



# Sierra Club

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*Kansas Chapter Agriculture Committee*  
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December 21, 2017      Certified Mail - Return Receipt Requested

John Mitchell, Dir. Of Environment  
KDHE  
1000 SW Jackson St. Su 420  
Topeka, Ks. 66612-1367

Subj: Petition for Reconsideration

- a. Husky Hogs, LLC, A-URPL-H007, & Federal permit: KS0094501
- b. Prairie Dog Pork, LLC, A-URPL-H010 & Federal permit: KS0101249

Dear Director Mitchell,

This is a petition pursuant to K.A.R. 28-16-62(g) for reconsideration of your decision to issue permits effective December 11, 2017 to the subject site(s) in Phillips County, Kansas. This petition applies to the subject permits and sites both individually and collectively, as the Sierra Club disputes that these two sites are actually separate operations.<sup>1</sup>

We are presenting this petition on behalf of Sierra Club members, and residents of Norton and Phillips Co. as described in our comments submitted to KDHE dated September 12, 2017 and December 5, 2017 that are hereby incorporated into this petition. In addition, in reference to KDHE's response to commenters dated Dec. 11, 2017, we are providing additional information to advise that these permits were improperly formulated and issued. Accordingly, the relief we now seek is revocation or termination of the permits.

**1. KDHE decision conflicts with statutes.** In their response to comments, KDHE failed to acknowledge or address K.S.A. 65-171d, K.S.A. 65-1,194 and K.S.A. 65-1,180 that clearly specify that swine producers who desire to confine more than 3724 animal units must meet a greater setback distance to habitable structures and to surface water. KDHE merely cites a regulation and their interpretation of LLC legal structures that places them in conflict with the statutes cited above. KDHE claims the subject operations meet the applicable setbacks only because KDHE assumes the two operations are separate.

**2. Failure to consider the preponderance of evidence disputing separate ownership.**

In our comment dated December 5, we listed the following ways that the paper-creation of different legal entities (LLC's) does not actually result in separate *ownership & control*. These facts are more relevant to the applicable statutes than whether the waste streams are handled separately.

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<sup>1</sup> This petition for reconsideration incorporates by reference Sierra Club's comments of September 12, 2017, and December 5, 2017, regarding the subject sites.

- a. The applicant for both entities is the same;
- b. Terry Nelson's daughter-in-law, Julia Nelson, specifies that she owns Prairie Dog Pork, LLC. *KDHE failed to acknowledge this critical point in their response to comments.*
- c. Terry Nelson signed over as a gift to Julia, a piece of Husky Hogs, LLC, surrounding the existing buildings designated as Prairie Dog Pork (*also not addressed by KDHE*);
- d. Julia signed the Nutrient Management Plan as "Owner/Operator."
- e. Both sites have the same physical address;
- f. Both sites are described variously as in the same location (Section 34);
- g. The buildings for both sites are intimately intermingled because they are being carved out of an existing operation of identical purpose (swine breeding);

To this list we will now add an even more important piece of evidence disclosed in KDHE's response to comments (see issue 12 of Prairie Dog Pork response):

- h. Husky Hogs, LLC will *own the swine in both sites and will actually operate the Prairie Dog Pork site.*

KDHE's response that the legislature does not direct them to investigate members or managers of (LLC) applicants, nor seek the operating agreements of the LLC's is an evasion of the duty to collect the necessary information to ensure that facts relevant to protections of air and water specified by the legislature are properly evaluated. Together with the adjacent Prairie Valley Feeders operation it is clear that all of these operations are closely integrated, owned and operated by the Nelson Family.

KDHE's claim of separate ownership hangs on the slender thread of their citation of a regulation and their interpretation of the character of LLC's, that together conflict with several statutes. From the foregoing, KDHE's claim is opposed with overwhelming evidence that this scheme is a legal fiction whose express purpose is to evade statutory requirements intended by the legislature for greater protection of neighbors and surface waters near large swine operations. Further, KDHE also failed to respond to our comment citing EPA's position that family-owned operations are considered under common ownership.

KDHE also failed to respond to our assertion that the decision in this case will create an enormous negative precedent that will allow numerous swine operators statewide to expand to much larger operations without providing the additional protections specified by the legislature in 1998. More rural Kansans will be subjected to health impacts from air emissions from these sites as described in the Kansas Health Institute's 2015 report referred to in our letter of September 12, 2017, and more of the state's surface waters will be at risk.

