

**IN THE DISTRICT COURT
FOR THE TWENTY-FIFTH JUDICIAL DISTRICT OF KANSAS
AT FINNEY COUNTY**

**SUNFLOWER ELECTRIC POWER
CORPORATION,**

Petitioner,

v.

**KANSAS DEPARTMENT OF HEALTH
AND ENVIRONMENT,**

and

**RODERICK L. BREMBY, IN HIS
OFFICIAL CAPACITY AS THE
SECRETARY OF THE KANSAS
DEPARTMENT OF HEALTH AND
ENVIRONMENT,**

Respondents.

Case No. _____

**PETITION FOR JUDICIAL REVIEW OF
KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT
DENIAL OF PERMIT APPLICATION UNDER K.S.A. § 65-3012(a)**

Petitioner, Sunflower Electric Power Corporation (“Sunflower”), hereby petitions this Court pursuant to K.S.A. § 77-607 for judicial review of the denial of Sunflower’s application to the Kansas Department of Health and Environment (“KDHE”) for the issuance of a permit authorizing construction of two new electricity generating units (the “Power Plants”) at its Holcomb Generating Station located in Finney County, Kansas (the “Application”) by KDHE Secretary Roderick L. Bremby (the “Secretary”) on October 18, 2007 (the “Denial Order”), to the extent that the Denial Order was issued by the Secretary pursuant to K.S.A. § 65-3012(a). In

compliance with K.S.A. § 60-2101, Sunflower has hereby timely and properly given notice of this appeal to Respondents. In support of this petition, Sunflower states:

PARTIES

1. Plaintiff Sunflower Electric Power Corporation is a Kansas corporation with its principal place of business at 301 W. 13th St., Hays, Kansas 67601.

2. Respondent KDHE is an agency of the State of Kansas. Its mailing address is: Curtis State Office Building, 1000 SW Jackson, Topeka, Kansas 66612.

3. Respondent Roderick L. Bremby (the “Secretary”) is the Secretary of KDHE, an agency of the State of Kansas. The Secretary’s mailing address is: Curtis State Office Building, Suite 540, 1000 SW Jackson, Topeka, Kansas 66612.

AGENCY ACTION AT ISSUE

4. The agency action at issue is the Secretary’s issuance of the Denial Order, a certified copy of which is attached as Exhibit A hereto.

JURISDICTION AND VENUE

5. Sunflower seeks review by the Court of the issuance of the Denial Order.

6. This case involves denial of a permit to construct by the Secretary of KDHE. Sunflower believes that exclusive jurisdiction for review of such a denial, including challenges to the lawfulness of the Secretary’s reliance on K.S.A. § 65-3012 in denying a permit to construct, resides with the Court of Appeals pursuant to K.S.A. § 65-3008a(b). Accordingly, Sunflower has this date filed a petition for review of the Denial Order with the Court of Appeals. Given the possibility, however, that the Secretary will assert that K.S.A. § 65-3012, rather than K.S.A. § 65-3008a(b), serves as authority for issuance of the Denial Order, Sunflower is filing this petition solely as a protective matter, in the event that the Secretary should contest jurisdiction in the Court of Appeals.

7. Should it ultimately be determined that jurisdiction to review the Denial Order is not within the Court of Appeals' jurisdiction, then this Court has original jurisdiction over this action pursuant to Article 3, Section 6 of the Kansas Constitution and K.S.A. §§ 77-607(a) and 77-609.

8. The Denial Order improperly, and without support of law, denied Sunflower the right to construct the Power Plants in Finney County, Kansas. Therefore, should it ultimately be determined that jurisdiction to review the Denial Order is not within the Court of Appeals' jurisdiction, pursuant to K.S.A. §§ 60-602(2) and 77-609(b) venue is proper in this Court.

ENTITLEMENT TO REVIEW

9. Sunflower has standing to seek review of the Denial Order under K.S.A. § 77-611(a) and (b) because Sunflower is a person to whom the Denial Order was specifically directed and Sunflower was a party to the KDHE proceedings that led to the issuance of the Denial Order.

