Approved: April 27, 2000
Date

MINUTES OF THE HOUSE COMMITTEE ON ENVIRONMENT.

The meeting was called to order by Chairperson Joann Freeborn at 3:30 p.m. on April 6, 2000 in Room 231-N of the Capitol.

All members were present except: Rep. Clay Aurand - excused
Rep. Henry Helgerson - excused
Rep. Douglas Johnston - excused
Rep. Bill Light - excused
Rep. Dennis McKinney - excused
Rep. Ray Merrick - excused
Rep. Melvin Minor - excused
Rep. Ted Powers - excused
Rep. Tom Sloan - excused
Rep. Tim Tedder - excused

Committee staff present: Raney Gilliland, Kansas Legislative Research Department
Mary Torrence, Revisor of Statute's Office
Mary Ann Graham, Committee Secretary

Conferees appearing before the committee: Secretary Clyde Graeber, Kansas Department Health and Environment, 400 SW 8th, Ste 200, Topeka, KS 66603
Yvonne Anderson, Managing Attorney, Kansas Department Health and Environment, 400 SW 8th, Ste 203, Topeka, KS 66603

Others attending: See Attached Sheet

Chairperson David Corbin called the Joint Committee meeting with House Environment and Senate Energy and Natural Resources to order at 1:00 p.m. in room 313-S. He opened an informational hearing on **SB670** and announced that this was an informational meeting only. Written testimony only will be accepted with no verbal testimony other than guest speaker Secretary Clyde Graeber, Kansas Department of Health and Environment.

SB670: An act concerning water pollution prevention.

Chairperson Corbin welcomed Secretary Graeber to the committee. He presented information on **SB670** which amends K.S.A. 65-170e. The purpose of amending this statute is to bring the State of Kansas into full compliance with federal requirements to provide the public the opportunity for judicial review of approval or denial of National Pollutant Elimination System permits. On March 10, 2000 the Supreme Court of the State of Kansas issued its opinion in Case No. 82,962, Families Against Corporate Takeover v. Gary Mitchell and The Kansas Department of Health and Environment. In its opinion, the Court questioned the state's compliance with federal regulations which require the opportunity for judicial review of NPDES permit actions through citizen suits at the state level. Under 33 U.S.C. Section 1342 (c)(2) state permit programs must comply with federal requirements. **SB670** provides for citizen suits to challenge NPDES permits consistent with the requirements of Section 509 of the Clean Water Act and 40 C.F.R. Section 123.30. 40 C.F.R. 123.30 requires that a state with approval to administer an NPDES program not narrowly restrict the rights of any interested person to judicial review of the granting or denial of any NPDES permit. (See attachment 1) A "Notice of Citizen Suit Under Section 505 of the Clean Water Act," was also distributed. Pursuant to the citizen suit provisions of Section 505 of the Clean Water Act, the Kearny County Alliance, a Kansas not-for-profit corporation, gives notice of its intent to file suit against the United States Environmental Protection Agency (USEPA) and the Kansas Department of Health and Environment (KDHE). (See attachment 2) A copy of the Court case " Families against Corporate Takeover v. Gary Mitchell and The Kansas Department of Health and Environment," was distributed for review, (See attachment 3) along with a copy of 40 C.F.D. 123.30 "Judicial review of approval or denial of permits," (See attachment 4) and a copy

of 33 U.S.C. Section 1342 (c) (2) concerning Water Pollution Prevention.(See attachment 5). Questions and discussion followed. Yovonne Anderson, Chief Legal Council, Kansas Department of Health and Environment was in attendance to answer committee questions.

Written testimony only in opposition to the bill was submitted by Kansas Ready Mixed Concrete Association, (See attachment 6) and Kansas Aggregate Producers Association. (See attachment 7)

Written testimony was submitted by Kansas Farm Bureau with concerns and questions to the bill and are questioning if this legislation really is necessary. (See attachment 8)

Chairperson Corbin thanked Secretary Graeber for his presentation and closed the informational hearing on **SB670**.

The meeting adjourned at 1:50 p.m.

