2004) is by undertaking “a continuous program of actual on-site construction of the source.” KMP had argued such a program began on April 28, 2004, after the Cabinet had made a May 5, 2004 determination that KMP’s construction authority had expired for lack of commencement. KMP made this representation on May 10, 2004, when responding to the Cabinet’s determination. Ultimately, on July 12 2004, the Cabinet voided its May 5, 2004 determination based on that representation by KMP. (Interestingly, KMP did not rely on the existence of either the CATS agreement or the EPC contract at the time and did not even notify the Cabinet of the contracts’ existences at the time, which is puzzling).

However, this representation of an actual on-site construction program by KMP was also erroneous. There is no dispute of material fact that there has been absolutely no construction activities on site since at least May 11, 2004, when an inspection of the proposed plant site by the Cabinet established the extent of the construction as of that date and when a follow up inspection on June 11, 2004, revealed the site abandoned with no further work having occurred since the

documentation to the Cabinet following entry of the EPC contract, which by its own current admission voided the CATS agreement, at least to this December 31, 2006 NTP penalty provision. Thus, these earlier Cabinet determinations are now known to be clearly in error based on the known undisputed facts of this record; and the earlier Cabinet determinations resulted from misrepresentations KMP made to the Cabinet, as to the then construction status of the project made at the time of those earlier Cabinet determinations. Thus, these earlier determinations made in error are not a defense to these later correct determinations made by the Cabinet. *See e.g. NREPC v. Kentucky Harlan Coal Company, Inc.*, 870 S.W. 2d 421, 427 (Ky. App. 1994) (“Moreover, a public officer’s failure ‘to correctly administer the law does not prevent a more diligent and efficient’ officer’s proper administration of the law, as ‘[a]n erroneous interpretation of the law will not be perpetuated.’” Internal citation omitted). This case is even stronger for application of this rule than the facts presented in the cited case. This is because, here, and unlike in the cited case, the Cabinet’s errors were made because of misrepresentations of the facts by KMP. Misrepresentation was not an element present in the *Kentucky Harlan* case, and those facts were a far stronger case for use of an earlier Cabinet determination to prevent a later redetermination.

earlier inspection. (In actuality, the only on-site construction activities which KMP reports began on April 28, 2004, and consisted of a single hole dug or constructed at the site, which from the Cabinet's photograph does not even appear to be engineered for any particular purpose. It is undisputed that no further site work has occurred. There is also no argument that any construction equipment has ever been returned to the site following its removal sometime prior to May 11, 2004, or that that any off-site construction of the circulated fluidized bed (CFB) boilers or other necessary component facilities required for the permit have been constructed or the construction be authorized to begin. It is also conceded by KMP in its 2008 petitions initiating this action that financing for this project has never been obtained. Finally, it is also undisputed that KMP has never given the required notice for the contractor to proceed (NTP) under the EPC contract. The NTP is the formal notice required by the EPC contract to be given to the contractor for the contractor to actually commence construction of the plant and to thereafter complete construction within a reasonable time under a projected schedule with penalties for failure to timely perform under said schedule.

C. Executive summary of basis for recommendation

KMP's argument that it can meet its ongoing construction requirements by entry of a contract with a completely open commencement of construction date left to its own unbridled discretion is rejected as a matter of law. This proffered interpretation conflicts with the express language of the regulations, which is set out in its entirety below in the Conclusions of Law. In addition, this proffered interpretation would completely defeat the two primary purposes of the construction requirements of the PSD program. These two purposes are to: i) assure major sources of air pollution are constructed using current BACT when actually constructed, as

opposed to being constructed using older technology, which is generally not as efficient or effective as newer technology in removing pollutants; and ii) to assure that proposed sources actually get timely constructed and do not otherwise impede other potential sources of economic activity from being constructed given proposed sources use up available air pollution increments in the air quality program, as long as those sources remain permitted for construction even assuming they are no longer viable projects.

Thus, as a matter of law, the undersigned concludes that KMP's construction authority under the PSD permit automatically expired on December 10, 2005, because after KMP's arguable commencement of construction, there was an 18 month gap in construction activities and, in fact, this failure to engage in any construction activities commenced at least by May 11, 2004, and continued until issuance of the Cabinet's January 17, 2008 determination that KMP lost its construction authority, which is a gap of over 44 months of no construction activities.³ In addition, given the NTP has never been given to date and the EPC contract does not establish any effective deadline (reasonable or otherwise) for the NTP to be given and an actual program of