10. To the extent that the Denial Order was issued by the Secretary pursuant to K.S.A. § 65-3012(b)(1), Sunflower is not required to exhaust its administrative remedies with respect to the challenge it seeks to bring to the legal authority and jurisdiction of the Secretary to deny a PSD construction permit based solely on the provisions of K.S.A. § 65-3012, as interpreted in Attorney General Opinion No. 2007-31 (the "Secretary's interpretation"), because (1) KDHE and the Secretary were without jurisdiction over Sunflower under K.S.A. § 65-3012; (2) the Secretary's interpretation of K.S.A. § 65-3012 is a pure question of law that requires no further application of law to evidence; and (3) under the circumstances presented here, it would be futile for Sunflower to pursue further administrative proceedings in an effort to have the Secretary reconsider and reject his own prior endorsement of Attorney General Opinion No.

2007-31. However, as a purely protective matter, Sunflower has filed a petition for reconsideration and a request for an administrative hearing with the Secretary.

11. To the extent that the Denial Order was not issued by the Secretary pursuant to K.S.A. § 65-3012(b)(1), Sunflower has no administrative remedies with respect to the issuance of the Denial Order.

12. This petition is being filed within thirty days after the Secretary's issuance of the Denial Order and therefore is timely under K.S.A. § 77-613(d).

FACTS RELEVANT TO ISSUES PRESENTED

13. The Kansas Air Quality Act ("AQA") is set forth at K.S.A. §§ 65-3001, et seq.; and KDHE has promulgated certain rules and regulations thereunder.

14. In Kansas, the process for permitting the proposed Power Plants is established and governed by K.S.A. §§ 65-3008, 65-3008a, and 65-3008b and the regulations promulgated thereunder, i.e., K.A.R. 28-19-300 et seq. and 40 C.F.R. 52.21 (as incorporated by reference at K.A.R. 28-19-350) (collectively, the "Permitting Rules").

15. The permit sought by Sunflower is denominated a "PSD construction permit" because the federal and state regulations that establish the requirements for the issuance of such a permit and the terms and conditions that must be contained in such permit are part of the "prevention of significant deterioration" provisions of the federal Clean Air Act ("CAA"), 42 U.S.C. §§ 7401, et seq. In accordance with the applicable provision of the CAA, the United States Environmental Protection Agency ("EPA") has authorized KDHE to administer this program in the state pursuant to the AQA, its implementing regulations, and the other applicable provisions of the Kansas State Implementation Plan for attaining and maintaining compliance with the National Ambient Air Quality Standards for regulated air pollutants and other provisions of the CAA.

16. Sunflower has fully complied with all applicable Permitting Rules in connection with its Application.

17. In February 2006, Sunflower submitted its Application to KDHE, by which it sought authority to construct three new electricity generating units, Holcomb 2 (“H2”), Holcomb 3 (“H3”), and Holcomb 4 (“H4”). On June 15, 2007, Sunflower withdrew its request for authorization to construct H4.

18. On September 21, 2006, KDHE made an initial decision under K.A.R. 28-19-350 that Sunflower’s Application should be approved and issued a draft permit to Sunflower (the “Draft Permit”).

19. On September 21, 2006, KDHE published a notice in the Kansas Register by which the agency provided notice to the public of (a) the issuance of the Draft Permit, (b) the public’s right to comment on this action, both by the submission of written comments and the opportunity to provide oral and written comments at a public hearing, and (c) public hearings that were to be held on this action in Garden City, Kansas and Topeka, Kansas.

20. On November 2, 2006, KDHE published a further notice in the Kansas Register by which the agency again provided notice to the public of (a) the issuance of the Draft Permit, and (b) the public’s right to comment on this action, both by the submission of written comments and the opportunity to provide oral and written comments at a public hearing, and provided notice of (c) a public hearing on this action, to be held in Lawrence, Kansas.

21. Pursuant to these notices, KDHE conducted three public hearings at which members of the public were afforded the opportunity to comment on the agency’s initial decision to approve Sunflower’s Application.

22. KDHE received several hundred written comments regarding the proposed agency action, including comments submitted by EPA and other federal and state agencies.

23. The comments received by KDHE included numerous statements of concern regarding global warming generally, the possible effect of global warming on Kansas, and assertions that carbon dioxide emissions from the proposed Power Plants would contribute to global warming.

24. On or about July 24, 2007, based on the complete record developed in conjunction with the Application, including the comments received and Sunflower's responses to those comments, KDHE's technical permitting staff (the "Staff") concluded that Sunflower's application should be approved and that a final PSD construction permit (the "Final Permit") should be issued to Sunflower authorizing the construction of H2 and H3.

