

ENVIRONMENTAL LAW CREEPS INTO KANSAS: A  
COMMENTARY ON THE *CONCERNED CITIZENS*  
*UNITED SUIT*†

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Environmental law as a discrete discipline is a phenomenon of the past decade. In that brief evolutionary period, a voluminous body of law has grown up around the areas of air pollution regulation, water pollution regulation, national environmental policy, and a wide variety of other subjects often termed "environmental." Aside from the legal areas specified, it is unlikely that any general consensus as to what is or should be included under the semantic umbrella of "environmental law" is possible, except perhaps that it, like beauty, is in the eye of the beholder.<sup>1</sup> One salient feature of environmental law, in whatever areas it is effective, is that it is now a federal system of regulation in which the states play a subservient role. Because state and local governments have historically been unable or unwilling to attempt effective abatement of the environmental evils often associated with increasing development, the federal government has gradually assumed dominance in all but the enforcement phases, while hypocritically maintaining that the states retain the primary responsibilities.<sup>2</sup> As a consequence, virtually all important regulatory decisions are made in Washington, and state agencies are expected to dance to the federal tune. However appalling to those of conservative bent, it is clear that without federal interference, environmental pollution would continue to increase while states competed for new industrial development.

If there were no mandatory federal regulations, Kansas, among other states, would have little or no environmental law. The Kansas Legislature pays lip service but few monies to environmental betterment while encouraging economic development. The State's environmental statutes were enacted

† The word "creeps" in the title means not only "snail's pace," a fair description of the rate at which environmental law in the State of Kansas has advanced, it is also one of the words frequently used by opponents of environmental progress to describe the vocal proponents, and vice versa. CREEP, as the popular acronym for the Committee to Re-Elect the President, has entered the language as a symbol of much of what is wrong with our political and administrative systems. Those difficulties are nowhere more pervasive than in the field of environmental control.

The conclusions expressed herein are solely those of the authors. This survey does not pretend to be a product of unalloyed "objectivity"; our predilection in favor of environmental quality is the starting point, not the conclusion, of this Article.

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<sup>1</sup> The newest—and best—treatise in the area, *FEDERAL ENVIRONMENTAL LAW* (E. Dolgin & T. Guilbert, eds. 1974) [hereinafter cited as *FEDERAL ENVIRONMENTAL LAW*], includes topics such as wildlife preservation, coastal development, energy jurisdiction, radiation, noise, historic preservation, and population control, in addition to the standard areas recited.

<sup>2</sup> E.g., Federal Water Pollution Control Act of 1972 § 101(b), 33 U.S.C. § 1251(b) (Supp. III, 1973) [hereinafter cited as *FWPCA*]. Again the reader is referred generally to *FEDERAL ENVIRONMENTAL LAW*, *supra* note 1, in its 1,600 page entirety as illustrative and more.

largely in response to parallel federal legislation, and Kansas administrators have largely circumvented any stringent legal requirements by exercising their discretion uniformly in favor of polluters.<sup>3</sup> Implementation of federal mandates by the Environmental Protection Agency (EPA) has to some extent brought the state regulatory structure into line with uniform national requirements, but many state officials remain less than ardent in the pursuit of environmental quality. Perhaps the new head of the Kansas Department of Health and Environment<sup>4</sup> will reverse this tendency in time, but no impetus for environmental improvement from the Governor's office, past or present, has been observable. The Governor's Advisory Council on Ecology has declined a leadership role in favor of wrangling over office space.<sup>5</sup>

I. *Concerned Citizens United, Inc. v. Kansas Power & Light Co.*:  
THE CUTTING EDGE OF THE LAW

By curious coincidence, virtually all of the disparate elements usually associated with the quasi-discipline of environmental law momentarily coalesced in one recent Kansas lawsuit before dissolving into unrecognizable fragments on June 15, 1974, when the Kansas Supreme Court handed down its decision in *Concerned Citizens United, Inc. v. Kansas Power & Light Co.*<sup>6</sup> (*CCU v. KPL*). The *CCU* lawsuit had its origins in KPL's announcement a year before stating its intention to construct an "Energy Center" which was to consist of four coal-fired generating units of 680 megawatt capacity each on a total of 12,800 acres of land in Pottawatomie County, north of Belvue. *CCU* was a group of landowners and other interested persons from that area who contended generally that the land KPL sought to acquire was better used for agriculture, and that the environmental damage that the Energy Center would cause outweighed the advantages of increased power generation. Plaintiffs alleged in their suit that KPL failed to conduct adequate studies before deciding to purchase or condemn the land, that the requisite state and federal permits could not be obtained by KPL on the known facts and law, that the county zoning regulations then in effect forbade construction, and thus that KPL should be enjoined from taking the lands unless and until the studies were done and the permits were obtained.<sup>7</sup> The Pottawatomie County District Court after trial found for KPL on all major issues of law

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<sup>3</sup> See generally Coggins, *Regulation of Air and Water Quality in Kansas: A Critical Look at Legislative Ambiguity and Administrative Discretion*, 21 KAN. L. REV. 1 (1972) [hereinafter cited as Coggins].

<sup>4</sup> As part of Governor Docking's governmental reorganization, the Kansas State Board of Health was replaced by a Secretary, and the Kansas Department of Health became the cabinet level Department of Health and Environment. KAN. STAT. ANN. § 75-5601 (Supp. 1974). The new Secretary, Dwight Metzler, was appointed by Governor Docking and has been retained by Governor Bennett. Hopefully, Mr. Metzler's ability and experience will markedly improve the hitherto hapless performance in the environmental division of the Department.

<sup>5</sup> See ADVISORY COUNCIL ON ECOLOGY, FOURTH ANNUAL REPORT (1973).

<sup>6</sup> 215 Kan. 218, 523 P.2d 755 (1974).

<sup>7</sup> Petition for Injunctive Relief, No. 11,213 (Pottawatomie County Dist. Ct., filed Oct. 29, 1973).

and fact.<sup>8</sup> The Kansas Supreme Court treated the controversy on appeal as a run-of-the-mill eminent domain squabble and affirmed.<sup>9</sup>

Although, as counsel for defendant noted subsequently, the Kansas Supreme Court's decision is right because it is final, the litigation may not be over if plaintiffs choose to press their claims in other courts. In this situation most of the main issues involved federal law, for which a federal court may ultimately be the arbiter; the decision thus has true finality only as to the state condemnation law issues. Nevertheless, this decision may have ended this particular controversy as a practical matter if these plaintiffs, like most others similarly situated, lack the financial and other resources to continue the battle. In some senses, this Article is intended to be a critical evaluation of the supreme court's decision, not because of the inherent importance of the decision, which is considerable, but because the factual situation may properly serve as the vehicle to survey, broadly and shallowly, the present state of environmental law as it affects Kansas.

Problems involving air and water pollution, environmental policy, solid waste disposal, energy policies, and land use planning, among others, were inherent in or tangentially related to the *CCU* lawsuit. Many such issues were not raised, and of those raised, few were decided. The Kansas Supreme Court decided only that KPL would not be enjoined because it had not abused its discretion. The court opined further that should it prove impossible for KPL to construct the plant, the landowner plaintiffs would then have a right to "reclaim full title" to the property.<sup>10</sup> The issue of condemnation, to which the court devoted the bulk of its opinion, will be treated herein only as a facet of more general land use policy. For the purpose of introducing environmental law developments generally, the other decided, undecided, and potential issues are more important. Before proceeding to the law, it is necessary to recite briefly the facts known about the proposed KPL facility, with particular attention to the environmental information available to the parties and courts.

Assuming the KPL Energy Center is ultimately completed, it will be the largest and most expensive project in the history of Kansas, and one of the largest generating complexes in the country, even without contemplated additions.<sup>11</sup> Its estimated cost two years ago was around three-quarters of a billion dollars. The facilities on the 12,800 acre (20 square mile) site, now

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<sup>8</sup> The trial court's memorandum decision is appended to the supreme court's opinion, 215 Kan. 218, 243-51, 523 P.2d 755, 774-80 (1974).

<sup>9</sup> *Id.* at 218, 523 P.2d at 756.

<sup>10</sup> *Id.* at 243, 523 P.2d at 773.

<sup>11</sup> The statement of facts is a summary of KPL's proposals as found by the trial court. *See* 215 Kan. at 243-50, 523 P.2d at 774-80. Because the Brief of Appellee KPL was limited to general conclusions regarding the facts, however, evidentiary citations will be to Appellants' Brief and the transcript (Tr.) or record (R.). It should be noted that despite its paucity of detail, a large part of KPL's brief was used verbatim in the supreme court's decision, not only as to factual recitation, but also as to the issues and the law. In light of the frequent injunctions from appellate to trial courts not to use one party's proposed findings and conclusions, but to decide independently, the practice of adopting verbatim a large part of one litigant's brief as the court's decision appears anomalous.

entirely zoned "agricultural," will consist of four conventional coal-burning units, which will produce steam to generate electricity, together with several 600 foot smokestacks and cooling towers.<sup>12</sup> The four units will burn eight million tons of coal annually, or 220 million tons during the life of KPL's present contract, and will use 25,000 gallons of water per minute (40,000 acre-feet per year).<sup>13</sup> Transportation facilities will include a railroad spur line and handling and storage areas for bringing the coal in, and substations, transformers, and transmission lines for taking the electricity out. In addition, KPL contemplates an 800 acre ash storage landfill, a 3,000 acre reservoir, percolating wells, and, eventually, water intake structures in the Kansas River. An unresolved question is whether a nuclear generating facility will be built on the site: one of KPL's required site criteria was that a capacity for a nuclear plant be included, and the company originally announced that such a prospect was contemplated. Later, at trial, KPL said only that it had no present intention of constructing an atomic plant, while carefully refraining from ruling out the possibility. Plaintiffs surmised that KPL would wait to see if "breeder" reactors were commercially feasible,<sup>14</sup> but both courts deemed the subject unworthy of consideration.<sup>15</sup>

KPL's proposal on its face raises serious environmental questions including those relating to criteria for plant site selection, effects on air and water quality, growth and development issues, transportation policy, and so forth. KPL had publicly claimed that it had conducted a "comprehensive environmental . . . impact study . . . according to" EPA guidelines.<sup>16</sup> At trial, it was admitted that no such study had been conducted,<sup>17</sup> and it was clear that there were few definitive answers available to the questions raised.

Much of plaintiffs' evidence, drawn largely from KPL's personnel and hired consultants, was introduced in an effort to establish the effects on overall environmental quality to be caused by the construction and operation of the Energy Center, and to forecast whether those effects would be within or without relevant legal standards. The record indicates that CCU's evidence

<sup>12</sup> Appellants' Brief at 2.

<sup>13</sup> *Id.* It is interesting to note that KPL placed great reliance on the fact that it would burn only "low sulphur" western coal. A recent government study asserts that, because such coal produces fewer BTUs per pound, the increased amount of coal necessary to produce equivalent energy would result in more air pollution than if higher sulphur content coal was burned. See U.S. GEOL. SURVEY, PRELIMINARY REPORT ON COAL DRILL-HOLE DATA AND CHEMICAL ANALYSES OF COAL BEDS IN CAMPBELL COUNTY, WYOMING, discussed in 59 SIERRA CLUB BULL. No. 10, at 21-22 (Nov. 1974).

<sup>14</sup> For a description of the breeder reactor program see Scientists' Institute for Pub. Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973).

<sup>15</sup> 215 Kan. at 222, 245, 523 P.2d at 759, 775 (Finding 15).

<sup>16</sup> That statement appeared in a KPL public relations pamphlet which was introduced into evidence as Plaintiffs' Exhibit 9. See Appellants' Brief at 17.

<sup>17</sup> Trial Court Finding 43, 215 Kan. at 249, 523 P.2d at 755. The circumstances surrounding KPL's alleged environmental study do not reflect favorably on KPL's professed dedication to environmental quality. It came out at trial that the "study" consisted of one half-day field trip by car to the site and a little cursory biological research. Dr. Marzolf, the expert retained by KPL's consulting engineering firm, testified that he was given no time or resources, that anything resembling an adequate environmental appraisal was impossible in the circumstances, and that he did not consider his work an adequate study, much less a true environmental impact statement. Dr. Marzolf's limited contribution was the only "study" of that kind conducted. R. at 169-71 (testimony of Dr. Marzolf).

was far less than absolutely conclusive, but, unfortunately, KPL chose to respond not with evidence or studies but rather with statements of good intention, "concepts," and generalities, with the limited exception in the air pollution area. The lack of detail offered by KPL, while establishing that KPL had not actually conducted the environmental impact study it had announced, was disregarded for the most part by the reviewing courts. A good example of the lack of conclusive evidence and consequent judicial diffuseness is provided by the set of issues surrounding the effect of KPL's installations on the quality of the State's waters.

Questions raised by plaintiffs relating to water quality were effectively blunted by KPL's sudden changes from its prior statements and position. Before trial, the utility had stated that it would take its water requirements from the Kansas River, use the water to sluice the ash from the burners into a settling pond, among other things, and return the used water to the river from whence it came.<sup>18</sup> As to this plan, it became evident at trial that KPL had not compiled or analyzed reliable or detailed data on: whether the withdrawal of its contemplated enormous volume of water would adversely affect the requirements of downstream users; whether the used water would contain pollutants, as it almost certainly would, or which pollutants in what amounts; whether the use of that volume of water would further pollute the river by reducing stream flow and dilution; whether, after discharge, the river would be within the water quality criteria issued for it;<sup>19</sup> or whether the river would be a hazard to or have an effect upon human, plant, or aquatic life or river use, and if so, what effect.<sup>20</sup>

In the interim between announcement and trial, KPL had become aware that if it either took water directly from the Kansas River or discharged wastewater into it, it would have been required to do the studies necessary to compile the information required for an environmental impact statement<sup>21</sup> (which KPL claimed to have already prepared) pursuant to the National Environmental Policy Act of 1969 (NEPA).<sup>22</sup> At trial, KPL for the first time stated that it would not take water from the Kansas River; instead, it would first dig percolating wells near the Kansas River and later build intake structures in the river. This was a curious conclusion by itself, but was even more curious inasmuch as the report by KPL's consultant had concluded that the Kansas River was the only feasible source of the necessary water volume.<sup>23</sup> After this apparent attempt to circumvent environmental studies related to water intake, KPL also

<sup>18</sup> See Plaintiffs' Exhibits 1, 11, and 15 (all documents compiled by KPL or its consultants); Appellants' Brief at 33.

<sup>19</sup> Water quality criteria define generally what the quality of water in the State's major river basins should be in terms of bacteria, scum, color, and so forth. KAN. ADMIN. REG. §§ 28-16-11 *et seq.* (1972). See Coggins, *supra* note 3, at 16-18.

<sup>20</sup> R. at 82 (testimony of Mr. Miller, KPL official).

<sup>21</sup> That conclusion was contained in a letter to KPL from the Army Corps of Engineers dated July 18, 1973, which was Plaintiffs' Exhibit 12.

<sup>22</sup> 42 U.S.C. §§ 4321 *et seq.* (1970). The impact statement requirement is discussed at Section VI. *infra*.

<sup>23</sup> Plaintiffs' Exhibit 15, Tr. at 16, 54. No other study of the problem was made.

came up with a method to avoid such studies relating to water discharge: we have adopted, KPL announced at trial, a concept of zero discharge, and, as zero discharge will obviously have no ill effects, no further studies need be conducted.<sup>24</sup> Thereafter, KPL personnel were forced to admit that their "concept" was only that. They had, in short, no plans or even definite ideas as to how that laudable goal was to be accomplished.<sup>25</sup> Since the sluiced coal ash contains traces of many harmful metals and chemicals, the human tolerance for which is not known, and since the volume of water to be used will not just disappear, KPL's "promise" to seal in some unknown manner the bottom of its settling pond, the only bit of specificity offered to support its "concept," certainly does little to dispel reasonable doubt.

