Approved March 17, 1988
Date

MINUTES OF THE HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES.

The meeting was called to order by Representative Dennis Spaniol at
Chairperson

3:30 ~~a.m.~~p.m. on March 2, 1988 in room 526-S of the Capitol.

All members were present except:

Representative Patrick (excused)

Committee staff present:

Laura Howard, Legislative Research Department
Paul West, Legislative Research Department
Arden Ensley, Revisor
Betty Ellison, Committee Secretary

Conferees appearing before the committee:

James Power, Director of Environment, Kansas Department of Health and Environment
Patricia Casey, Senior Counsel, Kansas Department of Health and Environment
Paul E. Fleener, Director of Public Affairs Division, Kansas Farm Bureau
Mike Beam, Executive Secretary, Cow-Calf/Stocker Division Kansas Livestock Association
Darrel Montei, Legislative Liaison, Kansas Department of Wildlife and Parks
Representative Jack Beauchamp
Clark R. Duffy, Assistant Director, Kansas Water Office

Chairman Dennis Spaniol began the meeting with the hearing on House Bill 3026--Low-level radioactive waste; fees imposed against major generators.

James Power represented the Department of Health and Environment, speaking as a proponent of this bill. His agency had developed this bill to allow the legislature to make a policy decision as to how to finance the state's involvement in the Central Interstate Low-Level Radioactive Waste Compact Commission. He said that the legislature needed to decide whether the necessary costs should be borne by the citizens of the state or assessed against the major generators of low-level radioactive waste. (Attachment 1)

House Bill 3027--Water pollution; discharge of sewage into waters of the state.

Patricia Casey spoke as a proponent, representing the Department of Health and Environment. She said this legislation was needed to bring Kansas law into compliance with the Clean Water Act. Her written testimony lists three major statutory changes, as well as proposed amendments to House Bill 3027 and copies of two Attorney General Opinions. (Attachment 2)

Representative Freeman requested the Department to supply the committee with copies of the order they received from the Environmental Protection Agency (EPA) notifying them that they were in noncompliance and she agreed to do so. In response to a question, James Power said that the fiscal note on this would be $3 million. He said this would not come from the superfund but approximately $½ million would come from General Water Pollution Control, roughly $1¼ million for Administration and Construction of Grant Program and around $300,000 to $400,000 for Water Quality Management Program.

There was considerable discussion relative to livestock and farm ponds.

Paul Fleener represented Kansas Farm Bureau, opposing House Bill 3027. His organization objected to the language relative to the flow of sewage into any of the waters of the state including privately-owned freshwater reservoirs and farm ponds." He noted that the new language in lines 0225-0238 would provide for a private right of action and this was a strong concern. (Attachment 3) Discussion followed.

Mike Beam, representing the Kansas Livestock Association, opposed House Bill 3027. He was concerned regarding the definition of "sewage" as it relates to livestock and farm ponds. He suggested that a clarification of the term "sewage" or further definition of the word "discharge" might help alleviate some of the fears. (Attachment 4)

At the request of Chairman Spaniol, Ms. Casey agreed to supply the committee with information regarding what other agricultural states in the area are doing to comply with the Clean Water Act. Following further discussion, the Chair announced that since the committee obviously would not be able to take action on this bill by March 3, he would request the Speaker to send it to Appropriations to keep it alive and refer it back to us at a later date. He felt that the committee needed to work on the bill and try to improve it, since a potential $3 million loss of revenue was involved.

House Bill 3006--Wildlife and parks; reporting of damage by wildlife.

Paul Fleener, representing Kansas Farm Bureau, spoke in favor of this legislation, since his organization had requested it. The bill would the Wildlife and Parks Department to establish a toll-free number to be used by farmers and other citizens to report wildlife damage to crops and other property. It was believed that this would be an additional aid to Wildlife and Parks in their effort to control this problem. (Attachment 5) During discussion, Mr. Fleener commented that perhaps another section could be added to the bill addressing what should be done once the information was received on the hotline.

During discussion, staff told the committee that funding for this would cost approximately $1900 per year for the line, line charges, etc., plus KANS-AN charges and costs for additional personnel. The funding source was not addressed in the bill, but it was assumed that the cost of the toll-free number would come from the budget of Wildlife and Parks in some way.

Mike Beam represented the Kansas Livestock Association with testimony in support of House Bill 3006. He felt that a toll-free "hotline" could help document wildlife damage problems and provide data in conducting long-range plans for wildlife damage control, as well as coordinating response actions between the Wildlife Damage Control Program at Kansas State University, the USDA Animal Damage Control Office in Pratt, and the Department of Wildlife and Parks. (Attachment 6)

Darrel Montei represented the Department of Wildlife and Parks in opposition to House Bill 3006. He noted that the cooperative efforts currently in place resulted in a pretty good reporting procedure. While the fiscal impact of the bill was not large, it seemed to be an unnecessary expenditure. Committee discussion followed. (Attachment 7)

MINUTES OF THE HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES,

room 526-S, Statehouse, at 3:30 ~~a.m.~~/p.m. on March 2, 1988

House Bill 2975--State water plan; cost-benefit analysis.

Representative Jack Beauchamp, sponsor of the bill, spoke in favor. He felt it was necessary to collect current figures on returns to investment in various water-related areas to support the thrust of implementation of the state water plan. He believed that the figures were currently available and if they could be compiled, the work of the budget planners could be accelerated. (Attachment 8) During discussion, Representative Beauchamp said he did not know what the fiscal cost would be, but he doubted that it would be very large. He believed it was important to get the water plan implemented expediently for economic development reasons.

Clark Duffy represented the Kansas Water Office in opposition to House Bill 2975. He commented that the Water Office supported the intent of the bill, but were concerned that if enacted, it would not produce the meaningful results desired. The reasons for the reservations of the Water Office regarding this bill are listed in his written testimony. (Attachment 9) During discussion, Mr. Duffy said he had not seen a fiscal note on this, but it would require about three full-time positions for two years to develop the methodology and if that was successful, to then conduct the analysis. They presently had no staff with the economic background required for this type of technical analysis.

This ended the hearings and the meeting was adjourned at 5:15 p.m.

The next meeting of the House Energy and Natural Resources Committee will be held at 3:30 p.m. on March 3, 1988.

Date: March 2, 1988

GUEST REGISTER

HOUSE

COMMITTEE ON ENERGY AND NATURAL RESOURCES

NAME	ORGANIZATION	ADDRESS	PHONE
Jerry Conrad	KG&E	Topeka	
Tom Taylor	KPL Gas Service	Topeka	
Woodman	KCPL	KC Mo.	
John Blythe	KFB	Manhattan	
MIKE BEAM	Ks. LVSTK. ASSN.	TOPEKA	
Pat Casey	KDHE	"	
Mary Ann Bradford	League of Women Voters	"	
Bob Meinen	Kansas Dept of Wildlife & Parks	"	2287
Bill Bryson	KCC	"	
Ken Kern	Conservation Commission	"	
Dave Corliss	LKM	"	
James Power	KDHE	"	1535
Darrell Montei	KDWP	Scott	3908

STATE OF KANSAS

DEPARTMENT OF HEALTH AND ENVIRONMENT
Forbes Field
Topeka, Kansas 66620-0001
Phone (913) 296-1500

Mike Hayden, *Governor*

Stanley C. Grant, Ph.D., *Secretary*
Gary K. Hulett, Ph.D., *Under Secretary*

Testimony Presented to

House Energy and Natural Resources Committee

by

The Kansas Department of Health and Environment

House Bill 3026

Mr. Chairman and Members of the Committee:

House Bill 3026 would allow the legislature to make a policy decision as to how to finance the state's involvement in the Central Interstate Low-Level Radioactive Waste Compact Commission.

In response to the Low-Level Radioactive Waste Policy Act of 1980, the states of Arkansas, Kansas, Louisiana, Nebraska, and Oklahoma formed the Central Interstate Low-Level Radioactive Waste Compact Commission in 1983, and empowered it to carry out the party states' duties and responsibilities of low-level radioactive waste management. It is the Commission's responsibility to see that its party states preserve the health, safety, and welfare of their citizens and the environment, and provide for and encourage the economical management of low-level radioactive wastes.

