

80 megawatt turbine. To make use of the increased capacity allowed by this new turbine, East Kentucky also performed substantial work on the Dale Unit 3 boiler. This work included, but was not limited to, installation or repair of new pulverizers, process controls, feeders, fans, the preheater and the superheater.

Based on information available to it and to EPA, East Kentucky should have anticipated an increase in utilization of the Dale Unit 3 and 4 boilers that would result in increased emissions and should have projected a net emissions increase from those boilers well above the "significance levels" established in the CAA for one or more regulated pollutants. East Kentucky in fact experienced such emission increases.

The Dale Plant is located in an area that has at all relevant times been classified as attainment or unclassifiable for NO₂, SO₂, PM and ozone. Accordingly, the Prevention of Significant Deterioration ("PSD") provisions of Part C, Title I of the Clean Air Act ("CAA") apply to operations at the Dale plant. Nevertheless, East Kentucky failed to obtain a PSD permit for the activities at Dale Units 3 and 4.

The substantial work at Dale Units 3 and 4 also resulted in an increase in the hourly emission rates for SO₂, NO_x, and/or PM. These activities were modifications that subjected those units to the NSPS at 40 C.F.R. Part 60, Subpart Da. To date, East Kentucky has not complied with those regulations.

Under the applicable Title V permit regulations, East Kentucky was required to identify all applicable requirements, identify a compliance schedule for those applicable requirements for which the Dale plant was not already in compliance, and to certify its compliance with all applicable requirements. East Kentucky's Title V permit for the Dale plant does not address PSD or NSPS Subpart Da.

These violations of the Act and the State Implementation Plan ("SIP") of Kentucky have resulted in the release of massive quantities of SO₂, NO_x, and/or PM into the environment. Until these violations are corrected, the Dale Plant will continue to release massive quantities of illegal SO₂, NO_x, and/or PM into the environment.

RELEVANT STATUTORY AND REGULATORY BACKGROUND

1. When the Act was passed in 1970, Congress exempted existing facilities, including the coal-fired power plant that is the subject of this NOV, from many of its requirements. However, in the 1977 CAA Amendments, Congress also made it quite clear that this exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979), "the statutory scheme intends to 'grandfather' existing industries; but...this is not to constitute a perpetual immunity from all standards under the PSD program." Rather, the Act requires grandfathered facilities to install modern pollution control devices whenever the

unit is proposed to be modified in such a way that its emissions may increase.

2. The PSD provisions require preconstruction review and permitting for modifications of stationary sources. Pursuant to applicable regulations, if a major stationary source located in an attainment area is planning to make a major modification, then that source must obtain a Prevention of Significant Deterioration ("PSD") permit. To obtain this permit, the source must agree to put on the best available control technology ("BACT") or in the case of a modification that is not major, must meet the emission limit called for under the applicable minor NSR program in the State SIP.
3. Pursuant to Part C of the Act, the SIP of Kentucky requires that no construction or operation of a major modification of a major stationary source occur in an area designated as attainment without first obtaining a permit. See: for PSD permits in attainment areas, Kentucky Administrative Regulation (KAR) 401 KAR 51:017, which was originally approved as part of the Kentucky SIP on September 1, 1989, at 54 Fed. Reg. 36307, and since amended.
4. The Kentucky SIP provisions identified in paragraph 3 above are all federally enforceable pursuant to Sections 110 and 113 of the Act.
5. Pursuant to Section 111 of the CAA, 42 U.S.C. § 7411, it is unlawful to operate a modified source in violation of applicable regulations.
6. Pursuant to 40 C.F.R. § 60.40a, the provisions of 40 C.F.R. Part 60, Subpart Da apply to electrical steam generating units, greater than 250 million BTU/hr in size, which are modified after September 18, 1978.
7. Pursuant to Section 502(a) of the Act, 42 U.S.C. § 7661(a), it is unlawful to operate without or in violation of a permit issued pursuant to subchapter V of the Act, 42 U.S.C. § 7661 *et. seq.*
8. Kentucky's program under subchapter V of the Act was granted interim approval by the Administrator on November 14, 1995, (60 Fed. Reg. 57186) and final approval on October 31, 2001, (66 Fed. Reg. 54953). These regulations are currently codified at 401 KAR 52.020. Pursuant to 401 KAR 52.020, Section (3)(1)(b), a source shall operate in compliance with a permit issued pursuant to that regulation.
9. Sections 4(1) and 5 of 401 KAR 52.020 require that a source submit a complete permit application which identifies all applicable requirements and information needed to determine applicable requirements for the source.
10. Section 5(8) of 401 KAR 52.020 requires that a permit application must contain a compliance plan for all applicable requirements for which the source is not in compliance.

11. Section 5(9) of 401 KAR 52.020 requires that a permit application must contain a certification of compliance with all applicable requirements.
12. Sections 21 and 23 of 401 KAR 52.020 require that a source submit compliance certifications annually.
13. Pursuant to 40 C.F.R. § 70.1(b), all subject sources shall have Title V permits which ensure compliance with all applicable requirements.
14. Section 113(a)(1) of the Act provides that at any time after the expiration of 30 days following the date of the issuance of this NOV, the Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the state implementation plan or permit, and/or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation on or before January 30, 1997, and no more than \$27,500 per day for each violation after January 30, 1997. Sections 113(a)(1) and 113(b) also provide that the Administrator may take the same actions to enforce violations of subchapter V of the Act, 42 U.S.C. § 7661 *et. seq.*
15. Section 167 of the Act, 42 U.S.C. § 7477, authorizes the Administrator to initiate an action for injunctive relief as necessary to prevent the construction, modification or operation of a major emitting facility which does not conform to the PSD requirements.
16. As provided in Sections 113(a)(1), 113 (b) and 167 of the Act, 42 U.S.C. §§ 7413(a)(1), 7413(b) and 7477, the violations set forth above subject East Kentucky to injunctive relief and civil penalties.

OPPORTUNITY FOR CONFERENCE

Respondent may, upon request, confer with EPA. The conference will enable Respondent to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts it may have taken or proposes to take to achieve compliance. Respondent has the right to be represented by counsel. A request for a conference must be made within 10 days of receipt of this NOV, and the request for a conference or other inquiries concerning the NOV should be made in writing to:

Alan E. Dion
Associate Regional Counsel
Environmental Accountability Division
U.S. EPA - Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
404-562-9575

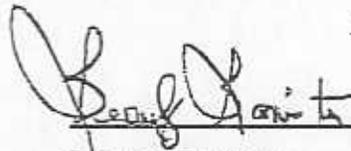
By offering the opportunity for a conference or participating in one, EPA does not waive or limit its right to any remedy available under the Act.

EFFECTIVE DATE

This NOV shall become effective immediately upon issuance.

JUL 02 2003

Date



Beverly Banister
Director
Air, Pesticides, and Toxics
Management Division