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2019 Dec 06 PM 2:30
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2018-CV-000465

Court: Shawnee County District Court

Case Number: 2018-CV-000465

Case Title: Sierra Club vs. Jeff Andersen - Secretary KS Dept Health & Environment, et al.

Type: Memorandum Decision and Order

SO ORDERED.

/s/ Honorable Richard Anderson, District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION TWO

SIERRA CLUB,
Petitioner,

v.

JEFF ANDERSEN, in his official capacity as
Secretary of the Kansas Department of Health
and Environment, and THE KANSAS
DEPARTMENT OF HEALTH AND
ENVIRONMENT, an agency of the
STATE OF KANSAS,
Respondents,

and

HUSKY HOGS, LLC and PRAIRIE
DOG PORK L.L.C.,
Intervenors.

Case No. 2018-CV-000465

SIERRA CLUB,
Petitioner,

v.

JEFF ANDERSEN, in official capacity as
Secretary of the Kansas Department of Health
and Environment, and THE KANSAS
DEPARTMENT OF HEALTH AND
ENVIRONMENT, and agency of the
STATE OF KANSAS,
Respondents,

and

ROLLING HILLS PORK, LLC and
STILLWATER SWINE, L.L.C.,
Intervenors.

Case No. 2018-CV-000746

MEMORANDUM DECISION AND ORDER

Petitioner Sierra Club has filed two Petitions for Judicial Review of Agency Final Action under the Kansas Judicial Review Act (KJRA), K.S.A. 77-601 *et seq.* Petitioner seeks judicial review of the Kansas Department of Health and Environment (KDHE) action, which granted permits for the construction and/or expansion of four confined swine feeding facilities. The confined feeding facility permits were issued for facilities owned by Husky Hogs, LLC and Prairie Dog Pork, LLC in Phillips County, Kansas and for facilities owned by Rolling Hills Pork, LLC, and Stillwater Swine, LLC in Norton County Kansas. The cases originally filed separately as Case No. 2018-CV-465 and Case No. 2018-CV-746 have been consolidated for judicial review.

OVERVIEW OF THE PERMITTING PROCESS

The Kansas Department of Health and Environment is charged with the responsibility for issuing permits for discharge of sewage pursuant to K.S.A. 65-165 and the Federal Water Pollution Control Act as amended, 33 U.S.C. §1251 et seq. The KDHE has broad authority to regulate confined feeding facilities for swine to prevent contamination of the waters of the state. KDHE administers the state permitting program for confined feeding facilities for swine pursuant to K.S.A. 65-1,178 through K.S.A. 65-1,198. KDHE permits are required for confined swine feeding facilities with an animal unit capacity of 1000 or more and those with an animal capacity of 300 to 999 when KDHE determines that the facility has significant water pollution potential. K.S.A. 65-166a(c). KDHE may require permits for smaller facilities; and if a permit is not required, small facilities can obtain a KDHE permit or certification voluntarily. K.S.A. 65-166a(c).

These permitting provisions depend upon the definition of "animal unit." A pig that weighs more than 55 pounds is 4/10ths of an animal unit and a pig that weighs 55 pounds or less is one 1/10th of an animal unit. K.S.A. 65-171d(c)(3)(A). Each of the four permits at issue here is for more than 1,000 and fewer than 3,725 animal units making them subject to a 4000 foot separation distance from any habitable structure or any city, county, state, or federal park in existence when the registration is received.

The confined feeding facilities for swine at issue here are also subject to separation distance from surface water. K.S.A. 65-1,180 provides that KDHE shall not approve a permit for construction of a new swine facility or expansion of an existing swine facility unless the swine waste management system for the facility is located in such a manner as to prevent impairment of surface waters and groundwater. K.S.A. 65-1,180(a)(1). Subsection (a)(3)(A) of K.S.A. 65-1,180 requires a swine facility having an animal unit capacity of 3,725 or more to be separated not less than 500 feet from any surface water. Subsection (a)(3)(B) requires a facility which has an animal unit capacity of 1,000 to 3,724 to be separated at least 250 feet from surface water.

THE COMMON ISSUE ON JUDICIAL REVIEW

The common question in this consolidated appeal is whether KDHE properly interpreted and applied K.A.R. 28-18a-4d in issuing the four separate confined feeding facility permits for swine in Phillips and Norton Counties. KDHE used this regulation as its test for determining whether the proposed facilities were separate or not. Whether the facilities were treated as separate determined whether the minimum separation distance from surface water would be required to be 250 or 500 feet for issuance of the permits. K.A.R. 28-18a-4d, in relevant part, provides: "***[s]wine facilities on separate pieces of land without a contiguous ownership***

boundary shall be classified as separate operations*, and each applicant shall be assessed a fee under K.A.R. 28-16-56d*." The Sierra Club argues KDHE's interpretation and application of the regulation, which was relied upon as the test for issuing four separate permits, violates K.S.A. 65-1,180(a)(3). The Sierra Club contends the minimum separation distance for these confined swine feeding facilities located in Phillips and Norton Counties must be at least 500 feet from surface water because the combined concentration of animal units in the facilities is 3,725 or more.

As for the disputed confined feeding facility permits for swine, KDHE issued separate state and federal permits to: (1) Permittee Husky Hogs, LLC for the facility named *Husky Hogs, LLC* with the total of 3724.8 animal units in Phillips County (HH/PDP R. at 439); (2) Permittee Julia Nelson for the facility named *Prairie Dog Pork* with the total of 2429.2 animal units in Phillips County (HH/PDP R. at 923); (3) Permittees Clarke and Julia Nelson for the facility named *Rolling Hills Pork* with the total of 3720 animal units in Norton County (RHP/SS R. at 569); and (4) Permittee N. Terry Nelson for the facility named *Stillwater Swine* with the total of 3720 animal units in Norton County (RHP/SS R. at 1237). Because each of the permits for the facilities was for fewer than 3,725 animal units, KDHE applied a 250 foot separation distance requirement from surface water.

In this appeal, Petitioner Sierra Club contends that KDHE should have considered Husky Hogs and Prairie Dog Pork in Phillips County as one facility and Rolling Hills Pork and Stillwater Swine in Norton County as one facility, rather than treating them as four separate facilities. The Sierra Club asserts that each confined feeding operation with capacity as large as each of these facilities in Phillips and Norton Counties must be located at least 500 feet from

surface water. The Sierra Club contends that issuing these water pollution control permits for the confined feeding facilities for swine in these circumstances: (a) violates the minimum separation distance from surface water requirement of K.S.A. 65-1,180(a)(3); (b) fails to prevent degradation of water quality in Prairie Dog Creek; (c) were issued without determining the depth to groundwater as required by K.A.R. 18-18a-33; (d) does not ensure the proper application of wastewater near the Almena Irrigation District #5 South Canal; and (e) does not apply reasonable measures to avoid spray drift from applying wastewater near neighboring residents.

The Sierra Club contends that Husky Hogs and Prairie Dog Pork located in Phillips County must be considered a single unified facility in measuring the required separation distance to surface water because both of the named facilities are physically located together. Highly summarized, Sierra Club argues the properties have common ownership, common control and have contiguous ownership boundaries. Sierra Club claims that through gifting and redrawing legal boundaries with transfers by quitclaim deed the Nelson family corporation and individual family members, with their interests in the various limited liability companies, have by such legal maneuvering been able to double animal unit capacity in the same physical space thereby avoiding the statutory minimum separation distance from surface water requirement and impermissibly increasing the risk of pollution. The Sierra Club maintains KDHE issued the Husky Hogs and Prairie Dog Pork permits in violation of the statutory environmental protection minimum separation distance of 500 feet for a confined feeding facility with animal units of 3725 or more.

Indeed, the record shows that three buildings of Husky Hogs are located between four buildings of Prairie Dog Pork. Essentially, the buildings of one LLC are sandwiched between the

buildings of the other LLC. The LLCs share contiguous ownership boundaries. Thus, the same physical area now has doubled the previously permitted number of animal units in the same area because there are two LLCs holding ownership of the two permitted confined feeding facilities. Both facilities have been issued the permits with only a required separation distance of 250 feet from the Prairie Dog Creek. Stated again, Sierra Club contends the separation distance for such a concentration of swine must be 500 feet from the surface water under K.S.A. 65-1,180(a)(3).

Similarly, the Sierra Club argues Rolling Hills and Stillwater Swine located in Norton County should be treated as a single facility in determining the required separation distance from surface water. The record establishes that the two Norton County facilities are located next to each other. The applicant's engineering firm described the operations as mirror images of each other. Julia and Clark Nelson signed an acknowledgment that they knew that the Stillwater Swine facility owned by N. Terry Nelson was being built "0 feet" from the property they owned. Both permits show the same legal description. The properties upon which the facilities have been built share contiguous ownership boundaries.

KDHE argues that the agency treated each of the four swine facilities as separate facilities because the permit applicants were separate LLCs located on separate pieces of property with separate operations. KDHE submits that after extensive review, which involved review of technical matters within its expertise, and after receiving and considering public comment, that the applications and supporting documents demonstrated that the proposed facility would adequately protect the waters of the state.