HOUSE ENVIRONMENT COMMITTEE GUEST LIST

DATE: April 6, 2000

NAME	REPRESENTING
Verne Anderson	KDHE
Clyde Graves	KDHE
Joe Turd	KDHE
Greg A Foley	KDHE
Leslie Kaufman	Kansas Farm Bureau
Bill Fuller	Kansas Farm Bureau
Jim Allen	Seaboard
Tom Bruno	Allen & Assoc.
Don Miles	KEC
Mike Jensen	Ks Pork
Greg Simmell	Sen Huelskamp
Wendy Harms	KAPA
E.C. "Woody" Moses	KCAMA
Judy Moler	Ks. Assn of Counties
Dan Kelley	LKM
Ron Appletoft	Water Dist. No 1 of Jo. Co.
Charles Benjamin	KNRE/KS Sierra Club
Mary Jane Stattelman	KDA
John Darlinger	"

HOUSE ENVIRONMENT COMMITTEE GUEST LIST

DATE: April 6, 2000

NAME	REPRESENTING
Natalie Haag	Gov. office
Ellin Irwin	Ks. Livestock Association
Mike Beam	Ks. Livstk. Assn.
Rebecca Bryant	Rep. Schwartz's intern
Mike Taylor	City of Wichita
John C. Rottenborn	Western Res. KPPC
JOHN IRWIN	WESTERN RESOURCES
Diane Hottman	" "
Paul A Johnson	PACK

KANSAS
DEPARTMENT OF HEALTH & ENVIRONMENT
BILL GRAVES, GOVERNOR
Clyde D. Graeber, Secretary

Testimony on Senate Bill 670
Presented to the Joint Meeting on
House Environment and Senate Energy and
Natural Resources Committees
by
Secretary Clyde D. Graeber

April 6, 2000

Thank you for this opportunity to present testimony on the proposed amendment of K.S.A. 65-170e. The purpose of the amendment is to bring the state of Kansas into full compliance with federal requirements to provide the public the opportunity for judicial review of approval or denial of National Pollutant Elimination System permits.

On March 10, 2000 the Supreme Court of the State of Kansas issued its opinion in Case No. 82,962, Families Against Corporate Takeover v. Gary Mitchell and The Kansas Department of Health and Environment In its opinion, the Court questioned the state's compliance with federal regulations which require the opportunity for judicial review of NPDES permit actions through citizen suits at the state level. Under 33 U.S.C. Section 1342(c)(2) state permit programs must comply with federal requirements.

The amendment requested provides for citizen suits to challenge NPDES permits consistent with the requirements of Section 509 of the Clean Water Act and 40 C.F.R. Section 123.30. 40 C.F.R. 123.30 requires that a state with approval to administer an NPDES program not narrowly restrict the rights of any interested person to judicial review of the granting or denial of any NPDES permit.

In support of amendment I now quote directly from Section 509 of the Clean Water Act and 40 C.F.R. 123.30:

Section 509 of the Clean Water Act requires that judicial review of certain agency actions including NPDES permit actions be had by "any interested person" within 120 days from the date of issuance or denial of a permit.

Capitol Tower Building
400 SW 8TH Street, Suite 200
(785) 296-0461

Topeka, KS 66603-3930
FAX (785) 368-6368

House Environment
4-6-00
Attachment 1

40 C.F.R. 123.30 states:

"All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally issued NPDES permit (see Section 509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permitted can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if person must have a property interest in close proximity to a discharge or surface waters in order to obtain review. (Emphasis Added.)

In the late 1980's a petition was filed with the EPA for revocation of the NPDES program approval based substantially on alleged program deficiencies related to the public's right to judicial review of administrative actions related to NPDES permits. Subsequently the legislature enacted provisions to address the public participation requirement as set forth in K.S.A. 65-170e. The provisions as enacted however are now being challenged as to sufficiency both by the Supreme Court of the State of Kansas and in another petition recently filed with EPA seeking withdrawal of EPA authorization of the NPDES program approval based on failure of the state to adopt the requirements of 40 CFR 123.30. The recent Notice of Citizen Suit Under Section 505 of the Clean Water Act served upon the KDHE on April 3, 2000 is the first of a number of actions expected to be filed by citizen groups challenging state NPDES program authorization.

I have no other purpose in proposing adoption of the amendments to K.S.A. 65-170e other than to protect the authority of the State of Kansas to administer the NPDES program for the benefit of all Kansas citizens.

H&E HALL & EVANS, L.L.C.
ATTORNEYS AT LAW

1200 SEVENTEENTH S[illegible]T
SUITE 1700
DENVER, COLORADO 80202
PHONE: 303/628-3300
FAX: 303/628-3368
WWW.HALLEVANS.COM

ROBERT J. VINCZE
VINCZER@HALLEVANS.COM
(303) 628-3346

DENVER
COLORADO SPRINGS
WASHINGTON, D.C.