The other main environmental questions involved in the construction and operation of the Energy Center were either ignored or accorded a similar post hoc justification. From the record, some observers, after discounting the proffered generalities, might be left with the impression that KPL made its decision solely on an economic basis, expressed in terms of "feasibility," and then asked its consultants to prepare a plausible, nonfactual environmental justification.

The reviewing courts did not, however, see the issues in that light. Instead, both the district court and the supreme court likened KPL to a public official whose actions are presumed regular, placed the burden of proof on plaintiffs to show that there was no reasonable probability that the relevant permits would be granted, and accepted virtually all of defendant's contentions and proof. As to the water quality and water usage issues, both courts accepted KPL's vague assurances that a zero discharge concept or system would be instituted and devoted no more discussion to that problem.<sup>26</sup> As to condemnation, the courts held that zoning changes and environmental and other permits were not conditions precedent to the exercise of the eminent domain power. Both courts further found that the taking of 12,800 acres was reasonably necessary to accomplish the lawful corporate purposes of KPL and that in the absence of fraud or bad faith, the only question presented was whether KPL abused its discretion. Both courts found it had not.<sup>27</sup> As to site location and environmental studies issues, the trial court specifically found that no in-depth environmental study was completed but that KPL could rely on its consultants' experience and expertise in the area.<sup>28</sup> Despite this finding by

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<sup>24</sup> Under FWPCA § 511(c)(1), 33 U.S.C. § 1371(c)(1) (Supp. III, 1973), impact statements are required for significant new water pollution sources. See generally Section III, *infra*; FEDERAL ENVIRONMENTAL LAW, *supra* note 1, at 772.

<sup>25</sup> R. at 32-33 (testimony of Mr. Jeffrey, KPL President).

<sup>26</sup> 215 Kan. at 223, 250, 523 P.2d at 760, 779 (Finding of Fact 48). The question of nuclear development was similarly decided. *Id.* at 221-22, 245, 523 P.2d at 759, 775 (Finding of Fact 15).

<sup>27</sup> *Id.* at 229-39, 251, 523 P.2d at 764-71, 780 (Conclusion of Law 9). A bill recently passed by the Kansas Senate (S.B. 60) would alter this situation by "requiring public utilities to obtain a Kansas Corporation Commission permit before beginning site preparation for a power plant." The Kansas City Times, Mar. 13, 1975, § C, at 18, col. 1. Additionally, a "public utility's right to eminent domain could not be exercised for the purpose of acquiring land for a plant site without the permit." *Id.*

<sup>28</sup> 215 Kan. at 249, 523 P.2d at 779.

the lower court, the supreme court stated that the issue had been raised for the first time on appeal and was in any event immaterial.<sup>29</sup> Neither court discussed the solid waste issue: that is, where will the ash and other waste materials ultimately go? Both courts devoted much of their respective discussions to the question of the effects of the Energy Center on air quality, and both courts accepted defendant's promises of compliance with the relevant standards, over plaintiffs' evidence indicating the improbability of compliance with ambient air standards.

By failing to distinguish between public and private condemners, the supreme court has unnecessarily imposed undue burdens on threatened landowners. By failing to grasp the essence of federal pollution control requirements, the court has postponed an inevitable environmental evaluation to the detriment of both the parties and the public. Most importantly, by failing to require KPL to show an adequate program of studies, investigation, and rational decision making, the court has rubber-stamped the same sort of unthinking "progress" which has already meant nationwide environmental degradation. This result came about in part because of the court's implicit view that this was an ordinary lawsuit in which all normal rules and presumptions apply. In fact, where litigation is tinged with public interest considerations to the extent of the *CCU* suit, an honest appraisal of the realities of such litigation would have indicated that plaintiffs' severe initial disadvantages should have received a somewhat more sympathetic hearing. Before proceeding to the substance of environmental law, the realities of environmental law and litigation should be taken into account.

## II. THE REALITIES OF ENVIRONMENTAL LITIGATION

There has been relatively little environmental litigation in Kansas,<sup>30</sup> per-

<sup>29</sup> *Id.* at 236, 523 P.2d at 769.

<sup>30</sup> The dearth of environmental litigation in Kansas might suggest an unawareness on the part of local lawyers regarding relief available for clients in various situations. Certainly the growing volume of such lawsuits elsewhere in the country indicates that it is only a matter of time before the applicable law is better understood, and more people begin to take advantage of it. At present, however, there is a decided lack of environmental specialization or expertise on the part of Kansas lawyers; the authors do not know of a single practitioner in the entire state who specializes in such cases, with the possible exception of a few anonymous corporate counsel. This lack is explainable by the hitherto low volume of legal business, but it is difficult to decide which factor is the chicken and which the egg.

The arguably environmental cases brought or decided in Kansas are too few for real categorization. The most significant environmental question ever to arise in Kansas has not been decided. A suit was prepared to contest the legality of siting the nation's nuclear waste repository in Lyons, Kansas, but the suit was never filed because the AEC dropped the proposal in face of vociferous political opposition. The most legally important case, resulting in a series of decisions, was brought for rather nakedly economic reasons. A group of helium-producing companies sued to delay the termination of the federal government's helium purchasing program, alleging that the Secretary of the Interior was required to draft an environmental impact statement before so terminating. The United States District Court for the District of Kansas and the Tenth Circuit Court of Appeals agreed, *National Helium Corp. v. Morton*, 455 F.2d 650 (10th Cir.), *aff'g* 326 F. Supp. 151 (D. Kan. 1971) (*National Helium I*), and the Secretary attempted to comply. The district court then twice found the EIS insufficient, but the Tenth Circuit on appeal finally decided that Interior had done as well as it could. *National Helium Corp. v. Morton*, 486 F.2d 995 (10th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974) (*National Helium II*). Conservation was involved in that the helium would likely be wasted if not purchased and stored by the Government, but the true significance of the litigation may be surmised from the fact that the companies suing sold tens of millions of dollars worth of the gas in the several years the lawsuit was pending. In another

haps because it is not the same as ordinary business or tort litigation. Almost inevitably an environmental claim comes about as the result of semi-organized citizen dissatisfaction with governmental or business decision making, frequently in part because the citizen plaintiffs were unable to make their voices heard or have their opinions taken into account in the administrative process. In nearly every case, the plaintiffs are either private individuals, loosely banded together into an organizational plaintiff, who believe that the decision in question will adversely affect them or the noneconomic values that they purport

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case also involving a Kansas company, one of the very few water pollution prosecutions ever attempted here, the company succeeded in arguing for an unwarrantedly restrictive reading of the Refuse Act, 33 U.S.C. § 407 (1970), by the district court. *United States v. Hercules Powder Co.*, 335 F. Supp. 102 (D. Kan. 1971).

People have not generally fared as well as corporations. Johnson County citizens' groups objecting to the proposed Switzer By-Pass through their residential neighborhood saw the summary judgment entered against their claims upheld by the Tenth Circuit. *Citizens Environmental Council v. Volpe*, 484 F.2d 870 (10th Cir. 1973), *cert. denied sub nom. Citizens Environmental Council v. Brinegar*, 416 U.S. 936 (1974). The only noteworthy aspect of that case was the failure of plaintiffs to conduct discovery early on; when they later attempted to elicit the facts from defendants, their discovery was barred by a local rule. See the district court opinion, 364 F. Supp. 286 (D. Kan. 1973). Still pending is a suit against the "unfederal" Winfield to Galena turnpike; plaintiffs claim that construction without EPA indirect source air pollution review will violate the Clean Air Act. Correspondence with Robert J. O'Connor, attorney for plaintiffs, in Wichita, Sept. 18, 1974. Whether state construction of another toll road in that little traveled area is a prudent venture may be gauged by the fact that the existing Kansas Turnpike from Kansas City to Topeka to Wichita and beyond incurred a sizable deficit in 1974. See *Lawrence Journal-World*, Feb. 18, 1975, at 1, col. 1. Other plaintiffs, comprised mostly of affected landowners facing condemnation, have sued the Army Corps of Engineers to stop the construction of the Hillsdale Dam near Paola. Their claims involve intricacies of the Federal Water Pollution Control Act, *see text* beginning at note 114 *infra*, as well as the standard NEPA claims and the prediction that much of the impounded area will be mudflats much of the year. *Save Our Invaluable Land, Inc. v. Needham*, No. 74-208-C5 (D. Kan., filed Oct. 20, 1974). As in the *CCU* case, plaintiffs retained an out-of-state lawyer with environmental experience: Arthur Benson of Kansas City, Missouri, also litigated the Truman Dam dispute. *See Environmental Defense Fund, Inc. v. Calloway*, 497 F.2d 1340 (8th Cir. 1974). Ranchers in Chase and Marion Counties have been fighting the Cedar Point Dam proposal tooth and hoof, but whether that controversy will be or has been continued in court is not known. Similarly, the citizenry of Wakeeny in Trego County is up in arms about the Round Mound Dam. Environmental groups in Lawrence have fought a channelization project for years, but seem to be losing, whereas other water resource boondoggles, such as the ship channel to Wichita, have been abandoned.

Many local problems have resulted in a form of environmental litigation, but those cases and decisions have largely gone uncompiled and unknown to the larger legal world. An example is a pending case in Lawrence, brought under state referendum and procedural statutes, to enjoin the construction of a municipal garage in a residential neighborhood. *Old West Lawrence Ass'n v. City of Lawrence*, No. 29349 (Douglas County Dist. Ct., filed Jan. 31, 1975). That litigation was made notable by the threat of the City Attorney to counterclaim against petitioners for damages, but that sort of tactic fortunately has no chance of success against any but the very timid. *See Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972). To the northeast, the St. Joseph (Missouri) Historical Society sued to prevent the destruction of urban renewal of various historical buildings, including the eastern terminus of the Pony Express. The trial was procedurally and substantially confused, which may account for the trial court's failure to apprehend the nature and meaning of the statutes on which plaintiff based its claims. *St. Joseph Historical Society v. Land Clearance for Redevelopment Ass'n*, 366 F. Supp. 605 (W.D. Mo. 1973). Plaintiff later dropped its appeal, even though the federal defendant conceded error below, because the defect was at least procedurally cured. An exception to this recitation of futility is the case of *Fields v. Eagle-Picher Industries, Inc.*, No. W-4695 (D. Kan., filed Sept. 9, 1971), a suit for damages caused by defendant's lead emissions, in which plaintiffs received a settlement of over \$150,000.

The most illustrative, if not the most important of the environmental litigation cases in the State so far, are the *CCU* and the *Wolf Creek Opposition* cases. The latter arose in essentially the same context as the former, except that the plant at issue will be nuclear instead of conventional. *Lance v. Kansas Gas & Electric Co.*, No. 12997 (Coffey County Dist. Ct., filed Nov. 5, 1974). It must be conceded that Kansas Gas and Electric, sponsor of the atomic venture, has conducted far more research than did KPL, and its commitment to public information has been far superior. After the bulk of this piece was written, the District Court in Coffey County denied WCO's request for injunctive relief against condemnation on grounds of federal preemption, and the case is on appeal. Conversation with Edward Collister, attorney for plaintiffs, in Lawrence, March 7, 1975.



to represent, or they are more permanent organizations, such as the Sierra Club, that are formed for the purpose of representing the public environmental interest. Typically, environmental plaintiffs will have grossly inadequate financial resources to sustain their lawsuit against legally and financially well-endowed governmental or industrial defendants.<sup>31</sup> The litigation is frequently complicated in both its legal and technological aspects,<sup>32</sup> and issues or projects of great significance in monetary or other terms are at stake.<sup>33</sup> The governmental agency or agencies involved often will have entered into an informal partnership with the industry being regulated, and that cooperation will have been detrimental to the interests of the plaintiffs.<sup>34</sup> In most such cases, the deciding criterion will be the degree of administrative discretion determined proper by the reviewing court.<sup>35</sup>

In the *CCU* case, all of these elements were present in a context somewhat dissimilar to the usual run of environmental cases. *CCU* was underfinanced, but was better lawyered than most. Although the suit did not formally involve an administrative agency as no formal governmental decisions had yet been made, the Kansas Supreme Court considered that KPL, as a delegate of the eminent domain power, was essentially equivalent to an agency of the State, and imposed a standard of judicial review loosely appropriate to such an agency: that is, the court reviewed only to determine whether there had been fraud, bad faith, or an abuse of discretion.<sup>36</sup> The plant being challenged was obviously significant in terms of investment and impact. As is routine in such cases, plaintiffs pointed to the known, anticipated, or hypothesized amounts and effects of pollutants likely to be emitted or discharged, the lack of planning, and so forth. KPL, on the other hand, emphasized the need for adequate energy resources and the economic feasibility of methods of providing those resources. Plaintiffs constructed worst-possible situations and raised the spectre of unknown but potential risks to health and aesthetics, while defendant offered equally speculative assurances that the problems

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<sup>31</sup> An exception to this rule is the *Scenic Hudson* litigation, in which plaintiffs have poured well over a million dollars in their more than a decade-long fight to preserve a unique natural feature on the Hudson River. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (*Scenic Hudson I*), is the first judicial decision in a still continuing series over a proposal for a pumped storage facility on Storm King Mountain in New York. *See also Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972) (*Scenic Hudson II*); *Scenic Hudson Preservation Conference v. Calloway*, 499 F.2d 127 (2d Cir. 1974) (*Scenic Hudson III*). Most recent federal environmental statutes provide for the award of attorneys' fees where "appropriate," whether or not plaintiff wins. *E.g.*, Endangered Species Act of 1973 § 1540(g)(4), 16 U.S.C. § 1540(g)(4) (Supp. III, 1973). Judicial familiarity with such provisions will likely encourage impecunious environmental ideologues, or at least their lawyers, to bring more suits in the future. Courts now remain apprehensive about awarding attorneys' fees and other litigation costs. *See, e.g.*, *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974) (reversed district court award of fees, no statute provided for an award).

<sup>32</sup> *E.g.*, *Crowther v. Seaborg*, 312 F. Supp. 1205 (D. Colo. 1970). *See also Texas v. EPA*, 499 F.2d 289 (5th Cir. 1974).

<sup>33</sup> *E.g.*, *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973) (*Trans-Alaska Pipeline II*).

<sup>34</sup> *E.g.*, *Sierra Club v. Morton*, 405 U.S. 345, 365 (1972) (Douglas, J., dissenting).

<sup>35</sup> The leading case is *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (*Overton Park I*).

<sup>36</sup> 215 Kan. at 227-29, 523 P.2d at 763-64.

would somehow be solved and that they were not all that bad anyway. To complete the comparison, the *CCU* plaintiffs typified environmental litigation by losing.

The *CCU v. KPL* situation also shows the interaction of environmental regulation and administrative procedural law. Permits or approvals from a variety of federal, state, and local agencies are prerequisites to plant construction. Plaintiffs may object formally or informally at all these administrative stages, and if successful at any point, the Energy Center will be delayed if not defeated. First, at the local level, KPL must obtain a zoning change from the county zoning board; under the supreme court's ruling, KPL can request the change as an owner of the affected area and thus reduce the persuasiveness of its evicted opponents. Second, at the state level, the Division of Environment within the Kansas Department of Health and Environment must approve the air pollutant emissions<sup>37</sup> and grant a permit for water pollutant discharge,<sup>38</sup> the Water Resources Board must approve the obstruction in the river and allow the taking of the State's waters by KPL,<sup>39</sup> and the Corporations Commission must authorize the whole project and resulting rate structure.<sup>40</sup> None of those agencies has demonstrated a propensity to stand firm in the path of progress. Third, at the federal level, the Environmental Protection Agency has a veto over the air and water pollution permits granted,<sup>41</sup> the Army Corps of Engineers must pass on KPL's construction of intake structures on the Kansas River and the taking of waters from the nearby federal reservoir,<sup>42</sup> the Federal Power Commission also may have to approve the reservoir depletion,<sup>43</sup> and the Interstate Commerce Commission will have a voice in the necessary rail traffic and new spur lines.<sup>44</sup> Also, if a nuclear component is subsequently added to the Energy Center, the Nuclear Regulatory Commission (formerly the Atomic Energy Commission) must issue licenses.<sup>45</sup>

At the time of suit, neither these nor other determinations had been made. KPL has yet to run the administrative gauntlet, and the plaintiffs may participate in the various public hearings that may be conducted over the course of these proceedings. While this crazy-quilt scheme of regulation may appear to be a formidable and time-consuming obstacle to KPL's plans, the historic industry-orientation of most regulatory agencies coupled with the added impetus of the energy crisis scare will most likely make the barrier more theoretical than real. Thereafter, plaintiffs' only recourse will be judicial review of the agencies' decisions in the federal courts. That course is fraught with new and different perils, as the "wilderness of administrative law" is

<sup>37</sup> KAN. STAT. ANN. §§ 65-3001 to -3017 (Supp. 1974).