### **3. Operational separation.**

KDHE's responses to some of our issues pertaining to operational separation were inaccurate or insufficient.

- a. *Swine ownership.* Regarding Issue 12 in the Prairie Dog Pork Response to comments, KDHE says an executed contract is not required when the swine operator of the facility owns the swine

at the facility, which we now know is Husky Hogs. That conflicts with Standard Condition No. 31 of the draft permit that says, "Whenever the permittee does not own all of the swine at the facility, the permittee shall provide the department a copy of the executed contract with the owner of the swine that specifies responsibility for the management of the swine or other process wastes." The permittee is Julia Nelson who does not own the hogs. Husky Hogs, LLC does. Thus the contract is required in this case.

b. *Sharing of yard spaces.* KDHE says spillage of wastes from Husky Hogs in the driveway owned by Prairie Dog Pork would constitute a discharge. OK, this discharge would in some cases run off into the areas between the berms of the PDP and HH lagoons. EPA says an AFO "production area" includes the waste containment area (distinct from the manure storage area) that includes the "areas within berms and diversions which separate uncontaminated stormwater." (cited in CAFO Permit Writers' manual as 40 CFR 122.23(b)(8)). Thus a discharge from the HH production area could flow into the PDP production area. Not only is that a transfer, but who is responsible for reporting this to KDHE and who would be subject to enforcement? The PDP and HH operating agreement might shed light on this and other relevant aspects of the relationship between them. While disclosure of this operating agreement may not be required, as noted by KDHE staff in its response, it is information the Secretary may require under K.S.A. 65-166.<sup>2</sup> The failure to obtain the operating agreement and determine whether it further informs the agency's view that the PDP and HH are entitled to an exemption from the applicable separation requirements constitutes a material error by omission.

c. *Dead animal handling.* The point of our comment was to assess the separation or lack thereof between the two operations. KDHE did not specify in their response *where* the dead animals would be staged at each site for pick up for composting at a third location. It is not noted on the plan view. K.A.R. 28-18-17(b)(2) states the dead animal handling plan should include "the method of and location or locations at the facility to be utilized for temporary storage of the swine carcasses." Given the extreme close proximity between these operations, and unless otherwise established, it can be assumed the operators will use the same means and location to stage the dead animals for pickup, further evidence that these two sites are not really separate. If dead animals cannot be sold for processing as meat, and KDHE says they are not process waste, then what kind of waste are they?

d. *Sharing of application fields.* KDHE responded that the Mr. Nelson's Prairie Valley Feeder's operation has removed from its nutrient management plan (NMP) the application fields listed in the NMP's of the subject sites. Did KDHE verify that this was done before or after any waste was applied to these fields in 2017? If so, how did they verify this fact?

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2. K.S.A. 65-166 states "It is required of public authorities having by law the charge of the sewer system of any municipality, township, county, or legally constituted sewer district, and of each and every person, company, corporation, institution, municipality, or federal agency, that upon making application for a permit to discharge sewage into any waters of the state, or the extension of any sewer system, the application shall be accompanied by plans and specifications for the construction of the sewage collection systems and/or sewage treatment or disposal facilities, and any additional facts and information as the secretary of health and environment may require to determine adequate protection of the public health of the state and the beneficial uses of waters of the state." (Emphasis added.)

#### 4. Failure to prevent degradation of water quality in Prairie Dog Creek.

This section covers KDHE response Issues 3 - 9 for both sites. KDHE failed to address the intent of the aforementioned Kansas statute requiring a 500 foot setback to surface water that recognizes a greater risk of pollution from large swine operation exceeding 3724 animal units, about 9300 hogs over 55 pounds of weight. KDHE acknowledges that nutrients such as phosphorus and nitrogen cause water quality impairments. However they dismiss our concerns because there are many sources of such pollutants.