Via Certified Mail
March 31, 2000

Honorable Carol M. Browner
1101A
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Honorable Janet Reno
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Honorable Dennis Grams
Regional Administrator
USEPA Region 7
901 North Fifth Street
Kansas City, Kansas 66101

Secretary Clyde D. Graeber
Kansas Department of Health & Environment
Capitol Tower Building
400 SW 8th Street, 2nd Floor
Topeka, Kansas 66603-3930

Director Ronald Hammerschmidt
Division of Environment
Forbes Field, Building 740
Topeka, Kansas 66620-0001

Director Karl Mueldener
Bureau of Water
Kansas Department of Health & Environment
Forbes Field, Building 283
Topeka, Kansas 66620

NOTICE OF CITIZEN SUIT UNDER SECTION 505 OF THE CLEAN WATER ACT

Pursuant to the citizen suit provisions of Section 505 of the Clean Water Act, the Kearny County Alliance, a Kansas not-for-profit corporation, gives notice of its intent to file suit against the United States Environmental Protection Agency ("USEPA") and the Kansas Department of Health and Environment ("KDHE"). The USEPA has failed to ensure that the NPDES program in the State of Kansas provides for an opportunity for judicial review in State Court of the final approval or denial of permits in accordance with 40 C.F.R. § 123.30. The KDHE has failed to adopt such a provision. Such judicial review is not discretionary. The State of Kansas must adopt this regulation or the USEPA must withdraw authorization for the Kansas NPDES program.

Under 33 U.S.C. § 1342 (c)(2), State permit programs must comply with federal requirements. The procedure for the withdrawal of a State permit program is set forth at 33 U.S.C. § 1342(c)(3). This process should commence immediately.

House Environment
4-6-00
Attachment 2

Respectfully submitted,

Robert J. Vincze (Kansas Bar No. 14101)
Hall & Evans, LLC
1200 17th Street, Suite 1700
Denver, Colorado 80202
(303) 628-3346
Attorneys for the Kearny County Alliance

Kearny County Alliance
Dr. Frankie Summers, President
HCR 3, Box 42
Lakin, Kansas 67860
(316) 355-6684

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 82,962

FAMILIES AGAINST CORPORATE TAKEOVER,

Appellant,

v.

GARY MITCHELL and THE KANSAS DEPARTMENT

OF HEALTH & ENVIRONMENT,

Appellees.

SYLLABUS BY THE COURT

In an administrative appeal filed by a nonprofit corporation seeking judicial review of agency action under K.S.A. 77-601 *et seq.*, challenging a permit issued by the Kansas Department of Health and Environment allowing operation of a large-scale hog farm, the record is examined, and it is held: (1) Standing is a jurisdictional issue, (2) when a motion to dismiss under K.S.A. 60-212(b)(6) raises the legal sufficiency of a claim, the court is under a duty to examine the petition to determine whether its allegations state a claim for relief under any possible theory, (3) dismissal of a petition under K.S.A. 60-212(b)(6) before utilization of discovery is seldom warranted, (4) the plaintiff here has asserted standing under K.S.A. 77-611(b) as a "person who was a party to the agency proceedings that led to the agency action," and (5) the case is not moot.

Appeal from Shawnee district court; TERRY L. BULLOCK, judge. Opinion filed March 10, 2000. Reversed and remanded.

John M. Carter II, of Topeka, argued the cause, and *Robert V. Eye,* of Topeka, was with him on the briefs for appellant.

Erika V. Bessey, special assistant attorney general, of Kansas Department of Health and Environment, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by

SIX, J.: This case raises the jurisdictional issue of standing. Petitioner, Families Against Corporate Takeover (FACT), appeals from a district court dismissal of a petition for judicial review of administrative agency action. FACT sought review of a Kansas Department of Health and Environment (KDHE) permit authorizing construction of a 14,300-head hog farm in Hodgeman County. The district court sustained a K.S.A. 60-212(b)(6) motion filed by KDHE and dismissed the case, finding that FACT had no standing to sue. FACT appeals.

Our jurisdiction is under K.S.A. 20-3018(c) (a transfer from the Court of Appeals on our own motion).

The single issue is whether FACT has standing to seek judicial review of the KDHE's decision.

Our answer is, "Yes."

FACTS

House Environment
4-6-00
Attachment 3

FACT is a nonprofit corporation founded in Hodgeman County by various citizens concerned about the environmental, economic, and social impacts of large-scale hog farms. Murphy Farms, Inc., (Murphy) sought a permit for its hog farm from KDHE. KDHE issued a permit to Murphy under the National Pollution Discharge Elimination System (NPDES). The NPDES is a delegated federal permitting program under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1994). See 33 U.S.C. § 1342(b) (1994) (NPDES state permitting program). See generally Niehaus, *Clean Water Act Permitting: The NPDES Program at Fifteen,* 2 Nat. Resources & Env't 16 (Winter 1987) (explaining the NPDES permitting process and relevant terminology). The NPDES program allows states to develop and administer permitting programs and issue NPDES permits if the state program is sufficient to meet federal Clean Water Act standards. KDHE issued the permit in question by virtue of the NPDES permitting authority found at 33 U.S.C. § 1342(b).