<sup>38</sup> *Id.* § 65-164.

<sup>39</sup> *Id.* §§ 82a-301, -706(b).

<sup>40</sup> *Id.* §§ 66-101 *et seq.*

<sup>41</sup> See notes 73, 74, 137 and accompanying text *infra*.

<sup>42</sup> See note 21 and accompanying text *supra*.

<sup>43</sup> See authorities cited notes 196, 197 *infra*.

<sup>44</sup> *Cf.* Harlem Valley Transp. Ass'n v. Stafford, 500 F.2d 328 (2d Cir. 1974).

<sup>45</sup> *Cf.* Calvert Cliffs-Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

involved to a great degree.<sup>46</sup> Implicit in the *CCU* case but not discussed at any length in the supreme court's opinion were questions relating to procedural administrative law which are common to many environmental lawsuits.

### A. *Standing*

*CCU* itself is another in what has become a long line of "instant plaintiffs," *i.e.* corporations and less formal organizations formed for the sole purpose of fighting a particular proposal in the belief that organization and numbers will add strength to the legal and political arguments. In almost all cases in federal courts, the most popular forum, such plaintiffs have been granted standing.<sup>47</sup> They merely have to show an "injury" to an aesthetic or recreational interest, and allege that a statute protects their interest.<sup>48</sup> In the *CCU* case standing was not a problem because the landowners who were directly affected were also included as plaintiffs. The supreme court, however, added a dictum to its opinion which perhaps negates in Kansas the standing doctrine developed in federal cases. After conceding that individual landowners could bring suit, the court said that "the corporate appellant in the case owns no property in the area, and thus cannot possibly show any irreparable injury."<sup>49</sup> While this language may have been meant to apply only to the limited question of whether irreparable injury has been shown to obtain equitable relief against threatened condemnation, it ignores injuries of a health, aesthetic, or other noneconomic nature.<sup>50</sup> That, of course, is what environmental law and litigation are all about: there are more important things to some people than just the economic benefit to themselves. A decade ago the Second Circuit specifically held that citizens whose aesthetic sensibilities had been adversely affected were sufficiently injured for standing purposes,<sup>51</sup> and that rationale has been expressly adopted by the Supreme Court of the United States.<sup>52</sup> To suggest that *CCU* cannot possibly show injury (and thus has no standing) in this situation where plaintiffs seek to uphold the public interest in a clean environment would be a considerable retreat from all recent progressive law and would raise serious, though not insurmountable, barriers to environmental

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<sup>46</sup> See generally Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970).

<sup>47</sup> See generally Comment, *More on Standing, the Supreme Court's Last Stand*, 3 ELR 10096 (1973).

<sup>48</sup> See cases cited note 52 *infra*.

<sup>49</sup> 215 Kan. at 243, 523 P.2d at 774.

<sup>50</sup> If the Kansas Supreme Court's position is as broad as its offhand language suggests, the law of standing in Kansas will likely regress to the bad old days of "economic injury," or "invasion of a legally protected interest." Those former concepts, in the language of Professor Freund, made the doctrine of standing "one of the most amorphous concepts in the entire domain of public law." *Flast v. Cohen*, 392 U.S. 83, 99 & n.18 (1968). Recent cases (those cited in note 52 *infra*) have all but eliminated the doctrine as a practical barrier, and no good reason suggests itself as to why Kansas should enshrine the hypertechnicalities now discarded by other courts.

<sup>51</sup> *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (*Scenic Hudson I*).

<sup>52</sup> *United States v. Students Challenging*, 412 U.S. 669 (1973) (*SCRAP I*); *Sierra Club v. Morton*, 405 U.S. 345 (1972) (*Mineral King I*). These two cases appear to moderate if not eliminate any doctrinal stringency remaining after the leading case of *Association of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150 (1970).

litigation generally.<sup>53</sup> Hopefully, the Kansas Supreme Court's dictum will be forgotten. Otherwise, such plaintiffs may be relegated to the federal courts for defense of their rights.

### B. *Exhaustion of Administrative Remedies, Ripeness, Finality, Laches, and Primary Jurisdiction*

Implicit in the opinion of the supreme court is the notion that the CCU plaintiffs came to the wrong forum at the wrong time, even though the individual plaintiffs were in imminent danger of losing their farms and homes. While never formally considering the doctrines of primary jurisdiction or exhaustion, the court in a sense decided at least the question of the applicability of the former.

Both the district court and the supreme court held that only particular and definite regulations of an agency could provide a standard to be followed and that general statutory commands would be ignored until implemented by the agencies.<sup>54</sup> In effect, the supreme court was saying that these questions are within the primary jurisdiction of an agency and the court will not attempt to apply the law until after the agency has provided its guidance. It is certainly debatable whether a court, particularly a state court, should get into an important and involved controversy such as what constitutes significant deterioration of air quality.<sup>55</sup> By failing to apply the statutory standard to the posited situation, however, the court has acceded to the taking of property without reasonable assurance that the purposes of the taking can be achieved. Any one or all of the doctrines of exhaustion, ripeness, finality, laches, or primary jurisdiction may pose further obstacles to plaintiffs should they choose to continue their fight by opposing issuance of the necessary permits to KPL, and then seeking judicial review of adverse agency determinations. These concepts are double-edged swords, and it is already too late for the utility to challenge the various standards with which it must comply.<sup>56</sup>

### C. *Reviewability and Scope of Review*

Other administrative law doctrines limit both initial access to the courts and the depth in which the court will examine the administrative action.

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<sup>53</sup> Standing requirements to challenge administrative action may be met with but one plaintiff, and the environmental group itself is not bound by the rule forbidding solicitation by lawyers.

<sup>54</sup> 215 Kan. at 241-42, 251, 523 P.2d at 772-73, 780. Another recent case on similar facts explicitly reached the same result. *Sierra Club v. Morton*, 379 F. Supp. 1254 (D. Colo. 1974) (Jim Bridger Plant).

<sup>55</sup> See Section III. *infra*.

<sup>56</sup> E.g., FWPCA § 509(b)(1), 33 U.S.C. § 1369(b)(1) (Supp. III, 1973) (general standards must be challenged within 90 days of final promulgation); *Getty Oil Co. (E. Ops.) v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972). It should be noted further that other power companies have attempted, by advertising campaigns as well as by litigation, to overturn nearly all such standards. Many of those suits and proceedings are still pending and may eventually affect KPL's project. See UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF PUBLIC AFFAIRS (Oct., 1974); TIME, Nov. 4, 1974, at 39 & 84; *Current Developments*, 6 ENV. RPTR. (BNA) at 957 (Oct. 18, 1974) & at 1109 (Nov. 8, 1974). A case challenging the EPA standards was recently filed in the Fourth Circuit by 10 power companies. *Appalachian Power Co. v. Train* (Civil No. 74-20-96) as discussed in *Current Developments*, 6 ENV. RPTR. (BNA) at 1004 (Oct. 25, 1974).

The Kansas Supreme Court reviewed only to determine whether there had been an "abuse of discretion" by KPL. This verbal standard embodies the most restricted scope of review, and means merely whatever the court in the circumstances wishes it to mean, no more no less. That standard in the *CCU* case was almost ludicrous, because the court had held that KPL's discretion was essentially unconfined by statutory guidelines and limitations except to the extent that the taking must be for "a lawful purpose." Thus the only standards against which KPL's action could be measured to determine whether its discretion had been abused were either missing altogether or came down to whatever the court chose to apply in the particular case. By comparison, the federal statute on judicial review—Kansas has no similar law—provides for review to decide all questions of law, and to determine whether the decision was arbitrary, capricious, abusive of discretion, *ultra vires*, short of statutory right, without proper procedure, or, if an adjudicatory decision, supported by substantial evidence.<sup>57</sup>

This concept of very limited judicial review stems from the presumption that public officials perform their duties properly. Even if one concedes, in the face of Watergate and other widespread official misconduct, that the presumption is valid, KPL is definitely not a public official but rather a profit-oriented monopoly corporation to which no such presumption should logically attach. A public official is also presumed to work for the public interest. Unless it is further presumed that what is good for KPL is good for the public, some account should have been taken of the fact that KPL's rates are a percentage of its investment, and the consequent fact that the proposed three-quarters of a billion dollars expansion program will result in a vast expansion of its rate base. Whether this is in the public interest may be debated, but it is beyond cavil that KPL is not disinterested in the decision.

Defining and confining the permissible scope of agency discretion is the central problem of administrative law.<sup>58</sup> Federal courts, particularly in environmental contexts, have steadily narrowed the formerly permissible scope by a variety of semantic and doctrinal devices. The *CCU* decision, according a private company far more latitude in taking property than is allowed federal agencies in their ordinary decision making, can only be regarded as anachronistic. Hopefully, the court will soon reconsider these implications of its opinion in terms of the ultimate question whether people or institutions are the more important concern of government.

#### D. *Burden of Proof*

Closely akin to the problem of defining the allowable degree of discretion granted by statute to an agency (or, in the *CCU* case, to KPL) is the question of which party has the burden of proof or persuasion on the issues presented.

<sup>57</sup> Administrative Procedure Act § 706, 5 U.S.C. § 706 (1970).

<sup>58</sup> See generally K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1971).

This latter question is frequently crucial to environmental plaintiffs because the relevant technical information is nearly always the exclusive property of the governmental and industrial defendants, and because the time pressures in seeking injunctions plus plaintiffs' lack of resources frequently militate against full, detailed discovery.

Thus, if plaintiffs in environmental litigation are required to prove by a preponderance of evidence that environmental standards will not in fact be met, or that as a matter of policy the Energy Center is a hazard to health or a boondoggle, or that the county zoning board will not grant a zoning change, plaintiffs stand little chance of winning. Even more difficult to prove as an evidentiary matter is the proposition that KPL "abused its discretion." The *CCU* plaintiffs did not succeed in proving any of these matters to the trial court's satisfaction, and, as both courts held simply that plaintiffs had the burden, plaintiffs lost the suit. Hidden in the shuffle, however, was a significant point: the evidence at trial brought out fairly clearly the facts that KPL did not have (or refused to release) definitive studies relating to the environmental issues, and thus that KPL's ultimate decisions must have been based on inadequate factual data as to those issues. In essence, then, while plaintiffs could not conclusively establish their contentions, neither could KPL disprove those contentions, and KPL, of course, was the only party with complete access to the facts. A persuasive argument can be made that in this situation, where plaintiffs have at least demonstrated a lack of detailed factual knowledge on the part of the project proponent, the burden should shift to defendant to show that it did have adequate information at its disposal and that its decision was reasonable in light of that evidence. Several state and federal courts when faced with analogous situations, have displayed no hesitation in shifting that type of burden.<sup>59</sup> The effect of holding strictly to the usual evidentiary rule in this case was to require the landowners, who lack access and resources, to themselves conduct an intensive study into the environmental effects of this massive project, a job that KPL should have done, but did not do.

#### E. *Relief in the Courts*

The ultimate reality of environmental litigation in the administrative context is that once plaintiff loses in court on a particular point, he loses that point forever, while if he wins, it only means beginning the battle again. Ordinary litigation results in a dispositive final judgment. Environmental litigants, to the contrary, can almost never achieve a final victory in the courts, because the relief granted most often is an injunction pending redetermination by the agency. Typically, the agency thereafter recasts its original decision in different language and judicial review begins anew. Had the *CCU* plaintiffs won, KPL would have had to go back to its drawing board and to do its

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<sup>59</sup> See, e.g., *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972); *Texas E. Transmission Corp. v. Wildlife Preserves, Inc.*, 48 N.J. 261, 275, 225 A.2d 130, 138 (1966).

homework to show a likelihood of obtaining the requisite approvals before evicting the plaintiffs. Because such decisions are confided by statute to the agency, and because the court can only remand, the main goal of most environmental litigation is delay. This is not delay in the sense of dilatoriness, but rather it means that plaintiffs by preserving the *status quo ante* may thus have time to mobilize the political process against the perceived threat to them. In some cases, where interim relief is granted, the effect is a remand to the legislature, as occurred in the Trans-Alaska Pipeline dispute.<sup>60</sup> This is the better course, as environmental questions in the final analysis are more often political than technical in nature.

### III. REGULATION OF AIR QUALITY

In addition to its discussion of the power of eminent domain and the application of that power in the *CCU* case, the Kansas Supreme Court devoted much of its attention to air pollution questions. Before surveying the issues in the instant case, this section will first survey the overall federal-state air pollution regulation structure.

Air quality regulation is now the most advanced of the various environmental arts and sciences. The federal government oversees and finances the regulatory mechanism, and a federal agency sets the initial, overall standards and retains ultimate enforcement authority.<sup>61</sup> The system now in effect stems from the Clean Air Act Amendments of 1970 (CAA),<sup>62</sup> which represent a radical departure from earlier, less stringent statutes.<sup>63</sup> "Moving sources," or vehicles, are subject to a separate set of federal standards and regulations,<sup>64</sup> while "stationary sources," such as the Energy Center, are regulated jointly.

Under the CAA, a series of standards and measures were mandated. First, air quality control regions were to be designated<sup>65</sup> (Kansas has seven). Second, the Administrator of EPA has issued air quality criteria for various pollutants that are intended to encompass the latest scientific and technological information as to the hazards presented by such pollutants.<sup>66</sup> Third, on the basis of those criteria, the Administrator has issued national ambient air quality standards for the main pollutants so identified: particulate matter, sulfur

<sup>60</sup> See generally J. SAX, *DEFENDING THE ENVIRONMENT* (1970).

<sup>61</sup> See, e.g., Luneburg, *Federal-State Interaction Under the CAA Amendments*, 14 B.C. IND. & COM. L. REV. 637 (1973).

<sup>62</sup> Clean Air Act, 42 U.S.C. §§ 1857 *et seq.* (1970), as amended, (Supp. III, 1973) [hereinafter cited as CAA]. For parallel developments in Kansas see Coggins, *supra* note 3, at 18-27; Note, *Pollution Reaches the Clean Air State*, 9 WASHBURN L.J. 443 (1970).

<sup>63</sup> For background on air pollution regulation history prior to 1970 see Fromson, *A History of Federal Air Pollution Control*, 30 OHIO ST. J.L. 516 (1969); O'Fallon, *Deficiencies in the Air Quality Act of 1967*, 33 LAW & CONTEMP. PROB. 275 (1969).

<sup>64</sup> CAA §§ 201-12, 42 U.S.C. §§ 1857f-1 to -6e (1970), as amended, (Supp. III, 1973). See generally Appleman, *The Clean Air Act: Analyzing the Automobile Inspection, Warranty, and Recall Provisions*, 10 HARV. J. LEGIS. 537 (1973).

<sup>65</sup> CAA § 107, 42 U.S.C. § 1857c-2 (1970).