³ Since the January 17, 2008 Cabinet determination letter warns against any construction activities after that date, the undersigned has assumed that any failure of KMP to construct after this date should not be used as evidence that construction activities are not ongoing, especially as KMP has timely challenged this determination and as it is not necessary in this case to reach the issue of whether a PSD permittee's construction requirements are tolled during such litigation periods. This is because the undersigned has concluded that the permit expired long before this determination. On a similar issue related to the second challenged determination, the undersigned concludes that after the January 17, 2008 Cabinet determination related to loss of construction authority, that KMP had no practical reason to pursue the renewal of its operational permit, as nothing had been constructed to operate and as a new combined PSD/Title V permit would then be needed for any construction activities to go forward. Thus, the undersigned concludes also that any perceived failure of KMP after January 17, 2008, to supply the additional information sought by DAQ in its review of the renewal application should not be treated as a failure of KMP to timely respond to a Cabinet request. (In addition, there was then no pending deadline given by DAQ for KMP's response to the remaining deficiencies, as there was no final or written NOD issued. The remaining deficiencies were discussed over a draft Statement of Basis (SoB) provided to KMP during a November 2007 meeting between KMP and DAQ with no evidence of any deadline being given in said meeting for KMP to respond further). It is a disputed mixed question of both fact and law as to how close the renewal application was to being determined "technically" complete when this process was terminated but KMP concedes at least some additional work was still required for the renewal application to be technically complete and ready for a final SoB.

ongoing site construction commenced, there is no reasonable basis for reliance on the EPC contract to assure completion of the construction within a reasonable period of time, as the commencement of construction is left completely to the unbridled discretion of the permittee. Construction cannot be completed within a reasonable time if after 6 and ½ years following issuance of the permit on May 4, 2001, and until the Cabinet's determination of January 17, 2008, that financing for the project has not yet been obtained and actual commencement of construction work via issuance of the NTP had not yet occurred. Thus, KMP's construction authority/permit has expired by automatic operation of both 401 KAR 51:017 Section 16(2)(a) 2 and 3. The bases for this recommendation are more fully explained in the Findings of Fact and Conclusions of Law, below, after first presenting a summary of the motion record and proceedings.

IV. APPEARANCES; PROCEDURAL HISTORY; AND MOTION RECORD

Oral argument was held on all pending motions, including an extensive oral argument on the parties' cross-motions for summary disposition, on September 22, 2008. The Hon. Stephen M. Soble appeared on behalf of the Petitioner, Kentucky Mountain Power, LLC (KMP), assisted by paralegal, Ms. Gretchen E. Stitelir. The Hon. Robin Thomerson, the Hon. Jackie Quarles, and the Hon. Lisa Jones appeared on behalf of the Respondent, Energy and Environment Cabinet (Cabinet), assisted by a legal intern, Ms. Torend Collins. Mr. John Lyons, the Director of the Cabinet's Division of Air Quality (DAQ), attended the conference as DAQ's client representative. The Hon. Kira E. Loehr appeared on behalf of the Intervening Respondent, Sierra Club (Sierra), accompanied by Sierra member and client representative, Ms. Leslie Barras. The

appearances made for KMP were made telephonically and all other appearances were made in person.

By agreement, following oral argument on September 22, 2008, the record for the parties' cross-motions for summary disposition was closed. The motion record consists of the parties' pleadings, cross-motions for summary disposition with supporting memoranda and supporting exhibits; and the parties' responses to the opposing motions with supporting responsive memoranda and supporting responsive exhibits. However, there were three rulings and/or stipulations placed on certain responsive exhibits introduced by the Cabinet, which rulings and stipulations were fully set out in the undersigned's September 25, 2008 Order formalizing the results of the September 22, 2008 oral argument and conference. (The three rulings and/or stipulations are set out in paragraph 6 of the September 25, 2008 Order. These will also be separately noted below in the undisputed KMP timeline set out in Subsection C of the Findings of Fact below, after the undersigned first makes brief findings to introduce the parties and background to this action in Subsection A and gives a summary of the permit and the relevant or argued relevant conditions of the permit in Subsection B. The timeline is developed from use of the parties' exhibits and is intended to be inclusive of all matters known from the summary disposition record that relate to the motions). See docket entry # 59 for a copy of the September 25, 2008 Order which in addition to formally closing the record on the parties' cross-motions for summary disposition and setting out the rulings/stipulations on said record, ruled on other pending motions and also canceled the formal evidentiary hearing which was then scheduled to commence on September 29, 2008.

Following the close of the summary disposition record, an additional conference was held on October 17, 2008, necessitated by the unfortunate passing of Mr. John Cleveland on September 22, 2008, which was Sierra's member and employee upon whom its claim for mandatory intervention was based and granted; and an oral argument held on November 6, 2008, to hear KMP's motion to dismiss Sierra as a party to this action based on Mr. Cleveland's death and to treat Sierra's prior filings as only the filings of an *amicus curiae*.

This November 6, 2008 oral argument was heard following a briefing schedule entered into between KMP and Sierra on Sierra's "standing" for continued permissive intervention, as it continued to seek after Mr. Cleveland's death. (The Cabinet chose not to participate in the briefing on this issue). At this time, Sierra waived its rights to seek leave to substitute a new member's standing affidavit for purposes of seeking continued mandatory intervention due to the unique circumstances of this case. (These circumstances are that the record has already been closed on dispositive cross-motions as of September 22, 2008, and that this case is being heard under the hearing process deadline of KRS 224.10-440(3), with the current deadline for issuance of the undersigned's report being November 17, 2008, with the undersigned having filed a request to the Secretary for a seven day extension to November 24, 2008. That request remains pending at the time of filing of this report. Substitution of a new member's affidavit would have caused delay and would probably require reopening of discovery etc., to address the sufficiency of the new member's claim for sufficient "injury in fact" to satisfy Sierra's claim for ongoing mandatory intervention). The undersigned overruled KMP's motion to dismiss Sierra in a formal Order entered on November 6, 2008, and allowed Sierra to continue as a full Intervening Respondent based on the permissive intervention criteria established at 401 KAR 100:010