FACT formally requested that KDHE revoke Murphy's permit to operate the hog farm. KDHE did not respond. By operation of law, KDHE's failure to respond within 60 days constituted a denial of FACT's request to revoke the permit. See K.A.R. 28-16-62(g)(2). FACT then filed a petition in Shawnee District Court seeking judicial review of KDHE's decision.

FACT provided three affidavits from members of the organization. These affiants alleged an imminent decrease in the value of their property, some of which was adjacent to the proposed hog farm. The alleged decrease in value would be caused by odor, flies, vermin, pestilence, and possible contamination of surface and ground water. One affiant also claimed harmful health consequences to his asthmatic wife and son because of KDHE's decision to allow the hog farm.

KDHE challenged FACT's standing to sue by filing a K.S.A. 60-212(b)(6) motion to dismiss (failure to state a claim upon which relief can be granted). The district court granted the motion, holding that FACT had no standing. The district court, relying on *Weinlood v. Simmons,* 262 Kan. 259, 936 P.2d 238 (1997), reasoned that FACT had not alleged sufficient individual and particularized injury to maintain standing.

Before addressing the standing issue we must dispose of a KDHE motion filed shortly before oral argument. KDHE moved to dismiss the appeal as moot. The motion asserted in part:

"2. The facility in issue has not been built and no construction is underway. . . .

"3. K.S.A. 1998 Supp. 17-5908 states that a proposition to allow swine production facilities as defined in K.S.A. 17-5903 may be submitted to qualified voters of a county for a vote upon whether to establish swine production facilities. K.S.A. 17-5903(s) defines a swine production facility as land, structures and related equipment owned or leased by a corporation for housing, breeding, farrowing or feeding of swine.

"4. The citizens of Hodgeman County, Kansas voted against allowing swine facilities in Hodgeman County by a vote of 551 to 529 as shown in the Abstract of Votes Case at a Special Election in Hodgeman County, Kansas, on the 1st day of April 1997 . . . .

"5. Murphy Family Farms is a family farming corporation and not subject to the prohibition on corporately owned swine facilities in Hodgeman County.

"6. On November 15, 1999, Smithfield Foods, Inc. signed a definitive acquisition agreement to acquire all of the capital stock of Murphy Farms, Inc. and its affiliated companies including Murphy Family Farms which is the holder of the permit in issue. . . .

"7. As a result of the above described transaction, the status of the permit holder will prohibit it from siting the proposed facility in Hodgeman County pursuant to local law."

The validity of the Hodgeman County vote on corporate hog production facilities was affirmed in *Cure v. Board of Hodgeman County Comm'rs,* 263 Kan. 779, 952 P.2d 920 (1998).

FACT contends the issue before us is not moot. We agree with FACT. The proposed merger contemplated between Murphy and Smithfield Foods, Inc., is beyond our record here. The focus of FACT's case is KDHE's action in issuing the permit. As long as the permit remains valid, FACT seeks to pursue its action against KDHE. What the future may hold for the acquisition of Murphy remains speculative. The case is not moot.

DISCUSSION

We now turn to FACT's standing. Standing is a jurisdictional issue. See *Moorhouse v. City of Wichita*, 259 Kan. 570, 574, 913 P.2d 172 (1996). Whether a district court has jurisdiction is a question of law over which we exercise unlimited review. *In re Marriage of Killman,* 264 Kan. 33, 34, 955 P.2d 1288 (1998).

The question is whether FACT has standing to challenge KDHE's actions. FACT and KDHE spend much time in their briefs discussing *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977). *Hunt* sets forth a three-prong standing test for unincorporated associations. 432 U.S. at 343. FACT urges us to adopt the *Hunt* test for associational standing. We recently did so in *NEA-Coffeyville v. U.S.D. No. 445,* No. 81,992, (filed January 28, 2000, after oral argument in this case).

The district court did not have the benefit of our standing holding in *NEA- Coffeyville.* The parties' submissions to the district court channeled the district judge into a standing analysis based on *Weinlood,* 262 Kan. 259. *Weinlood* was a 42 U.S.C. § 1983 (1994) action filed by prison inmates challenging the assessment of a $1 monthly service fee for administrating each inmate's trust account. The inmates did not take issue with the amount of the fee; they argued it could not be paid to the Crime Victims Compensation Fund. We said:

"The problem with this contention in the context of this litigation is that if the fees collected are being improperly sent to the crime victims compensation fund rather than being used to defray the costs of operation of the prison, the injured parties are the taxpayers of Kansas." 262 Kan. at 266.

We then reasoned: "Generally, an injunction will not lie at the suit of a private person to protect the public interests. [Citations omitted.] A plaintiff must have a special private interest distinct from that of the public at large in order to bring an actionable claim." 262 Kan. at 267. The context of *Weinlood* is far afield from the strong public policy of citizen participation in NPDES permitting. The participation policy has been mandated by Congress, the Environmental Protection Agency (EPA), and the KDHE regulations.