<sup>66</sup> *Id.* § 108, 42 U.S.C. § 1857c-3.

oxides, nitrogen oxides, carbon monoxide, photochemical oxidants, and hydrocarbons.<sup>67</sup> The primary ambient standard is the maximum amount of a particular pollutant in a given volume of ambient air that is safe for public health purposes. The primary standard must be achieved by May 31, 1975. The secondary standard for a pollutant is the lesser amount of that particular pollutant such as will "protect the public welfare from any known or anticipated adverse effects," and is to be attained within a "reasonable" time.<sup>68</sup> These first three elements of the regulatory scheme generally follow the footsteps of prior regulation. The new system differs from the old, however, in that the emphasis has shifted from measurement of the ambient air to controlling the flow of pollutants at their sources, *e.g.*, smokestacks. To control pollutants at the source, the state must apply and enforce the federal basic emissions limitations prescribing the maximum amount of pollutants that can be emitted from any particular stationary source.<sup>69</sup> The Administrator may also designate certain pollutants as hazardous and impose standards for the control of those particular pollutants.<sup>70</sup> Further, the Administrator is authorized and commanded to develop more stringent "standards of performance" for new stationary sources (those constructed after publication of an applicable regulation).<sup>71</sup>

The Act contemplates that the states will adopt these federal measures as the floor for their own enforcement programs. If they do, the states will receive financial assistance and a minimum of federal interference. If they do not, the assistance will not be forthcoming, and EPA will take over regulation within those states entirely.<sup>72</sup> After the federal agency has finally promulgated the various emissions standards and limitations, and the state has conducted an inventory of air pollution sources, the state must submit to EPA a document called an implementation plan which sets out in full the state's strategy for meeting all federal requirements and otherwise controlling air pollution within the state. The implementation plan theoretically brings together in one document all details of the state program; its minimum contents are spelled out in section 110 of the Clean Air Act.<sup>73</sup> Included within the implementation plan are to be the statutes, reports, and compliance schedules for all major polluters within the state. A public hearing conducted by the state agency is required before an implementation plan can be submitted to EPA, and EPA must approve the plan before it becomes effective. If EPA disapproves part or all of the plan and the state does not correct its deficiencies,

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<sup>67</sup> *Id.* § 109, 42 U.S.C. § 1857c-4. The primary and secondary standards for those pollutants can be found at 40 C.F.R. §§ 50.1-11 (1974). *See, e.g.*, *Kennecott Copper Co. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972).

<sup>68</sup> CAA §§ 109(b)(2), 110(a), 42 U.S.C. §§ 1857c-4(b)(2), -5(a) (1970).

<sup>69</sup> *Id.* § 110(a)(2)(B), 42 U.S.C. § 1857c-5(a)(2)(B).

<sup>70</sup> *Id.* § 112, 42 U.S.C. § 1857c-7.

<sup>71</sup> *Id.* § 111, 42 U.S.C. § 1857c-6 (1970), *as amended* (Supp. III, 1973).

<sup>72</sup> *Id.* § 113(b), 42 U.S.C. § 1857c-8(b).

<sup>73</sup> *Id.* § 110, 42 U.S.C. § 1857c-5 (1970). *See generally* Note, *Implementation Plans*, 26 *BAYLOR L. REV.* 232 (1974). Section 114(c) reinforces the public participation requirement with respect to implementation plans as it specifically commands that all emissions data be made publicly available.



EPA is then required to draft a new plan or portion of a plan to correct those deficiencies.<sup>74</sup>

From the viewpoint of an individual stationary source in Kansas, its obligation begins when the Division of Environmental Health (now, under the recent reorganization, the Division of Environment) notifies it to submit a report containing necessary emissions data. If it is in compliance at that point, no further action is taken. If not, the polluter must apply to the Division for a variance, which will include a compliance schedule. If the schedule is not met, the polluter is theoretically in violation and subject to harsh civil and criminal penalties.<sup>75</sup>

The questions of which procedure and what standards are to govern variance grants remain subject to controversy and are of great practical importance for individual polluters. In Kansas, grant of a variance is deemed a "revision" of the Kansas Implementation Plan. As so treated, there are few procedural or substantive barriers to a polluter continuing to pollute, because revisions of a plan under section 110(a)(3) require only a public hearing,<sup>76</sup> state approval, and EPA approval. Those approvals are not circumscribed by strict substantive standards of any sort. The majority of courts construing the statute have held that state variances via the "revision" route are proper in the "pre-attainment" period, *i.e.* before May 31, 1975, when the primary ambient standards must be met nationwide.<sup>77</sup> After May of 1975, those same courts have stated, variances must be treated as a "postponement" subject to the strictures of section 110(f).<sup>78</sup> The latter procedure greatly limits administrative discretion to grant variances as it requires that the Governor apply to EPA for such a postponement, because it must be determined, *inter alia*, that the technology necessary to control the pollution anticipated is unavailable (*not* that it is too expensive), and that "continued operation of such

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<sup>74</sup> CAA § 110(c), 42 U.S.C. § 1857c-5(c) (1970). The EPA is required to disapprove state plans which fail to measure up to CAA guidelines, and private litigants have forced the EPA to do so. *See Texas v. EPA*, 499 F.2d 289 (5th Cir. 1974) (disapproval of portions of the Texas Plan affirmed in part, reversed in part); *Natural Resources Defense Council, Inc. v. EPA*, 494 F.2d 519 (2d Cir. 1974) (four flaws found in the New York Plan); *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390 (5th Cir. 1974) (four segments of the Georgia Plan disapproved), *rev'd*, 43 U.S.L.W. 4467 (U.S. Apr. 16, 1975); *Natural Resources Defense Council, Inc. v. EPA*, 478 F.2d 875 (1st Cir. 1973).

<sup>75</sup> *See Coggins*, *supra* note 3, at 23-27. There are no known instances where such theoretical penalties have been sought or imposed in Kansas.

<sup>76</sup> CAA § 110(a)(3), 42 U.S.C. § 1857c-5(a)(3) (1970). For three years, DEH, the Kansas agency, granted variances without the notice or hearing required by Kansas or federal law, *cf. KAN. STAT. ANN.* § 65-3013 (1972), until the Kansas Attorney General ordered a cessation of such practices. DEH then held 97 "hearings" in five days to cover its prior omissions. The only "evidence" presented at those farcical exercises was a reading of the proposed compliance schedule. No information as to the type or amount of pollutant emitted or its effects on health was introduced; no questioning or general dissent was allowed; and no findings were made or reasoned decisions handed down. *See Kansas Sierra Club Protest*, December 18, 1973, on file with EPA Region VII, 1746 Baltimore, Kansas City, Missouri. The EPA Region VII later solemnly agreed that this "procedure" was adequate, and DEH has happily followed it in at least 67 more instances.

<sup>77</sup> Cases in support of this interpretation include *Natural Resources Defense Fund, Inc. v. EPA*, 494 F.2d 519 (2d Cir. 1974) (New York Plan); *Natural Resources Defense Council, Inc. v. EPA*, 483 F.2d 690 (8th Cir. 1973), and *Natural Resources Defense Council, Inc. v. EPA*, 478 F.2d 875 (1st Cir. 1973).

<sup>78</sup> *See cases cited note 77 supra.*

source is essential to national security or to the public health or welfare."<sup>79</sup> One court has concluded that all variance requests, before or after the attainment date, are postponements<sup>80</sup> and another court held that all variances are revisions.<sup>81</sup> The former decision represents the better view, with more statutory support. It is now pending before the United States Supreme Court,<sup>82</sup> so that controversy may be ended shortly. Still at issue is the degree of procedural safeguards afforded disputants in hearings mandated by the Act.<sup>83</sup>

To enforce the Act, a series of procedures are provided which can be utilized by the federal agency, by the state agency, and by private citizens. The Administrator of EPA, after notice to the state, may pursue an individual violator in court, or may take over entirely the state's program if "violations . . . are so widespread that such violations appear to result from failure of the state . . ." to enforce its plan.<sup>84</sup> The civil and criminal penalties available to both federal and state agencies include fines up to 25,000 dollars per day.<sup>85</sup> Private citizens or corporations that are adversely affected by decisions of general applicability under the CAA may file a petition in the appropriate court of appeals for review.<sup>86</sup> Most litigation to date has involved approval of state implementation plans,<sup>87</sup> indirect source review,<sup>88</sup> and overall standards.<sup>89</sup> If a particular source is in violation and not being pursued by the state or the Administrator, citizens may bring suit directly against the violator.<sup>90</sup> Citizens may also sue the Administrator to perform duties not discretionary under the Act,<sup>91</sup> and preexisting statutory or common-law remedies

<sup>79</sup> CAA § 110(f), 42 U.S.C. § 1857c-5(f) (1970). It may be surmised that the Governor's role will likely also be a limiting factor as it will be politically unpopular in many communities to allow notorious polluters to continue despoiling the air.

<sup>80</sup> *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390 (5th Cir. 1974), *rev'd*, 43 U.S.L.W. 4467 (U.S. Apr. 16, 1975).

<sup>81</sup> *Natural Resources Defense Council, Inc. v. EPA*, 507 F.2d 905 (9th Cir. 1974) (Arizona Plan).

<sup>82</sup> *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390 (5th Cir. 1974), *rev'd*, 43 U.S.L.W. 4467 (U.S. Apr. 16, 1975). As this article went to press, the Supreme Court reversed.

<sup>83</sup> *E.g.*, *Duquesne Light Co. v. EPA*, 481 F.2d 1 (3d Cir. 1973).

<sup>84</sup> CAA § 113(a)(2), 42 U.S.C. § 1857c-8(a)(2) (1970).

<sup>85</sup> *Id.* § 113(c), 42 U.S.C. § 1857c-8(c) (1970), *as amended*, (Supp. III, 1973).

<sup>86</sup> *Id.* § 307(b), 42 U.S.C. § 1857h-5(b) (1970). If the petition for review is not filed within 30 days, all review is precluded. *See, e.g.*, *Getty Oil Co. (E. Ops.) v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972). *See generally* Lunenburg & Roselle, *Judicial Review Under the CAA of 1970*, 15 B.C. IND. & COM. L. REV. 667 (1974).

<sup>87</sup> *See* cases cited in note 77 *supra*.

<sup>88</sup> Pursuant to the language of § 110(a)(2)(B), requiring provision for "land-use and transportation controls" in state implementation plans when ambient standards will not be otherwise met, and pursuant to various court orders, *e.g.*, *Natural Resources Defense Council, Inc. v. EPA*, 475 F.2d 968 (D.C. Cir. 1973), the EPA has undertaken very limited regulation of "indirect" or "complex" sources, those being developments, such as shopping centers and highways, which attract vehicular pollution sources. *See* 39 Fed. Reg. 25292-01 (1974). *See generally* Bracken, *Transportation Controls Under the CAA: A Legal Analysis*, 15 B.C. IND. & COM. L. REV. 749 (1974); Mandelker & Rathschild, *The Role of Land-Use Controls in Combatting Air Pollution Under the CAA of 1970*, 3 ECOL. L.Q. 235 (1973). Cases involving indirect sources include *Plan for Arcadia v. Anita Associates*, 501 F.2d 390 (9th Cir. 1974); *City of Highland Park v. Train*, 374 F. Supp. 758 (N.D. Ill. 1974).

<sup>89</sup> *Kennecott Copper Co. v. EPA*, 462 F.2d 846 (D.C. Cir. 1972). *See generally* Comment, *Litigation Under the Clear Air Act*, 3 ELR 10007 (1973).

<sup>90</sup> CAA § 304(a)(1), 42 U.S.C. § 1857h-2(a)(1) (Supp. III, 1973).

<sup>91</sup> *Id.* § 304(a)(2), 42 U.S.C. § 1857h-2(a)(2). *See* *Natural Resources Defense Council, Inc. v. EPA*, 475 F.2d 968 (D.C. Cir. 1973) (transportation plan delay disapproval held nondiscretionary); *Riverside v. Ruckelshaus*, 4 ERC 1728 (C.D. Cal. 1972) (nondiscretionary duty to formulate standards).

are not affected, since the citizen suit provisions are not exclusive.<sup>92</sup> Of great importance to citizen groups and their attorneys is the provision allowing recovery of attorneys fees where "appropriate"—whether or not they win the suit.<sup>93</sup>

The most important citizen suit to date has been *Sierra Club v. Ruckelshaus*,<sup>94</sup> in which the District Court for the District of Columbia held that the Act taken as a whole meant that no significant deterioration of existing good air quality could be allowed. Consequently, the Administrator was ordered to disapprove any state implementation plan without such prohibition and was further ordered to promulgate regulations to enforce the nondegradation requirement. The Kansas Attorney General, who had similarly interpreted Kansas law, participated as *amicus* for affirmance on the appeal of that decision, and it was affirmed four to four by the United States Supreme Court in June, 1973,<sup>95</sup> well before the *CCU* trial. The potential social and economic implications of that decision are enormous, because a great deal of growth must necessarily be prohibited, unless new industrial developments are able to achieve near "zero emissions," or unless equitable systems of air control burden sharing can be worked out.

The EPA took the better part of two years to comply with the trial court's order, and its prodigious labors produced a mouse. Citing the lack of a "definitive" judicial decision, ignoring the plain terms of the *Sierra Club* decision, and reacting to immense political pressure, EPA advanced alternatives and held hearings, and finally ducked the whole question in its regulations by providing that each state could decide for itself whether and to what extent its air quality may be degraded.<sup>96</sup> The EPA's final regulations, effective only recently, have already been challenged.<sup>97</sup> The only certain things that may be said about the "no significant deterioration" standard at this point are, first, that it is the law of the land, and, second, that further litigation will ensue to enforce it.

Many of the issues that can be raised under the complex regulatory procedure described briefly above are illustrated by KPL's proposed energy complex. From the foregoing, it may be seen that KPL must comply with emissions limitations or standards of performance for new sources, that the ambient air quality in the Air Quality Control Region must be at least up to the primary standard in the area by June, 1975, and that significant deterioration

<sup>92</sup> CAA § 304(e), 42 U.S.C. § 1857h-2(e) (1970).

<sup>93</sup> *Id.* § 304(d), 42 U.S.C. § 1857h-2(d).

<sup>94</sup> 344 F. Supp. 253 (D.D.C. 1972), *aff'd by an equally divided Court sub nom.* Fri v. Sierra Club, 412 U.S. 541 (1973).

<sup>95</sup> 412 U.S. 541 (1973).

<sup>96</sup> The proposed regulations were published in 39 Fed. Reg. 31000-09 (1974). See generally Note, 1974 U. Ill. L.F. 314.

<sup>97</sup> Such litigation is already underway. According to the Executive Director of the Sierra Club Legal Defense Fund, the Sierra Club filed just one hour ahead of Natural Resources Defense Council, Inc. its challenge to the legality of the regulations referred to in the preceding footnote on the date they became final. Conversation with John Hoffman, Executive Director of the Sierra Club Legal Defense Fund, Jan. 16, 1975.

of existing good quality air cannot be approved by EPA. KPL will be required to obtain clearance for its emissions from the Division of Environment before operation of the Energy Center begins, and that clearance must in turn be approved by EPA. The questions discussed hereinafter were treated somewhat shallowly during the *CCU* trial and appeal, but must necessarily be faced by the deciding agencies and reviewing courts when the actual application is made.

