RENDERED: SEPTEMBER 19, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

ORDERED PUBLISHED: DECEMBER 5, 2008; 2:00 P.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001723-MR

COMMONWEALTH OF KENTUCKY,
ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET — APPELLANT

APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-00640

SIERRA CLUB; VALLEY WATCH, INC.;
LESLIE BARRAS; HILARY LAMBERT;
ROGER BRUCKER; AND THOROUGHBRED
GENERATING COMPANY, LLC. — APPELLEES

AND NO. 2007-CA-001742-MR

THOROUGHBRED GENERATING
COMPANY, LLC. — CROSS-APPELLANT

CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 06-CI-00640

SIERRA CLUB; VALLEY WATCH, INC.;
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ROGER BRUCKER; AND COMMONWEALTH
OF KENTUCKY, ENVIRONMENTAL AND
PUBLIC PROTECTION CABINET — CROSS-APPELLEES

OPINION
REVERSING

** ** ** ** **

BEFORE: CLAYTON, MOORE, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: This action is an appeal from the remanding of an Air Quality Permit (Permit) by the Franklin Circuit Court. The Environmental and Public Protection Cabinet (Cabinet), through its Secretary, issued a Permit to Thoroughbred Generating Company, LLC (Thoroughbred) to operate a coal steam generating plant located in Muhlenberg County, Kentucky. The Franklin Circuit Court remanded the Permit for further findings on several issues. The Cabinet and Thoroughbred then brought this appeal.

FACTUAL SUMMARY

Thoroughbred filed for a Permit with the Cabinet. After a seventy-day hearing, the Hearing Officer recommended the Permit be remanded. The Secretary of the Cabinet disagreed with this finding and issued a Final Order on April 11, 2006, upholding the Permit. The issuance of the Permit was then appealed to the Franklin Circuit Court by the current Appellees: Sierra Club; Valley Watch, Inc.; Leslie Barras; Hilary Lambert; and Roger Brucker on May 10, 2006. The Franklin Circuit Court remanded the Secretary's Order issuing the Permit and this appeal followed.

The Hearing Officer conducted a lengthy administrative hearing and issued a Report recommending that the Secretary remand the Permit to reconsider:

the ecological risk from toxic emissions from the facility; the impact to soils, vegetation and visibility; the Best Available Control Technology (BACT) determinations for sulfur dioxide and nitrogen oxides; the enforceability of certain permit provisions; and to correct (or further research) certain "errors and omissions" in the Permit.

The Secretary thereafter rejected the Hearing Officer's recommendation to remand the Permit for a consideration of the power plant's impact on soils, vegetation and visibility, disagreeing with the Hearing Officer's finding that the Cabinet's BACT analysis had been flawed during the Permit process. The Franklin Circuit Court found that the Secretary's Final Order should be remanded to the Cabinet because parts of the Order were not supported by substantial evidence in the record while other aspects relied on misguided interpretations of the law.

STANDARD OF REVIEW

In reviewing an agency's decision, we must determine whether the action taken by the agency was arbitrary. *Kentucky Board of Nursing v. Ward,* 890 S.W.2d 641, 642 (Ky. App. 1994). An action is arbitrary if it is not based on substantial evidence in the record. Substantial evidence is defined as evidence that "when taken alone or in the light of all the evidence, it has sufficient probative value to induce conviction in the minds of reasonable men." *Kentucky State Racing Commission v. Fuller,* 481 S.W.2d 298, 308 (Ky. 1972). If we determine that there is substantial evidence to support the agency's decision, we must

determine whether the agency was correct in its application of the law to the facts. *Commonwealth Dept. of Education v. Commonwealth*, 798 S.W.2d 464, 467 (Ky. App. 1990).

With this standard in mind, we will review the four allegations of error that are before us.

DISCUSSION

Protection of air quality is a mandate delegated to the Cabinet by the legislature. Kentucky Revised Statutes (KRS) 224.10-100(26) requires the Cabinet to "[p]reserve existing clean air resources while ensuring economic growth by issuing regulations, which shall be no more stringent than federal requirements[.]"

The Sierra Club (Sierra) contends that, in issuing the Permit, the Cabinet failed to abide by the three basic duties imposed by Kentucky air-quality standards. Specifically, the Appellees asserted in the Franklin Circuit Court action that the Secretary failed to issue a permit which conformed to the three basic requirements of Kentucky's Prevention of Significant Deterioration (PSD) program. We will review each of the allegations of error at the trial court level in turn.