Important in its evaluation, KDHE interpreted and applied K.A.R. 28-18a-4(d) as classifying swine facilities as separate operations if the facilities are "***located on separate pieces***

of land without a contiguous property <u>ownership.</u>" KDHE concluded the real property for the three proposed facilities of Husky Hogs and Prairie Dog Pork would be *"**located on separate pieces of land without a contiguous property <u>ownership.</u>**"* KDHE maintained the facilities did not share ***"contiguous property <u>ownership</u>."*** Further, the agency concluded that it had no direction from the Legislature to investigate members or managers of limited liability companies with respect to common ownership and operation issues.

KDHE reached the same conclusion with regard to Rolling Hills Pork and Stillwater swine. KDHE concluded that the quitclaim deed submitted to the agency verified there was not ***"contiguous property <u>ownership.</u>"*** Again, KDHE concluded that it was not tasked with investigating business ownership structures.

SUMMARY OF DECISION

The Court finds that the KDHE's findings of fact that there were not swine facilities on separate pieces of land ***without a contiguous ownership boundary*** is not supported by substantial evidence and is otherwise unreasonable, arbitrary and capricious. The evidence in the record establishes the proposed swine facilities have contiguous ownership boundaries whether the actual land in Phillips and Norton Counties upon which the swine will be standing and making waste is owned and titled by one or two or four individuals, corporations or limited liability companies.

The Court further finds that KDHE erroneously interpreted and applied K.A.R. 28-18a-4(d). The purpose of K.S.A. 65-1,180(a) is to require a minimum setback from surface water of 500 feet for the "*swine waste management system for the facility*" if the animal unit concentration in the particular facility has an animal unit capacity of 3,725 or more animal units.

A concentration of animal units in excess of that maximum capacity creates an impermissible risk of pollution according to the legislative enactment.

KDHE has been given broad authority to protect the environment. KDHE has the authority to grant the permits or refuse to grant the permits to side-by-side facilities whether or not separate ownership exists. Whether these swine facilities in Phillips County and Norton County are treated as one or two facilities in each county, KDHE still is charged with the environmental protection responsibility to make sure the animal unit concentration in a particular space does not exceed certain capacities without required separation distance from surface water of the swine waste management system for the facility.

In these circumstances, KDHE applied the administrative regulation which appears to be directed at determining whether an application fee should be paid by an applicant in derogation of K.S.A. 65-1,180(a)(3), which requires minimum separation of the facility from surface water for a facility with certain concentrations of animal units. KDHE construed its authority too narrowly by arbitrarily limiting a review of the common ownership issues and by misapplying its own adopted regulatory test expressed as *"without contiguous property **ownership,"*** rather than as actually expressed in the regulation, "***without a contiguous ownership boundary.***" Simply because there are separate limited liability company owners does not mean KDHE does not have authority to deny a permit to one or both or some or all of the applicants because animal unit and separation distances for the swine waste management system would not be in compliance with the requirements of K.S.A. 65-1,180.

As a result, the Court reverses the action by KDHE granting the two separate confined feeding facility permits for swine for Husky Hogs and Prairie Dog Pork located in Phillips

County and the two separate confined feeding facility permits for Rolling Hills Pork and Stillwater Swine located in Norton County. These matters are remanded to the Kansas Department of Health and Environment for further proceedings on the applications for confined feeding facility permits consistent with this ruling.

REVIEW OF THE AGENCY RECORD

I. The Husky Hogs and Prairie Dog Pork Permits (Phillips County)

1. On June 13, 2017, Terry Nelson wrote to Tara Mahin, Chief of KDHE's Livestock Management Section, with a proposal for a new facility and modification of an existing permit for Husky Hogs. (HH/PDP[1] R. at 36)
2. KDHE received a registration for a proposed confined feeding facility that Husky Hogs will own. The registration form identified Julia Nelson as the applicant and Husky Hogs LLC as the property owner. The center of Section 34, Township 1, Range 20, Phillips County, Kansas was identified as the location of the facility. (HH/PDP R. at 24-27)
3. On July 10, 2017, KDHE received a registration for a proposed confined feeding facility to be owned by C&J Swine (Prairie Dog Pork). The registration form identified Julia Nelson as the applicant and C&J Swine LLC as the property owner. The center of Section 34, Township 1, Range 20, Phillips County, Kansas was identified as the location of the facility. (HH/PDP R. at 488)
4. On September 29, 2017, KDHE conducted a site evaluation for the Husky Hogs and Prairie Dog Pork facilities. The legal description listed on the KDHE Livestock Waste Management Site Evaluation for Husky Hogg LLC and C&J Swine LLC- Sow Site

[1] "HH" Refers to Husky Hogs. “PDP” refers to Prairie Dog Pork.

(Prairie Dog Pork) was listed for each as: C 34-1-20. The distance to the nearest surface water on the Site Evaluation for each facility was reported to be 250 feet to Prairie Dog Creek. (HH/PDP R. at 39-55, 514-530)

5. On September 29, 2017, Terry Nelson as president of Nelson Farms, Inc. and Husky Hogs LLC conveyed real property, by a Corporation Quitclaim Deed, to Prairie Dog Pork, LLC. The transfer was made through gift. (HH/PDP R. at 746- 749)
6. On October 4, 2017, Prairie Dog Pork, LLC, as property owner, through applicant Julia Nelson, applied to the KDHE for a water pollution control permit for a confined feeding facility for swine in Phillips County, Kansas. (HH/PDP R. at 532-645)
7. On October 6, 2017, Husky Hogs, LLC, as property owner, through applicant Julia Nelson, applied to the KDHE for a water pollution control permit for a confined feeding operation for swine in Phillips County, Kansas. (HH/PDP R. at 58-152)
8. On October 27, 2017, KDHE notified Husky Hogs that it had reviewed the permit application and that a draft permit was being issued, subject to public notice requirements. (HH/PDP R. at 295-297)
9. On October 27, 2017, KDHE issued an approval letter for the Prairie Dog Pork facility. (HH/PDP R. at 776-778)
10. On December 1, 2017, Husky Hogs and Prairie Dog Pork submitted to KDHE a contract stating that Prairie Dog Pork would be responsible for managing the manure and waste generated at Prairie Dog Pork. (HH/PDP R. at 757)
11. On December 5, 2017, Petitioner submitted public comments on the permit applications for Prairie Dog Pork and Husky Hogs. (HH/PDP R. at 882-89, 892-99)

12. On December 11, 2017, KDHE staff recommended to the Secretary that the permits for both Prairie Dog Pork and Husky Hogs be issued because they met the applicable statutory and regulatory requirements. (HH/PDP R. at 391-92, 858-69)
13. On December 12, 2017, KDHE issued the permits to Husky Hogs and Prairie Dog Pork. (HH/PDP R. at 454-68, 922-36)
14. On December 21, 2017, Petitioner submitted to the KDHE a Petition for Reconsideration for both Prairie Dog Pork and Husky Hogs permits. (HH/PDP R. at 1102-06)
15. On February 14, 2018, KDHE issued a written response to Petitioner's Petition for Reconsideration, upholding the Respondent's decision to issue the subject permits. (HH/PDP R. at 1107-10)
16. On March 12, 2018, Petitioner submitted an appeal to the denial of the Petition for Reconsideration for the Husky Hogs and Prairie Dog Pork permits. (HH/PDP R. at 1112-15)
17. On June 14, 2018, Petitioner filed in this Court a Petition for Judicial Review.

II. The Rolling Hills Pork and Stillwater Swine Permits (Norton County)

18. On June 26, 2017, KDHE received a registration from Clarke and Julia Nelson, on behalf of Rolling Hills Pork, for a modification and expansion of a confined feeding facility in Norton County, Kansas. (SS/RHP[2] R. at 10-17)
19. On August 15, 2017, KDHE received a registration from Terry Nelson, on behalf of Stillwater Swine, for a modification and expansion of a confined feeding facility in Norton County, Kansas. (SS/RHP R. at 666-73)

[2] "SS" refers to Stillwater Swine. "RHP" refers to Rolling Hills Pork.