The expert testimony of both sides at trial as to compliance or noncompliance with the various controls and standards was unfortunately less than definitive. KPL's personnel and consultants did not give details of the anticipated emissions; rather they relied on general statements that no "violation" would occur and that the "best" control would be used although its nature and, necessarily, its degree of effectiveness were unknown. Defendant also relied on its "experience," and that of its consultant, but its emissions control record at its Lawrence and LaCygne installations was shown to be considerably less than perfect.<sup>98</sup> Plaintiff, on the other hand, relied on the testimony of Mr. Eagles, a consultant unconnected with the project. He testified that, given certain levels of operation and performance, the plant would emit 6,700 tons of particulate matter, 69,000 tons of sulfur oxides, and 47,000 tons of nitrogen oxides per year.<sup>99</sup> If true, these figures indicate that the KPL emissions would result in a 50 percent increase in total particulate pollution in the entire 14-county Air Quality Control Region (and present levels already violate all ambient standards), a doubling of nitrogen oxide emissions, and a sevenfold increase in sulfur oxides. Mr. Eagles' figures were uncontroverted but ridiculed: defendant referred to them as a "meaningless theatrical" in view of the total amount of air involved.<sup>100</sup> The trial court found Eagles' assumptions questionable and gave his testimony no credence.<sup>101</sup>

The issue of future compliance with emissions standards was mooted by KPL's general assertions and plaintiffs' decision not to appeal that issue. Neither side dealt specifically with the question of new source compliance standards, although the vague references to "standards" may have been meant to include new source standards of performance.<sup>102</sup> Also potentially an issue but not raised was the question of indirect source review.<sup>103</sup> The KPL Energy Center will certainly attract and concentrate vehicular traffic and construction activity, but it does not seem to fall within present regulatory bounds.<sup>104</sup>

<sup>98</sup> Mr. Miller, of KPL, admitted that the Lawrence stack gas cleaning system for sulfur oxides operated less than 80% of the time (Tr. at 116-18), and that KPL continued to operate even when the systems were under repair or undergoing maintenance (Tr. at 114).

<sup>99</sup> Tr. at 6-8 (testimony of Mr. Eagles).

<sup>100</sup> Appellee's Brief at 33. For example, KPL's own figures indicate an annual particulate emission rate of 6,500 tons, even assuming that its aim of 99.2 percent particulate removal rate is achieved. KPL's Answers to Congressman William Roy, Plaintiffs' Exhibit 11 at 2.

<sup>101</sup> 215 Kan. at 249, 523 P.2d at 778 (Finding 39).

<sup>102</sup> See text at note 71 *supra*.

<sup>103</sup> See note 88 *supra*.

<sup>104</sup> Cf. 39 Fed. Reg. 25292-301 (1974). In any event, the Kansas agency lacks authority to conduct an adequate review of complex sources. EPA, STATE ENVIRONMENTAL PROGRAMS, REGION VII at K-5 (Sept. 1974).

The issue of primary and secondary ambient standards is more amenable to legal analysis, but is also befogged by incomplete and conflicting official information. Belvue is in the Northeast Kansas Air Quality Control Region, a 14-county area including the cities of Topeka, Atchison, and Lawrence. According to the monitoring records, primary ambient standards for all basic pollutants except particulate matter are met for the Region. Particulate pollution, however, has exceeded allowable limits in one or more monitoring stations every year, and there is no clear trend toward improvement.<sup>106</sup> Defendant and its witnesses did not attempt to explain how the ambient standard could possibly be met Regionwide when a great increase in total particulate emissions, to be widely dispersed over the region by 600-foot stacks,<sup>108</sup> will occur in an area already in violation. Also conspicuous by its absence was an evaluation of whether larger increases in nitrogen oxides and sulfur oxides would maintain concentrations of those pollutants below maximum ambient levels. The Chief Engineer of the Division of Environment testified for defendant, but his testimony was mercifully ignored by all concerned. After baldly stating on direct examination that his Division would have no objection to the energy complex, the Chief Engineer was forced to admit on cross examination that the Region was in violation, that he did not know the pertinent facts, and that no decision could be made until the facts were known.<sup>107</sup> In sum, plaintiffs showed at least a likelihood of ambient standard violations in the Region as a result of the Energy Center's anticipated emissions, but the courts accepted KPL's necessarily unsupported assertions that no "violation" would occur.<sup>108</sup>

Neither court addressed directly the issues of ambient air standards. The trial court found that air quality in the area was equivalent to that measured by a rural monitoring station, omitted to note that air quality is measured Regionwide, and did not attempt a forecast of future air quality.<sup>109</sup> Also avoided was the topic of hazardous pollutants, even though traces of many hazardous elements are found in the coal to be burned. KPL did not have any precise analyses, and the trial court specifically noted that a potential hazard existed,<sup>110</sup> but the matter was then dropped.

The ultimate and most difficult issue of air quality regulation, that being what constitutes significant deterioration, was also avoided by resort to vague

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<sup>106</sup> The evidence at trial, taken from official measurements, indicated a worsening of particulate pollution at 4 of 5 measuring sites from 1970 to 1971, and further deterioration at 2 of 4 sites between 1971 and 1972. Defendant's Exhibit 7 at 7-8, 13-14, 21-22; Appellants' Brief at 43.

<sup>107</sup> Higher stacks have been purposely used as a "dispersion technique" in other areas. The original Georgia Implementation Plan was designed to allow a polluter to emit more pollutants if the smokestack was higher. This was held to be an illegal evasion of the CAA in *Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390 (5th Cir. 1974), *rev'd on other grounds*, 43 U.S.L.W. 4467 (U.S. Apr. 16, 1975).

<sup>108</sup> R. at 201-05.

<sup>109</sup> *Cf. New Mexico Citizens v. Train*, 6 ERC 2061 (D.N.M. 1974) (prospective violation of ambient standards states a federal claim for relief).

<sup>110</sup> 215 Kan. at 224, 523 P.2d at 760-61.

<sup>111</sup> *Id.* at 246-47, 523 P.2d at 776-77.

technicalities. The trial court felt that the inevitable pollutants were miniscule in relation to the total amount of ambient air, and held that "[n]on-deterioration of air quality' means reduction of quality of ambient air to a point beyond applicable established standards. . . ."<sup>111</sup> This, of course, is exactly what the federal courts had held the phrase did *not* mean. The Kansas Supreme Court agreed that "significant deterioration" was irrelevant because EPA had not promulgated regulations to enforce that requirement.<sup>112</sup> Thus, even though the highest court in the land has agreed that the CAA mandated a non-degradation policy, the courts deciding the *CCU* litigation refused to enforce that policy, holding instead that it is not enforceable until EPA has promulgated implementing regulations—perhaps an unconscious application of the primary jurisdiction doctrine.<sup>113</sup> The same non-degradation problem will inevitably arise in the parallel field of water pollution regulation, but KPL successfully avoided a judicial determination of that question by other means.

#### IV. WATER POLLUTION REGULATION

Regulation of water pollution is governed by the Federal Water Pollution Control Act of 1972 (FWPCA),<sup>114</sup> the most detailed, complex, and comprehensive environmental statute on the books. In passing this legislation, Congress repealed the implied right to pollute and rejected the assimilative capacity concept<sup>115</sup> by specifically providing that all pollutant discharge into navigable waters is prohibited except as allowed by the Act,<sup>116</sup> that water quality is to be restored and maintained nationwide,<sup>117</sup> and that regulation will aim at the goal of zero discharge by 1985.<sup>118</sup> To help ensure that the state and federal bureaucrats carry out the onerous tasks allotted them, the Act requires the broadest possible spectrum of citizen participation,<sup>119</sup> and also provides for citizen suits to enforce it.<sup>120</sup>

<sup>111</sup> 215 Kan. at 251, 523 P.2d at 780 (Conclusion 8). That court went on to note, somewhat more accurately, that "to adopt the position that this phrase means maintenance of present air quality . . . would totally prevent the construction . . . of any new industry at one new site anywhere in the nation." *Id.*

<sup>112</sup> 215 Kan. at 241-42, 523 P.2d at 772-73.

<sup>113</sup> For a case openly dodging the issue of significant deterioration, using for a rationale the questionable doctrine of primary jurisdiction see *Sierra Club v. Morton*, 379 F. Supp. 1254 (D. Colo. 1974) (*Jim Bridger Plant*). See also *New Mexico Citizens v. Train*, 6 ERC 2061 (D.N.M. 1974).

<sup>114</sup> Federal Water Pollution Control Act Amendments of 1972 §§ 101 *et seq.*, 33 U.S.C. §§ 1251 *et seq.* (Supp. III, 1973). See generally, Fleischacker & Joelson, *Water Pollution Control Act*, 20 PRAC. LAW. 29 (1974); Note, 1973 WIS. L. REV. 893 (1973).

<sup>115</sup> Previous federal (and present state) laws had permitted pollution of waters up to the point where a demonstrable economic or visual harm occurred (its assimilation point). This concept had been endorsed in the previous Water Pollution Control Act and its amendments. Federal Water Pollution Control Act of 1948, ch. 758, 62 Stat. 1155, *as amended*, 33 U.S.C. §§ 1151 *et seq.* (1970). The Rivers and Harbors Act of 1899, ch. 425, §§ 13, 16, 17, 30 Stat. 1152, *as amended*, 33 U.S.C. §§ 407, 411, 413 (1970), *as amended*, (Supp. III, 1973), popularly termed the Refuse Act, contained a flat prohibition against dumping refuse, defined as "all foreign substances and pollutants" (sewage excepted), *United States v. Standard Oil Co.*, 384 U.S. 224 (1966), in a navigable waterway without a permit, but government policy rendered the Refuse Act largely impotent as an effective anti-pollution tool. See *Coggins*, *supra* note 3, at 9-12.

<sup>116</sup> FWPCA § 301(a), 33 U.S.C. § 1311(a) (Supp. III, 1973).

<sup>117</sup> *Id.* § 101(a), 33 U.S.C. § 1251(a).

<sup>118</sup> *Id.* § 101(a)(1), 33 U.S.C. § 1251(a)(1).

<sup>119</sup> *Id.* § 101(e), 33 U.S.C. § 1251(e).

<sup>120</sup> *Id.* § 505, 33 U.S.C. § 1365.

The regulatory scheme created by the FWPCA primarily aims at accomplishing the regulation of pollutant discharges from "point sources" (primarily industrial plants, municipal sewage treatment plants, and feedlots<sup>121</sup>), the regulation of oil spills and other hazardous substances, and financial assistance for sewage plant construction. The latter two categories will not be further discussed as the municipal treatment plant construction grant program has degenerated into a political quagmire involving, *inter alia*, miles of red tape and the impoundment controversy,<sup>122</sup> and the oil spill problem encompasses a separate and distinct regulatory area.<sup>123</sup> The Act also deals directly with a wide variety of individual problems,<sup>124</sup> and begins a process of planning for eventual regulation of "non-point sources, such as construction activities and fertilizer runoff."<sup>125</sup>

Point sources are divided into two categories—those discharging directly into navigable waters, and those discharging into public treatment works. Separate regulatory schemes are provided for each category. Direct dischargers must meet the stricter of either effluent standards or water quality standards.<sup>126</sup> The former of those dual requirements are limitations by particular types of dischargers on the amounts of pollutants that they may discharge. Slightly more specific are the statutory requirements that the applicable effluent limitations must reflect the "best practicable control technology currently available" by July, 1977,<sup>127</sup> and the "best available technology economically achievable" by July, 1983.<sup>128</sup> Also applicable to direct dischargers are new source effluent limitations, called "national standards of performance,"<sup>129</sup> and special standards for toxic pollutants.<sup>130</sup> These various effluent limitations are roughly equivalent to emissions standards in air quality regulation. Water quality standards, on the other hand, define minimum "ambient" water quality, and if the receiving waters violate these standards, the discharger will have to further restrict its discharge even if it has met the applicable effluent standards.<sup>131</sup>

The FWPCA goes beyond the CAA not only in terms of goals, complexity, and detail, but it also incorporates the potentially far more effective enforcement device of the permit, required for all point sources,<sup>132</sup> in addition to the

<sup>121</sup> Feedlots are, of course, a matter of considerable importance in Kansas. As point sources, fairly definitive effluent limitations have been established, and new "combined feeding operations" are subject to a modified "zero discharge" standard. See 38 Fed. Reg. 24466 (1973); Hines, *Farmers, Feedlots and Federalism: The Impact of the 1972 FWPCA on Agriculture*, 19 S.D.L. Rev. 540 (1974).

<sup>122</sup> See, e.g., Shinn, *Federal Grant Program to Aid Construction of Municipal Sewage Treatment Plants*, 48 TUL. L. REV. 85 (1973).

<sup>123</sup> FWPCA § 311, 33 U.S.C. § 1321 (Supp. III, 1973).

<sup>124</sup> E.g., *id.* § 102(b), 33 U.S.C. § 1252(b) (releases from federal dams); *id.* § 312, 33 U.S.C. § 1322 (marine sanitation devices); *id.* § 318, 33 U.S.C. § 1328 (aquaculture).

<sup>125</sup> *Id.* § 208, 33 U.S.C. § 1288.

<sup>126</sup> *Id.* § 302, 33 U.S.C. § 1312.

<sup>127</sup> *Id.* § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A).

<sup>128</sup> *Id.* § 301(b)(2)(A)(i), 33 U.S.C. § 1311(b)(2)(A)(i).

<sup>129</sup> *Id.* § 306, 33 U.S.C. § 1316.

<sup>130</sup> *Id.* § 307, 33 U.S.C. § 1317.

<sup>131</sup> *Id.* § 302, 33 U.S.C. § 1312.

<sup>132</sup> *Id.* § 402(a), 33 U.S.C. § 1342(a).

more conventional administrative, civil, and criminal remedies.<sup>133</sup> All effluent and other limitations are to be applied individually to each such source, which must apply for a permit, pursuant to the National Pollutant Discharge Elimination System (NPDES).<sup>134</sup> The standards are to be applied and permits granted by EPA, unless a state demonstrates that it has sufficient legal authority and resources to administer its own permit program.<sup>135</sup> Kansas became the first state to have its application denied, but after minor amendments to the antiquated Kansas water pollution statutes<sup>136</sup> by the 1974 Legislature, the EPA granted a subsequent DEH request without holding the public hearing required by section 402 of the FWPCA. Even if the state is granted authority for initial permit issuance, EPA retains a veto.<sup>137</sup> The permit should incorporate a compliance schedule whereby the discharger must meet the relevant standards by the relevant dates, and in return the permit in essence immunizes the polluter for a period of up to five years.<sup>138</sup> Dischargers into public treatment works do not need permits, but each such municipal plant is required to get a permit. Those "indirect" dischargers are required to comply with pretreatment standards, which will, when promulgated, define the ways that such dischargers must take pollutants out of their discharge that cannot be handled by municipal plants.<sup>139</sup> If the plant cannot handle the industrial discharge, or if the pretreatment standards are being violated, standards and sanctions can be applied directly to the indirect dischargers.<sup>140</sup>

In sum, the FWPCA erects a regulatory structure whereby the federal government sets the standards, and the state agencies, under federal supervision, apply the standards through issuance of discharge permits. Various planning processes with public participation are set in motion, aimed at area-wide plans,<sup>141</sup> eventual control of non-point sources,<sup>142</sup> coherent allocation of financial resources,<sup>143</sup> and overall control strategies.<sup>144</sup>

KPL avoided the effect of these regulations, standards, and strictures in the *CCU* case by merely asserting that it would adopt a zero discharge concept. The courts accepted this vague promise, even though it was never explained how the concept could be effectuated.<sup>145</sup> Each year the residue of eight million

<sup>133</sup> *Id.* §§ 401-05, 33 U.S.C. §§ 1341-45. In addition, "federal common law" can be invoked to abate interstate pollution. See, e.g., Campbell, *Illinois v. City of Milwaukee: Federal Jurisdiction Through Federal Common Law*, 3 ENVIR. L. 267 (1973).

<sup>134</sup> See Arnold, *Effluent Limitations and NPDES: Federal and State Implementation of the FWPCA*, 15 B.C. IND. & COM. L. REV. 767 (1974).

<sup>135</sup> FWPCA § 402(c), 33 U.S.C. § 1342(c) (Supp. III, 1973).

<sup>136</sup> See Coggins, *supra* note 3, at 13-15.

<sup>137</sup> FWPCA § 402(d)(2), 33 U.S.C. § 1342(d)(2) (Supp. III, 1973).