The Commission sought to meet its responsibility of ensuring a developer be chosen and a facility built to handle the region's waste by method of Request for Proposals (RFP) thereby giving any interested and qualified entity a chance to respond. Interested applicants were able to use the Request for Proposal as a guide for submitting a proposal to develop, construct, and operate a regional waste facility. The Commission met in Oklahoma City, Oklahoma, on June 29, 1987, and selected U.S. Ecology as the contractor to develop, construct, and operate the regional low-level radioactive waste facility.

During a December 1987 meeting in New Orleans, the Compact Commission selected the State of Nebraska as the initial host

As a member of a compact commission, there are certain financial obligations which need to be met. These include $25,000 per year for carrying out the administrative activities of the Commission office (K.S.A. 65-34a01, Article IV, h.1.) In addition, the staff is involved in several meetings a year in fulfilling the state's obligation as a participant in the compact. This has been as many as four out-of-state trips per year for two to three people. Finally, there will be costs associated with the development of the facility.

Nebraska Governor Kay Orr, in a December 1, 1987 statement, requested compensation for local communities who become active participants in the site selection process. Her statement indicates that preoperational compensation would be an obligation of the nonsite states. This may amount to $70,000 per state for each of the next three to four years.

Thus, there is a need for a policy decision on the part of the legislature as to whether or not these costs should be borne by the citizens of the State of Kansas or assessed against the major generators of low-level radioactive waste. It is our opinion the legislature would be wise in considering this bill and supporting the concept in the proposed legislation.

Submitted by:

James A. Power, Jr., P.E.
Director, Division of Environment
March 2, 1988

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Phone (913) 296-1500

Mike Hayden, *Governor*

Stanley C. Grant, Ph.D., *Secretary*
Gary K. Hulett, Ph.D., *Under Secretary*

Testimony Presented to

House Energy and Natural Resources Committee

by

Kansas Department of Health and Environment

House Bill 3027

This bill is the result of the Environmental Protection Agency (EPA) notifying the Kansas Department of Health and Environment (KDHE) that the Kansas statutes codified at K.S.A. 65-164 et seq. were no longer in compliance with the provisions of the Clean Water Act. Pursuant to the delegation of authority to administer the National Pollution and Discharge Effluent System (NPDES) program under the Clean Water Act, the State must meet and maintain such compliance.

The amendments set forth in HB 3027 were arrived at through negotiation with EPA at both the local and national level and as a result of two Attorney General Opinions, copies of which are attached, relative to the current requirements of the Clean Water Act.

There are three major statutory changes:

Sections 1, 2, 3, 4 and 8. The elimination of the exemption of discharges into freshwater ponds. Thereby requiring that discharges into privately-owned freshwater ponds be covered by the NPDES program.

Sections 4, 5, and 6. Increase(s) in the penalty amount for violations of the Act.

Section 7. Allows intervention by non-parties in certain proceedings.

Attachment 2
House Energy & NR 3-2-88

On March 1, 1988 EPA notified KDHE that:

1. There had been miscommunication concerning the fine and penalty changes. Therefore, KDHE is now requesting the Committee amend House Bill 3027 to reflect the original statutory amounts as shown in the attached amended version of the bill.

2. There should be statutory authority for intervention when KDHE seeks an injunction for permit condition violation(s). This change is also reflected in the attached amended version of the bill.

We support House Bill 3027.

Presented by: L. Patricia Casey
Acting General Counsel
March 2, 1988

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September 1, 1987

ATTORNEY GENERAL OPINION NO. 87- 130

Pat Casey
Special Assistant to the Secretary
Department of Health and Environment
Forbes Field
Topeka, Kansas 66620-0001

Re: Public Health--Water Supply and Sewage--State Statutory Implementation of the National Pollutant Discharge Elimination System Program

Synopsis: Although a permit term or condition is not considered a "provision of the act" under K.S.A. 65-171t, and thus an action may not be brought pursuant to that section, injunctive relief may be sought through the broad powers granted to the secretary under K.S.A. 65-101. K.S.A. 65-170b grants broad authority to KDHE representatives to make inspections of records relating to a permitted facility to determine compliance with statutory and regulatory provisions relating to water pollution or public water supply. K.S.A. 65-171b does not provide for an override of the thirty day notice period provided by K.S.A. 65-165, but the same result may be achieved through injunctive relief. K.S.A. 60-224(b)(2) provides for permissive intervention when an applicant has a claim or defense with a question of law or of fact in common with the main action. "Sewage," as defined by K.S.A. 1986 Supp. 65-164 would include wastes with elevated temperatures, as long as they are "from domestic, manufacturing or other forms of industry." Cited herein: K.S.A. 60-224(b)(2); K.S.A. 65-101; K.S.A. 1986 Supp. 65-164; K.S.A.

65-165; 65-170b; 65-171b; K.S.A. 1986 Supp. 65-171d; K.S.A. 65-171t.

* * *

Dear Mr. Casey:

As Special Assistant to the Secretary of Health and Environment, Mr. Charles Hamm requested our opinion on several questions concerning the administration of the National Pollutant Discharge Elimination System (NPDES) program. Specifically, he inquired:

"1. Is the language of K.S.A. 65-171t broad enough to include bringing an action to prevent violations of permit conditions as issued under the authority in K.S.A. 65-165? Or stated another way, is a permit term or condition considered a 'provision of the act' under K.S.A. 65-171t?

"2. Is the statutory language of K.S.A. 65-170b broad enough to include the authority to enter property upon which records are kept concerning a permitted facility even if such property is not otherwise subject to K.S.A. 65-161 through 65-171?

"3. Will a finding of 'abatable pollution' pursuant to K.S.A. 171b be sufficient to override a 30 day notice period to the permittee as required by K.S.A. 65-165?

"4. Whether the provisions of K.S.A. 60-224(b)(2) required an applicant to have a cause of action for permissive intervention?

"5. Is the statutory definition of 'sewage' in K.S.A. [1986 Supp.] 65-164 broad enough to cover discharges with elevated temperatures?

"6. What types of discharges are not subject to NPDES permitting in relation to K.S.A. 1986 Supp. 65-171d?"

As to your initial inquiry, K.S.A. 65-171t states:

> "The attorney general, upon the request of the secretary of health and environment, shall bring an action in the name of the state of Kansas to seek injunctive relief to prevent the violation, or to enjoin any continuing violation, of any provision of

> this act or any rule and regulation adopted pursuant to the provisions of this act[*]."

The asterisk following the text of the statute indicates that the language "this act" refers to Chapter 212 of the 1977 Session Laws. K.S.A. 65-165, which sets out the authority of the secretary to issue sewage discharge permits, was not affected by this act. Therefore, it is our opinion that your question must be answered in the negative.

However, it is well-settled that health authorities may seek injunctive relief to prevent an anticipated health menace.

> "They are not compelled to wait until the health menace--discomfort, ill health, and perhaps death--is actually present. To be of real value health authorities must have authority to take such action as is necessary to prevent a health menace which is reasonably likely to occur under the facts and circumstances applicable thereto." Dougan v. Shawnee County Commissioners, 141 Kan. 554, 560 (1935).

So, if a violation of the permit condition warranted such action, injunctive relief could be sought through the broad powers granted to the secretary under K.S.A. 65-101.

As to your second inquiry, K.S.A. 65-170b states in relevant part:

> "In performing investigations or administrative functions relating to water pollution or a public water supply system as provided by K.S.A. 65-161 to 65-171j, inclusive, or any amendments thereto, the secretary of health and environment or the secretary's duly authorized representatives upon presenting appropriate credentials, may enter any property or facility which is subject to the provisions of K.S.A. 65-161 to 65-171j, inclusive, or any amendments thereto, for the purpose of observing, monitoring, collecting samples, examining records and facilities to determine

> compliance or noncompliance with state laws and rules and regulations relating to water pollution or public water supply." (Emphasis added.)

In our opinion, the language gives broad authority to KDHE representatives to make inspection of records relating to a permitted facility to determine compliance with statutory and regulatory provisions relating to water pollution or public water supply. Our opinion is buttressed by a letter issued by the Attorney General on May 23, 1973 to Jerome H. Svore, which concludes that state law enables an authorized representative of the state to

> "[h]ave a right of entry to, upon, or through any premises of a permittee or of an industrial user of a publicly-owned treatment works in which premises an effluent source is located or in which any records are required to be maintained," p. 7. (Emphasis added.)