20. On October 18, 2017, Stillwater Swine and Rolling Hills Pork submitted applications to KDHE. (SS/RHP R. at 62-275, 722-940)
21. On December 6, 2017, Terry Nelson, as President of Nelson Farms, Inc. conveyed real property, through a Corporation Quitclaim Deed, to Clarke and Julia Nelson. The transfer was made by gift. (SS/RHP R. at 292-93)
22. On December 12, 2017, KDHE issued an application approval letter for Rolling Hills Pork. (SS/RHP R. at 327-329)
23. On December 15, 2017, KDHE issued a public notice for the Rolling Hills Pork permit. (SS/RHP R. at 378-98)
24. On December 22, 2017, KDHE issued an application approval letter for Stillwater Swine. (SS/RHP R. at 987-89)
25. On January 5, 2018, KDHE issued a public notice for the Stillwater Swine permit. (SS/RHP R. at 1033-56)
26. On January 16, 2018, and on February 6, 2018, Petitioner submitted written comments about the Rolling Hills Pork and Stillwater Swine permits. (SS/RHP R. at 416-423, 439-42)
27. On January 23, 2018, a public hearing took place about the Rolling Hills Pork permit. (SS/RHP R. at 456-84)
28. On February 13, 2018, a public hearing took place about the Stillwater Swine permit. (SS/RHP R. at 1111-1212)
29. Rodney and Tonda Ross submitted comments to KDHE in a letter dated December 22, 2017 and February 13, 2018. (SS/RHP R. 424-29, 1135-36)

30. On April 20, 2018, KDHE’s staff recommended to the Secretary that the Rolling Hills Pork permit be issued. (SS/RHP R. at 402-15)
31. On April 30, 2018, KDHE issued a permit for Rolling Hills Pork. (SS/RHP R. at 568-81)
32. On May 18, 2018, KDHE's staff recommended to the Secretary that the Stillwater Swine permit be issued. (SS/RHP R. at 1059-1073)
33. On June 4, 2018, KDHE issued a permit to Stillwater Swine. (SS/RHP R. at 1236-50)
34. On May 16, 2018, Petitioner submitted to the KDHE a Petition for Reconsideration related to the Rolling Hills Pork permit. (SS/RHP R. at 650-53)
35. On June 13, 2018, Petitioner submitted to the KDHE a Petition for Reconsideration related to the Stillwater Swine permit. (SS/RHP R. at 1296-1300)
36. On July 17, 2018, KDHE denied the Petition for Reconsideration for the Rolling Hills Pork permit. (SS/RHP R. at 642-46)
37. On August 1, 2018, KDHE denied the Petition for Reconsideration for the Stillwater Swine permit. (SS/RHP R. at 1289-1291)
38. On August 18, 2018, Petitioner wrote a letter appealing KDHE’s decision to deny the Petition for Reconsideration for both Stillwater Swine and Rolling Hills Pork permits. (SS/RHP R. at 1276-79)
39. On August 29, 2018, KDHE denied Petitioner's appeal. (SS/RHP R. at 623-24)
40. On September 26, 2018, Petitioner filed in this Court a Petition for Judicial Review.
41. On October 26, 2018, both Petitions for Judicial Review were consolidated.

STANDARD OF REVIEW

The Kansas Judicial Review Act (KJRA) controls the Court's review of agency actions. A rebuttable presumption of validity attaches to all actions of an administrative agency. *In re Tallgrass Prairie Holdings, LLC*, 50 Kan. App. 2d 635, 659, 333 P.3d 899 (2014). Under K.S.A. 77-621(a), the burden of proving the invalidity of an agency action rests with the party asserting invalidity. A reviewing court has unlimited review over questions of law. *Sierra Club v. Mosier*, 305 Kan. 1090, 91 P.3d 667 (2017); *Villa v. Kansas Health Policy Authority*, 296 Kan. 315, 323, 291 P.3d 1056 (2013). An agency's interpretation of a statute or regulation is not afforded any significant deference on judicial review. 296 Kan. at 323.

K.S.A. 77-621(c) sets out the Court's authority to grant relief on a petition for review. In order for the Court to grant relief the Petitioner must establish any one of eight grounds for relief expressed in the statute. The grounds for relief under K.S.A. 77-621(c) claimed in these consolidated cases by Sierra Club are highlighted:

(1) the agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;

(2) the agency has acted beyond the jurisdiction conferred by any provision of law;

(3) the agency has not decided an issue requiring resolution;

(4) the agency has erroneously interpreted or applied the law;

(5) ***the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure***;

(6) the persons taking the agency action were improperly constituted as a decision-making body or subject to disqualification;

(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

(8) ***the agency action is otherwise unreasonable, arbitrary or capricious***.

The Kansas Court of Appeals has stated that the tests under K.S.A. 77-621(c)(7) and (c)(8) "mean different things":

> A challenge under [K.S.A. 77-621(c)(8)] attacks the quality of the agency's reasoning. [Citations omitted.] Although review must give proper deference to the agency, its conclusion may be set aside—even if supported by substantial evidence—if based on faulty reasoning. A challenge under [K.S.A. 77-621(c)(7)] attacks the quality of the agency's fact-finding, and the agency's conclusion may be set aside if it is based on factual findings that are not supported by substantial evidence.

In re Protests of Oakhill Land Co., 46 Kan. App. 2d 1105, 1115, 269 P.3d 876 (2012).

The Court's review of an agency action is not de novo, and the Court may not reevaluate evidence or substitute its own judgment for that of an administrative agency; it may only "consider all of the evidence—including evidence that detracts from an agency's factual findings—when [it assesses] whether the evidence is substantial enough to support those findings." *Herrera-Gallegos v. H&H Delivery Service, Inc.*, 42 Kan. App. 2d 360, 363, 212 P.3d 239 (2009); see also *Coonce v. Garner*, 38 Kan. App. 2d 523, 531, 167 P.3d 801 (2007).

In reviewing an administrative agency's action for substantial evidence, the Court is mindful that substantial evidence "is such evidence as a reasonable person might accept as being sufficient to support a conclusion." *Kotnour v. City of Overland Park*, 43 Kan. App. 2d 833, 837, 233 P.3d 299 (2010). That said, when reviewing an agency decision, the Court should examine whether the evidence supporting the agency's decision has been so undermined by other

evidence that it is insufficient to support the agency's decision. *Lake v. Jessee Trucking*, 49 Kan. App. 2d 820, 836, 316 P.3d 796 (2013).

When the adequacy of an agency's findings is challenged, the Kansas Court of Appeals has offered the following analysis:

> The decision of any administrative body should contain a finding of the pertinent facts on which it is based in order for the reviewing court to determine whether the decision reached is reasonable and lawful. [Citations omitted.] As expressed in appellate decisions,
>
> > "[i]t is a general rule of administrative law that an agency must make findings that support its decision, and those findings must be supported by substantial evidence. [Citation omitted.] The necessity for findings is to 'facilitate judicial review, avoid judicial usurpation of administrative functions, assure more careful administrative consideration to protect against careless and arbitrary action, assist the parties in planning their cases for rehearing and judicial review, and keep such agencies within their jurisdiction as prescribed by the Legislature.' [Citations omitted.]" [Citations omitted.]
> >
> > "Lack of expressed findings of fact may not be supplied by implication, and, where they are required, courts will not search the record in order to ascertain whether there is evidence from which the ultimate findings could be made. . . .
> >
> > "[A]n agency is not required to furnish detailed reasons for its decision; however, the decision must be sufficiently clear so that a court is not required to speculate as to its basis." [Citations omitted.]
>
> Despite these authorities insisting on a degree of clarity in agency fact finding and rationale, our courts have consistently affirmed agency determinations which are conceptually sound but lack some mathematical precision. Our appellate courts have consistently stated that to find a lack of substantial evidence to support the [agency] action, the decision must be so wide of the mark as to be outside the realm of fair debate. . . .

In re Protests of City of Hutchinson/Dillon Stores For Taxes Paid for 2001 & 2002 in Reno County, Kan., 42 Kan. App. 2d 881, 888–89, 221 P.3d 598 (2009). Furthermore:

> An agency's decision is arbitrary and capricious if it is "is so wide of the mark that its unreasonableness lies outside the realm of fair debate." [Citation omitted.] An agency's action is arbitrary and capricious if it is unreasonable, without foundation in fact, not supported by substantial evidence, or without adequate determining principles.

Denning v. Johnson County, Sheriff's Civil Service. Board, 46 Kan. App. 2d 688, 701, 266 P.3d 557 (2011) *aff'd sub nom. Denning v. Johnson County*, 299 Kan. 1070, 329 P.3d 440 (2014).

As stated above, a reviewing court has unlimited review over questions of law. *Villa v. Kansas Health Policy Authority*, 296 Kan. 315, 323, 291 P.3d 1056 (2013). While an agency's interpretation of a statute or regulation is not afforded any significant deference on judicial review, the Court must remain mindful that administrative agencies may possess a special expertise. In *Kansas State Board Of Healing Arts v. Foote*, 200 Kan. 447, 459, 436 P.2d 828 (1968), the Supreme Court noted that the Kansas State Board of Healing Arts "is the agency peculiarly qualified to predicate judgment on a scientific basis, and that judgment ought not be readily interfered with." In *Hart v. Board of Hearing Arts of the State of Kansas*, 27 Kan. App. 2d 213, 218, 2 P.3d 797 (2000) *rev. denied*, 269 Kan. 932 (2000), the Court of Appeals stated that: "Courts have held that administrative agencies are entitled to rely upon their own expertise. [Citations omitted.] . . . Where substantial evidence is presented that supports a finding of a violation of the [Kansas Healing Arts Act], Board members are entitled and expected to rely on their own expertise and experience in making these decisions."