<sup>138</sup> Compliance with the permit is deemed to be compliance with key provisions of the FWPCA. *Id.* § 402(k), 33 U.S.C. § 1342(k). The length of the permit is not to exceed 5 years, subject to specific exceptions. *Id.* § 402(b)(1), 33 U.S.C. § 1342(b)(1).

<sup>139</sup> *Id.* § 307(c), 33 U.S.C. § 1317(c).

<sup>140</sup> *Id.* § 307(d), 33 U.S.C. § 1317(d).

<sup>141</sup> *Id.* § 208, 33 U.S.C. § 1288.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* § 106, 33 U.S.C. § 1256.

<sup>144</sup> *Id.* § 303, 33 U.S.C. § 1313.

<sup>145</sup> See notes 18-25 and accompanying text *supra*.



tons of coal will be sluiced into a retaining pond, and that considerable waste residue will not disappear by wishing it were so.<sup>146</sup>

By the time the Kansas River flows into the Missouri River, it is virtually dead; the ashes and trace elements remaining after KPL burns its coal, if not trapped and retained, will not help to revive it. Even if the waste matter is retained, both by utilization of a water pollution retention pond and air pollution scrubbers, where will it go?<sup>147</sup> That, of course, introduces the program of solid waste disposal, an issue ignored by the parties and courts.

## V. SOLID WASTE DISPOSAL

It appears that nearly all solid waste in Kansas will go into a covered dump, which, in our euphemistic age, has been labeled a "sanitary landfill." Solid waste disposal is not regulated by the federal government; the federal statutes provide only for grants, studies, and demonstration projects.<sup>148</sup> Unless Congress takes additional action, such regulation will be in the exclusive province of the states. The Kansas system is typical.<sup>149</sup>

By June 30, 1974, all counties in Kansas were required to submit to the Kansas Department of Health and Environment (KDHE) a workable plan for the management of the solid waste within a county or city.<sup>150</sup> A countywide waste management committee recommended to KDHE a plan to fulfill the seven statutory requisites: (1) the plan must list areas within the county where present waste management systems exist, and where land is available for the next ten years for future systems;<sup>151</sup> (2) the plan must "reasonably" conform to the procedural standards and other regulations formulated by the Secretary of KDHE;<sup>152</sup> (3) the plan is required to extend the system in view of area needs, and do so "in a manner which will not contribute to pollution of the waters or air of the state, nor constitute a public nuisance and shall otherwise provide for the safe and sanitary disposal of

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<sup>146</sup> If KPL achieves zero discharge into ground or surface waters, Kansans should be properly grateful, but the suspicion persists that its "concept" was more a litigation stratagem than a definite, achievable plan. That suspicion is aided by the fact that NEPA impact statements should be prepared for new sources and also by the obvious lack of planning that preceded KPL's sudden change in its public position. See notes 16-20 and accompanying text *supra*.

<sup>147</sup> The most dramatic illustration of this problem is the *Reserve Mining* litigation, still unresolved after several years and many judicial opinions. Plaintiffs in that case seek to require the on-land disposal of taconite tailings now dumped into Lake Superior. The widely-publicized decision shutting down Reserve's operations has been stayed, but it appears that the litigation is now concerned with how, not whether, the tailings will be disposed of on land. The main opinions in the case may be located at *United States v. Reserve Mining Co.*, 380 F. Supp. 11 (D. Minn. 1974), and 498 F.2d 1073 (8th Cir.), *stay denied*, 95 S. Ct. 287 (1974).

<sup>148</sup> The federal statute is The Solid Waste Disposal Act, 42 U.S.C. §§ 3251-59 (1970), *as amended*, (Supp. III, 1973). See FEDERAL ENVIRONMENTAL LAW, *supra* note 1, at 1291 *et seq.* (1974).

<sup>149</sup> KAN. STAT. ANN. §§ 65-3401 to -16 (Supp. 1974).

<sup>150</sup> *Id.* § 65-3405. It is doubtful whether the plans submitted embody the final version of each county's disposal system, as the preliminary planning process is still in progress. Whether the plans strictly conform to the stated statutory requisites *infra* may also be doubted.

<sup>151</sup> *Id.* § 65-3405(c)(1).

<sup>152</sup> *Id.* § 65-3405(c)(2).

solid waste";<sup>153</sup> (4) future trends, as well as present plans are to be viewed in conjunction, so that areas which can reasonably be expected to be served by the system within ten years can be delineated;<sup>154</sup> (5) the plan is to take into consideration existing laws affecting the "development, use and protection of air, water or land resources";<sup>155</sup> (6) the plan must establish a time and revenue schedule;<sup>156</sup> and (7) the plan must include all reasonable information required by the Secretary.<sup>157</sup>

All counties have filed a plan, but most of those plans call for turning present dumps into sanitary landfills, in which the garbage, etc., will be buried instead of burned or just dumped. This is certainly a change for the better, even though this step probably does not represent the best methodology ultimately available.

In any event, KPL's waste may be dumped or buried, or KPL may attempt to dispose of it in other ways. If the latter, KPL may be required to obtain yet another permit from the KDHE. Effective June 30, 1976, no one in Kansas can operate a "solid waste processing facility or a solid waste disposal system" without a permit.<sup>158</sup> KPL may, however, be exempt from this requirement if its production of electricity is deemed a "manufacturing" operation and its waste disposal activities do not constitute a nuisance.<sup>159</sup> If not so exempt, KPL must, to obtain a permit, show that its facilities and system comply with the purposes of the act.<sup>160</sup> The KDHE must make an on-site inspection, and may make its permit conditional upon correctional measures.<sup>161</sup>

The foregoing three sections have discussed in broad outline the regulatory schemes created to deal with, in the context of KPL's proposal, the nuts-and-bolts environmental law issues: pollution of the air, the water, and the land. Equally as important are the more nebulous yet more basic issues of national environmental policy.

<sup>153</sup> *Id.* § 65-3405(c)(3). This seemingly flat prohibition against pollution is undercut by other sections. In KAN. STAT. ANN. § 65-3409(c) (Supp. 1974), it is declared illegal to burn solid waste in violation of the Kansas Clean Air Act, *id.* §§ 65-3001 to -20. Since some burning, and hence some of the concomitant air pollution, is not per se illegal, this appears to relax the flat ban on contributing to any air pollution which is imposed if § 3405(c)(3) is read alone. The provision in the regulations, allowing variances under "exceptional circumstances," also relaxes the standard somewhat. KAN. ADMIN. REG. § 28-29-2 (1972).

<sup>154</sup> KAN. STAT. ANN. § 65-3405(c)(4) (Supp. 1974). This provision, if read together with § 3405(b), indicates the long-range nature of the Act. Section 3405(b) states: "[T]he solid waste management system plan submitted by each county shall provide for a solid waste management system plan to serve all the residents of all townships and cities within the county except for those cities which elect to be excluded from the county plan." It is unclear whether the Act must immediately serve all residents specified in § 3405(b), or whether the expansion referred to in § 3405(c)(4) refers only to extension of the plan to rural areas. Another unanswered question is how much, if any, the system must extend in the future.

<sup>155</sup> *Id.* § 65-3405(c)(5).

<sup>156</sup> *Id.* § 65-3405(c)(6). No time limit per se is imposed. However, § 65-3407 requires a permit for the operation of a system, and the permit cannot be granted unless the system meets certain requirements. See notes 158-60 and accompanying text *infra*.

<sup>157</sup> *Id.* § 65-3405(c)(7).

<sup>158</sup> *Id.* § 65-3407(a).

<sup>159</sup> *Id.* § 65-3409.

<sup>160</sup> *Id.* § 65-3407(b).

<sup>161</sup> *Id.*

## VI. NATIONAL ENVIRONMENTAL POLICY

One issue that should have been but was not central to the *CCU* case concerned the application of the National Environmental Policy Act of 1969 (NEPA).<sup>162</sup> Plaintiffs had alleged noncompliance with the Act, and their evidence conclusively established that, if applicable, no compliance with NEPA had been had. The district court made no finding and based no conclusion on compliance or noncompliance, other than its finding that defendant had not conducted an in-depth environmental study, and the Kansas Supreme Court concluded without explanation that the NEPA issue had not been raised below and was in any event "immaterial,"<sup>163</sup> a revealing if somewhat questionable conclusion.

A. *NEPA in a Nutshell*

NEPA requires that all federal agencies generally give consideration if not priority to the environmental facets of their subject matter and that an environmental impact statement (the infamous EIS) be drafted, commented upon, and reviewed in connection with their major actions.<sup>164</sup> The EIS must incorporate a detailed statement of all aspects of the project, and all known adverse effects must be included and discussed.<sup>165</sup> The cutting edge of NEPA is the requirement that all reasonable alternatives to the proposal and the environmental effects of each be evaluated in the EIS.<sup>166</sup> The law is designed to force agencies to consider the consequences, environmental and otherwise, of their actions before acting, and to act in a way consonant with the goal of a healthful and pleasing national environment. While environmentalists regard NEPA as a primary guardian of environmental quality, and have, indeed, based about 500 lawsuits on alleged violations of its provisions, the agencies subject to its commands have appeared less than eager to comply "to the fullest extent possible."<sup>167</sup>

NEPA litigation has raised both procedural and substantive issues; the environmental litigant must surmount a galaxy of procedures before questions of substance will be reached. The first question is whether plaintiff will be able to get a decision on the merits, or whether one or more of a host of administrative law doctrines will close the court's door in his face. Standing, jurisdiction, venue, sovereign immunity, laches, exhaustion, ripeness, and non-

<sup>162</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* (1970) [hereinafter cited as NEPA].

<sup>163</sup> 215 Kan. at 236, 523 P.2d at 769.

<sup>164</sup> NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970).

<sup>165</sup> *E.g.*, *Calvert Cliffs' Coordinating Comm., Inc. v. AEC*, 449 F.2d 1109 (D.C. 1971); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 749, 758-59 (E.D. Ark. 1971) (*Cossatot River I*). The general statutory commands have been somewhat refined by "Guidelines" promulgated by the Presidential Council on Environmental Quality (CEQ). The 1973 version is found at 40 C.F.R. §§ 1500 *et seq.* (1973). CEQ was created by NEPA Title II, 42 U.S.C. §§ 4371 *et seq.* (1970), but was not given explicit rulemaking power. *Id.*

<sup>166</sup> *E.g.*, *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972); Note, 57 MINN. L. REV. 632 (1973).

<sup>167</sup> NEPA § 102, 42 U.S.C. § 4332 (1970).

reviewability have all been used to defeat environmentalist litigants before any NEPA question could be reached, but these doctrines now seldom constitute final barriers if plaintiff has been persistent and timely.<sup>168</sup> An impact statement is required for any legislative proposal and for any other federal action significantly affecting the quality of the human environment.<sup>169</sup> The threshold procedural question under NEPA is therefore whether an EIS must be prepared, which in turn depends on the answers to the following series of sub-questions regarding the project being challenged:

- (a) Is it "federal," *i.e.* is a federal agency authorizing, approving, licensing, building, or financing the project? If so, sufficient federal contact is involved, unless the contact is highly remote.<sup>170</sup>
- (b) Is the federal role an "action," *i.e.* at what stage do idle notions, preliminary studies, etc., ripen into concrete plans? The leading case on the subject essentially holds that the answer is "not too early and not too late."<sup>171</sup>
- (c) Is the federal action major and will it have a significant effect on the environment? The answer has most often been yes to any project of any consequence,<sup>172</sup> but some courts, by limiting the scope of their review, allow agencies considerable latitude in determining whether or not to draft the EIS.<sup>173</sup> A negative agency decision must be supported by a statement of reasons known as a mini-NEPA statement.<sup>174</sup>
- (d) Is the agency or the decision exempt by reason of circumstances or non-retroactivity from the EIS requirement? Some emergency decisions and some military operations have been exempted;<sup>175</sup> the nonretroactivity principle does not apply to any project which had substantial work remaining to be completed on January 1, 1970.<sup>176</sup>

If the first three questions are answered affirmatively and the fourth negatively, the agency (not the applicant)<sup>177</sup> must prepare an EIS.

The next set of procedural questions involves the preparation methodology and the contents of the impact statement when completed and reviewed.<sup>178</sup>

<sup>168</sup> See generally Coggins, *Preparing an Environmental Lawsuit, Part II: Doctrinal Barriers and Pretrial Preparation*, 58 IOWA L. REV. 487, 507-513 (1973); Section II. *supra*.

<sup>169</sup> NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970).

<sup>170</sup> See F. ANDERSON, *NEPA IN THE COURTS*, 57-64 (1973) [hereinafter cited as ANDERSON]. Compare *City of Boston v. Volpe*, 464 F.2d 254 (1st Cir. 1972), with *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973).

<sup>171</sup> *Scientists Institute for Pub. Information, Inc. v. AEC*, 481 F.2d 1079 (D.C. Cir. 1973); Note, 87 HARV. L. REV. 1050 (1974).

<sup>172</sup> See generally ANDERSON, *supra* note 170, at 76-78.

<sup>173</sup> *E.g.*, *Morningside Renewal Council, Inc. v. AEC*, 482 F.2d 234 (2d Cir. 1973). The AEC was permitted to proceed with the licensing of a nuclear power plant located in the middle of New York City without any NEPA statement. The shortsightedness of this was noted by Judge Oakes in dissent. *But see, e.g.*, *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972).

<sup>174</sup> *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) (Hanly II); Note, *Environmental Law: the Mini-Impact Statement Requirement*, 13 WASHBURN L.J. 140-47 (1974).

<sup>175</sup> *E.g.*, *McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1971) (no NEPA statement required for storage of highly poisonous gas near Denver); *Cohen v. Price Comm'n*, 337 F. Supp. 1236 (S.D.N.Y. 1972).

<sup>176</sup> *Arlington Coalition on Transp. v. Volpe*, 458 F.2d 1323, 1330-31 (4th Cir. 1972).

<sup>177</sup> Whether and to what extent the responsible agency may delegate the task of preparing an EIS to the public or private petitioner is a source of continuing controversy. See, *e.g.*, Note, 44 COLO. L. REV. 161 (1972).

<sup>178</sup> ANDERSON, *supra* note 170, at 179-214; Note, *Environmental Law: Strict Compliance with Procedural Requirements of NEPA—The Agencies Must Play by the Rules*, 24 U. FLA. L. REV. 814 (1972).

Were adverse opinions and comments included and discussed?<sup>179</sup> Was a rigorous, interdisciplinary approach utilized?<sup>180</sup> Was the final product that of the agency or merely a redraft of the applicant's version?<sup>181</sup> Were the environmental effects of the alternatives discussed?<sup>182</sup> Was the statement sufficiently detailed?<sup>183</sup> The possibilities are boundless.

Assuming the agency and its EIS pass those tests, the substantive aspects of NEPA are the environmental plaintiff's last refuge. NEPA mandates not only the observance of its procedures, the most notable of which is the impact statement requirement,<sup>184</sup> it also commands that federal agencies hew to its stated policies. Those policies, enumerated in section 101, declare in general that the federal government is to protect and enhance rather than continue to despoil the physical environment.<sup>185</sup> Whether courts would order agencies to follow those policy guidelines with respect to particular projects was long in issue—and is not yet finally settled—but the judicial trend is toward enforcing the substance of the Act as it accords with developing concepts of judicial review, and is necessary to prevent administrative nullification of the congressional intent.<sup>186</sup> Due to the persistence of frustrated citizens' groups in bringing their complaints to federal courts, NEPA has evolved considerably in the five years it has been in existence, but many of the important questions raised remain to be finally determined. After evaluating whether NEPA does or should apply to the KPL energy project, the remainder of this Article will speculate on what might have been discussed or decided had a full NEPA evaluation of that project been undertaken.