Section 11(2)(b). For the bases for this ruling, see November 6, 2008 Order, at docket entry # 70. For further bases, see also the portion of the July 3, 2008 Order, at docket entry # 31, which granted Sierra's motion for permissive intervention into this matter along with Sierra's then alternate motion to intervene under the mandatory criteria of 401 KAR 100:010 Section 11(2)(a). The undersigned had ruled that Mr. Cleveland's affidavit establishing an "injury in fact" was essential to Sierra's associational standing needed to satisfy the criteria of the regulation for mandatory intervention but concludes this is not needed for permissive intervention when a "case or controversy" or Kentucky similar caselaw standards for standing are otherwise being met by the parties of record. Since the bases for the undersigned's ruling on this issue have been fully set out in these prior Orders, this report will not further address the issue of Sierra's participation as an Intervening Respondent. However, KMP has continued to strongly object to these rulings and has, at least to date, preserved this issue of Sierra's participation for further review. The prior Orders on this issue were specifically noted as being interim Orders not subject to the filing of exceptions at the time entered. These rulings are now ripe for the filing of exceptions with the filing of this report and recommendation, as are all other preliminary rulings.⁴

⁴ The same is true of the undersigned's ruling on Sierra's motion for costs and expenses associated with defending KMP's motion to compel further discovery. See docket entry #s 60 and 61 (Sierra's motion and counsel's affidavit in support respectively). KMP's response to this motion was placed under abeyance pending consideration of its motion to dismiss Sierra as a party. On November 6, 2008, the undersigned entered an Order setting the remainder of the briefing schedule on said motion. Oral argument on the motion was waived and the motion was taken under submission with the filing of KMP's responsive brief filed on November 12, 2008, and Sierra's reply brief filed on November 14, 2008. The undersigned has addressed said motion by separate Order entered immediately prior to his entry of this report and will not separately address the merits of that motion here, except for inclusion of an appropriate provision in the proposed Secretary's Final Order attached to this report. Any party objecting to said ruling will have the right to file objections to the undersigned's Order when filing exceptions to this report. This right to file exceptions shall extend to that ruling, Sierra's intervention status, and on all other preliminary matters ruled upon in this action, which are now ripe to present to the Secretary with the filing of exceptions to this report.

Finally, counsel for KMP and Sierra in this action have also been involved in a very similar case to this action, which other case was originally filed in the US District Court in Illinois by Sierra under the Clean Air Act's (CAA) citizen suit provisions. That action was filed by Sierra against a sister company of KMP's (Franklin County Power of Illinois, LLC or FCP). In that case, Sierra had alleged FCP had lost construction authority for a similar proposed coal-fired power plant under a PSD permit issued by the state of Illinois for lack of meeting the construction requirements to maintain the PSD permit. (Both Illinois and Kentucky have been delegated CAA permitting authority by the federal Environmental Protection Agency (EPA) under approved State Implementation Plans, or SIPs). The federal District Court Judge agreed with Sierra on both its standing to bring the suit and on the substantive merits that FCP had lost its PSD permit for failure to meet its construction requirements. FCP timely appealed that ruling to the US Court of Appeals for the Seventh Circuit and, in this action, KMP has made extensive use of the briefs and filings made in that case by filing substantial portions of those filings as exhibits into this action. The parties in the FCP case had oral argument before the Seventh Circuit on October 29, 2007, but as of the close of this record on September 22, 2008, they reported no decision had yet been rendered. The undersigned had advised, since these cases were factually and legally similar and had been substantially referred to in the filings in this action, that the parties should provide a copy of the Seventh Circuit Court's opinion in the FCP case once rendered. A copy of this opinion, which affirmed the District Court opinion on all aspects, was filed into the record by Sierra on October 27, 2008. See docket entry # 66. (Actual construction of the proposed plant in the FCP case had been limited to construction of a hole in the ground, as here, but apparently in the Illinois case, the EPC contract had not actually been

entered, just the preliminary CATS contract to negotiate an EPC). This possible distinguishing feature between the two cases has been fully considered by the undersigned in this case but for the reasons otherwise stated herein does not lead to a different result. This FCP case is additional authority establishing that a PSD permit automatically expires if the permittee fails to meet the ongoing construction requirements of the CAA's PSD program. KMP has not cited any contrary authority and this is the primary basis KMP's motion for summary disposition must be denied.⁵

V. FINDINGS OF FACT

After carefully considering the motion record in the light most favorable to KMP, the undisputed facts of record are established as follows:

A. Parties, Background, and Other Persons' Relationship to Case Mentioned in the Motion Record

1. The Energy and Environment Cabinet (Cabinet) is the administrative agency charged with the statutory responsibility under KRS Chapter 224 for protecting the land, air, and water resources of the Commonwealth of Kentucky from pollution and environmental degradation. As part of that responsibility, the Cabinet's Division of Air Quality (DAQ) has been delegated Clean Air Act permitting authority under both the CAA Prevention of Significant Deterioration (PSD) and Title V operating permit programs in the Commonwealth pursuant to a State Implementation Plan (SIP) approved by the federal Environmental Protection Agency (EPA). The Cabinet is the named party Respondent in the petition and amended petition in this matter.