As to your third inquiry, K.S.A. 65-171b states:

> "It shall be the duty of the attorney general, on presentation by the secretary of health and environment of evidence of abatable pollution of the surface waters detrimental to the animal or aquatic life in the state, to take such action as may be necessary to secure the abatement of such pollution." (Emphasis added.)

The statutory language does not specifically provide for an override of the thirty day notice period under K.S.A. 65-165. However, the same result may be achieved through injunctive relief where warranted by the circumstances, as discussed under your initial inquiry. Our opinion is again buttressed by Kansas Attorney General Opinion of May 23, 1973 to Jerome H. Svore which states in relevant part:

> "State law provides authority to:
>
> "a. Abate violations of:
>
> . . . .
>
> "b. Apply sanctions to enforce violations

described in paragraph (a) above, including the following:

"(1) Injunctive relief, without the necessity of a prior revocation of the permit;" p.13. (Emphasis added.)

As to your fourth inquiry, K.S.A. 60-224(b)(2) provides for permissive intervention

"[W]hen an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." (Emphasis added.)

The statutory language requires that the claim or defense of the applicant have a question of law or fact in common with the main action. The statute also makes the grant or denial of the application discretionary with the court. Thus, an applicant with a claim or defense may, in the discretion of the court, be denied intervention if the intervention would unduly delay or prejudice the rights of the original parties.

As to your fifth inquiry, K.S.A. 65-164 states in relevant part:

"For the purposes of this act, sewage is hereby defined as any substance that contains any of the waste products or excrementitious or other discharges from the bodies of human beings or animals, or chemical or other wastes from domestic, manufacturing or other forms of industry." (Emphasis added.)

In our opinion, the language "other wastes" would include those with elevated temperatures, as long as they are "from domestic, manufacturing or other forms of industry."

As to your sixth inquiry, to this date our office has not been provided with the additional information needed to adequately address your question.

In conclusion, although a permit term or condition is not considered a "provision of the act" under K.S.A. 65-171t, injunctive relief may be sought through the broad powers granted to the secretary under K.S.A. 65-101. K.S.A. 65-170b grants broad authority to KDHE representatives to make inspections of records relating to a permitted facility to determine compliance with statutory and regulatory provisions relating to water pollution or public water supply. K.S.A. 65-171b does not provide for an override of the thirty day notice period provided by K.S.A. 65-165, but the same result may be achieved through injunctive relief. K.S.A. 60-224(b)(2) provides for permissive intervention when an applicant has a claim or defense with a question of law or of fact in common with the main action. "Sewage," as defined by K.S.A. 1986 Supp. 65-164 would include wastes with elevated temperatures, as long as they are "from domestic, manufacturing or other forms of industry."

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Julene L. Miller

Julene L. Miller
Deputy Attorney General

RTS:JLM:jm

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October 26, 1987

ATTORNEY GENERAL OPINION NO. 87- 154

L. Patricia Casey
Senior Counsel
Department of Health and Environment
Forbes Field
Topeka, Kansas 66620-0001

Re: Public Health -- Secretary of Health and Environment, Activities; Water Supply and Sewage -- Implementation of Clean Water Act; N.P.D.E.S. Program

Synopsis: The partial transfer of authority from the Kansas Department of Health and Environment to the Kansas Corporation Commission does not allow a discharge of pollution in violation of the federal National Pollution Discharge Elimination System (N.P.D.E.S.) permit requirements.

State law defines pollution as broadly as it is defined by federal law.

With the exception of some privately owned farm ponds and reservoirs, regulation of discharges into waters of the state include discharges into bodies of water defined by federal law.

State enforcement provisions include civil penalties which appear to be as stringent as required by federal law. However, the criminal penalties provided by state law are less stringent.

Variances granted under state law are limited to those allowable under federal law.

Legislative amendments appear necessary to conclude that the state program meets all the requirements of the federal act. Cited herein: K.S.A. 60-224; 65-101; 65-102a; 65-161; 65-162a; K.S.A. 1986 Supp. 65-163; 65-163a; 65-164; K.S.A. 65-165; 65-166; 65-167; 65-169; 65-170b; 65-170c; 65-170g; K.S.A. 1984 Supp. 65-171d; K.S.A. 1986 Supp. 65-171d; K.S.A. 65-171m through 65-171t; L. 1986, ch. 201, § 22; K.A.R. 28-16-28b(35); 28-16-57; 28-16-58; 28-16-62; 82-3-400; 82-3-401; 33 U.S.C.A. §§ 1318, 1362(6), 1362(7); 40 C.F.R. §§ 122.2, 123.27 (1986).

* * *

Dear Ms. Casey:

As Senior Counsel for the Kansas Department of Health and Environment, you have requested our opinion concerning several issues involving the National Pollution Discharge Elimination System (N.P.D.E.S.) program. Your request of August 27, 1987 reflects concerns raised by the United States Environmental Protection Agency in April of this year regarding Kansas statutory and regulatory compliance with federal law.

I. Initially, you ask whether jurisdiction over N.P.D.E.S. regulated discharges has been transferred from the Department of Health and Environment (KDHE) to the Kansas Corporation Commission (KCC). Prior law allowed KDHE to protect the waters of the state from pollution by oil, gas and salt water injection wells. K.S.A. 65-171d (1984). This section was amended by L. 1986, ch 201, § 22, which transferred certain duties to the KCC, while retaining in KDHE jurisdiction over the clean up of such pollution. We believe that this transfer of authority does not effect the state N.P.D.E.S. permit program.

Pursuant to the transfer of authority, a memorandum of understanding (MOU) was entered into between the KCC and KDHE. The agreement, dated July 1, 1986, assures cooperation between the agencies regarding the prevention and clean-up of pollution. The KCC has jurisdiction to prevent pollution by oil and gas activities. Such jurisdiction is to be exercised in cooperation with KDHE. Oil and gas activities are to be in compliance with applicable federal and state statutes and regulations. MOU, at page 4. Authority

for prevention or clean-up of pollution resulting from transportation, storage or refining of oil and gas is vested in KDHE. MOU, at page 5. The KCC has jurisdiction to prevent pollution in the drilling, injection and disposal phases of oil and gas activities. These activities are subject to application and approval pursuant to K.A.R. 82-3-400 et seq. Such application must show that injection or disposal will be contained within a zone, and will not enable the fluid to enter fresh or usable water strata. K.A.R. 82-3-401. In short, we believe that prior to commencing oil and gas activities regulated by KCC, approval is required, and assurances must be made that the injection will not result in the degradation of water resources.

In light of the regulatory scheme implemented by KCC, and the clarification of duties of KCC and KDHE, we believe that the transfer of authority between the agencies does not allow an unpermitted discharge of pollution to occur which would otherwise be subject to N.P.D.E.S. requirements. Pollution is defined by 33 U.S.C.A. § 1362(6) (B) as not including "water, gas, or other material which is injected into a well to facilitate production of oil or gas ... if the well ... is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources." These conditions being met, it is our opinion that the 1986 amendments to K.S.A. 65-171d do not allow a discharge of pollution in violation of the federal act.

II. Your second question involves updating statutory reference to federal law. The secretary of KDHE is authorized by K.S.A. 1986 Supp. 65-171d(b) to adopt regulations promulgated by the federal government pursuant to the clean water act and the 1981 amendments thereto. The clean water act, however, has been amended in 1983 and 1987. For the secretary to implement these amendments, legislative action is required which incorporates these updates.

III. Your third question is whether the Kansas definition of pollution is broad enough to encompass the definition of pollution as used in the clean water act. Pursuant to K.S.A. 1986 Supp. 65-171d(b), the secretary has adopted by reference the federal definition of pollution, as it appears in 33 U.S.C.A. § 1362(6) (as in effect Dec. 27, 1977, Pub.L 95-217, § 33(b), 91 Stat. 1577). K.A.R. 28-16-58(l), 87 Kan. Register 647-48 (1987).

IV. Your fourth question is whether point source discharges into farm ponds and fresh water reservoirs are subject to N.P.D.E.S. permit requirements. Farm ponds and fresh water reservoirs are exempt from water quality standards if they are privately owned and all land bordering the pond or reservoir is under common private ownership. This exemption does not apply, however, if the water quality standard relates to a discharge into waters of the state, or if the standard relates to the public health of persons using the pond or reservoir. K.S.A. 1986 Supp. 65-171d(d). The question arises whether a discharge into such farm ponds or reservoirs is subject to N.P.D.E.S. permit requirements.