We surmise that the district court's analysis of FACT's standing may have differed had *NEA-Coffeyville* been available. The NEA-Coffeyville teachers were members of an unincorporated association. We acknowledge FACT is a corporation. The organization seeking standing in *Hunt* was a state agency established to promote and protect the state's apple industry. Here, FACT members have formed a nonprofit corporation rather than an unincorporated association. We see no reason to turn a standing issue on whether the members have gathered in the form of a nonprofit corporation rather than an unincorporated association. See *Colorado Pyrotechnic Ass'n v. Meyer,* 740 F. Supp. 792, 795 (Colo. 1990).

Our analysis does not end with the reference to *NEA-Coffeyville,* however. FACT did not file a traditional civil lawsuit. FACT filed a petition for judicial review under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77-601 *et seq.* The KJRA defines standing for judicial review of an agency action. Therefore, whether FACT meets the three-part test for standing in *NEA-Coffeyville* becomes relevant only if FACT meets the standing requirements of the KJRA. Standing under the KJRA is controlled by K.S.A. 77-611, which provides:

"The following persons shall have standing to obtain judicial review of final or nonfinal agency action:

(a) A person to whom the agency action is specifically directed;

(b) a person who was a party to the agency proceedings that led to the agency action;

(c) if the challenged agency action is a rule and regulation, a person subject to that rule; or

(d) a person eligible for standing under another provision of law."

FACT asserted standing in the district court under subsection (d)'s "another provision of law" clause, citing 40 C.F.R. Part 123 (1999). Effective June 7, 1996, 40 C.F.R. § 123.30 directed states administering the NPDES program to provide citizens an opportunity for judicial review of approval or denial of NPDES permits. 61 Fed. Reg. 20,972 (1996). The Clean Water Act itself provides for citizen suits in federal court at 33 U.S.C. § 1365 (1994). States that administer the NPDES program are required by federal regulations to provide for judicial review through citizen suits at the state level. 40 C.F.R. § 123.30.

The problem with FACT's reliance on 40 C.F.R. § 123.30 as "another provision of law" is that § 123.30 directs states to adopt a standing rule and does not provide an independent basis for standing. The EPA promulgated this rule after it became aware of "instances in which citizens [were] barred from challenging State-issued permits because of restrictive standing requirements in State law." 61 Fed. Reg. 20,972 (1996). See *e.g., EDF v. State Water Control Board,* 12 Va. App. 456, 404 S.E. 2d 728 (1991) (holding under Virginia law only a permittee has standing to challenge issuance or denial of permit).

As KDHE observes, Kansas has not adopted 40 C.F.R. § 123.30 as the law of this state. It is interesting that KDHE makes this argument. By admitting that there has been no compliance with 40 C.F.R. § 123.30, KDHE admits that its authority to grant NPDES permits is in jeopardy and may be revoked by the EPA. KDHE says in its brief: "If a state fails to meet the standard, the remedy is a petition to the United States Environmental Protection Agency for review and possible withdrawal of program authorization by the federal regulatory agency [the EPA] in accordance with the Clean Water Act." KDHE is correct. Under 33 U.S.C. § 1342(c)(3), the Administrator of the EPA must decide, after a public hearing, that a state is not administering the NPDES program according to federal requirements before revoking a state's authority to administer the program. Thus, FACT could file a complaint with the EPA seeking to revoke the KDHE's authority to grant NPDES permits. However, even if that authority is revoked by the EPA, it is not clear that the permit at issue here would be affected. Nothing in § 1342(c) provides grounds for challenging permits issued while the state agency was out of compliance.

We are puzzled by what appears to be the State's truncated approach to NPDES administration. KDHE administers the federal program and issues the hog farm permit under the federal program; but according to KDHE, the legislature has not adopted the part of the federal program that opens Kansas courts for Kansans to question the permit by judicial review. KDHE is contesting what the EPA clearly says should be allowed: citizen suits to challenge NPDES permits.

FACT makes two alternative arguments on appeal. First, FACT asserts that if state law does not provide for standing (because Kansas failed to adopt a standing rule as directed by § 123.30), state authority to administer the NPDES program is preempted by federal law. However, even if FACT has standing under 33 U.S.C. § 1365 in a preemption analysis, that standing would be in federal, not state, court.

Second, FACT asserts standing under K.S.A. 77-611(b) as a "person who was a party to the agency proceedings that led to the agency action." FACT argues in the alternative at this stage because KDHE's admission that Kansas has not adopted a § 123.30 standing rule came in its brief to this court. Although not advanced in the district court, we conclude the "K.S.A. 77-611(b)" argument is before us on appeal.