I. <u>The Adequacy of the Analysis Regarding Impacts to Soils, Vegetation and Visibility.</u>

Under Kentucky's BACT requirement, the Cabinet must set an emissions limit on any pollutant that any proposed plant may emit in a significant quantity. In this case, it is sulfur dioxide and nitrogen oxides. Any company within

this Commonwealth that is defined by 401 Kentucky Administrative Regulations (KAR) 51:001 Section 1(25)(a) as a "major stationary source" of air pollutants is included in the requirements of the Preventive SD program and must receive a PSD permit. Specifically, 401 KAR 51:017 Section 13(1)(a) requires that any party seeking a permit under the regulations "provide an analysis of the impairment to visibility, soils, and vegetation that will occur as a result of: [t]he source[.]"

The Franklin Circuit Court held that the Secretary's Final Order erred both as a matter of law and in her application of the facts in determining whether the ecosystem in the area of operation should take into account only the pollutants that the plant would produce rather than those which already exist in the area. The Appellees contend that the Secretary erred when she applied an analysis which assumed a baseline of zero population in making a decision as to the impact of the plant's pollutant output on the vegetation and soils in the surrounding area. At the trial court level, as here, the Cabinet argues that regulations do not require any type of "cumulative" approach as reflected in the Environmental Protection Agency (EPA) guidelines, but argue that there is support in the regulations for the Secretary's "isolate" approach.

> Regulation 401 KAR 51:017 Section 13 provides that:
>
> (1) The owner or operator shall provide an analysis of the impairment to visibility, soils and vegetation that will occur as a result of:
>
> (a) The source or modification; and

(b) General commercial, residential, industrial and other growth associated with the source or modification.

(2) The owner or operator shall not be required to provide an analysis of the impact on vegetation having no significant commercial or recreational value.

(3) The owner or operator shall provide an analysis of the air quality impact projected for the area as a result of general commercial, residential, industrial and other growth associated with the source or modification.

The Secretary adopted the Cabinet's finding that the area at issue was mainly post-mining use land and that any visibility changes in that environment would be minimal as multiple control technologies would be utilized. Final Order p. 22. Finding that the specific language of 401 KAR 51:017 Section 13 only required Thoroughbred to provide an analysis of any impairment as a result of the specific source or modification, the Secretary concluded that there was no requirement in the regulations for a "cumulative" analysis.

While not citing to any specific regulations in its determination that the Secretary erred in making this conclusion, the Franklin Circuit Court held that one could not "accurately assess the impact of a singular act without first determining the context within which that act occurs." Order at p. 5. Appellees do not contend that the regulation at issue should be read any differently. They do, however, argue that the Secretary erred in not requiring the Cabinet to provide a rational explanation of its position that the plant would not cause any harm. The Cabinet, on the other hand, argues that the Secretary's analysis was appropriate

and sound in that she applied the plain language of 401 KAR 51:017 Section 13, discussed other environmental regulations which specifically require a "cumulative" approach be used, and she considered the legislative mandates of KRS Chapter 13A.

In *Lindall v. Kentucky Retirement Systems*, 112 S.W.3d 391, 394 (Ky. App. 2003), the Court found that "[c]ourts are . . . required to give the words of a statute their plain meaning, which prevents a court from adding language to the statute which does not presently exist." An agency is bound by the regulations it promulgates and regulations adopted by an agency have the force and effect of law. *See Shearer v. Dailey*, 312 Ky. 226, 226 S.W.2d 955 (1950), and *Linkous v. Darch,* 323 S.W.2d 850 (Ky. 1959). An agency's interpretation of its regulations is valid, however, only if it complies with the actual language of the regulation. *Fluor Constructors, Inc. v. Occupational Safety and Health Review Commission*, 861 F.2d 936 (6th Cir. 1988).

The Secretary found that Appellees did not establish a *prima facie* case before the Hearing Officer that sulfur dioxide emissions would impact vegetation species in the area which have a commercial or recreational significance. The Appellees relied on an e-mail which the Secretary found was inadmissible. The Hearing Officer admitted the e-mail from Dr. Julian Campbell, a botanist and professor at Western Kentucky University, to Appellees' expert witness, Dr. Phyllis Fox. The Secretary correctly found that this evidence was hearsay and inadmissible. As a result, the Appellees offered no compelling

evidence to the contrary and did not meet their burden of proof. *Kentucky Unemployment Insurance Commission v. King*, 657 S.W.2d 250-51 (Ky. App. 1983).