That claim is disingenuous because we are dealing here with a very large, known and specific increase in waste loading to the area along Prairie Dog Creek. If all of Mr. Nelson's registrations are built out, there will be 87,000 more hogs of various sizes confined along the creek. KDHE justifies their decision to allow this large expansion of hogs entirely on the efficacy of nutrient management plans. It is well known that nutrient utilization plans do not prevent all nutrients from escaping impoundments and waste application fields. As we noted, a runoff incident occurred in October of this year from one of Mr. Nelson's fields near the subject site. Recent research shows an increase in pig waste markers downstream of hog CAFOs in North Carolina indicating that NMFs do not prevent pollution of streams near where waste is applied to fields.<sup>3</sup>

KDHE does not deny that air emission and deposition of ammonia-N occurs near swine CAFOs but merely denies they have jurisdiction in this context. That is true, but our reason for citing this element was to show that it is impossible in this setting to prevent additional nutrient loading to Prairie Dog Creek that will affect downstream water bodies.

KDHE acknowledges that the new Prairie Dog Pork waste lagoon will be allowed to leak at a rate of 0.1 inch per day, or about 3 feet per year, over shallow, sensitive, alluvial groundwater that is already polluted. In the response to issue no. 8, KDHE mischaracterizes our comment that "there are so many potential sources" knowing full well we are referring only to the numerous lagoons, runoff impoundments and waste application fields at or very near the subject site, all owned and operated by the Nelson Family. KDHE cites groundwater monitoring as a means of prevention of further degradation of the creek and its alluvial aquifer, but over the past 18 years KDHE has never required any actual remediation in response to regular readings in excess of the 10 mg/l standard.

In the case of the new Prairie Dog Pork waste lagoon, KDHE had the option of not acceding to Mr. Nelson's plan to evade the statute requiring a 500-foot setback from Prairie Dog Creek. Alternately, KDHE could cite the poor conditions in surface and groundwater and have required Mr. Nelson to use an impermeable synthetic liner to essentially eliminate any discharge to groundwater. The *Cow Palace* case was presented as further evidence that lagoon seepage is, especially in this case of shallow, alluvial aquifer, a discharge that will cause further degradation.

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3. C. Heaney, K. Myers, S. Wing, D. Hall, D. Baron, & J. Stewart, *Source tracking swine fecal waste in surface water proximal to swine concentrated animal feeding operations*, *Sci. Total Environ.* 2015 April 1; 511: 676–683.

Taken in aggregate it is clear that KDHE, in their wish to accommodate Mr. Nelson, has failed in its duty to prevent further degradation of an impaired water body as specified in the agency's own anti-degradation policy which is a matter of both state law and the federal Clean Water Act that KDHE is supposed to be administering.

**5. Applicant failed to establish groundwater level under lagoon.** KDHE does not deny that the applicant did not notify them two days in advance of the geological investigation. That is a violation of K.A.R. 28-18a-33(c). This regulation does not give the applicant or KDHE discretion to ignore it regardless of how KDHE might have responded.

The regulation refers to "lowest elevation of the finished interior grade of the swine waste-retention lagoon . . ." This is not a single point. Rather, it is a plane of points comprising the bottoms of the two stages widely separated from each other. Pollution from the point farthest from Test Hole 5 is just as likely to enter the groundwater as the closest.

The farther point is almost two football fields away from TH-5 that the applicant relied upon. It appears that the applicant's engineer or contractor, who was using a truck hoe out of convenience, went far to the east (TH-5) of the actual location of the retention structure, because that location was downhill by about seven feet in elevation. He could have gotten the precise measurement by using a well drilling apparatus beside the actual location of the lagoon bottoms. Perhaps if KDHE had been consulted as required, staff could have evaluated the situation and ordered the correct procedure.

KDHE attempts to defend itself by citing design standards allowing an applicant to use groundwater wells in the vicinity to establish the static water level on a case-by-case basis. This is irrelevant in this case because the applicant used a truck hoe instead. If he had, for example, used data from his up-gradient monitoring well, which is closer to the southwest corner of the stage-one lagoon bottom than TH-5, he would have discovered that the average static water level over the past nine years of monitoring is 2072.7 with little variation. *This is only about 6 feet below the lagoon bottom elevation.* Thus, KDHE has allowed the applicant to violate regulations in this case without evidence or reasonable justification.

Based on the foregoing abundance of evidence we respectfully request that KDHE revoke both of the subject permits.

Sincerely,

Craig S. Volland, Chair  
Agriculture Committee  
Kansas Chapter, Sierra Club