Under K.S.A. 1999 Supp. 60-208, pleadings are to be given a liberal construction. We note that at the time the K.S.A. 60-212(b)(6) motion to dismiss was granted there had been no discovery. The record suggests that no factual matters outside the pleadings were presented to or considered by the district court. We have previously set out the scope of review for a motion to dismiss. See *Bruggeman v. Schimke,* 239 Kan. 245, 247-48, 718 P.2d 635 (1986). The concept of notice pleading relies on its

companion, discovery, to fill in the gaps. See 1 Gard and Casad, Kansas C. Civ. Proc. 3d Annot. § 60-208 (1997). We have held that it is not necessary to plead a statute under which relief may be granted if the facts bring the case within the statute. *Oller v. Kincheloe's, Inc.,* 235 Kan. 440, 448, 681 P.2d 630 (1984). Our discussion of notice pleading in *Oller* applies here. 235 Kan. at 446-49. Dismissal of a petition on a K.S.A. 60-212(b)(6) motion before utilization of discovery is seldom warranted. *Noel v. Pizza Hut, Inc.,* 15 Kan. App. 2d 225, 233, 805 P.2d 1244 (1991), *rev. denied* 248 Kan. 996 (1991). Following the teaching of *Bruggeman* we have a duty to determine if the pleaded facts and inferences state a claim on any possible theory. See *Noel,* 15 Kan. App. 2d at 231.

Consideration of FACT's K.S.A. 77-611(b) assertion that it was a party to the KDHE proceedings is endorsed by an exception to our general rule on issues raised for the first time on appeal. FACT's assertion involves only a question of law arising from facts we deem admitted in reviewing a K.S.A. 60-212(b)(6) motion. See *Johnson v. Kansas Neurological Institute,* 240 Kan. 123, 126, 727 P.2d 912 (1986).

FACT argues that it fully participated in the permitting process as allowed by K.A.R. 28-16-61. K.A.R. 28-16-61(b) requires KDHE to provide for a public notice and comment period during the NPDES permitting process. During the public comment period, any interested person may submit written comments on a draft permit and may request a public hearing. K.A.R. 28-16-61(c). "All comments shall be considered in making the final decision and shall be answered as provided in subsection (e) of this regulation." K.A.R. 28-16-61(c). Clearly KDHE must allow citizens to comment on its proposed permits, and it also must respond to their comments.

At the request of FACT and others, a public meeting was held in Hodgeman County. At that meeting, members of FACT and two consultants hired by FACT submitted comments on the pending permit for Murphy's hog farm. The record does not disclose whether KDHE formally responded to FACT's comments.

FACT participated in the agency proceedings (permit review and public comment) that led to the agency action (granting the permit). During oral argument before us, KDHE's counsel said: "[T]hose citizens did both as a group and individually have the opportunity to participate in the permitting process through the public hearing process, through the opportunity to submit comments on the permit." We hold that FACT is entitled to assert standing as a "person who was a party to the agency proceedings that led to the agency action" under K.S.A. 77-611(b).

In *NEA-Coffeyville,* 268 Kan. , Syl. ¶ 2, we said:

"An association has standing to sue on behalf of its members when (1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires participation of individual members."

Under *NEA-Coffeyville* and *Hunt,* FACT has standing to seek judicial review of the KDHE's action. First, the individual members of FACT have shown sufficient imminent injury to sue individually. Second, there is no doubt that the interests FACT seeks to protect are germane to its purpose. FACT was organized for the express purpose of protecting its members from the adverse effects of a large-scale hog farm. Last, neither the claim asserted nor the relief requested requires the participation of individual FACT members. FACT seeks judicial review of agency action. The relief sought is revocation of the NPDES permit. Assuming FACT's initial contentions survive the discovery process, the district court's analysis will be whether KDHE complied with the various rules and regulations involved in granting an NPDES permit. This analysis does not require participation of individual FACT members.

The KDHE administrative regulations support FACT's standing as a "party." K.A.R. 28-16-62(g) specifically governs the *procedures* for modifying, revoking, reissuing, and terminating NPDES permits. *Any interested person* may request that a permit be modified, revoked, reissued, or terminated. K.A.R. 28-16-62(g)(1) (as FACT did here). Denials of such requests are not subject to public notice, comment, or hearings. However, the regulations state that this informal process is "a prerequisite to seeking judicial review of agency action" in denying the request. K.A.R. 28-16-62(g)(2). This is a clear

...dication that citizens are allowed to both comment on proposed NPDES permits *and* seek judicial review of permit granting.

Reversed and remanded.

END

 | Keyword | Name » SupCt - CtApp | Docket | Date |

Comments to: WebMaster, kscases@kscourts.org.
Updated: March 10, 2000.
URL: http://kscourts.org/kscases/supct/2000/20000310/82962.htm.