The clean water act regulates pollution of navigable waters. Navigable waters include waters of the United States and territorial seas. 33 U.S.C.A. § 1362(7). The term "waters of the United States" is defined as including intrastate bodies of water, "the use, degradation, or destruction of which would affect or could effect interstate or foreign commerce . . . " 40 C.F.R. § 122.2 (1986).

We believe that situations could arise in which a discharge would be prohibited by federal law, but not prohibited by state law. For example, if the pond or reservoir is so constructed as to preclude seepage or discharge from the body of water into waters of the state, and a water quality standard is not designed to protect the health of persons using the pond or reservoir, then such water quality standard would not apply to the pond or reservoir. However, that pond or reservoir could theoretically be a navigable water, into which the unpermitted discharge of pollutants is prohibited by federal law. Therefore, it is our opinion that state law is not as broad as federal law in this area.

V. Your fifth question is whether the definition of "Waters of the State" includes the items specified in the federal definition of "Waters of the United States."

"Waters of the State" are defined as:

> "[A]ll streams and springs, and <u>all bodies of surface and subsurface waters within the boundaries of the state.</u>" K.S.A. 65-161(a). (Emphasis added).

The federal definition appears much broader as it includes items such as "mudflats, sandflats, wetlands, sloughs,

prairie potholes and wet meadows." 40 C.F.R. § 122.2 (1986). However, "surface waters" are defined by state regulation as:

> "all streams and rivers, including springs, water in alluvial aquifers available for flow to streams, and riparian wetlands, and all lakes and wetlands." K.A.R. 28-16-28B(35).

While terminology may differ between federal and state provisions, we believe them to be practically synonymous. In light of the previous discussion regarding certain farm ponds and reservoirs, it should be noted that those bodies are not excluded from waters of the state as defined by the regulation. Those farm ponds and reservoirs are simply excluded from water quality standards in some situations.

VI. Your sixth question is whether state enforcement provisions are as strict as those required by federal law. First, state law must authorize an injunction for violations or threatened violations of any program requirement or permit condition. 40 C.F.R. § 123.27(a)(2) (1987). At the request of the secretary of KDHE, the attorney general is authorized to seek to enjoin violations of K.S.A. 65-162a, 1986 Supp. 65-163, 1986 Supp. 65-163a, 65-170b and 65-171m through 65-171g and amendments, inclusive. Such enforcement extends to rules and regulations promulgated pursuant to those sections. K.S.A. 65-171t. In addition, the secretary has broad authority to take steps necessary to protect the public health under K.S.A. 65-101, as explained in Dougan v. Shawnee County Commissioners, 141 Kan. 554, 560 (1935). In short, if a permit condition is a response to a statutory or regulatory requirement, or if a permit condition protects public health, then we believe the violation of that permit condition may be enjoined.

The second aspect of enforcement authority involves a comparison between federal and state civil and criminal penalties for various acts.

Regarding civil penalties, federal regulations provide that a State program have available the following remedies:

> "Civil penalties shall be recoverable for the violation of any NPDES permit condition; any NPDES filing requirement; any duty to allow or carry out inspection,

> entry or monitoring activities; or, any regulation or orders issued by the State Director. These penalties shall be assessable in at least the amount of $5,000 a day for each violation." 40 C.F.R. § 123.27(a)(3)(i)(1986).

State law provides for a civil penalty not to exceed $10,000 for these violations. K.S.A. 1986 Supp. 65-170d(a). This penalty is imposed by the director of the division of environment. K.S.A. 1986 Supp. 65-170d(b). We believe that, while the director might assess all penalties in an amount over $5,000 to comply with the federal regulation, such is not currently required by statute.

Federal Regulations also provide that the state program have available the following criminal penalties:

> "Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any NPDES permit condition; or any NPDES filing requirement. These fines shall be assessable in at least the amount of $10,000 a day for each violation." 40 C.F.R. § 123.27(a)(3)(ii) (1986),

and

> "Criminal fines shall be recoverable against any person who knowingly makes any false statement, representation or certification in any NPDES form, in any notice or report required by an NPDES permit, or who knowingly renders inaccurate any monitoring device or method required to be maintained by the Director. These fines shall be recoverable in at least the amount of $5,000 for each instance of violation." 40 C.F.R. § 123.27(a)(3)(iii) (1986).

The state penalties relating to activities listed in paragraph (ii) of the federal regulation appear in K.S.A. 65-167. For failing to report a sewage discharge, the fine is $1,000 per day for each day the offense is maintained. For willfully or negligently violating any applicable standard or limitation under K.S.A. 65-165, any N.P.D.E.S. permit condition under

K.S.A. 65-167, or any requirement of K.S.A. 1986 Supp. 65-164 or 65-166, the penalty is not less than $2,500 and not more than $25,000, plus $25,000 for each day the offense is maintained. The state penalties relating to activities listed in paragraph (iii) of the federal regulation appear at 65-170c, with a fine of not less than $25 and not more than $10,000. Each day the violation continues constitutes a separate violation.

The third aspect of enforcement authority involves the penalties listed in K.S.A. 65-169. That section states that failing to furnish, on demand, information required by the secretary is a misdemeanor, punishable by a fine of $50 to $500. In addition, failing to fully comply with the requirements of the secretary is a misdemeanor, punishable by a fine of $25 to $100. The issue is raised whether this section limits the criminal penalties listed in K.S.A. 65-167, discussed above. We believe that these penalties are in addition to the civil penalties listed in K.S.A. 1986 Supp. 65-170d(a). They do not displace, nor are they in conflict with the criminal penalties listed in K.S.A. 65-167. Section 65-169 deals with orders made by the secretary, while section 65-167 relates to statutory, regulatory and permit requirements.

In summary, the criminal enforcement provisions of state law are less stringent than those required by federal law. The discrepancies are curable only by legislative action. Regarding civil penalties, state law may be enforced consistently with federal law, though the higher federal penalties are not currently required by state law.

VII. Your seventh inquiry involves variances. The federal act and regulations authorize variances from applicable effluent limitations. However, concerns have been raised whether state law allows the secretary to grant variances which are not allowed by federal law. Obtaining a variance is not a matter of right. The only applicable statutory reference to a variance is made in K.S.A. 65-171p, which deals with drinking water standards. Further reference is made in K.A.R. 28-16-62(e), as amended in 87 Kan. Register 647-48 (1987). Both provisions are discretionary with the secretary. While it appears that, in exercising discretion, the secretary could allow a variance which is not authorized by federal law, we believe that the secretary has limited himself to the terms of federal law by promulgating K.A.R. 28-16-57, as amended in 87 Kan. Register 647-48 (1987). That regulation states an intention to comply with the

provisions of the federal water pollution control act relating to the N.P.D.E.S. program as well as the federal regulations adopted pursuant to that act.

VIII. Your final question relates to other clarification of current law. First, 33 U.S.C.A. § 1318(a) requires that a state have a right of entry and inspection on premises not only where effluent sources are located, but also on the premises where records for those sources are kept. The secretary has statutory authority to enter property subject to K.S.A. 65-161 through 65-171j. K.S.A. 65-170b. The problem arises when records are not kept on premises subject to those sections. We believe that this problem has been cured, however, by the consent of licensee's to allow entry and inspection. The requirements of 33 U.S.C.A § 1318 have been adopted by reference as a permit condition. K.A.R. 28-16-62(b)(1). We therefore believe that, based on the permit condition, the state has a right to enter and inspect premises where records for effluent sources are kept. Related to this subject is the question of the state's right to sample and apply monitoring, recording and reporting requirements. Such authority is provided by K.S.A. 65-170b.

You have also inquired whether effluent data is available to the public. Records, reports, data, and other information relative to discharges of pollution are required to be available to the public, however there is protection for trade secrets. K.S.A. 65-170g. That section further states that nothing in the act shall be construed to make effluent data, records, reports, permits and applications confidential. We believe, therefore, that since these matters are not confidential, if they relate to environmental concerns, they are to be available to the public pursuant to K.S.A. 65-102a.