CONCLUSIONS OF LAW

I. Evidence Outside the Agency Record May Be Considered on the Issue of Standing

KDHE and Intervenors first challenge Petitioner Sierra Club's standing to petition for review. The Kansas Supreme Court has held that a party seeking review of an agency

determination can establish standing by submitting affidavits or declarations in court rather than through evidence submitted to the administrative agency because a petitioner does not need to establish an injury in fact to participate in the proceedings before the agency, rather the injury-in-fact requirement is imposed as a check on the court's power to review and revise legislative and executive action. *Sierra Club v. Moser*, 298 Kan. 22, 36, 310 P.3d 360 (2013). In *Sierra Club v. E.P.A.*, 292 F.3d 895, 899 (D.C. Cir. 2002), the Court held that an administrative agency is not subject to Article III of the Constitution of the United States and it is not until when the petitioner later seeks judicial review that the constitutional requirement of standing kicks in.

Although K.S.A. 77-618 provides that review is "confined to the agency record for judicial review," it does not address establishing standing. *Sierra Club v. Moser* at 39. Thus, Sierra Club may rely on the declarations, which are outside the agency record, to establish standing.

II. Petitioner Sierra Club has Standing to Challenge the Agency Action

The Sierra Club contends it has organizational standing because its members, Tonda and Rodney Ross and Carl Wolfe, have sufficient standing to participate as individuals in the Petition for Judicial Review. Petitioner contends that Carl Wolfe participated in the agency proceedings before the issuance of the subject permits by joining in Sierra Club's comments and objections related to the permits for Husky Hogs, Prairie Dog Pork, Rolling Hills Pork, and Stillwater Swine. Sierra Club also contends that Tonda and Rodney Ross have standing because they provided comments before issuance of permits related to Rolling Hills Pork and Stillwater Swine, and that they filed petitions for reconsideration with the KDHE.

Sierra Club further asserts organizational standing because Prairie Dog Creek, the water body that may receive wastes from the subject confined feeding operations, is hydraulically connected to Harlan County Lake in Nebraska. Declarations of Carl Wolfe and Tonda and Rodney Ross, which were attached as exhibits to Petitioner's Brief, state that Carl Wolfe has a residence on Harlan County Lake and Tonda and Rodney Ross use Harlan County Lake for boating and other recreational purposes. Petitioner contends that the impairment of Harlan County Lake water quality interferes with their use and enjoyment of the lake.

KDHE and the Intervenors dispute Sierra Club's standing to maintain the challenge to Rolling Hills Pork and Stillwater Swine permits because, although the agency record reflects that Tonda and Rodney Ross submitted comments in that proceeding, they challenge whether Mr. and Mrs. Ross have a cognizable injury. KDHE and the Intervenors contend that Sierra Club lacks standing to maintain the challenge to Husky Hogs and Prairie Dog Pork permits because no individual Sierra Club member can show that they participated in the proceedings or that they have suffered a cognizable injury.

Further, for standing to petition for judicial review, the requirements of K.S.A. 77-607 must be met. The statute provides:

> (a) A person who qualifies under this act regarding (1) standing (K.S.A. 77-611), (2) exhaustion of administrative remedies (K.S.A. 77-612) and (3) time for filing the petition for judicial review (K.S.A. 77-613) and other applicable provisions of law regarding bond, compliance and other preconditions is entitled to judicial review of final agency action.

A. Standing

A party seeking relief under K.S.A. 77-601 et seq., must have both common-law standing and statutory standing. *Sierra Club v. Moser,* at 29-30. Common-law standing has been described:

> "Generally, to demonstrate common-law or traditional standing, a person suing individually must show a cognizable injury and establish a causal connection between the injury and the challenged conduct. To establish a cognizable injury, a party must establish a personal interest in a court's decision and that he or she personally suffers some actual or threatened injury as a result of the challenged conduct. [Citations omitted.]"

Sierra Club v. Moser at 33. K.S.A. 77-611 provides the requirements for statutory standing:

> "The following persons have standing to obtain judicial review of final or non-final 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."

KDHE and the Intervenors dispute Petitioner's standing to maintain the challenge to Rolling Hills Pork and Stillwater Swine permits because they question whether Mr. and Mrs. Ross have a cognizable injury. Further, KDHE and the Intervenors contend that Sierra Club lacks standing to maintain the challenge to Husky Hogs and Prairie Dog Pork permits because no individual Sierra Club member can prove that they participated in the proceedings or that they have suffered a cognizable injury.

KDHE and the Intervenors contend that Sierra Club does not have association standing regarding the challenge to the Husky Hogs and Prairie Dog Pork permits because no individual Sierra Club member has standing. KDHE and the Intervenors contend that Sierra Club has failed

to show that Carl Wolfe, a Sierra Club member, participated in the agency proceedings for the Husky Hogs and Prairie Dog Pork permits. The agency record does shows that Sierra Club submitted comments in objection to the Husky Hog and Prairie Dog Pork permits in a letter dated December 5, 2017. In that letter, Petitioner wrote:

> "We are expanding our objection to the issuance of these permits on behalf of the Sierra Club, members of the Sierra Club who live downstream of the subject site that would be affected by KDHE's actions, including **Carl Wolfe** who has a home near Republican City of Harlan County Lake in Nebraska and Wade Beisner who lives in Orleans and frequently recreates at the lake."

The dispute on the issue of standing between Sierra Club, KDHE, and the Intervenors is over whether Carl Wolfe's participation in the preceding provides sufficient basis to establish standing.

The Kansas Court of Appeals has observed the definition of "*party to agency proceedings"* in K.S.A. 77-602 as being someone who is allowed to *"participate as a party*" in the agency proceeding *"is far from clear." Board of Sumner County Commissioners v. Bremby*, 286 Kan. 745, 755, 189 P.3d 494 (2008). In *Bremby,* the appellate court reviewed principles of statutory construction to determine the legislative intent when it adopted the standing provisions of K.S.A. 77-601 et seq. *Bremby* at 755. The Court stated that when the legislature adopted K.S.A. 77-601 et seq., it did so with the intention for the term *"proceeding"* to be read broadly. *Bremby* at 755. Regarding the interpretation of the definition of "*party,*" the Kansas Supreme Court has stated that to determine whether a person is a party, is defined by that person's participation in a lawsuit or other action, such as the drafting of a contract. *Bremby* at 755. Thus, in order to determine whether a person is a party to an agency proceeding, the Court must determine what is required as "*for participation*" in a proceeding. *Bremby* at 755.

Intervenors rely heavily on *W.S. Dickey Clay Mfg. Co. v. State Corp. Com.*, 241 Kan. 744, 740 P.2d 585 (1978) to support their assertion that Carl Wolfe lacks individual standing because he did not participate in the agency proceeding. In *Dickey Clay*, the petitioner sought review of an order of the Kansas Corporation Commission relating to a franchise agreement between the Gas Service Company and the City of Pittsburg, Kansas. The district court dismissed the petitioner's challenge, and the Kansas Supreme Court affirmed the dismissal by the district court, because the petitioner did not take timely steps to become a party to the proceedings and because the petitioner failed to exhaust its available administrative remedies. *Dickey Clay* at 749-51. Thus, although the *Dickey Clay* challenge was dismissed because the petitioner did not have independent action for judicial review, it was not dismissed because of the party's participation in the agency proceedings, rather it was dismissed because of the party's failure to take timely steps to become a party to the proceeding and for failure to exhaust administrative remedies. This is not the issue in this case.

The issue in this case is whether Sierra Club, in presenting public comment on behalf of Carl Wolfe, constitutes sufficient participation for Carl Wolfe to have individual standing. KDHE relies on *Sierra Club v. Mosier* in arguing that Carl Wolfe did not participate in the agency proceedings for the Husky Hogs and Prairie Dog Pork permits. As to the Husky Hogs and Prairie Dog Pork permits, nothing in the agency record shows there was a public hearing held. There was just the opportunity for public comment and responses to the comments. During this period, Carl Wolfe did not personally submit a public comment. However, Sierra Club submitted a public comment on behalf of Carl Wolfe specifically voicing his objection to the issuing of the permits. Based on the Kansas Supreme Court's broad interpretation of the term

"proceeding" under K.S.A. 77-601 et seq., this Court finds Carl Wolfe did sufficiently participate in the agency proceeding. There was no public hearing held for Carl Wolfe to attend or to orally voice his objection. The only other option was to submit a written public comment, which Sierra Club submitted on his behalf. Thus, Petitioner has met the statutory standing requirement under K.S.A. 77-601 et seq.

As stated above, a party seeking relief under K.S.A. 77-601 et seq., must have both common-law standing and statutory standing. *Sierra Club v. Moser* at 29-30. Sierra Club must also show that it meets common-law standing requirements for associations. Generally, to prove common-law standing, a person suing must show a cognizable injury and establish causal connection between the injury and the challenged conduct. *Board of Miami County Commissionerss v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 324, 255 P.3d 1186 (2011); *Bremby*, at 761. To establish a cognizable injury, a party must establish a personal interest in a court's decision and that he personally suffers some actual or threatened injury as a result of the challenged conduct. *Lower v. Board of Directors of Haskell County Cemetery District,* 274 Kan. 735, 747, 56 P.3d 235 (2002).

The United States Supreme Court and the Kansas Supreme Court have held that 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 request require participation of individual members. *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977); *NEA-Coffeyville v. U.S.D. No. 445*, 268 Kan. 384, 387, 996 P.2d 821 (2000).