NOTE: States which are authorized to administer the NPDES permit program under section 402 of CWA are encouraged to rely on existing statutory authority, to the extent possible, in developing a State UIC program under section 1422 of SDWA. Section 402(b)(1)(D) of CWA requires that NPDES States have the authority "to issue permits which * * * control the disposal of pollutants into wells." In many instances, therefore, NPDES States will have existing statutory authority to regulate well disposal which satisfies the requirements of the UIC program. Note, however, that CWA excludes certain types of well injections from the definition of "pollutant." If the State's statutory authority contains a similar exclusion it may need to be modified to qualify for UIC program approval.

§ 123.29 Prohibition.

State permit programs shall provide that no permit shall be issued when the Regional Administrator has objected in writing under § 123.44.

§ 123.30 Judicial review of approval or denial of permits.

All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process. A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally-issued NPDES permit (see § 509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permittee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.) This requirement does not apply to Indian Tribes.

[61 FR 20980, May 8, 1996]

§ 123.31 Requirements for eligibility of Indian Tribes.

(a) Consistent with section 518(e) of the CWA, 33 U.S.C. 1377(e), the Regional Administrator will treat an Indian Tribe as eligible to apply for NPDES program authority if it meets the following criteria:

(1) The Indian Tribe is recognized by the Secretary of the Interior.

(2) The Indian Tribe has a governing body carrying out substantial governmental duties and powers.

(3) The functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian Tribe, held by the United States in trust for the Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation.

(4) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions to be exercised, in a manner consistent with the terms and purposes of the Act and applicable regulations, of an effective NPDES permit program.

(b) An Indian Tribe which the Regional Administrator determines meets the criteria described in paragraph (a) of this section must also satisfy the State program requirements described in this part for assumption of the State program.

[58 FR 67981, Dec. 22, 1993, as amended at 59 FR 64343, Dec. 14, 1994]

§ 123.32 Request by an Indian Tribe for a determination of eligibility.

An Indian Tribe may apply to the Regional Administrator for a determination that it qualifies pursuant to section 518 of the Act for purposes of seeking NPDES permit program approval. The application shall be concise and describe how the Indian Tribe will meet each of the requirements of § 123.31. The application shall include the following information:

(a) A statement that the Tribe is recognized by the Secretary of the Interior;

(b) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. This statement should:

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such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under sections 1314(b) and (c) of this title. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

(b) Review of Administrator's action; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(*l*) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

(3) Award of fees

In any judicial proceeding under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party whenever it determines that such award is appropriate.

(c) Additional evidence

In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(June 30, 1948, c. 758, Title V, § 509, as added Oct. 18, 1972, Pub.L. 92–500, § 2, 86 Stat. 891, and amended Dec. 28, 1973, Pub.L. 93–207, § 1(6), 87 Stat. 906; Feb. 4, 1987, Pub.L. 100–4, Title III, § 308(b), Title IV, § 406(d)(3), Title V, § 505(a), (b), 101 Stat. 39, 73, 75; Jan. 8, 1988, Pub.L. 100–236, § 2, 101 Stat. 1732.)

Code of Federal Regulations

Judicial review under Environmental Protection Agency administered statutes, see 40 CFR 23.1 et seq.
Public information, see 40 CFR 2.100 et seq.

United States Supreme Court

Jurisdiction, court of appeals review of federal administrator's objection to state permit, see Crown Simpson Pulp Co. v. Costle, 1980, 100 S.Ct. 1093, 445 U.S. 193, 63 L.Ed.2d 312.

§ 1370. State authority [FWPCA § 510]

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or

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800 S.W. Jackson Street, #1408
Topeka, Kansas 66612-2214
(785) 235-1188 • Fax (785) 235-2544

KRMCA

Kansas Ready Mixed
Concrete Association

Edward R. Moses
Managing Director

TO: THE HOUSE ENVIRONMENT & THE SENATE ENERGY & NATURAL RESOURCES COMMMITTEES

FROM: WENDY HARMS, ASSOCIATE DIRECTOR

KANSAS READY MIXED CONCRETE ASSOCIATION

SUBJECT: SENATE BILL NO. 670

DATE: 4/6/00

This is to advise you of our industry's opposition to Senate Bill No. 670. SB 670 would change the manner in which NPDES permits held by our members would be administered.

Our opposition is based on two points:

- First, the current language in K.S.A. 65-170e is sufficiently inclusive to permit any party having a legitimate interest in the issuance of an NPDES permit to have administrative as well as judicial standing.

- Second, provisions Page 1, Line 40 would change the procedures already mandated by the Kansas Administrative Procedures Act and subsequent rules and regulations. Thus changing the framework under which our industry already conducts business.