2. Kentucky Mountain Power Company, LLC (KMP) is a Kentucky limited liability company and holder of a combined federally enforceable Title V/PSD combined permit, # V-00-

⁵ This case is officially designated as *Franklin County Power of Illinois, et. al. v. Sierra Club*, ___F.3d___ 2008 WL 4693519 (C.A. 7(Ill.)(Opinion entered October 27, 2008). It should be noted that this action is not final as FCP, Khanjee, and EnviroPower on November 12, 2008, filed a petition for rehearing and for rehearing *en banc*.

045, issued on May 4, 2004 for a proposed 600 megawatt (MW) coal-fired electrical generating power plant to be located near the community of Talcum, Knott County, Kentucky. Two circulating fluidized bed (CFB) boilers are proposed for this facility, which will burn coal and coal refuse. The CFB units are rated to generate up to 2,550 Million (MM) BTU/hour each of electrical power. The proposed facility is considered to be a “major source” of pollutants under both federal and state law. Simultaneously with issuance of this combined Title V/PSD permit, KMP was also issued a required Phase II Acid Rain Permit, permit # A-00-006, which begins on page 39 of the combined permits. All parties provided copies of these combined permits, hereinafter permit or combined permit, as part of their motion exhibits. See KMP exhibit # 3; Cabinet exhibit # 1.1 and Sierra exhibit #1A. KMP is the sole named party Petitioner in this action.

3. KMP is a wholly owned subsidiary of its parent company, EnviroPower, LLC (EnviroPower). Franklin County Power, LLC (FCP) is a sister company to KMP, as FCP is also a wholly owned subsidiary of EnviroPower. On March 31, 2003, EnviroPower and its subsidiaries including both KMP and FCP entered into two contracts with Khanjee Holdings LLC (Khanjee) for i) Khanjee to oversee development of the KMP and FCP projects; and ii) for Khanjee to purchase EnviroPower, including its subsidiaries. For a copy of these contracts, which also establish these business relationships between KMP, FCP, and EnviroPower, see Cabinet reply exhibits #s 4 and 5. Mr. Frank Rotondi signed these contracts on behalf of EnviroPower, as its then President and CEO. To date, the purchase agreement between Khanjee and EnviroPower has not been consummated by payment of the \$10 million purchase price for 100% of the stock. See Cabinet reply exhibit # 7, which is a copy of the Texas Court of Appeals opinion in the case

of *EnviroPower, LLC v. Bear, Stearns & Co., Inc.*, Case No. 01-04-01111-CV entered on February 21, 2008, which has been introduced for the limited purpose of establishing this purchase agreement has yet to be consummated and is to be used for no other purposes. (The opinion dealt with the appropriate bond to be posted by EnviroPower in defense of Bear Stearns attempt to enforce a \$1.6 million dollar New York judgment it had obtained against EnviroPower). The opinion notes the fact that this purchase agreement had not been consummated at its note 2 in the opinion. See paragraph 6 (b) of the undersigned's September 25, 2008, Order limiting the use of this exhibit for that sole purpose. For purposes of these motions, the undersigned has assumed these contracts remain effective and that the entity KMP continues to desire to overturn the challenged Cabinet determinations.⁶

4. Mr. Akhtar Khan is a US citizen and resident of the Commonwealth of Virginia. Mr. Khan is the Chairman and CEO of Khanjee Holding (US), Inc., a Delaware corporation. Mr. Khan is also the Chairman of the Development Committee of EnviroPower, LLC for the

⁶ Counsel for the Cabinet tendered a copy of a January 23, 2008 letter from Mr. Steve Addington, as President of EnviroPower to Mr. Kahn of Khanjee Holdings purportedly terminating both the March 31, 2003 purchase agreement and March 31, 2003 development agreement, as part of its reply exhibits. (Tendered Cabinet reply exhibit # 6). This tender was stricken from the evidentiary record and remains in the record for purposes of avowal only. The bases for this ruling is that counsel for KMP reported during oral argument that both Mr. Khan and Khanjee reject the effectiveness of this letter and have responded to it. Given the proposed exhibit was tendered only as a reply exhibit and was not provided in the Cabinet's original motion, as the undersigned concludes it should have been provided under the circumstances because it raised completely new issues, and this failure prevented KMP's ability to respond in writing to said exhibit; and given KMP reports it has a substantive response the undersigned has assumed an effective response could be made for purposes of these motions. See the undersigned's July 25, 2008 Order in which KMP's motion to strike this tendered exhibit was sustained at its paragraph 6(a) on these bases. See also discussion in note 7 therein, that since the undersigned has not entered any Show Cause Order or given "KMP" opportunity for notice and hearing, he has also assumed that the entity KMP desires to continue to pursue this matter, as opposed to desiring to seek a new permit, as another person allegedly speaking on behalf of KMP verbally advised DAQ Director Lyons it desired to do. In fact, Director Lyons reports that he was verbally asked by a purported KMP official to issue the January 17, 2008 determination letter, which KMP now challenges. A copy of Director Lyons' July 11, 2008 affidavit was introduced, as Cabinet reply exhibit # 11. KMP did not object to introduction of this affidavit, assuming it was also stipulated that the "KMP" request to Mr. Lyons was a verbal request and was not reduced to any writing. The Cabinet so stipulated and the affidavit was introduced with this stipulated qualification. Mr. Randy Baird is the reported KMP contact that made the request to Mr. Lyons.