KDHE and the Intervenors contend no individual Sierra Club member suffered a cognizable injury and that there is no causal connection between the alleged injury and the permits. Sierra Club counters by suggesting there is sufficient evidence in the agency record and in the declarations to establish a cognizable injury and a causal connection. To satisfy the first prong of the association standing test, an individual Sierra Club member must have standing. As discussed above, the Kansas Supreme Court has held that additional declarations and affidavits outside the agency record, may be included if they are used to establish standing. *Sierra Club v. Moser* at 39.

Carl Wolfe states in his declaration that his residence is on the shore of Harlan County Reservoir and that the Harlan County Reservoir is fed by the Republican River and one of its major tributaries is the Prairie Dog Creek. Carl Wolfe claims that his recreational use of the Harlan County Reservoir would be impaired by diminished water quality. In the declaration of Tonda and Rodney Ross, they state that their residence is in Norton County, and that they have a vacation home near the Harlan County Reservoir. Mr. and Mrs. Ross also submitted comments about the Stillwater Swine and Rolling Hills Pork permits during the public comment period, and they filed a Petition for Reconsideration with the Director of Environment and a Petition for Reconsideration with the Secretary of the KDHE.

In the declaration and the public comments submitted by Mr. and Mrs. Ross, they voice their concerns of the Stillwater Swine and Rolling Hills Pork permits. Mr. and Mrs. Ross claim that their residence is less than 200 feet from the center pivot used by Rolling Hills Pork and Stillwater Swine. Mr. and Mrs. Ross claim that before being used as a disposition point for swine wastes, the central pivot was used for normal irrigation purposes and that mist from the irrigation

water would drift onto their property. They are concerned that the center pivot will now be used by Rolling Hills Pork and Stillwater Swine and that the mists of liquefied swine waste would drift onto their property and expose them to health risks. Mr. and Mrs. Ross also voiced their concerns of the possible contamination of the Almena Irrigation District Canal and the Harlan County Reservoir.

Carl Wolfe and Mr. and Mrs. Ross have sufficiently established for purposes of standing that they have suffered an injury in fact. Mr. Wolfe, who lives on the shore of the Harlan County Reservoir, claims that his recreational use would be disturbed by a diminishment in water quality. Mr. and Mrs. Ross, who live within 200 feet from the central pivot, claim that the mists of the swine wastes would drift onto their property. They also assert contamination from the Rolling Hills Pork and Stillwater Swine facilities would upset their recreational use of the Harlan County Reservoir. The declarations and public comments of these Sierra Club members show that recreational, aesthetic, health and property interests will be harmed by the challenged activity.

The major contention involves causation and whether the injuries are fairly traceable to Husky Hogs, Prairie Dog Pork, Rolling Hills Pork, and Stillwater Swine. Carl Wolfe and Mr. and Mrs. Ross both express their concern over potential outbreaks of blue-green algae in the Harlan County Reservoir. They claim the contamination from the confined animal feeding operations will at least in part diminish the water quality of the Harlan County Reservoir. These comments, at face value, provide no more than just general concerns of the community near the confined animal feeding operations and do not give sufficient evidence to show a causal connection.

However, these individuals need not prove an exact scientific connection to the challenged action. When causation is based on scientific evidence and is not within common understanding, the court generally requires an opinion of an expert. *Sierra Club v. Moser* at 41; see, *e.g.*, *Schlaikjer v. Kaplan*, 296 Kan. 456, 464, 293 P.3d 155 (2013). In *Sierra Club v. Moser*, Sierra Club sought judicial review of an agency action that allowed the issuance of a permit for the construction of a coal fired power plant. *Sierra Club v. Moser* at 25. The individual Sierra Club member, in that case, stated that she was an elderly person who was worried about breathing the pollutants that will come from the new coal plant. *Sierra Club v. Moser* at 40. The Kansas Supreme Court found that such evidence alone was insufficient to establish a causal connection. However, the Supreme Court granted standing to Sierra Club based on two significant pieces of evidence: (1) the elderly person's proximity to the coal plant and (2) a written declaration of Jonathan Levy, Ph.D., Associate Professor of Environmental Health and Risk Assessment at the Harvard School of Public Health. *Sierra Club v. Moser* at 41. Through, Mr. Levy's declaration, Sierra Club established a sufficient connection between the imminent injuries and the challenged action. *Sierra Club v. Moser* at 41.

In *Families Against Corporate Takeover v. Mitchell*, 268 Kan. 803, 1 P.3d 884 (2000), a nonprofit corporation sought judicial review of KDHE's grant of a permit to operate a large-scale hog farm. The Kansas Supreme Court found that the individual members had standing to challenge the agency action because the individual members alleged a decrease in the value of their adjacent properties would be caused by odor, flies, vermin, pestilence and possible contamination of surface and ground water. 268 Kan. at 804.

Both Carl Wolfe and Mr. and Mrs. Ross have established a sufficient causal connection between their imminent injuries and the challenged agency action. In Carl Wolfe's declaration, he states that he is a wildlife biologist and claims that there is a relationship between outbreaks of blue-green algae and contamination caused by confined animal feeding operations. Carl Wolfe alleges that the animal wastes from the confined animal feeding operations will be discharged into water bodies that drain into the Harlan County Reservoir. This is sufficient evidence to show a causal connection between the imminent injuries and the confined swine feeding operations.

Mr. and Mrs. Ross claim that the mists of the swine wastes would drift onto their property because they live within 200 feet from the Rolling Hills and Stillwater Swine center pivot. This concern was made known in Mr. and Mrs. Ross's public comments in objection to the permits. KDHE did address this issue in their response to the public comments by stating:

> "There is one habitable structure located 1,000-feet of the Rolling Hills Pork land application area ("Malcom Pivot") and is owned by Nelson Farms Inc. K.S.A. 65-1, 182 prohibits the application of swine manure or wastewater on bare ground within 1,000 feet of a habitable structure, unless the waste is incorporated into the soil that same day. This prohibition can be avoided through a variety of means including but not limited to: 1) only applying swine waste when vegetation or crops are growing; 2) incorporating the swine waste within 24 hours; and 3) obtaining a waiver from the habitable structure owner. Additionally, the permittee is required to use reasonable procedures and precautions to avoid spray drift from the land application site. There are no other laws that require the land application of swine waste to be located a certain distance from a habitable structure."

Although KDHE addressed the concerns of Mr. and Mrs. Ross, the causal connection between their imminent injury and the challenged action remains. Thus, both Carl Wolfe and Mr. and Mrs. Ross have established a causal connection for purposes of establishing standing.

Finally, a favorable ruling by this Court would provide at least some benefit to the Petitioner. Preventing any more contamination to the Harlan County Reservoir would likely help

Petitioner, along with the individual Sierra Club members meet their organizational purpose. A ruling in their favor would likely alleviate the alleged injury.

In conclusion, Petitioner Sierra Club has established association standing. First, individual members of Sierra Club have shown sufficient imminent injury to sue individually. Second, the interests Petitioner seeks to protect are germane to its purpose. Last, neither the claim asserted nor the relief requested requires the participation of individual Sierra Club members. The relief sought is the reversal and or revocation of the agency action granting the confined swine feeding facility permits. Determining this issue in this process does not require the participation of individual Sierra Club members.

B. Exhaustion of Administrative Remedies and Timely Filing for Judicial Review

In December 2017, Petitioner Sierra Club filed a petition for reconsideration of the Husky Hogs and Prairie Dog Pork permits. This petition was denied by Respondent KDHE's Director of Environment in February 2018. Petitioner appealed this denial to the Secretary of KDHE. Under K.A.R. 28-16-62(g)(2), if the Secretary takes no action on the appeal within 60 days, the Petitioner may petition for judicial review. The Secretary did not take any action within 60 days. Petitioner filed the instant Petition for Judicial Review. Petitioner has exhausted all administrative remedies and timely filed a Petition for Judicial Review.

In May and June 2018, Petitioner filed petitions for reconsideration of the Stillwater Swine and Rolling Hills Pork permits. The petitions for reconsideration were denied by the Respondent KDHE's Director of Environment in July 2018. These denials were then appealed to the Secretary of KDHE in August 2018. On August 29, 2018, the Secretary denied the appeals.

Petitioner has therefore exhausted all available administrative remedies and has qualified for Judicial Review under K.S.A. 77-607.

III. The Requirements For Separation Distance From Surface Water

Petitioner Sierra Club contends that Respondent KDHE violated K.S.A. 65-1,180(a)(3) when it treated Husky Hogs and Prairie Dog Pork as separate facilities and required only a 250-foot separation distance from surface water. (18CV465). Petitioner also contends that Respondent violated K.S.A. 65-1,180(a)(3) when it treated Rolling Hills Pork and Stillwater Swine as separate facilities and only required a 250-foot separation distance from surface water. (18CV746).