### B. NEPA and the Energy Center

Both courts in the *CCU* case appeared unfamiliar with NEPA and consequently ignored its potential application to the Energy Center. It is reasonably clear that KPL at some point will have to assist some federal agency in preparing an EIS. Indeed, the company conceded as much.<sup>187</sup> There can be no question that construction of the KPL plant is a major action having a significant effect on the environment, but the degree and type of federal involve-

<sup>179</sup> NEPA § 102(2)(C)(ii), 42 U.S.C. § 4332(2)(C)(ii) (1970).

<sup>180</sup> The requirement for a "systematic, interdisciplinary approach" is contained in § 102(2)(A), and has been applied to an EIS, e.g., *Sierra Club v. Froehlke*, 359 F. Supp. 1289 (S.D. Tex. 1973), *rev'd on other grounds*, 499 F.2d 982 (5th Cir. 1974).

<sup>181</sup> Compare *Greene County Planning Bd. v. FPC*, 455 F.2d 412, 420-21 (2d Cir. 1972), *cert. denied*, 409 U.S. 990 (1973), with *Citizens Environmental Council v. Volpe*, 484 F.2d 879 (10th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

<sup>182</sup> NEPA § 102(2)(C)(iii), 42 U.S.C. § 4332(2)(C)(iii) (1970). See *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

<sup>183</sup> NEPA § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1970). Cf. *Environmental Defense Fund, Inc. v. Corps of Engineers*, 348 F. Supp. 916 (N.D. Miss. 1972), *aff'd*, 492 F.2d 1123 (5th Cir. 1974).

<sup>184</sup> Other sections apply to non-"major" actions. NEPA §§ 102(2)(A), (B), (D), 42 U.S.C. §§ 4332(2)(A), (B), (D) (1970).

<sup>185</sup> *Id.* § 101, 42 U.S.C. § 4331.

<sup>186</sup> *Conservation Council v. Froehlke*, 473 F.2d 664 (4th Cir. 1973); *Environmental Defense Fund, Inc. v. Froehlke*, 473 F.2d 346 (8th Cir. 1973) (Cache River); *Montgomery v. Ellis*, 464 F. Supp. 517 (N.D. Ala. 1973). *But cf.* *National Helium Corp. v. Morton*, 486 F.2d 995, 1001 (10th Cir. 1972) (National Helium II).

<sup>187</sup> Appellee's Brief at 29; R. at 69.

ment is open to some question. To date KPL has exploited this ambiguity successfully. As NEPA is a command to federal agencies only, it must be found that a federal agency is required to give consent to the KPL project before the impact statement requirement comes into play. In this case, it is clear that if KPL had kept to its original intention to put water intake structures in the Kansas River, the Corps of Engineers, who must approve all such structures, would be required to draft a statement covering the entire project.<sup>188</sup> The Corps of Engineers so informed KPL, and requested preliminary data.<sup>189</sup> KPL's "percolating wells" end run around the law illustrates that NEPA is not omnipotent, but this maneuver will only succeed until KPL returns to its original design. Naturally KPL wishes to postpone the task until the first units are constructed and on line, so that its preexisting investment will dictate in some measure the outcome of the subsequent environmental analysis.<sup>190</sup>

NEPA may also come into play in regard to other aspects of the project where some sort of federal clearance is mandatory.<sup>191</sup> The Environmental Protection Agency need not prepare an EIS before passing on the adequacy of KPL's air pollution measures,<sup>192</sup> but it may have to do so before issuing a water pollution permit.<sup>193</sup> As noted above, KPL can likely avoid this requirement if it succeeds in implementing its "zero discharge" concept.<sup>194</sup> Further, a litigant could force the ICC, perhaps the most anti-NEPA agency,<sup>195</sup> to comply when it considers rail transportation aspects, but that agency would certainly resist doing a comprehensive, indepth study. The Federal Power Commission may also have a role with respect to interstate electricity transmission and water intake from the federal reservoir,<sup>196</sup> but it, too, has been less than wholehearted in its pursuit of environmental quality.<sup>197</sup> If any of these or other federal approvals are sought, KPL and the agency must by

<sup>188</sup> *Citizens for Clean Air, Inc. v. Corps of Engineers*, 349 F. Supp. 696, 708 (S.D.N.Y. 1972).

<sup>189</sup> See note 21 *supra*.

<sup>190</sup> The businessman may deem this course of action a rather imprudent gamble at first blush, but the realities are contrary. Very few large scale projects have ever been permanently stopped after substantial amounts have been invested in them. For environmentalist opponents to succeed, they must act decisively before construction, as happened with the proposed Lyons Nuclear Waste Repository. See note 30 *supra*.

<sup>191</sup> It is interesting to note that NEPA will have an effect on the mining of KPL's Wyoming coal. In the very recent case of *Sierra Club v. Morton*, 509 F.2d 533, (D.C. Cir. 1975), the court held that an EIS must be prepared on the entire Northern Great Plains Coal development scheme. Also of peripheral interest are the facts that Congress passed in late 1974 a strip-mining bill (S. 425, 93d Cong., 2d Sess. (1974)), but the President vetoed it. This year the Senate passed, 84-13, a new strip-mining bill almost identical to that vetoed by the President. N.Y. Times, Mar. 13, 1975, § 1, at 1, col. 3 (city ed.). The House passed a strip-mining bill on March 18, 1975, and the two bills are now in conference. N.Y. Times, Mar. 19, 1975, § 1, at 1, col. 4 (city ed.).

<sup>192</sup> *E.g.*, *Portland Cement Ass'n v. Ruckelshaus*, 486 F. 2d 375 (D.C. Cir. 1973).

<sup>193</sup> FWPCA § 511(c), 33 U.S.C. § 1371(c) (Supp. III, 1973). See generally FEDERAL ENVIRONMENTAL LAW, *supra* note 1, at 778-84.

<sup>194</sup> See text at notes 18-25 *supra*.

<sup>195</sup> See, *e.g.*, *Harlem Valley Transp. Ass'n v. Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973), *aff'd*, 500 F.2d 328 (2d Cir. 1974); *Students Challenging v. United States*, 346 F. Supp. 798 (D.D.C. 1972), *rev'd*, 412 U.S. 669 (1973) (SCRAP I).

<sup>196</sup> See *Chemehuevi Tribe v. FPC*, 489 F.2d 1207 (D.C. Cir. 1973) (after completion of this Article, *Chemehuevi* was vacated, 43 U.S.L.W. 4334 (U.S. Mar. 3, 1975)); *Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

<sup>197</sup> See, *e.g.*, the *Greene County* case, note 196 *supra*, and the second opinion at 490 F.2d 256 (2d Cir. 1974).

law draft an EIS, however belatedly. KPL's present success in circumventing NEPA means that the ratepaying public will not learn the full story of the Energy Center until after it is too late to do anything about it.<sup>198</sup>

The *CCU* case illustrates in stark relief the "prepartnership" regulation issue under NEPA. As in the *Gage* cases, *Gage v. AEC*<sup>199</sup> and *Gage v. Commonwealth Edison Co.*,<sup>200</sup> the utility successfully evicted the landowners before an environmental assessment was undertaken even though it was clear that an EIS would be required when the utility later made application for requisite federal approvals. Had the Kansas courts explicitly dealt with the issue, the *Gage* opinions would have been precedent for letting KPL go ahead, but other cases have eroded the value of that precedent. NEPA is to be followed as early as possible, and federal condemnation proceedings have been enjoined for lack of NEPA compliance fairly often.<sup>201</sup> This has not yet occurred in the "pre-NEPA" stage, *i.e.* before the utility has formally applied to the federal agency.<sup>202</sup> One court, however, did not hesitate to halt private actions pending agency NEPA compliance, and called for the promulgation of prepartnership regulations.<sup>203</sup>

Had an EIS been drafted in the *CCU* case, much more basic information would have become available. NEPA requires that a statement be detailed, that a full description of the project be included, and that all impacts, positive as well as negative, be assessed.<sup>204</sup> The decision-maker must then rationally weigh the benefits against the detriments of the project, and attempt to reach the "optimally beneficial" result.<sup>205</sup> In this case, KPL would have had to give a much more comprehensive picture of its proposal, and it would have had to study the probable effects of its pollution on the air, water, and land. Concepts and promises would not have sufficed to excuse a lack of detailed planning. KPL also would have been required to investigate a wider range of alternative methods of accomplishing the same result: it appeared from the testimony and exhibits that the only factors receiving more than cursory thought were fuel type and site location. Further, the utility would have been forced to take into account the adverse facts, views, and opinions adduced by the opponents, a course KPL has appeared somewhat reluctant to follow. Finally, KPL could not have ignored the environmental aspects in making its initial determination; obvious *post hoc* justifications seldom are acceptable under NEPA.<sup>206</sup> Thus, had an EIS been drafted, the utility and licensing

<sup>198</sup> See note 190 and accompanying text *supra*.

<sup>199</sup> 479 F.2d 1214 (D.C. Cir. 1973). *Accord*, *Proetta v. Dent*, 484 F.2d 1146 (2d Cir. 1973).

<sup>200</sup> 356 F. Supp. 80 (N.D. Ill. 1972).

<sup>201</sup> *E.g.*, *Thompson v. Fugate*, 347 F. Supp. 120 (E.D. Va. 1972).

<sup>202</sup> See generally FEDERAL ENVIRONMENTAL LAW, *supra* note 1, at 354-56.

<sup>203</sup> *Silva v. Romney*, 473 F.2d 287 (1st Cir. 1973). See generally FEDERAL ENVIRONMENTAL LAW, *supra* note 1, at 354-56, for a concise discussion of the issue.

<sup>204</sup> See authorities cited note 165 *supra*.

<sup>205</sup> *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971).

<sup>206</sup> *E.g.*, *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972).

agency would have been able to make a better-informed, thus more rational, decision.

That is not all. Had a NEPA evaluation taken place, a series of important societal questions would probably have been confronted instead of being casually tossed aside. The following subsections will merely raise and briefly comment on some of those issues. It must at the outset be emphasized that no claim or pretense of possessing ultimate answers is made; the point is that the questions should at least have been considered in far more depth.

### C. *Energy Policy*

Many of the unexplored, overriding environmental conundrums inherent in the *CCU* case relate to considerations of energy use and conservation. The first question is whether there is a real need for the Energy Center of the size contemplated, particularly in light of the likely detrimental effects. KPL's basic position was founded upon an attempted justification of the proposed project by reliance on the recent historic rise in the electricity demand curve of six to seven percent annually in its marketing area.<sup>207</sup> Other factors may undercut KPL's implicit presumption that a curve on a chart has a value independent of its context. It seems particularly relevant that the "energy crisis" has caused a decline in demand due to personal efforts at conservation. In fact, at the time of trial, KPL's energy production was 11 percent below the predicted level<sup>208</sup> (in similar situations, other power companies have requested rate increases, thus penalizing successful consumer conservation efforts). Although no strong action has as yet been taken by federal or state governments in the direction of a mandatory energy conservation program, there is more than a possibility that some such legislation will be enacted in the near future. Further, the rise in energy demand may be partially artificial; electric utilities have conducted many advertising campaigns in recent years to increase power consumption. It thus may be pertinent to ask whether KPL has an obligation to do what it can to dampen demand, by such means as a request to the Corporation Commission that rates for large users be equalized with those charged residential users. Next, it seems at least questionable, independent of the energy crisis, whether the demand curve will continue its sharp upward trend. The population of Kansas certainly is not rising six or seven percent annually; in fact, the most recent official census showed that most counties declined in population between 1960 and 1970.<sup>209</sup> It would further appear that most Kansans who intend to acquire air-conditioning, rural electricity, and so forth, have already done so. If the real need for the contemplated increase in generating capacity is to provide for an increasing industrialization of Kansas, an argument might be made that the

<sup>207</sup> 215 Kan. at 245, 523 P.2d at 775 (Finding 11) (8% in the past 2 years).

<sup>208</sup> Appellant's Brief at 18; R. at 57.

<sup>209</sup> INSTITUTE FOR SOCIAL AND ENVIRONMENTAL STUDIES, KANSAS STATISTICAL ABSTRACTS, at 5-7 (1973).



citizens of Kansas should be aware of that goal and should have a voice in determining whether or to what extent it should be followed.<sup>210</sup> Some would almost certainly object to "despoiling" Kansas in order to export electricity to other states. Thus far KPL has never made clear what percentage of the power generated would be exported. KPL has avowed that the most pressing consumer need is for peak load capacity to handle the demand by air-conditioning in July and August, and that its routine capacity during the other ten months is more nearly adequate.<sup>211</sup> It is not unreasonable to ask whether a less drastic remedy, such as an improved areawide or nationwide power grid,<sup>212</sup> for the prophesied deficiency might not be considered. Finally, in the event KPL ultimately attempts to construct a nuclear breeder reactor on the site, it will be asked whether an agricultural state should assume the potential risks of the magnitude inherent in such an installation. Kansans have already objected rather vehemently to the AEC's proposal to make Kansas the "repository" for the Nation's radioactive nuclear waste,<sup>213</sup> and another hot debate no doubt will ensue if KPL attempts to install a generator of such waste.

Another question relating to public energy policy has to do with the fuel used to generate electricity. The national policy, to the extent we now have one, is in favor of coal as the basic fuel. The Administration has called for conversion of existing plants from petroleum fuels to coal, and a few utilities have complied.<sup>214</sup> There is therefore little or no basis for questioning KPL's basic choice of coal. Even so, the feasibility of using organic solid waste as a *supplementary* fuel has been demonstrated in an existing plant in St. Louis, and other such facilities will be coming on line. Since Kansas has a solid waste problem, though of less magnitude than that in more populous states, it may be fairly asked whether KPL considered this alternative, and, if it did, why the concept was rejected.

Perhaps KPL did consider these questions and perhaps it did reasonably decide that its proposal was the best possible solution. Because its monies and, ultimately, its powers, including those of condemnation, emanate from the people of Kansas, it can be persuasively contended that those same people are entitled to know why KPL did what it did.

#### D. Land Use Policy

KPL's proposal has raised, potentially, a number of intriguing land use problems. All save the basic eminent domain issue and a few other questions

<sup>210</sup> The extent to which states and localities can constitutionally manage their own growth destinies is the subject of considerable controversy. *Compare* Construction Industry Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *with* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

<sup>211</sup> Remarks of Mr. Stedham, KPL official, at Sierra Club seminar, Lawrence, Kansas, Mar. 5, 1974.

<sup>212</sup> Power grid in this sense means interconnections between separate power generating systems whereby a deficiency of peak capacity in one area can be made up by "borrowing" capacity from another area generating at less than full capacity.

<sup>213</sup> *See, e.g.*, Lawrence Journal-World, Mar. 16, 1971 at 1, col. 5-8.

<sup>214</sup> Remarks of Mr. Russell Train, EPA Administrator, at ALI-ABA Environmental Law Seminar, Washington, D.C., Jan. 16, 1975. *Cf.* The Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319.

were ignored by the parties and reviewing courts. The Kansas Supreme Court decided in essence that KPL's delegated condemnation power could be exercised for any lawful corporate purpose as long as KPL did not abuse its discretion.<sup>215</sup> That, of course, is an unexceptional holding; few courts hold the condemnor to a higher standard.<sup>216</sup> Some implications of the decision nevertheless give one pause. KPL argued and the court held that the delegation of the power was nearly devoid of standards and safeguards governing the exercise of the eminent domain power.<sup>217</sup> That power is indisputably legislative, and in somewhat analogous situations, courts, including Kansas courts, have held delegations of the legislative power invalid when not accompanied by such standards.<sup>218</sup> Just as basic is a potential question of legislative intent. The eminent domain statute was passed long ago to allow for necessary transmission line easements and so forth, but did the Legislature really intend to allow a private company to take, without standards or restrictions, 20 square miles of agricultural land? As a consequence of the *CCU* case and a similar taking near Burlington,<sup>219</sup> the Legislature planned a review of its now unrestricted delegation to utilities during the 1975 session.<sup>220</sup> The supreme court also accepted without cavil KPL's assertion that 12,800 acres were "reasonably necessary," even though other generating plants of similar size have been able to get by with one-sixth that much land.<sup>221</sup>

Federal land use planning legislation has not yet been enacted. The bills proposed so far would set up a system of grants to states to enable them to begin a process of inventorying, planning, and, eventually, regulating.<sup>222</sup> At present, therefore, the only functioning land use planning mechanism in Kansas is county zoning (and, to a lesser degree, the "comprehensive plan" device).<sup>223</sup> For that reason, the Kansas Attorney General, participating as *amicus curiae* in the *CCU* appeal, sought remand on the grounds that a zoning change should be a condition precedent to the condemnation, and that the Legislature should be given an opportunity to consider the overall eminent domain problem.<sup>224</sup> The court passed over the Attorney General's argument without discussion.<sup>225</sup>

<sup>215</sup> See note 27 and accompanying text *supra*.