Kentucky and Illinois projects at issue. Mr. Khan has participated in some of the conferences in this matter as KMP's client representative. See also Mr. Khan's September 2, 2008 affidavit in the record as KMP's exhibit # 16. Mr. Khan signed the contracts specified in paragraph 3, above on behalf of Khanjee Holdings, LLC, as the entity was described in those documents.

5. Knott County Power Partners (KCPPs) is a contractor partnership or consortium composed of construction companies Black & Veatch and Zachary Construction per Mr. Khan's affidavit. On February 4, 2004, a contract was entered into for the engineering, procurement, and construction of the proposed plant at issue (the EPC contract) between KMP, as signed on its behalf by Mr. Khan of Khanjee; and KCPPs, as signed on its behalf by Mr. Steve Edwards, an Executive President of Overland Contracting, Inc.⁷ A redacted copy of this EPC contract has been introduced as KMP's exhibit # 6; and a sealed unredacted copy of this EPC contract has been introduced as KMP's exhibit # 7.⁸

6. Sierra Club is America's oldest (founded in 1892) and largest grassroots environmental advocacy organization with approximately 5,000 members in the Commonwealth of Kentucky, with those Kentucky members spread throughout the Commonwealth. Its goals are to preserve, protect, and enhance the natural environment including protection of air, water, and land resources and to protect the health of its members from pollution sources. See Sierra's

⁷ As noted in Cabinet exhibit #1.10, Mr. Edwards is also an Executive Vice President of Black & Veatch Corporation.

⁸ It should be noted that this unredacted EPC contract, KMP exhibit # 7, and specified other documents in the motion record have been produced by KMP under a claim of confidentiality under KRS 224.10-210 and 401 KAR 1:060 and are protected from other disclosure under the terms of a Protective Order entered on August 5, 2008, by the undersigned, at docket entry # 40. See also Order entered on September 25, 2008, at docket entry # 59. which identified all documents that are to be treated as sealed and subject to these Protective Order terms. The inclusive list of these documents to be treated under seal is as follows: i) KMP exhibits #s 4 (WestLB financing mandate letter) and 7 (unredacted EPC contract); and Cabinet exhibits #s 1.9 (pages from the contract agreement and terms sheet or CATS agreement as labeled by the undersigned) and 1.10 (April 20, 2006 letter from Mr. Edwards of Black & Veatch).

pleadings in this matter in support of its motion to intervene at docket entries #s 22 (original motion to intervene); 26 (statement of position) and 30 (Sierra's reply to KMP's opposition including affidavit of member and employee Mr. John Cleveland).

7. On July 31, 2008 the undersigned issued an Order sustaining Sierra's motion to intervene into this action as a full party Respondent under both the criteria for mandatory intervention established at 401 KAR 100:010 Section 11(2)(a) and for permissive intervention under the criteria of 401 KAR 100:010 Section 11(2)(b). See Order entered on July 3, 2003, at docket entry # 31 for the bases of said ruling, which was made over KMP's strong objections. The ruling for mandatory intervention was based on Sierra's associational standing to represent the interests of its member, Mr. John Cleveland, who had sufficiently established an injury in fact to him from the permit sought by KMP through its challenges to the Cabinet's determinations at issue.

8. On September 22, 2008, Mr. John Cleveland unfortunately died from a tragic accident on his property. This was the same date the undersigned conducted oral argument on the parties' cross-motions for summary disposition and verbally closed the motion record by agreement. Mr. Cleveland's death was unknown at the time of this oral argument and apparently happened later in the day. Sierra's counsel reported this death to the undersigned's Office shortly after it had occurred. The undersigned had also read about the death in the Lexington Herald Leader on or about September 24, 2005.

9. As a result of the above, the undersigned conferenced with counsel of record and set a briefing schedule to address Sierra's ongoing status as an Intervening Respondent. KMP sought to dismiss Sierra from these proceeding and to covert all of its filings as filings of an *amicus*

curiae or friend of the court. These proceedings are discussed in more detail in Section IV of this report, above.