A. Husky Hogs and Prairie Dog Pork Permits

As for the Husky Hogs and Prairie Dog Pork permits, Sierra Club claims that the KDHE should have considered Husky Hogs and Prairie Dog Pork as a single facility and required at least 500 feet as the minimum separation distance under K.S.A. 65-1,180. Petitioner asserts that Respondent KDHE should have considered the following information to show the two facilities although owned by separate limited liability companies were a single, unified facility and operation: (1) Prairie Dog Pork is located within the stated boundary of the Husky Hogs facility; (2) Julia Nelson is the owner of Husky Hogs and Prairie Dog Pork; (3) Julia Nelson is the applicant for both Husky Hogs and Prairie Dog Pork; and (4) Husky Hogs will both own and operate the hogs from the Husky Hog operation and the Prairie Dog Pork operation. Petitioner states that Respondent's decision to disregard this information is arbitrary and capricious and fails to decide the issue based on the totality of the administrative record.

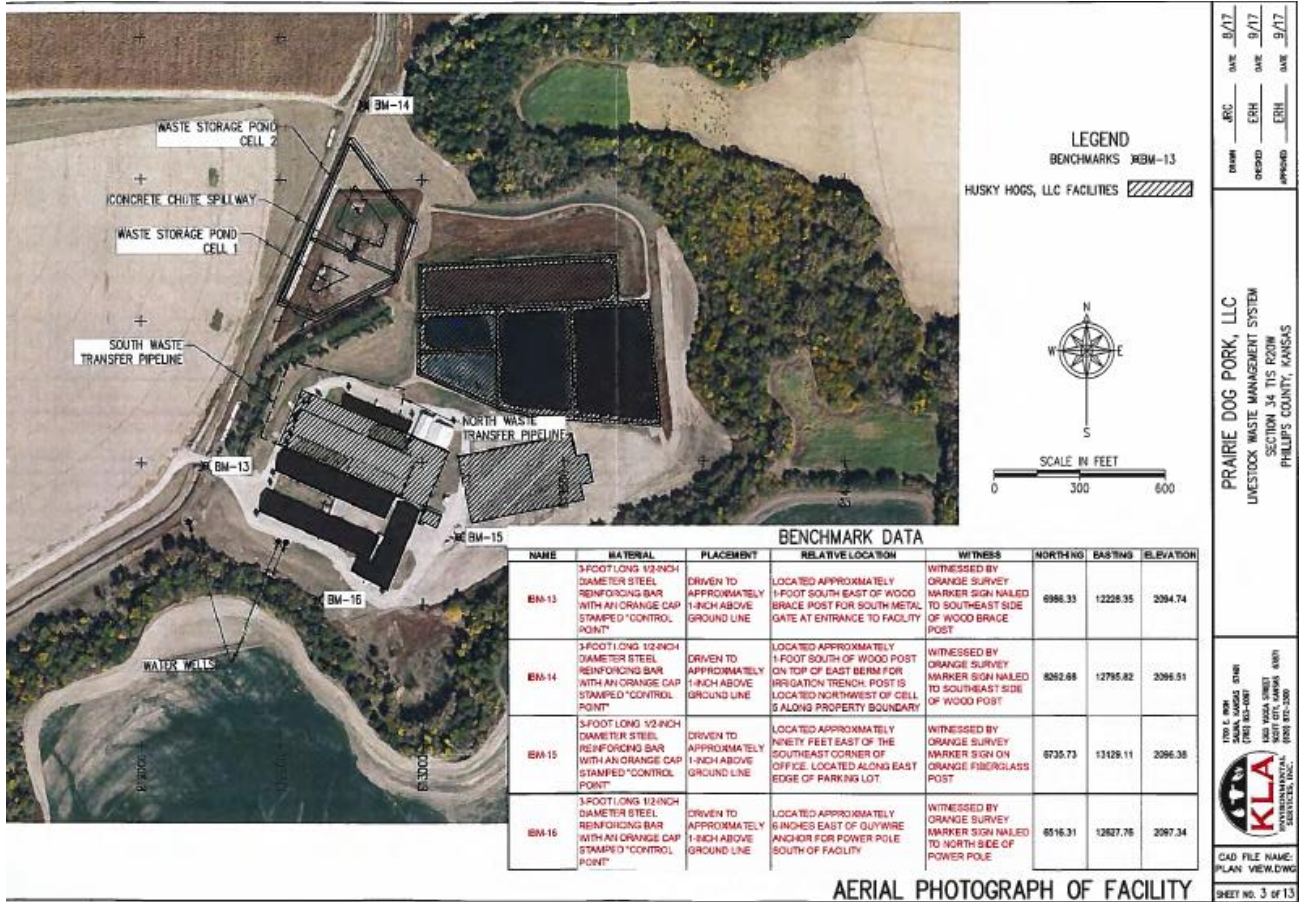
Respondent KDHE, in support of its conclusion that the two operations are separate facilities, cites and relies upon its own administrative regulation, K.A.R. 28-18a-4(d), which states: ***"swine facilities on separate pieces of land without a contiguous ownership boundary shall be classified as separate operations."*** Respondent KDHE found that under K.A.R. 28-18a-4(d), the operations were separate because they lacked a "***contiguous property <u>ownership</u>"***:

> "Kansas Administrative Regulations (K.A.R.) 28-18a-4(d) classifies swine facilities as separate operations if the facilities are located on separate pieces of land without a ***contiguous property <u>ownership</u>***. ***The real property these three proposed facilities are to be located on do not share contiguous property <u>ownership</u>. The property the Husky Hogs, L.L.C. facility is located on is owned by Husky Hogs, L.L.C.; the property the Prairie Dog Pork, L.L.C. facility is located on is owned by Prairie Dog Pork, L.L.C. … A quit claim deed was submitted to KDHE that verifies there is not contiguous property <u>ownership</u>.***
>
> Under Kansas law, Limited Liability Companies do not have owners; they are composed of members and operated by managers. KDHE has not been directed by the Legislature to investigate members or managers of applicants, nor is there a legal requirement that an 'operating agreement' as defined in Kansas Statues Annotated (K.S.A.) 17-7663(k) be submitted to KDHE." (emphasis added)

Prairie Dog Pork and Husky Hogs have separate LLC owners and are located on separate pieces of land. That said, KDHE's contention and fact finding that the operations do not share a *contiguous property boundary* is unsupported by substantial evidence in the record. The regulation Respondent KDHE relied on makes it clear there cannot be a *contiguous ownership boundary* if swine facilities are to be classified as separate operations. Respondent KDHE does not explain why there is no contiguous ownership boundary, other than referring to a quitclaim deed that was submitted to KDHE. The quitclaim deed does show separate ownership of the facilities by the limited liability companies; however, the quitclaim deed does not verify that there was no contiguous property boundary. KDHE applied a test or standard of ***contiguous property ownership*** rather than of ***contiguous ownership boundary***, which is the actual

terminology used in the regulation. Respondent KDHE has clearly misinterpreted and misapplied K.A.R. 28-18a-4(d). The properties of the two LLCs have a contiguous ownership boundary. Thus, under the test Respondent KDHE elected to apply the swine facilities are not separate.

Prairie Dog Pork buildings were included in the same space as the former Husky Hogs facility. In the June 13, 2017 email, Mr. Nelson proposed to sell and permit the "three south barns" to Clarke and Julia Nelson. The email contained an aerial photo of the location, which is reproduced here. Also shown below is an aerial photo that was submitted as a construction drawing for Prairie Dog Pork. (HH/PDP R. at 437 and 674)



NAME	MATERIAL	PLACEMENT	RELATIVE LOCATION	WITNESS	NORTHING	EASTING	ELEVATION
BM-13	3-FOOT LONG 1/2-INCH DIAMETER STEEL REINFORCING BAR WITH AN ORANGE CAP STAMPED "CONTROL POINT"	DRIVEN TO APPROXIMATELY 1-INCH ABOVE GROUND LINE	LOCATED APPROXIMATELY 1-FOOT SOUTH EAST OF WOOD BRACE POST FOR SOUTH METAL GATE AT ENTRANCE TO FACILITY	WITNESSED BY ORANGE SURVEY MARKER SIGN NAILED TO SOUTHEAST SIDE OF WOOD BRACE POST	6986.33	12228.35	2094.74
BM-14	3-FOOT LONG 1/2-INCH DIAMETER STEEL REINFORCING BAR WITH AN ORANGE CAP STAMPED "CONTROL POINT"	DRIVEN TO APPROXIMATELY 1-INCH ABOVE GROUND LINE	LOCATED APPROXIMATELY 1-FOOT SOUTH OF WOOD POST ON TOP OF EAST BERM FOR IRRIGATION TRENCH. POST IS LOCATED NORTHWEST OF CELL 5 ALONG PROPERTY BOUNDARY	WITNESSED BY ORANGE SURVEY MARKER SIGN NAILED TO SOUTHEAST SIDE OF WOOD POST	8262.68	12795.82	2096.51
BM-15	3-FOOT LONG 1/2-INCH DIAMETER STEEL REINFORCING BAR WITH AN ORANGE CAP STAMPED "CONTROL POINT"	DRIVEN TO APPROXIMATELY 1-INCH ABOVE GROUND LINE	LOCATED APPROXIMATELY NINETY FEET EAST OF THE SOUTHEAST CORNER OF OFFICE. LOCATED ALONG EAST EDGE OF PARKING LOT	WITNESSED BY ORANGE SURVEY MARKER SIGN ON ORANGE FIBERGLASS POST	6735.73	13129.11	2096.38
BM-16	3-FOOT LONG 1/2-INCH DIAMETER STEEL REINFORCING BAR WITH AN ORANGE CAP STAMPED "CONTROL POINT"	DRIVEN TO APPROXIMATELY 1-INCH ABOVE GROUND LINE	LOCATED APPROXIMATELY 6 INCHES EAST OF GUYWIRE ANCHOR FOR POWER POLE SOUTH OF FACILITY	WITNESSED BY ORANGE SURVEY MARKER SIGN NAILED TO NORTH SIDE OF POWER POLE	6516.31	12627.76	2097.34

Respondent's interpretation and application of K.A.R. 28-18a-4(d) is flawed. The quitclaim deed was the instrument that created the contiguous ownership boundary between Prairie Dog Pork and Husky Hogs. It is uncontroverted that Husky Hogs was the sole facility before the proposal to create the Prairie Dog Pork facility. Terry Nelson, on behalf of Nelson Farms, Inc. conveyed by gift real property originally used in the Husky Hogs facility, to Julia Nelson, the owner of Prairie Dog Pork. This conveyance created the contiguous ownership boundary between the two facilities. Black's Law Dictionary defines “contiguous” as “[t]ouching at a point or along a boundary; near in time or sequence.” Black's Law Dictionary (11th ed.