In this case, the Secretary followed the plain language and meaning of the statute in determining that a "cumulative" analysis was not the intent of the legislature. KRS 13A.130 prohibits an administrative body from modifying an administrative regulation by internal policy or another form of action. Consequently, the Secretary applied the correct rule of law in making her determination and the Franklin Circuit Court erred in finding that she did not.

II. The BACT Regarding Sulfur Dioxide And Nitrogen Oxide Emissions.

The Cabinet argues that the record supports the Secretary's finding that the Appellees had not met their burden of showing a 99 percent sulfur dioxide reduction technology was available. It points to the testimony of Don Shepherd, from the National Park Service Air Resources Division in Denver, Colorado. Mr. Shepherd concluded that the emission limits in Thoroughbred's Permit constitute BACT for this source and that there was no other example of a power plant equivalent to the design of Thoroughbred that could achieve as low a limit. Thoroughbred had achieved a 98 percent reduction through the technology they utilized. The Cabinet argues that the Appellees failed to provide any evidence that technology for 99 percent reduction of sulfur dioxide was commercially available.

The Cabinet also contends that the Secretary weighed the evidence in the record presented on Appellees' claim that, to reduce sulfur dioxide emissions,

low sulfur coal should be blended with the Western Kentucky high sulfur bituminous coal chosen by Thoroughbred. It argues that the technical determination was made that coal blending to reduce sulfur dioxide would require Thoroughbred to redesign its planned source. The Cabinet contends that this conforms to the regulatory scheme and requirements, thus, the Secretary was correct in her findings. The Appellees, on the other hand, argue that the Secretary erred in her finding that Thoroughbred was in compliance with BACT regarding each of the pollutants.

In reviewing the pertinent regulations, we note that 401 KAR 51:017 applies "to the construction of a new major stationary source or any project at an existing major stationary source that commences construction after September 22, 1982, and locates in an area designated attainment or unclassifiable under 42 U.S.C. 7407(d)(1)(A)(ii) and (iii)."

Regulation 401 KAR 51**:**001 Section 1(25)(a)(b)(c) provides:

> "Best available control technology" or "BACT" means an emissions limitation, including a visible emission standard, based on the maximum degree of reduction for each regulated NSR pollutant that will be emitted from a proposed major stationary source or major modification that:
>
> > (a) Is determined by the cabinet on a case-by-case basis after taking into account energy, environmental, and economic impacts and other costs, to be achievable by the source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or

> innovative fuel combustion techniques for control of that pollutant;
>
> (b) Does not result in emissions of a pollutant that would exceed the emissions allowed by an applicable standard of 40 C.F.R. Parts 60 and 61; and
>
> (c) Is satisfied by a design, equipment, work practice, or operational standard or combination of standards approved by the cabinet[.]

The Hearing Officer found that:

> There are two types of alternative boiler designs that TCG [Thoroughbred] and DAQ [Division for Air Quality] did not consider in their BACT analyses: CFB [Circulating Fluidized Bed Boiler] and IGCC [Integrated Gasification Combined Cycle]. They were eliminated based on differences in boiler type and/or differences in fuel before they went through the top-down BACT process. As stated, TGC's BACT limits are based on the use of PC boilers. In sum, TGC selected PC boilers because it contends they are "the only reliable and proven combustion technology available to meet the designed 1500 MW base load, site limitations and operational requirements of the project." (Citations omitted).

Hearing Officer's Report at 158-59.

In determining whether the BACT standards for sulfur dioxide had been met, the Secretary found that no other coal-fired plant within the United States required a 99 percent removal of sulfur dioxide. As to nitrogen oxides, she set forth more stringent requirements than the Hearing Officer had recommended. The trial court found that this reasoning was flawed on both accounts. First, as to sulfur dioxide, the trial court found that the Secretary relied on "an impermissible, backwards-looking standard for determining what level of SO_2 reduction was

achievable." Franklin Circuit Court Order at p. 8. As to nitrogen oxides, the court found that "the Secretary should have remanded the permit for a more complete BACT analysis." *Id*. The court did not, however, cite to any law supporting its analysis.

Pursuant to 401 KAR 51:001 Section 1(25), a BACT analysis requires a determination of the maximum degree of reduction achievable for the source. We believe this language is clear that the sulfur dioxide emissions need to also be the maximum achievable for the source rather than just the level required by other permits. However, the record indicates that the maximum achievable level was obtained by Thoroughbred. As set forth above, the Secretary relied upon the testimony of experts in making her determination. That testimony, however, indicated that there was no other power plant which was equivalent to Thoroughbred's which could achieve the limits required in the Permit.