25. The Staff then recommended to Ronald Hammerschmidt, Ph.D., Director of the KDHE Bureau of the Environment, that Sunflower's Application be approved and that the Final Permit sought by Sunflower should be issued in the form drafted by the staff.

26. Director Hammerschmidt concurred in the Staff recommendation and forwarded this matter to the Secretary with a recommendation that the Application be approved and that Sunflower be issued the Final Permit.

27. The Permitting Rules do not currently contain any restrictions on or other regulations addressing the emission of carbon dioxide.

28. To date, there is no federal or Kansas regulatory program in place that establishes any rule or regulation of general application for the management of carbon dioxide emissions from either mobile or stationary sources of such emissions.

29. K.S.A. § 65-3012 (“Section 3012”) provides the Secretary with certain emergency powers to address emissions of an air contaminant or contaminants from existing sources that present a “substantial endangerment to the health of persons or to the environment” or where there is an imminent or actual violation of the AQA. Section 3012 provides, in relevant part: “Notwithstanding any other provision of this act, the Secretary may take such action as may be necessary to protect the health of persons or the environment: (1) Upon receipt of information that the emission of air pollution presents a substantial endangerment to the health of persons or the environment”

30. On or about September 1, 2007, the Secretary (acting in his official capacity) requested an opinion from the Attorney General of the State of Kansas, Paul Morrison (the “Attorney General”) as to “whether, in the absence of federal or state regulations setting limitations for a specific pollutant, K.S.A. § 65-3012 authorizes the Secretary to deny or modify an air quality permit, or place a stay on issuance of an air quality permit until state or federal regulations are enacted to address the pollutant.”

31. On or about September 24, 2007, the Attorney General issued his opinion in response to the Secretary’s request (the “AG Opinion”), stating in part that “K.S.A. § 65-3012 authorizes the Secretary to take actions as necessary to protect the health of persons or the environment. Such actions may include denying an air quality permit application on the basis of the anticipated emissions of a particular pollutant or modifying a proposed permit to address such pollutant.” The AG Opinion also noted that any action to deny an air quality permit would trigger due process protections. The AG Opinion also noted that staying the issuance of the Sunflower permitting proceedings pending the adoption of standards to regulate a particular pollutant would likely not withstand a due process challenge, citing case law observing that, in

the absence of rules, due process requires an agency, in taking action, to demonstrate the application of internal and written standards that are objective, ascertainable, and applied consistently and uniformly.

32. On October 18, 2007, the Secretary applied the interpretation of law set forth in the AG Opinion and denied Sunflower's Application, stating in relevant part that he has "authority under K.S.A. § 65-3012 ... to take such action as is necessary to protect the health of persons or the environment, notwithstanding a permit applicant's compliance with all other existing provisions of the Kansas air quality act" and that in his opinion, there was "support for the position that emission of air pollution from the proposed coal fired plant, specifically carbon dioxide emissions, presents a substantial endangerment to the health of persons or to the environment."

33. Subsequent to issuing the Denial Order, the Secretary and the Governor have made numerous public statements disclosing that a final decision has been made to interpret K.S.A. § 65-3012 as authorizing denial of the Sunflower permit and that a final decision has been made not to apply K.S.A. § 65-3012 to other new and existing sources of carbon dioxide emissions.

34. Prior to September 2007, K.S.A. § 65-3012, consistent with its plain meaning, had only been applied to existing pollution that presents an air pollution emergency and therefore had never been considered by KDHE in connection with an application for a PSD construction permit for a new source of future emissions.

35. Prior to October 18, 2007, no application for a PSD construction permit had ever been denied under K.S.A. § 65-3012.

36. At no time prior to issuance of the Denial Order did the Secretary notify Sunflower of his intent to consider K.S.A. § 65-3012 in any way in connection with Sunflower's Application.

37. At no time did the Secretary afford Sunflower an opportunity to be heard in connection with the Secretary's consideration of K.S.A. § 65-3012 as part of his consideration of Sunflower's Application.

38. The Secretary did not and cannot cite to any Kansas statute or regulation establishing any criteria that must be satisfied for the Secretary to make a "substantial endangerment" finding with respect to future emissions, and the Secretary did not, and cannot, cite to any Kansas statute or regulation establishing any procedure by which the Secretary may make a "substantial endangerment" finding under K.S.A. § 65-3012 that applies to proposed emissions subject to PSD construction permit requirements.