2019). As shown in the aerial photos, the real property of Husky Hogs is sandwiched between the real property of Prairie Dog Pork.

Prairie Dog Pork and Husky Hogs do not meet the test for separateness applied by KDHE which was based on K.A.R. 28-18a-4(d). There is a *contiguous ownership boundary*, thus these two facilities cannot be classified as separate facilities applying the regulation and test for separateness relied upon by KDHE. Since these facilities cannot be considered separate facilities based only on contiguous ownership boundary evaluation, there is a violation of K.S.A. 65-1,180, which prohibits a swine facility with an animal unit capacity of 3,725 or more of being located less than 500 feet from any surface water. The Husky Hogs permit authorizes the confinement of 3724.8 animal units and the Prairie Dog Pork permit authorizes the confinement of 2492.2 animal units. The nearest surface water to the facilities is Prairie Dog Creek, which is 250 feet away. Since the facilities combined animal units exceed 3,725, the separation distance requirement in K.S.A. 65-1,180 is violated.

B. Rolling Hills Pork and Stillwater Swine Permits

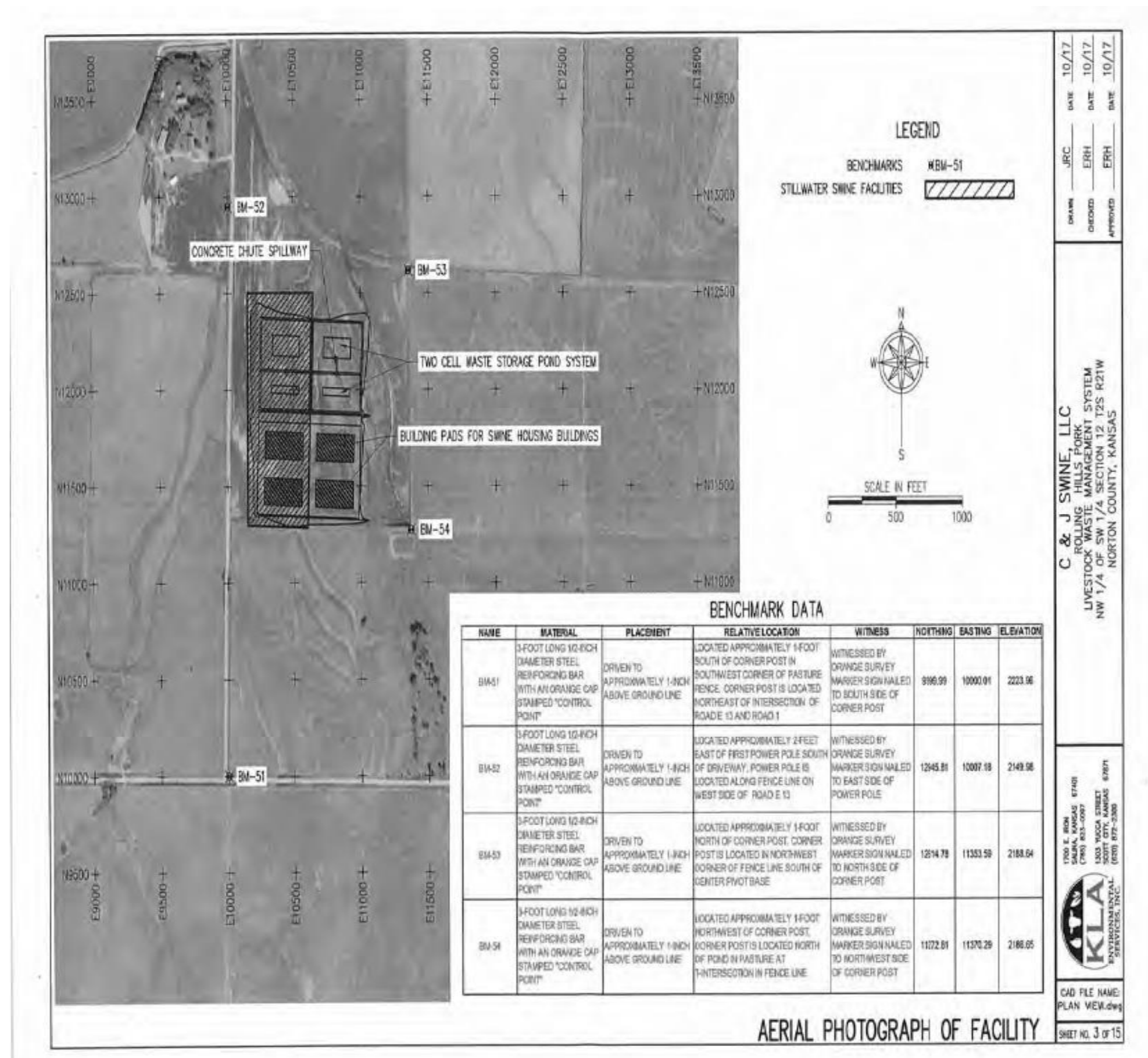
The same analysis applies for the Rolling Hills Pork and Stillwater Swine permits. Petitioner claims that KDHE should have considered Rolling Hills Pork and Stillwater Swine as a single entity and applied the 500-foot separation distance required under K.S.A. 65-1,180. Petitioner claims that the Respondent should have considered the following information to show that they are a unified operation: (1) Rolling Hills Pork and Stillwater swine are next to each other; (2) there is a signed Property Line Acknowledgement; and (3) both are owned by immediate members of the Nelson family.

Respondent KDHE, in support of its conclusion that the two operations are separate entities, cites K.A.R. 28-18a-4(d), which states: ***"swine facilities on separate pieces of land without a contiguous ownership boundary shall be classified as separate operations."*** KDHE found that under K.A.R. 28-18a-4(d), the operations were separate because they lacked a ***"contiguous property <u>ownership</u>***," once again ignoring the actual terminology of the regulation, which is "***a contiguous <u>ownership boundary</u>***." KDHE reasoned:

> "The construction and operation of the Stillwater Swine facility is not an expansion of the Rolling Hills Pork facility. As stated in our Public Comment Response Letter, ***K.A.R. 28-18a-4(d) classifies swine facilities as separate operations if the facilities are located on separate pieces of land without a contiguous property ownership.*** Nelson Farms, Inc. owns the property on which the Stillwater Swine facility is located and C&J Swine, LLC, owns the property upon which the Rolling Hills Pork facility is located. ***A Quit Claim Deed was submitted to KDHE that verifies there is not contiguous property ownership.***
>
> KDHE did not fail to consider the preponderance of evidence disputing separate ownership. KDHE is not tasked with investigating business ownership structures. Nelson Farms, Inc. and C&J Swine, LLC are separate legal entities; each is a registered business with the State of Kansas. Nelson Farms, Inc. provided KDHE with all necessary information required by statute and regulation for permitting purposes. The additional evidence presented in your [letter] dated May 16, 2018 to revoke or terminate the Rolling Hills Pork permit does not dispute that these are separate legal entities." (Emphasis added.)