Almost every member of our industry is required to seek and retain NPDES permits. As we operate in almost every legislative district in this state any negative impacts as a result of this bill will be felt statewide. We urge your careful consideration of this measure.

We thank you for allowing us to provide you with our comments concerning SB 670.

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4-6-00
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800 S.W. Jackson Street, #1408
Topeka, Kansas 66612-2214
(785) 235-1188 • Fax (785) 235-2544

KAPA

Kansas Aggregate
Producers' Association

Edward R. Moses
Managing Director

TO: THE HOUSE ENVIRONMENT & THE SENATE ENERGY & NATURAL RESOURCES COMMMITTEES

FROM: EDWARD R. MOSES, MANAGING DIRECTOR

KANSAS AGGREGATE PRODUCER'S ASSOCIATION

SUBJECT: SENATE BILL NO. 670

DATE: 4/6/00

This is to advise you of our industry's opposition to Senate Bill No. 670. SB 670 would change the manner in which NPDES permits held by our members would be administered.

Our opposition is based on two points:

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Kansas Farm Bureau
2627 KFB Plaza, P.O. Box 3500, Manhattan, Kansas 66505-8508 / (785) 587-6000

April 6, 1999

TO: Chairman Corbin and members of the Senate Committee on Energy and Natural Resources

Chair Freeborn and members of the House Environment Committee

FROM: Leslie Kaufman, Assistant Director
Public Policy Division
Kansas Farm Bureau

RE: **SB 670 – implementing new procedures for interested parties to bring actions for judicial review of certain permits issued by KDHE.**

Kansas Farm Bureau certainly appreciates the opportunity to comment on statutory changes being proposed in SB 670. As you know, the bill was introduced at the request of KDHE Secretary Graber. The bill will add new language to Kansas statutes and allow **"interested parties"** to bring actions for review of permits issued by the agency.

The relatively short time frame between the introduction of this bill and today's briefing has not afforded us an abundance of time to research various statutes, regulations and issues connected with this proposal. The initial research we have conducted has resulted in some concerns and questions with SB 670.

One concern with the new language in SB 670 is the use of the term "interested persons". SB 670 does not define the term. Our research into the statute being amended (KSA 65-170e) or the Kansas Act for Judicial Review and Civil Enforcement of Agency Action (KSA 77-601 et. seq.) has not revealed a definition for this term. As such, we believe it is unclear who qualifies as an "interested person".

Apart from questioning the terminology in the bill, we would also inquire if this legislation really is necessary. As we understand it, part of the reason for requesting

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Professionals from the Ground Up

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the bill was to provide a judicial review process as required by 40 CFR section 123.30 as part of KDHE's program for issuing National Pollution Discharge Elimination System (NPDES) permits. This regulation requires

> ***"All States that administer or seek to administer a program under this part shall provide an opportunity for judicial review in State Court of the final approval or denial of permits by the State that is sufficient to provide for, encourage, and assist public participation in the permitting process.*** *A State will meet this standard if State law allows an opportunity for judicial review that is the same as that available to obtain judicial review federal court of a federally-issued NPDES permit. (see section 509 of the Clean Water Act). A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits (for example, if only the permitee can obtain judicial review, if persons must demonstrate injury to a pecuniary interest in order to obtain judicial review, or if persons must have a property interest in close proximity to a discharge or surface waters in order to obtain judicial review.)...(emphasis added).*

Our review of the statutes lead us to believe that Kansas statutes offer a wide opportunity for persons to participate in the permitting process and judicial review process. KSA 77-611 governs who has standing to obtain judicial review of an agency action and includes "a person who was a party to the agency proceedings that led to the agency action". KSA 77-602(f)(2) defines "party to agency proceedings" to include "a person...allowed to intervene or participate as a party in the proceeding. In a recent Kansas Supreme Court case, *Families Against Corporate Takeover vs. KDHE* (No. 82,962, filed March 10, 2000), the appellant was found to have standing to obtain judicial review under KSA 77-611 since they had participated in the agency proceedings of permit review and public comment which led to the agency action of issuing an NPDES permit.

Although the Kansas statutes determining who has standing to obtain judicial review may not exactly mirror federal language, we do not read 40 CFR section 123.30 as requiring specific, boiler plate language. The Kansas statutes are broad and able to include a wide range of interests and stakeholders. The language is not narrowly drawn or class restrictive.

We would respectfully assert that revising long-standing statutory language regarding who has the ability to obtain judicial review is not a matter to be taken lightly or rushed through the legislative process. We are concerned that the new language proposed in SB 670 could have significant implications. We urge the legislature to approach this matter carefully, cautiously and to not act on SB 670 at this time. We appreciate the opportunity to share our initial comments on SB 670. Thank you.