Federal regulations require states to have procedures to ensure opportunity for public participation in enforcement proceedings. 40 C.F.R. § 123.27(d). That regulation requires that the state either allow intervention as of right in any civil or administrative action by a citizen who has an interest which may be adversely affected, or provide assurance that the agency will not oppose intervention when such intervention is made permissive by statute. When the second alternative is chosen, settlement of any enforcement action is subject to 30 days public notice and comment. Regarding intervention as of right, the Kansas Rules of Court Procedure parallel federal rules. We do not believe that a citizen having an interest which may be adversely affected is given an unconditional right to intervene under K.S.A. 60-224(a)(1) or

(2). Subsection (a)(1) of the rule allows intervention as of right when a statute grants an unconditional right. We find no statute granting that right. Subsection (a)(2) of the rule allows intervention as of right when the person's interests may be adversely affected, but not when those interests are adequately represented by existing parties. We believe that a court could determine that the individual's interests are adequately represented by either of the existing parties, thereby making intervention as of right not available. Regarding permissive intervention under K.S.A. 60-224(b), we believe that the assurance of non-opposition to intervention must come from the secretary, not from our office. In summary, we believe that public participation is not guaranteed by current Kansas law, and can be guaranteed only through legislation granting intervention as of right. Alternatively, the secretary could assure that intervention will not be opposed, and that the public will be given an opportunity to comment on a proposed settlement agreement after 30 days notice.

In conclusion, in our opinion, the partial transfer authority from KDHE to KCC does not allow a discharge of pollution in violation of N.P.D.E.S. permit requirements. State law defines pollution as broadly as it is defined by federal law. However, some privately owned farm ponds and reservoirs may be exempt from N.P.D.E.S. permit requirements under the state program, which is in derogation of federal law. Other than those exceptions, the state definition of waters of the state are as inclusive as federal definitions. State enforcement provisions include civil penalties which appear to be as stringent as federal civil penalties. However, the criminal penalties provided by state law are less stringent. Variances granted under state law are limited to those allowed under federal law. Other legislative changes appear necessary to conclude that the state program meets all the requirements of the federal clean water act.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Mark W. Stafford

Mark W. Stafford
Assistant Attorney General

RTS:JLM:MWS:ma

Session of 1988

HOUSE BILL No. 3027

By Committee on Energy and Natural Resources

2-24

AN ACT concerning water; relating to the protection of water from pollution; amending K.S.A. 65-165, 65-166, 65-167, 65-170c and 65-170e and K.S.A. 1987 Supp. 65-164, 65-170d and 65-171d and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1987 Supp. 65-164 is hereby amended to read as follows: 65-164. (a) No person, company, corporation, institution or municipality shall place or permit to be placed ~~or~~, discharge or permit to flow *any sewage* into any of the waters of the state ~~any sewage, except as hereinafter provided. This act shall not prevent the discharge of sewage from any public sewer system owned and maintained by a municipality or sewerage company, if such sewer system was in operation and was discharging sewage into the waters of the state on March 20, 1907, but this exception shall not permit the discharge of sewage from any sewer system that has been extended subsequent to such date, nor shall it permit the discharge of any sewage which, upon investigation by the secretary of health and environment as hereinafter provided, is found to be polluting the waters of the state in a manner prejudicial to the health of the inhabitants thereof~~, *including privately-owned freshwater reservoirs and farm ponds.*

(b) For the purposes of this act, "sewage" means any substance that contains any of the waste products or excrementitious or other discharges from the bodies of human beings or animals, or chemical or other wastes from domestic, manufacturing or other forms of industry.

(c) Whenever a complaint is made to the secretary of health and environment by the mayor of any city of the state, by a local

health officer or by a county or joint board of health, complaining of the pollution or of the polluted condition of any of the waters of the state situated within the county within which the city, local health officer or county or joint board of health is located, it shall be the duty of the secretary of health and environment to cause an investigation of the pollution or the polluted condition complained of. Also, whenever the secretary of health and environment otherwise has reason to believe that any of the waters of the state are being polluted in a manner prejudicial to the health of any of the inhabitants of the state, the secretary may initiate an investigation of such pollution.

(d) Whenever an investigation is undertaken by the secretary of health and environment, under subsection (c), it shall be the duty of any person, company, corporation, institution or municipality concerned in such pollution to furnish, on demand, to the secretary of health and environment such information as required relative to the amount and character of the polluting material discharged into the waters by such person, company, corporation, institution or municipality. If the secretary of health and environment finds that any of the waters of the state have been or are being polluted in a manner prejudicial to the health of any of the inhabitants of the state, the secretary of health and environment shall have the authority to make an order requiring: (1) Such pollution to cease within a reasonable time; (2) requiring such manner of treatment or of disposition of the sewage or other polluting material as, in the secretary's judgment, is necessary to prevent the future pollution of such waters; or (3) both. It shall be the duty of the person, company, corporation, institution or municipality to whom such order is directed to fully comply with the order of the secretary of health and environment.

(e) Any action of the secretary pursuant to subsection (d) is subject to review in accordance with the act for judicial review and civil enforcement of agency actions. The court on review shall hear the case without delay.

Sec. 2. K.S.A. 65-165 is hereby amended to read as follows: 65-165. Upon application made to the secretary of health and

environment by the public authorities having by law the charge of the sewer system of any municipality, township, county, or legally constituted sewer district, or any person, company, corporation, institution, municipality or federal agency, the secretary of health and environment shall consider the case of such a sewage discharge or sewer system, otherwise prohibited by this act from discharging sewage into any of the waters of the state, *including privately-owned freshwater reservoirs and farm ponds*, or the extension of a sewer system and whenever it is the secretary's opinion that the general interests of the public health would be served thereby, or that the discharge of such sewage would not detract from the quality of the waters of the state for their beneficial uses for domestic or public water supply, agricultural needs, industrial needs, recreational needs or other beneficial use and that such discharge meets or will meet all applicable state water quality standards and applicable federal water quality and effluent standards under the provisions of the federal water pollution control act and amendments thereto as in effect on January 1, ~~1984~~ *1988*, the secretary of health and environment shall issue a permit for the extension of a sewer system or for the discharge of sewage, or both, and shall stipulate in the permit the conditions on which such discharge will be permitted and shall require such treatment of the sewage as determined necessary to protect beneficial uses of the waters of the state in accordance with the statutes and rules and regulations defining the quality of the water affected by such discharge and may require treatment of the sewage in accordance with rules and regulations predicated upon technologically based effluent limitations. Indirect dischargers shall comply with all applicable pretreatment regulations and water quality standards.

Every such permit for the discharge of sewage shall be revocable, or subject to modification and change, by the secretary of health and environment, upon notice having been served on the public authorities having, by law, the charge of the sewer system any municipality, township, county or legally constituted sewer district or on the person, company, corporation, institution, municipality or federal agency owning, maintaining or using the

sewage system. The length of time after receipt of the notice within which the discharge of sewage shall be discontinued may be stated in the permit, but in no case shall it be less than 30 days or exceed two years, and if the length of time is not specified in the permit it shall be 30 days. On the expiration of the period of time prescribed, after the service of notice of revocation, modification or change from the secretary of health and environment, the right to discharge sewage into any of the waters of the state shall cease and terminate, and the prohibition of this act against such discharge shall be in full force, as though no permit had been granted, but a new permit may thereafter again be granted, as hereinbefore provided.

Sec. 3. K.S.A. 65-166 is hereby amended to read as follows: 65-166. It is required of public authorities having by law the charge of the sewer system of any municipality, township, county, or legally constituted sewer district, and of each and every person, company, corporation, institution, municipality, or federal agency, that upon making application for a permit to discharge sewage into any waters of the state, *including privately-owned freshwater reservoirs and farm ponds,* or the extension of any sewer system, the application shall be accompanied by plans and specifications for the construction of the sewage collection systems ~~and/or~~ *or* sewage treatment or disposal facilities, and any additional facts and information as the secretary of health and environment may require to determine adequate protection of the public health of the state and the beneficial uses of waters of the state.