Again, Rolling Hills Pork and Stillwater Swine have separate limited liability company owners and are on adjacent pieces of land. That said, there is a contiguous ownership boundary between the two. The regulation Respondent relied on makes it clear there cannot be a contiguous ownership boundary if swine facilities are to be classified as separate operations. Respondent does not explain why or how it found there is no contiguous ownership boundary when the properties are side by side and "0 feet" apart. As stated, the quitclaim deed does show separate ownership of the facilities; however, it does not verify that there was no contiguous

property ownership boundary. Respondent KDHE has erroneously interpreted and applied K.A.R. 28-18a-4(d) in a manner which violates the separation distance requirement of K.S.A. 65-1,180(a)(3). Shown below is an aerial photo that was submitted as a construction drawing during the application process. (SS/RHP R. at 122)



BENCHMARK DATA

NAME	MATERIAL	PLACEMENT	RELATIVE LOCATION	WITNESS	NORTHING	EASTING	ELEVATION
BM-51	3-FOOT LONG 1/2-INCH DIAMETER STEEL REINFORCING BAR WITH AN ORANGE CAP STAMPED "CONTROL POINT"	DRIVEN TO APPROXIMATELY 1-INCH ABOVE GROUND LINE	LOCATED APPROXIMATELY 1-FOOT SOUTH OF CORNER POST IN SOUTHWEST CORNER OF PASTURE FENCE. CORNER POST IS LOCATED NORTHEAST OF INTERSECTION OF ROAD E 13 AND ROAD 1	WITNESSED BY ORANGE SURVEY MARKER SIGN NAILED TO SOUTH SIDE OF CORNER POST	9990.99	10000.01	2223.96
BM-52	3-FOOT LONG 1/2-INCH DIAMETER STEEL REINFORCING BAR WITH AN ORANGE CAP STAMPED "CONTROL POINT"	DRIVEN TO APPROXIMATELY 1-INCH ABOVE GROUND LINE	LOCATED APPROXIMATELY 2-FEET EAST OF FIRST POWER POLE SOUTH OF DRIVEWAY. POWER POLE IS LOCATED ALONG FENCE LINE ON WEST SIDE OF ROAD E 13	WITNESSED BY ORANGE SURVEY MARKER SIGN NAILED TO EAST SIDE OF POWER POLE	12945.81	10007.18	2149.98
BM-53	3-FOOT LONG 1/2-INCH DIAMETER STEEL REINFORCING BAR WITH AN ORANGE CAP STAMPED "CONTROL POINT"	DRIVEN TO APPROXIMATELY 1-INCH ABOVE GROUND LINE	LOCATED APPROXIMATELY 1-FOOT NORTH OF CORNER POST. CORNER POST IS LOCATED IN NORTHWEST CORNER OF FENCE LINE SOUTH OF CENTER PIVOT BASE	WITNESSED BY ORANGE SURVEY MARKER SIGN NAILED TO NORTH SIDE OF CORNER POST	12814.79	11353.59	2188.64
BM-54	3-FOOT LONG 1/2-INCH DIAMETER STEEL REINFORCING BAR WITH AN ORANGE CAP STAMPED "CONTROL POINT"	DRIVEN TO APPROXIMATELY 1-INCH ABOVE GROUND LINE	LOCATED APPROXIMATELY 1-FOOT NORTHWEST OF CORNER POST. CORNER POST IS LOCATED NORTH OF POND IN PASTURE AT T-INTERSECTION IN FENCE LINE	WITNESSED BY ORANGE SURVEY MARKER SIGN NAILED TO NORTHWEST SIDE OF CORNER POST	11072.81	11370.29	2186.65

The contiguous ownership boundary was created by the December 6, 2017, quitclaim deed. The real property that Rolling Hills Pork was built on was conveyed by Terry Nelson to

Clarke and Julia Nelson by quitclaim deed. Further, Clarke and Julia Nelson signed a Property Line Acknowledgement, in which they stated they knew that Stillwater Swine was "0 feet" away from their property line. These two facilities do share a contiguous property ownership boundary and therefore do not meet the test criteria used in the permitting process under K.A.R. 28-18a-4(d). Since these facilities cannot be considered separate facilities because they have a contiguous boundary, there is a violation of K.S.A. 65-1,180, which prohibits a swine facility with an animal unit capacity of 3,725 or more from being located less than 500 feet from any surface water. The Stillwater Swine permit authorizes the confinement of 3,720 animal units and the Rolling Hills Pork permit authorizes the confinement of 3,720 animal units. The nearest surface water to the facilities is a livestock pond owned by Rodney Ross 250 feet away. Since the facilities combined animal units exceed 3,725, they are in violation of the 500 foot separation distance requirement of K.S.A. 65-1,180.

DECISION

The Court reverses the agency action with respect to the issuance of the four permits for confined swine feeding facilities because the agency arbitrarily used, interpreted and applied K.A.R. 28-16-56d in derogation of the requirement for required minimum separation distances from surface water set out in K.S.A. 65-1,180 for concentration of animal units of 3725 or more. In that statute, the legislature directs that a permit for construction of a new swine facility or expansion of an existing swine facility should not be approved unless the swine waste management system for the facility meets certain requirements for separation from surface waters. KDHE has broad authority to consider the necessary environmental protection requirements for confined swine feeding facilities. KDHE has broad authority to deny an

application for a confined swine feeding facility that will impair surface or groundwater regardless of distance or separation from surface water. K.S.A. 65-1,196(a)(1) anticipates KDHE through its regulations may impose additional or more stringent requirements than those set by the Legislature when taking into account varying conditions that are probable with respect to each source of sewage. See also, K.S.A. 65-171d(d). But here the Legislature has established minimum setback requirements from surface water for facilities based on animal units pursuant to K.S.A. 65-1,180.

In these circumstances, KDHE construed its authority too narrowly by arbitrarily limiting itself from a review of the ownership issues as one factor in the permitting process in determining whether these facilities should be treated as single or separate in evaluating the environmental pollution risk to surface water. Kansas law imposes no separation distance requirement between swine facilities. They may be adjacent to one another or separated by a distance. The critical focus of the applicable statute appears to be the separateness and adequacy of the waste management systems for the concentration of animal units in a particular physical space or area.

As the Interveners argued, swine facilities with capacities in excess of 1000 animal units on tracts of land that are next to one another pose no greater threat to water quality than two facilities that are miles apart so long as they have separate waste management systems, land application areas, waste conveyance mechanisms and feed storage areas with no conveyance mechanisms between them. That said, the Legislature has declared minimum setback and separation requirements from surface water for confined swine feeding facilities based on animal units. In this instance, KDHE erroneously and arbitrarily interpreted its own regulation to limit

its review of the separateness of facilities for the proposed number of animal units in such facility (or combined facility) and the required separation distance from surface water of the swine waste management system for the facility (or combined facility) based on an evaluation only of titled property ownership rather than on consideration of whether there existed a contiguous ownership boundary.

KDHE has the authority to treat or deem the Husky Hogs and Prairie Dog Pork operations in Phillips County as single or separate facilities for purposes of issuing or refusing to issue the subject permits even though owned by different limited liability companies. In this instance, through gifting and legal gerrymandering, the applicants sought, and by KDHE's misapplication of a test it elected to apply derived from K.A.R. 28-18a-4d, were able to double the animal units on the same amount of land without complying with the surface water separation setback distances required by K.S.A. 65-1,180(a)(3).

The agency erred by basing its reasoning of separateness blindly upon titled property ownership reflected in the quitclaim deeds rather than upon whether the pieces of land had a contiguous ownership boundary, which is the test the agency elected to apply, while at the same time arbitrarily and unreasonably refusing to even consider or examine other matters pertaining to common ownership interests and/or common control of operations. The agency reasoned such inquiry and factors were beyond its legislative charge. On the contrary, the Legislature granted the agency broad authority to protect the surface waters in the public environment stating in K.S.A. 65-1,196(a)(1) that: "*The express adoption or authorization of standards and requirements for swine facilities by this act shall not be construed to prohibit or limit in any manner the Secretary's authority to adopt and enforce rules and regulations establishing: (1)*

Standards and requirements for swine facilities that are in addition to or more stringent than those provided by this act…"

The agency had the same authority to evaluate the applications for permits by Rolling Hills Pork and Stillwater Swine. These operations are side-by-side. They share contiguous ownership boundaries. Again, KDHE misapplied its own test borrowed from K.A.R. 28-18a-4, the regulation directed at filing of applications and payment of fees with respect to confined swine feeding facility sewage permits. The swine facilities may be considered to be on separate pieces of land titled under ownership of two different limited liability companies but the pieces of land have a contiguous ownership boundary. Therefore, under the test the agency elected to apply, the two swine facilities are not classified as separate facilities under the language of K.A.R. 28-18a-4. Based on the agency's own contiguous ownership boundary test adopted for determining whether the confined feeding facilities for swine are separate or not, and with the animal unit capacities indicated in each application for a permit, the required separation distance of 500 feet minimum from surface water must be addressed in determining whether the permits should be issued.

FINAL ORDER

For the reasons stated above, the Court reverses the final agency action of the Kansas Department of Health and Environment which granted the four subject permits for confined feeding facilities for swine and remands this matter to KDHE for further proceedings on these applications for permits consistent with this ruling. The Court need not and will not address the other issues raised by the Petitioner concerning the alleged degradation of water quality in Prairie Dog Creek, the failure to properly measure the depth to ground water, the failure to adequately

ensure proper wastewater application and the alleged lack of reasonable measures to avoid spray drift, because those issues arise out of the issuance of the permits and will once again have to be considered and addressed by the agency on remand.

This Memorandum Decision and Order shall constitute the Court's entry of judgment when filed with the Clerk of this Court. No further Journal Entry is required.

This Order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED

Richard D. Anderson
District Judge, Division 2

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically, and placed in the U.S. Mail if required, on the date stamped on the order, providing notice to the following:

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