10. On November 6, 2008, the undersigned overruled KMP's motion to dismiss Sierra as an Intervening Respondent in this matter based on Mr. Cleveland's passing and allowed Sierra's full ongoing participation in this matter to continue as a Intervening Respondent based solely on the permissive intervention criteria of 401 KAR 100:010 Section 11(2)(b). Sierra has waived its rights at this time due to the unique circumstances of this case, as explained in Section IV of this report, above, to attempt to substitute a new member's standing in replacement of Mr. Cleveland in support of an ongoing claim for mandatory intervention. The bases for allowing Sierra Club to continue its ongoing participation as full Intervening Respondent based on its claim for meeting the permissive intervention standards are fully set out in the undersigned's Order of November 6, 2008, which is at docket entry # 70. The undersigned notes that in his original Order granting Sierra's original motion for intervention, said Order was granted under both the mandatory and permissive criteria and that Mr. Cleveland's alleged injury in fact from KMP's permit was not relied on at all as a contributing basis for granting Sierra's claim for permissive intervention. (Sierra's participation in the similar Illinois case involving KMP's sister company (the FCP case), is a very strong factor in support of allowing ongoing participation in this matter, as being beneficial to this process because Sierra has made relevant arguments and assisted the Cabinet in fulfilling its statutory mandate). Given this level of Sierra's participation in the process leading to the closing of the record on these cross-motions for summary disposition, Sierra should be allowed to continue as a full party at this time.

11. KMP has continued to strongly object to Sierra's participation in this matter as an Intervening Respondent and has preserved, to date, its ongoing objection to the rulings set out in the July 3, 2008, and November 6, 2008 Orders allowing said participation. However, since the bases for those rulings are fully set out in those Orders, the undersigned will not separately set out the bases for those rulings here, but instead references those Orders, as if fully set out herein. Finally, on this issue, the rulings in said Orders were labeled to be interim rulings at the time and not subject to the filing of exceptions until the filing of this dispositive report. Again, KMP has preserved its rights to file exceptions to these rulings and the time is now ripe for it to do so.

B. Brief Overview of the Permit; and the Relevant or Argued Permit Conditions

12. On May 4, 2001, the combined permits were issued as a single 43 page document. See general discussion of this combined permit in Finding No. 2, above. This is combined Title V/PSD permit # V-00-045 and Phase II acid rain permit # A-00-006, which begins at page 39 of the combined permit. The first combined Title V/PSD portion of the combined permits is broken into nine major Sections, labeled A-I, covering the topics briefly noted as follows in subparagraphs labeled (a) through (i):

(a). **Section A.** This section covers: permit authorization in general and notes the completion determination on the application was made on June 16, 2000.

(b) **Section B.** This section covers emission points; emission units; applicable regulations and operating conditions. Among the applicable regulations, regulation 401 KAR 51:017 (the PSD regulation) is cited as being applicable to this air pollution source. Regulation 401 KAR 50:035 (Permits) is also cited in this section and in other sections of the permit, particularly in the general conditions section below (Section G), which all parties have relied

upon to some degree in their respective arguments. (All general conditions argued are set out in their entirety below). However, this 401 KAR 50:035 permitting regulation has subsequently been repealed and replaced by a new permitting regulation within 401 KAR Chapter 52, Permits, Registrations and Prohibitory rules with 401 KAR 52:020 of that KAR regulatory Chapter applying to Title V permits. As to all of the 401 KAR 50:035 references in the permit significant to this case, those substantive requirements have now been recodified into 401 KAR 52:020 with no change in substance known to the undersigned. (No changes were argued by the parties).

(c). **Section C.** This section covers insignificant activities, which are not at issue in this proceeding.

(d). **Section D.** This section covers source emission limitations and testing requirements, which are not at issue in this proceeding.

(e). **Section E.** This section covers source control equipment operating requirements, which are not at issue in this proceeding.

(f). **Section F.** This section covers monitoring, record keeping, and reporting requirements, which are not at issue in this proceeding.

(g). **Section G.** This section, at permit pages 31-36, covers general conditions of the permit and contains the following general conditions which have been relied upon by the parties or are relevant to the pending arguments of the parties:

G.(a). General compliance requirements.

...

8. Except as identified as state origin requirements in this permit all terms and conditions contained herein shall be enforceable by the United States Environmental Protection Agency and citizens of the United States.

...

11. This permit shall not convey property rights or exclusive privileges. [This condition then references Regulation 401 KAR 50:035, Permits, Section 7(3)(g) as the regulatory basis for this condition. The current reference to this same restriction is 401 KAR 52:020 Section 10 and the manual referenced therein. "Cabinet Provisions for Issuing Title V Permits," (Title V Manual, June 2000), at its page 5. This Title V Manual, as hereinafter described is incorporated into the regulations at 401 KAR 52:020 Section 26(1)].⁹

...