Sec. 4. K.S.A. 65-167 is hereby amended to read as follows: 65-167. Upon conviction, the penalty for the willful or negligent discharge of sewage into or from the sewer system of any municipality, township, county or legally constituted sewer district by the public authorities having, by law, charge thereof or by any person, company, corporation, institution, municipality or federal agency, into any of the waters of the state, *including privately-owned freshwater reservoirs and farm ponds* without a permit, as required by this act, or in violation of any term or condition of a permit issued by the secretary of health and

environment, or in violation of any requirements made pursuant to K.S.A. 65-164, 65-165 or 65-166, and amendments thereto, shall be not less than ~~$2,500~~ *$10,000* and not more than $25,000, and a further penalty of not more than $25,000 per day for each day the offense is maintained. The penalty for the discharge of sewage into or from any sewage system into any waters of the state, *including privately-owned freshwater reservoirs and farm ponds* without filing a report, in any case in which a report is required by this act to be filed shall be ~~$1,000~~ *$10,000* per day for each day the offense is maintained.

Sec. 5. K.S.A. 65-170c is hereby amended to read as follows: 65-170c. Any person who knowingly makes any false statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained under the provisions of K.S.A. 65-161 to 65-171h, inclusive, ~~or any~~ *and* amendments thereto, or who falsified, tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained pursuant to ~~said~~ *such* statutes, shall be punished upon conviction by a fine of not less than ~~twenty-five dollars ($25)~~ *$5,000* and not more than ~~ten thousand dollars ($10,000)~~ *$10,000*. Each day in which the failure to comply with such requirements or other violation continues shall constitute a separate offense.

Sec. 6. K.S.A. 1987 Supp. 65-170d is hereby amended to read as follows: 65-170d. (a) Any person who violates: (1) Any term or condition of any sewage discharge permit issued pursuant to K.S.A. 65-165, and amendments thereto; (2) any effluent standard or limitation or any water quality standard or other rule or regulation promulgated pursuant to K.S.A. 65-171d, and amendments thereto; (3) any filing requirement made pursuant to K.S.A. 65-164 or 65-166, and amendments thereto; (4) any reporting, inspection or monitoring requirement made pursuant to this act or K.S.A. 65-166, and amendments thereto; or (5) any lawful order or requirement of the secretary of health and environment shall incur, in addition to any other penalty provided by law, a civil penalty in an amount ~~of up to~~ *not less than $5,000 but not more than* $10,000 for every such violation. In the case of a

$2,500

not less than $1,000 and not more than

$25

of up to

continuing violation, every day such violation continues shall, for the purpose of this act, be deemed a separate violation.

(b) The director of the division of environment, upon a finding that a person has violated any provision of subsection (a), may impose a penalty within the limits provided in this section, which penalty shall constitute an actual and substantial economic deterrent to the violation for which it is assessed.

(c) No such penalty shall be imposed except upon the written order of the director of the division of environment to such person stating the violation, the penalty to be imposed and the right of such person to appeal to the secretary of health and environment. Any such person may, within 30 days after notification make written request to the secretary of health and environment for a hearing thereon. The secretary of health and environment shall hear such person or persons within 30 days after receipt of such request and shall give not less than 10 days' written notice of the time and place of such hearing. Within 15 days after such hearing, the secretary of health and environment shall affirm, reverse or modify the order of the director and shall specify the reasons therefor. Nothing in this act shall require the observance at any hearing of formal rules of pleading or evidence.

(d) Any action of the secretary pursuant to this section is subject to review in accordance with the act for judicial review and civil enforcement of agency actions.

Sec. 7. K.S.A. 65-170e is hereby amended to read as follows: 65-170e. *(a)* The attorney general, upon the request of the secretary of health and environment, may bring an action in the name of the state of Kansas in the district court of the county in which any person who violates any of the provisions of this act may do business, to recover penalties or damages as provided by this act.

(b) Any citizen having an interest which is or may be adversely affected shall have the right to intervene in any civil actions brought under this section or any administrative actions brought under K.S.A. 65-170d, and amendments thereto, which seek:

(1) Restraint of persons from engaging in unauthorized ac-

tivity which is endangering or causing damage to public health or the environment;

(2) injunction of threatened or continuing violations of this act ~~and~~ regulations promulgated thereunder, and permit conditions;

(3) assessment of civil penalties for violations of the act, regulations promulgated thereunder, permit conditions or orders of the director of environment or secretary of health and environment.

Sec. 8. K.S.A. 1987 Supp. 65-171d is hereby amended to read as follows: 65-171d. (a) For the purpose of preventing surface and subsurface water pollution and soil pollution detrimental to public health or to the plant, animal and aquatic life of the state, and to protect beneficial uses of the waters of the state and to require the treatment of sewage predicated upon technologically based effluent limitations, the secretary of health and environment shall make such rules and regulations, including registration of potential sources of pollution, as may in the secretary's judgment be necessary to: (1) Clean up pollution resulting from oil and gas activities regulated by the state corporation commission; (2) protect the soil and waters of the state from pollution resulting from (A) oil and gas activities not regulated by the state corporation commission or (B) underground storage reservoirs of hydrocarbons, natural gas and liquid petroleum gas; (3) control the disposal, discharge or escape of sewage as defined in K.S.A. 65-164, and amendments thereto, by or from municipalities, corporations, companies, institutions, state agencies, federal agencies or individuals and any plants, works or facilities owned or operated, or both, by them; and (4) establish water quality standards for the waters of the state to protect their beneficial uses.

(b) The secretary of health and environment may adopt by reference any regulation relating to water quality and effluent standards promulgated by the federal government pursuant to the provisions of the federal clean water act, and ~~the 1981~~ amendments thereto, ~~which the secretary is otherwise authorized by law to adopt~~ *as in effect on January 1, 1988.*

(c) For the purposes of this act, including K.S.A. 65-161

through 65-171h, and amendments thereto, pollution means: (1) Such contamination or other alteration of the physical, chemical or biological properties of any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to the plant, animal or aquatic life of the state or to other designated beneficial uses; or (2) such discharge as will or is likely to exceed state effluent standards predicated upon technologically based effluent limitations.

(d) In adopting rules and regulations, the secretary of health and environment, taking into account the varying conditions that are probable for each source of sewage and its possible place of disposal, discharge or escape, may provide for varying the control measures required in each case to those the secretary finds to be necessary to prevent pollution. If a freshwater reservoir or farm pond is privately owned and where complete ownership of land bordering the reservoir is under common private ownership, such freshwater reservoir or farm pond shall be exempt from water quality standards except as it relates to: *(1) Discharge of sewage into such freshwater reservoir or farm pond; (2)* water discharge or seepage from the reservoir to *other* waters of the state, either surface or groundwater~~, or as it relates to the~~*; or (3)* public health of persons using the reservoir or pond or waters therefrom.

(e) (1) Whenever the secretary of health and environment or the secretary's duly authorized agents find that the soil or waters of the state are not being protected from pollution resulting from oil and gas activities not regulated by the state corporation commission or from underground storage reservoirs of hydrocarbons, natural gas and liquid petroleum gas or that storage or disposal of salt water or oil not regulated by the state corporation commission or refuse in any surface pond is causing or is likely to cause pollution of soil or waters of the state, the secretary or the secretary's duly authorized agents shall issue an order prohibiting such activity, underground storage reservoir or surface pond. Such order shall take effect 10 days after service upon the owner, operator, contractor or agents thereof. Any person aggrieved by

such order ~~may~~, within 10 days of service of the order, *may* request a hearing on the order.

(2) Hearings may be conducted by the secretary or hearing officers appointed by the secretary. Such hearing officers shall have the power and authority to conduct such hearings in the name of the secretary at any time and place and a record of the proceedings of such hearings shall be taken and filed with the secretary together with findings of fact. On the basis of the evidence produced at the hearing, the secretary shall make findings of fact and conclusions of law and shall give written notice of such findings and conclusions to the alleged violator. The order of the secretary shall be final unless review is sought under paragraph (4) of this subsection.

(3) Any notice, order or instrument issued by or with the authority of the secretary may be made by mailing a copy of the notice, order or other instrument by registered or certified mail directly to the person affected at such person's last known post office address as shown by the files or records of the secretary.

(4) Any action of the secretary pursuant to this subsection is subject to review in accordance with the act for judicial review and civil enforcement of agency actions.

(f) The secretary may adopt rules and regulations establishing fees for the following services:

(1) Plan approval, monitoring and inspecting underground or buried petroleum products storage tanks, for which the annual fee shall not exceed $5 for each tank in place;

(2) permitting, monitoring and inspecting salt solution mining operators, for which the annual fee shall not exceed $1,950 per company; and

(3) permitting, monitoring and inspecting hydrocarbon storage wells and well systems, for which the annual fee shall not exceed $1,875 per company.

