Approved March 28, 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 17, 1988 in room 526-S of the Capitol.

All members were present except:

Representative Sifers (excused)

Committee staff present:

Raney Gilliland, Legislative Research
Laura Howard, Legislative Research
Arden Ensley, Revisor
Betty Ellison, Committee Secretary

Conferees appearing before the committee:

Don Schnacke, Kansas Independent Oil & Gas Association
Mike Beam, Executive Secretary, Cow-Calf/Stocker Division
Kansas Livestock Association
Conni McGinness, Kansas Electric Cooperatives, Inc.
Bill R. Fuller, Assistant Director, Public Affairs Division,
Kansas Farm Bureau
Chris Wilson, Director of Governmental Relations, Kansas Fertilizer
and Chemical Assoc. and Kansas Grain and Feed Assoc.

Chairman Spaniol called the meeting to order.

Senate Bill 455--Environmental contamination response act; Re Proposal No 12.

Don Schnacke represented the Kansas Independent Oil & Gas Association. He agreed with many of the suggestions made by the Cities Service representative on March 16, and made a number of additional recommendations. Mr. Schnacke suggested that the bill include a technical advisory committee similar to what was created under KCC jurisdiction in 1982. He believed that it had aided the Commission in its decisions and had given interested parties and industries the opportunity to participate with their expertise. (Attachment 1) Discussion followed.

Chris Wilson spoke as a proponent of Senate Bill 455, representing Kansas Fertilizer and Chemical Association and Kansas Grain and Feed Association. She noted that many of the associations' concerns had been resolved by the Senate Committee. However, in her testimony, she listed a number of remaining concerns, although her associations definitely supported the purpose of the bill. (Attachment 2) Considerable discussion followed.

Chairman Spaniol called attention to written testimony in favor of Senate Bill 455 which had been received from Rob Hodges, Executive Director, Kansas Industrial Council, Kansas Chamber of Commerce and Industry, noting that copies had been distributed to the committee. (Attachment 3)

Mike Beam, representing the Kansas Livestock Association, testified in opposition to Senate Bill 455. He commented that some concerns of his organization had been resolved by the Senate committee, but several points of concern remain. (Attachment 4) Discussion followed.

The Chairman directed attention of the committee to written testimony which had been received and distributed from the Wichita Chamber of Commerce (Attachment 5), the Department of Environmental Resources with Sedgwick County (Attachment 6) and the written testimony from M.S. Mitchell, President of the Homebuilders Association of Kansas,

who testified before the committee on March 16. (Attachment 7)

Conni McGinness represented Kansas Electric Cooperatives, speaking as an opponent to Senate Bill 455. Her group believed that the bill would be improved by amending the definitions of "cleanup standard" and "contaminant" to better track definitions currently applied under federal EPA laws. (Attachment 8)

Bill Fuller, representing Kansas Farm Bureau, spoke in opposition to Senate Bill 455. He noted that his organization did not oppose the concept of the bill, but they had adopted policy relative to landowners' rights which conflicted with one section of the bill. The Senate committee had amended that section and lessened their concerns in that regard. A number of other concerns were expressed in his testimony. (Attachment 9) Further discussion followed.

This ended the list of conferees on Senate Bill 455.

Dr. Stanley Grant, Secretary, Department of Health and Environment, addressed brief remarks relative to Senate Bill 455 to the committee and fielded a number of questions of committee members.

Chairman Spaniol indicated that the committee would begin discussion of Senate Bill 455 on March 22. The bill would be worked section by section and any amendments offered by committee members would be considered. Action on the bill would not be taken until a later date.

There were no objections to the minutes of March 1, 2 and 3, and they were approved.

The meeting was adjourned at 5:00 p.m.

The next meeting of the House Energy and Natural Resources Committee will be held at 3:30 p.m. on March 22, 1988 in Room 526-S.

Date: March 17, 1988

GUEST REGISTER

HOUSE

COMMITTEE ON ENERGY AND NATURAL RESOURCES

NAME	ORGANIZATION	ADDRESS	PHONE
Pam Carlisle	LKM	112 W. 7th Topeka	354-9565
Mary Ann Bradford	League of Women Voters	Topeka	354-1646
Kathy Duncan		Topeka	232-1341
Alan Steppat	Pete McGill & Associates	Topeka	233-4512
Mike Beam	KS. Lodge Assn.	Topeka	232-9358
Bill Fuller	Kansas Farm Bureau	Manhattan	537-2261
Dale Lambley	KSBA	Topeka	296-2263

KIOGA
KANSAS INDEPENDENT OIL & GAS ASSOCIATION
500 BROADWAY PLAZA • WICHITA, KANSAS 67202 • (316) 263-7297

March 17, 1988

TO: House Energy & Natural Resources Committee

RE: SB 455 - Environmental Contamination Response Act

We were impressed with the testimony presented by Cities Service by an obvious expert in this field and his presentation of constructive suggestions for the Committee. We have additonal comments that we hope will also be helpful.

Beginning on line 0077 the committee amendment was added to protect against the application of agricultural chemicals and discharges of pollutants permitted by the State of Kansas. We want to make certain that this will include saltwater repressuring and disposal permits issued by the KCC. If not, we recommend you further define the term "discharge of pollutants" on line 0079 to include underground injection of saltwater and brine produced in association with oil and gas in order to insure that this exemption applies to repressuring and disposal operations permitted by the State.