<sup>216</sup> See generally Note, *Eminent Domain and the Environment*, 56 CORNELL L.J. 651 (1971). An exception is *Seadade Industries, Inc. v. Florida Power & Light Co.*, 245 So. 2d 209 (Fla. 1971). Other such cases are discussed in Appellants' Brief at 24-30.

<sup>217</sup> 215 Kan. at 225-29, 523 P.2d at 761-64.

<sup>218</sup> See, e.g., K. DAVIS, ADMINISTRATIVE LAW TEXT, §§ 2.07-.14 (2d ed. 1970). Cf. *State ex rel. Donaldson v. Hines*, 163 Kan. 300, 182 P.2d 865 (1947). State courts have been especially leery of broad delegations to self-interested private delegates. See, e.g., *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners*, 40 Cal. 2d 436, 254 P.2d 29 (1953).

<sup>219</sup> See note 30 *supra*.

<sup>220</sup> An Interim Special Committee on Transportation and Utilities has been considering the problem. It was recently reported that railroad companies were objecting to a bill in the Legislature that would delegate to a pipeline company the power of eminent domain for a proposed coal slurry pipeline from Wyoming to Arkansas.

<sup>221</sup> Appellants' Brief at 50-52 lists the amount of land taken by other utilities for recent comparable projects; no other conventional generating complex required anywhere near the 12,800 acres.

<sup>222</sup> E.g., S. 268, 93d Cong., 1st Sess. (1973).

<sup>223</sup> See KAN. STAT. ANN. § 12-704 (Supp. 1974).

<sup>224</sup> Brief of Kansas Attorney General as *Amicus Curiae* at 1.

<sup>225</sup> 215 Kan. at 233-34, 523 P.2d at 767.

In terms of land use, the record indicates that many questions of apparent importance were given little or no attention by KPL or the courts. For example, it would seem rational that consideration should have been given to the question whether the benefits of agricultural production on the land in this time of worldwide food shortages outweigh the benefits of its use to produce electricity. KPL, of course, has a vested interest in the latter use only, but others could argue that, if a choice must be made, it is easier for people to adjust to less electricity than to less food. Looking at the problem in that broader context, it can be seen that millions of acres are being taken out of production annually to make way for highways, reservoirs, and suburbs, as well as power plants. Where is the point of diminishing returns? All too often, it will be alleged, that point is recognized only after it has been passed. In the same vein, the further question naturally arises as to whether it is absolutely necessary to take productive land in this case. More specifically, would it not be wiser overall to locate the Energy Center in an area unsuitable for agriculture, such as strip-mined lands in southeast Kansas? One might also ask whether electrical transmission facilities are so inefficient that it would not be a better idea to build the complex near the coal fields in Wyoming. Such an observer would note that great savings of transportation costs and energy would be realized thereby, and that some at least rudimentary facilities for such long range transmission must be available because KPL intends to export some of the energy that will be produced. Finally, if the public interest is a valid criterion, is KPL the proper entity to make these decisions on behalf of the general public?

These energy and land-use questions—and it should again be emphasized that they are only questions—are not new. Federal and state legislators have grappled with similar problems in connection with proposed power plant-siting legislation, among other things, but neither the United States nor the State of Kansas has passed such legislation thus far. It may be that the sole object of a private corporation, even one granted a monopoly by the state, is to generate profits, and that any other consideration tending to interfere with that goal should be shunted aside by the corporation. In that case, “moral” and “public interest” factors, to the extent the society deemed them necessary, would have to be (and have been) imposed from above. Perhaps that is in fact the true way of the world, but corporate press releases in the past decade reflect a different philosophy: a professed commitment to the public interest independent of governmental coercion. If such high minded declarations are to be believed, then it must be asked whether the public interest can be served without public participation in the important decision making processes, and, further, whether that participation will rise above the angry, futile expression of frustration unless that public is given timely notice of the relevant facts and options. To ask in that manner is to answer. The decisions of the trial

court and the Kansas Supreme Court in the *CCU* case ignored these broader questions altogether.

#### VII. CONCLUSION: EVALUATION, PROPHECY, AND GUIDELINES

If the *CCU v. KPL* suit is seen as presenting only a narrow eminent domain question, the outcome is defensible. Viewed more broadly, however, the decision does not set to rest all reasonable doubt as to its wisdom or legal foundation. Where federal law was involved in the case, the Kansas Supreme Court's interpretation did not resolve the true questions presented, and did nothing toward erecting a rational structure for a reasonable resolution of those questions. To the extent that such nebulous concepts as public interest, democratic principles, and wisdom are relevant to this sort of case, the court's opinion was arguably short-sighted. The end result—another huge power plant—is unexceptional in itself, but the cursory treatment given to the important environmental and human issues raised bodes ill. Unless those issues are faced and resolved prior to the commitment of resources involved in condemnation and construction, the initial plan becomes self-justifying. Past investment will serve to justify continuance of the project, even if it later becomes apparent that the benefits are not worth the cost.

Assuming that Kansas law and Kansas courts are less than warmly receptive to environmental considerations, the reader may ask whether things are any different in other states? While the precise law varies somewhat in every jurisdiction, and while no definite survey will be attempted, the answer is affirmative. Many states, for example, have their own NEPA-type requirements, which, if applied here, would have eliminated the necessity for the *CCU* lawsuit. In California, even a true governmental entity cannot annex, much less condemn, without first formally considering the environmental consequences.<sup>226</sup> The environmental protection departments in some other states are far more perceptive and active than the Kansas Department of Health and Environment,<sup>227</sup> and, in some states, earlier and more comprehensive judicial review of less ardent agency action has achieved the same result.<sup>228</sup> Another avenue available in some states is the flat grant of standing to challenge any environmental degradation, an approach pioneered by the State of Michigan.<sup>229</sup> Other state supreme courts have granted some type of relief in somewhat similar situations as well.<sup>230</sup>

<sup>226</sup> *Bozung v. Local Agency Formation Comm'n*, 112 Cal. Rptr. 668 (App. 1974). See generally Yost, *NEPA's Progeny: State Environmental Policy Acts*, 3 ELR 50090 (1973).

<sup>227</sup> As pointed out in *Coggins*, *supra* note 3, the Kansas agency has been extremely reluctant to enforce in court the laws entrusted to it for enforcement. Similar agencies in other states, such as Illinois and New York, have had fewer qualms about doing the job mandated by statute. See, e.g., *New York Power Authority v. Department of Environment Conservation*, 379 F. Supp. 243 (N.D.N.Y. 1974); *United States v. United States Steel Co.*, 356 F. Supp. 556 (N.D. Ill. 1973).

<sup>228</sup> In Nebraska, for example, the Sierra Club has succeeded in having the FPC halt construction of the Gerald Gentleman Power Station until the utility and state agency do their homework. 6 *Sierra Club Nat'l News Rep.* No. 46 (Dec. 27, 1974).

<sup>229</sup> See *Sax & DiMento, Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 *ECOL. L.Q.* 1 (1974).

<sup>230</sup> E.g., *Seadade Industries, Inc. v. Florida Power & Light Co.*, 245 So. 2d 209 (Fla. 1971).

The criticism of the decisions of the trial court and Supreme Court of Kansas in the foregoing discussion naturally raises the question: what should those courts have decided and why? That question is of course far from simple, as it poses legal questions of societal magnitude and incorporates a near infinite series of variables. Nevertheless, it is confidently asserted here that KPL should have been enjoined from condemnation until such time as it could carry the burden of demonstrating that all reasonably relevant data had been compiled and rationally evaluated, and that it had the requisite permits in hand (or that there was a high degree of probability that the permits would be granted).

In arguing for this result, it must be conceded at the outset that the court's decision was within the scope of the available, albeit limited Kansas precedent; that the evidence presented by plaintiff CCU could validly be considered less than a "preponderance" on many issues; and that a litigant should not win his suit merely because he professes to be on the side of environmental quality. Even so, if the premise that people should not be evicted from their land by a private enterprise unless necessary to the attainment of higher societal goals is valid, then plaintiffs' case should have been deemed adequate to support at least interim relief.

In a more perfect world, judges would take into account the disparity in resources and in information possessed by the contending parties. They would not mechanically place the entire burden of proof and persuasion on the impecunious plaintiff when it is the wealthy and knowledgeable defendant that is disturbing the *status quo* to plaintiff's detriment, but would rather require that defendant to spell out and justify its action without equivocation or evasion. The more perfect court would also go right to the heart of the legal questions presented. It would not slough off the difficult ones because they are novel or because a supposedly expert agency has not yet officially recorded its view of those matters. Such a court would also be more interested in the meaning and spirit of a statute than in ways of avoiding its application, and it would be most interested in the appearance and reality of doing justice. One of the most compelling reasons for reversal is simply that it certainly does not *appear* that justice was done when plaintiffs are, with the courts' apparent approval, divested of their lands in favor of a monopoly utility which may or may not be allowed, eventually, to construct an enormous energy complex, the output of which may or may not be justifiable and the environmental effects of which may or may not be disastrous.

Such arguments, however, may belong only to the perfect world. In this imperfect one, there is still sufficient reason and precedent to accord plaintiffs the interim relief sought. On the basic issue of eminent domain power, it does not strain credulity to acknowledge that a private corporation is not a governmental entity. It would follow that the corporation might not deserve the great benefit of the doubt ordinarily accorded organs of government. It is

interesting to observe that in other contexts, such as due process in terminating service, utilities have fought tenaciously and successfully against the concept that they are subject to standards governing governmental operations.<sup>231</sup> This simple recognition of reality would have sufficed for reversal in the *CCU* suit, because the burden of proof would naturally have shifted to the party seeking to change the *status quo*, and, as shown above, KPL did not prove that it in fact had done its homework or that it could obtain the requisite clearances. If presumptions must be indulged, logic and fairness favor such an opposite approach.

The other issues, separately and together, are also sufficient to support reversal. As pointed out above, when the supreme court passed over the overriding NEPA issues as immaterial and late,<sup>232</sup> it was in effect condoning a rather transparent circumvention of a valid statute of the United States, allowing construction of enormous magnitude without benefit of any real environmental evaluation, and shirking its own duty in the process. The unfamiliarity of Kansas courts with novel and complex federal law is no excuse.<sup>233</sup> KPL not only conceded NEPA's eventual applicability, it also had initially claimed compliance. It could work no injustice to hold the utility to its word, as a matter of equity if nothing else. Had NEPA compliance been ordered, the information necessary to answer, one way or the other, the questions pertaining to water quality and solid waste disposal would have been compiled.

The trial court's decision should also have been reversed on the air quality issue. As to emissions limitations, the conclusion that emissions would not violate present standards appeared adequately supported by the evidence. Even assuming that new source standards would be met, defendant did not and could not show that ambient standards for the Region would be met or maintained. Since over a million people breathe the air in and around the Northeast Kansas Air Quality Control Region, it would seem incumbent upon KPL to demonstrate that its facility would not pose a widespread hazard to health. Even if the initial burden properly rests on plaintiffs, their evidence showing a present violation of the ambient particulate standard coupled with their uncontroverted estimates of defendant's exacerbating future emissions should have shifted that burden. Further, the dilemma posed by the "no significant deterioration of existing air quality"<sup>234</sup> standard should have been squarely met instead of avoided. For all these reasons, the supreme court should have granted interim relief, even in this imperfect world.

But the court did not do so, and future plaintiffs must live with or seek to overturn this decision. If a similar situation arises in the future, what options are open to the about-to-be-displaced landowners and the more ideological future environmental plaintiff in light of the *CCU* suit? The authors'

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<sup>231</sup> *Jackson v. Metropolitan Edison Co.*, 95 S. Ct. 449 (1974).

<sup>232</sup> 215 Kan. at 236, 523 P.2d at 769. See text at note 163 *supra*.

<sup>233</sup> Appellants alleged and briefed the point. Appellants' Brief at 31-34.

<sup>234</sup> See notes 95-97 and accompanying text *supra*.

power of prophecy is less than biblical, but a few generalities and guidelines may be tentatively advanced. First, looking at the bright side, it is not impossible to win a case under the test announced. To prevail, the future plaintiff must persuasively prove the vast unlikelihood of defendant actually receiving the requisite clearances. Plaintiff's claim will probably have to be founded on violation of a specific statutory standard, and his chances probably will be enhanced if it is a state, not federal, statute. This is of course a slim hope inasmuch as the utility probably would not get to the point of condemnation if it appeared that obvious that the units could not eventually be built. Still, the possibility remains that the ambiguity of the court's "abuse of discretion" review concept could work both ways, justifying an opposite result under the same verbal test in similar circumstances. Second, the federal courts have generally been more hospitable to environmental claims. Even so, a great many difficulties face a litigant seeking judicial intervention at this stage of the controversy,<sup>285</sup> as a federal claim will probably not arise until an unconstitutional taking or a federal dereliction occurs. Ultimately the best remedy is legislation designed to prevent this sort of thing from happening again. That remedy is dependent on effective mobilization of public opinion, and the necessity for legislation does not strike home with the average citizen until he too is displaced. It must also be admitted that the few unpaid environmental lobbyists in Topeka are no match for industry's hordes of hired hucksters.

Should the lawyer for our hypothetical future plaintiff decide to litigate, it might be worthwhile if he considers the following general suggestions:

- (1) Find a timely federal claim and bring suit in federal court.
- (2) Husband your resources: whether you win, lose, draw, or do not attempt litigation, the important decisions are made in the state and federal agencies. To be ultimately successful, the opponent of progress must be prepared to dig in and fight at various levels for years. (It may be that CCU shot its wad just as it made its case.)
- (3) Be alert for areas of mutual benefit in which compromise is possible, but do not expect gift horses. Environmental litigation sometimes rouses apprehension as well as anger in the beleaguered corporate breast, so there may be more chance for successful settlement than one could reasonably expect.
- (4) Conduct as much discovery as is legally and humanly possible under the circumstances. Defendants are the sole repositories of the facts and opinions you need to obtain in order to prevail.
- (5) Do not be shy about consulting with established conservation associations. While they are probably worse off financially than your clients, their advice or other assistance, even of the moral suasion variety, can be of benefit. (The Sierra Club Foundation donated a sum to CCU to help it with its legal expenses.)
- (6) Do not expect to become wealthy from such suits; the plaintiff's lawyer is as likely to sustain a loss as otherwise, so he should not accept the case unless

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<sup>285</sup> *E.g.*, *New Mexico Citizens v. Train*, 6 ERC 2061 (D.N.M. 1974).

willing to do his best for less. Ethics, hopefully, are not a function of the minimum fee schedule.

In sum, the environmental litigation climate in Kansas after the *CCU* decision is not now hospitable. Since the Kansas Supreme Court's ruling seemed more reflective of apprehension toward and unfamiliarity with federal environmental law than with antipathy toward environmental claims, it may be predicted with some confidence that as the nationwide tide of litigation engulfs Kansas, the court will gain sympathy with experience. Future commentators will probably point to the *CCU* case as the decision that marked the true start of environmental law in Kansas. While the court's conclusions were at best questionable, the right questions have now been raised for the first time.