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Kansas Natural Resource Coalition v. U.S. Department of Interior—Congressional Review Act removed subject matter jurisdiction over suit challenging FWS's failure to submit for review the 2003 Policy for Evaluation of Conservation Efforts When Making Listing Decisions

The 1996 Congressional Review Act requires that "[b]efore a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule." 5 U.S.C. § 801(a)(1)(A). The CRA incorporates by reference, with several exceptions not relevant here, the definition of "rule" in the Administrative Procedure Act. *See id.* § 551(4) ("rule" includes, inter alia, "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"). Subsequent to the CRA's adoption, the Fish and Wildlife Service adopted a Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100 (Mar. 28, 2003) but did not submit it for review. The Kansas Natural Resource Coalition, a group of western Kansas county governments, sued the Department of the Interior and various officials in 2018 alleging that the Policy was invalid given the lack of submission. KNRC argued that the Policy's invalidity caused injury in fact because the coalition could not "not beneficially rely on the [Policy] in implementing" a lesser prairie-chicken conservation plan that it had developed; i.e., the CRA noncompliance "puts conservation agreement participants 'in a bind: they must show that their plans are certain to be implemented and effective but the failure to submit the PECE Rule undermines the incentives necessary to achieve that certainty.'" The district court dismissed the action, construing CRA § 805 to deprive it of subject matter jurisdiction. That section reads: "No determination, finding, action, or omission under this chapter shall be subject to judicial review." *Kansas Natural Resource Coalition v. U.S. Dep't of Interior*, 382 F. Supp. 3d 1179 (D. Kan. 2019). In view of this determination, the court did not address two other grounds raised by the federal defendants for dismissal: lack of Article III standing and failure to bring the action within the six-year limitation period under 28 U.S.C. § 2401(a).

A divided Tenth Circuit panel affirmed. *Kansas Natural Resource Coalition v. U.S. Dep't of Interior*, No. 19-3018, 2020 WL 4931375 (10th Cir. Aug. 24, 2020). Unlike the district court, the majority deemed it appropriate to address first KNRC's standing—which it found absent given the complaint's allegations—and then "[i]n the interest of judicial economy" the proper interpretation of § 805—which, like the district court, it held removed federal court jurisdiction.

On the standing issue, the majority observed that "KNRC does not allege that anyone besides KNRC itself—in this lawsuit— has exhibited any lack of confidence in the Rule. And the complaint describes counties' and property owners' 'incentives' without alleging that any of them is having doubts about participating in KNRC's conservation plan." It added, in response to the contention that KNRC could not "rely on the PECE Rule until [its submission and] the time for a

joint resolution of disapproval expires" with the observation that "[t]his theory fails because Congress can overturn the PECE Rule at any time, regardless of the CRA." The majority deemed as "speculative" KNRC's remaining grounds for standing—(1) the risk that application of the Policy to an anticipated lesser-prairie chicken listing might result in giving "'short shrift'" to the KNRC conservation plan and (2) the potential for "'a decision not to list the species [being] struck down for considering plans like KNRC's.'" The majority did agree, however, with KNRC's assertion "that the shortcomings with respect to standing identified in the complaint are 'curable,' and ... that, rather than remand 'with leave to amend,' we reach the issue of subject matter jurisdiction 'to avoid the needless waste of party and judicial resources.'"

On the subject matter jurisdiction issue, the construed what it viewed as the straightforward text of § 805 to foreclose judicial review of the agency's CRA noncompliance:

> An "omission" is a "failure to do something; esp., a neglect of duty." ... "Under," when used as a preposition, sometimes means "subject to the authority, control, guidance, or instruction of," as in "under the terms of the contract." .... So, an "omission under this chapter" refers to the failure to do something that the CRA requires. [¶] DOI's duty to submit the PECE Rule to Congress arises under § 801(a)(1)(A). KNRC alleges that DOI has failed to do something the CRA requires it to do by not submitting the PECE Rule to Congress. Consequently, KNRC's claim is covered by the plain language of § 805, and we lack subject matter jurisdiction to review DOI's omission.

It further rejected the dissent's position that "§ 805 'strips review of compliance with the CRA's review procedures, which do not arise until after an agency has submitted a proposed rule for review.'" The majority reasoned that "[t]his reading ... has no basis in the text of § 805" and accordingly "would have us read § 805 to preclude judicial review of all omissions except those arising under § 801(a)(1)(A). We decline to 'add to, remodel, update, or detract from' the CRA's plain language in such a manner." The majority also rejected the dissent's reliance on the presumption of judicial review with respect to administrative agency actions because such presumption is overcome "'by "clear and convincing evidence" of congressional intent to preclude judicial review.'" Here, "§ 805 unambiguously applies to KNRC's claim, [and] the presumption is rebutted."

The lengthy dissent differed on both issues. It contended that KNRC's allegations sufficed to establish procedural injury. "KNRC's legally protected interest is its interest in avoiding the listing of the lesser prairie chicken." Thus, "DOI's refusal to submit the PECE Rule to Congress, in violation of the CRA, has created uncertainty about the validity of the criteria DOI will use in determining whether KNRC's conservation plan obviates the need for the species to be listed. This uncertainty, which impedes KNRC's protection of its interest, is a concrete injury for standing purposes." Section 805 did not foreclose judicial review, the dissent continued, in light of the *noscitur a sociis* rule of construction:

> All four terms in § 805 describe actions taken after the CRA's review provisions have been triggered. Congress, for instance, does not make a "finding" or "determination" under the CRA until a rule has been submitted for approval. Thus, the phrase "under this statute" may reasonably be interpreted to concern "determination[s], finding[s], action[s], or omission[s]" controlled or guided by the CRA after the statute's review provisions have been triggered. The only action contemplated by the CRA that precedes the operation of its review mechanisms is an agency's submission of a proposed rule. But the requirement that an agency submit a rule for approval is contained in a provision of the statute titled, "Congressional review," which instructs how a submitted

> rule must be reviewed upon submission. ... Thus, a plausible—and narrower—interpretation of the statute is that it strips review of compliance with the CRA's review procedures, which do not arise until after an agency has submitted a proposed rule for review.

The dissent additionally argued that "the legislative history and purpose of the CRA, and the nature of DOI's action" supported its position that § 805 did not possess the requisite clarity to rebut the presumption of reviewability. It concluded by addressing the federal defendants' six-year limitation defense under § 2401(a). KNRC's claim, in the dissent's view, "first accrued on December 11, 2012, when DOI proposed listing the lesser prairie chicken as a threatened species under the ESA." The claim was therefore timely in light of the complaint's filing in April 2018.

Decision link: https://www.ca10.uscourts.gov/opinions/19/19-3108.pdf