⁹ The Cabinet and Sierra have argued this condition in rebuttal of KMP's argument that these determinations constitute the unconstitutional deprivation or taking of property rights without due process of law. KMP argues due process was required prior to the determinations being made or becoming effective. While the undersigned rejects KMP's arguments for other reasons, he does not conclude this condition as being dispositive of the issue. The undersigned believes the primary purposes of this condition are to assure that no arguments can be made that permits are property that can be transferred like normal property without Cabinet approval or that the grant of the permit precludes other applicants from also being granted permits for similar activity, if they otherwise qualify. However, whatever property rights are granted by this type of permit **for purposes of determining the amount of due process required to determine said rights are expired, suspended, revoked, or terminated, which is the critical issue here**, the rights granted by this permit are strictly limited to the conditions imposed on the permit and requirements of law. The undersigned has concluded that the rights granted under this permit are expressly limited and automatically expire upon the permittee's failure to meet the ongoing construction requirements of the regulations, which are also specified as express conditions or limitations of the permit, which conditions are set out below. In addition, under any constitutional analysis of the amount of due process required prior to the property "deprivation" complained of, the courts would certainly consider the impact on the property right affected in the relationship to the need for prior due process, as opposed to post determination due process. Here, there was nothing operating, nothing constructed, and there was no ongoing construction when the determinations were made. In short, KMP is not harmed by having its due process hearing after the initial determinations were made and before the final Cabinet determinations are made by the Cabinet Secretary. On this issue, it must also be noted that the evidence of record is that an official with KMP, who had been KMP's primary contact with the Cabinet, **verbally requested that the Cabinet's then opinion which was known by KMP (that KMP's permit had expired and KMP needed to file an application for a new permit) be reduced to a formal written determination letter.** See Cabinet reply exhibit # 11, the July 11, 2008 affidavit of DAQ Director John Lyons. Thus, KMP is now contesting this process, but this is the very process it requested to be triggered itself. Finally, given the Cabinet's opinion that the permit expired and there was nothing operating or under construction at the time to be affected by said determination, it makes common sense to resolve the issue finally before KMP detrimentally relies on a possibly expired permit and constructs in violation of the Kentucky PSD program and the federal CAA, even assuming KMP was ready to proceed with the project which the record does not otherwise establish it was. (KMP had the option, assuming it was in fact ready to proceed on the project which had been inactive since June of 2004, of ignoring the Cabinet's opinion and proceeding with the project and, thus, risking enforcement action by the Cabinet or citizens' suits under the CAA and loss of monies from facilities constructed without a valid permit, if it believed it was correct on the permit issue). That would not be a reasonable option and the ability to obtain financing with even a preliminary Cabinet determination known would not be practically likely. Thus, even assuming the Cabinet determinations would have been labeled to be "preliminary" as opposed to being final and a notice an opportunity of being heard before being made effective, the practical results are not likely to be any different. However, given the undersigned's conclusion that it would be unfair to use KMP's inactivity since the Cabinet's January 17, 2008 determination against it, as long as it continues to challenge the determination on the merits of the substantive issue presented in this case (loss of construction authority/PSD permit based on KMP's failure to meet the ongoing construction requirements), this process, as opposed to the prior due process it says was required, is not only not detrimental to KMP but arguably improves its position.

15. Permit shield. Except as provided in State Regulation 401 KAR 50:035, Permits, *compliance by the emissions units listed herein* with the conditions of the permit shall be deemed to be compliance with all applicable requirements identified in this permit as of the date of issuance of the permit. [Italics emphases added to demonstrate this is an operational concept applied to shield operations which are in compliance with the stated permit conditions from being cited as being otherwise out-of-compliance with any regularity requirements, at least of those requirements established by regulations identified in the permit itself as being applicable to the source. The PSD regulation, 401 KAR 51:017, is one of the identified regulations and it is the source of the construction requirements at issue in this case. However, since the exact construction requirements at issue are also express conditions on the permit itself, this permit shield concept does not help KMP in its argument. Finally, the current codified location of the permit shield is at Section 11 of 401 KAR 52:020. This section is set out in its entirety below in the Conclusions of Law because its applicability as a defense to these determinations was argued strongly by KMP.]

...

G(b) Permit Expiration and Reapplication requirements

This permit shall remain in effect for a fixed term of five (5) years following the original date of issue. Permit expiration shall terminate source's right to operate unless a timely and complete renewal application has been submitted to the division at least six months prior to expiration date of the permit. Upon a timely and complete submittal, the authorization to operate within the terms and conditions of the permit, including any permit shield, shall remain in effect beyond the expiration date until the renewed permit is used or denied by the until renewal permit is issued or denied. [It then cites 401 KAR 50:035 Section 12, which is now codified at 401 KAR 52:020 Section 12.]¹⁰

¹⁰ The undersigned concludes that KMP filed a timely and "administratively" complete renewal application for purposes of receiving the benefit of this condition if it were to be determined relevant to this case which for the reasons stated further below the undersigned concludes it is not. This condition of the permit is, in essence, the "application shield" now codified at 401 KAR 52:020 Section 8. However, the record reflects that KMP has never fully complied with DAQ's information requests sufficient for the Cabinet to make a "technically" complete permit application determination, which would allow a final statement of basis (SoB) to be made on the application. The base or "administrative" complete portions of an application, which the undersigned concludes are the requirements needed to obtain a "completed" application for purposes of the application shield, are the specified requirements established at 401 KAR 52:020 Sections 4 (required form) and 5 (required information). However, Section 4(2)(c) states as follows: "Applications for permit renewals shall provide only the information that is new or different from the most recent source-wide permit application and certification by a responsible official pursuant to section 23 of this administrative regulation." This renewal application was on the correct form and had the required certification and appears "complete" under those standards since there had been no changes since the original permit approval. The regulations also provide for the Cabinet to make a "completeness" "review" and "determination" using the standards of Section 2.1 of the Title V Manual, at page 14. The Cabinet is given broad discretion to request any information it needs to evaluate the source and to determine all applicable requirements under this section. In

...