(g) Agents of the secretary shall have the right of ingress and egress upon any lands to clean up pollution resulting from oil and gas activities. Such agents shall have the power to occupy such land if necessary to investigate and clean up such pollution. Any agent entering upon any land to conduct cleanup activities

shall not be liable for any damages necessarily resulting therefrom except damages to growing crops, livestock or improvements on the land.

Sec. 9. K.S.A. 65-165, 65-166, 65-167, 65-170c and 65-170e and K.S.A. 1987 Supp. 65-164, 65-170d and 65-171d are hereby repealed.

Sec. 10. This act shall take effect and be in force from and after its publication in the statute book.

Kansas Farm Bureau

PUBLIC POLICY STATEMENT

HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE

RE: H. B. 3027, Relating to the protection water from pollution

March 2, 1988
Topeka, Kansas

Presented by:
Paul E. Fleener, Director
Public Affairs Division
Kansas Farm Bureau

Mr. Chairman and Members of the Committee:

My name is Paul E. Fleener. I am the Director of Public Affairs Division for Kansas Farm Bureau.

We appreciated the opportunity to be able to present testimony to your Committee concerning **H.B. 3027.** You allowed us to do that and these written comments are presented after the fact. We will summarize our views on this legislation.

We are **opposed** to H.B. 3027 as it is presently and ever so broadly written. We have discussed with your Committee on previous occasions the desire of farmers and ranchers to be part of the solution to quality water in this state and to the prevention of pollution to the waters of this state.

H.B. 3027 is another example of the long reach of a federal agency. The U.S. EPA is seeking to dictate to this Legislature what must be done to protect the waters of the State. Well, we all want clean water. But what we object to in this legislation is the very poorly defined, overly-broad language indicating that no person, company, etc. "shall place or permit to be placed, discharge or permit to flow **any sewage** into any of the waters of the state, **including privately-owned freshwater reservoirs and farm ponds.**"

Mr. Chairman, and Members of the Committee there are more than 100,000 farm ponds in the State of Kansas. For the most part, those were built by farmers and ranchers for the purposes of stock watering. Those livestock sometimes do more than get a drink when they go down to the pond. This overly-broad legislation would make it a very serious penalty for any sewage (and the bill if drafted would say that includes animal waste) to be allowed to be discharged into any freshwater reservoir or farm pond. Mr. Chairman that cannot be legislated. The fines proposed are exorbitant. They appear on page 5 of H.B. 3027.

But another of the things **we resist strongly** is the new language on pages 6 and 7, lines 0225 through 0238. Mr. Chairman and Members of the Committee this language provides for a private right of action. We have fought that at the federal level on the FIFRA (Federal Insecticide, Fungicide, Rodenticide Act) and other pieces of legislation. Kansas law provides that the Attorney General, at the request of the Secretary of Health and Environment, is the appropriate one to bring in action in the name of the State of Kansas if someone is polluting the waters of the State of Kansas. That right should not be given away by the state. There should be no private right of action in this legislation. We urge you to delete this if you continue to work this bill and recommend any portion of it for passage.

In conclusion, we would hope that this Committee would send a message to the EPA in Washington, D.C. to indicate that this Legislature will determine how the waters of this state will be protected and you will not be dictated to by the EPA. There are, as we indicated earlier, over 100,000 farm ponds in Kansas. Only

12,000 of them are "permitted" ponds. The exact numbers and definitions for a pond which has a permit can be obtained from the Division of Water Resources, State Board of Agriculture. The Chief Engineer of that Division has the responsibility for issuing the permit in the first place.

Mr. Chairman we are opposed to this legislation and if it continues in its present form we will continue our opposition. We would be pleased to work with the Committee to seek to structure workable, appropriate language for legislation to help all of us, all Kansans, protect the waters of the state.

Kansas Livestock Association

2044 Fillmore • Topeka, Kansas 66604 • Telephone: 913/232-9358

Owns and Publishes **The Kansas STOCKMAN** magazine and **KLA News & Market Report** newsletter.

March 9, 1988

TO: Representative Dennis Spaniol, Chairman of the House Energy and Natural Resources Committee

FROM: Mike Beam, Executive Secretary, Cow-Calf/Stocker Division

RE: HB 3027, Regulating Privately Owned Fresh Water Farm Ponds

Thanks for allowing us to comment about HB 3027 to your committee last Wednesday. I have attempted to summarize our concerns and objections with this legislation.

We have no objection to the original language in KSA 1987 Supp. 65-164, which prohibits the discharge of sewage into "waters of the state." Unfortunately, with the definition of sewage, the bill could have a significant impact to farmers and ranchers if our law includes privately owned fresh water reservoirs and farm ponds. The definition of sewage is **any** substance that contains **any** of the waste products or excrementitious or other discharges from the bodies of human beings or animals. I'm fearful that this bill could literally mean our livestock cannot emit any waste into a privately owned farm pond without being in violation of state law.

Our counterparts in other states have experienced anti-grazing groups threats for fencing off all waters along public land. This is due to a law or regulation that prohibits any animal waste from dropping into the streams. Of course, fencing all of this water would be impractical and uneconomical. Certain groups have used this approach to place barriers on the grazing of federal and private lands.

The language of HB 3027 is particularly alarming due to the penalties prescribed in section 4 on lines 159 to 166. It doesn't seem quite fair to penalize a rancher up to $25,000 per day if his cow accidentally secretes waste into a privately owned farm pond.

I understand the implications from EPA for completely omitting the reference to privately owned fresh water reservoirs and farm ponds. It appears that Kansas is the only state in the region considering such legislation. Perhaps we can wait a year or at least amend the bill to make it more practical. A clarification of the term "sewage" or further definition of the word "discharge" may help alleviate many of our fears.

Thanks again for considering our views. If we can provide any information to the committee, we will be happy to cooperate.

Attachment 4
House Energy & NR 3-2-88

Kansas Farm Bureau

PUBLIC POLICY STATEMENT

HOUSE ENERGY AND NATURAL RESOURCES

RE: H.B. 3006 - Creating a toll-free number for reporting wildlife damage

March 2, 1988
Topeka, Kansas

Presented by:
Paul E. Fleener, Director
Public Affairs Division
Kansas Farm Bureau

Mr. Chairman and Members of the Committee:

My name is Paul E. Fleener. I am the Director of Public Affairs for Kansas Farm Bureau. We appreciate very much the opportunity to make a brief statement concerning **H.B. 3006.** This is a piece of legislation we requested the Committee introduce. It carries out one of the request our members have made concerning wildlife in the State of Kansas and the damage caused by deer and other wildlife. It reflects only one small paragraph out of our policy position on the Wildlife and Parks Department. The total policy position on that matter is attached. The pertinent paragraph says this:

"We urge the Wildlife and Parks Department to establish a toll-free number to be used by farmers and other citizens to report wildlife damage to crops and other property."

Mr. Chairman, since you allowed me to present our testimony verbally and provide this written testimony to Committee Members subsequent to the hearing, I do have the benefit of the questions that were asked and would respond briefly to some of them in this testimony. First, we agree with much of what was said by Mr. Beam of the Livestock Association concernin

Kansas ... i.e. the Extension Service at Kansas State University and the Wildlife Damage Control Program of the U.S. Department of Agriculture, housed in Pratt, Kansas. There should be coordination between Wildlife and Parks and these other entities. Perhaps a new section should be added to H.B. 3006 to reflect the legislative directive for Wildlife and Parks to utilize the information obtained by a reporting on the toll-free number which would be established to one of the other appropriate entities, depending on the type of damage and the animal causing that damage. The other two programs ... Extension or Wildlife Damage Control Specialist ... each has a particular focus for its work, but all should coorperate.

Our testimony during your hearings on the deer over-population measures gave your Committee Members some sense of the depth of feeling our farmers and ranchers have concerning crop damage by deer and other species. We would appreciate your favorable consideration of H.B. 3006. The fiscal note for this legislation is not large. It would provide a service to the people of Kansas, rural and urban, and we believe this legislation should be enacted. Thank you very much for the opportunity to make these comments.

Wildlife and Parks Department

We favor establishment of a land-leasing policy giving first-choice farm tenancy privileges to the original landowner. Should the original landowner not desire to lease Wildlife and Parks property, a uniform procedure for bid-basis land leasing should prevail through all Wildlife and Parks service regions.