39. The Secretary did not and cannot identify or articulate any substantive criteria or standard to be used in connection with his inquiry as to whether or not carbon dioxide emissions from the proposed Power Plants would constitute air pollution that poses a "substantial endangerment to the health of persons or to the environment" in Kansas.

40. The Secretary did not and cannot identify or articulate any established process by which he conducted his inquiry into the issue of whether carbon dioxide emissions from the proposed Power Plants would pose a "substantial endangerment to the health of persons or to the environment" in Kansas.

41. The Denial Order does not articulate any basis for the Secretary's finding that carbon dioxide emissions from the proposed Power Plants would pose a "substantial endangerment to the health of persons or to the environment" in Kansas.

GROUND FOR GRANTING JUDICIAL RELIEF

42. The grounds on which Sunflower seeks review of the Denial Order by the Court are as follows:

A. The Denial Order is invalid because the Secretary has erroneously interpreted or applied Section 3012, in that K.S.A. § 65-3012 (“Section 3012”) only addresses current air pollution that results from existing stationary and mobile sources of air contaminant emissions and thus provides no authority or jurisdiction to the Secretary to deny a permit to construct a new source of such emissions.

B. The Denial Order is invalid because the Secretary has engaged in an unlawful procedure, in that the Secretary’s reliance on Section 3012 to deny Sunflower’s Application constitutes de facto rulemaking without compliance with proper rulemaking procedures.

C. The Denial Order is invalid because (a) the Secretary has engaged in an unlawful procedure and decision making, and (b) the Secretary’s issuance of the Denial Order is unconstitutional, in that it denied Sunflower its procedural due process rights under the United States and Kansas constitutions, as follows:

1. The Secretary failed to provide Sunflower any notice of his intent to consider Section 3012 in taking final action on Sunflower’s Application.

2. The Secretary failed to provide Sunflower any opportunity to be heard concerning his consideration of Section 3012 in taking final action on Sunflower’s Application.

3. The Secretary failed to provide Sunflower any notice of any decisional standard or criteria that Sunflower must satisfy to obtain the permit sought or any notice of the process by which the Secretary would consider Section 3012 in taking final action

on Sunflower's Application; nor has the Secretary at any time articulated any such decisional standard, criteria or process.

4. The Secretary failed to support the Denial Order with findings of fact or to relate his "findings" to decision making criteria that are objective, ascertainable, and applied consistently and uniformly.

5. The Secretary failed to provide Sunflower any opportunity to respond to the Denial Order prior to it becoming effective.

D. The Denial Order is invalid because it is based upon purported determinations of fact that are not supported by evidence that is substantial when viewed in light of the record as a whole, in that the Denial Order contains no factual determination that emissions of carbon dioxide from the proposed Power Plants will cause a substantial endangerment to the health of persons or to the environment; and there is no substantial evidence in the record to support such a factual determination.

E. The Denial Order is invalid because the Secretary's issuance of the Denial Order is unconstitutional, in that it prohibits the potential emissions of carbon dioxide from the proposed Power Plants when those emissions are much less than aggregate carbon dioxide emissions from existing permitted sources and from newly permitted sources in Kansas and thereby denies Sunflower's right to equal protection under the law under the United States and Kansas Constitutions.

F. For each and all of the foregoing reasons, the Denial Order is invalid because its issuance was unreasonable, arbitrary, capricious, and contrary to law.

REQUEST FOR RELIEF

For the reasons stated above, Sunflower respectfully requests the Court to grant this Petition, to vacate the Denial Order on some or all of the grounds set forth above, to remand this

matter to the Secretary with instructions to issue the Final Permit on the grounds that all discretion available to the Secretary has been exercised, and to grant it all further appropriate relief.

Dated: November 16, 2007

Respectfully submitted,

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**ATTORNEYS FOR PETITIONER,
SUNFLOWER ELECTRIC POWER
CORPORATION**

EXHIBIT A

CERTIFICATE OF SERVICE

Copies of the foregoing **Petition For Judicial Review Of Kansas Department Of Health And Environment Denial Of Permit Application Under K.S.A. § 65-3012(a)** have been served via United States mail, facsimile, and e-mail, this 16th day of November, 2007, upon:

Roderick L. Bremby
Secretary, Kansas Department of Health and Environment
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Topeka, Kansas 66612-1368
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