G(d) Construction, Start-Up and Initial Compliance Demonstration Requirements.

...

3. Pursuant to 401 KAR 50:035, Permits, Section 13(1), unless construction is commenced on or before 18 months after the date of issuance of the permit, or if commenced and then stopped for any consecutive period of 18 months or more, or if construction is not completed within eighteen (18) months or of the scheduled completion date, *then the construction AND operating authority granted by this permit for those affected facilities for which construction was not completed shall IMMEDIATELY become invalid.* Extensions of the time periods specified herein may be granted by the division upon a satisfactory request showing that an extension is justified. [Emphasis added to demonstrate the undersigned's conclusion that this particular permit condition and the regulations upon which it is based controls

addition, Section 5(1) of regulation 401 KAR 52:020 also requires an application to contain the following: "All the information needed to determine the applicable requirements and emission fees." The formal "completeness" determination contemplated by Section 9 of 401 KAR 52:020 was never made by DAQ in this case, but informational insufficiencies were timely noted by the Cabinet to KMP which avoided the operation of the "deeming" of completeness by the Title V Manual at page 14. This is because a first Notice of Deficiency (NOD) was provided to KMP by the Cabinet within sixty days from receipt of the application renewal. (The Manual deems the application complete if no notice of incompleteness is provided within sixty days) The distinction between administrative completeness and technical completeness is not actually specified in the regulations but is a distinction used by DAQ, as counsel for the Cabinet discussed this distinction at oral argument. Since a renewal applicant cannot guess what information DAQ will determine it needs for the review, other than the information which is expressly specified in the regulation which is de minimus for a renewal applicant without changes, a renewal applicant should continue to get the benefit of the application shield if the base "administrative" complete information is provided six months preceding expiration and the renewal applicant continues to respond timely in good faith manner to any further informational requests by DAQ during processing of the renewal application. If the applicant fails to do this, the permittee loses the application shield otherwise allowing operations on an expired permit. See 401 KAR 52:020 Section 8(2). However, this section does apply here because, as noted elsewhere, KMP was never given a deadline to respond to the remaining insufficiencies, as explained by use of a preliminary draft SoB during a November 2007 meeting between KMP and DAQ and because the January 17, 2008 determination of loss of construction authority intervened making any response practically moot. In contrast, it is also possible to argue under the regulations that if DAQ fails to make an actual "completeness" determination as contemplated by the regulation and Title V Manual by the end of the expiration of the original permit, then authority to operate is lost until the renewal application is approved. The undersigned need not definitively address this issue. Regardless of the proper interpretation, it is clear that the application shield applies only to the operational portion of the permit and there is absolutely nothing constructed to operate. This is a moot issue. It does not apply to the construction portion of the permit whose continuing validity requires the ongoing construction requirements of the regulations to be met. See 401 KAR 52:020 Section 3(2)(a) and 401 KAR 51:017 Section 16(2)(a). If construction authority is lost, a new combined PSD/Title V permit is needed for the facility at issue to be constructed. See General Condition G(c)3, which is set out in its entirety below. Thus, KMP's reliance on the application shield in this case is completely misplaced.

the disposition of this case and requires the motions for summary disposition of the Cabinet and Sierra be granted. This is because the record establishes, without any factual dispute, that any construction activity, assuming it was timely commenced as the undersigned has assumed for these motions, has been stopped as of at least **June 10, 2004** and has never been re-commenced to date. This was a continuous stoppage of construction, after the assumed commencement of construction, of over 43 months prior to the Cabinet **January 17, 2008** determination letter. The cited regulation this condition is based on is now recodified without any change at 401 KAR 52:020 Section 3(2)(a). See also 401 KAR 51:017 Section 16(2)(a) for these same construction requirements in the PSD regulation. In addition, Section 3(1)(a) of the permitting regulation 401 KAR 52:020 and Section 16(1) of the PSD regulation 401 KAR 51:017 which in combination mandate a new combined PSD/Title V permit to be obtained once the construction and operating authority is lost pursuant to this condition and the ongoing construction requirements for the combined PSD/Title V permit. Thus, given nothing has been constructed to actually operate, this condition also completely makes moot KMP's application for renewal of its permit. The renewal application must be terminated as a matter of law and an application for a combined new permit is required.

...

(h). **Section H.** This section covers alternative operating scenarios, which are not at issue in this proceeding and are not used in the permit.

(i). **Section I.** This section covers compliance schedules, which are not at issue in this proceeding and are not used in the permit, since this is a permit for a new source.

13. **Phase II Acid rain permit.** The final pages of the combined permit constitute the Phase II Acid Rain Permit, permit # A-00-006. This section provides the SO₂ allowances allocated and the NO_x requirements for each affected unit and cites federal regulation 40 CFR Part 76, as being applicable. This section also cites the repealed state permit regulation, which is now codified at 401 KAR 52:020, and also repealed acid rain permit regulation 401 KAR 50:072, which is now covered at 401 KAR 52:060, Acid rain permits. The merits of these requirements are not at issue in this proceeding, but there is a possibly relevant issue in that a