BACT "must be solidly grounded on what is presently known about the selected technology's effectiveness[.]" *In re Newmont Nevada Energy Investment, LLC, TS Power Plant,* 12 E.A.D. 429, 441 (EAB 2005). The Secretary used present technology in determining that Thoroughbred met the level required by the KAR in regards to BACT. While the Franklin Circuit Court disagreed, there was no support for the court's decision to remand the Permit. Thus, we will reverse the decision of the Franklin Circuit Court remanding the Permit on this ground as well.

III. Ambient Air Quality Standards.

Next, the Cabinet contends that the Secretary did not err when she found that the Permit as issued would not cause nor contribute to air pollution which would violate National or Local Air Quality Standards. The Franklin Circuit Court found that the Secretary used an incorrect standard in making her determination. It found that the Secretary shifted the burden onto the Petitioners to prove that the proposed source will violate National Ambient Air Quality Standards (NAAQS) when the correct standard would have been for the Petitioner to "show that the applicant for the permit has not demonstrated with certitude the new source's compliance with NAAQS." Franklin Circuit Court Order at p. 9. The court also cited to the fact that no consideration was given to emissions from a diesel-fired emergency generator which would be used during a significant portion of Thoroughbred's operation.

The Hearing Officer concluded that the emergency generator emissions need not be included in the modeling as it was a mere assertion on the part of the Appellees that such would render different results. The Cabinet asserts that the Franklin Circuit Court was bound by the findings if they were supported by substantial evidence which, they argue, they were. The Appellees contend that the Secretary and Hearing Officer erred in this conclusion.

The burden of proof in administrative hearings is set out in 401 KAR 100:010 Section 13(9). It provides that "[t]he petitioner shall bear the burden of

going forward to establish a prima facie case and the ultimate burden of persuasion as to the requested relief." The Cabinet contends that the trial court erred in determining that there should be a certainty in the modeling, which would include the inclusion of the generator. The Cabinet asserts that the nature of "modeling" is merely a prediction and that certainty is not required.

While the purpose of a "model" is for prediction, any "model" should be as complete as possible in order for the prediction to be accurate. In predicting air quality based upon the operating procedures of a generating plant, anything that plant uses routinely should be part of the "model" used to determine whether air quality guidelines will be violated by its operation. In this action, the generator is an alternate power source which should be used in emergency situations only. There was no proof offered before the Hearing Officer that the sporadic use of the generator would cause any additional impact on the air quality. Thus, the Franklin Circuit Court erred in remanding the Permit to the Secretary for further findings on this issue.

IV. Public Participation Requirements.

Finally, the Cabinet contends that the Franklin Circuit Court erred in determining that the Cabinet's notice of the Permit in Muhlenberg County and its publication of the Class II increment without also publishing the Class I increment were inadequate.

The Franklin Circuit Court held that Kentucky's Clean Air Act regulations require the Cabinet to provide public notice of any increment

consumption which was expected to occur as a result of a new source. Franklin Circuit Court Order at p. 9. The circuit court found that the Cabinet's interpretation of 401 KAR 52:100 Section 5(10) as requiring notice only in the county in which the new source will be constructed was incorrect and, instead, that the regulation required more than just notice within the county in which the source would be located. The court rationalized that Thoroughbred would, in effect, consume all of the remaining sulfur dioxide increment in the region and foreclose construction of any new sources of air pollution in that region for decades. Consequently, the court held that notice given by the Cabinet regarding the Permit was not sufficient under Kentucky's regulations. As is found throughout the court's opinion, however, there is no legal analysis on this issue. Also, the court does not indicate exactly what notice it believes to be necessary in order to fulfill the requirements of the regulations.

The provisions of 401 KAR 52:100 Section 5(10) require that public notice "[f]or permits subject to review under 401 KAR 51:017, [include] the degree of increment consumption expected to occur[.]" The Cabinet argues there is no specific requirement that Class I increment consumption be published.

Any area which would be affected by the emissions of a plant such as the one currently proposed by Thoroughbred should be included in public notice and hearing requirements. It is required that notice be substantially compliant and that it achieve the purpose of the notice. *See Conrad v. Lexington-Fayette Urban County Government,* 659 S.W.2d 190 (Ky. 1983). In this case, the notice achieved

the purpose as areas which would be affected were able to participate. Thus, the Franklin Circuit Court erred in its remand of the Permit to the Secretary for further findings on this issue.

CONCLUSION

We find that the decision of the Franklin Circuit Court remanding the Permit to the Cabinet was in error and shall be reversed allowing the Secretary's decision to stand.

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