We are opposed to the Wildlife and Parks Department having the authority to use the power of eminent domain.

We believe the Wildlife and Parks Department should pay property taxes, or make an in-lieu-of tax payment to the county and school districts in which Wildlife and Parks property is located.

We ask that legislation be enacted that would require the Wildlife and Parks Department to conduct big game population control measures or pay for damages upon petition from landowners and/or operators.

We urge the Wildlife and Parks Department to establish a toll-free telephone number to be used by farmers and other citizens to report wildlife damage to crops and other property.

Kansas Livestock Association

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Owns and Publishes **The Kansas STOCKMAN** magazine and **KLA News & Market Report** newsletter.

STATEMENT

OF THE

KANSAS LIVESTOCK ASSOCIATION

TO THE

COMMITTEE ON

ENERGY AND NATURAL RESOURCES

REPRESENTATIVE DENNIS SPANIOL, CHAIRMAN

WITH RESPECT TO HB 3006

TOLL-FREE NUMBER FOR WILDLIFE DAMAGE

PRESENTED BY

MIKE BEAM

EXECUTIVE SECRETARY, COW-CALF/STOCKER DIVISION

MARCH 2, 1988

Thank you Mr. Chairman and committee members for the opportunity to express our views about HB 3006. The Kansas Livestock Association supports this legislation, which would require the Department of Wildlife and Parks to provide a toll-free telephone number for the reporting of damage by wildlife to crops and other property.

First, let me review with you the agencies that are responsible for wildlife damage in Kansas. K.S.A. 76-459 through 76-464 recognize the Kansas Wildlife Damage Control Program at Kansas State University. Its primary function is to conduct educational programs to help farmers/ranchers and other entities reduce wildlife damage by safe, selective, and legal

methods of control. Given their financial constraints, our members feel this agency has done an excellent job of responding to wildlife damage problems.

In 1987, USDA placed an Animal Damage Control person in Kansas. This person established an office at the Kansas Department of Wildlife and Parks office in Pratt. USDA's program is similar, but places primary emphasis on bird control problems. Technical assistance has been the major mode of operation in handling wildlife damage complaints by this agency.

Both agencies are beginning to document complaints and assess damages caused by the state's wildlife. Our members believe the Department Wildlife and Parks should be fully appraised of wildlife damage problems. A toll-free telephone number is one way to document problems. It's also important to coordinate response actions between K.S.U., USDA, and the department.

This committee has heard from us earlier this session about land-owner/tenant concern with damages caused by the state's growing deer herd. There are other species of wildlife that cause problems that should be addressed by the state. A toll-free "hotline" could at least help document wildlife damage problems and provide data in conducting long-range plans for wildlife damage control. We hope the committee looks favorably at this proposal. Thank you.

H.B. 3006

TESTIMONY PRESENTED TO HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE - March 2, 1988

PROVIDED BY: KANSAS DEPARTMENT OF WILDLIFE AND PARKS

H.B. 3006 would require the Department of Wildlife and Parks to provide a toll free telephone number for reporting of damage by wildlife to crops and property.

The Wildlife Damage Control Program in Kansas is administered through signed agreements among several state and federal agencies. The U.S. Fish and Wildlife, U.S. Department of Agriculture, Kansas Department of Health and Environment, KSU Extension Service and the Kansas Department of Wildlife and Parks. Each agency specializes, yet cooperates in providing wildlife damage or complaint services to the public. The Extension Service, through the Wildlife Damage Control Specialist, Maintains a composite record of agency efforts and public contacts. The public currently has numerous procedures for contacting various agencies when a problem exists or help is needed. We encourage people to contact local department personnel in order to receive prompt attention. Calls to our regional offices occur and occasional calls are received at department headquarters. Efforts to get the appropriate field employee in contact with the person occurs, but may not be as prompt as making local contact. Persons may also contact the local Sheriffs' Office who in turn will relay the message to a Conservation Officer for response.

County Agents are available to receive calls and either handle directly, refer to our agency, U.S.D.A., or to the specialist at KSU. Calls also go direct to the KSU specialist and the U.S.D.A. specialist.

In general, persons needing help have to make only a local telephone call to receive assistance. Should a toll free number be established, it would receive some use. It may also cause time delay for some persons due to increased referral steps. The fiscal impact of this bill is not large, but does not seem to be a necessary expenditure in view of the various procedures currently available to persons experiencing problems.

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HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS

MEMBER: AGRICULTURE AND SMALL BUSINESS
INSURANCE
LOCAL GOVERNMENT

March 2, 1988

HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE
HB 2483

Representative Spaniol, Members of the Committee:

It is obvious the battle lines are definite for the allocation of monies for implementation of the State Water Plan; therefore, I would like to see current figures on returns to investment in various water-related contributions, usages, developments, as relates to agriculture, parks, wildlife resources, industry, recreation, etc.

Also, costs of present water crisis situations - contamination loss of water on an annual basis. Costs of health related problems in contaminated areas. Losses of income capability in contaminated areas. Cost of water per capita down to daily average Kansan cost as compared to other states per capita consumption.

The rules of the game change on an annual basis dictated by sources of income and trends in general. Better than 80 percent of our future economic development will come from existing business and industry.

The Redwood Krider report hardly made mention of agriculture, its contributions or its potential for the future of Kansas economic base.

What are the most important basic elements influencing economic development?

Transportation System	Capital	Work Force
Water	Educational System	

We have had a water plan for a number of years, 10-15, I'm not sure. However, we don't seem to get serious about the urgency of implementing it. Seems to me if we could collect figures to support our thrust of implementation of the water plan, we would be more successful in our endeavors; thus, my reason for introducing this bill.

Respectfully Submitted,

Jack

Representative Jack Beauchamp

Attachment 8
House Energy & NR 3-2-88

Presented to the
House Energy and Natural Resources Committee

by
Clark R. Duffy, Assistant Director
Kansas Water Office

March 2, 1988
Re: H.B. 2975

I appear today in opposition to House Bill 2975 which would require the Kansas Water Office to prepare a cost-benefit analysis of all aspects of the State Water Plan. Although the Kansas Water Office supports the intent of this bill, we are concerned that its enactment would not produce meaningful results.

Water plans and policies should be an expression of "values," while projects should be an expression of costs and benefits. Therefore, we have reservations about H.B. 2975 for the following reasons:

1. The State Water Plan contains recommendations for water policies and programs not development projects. Therefore, the plan do not lend itself to the traditional cost-benefit analysis.
2. There is currently no methodology for conducting cost-benefit analysis for comprehensive water plans. As a result, no meaningful cost-benefit analysis can be conducted until research in the development of a methodology has been successfully completed.
3. There is already a clear expression of legislative goals, objectives and water policies in the State Water

Resources Planning Act. These "values" provide the guidance for development of the specific recommendations in the State Water Plan.

4. The state water planning process currently subjects proposed recommendations to extensive public review for social and political acceptability.

One example of the difficulty in conducting a meaningful cost-benefit analysis is the Multipurpose Small Lake Program. This program was recommended in the State Water Plan to meet the following policy of the State Water Resources Planning Act: The state encourages the development of adequate water storage to meet, as nearly as practical, present and anticipated water uses through multipurpose reservoirs.

A benefit-cost analysis for the program would need to first identify all probable projects for water supply, flood control and recreation over a given time. Then the analysis would need to identify the direct costs: engineering, construction, land acquisition, etc., and direct benefits which would be some economic indication of the state and an assumed sponsor's flood control, enhanced water supply or enhanced recreation benefit. There are indirect costs and benefits which are significant as well. Such costs include the loss of habitat, the need for treatment plant upgrading to use the lake's water supply and the opportunity cost of funding this project over another. Indirect benefits include regional recreation, the opportunity to be

weaned from a marginal water supply, lower treatment costs for cleaner water, etc. The public benefit values would then need to be compared to the public cost of not providing the opportunities under the program.

As this example indicates, such an analysis would require considerable time, money and many subjective decisions by the individuals conducting the analysis. Even if such an analysis could be successfully completed, it would not be a substitute for the clear expression of public policy stated in the Water Resources Planning Act and the public acceptability of the program as verified through the state water planning process.

For these reasons, the Kansas Water Office is doubtful that the passage of H.B. 1975 would provide useful information in guiding decisionmakers in the implementation of the State Water Plan.