We anticipate a problem under 2(i) beginning on line 0094 relating to "responsible person". It appears that an oil and gas lease operator acquiring a lease of land containing a leaking well abandoned by a previous operator will be a "responsible person" under Section 2(i), provided that the subsequent operator "knew or should have known" of the existence of the leaking well at the time the lease was acquired. This standard differs from the "person who is legally responsible for the proper care and control of an abandoned well" under KSA 55-179(b), in that responsibility under SB 455 requires prior knowledge of the leaking well. Notwithstanding the language of Section 9 of the bill, these conflicting standards should be reconciled. We think the responsibility should be on the operator last using the well as opposed to simply having rights to the well or lease. Responsibility should lie with the State of Kansas if such operator is insolvent or is no longer in existence. We think the new Kansas liability theory on line 0095 of the operator "who knew or should have known" is establishing liability without fault and will predictably attract legal assault. We wonder if this legislature wants to establish a liability standard as strict as this.

Section 6(e), starting on line 0470, provides that no person shall be liable for environmental contamination caused by the natural occurrence of a contaminant. Crude oil and salt water are naturally occurring substances. We assume from testimony KDH&E, crude oil and produced brines will be considered contaminants. Clarification of what constitutes a "natural occurrence" might therefore help resolve doubts about an oil and gas operator's liability. Liability for pollution caused by natural contaminants could, for instance, be limited to contaminants removed from the place where they naturally occur. If the oil and gas lease is considered the place where petroleum and associated contaminants naturally occur, liability would be triggered only upon removal (or release) of these products outside the lease. Lease pollution, if any, would then continue to be the domain of the KCC as it is now under KSA 74-623 (1986).

We have been allowed to examine the proposed draft of a Memorandum of Understanding between KDH&E and KCC which can be the place for jurisdictional questions to be resolved. We have, from the beginning, been concerned about the broad reach of this bill, the potential conflict with KCC authority found under KSA 74-623 et. seq., and the reestablishment of dual responsibility of the two agencies. Section 9 on page 15, although attempting to address this conflict, does indicate that SB 455 is supplemental to existing laws regulating the oil and gas industry and, in effect, creates additional regulatory oversight of our industry as it relates to the protection of surface and groundwater.

Additionally, SB 455 authorizes the Secretary of KDH&E, in four separate sections, to adopt rules and regulations to implement this legislation. This authority is found on lines 0046, 0055, 0149, and 0265. Furthermore, the act and the rules and regulations are authorized to equate into Class B misdemeanors and Class E felonies and penalties up to $5,000 per day.

This broad new authority and power given to this agency does bother our industry and we only hope that the end result is that we are not unfairly regulated or priced out of existence.

KDH&E apparently has a list of 302 contaminated sites as candidates for clean up and remediation. Last year we examined an older list of 209 sites. 55 were listed as petroleum or chloride related contamination sites. Upon closer examination, we found that, of the petroleum and chloride contamination sites some of the issues no longer exist; some never will be able to be remediated; many are very old issues; some are identified as low on chloride or may be neutral; some are already corrected ; for some the responsible parties are being sought through existing legal channels for remediation; and much of this contamination falls under HB 3078 (1986) and SB 498 (1982)--the jurisdiction of the State Corporation Commission.

Our industry has been cooperating with several state agencies and interested parties on several task forces to examine and determine what is the correct

analysis and possible remedial activity. SB 455 would ignore this opportunity to collaborate with others. In 1982 your Committee approved the creation of the Oil and Gas Advisory Committee under the State Corporation Commission to advise the Commission on environmental issues. It gives all interested agencies, like KDH&E, KGS, GWMD, and many others the opportunity to influence appropriate action.

We suggest SB 455 include a technical advisory committee similar to what was created under KCC jurisdiction in 1982. That has worked well. It has helped the Commission in its decisions and it has given interested parties and industries the opportunity to participate with their expertise.

Donald P. Schnacke

STATEMENT OF THE

KANSAS FERTILIZER AND CHEMICAL ASSOCIATION
AND THE
KANSAS GRAIN AND FEED ASSOCIATION

TO THE

HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE

REPRESENTATIVE DENNIS SPANIOL, CHAIRMAN

REGARDING S.B. 455

MARCH 17, 1988

Mr. Chairman and Members of the Committee, I am Chris Wilson, Director of Governmental Relations of the Kansas Fertilizer and Chemical Association (KFCA) and the Kansas Grain and Feed Association (KGFA). KGFA is comprised of over 1,300 member firms which constitute the state's grain handling and storage industry. KFCA's 450 members represent the state's agricultural fertilizer and chemical industry.

The two associations support the purpose of S.B. 455 as stated in the bill. Many of the concerns our associations had about the bill were resolved by the Senate Committee. However, we do have several remaining questions about this legislation, many of which have been addressed by previous conferees.

We recognize that the law must provide some degree of latitude to the regulatory agency and that a certain level of trust must exist that the agency will not abuse its authority. Further, our industry believes we have an appropriate working relationship with the Kansas Department of Health and Environment (KDHE) at this time. The agency, we believe, is doing a good job of communicating with industry, and our industry endeavors to cooperate with the agency in any appropriate manner.

However, our members are wary about the potential for abuse which broad designation of authority such as that provided by S.B. 455 affords,

largely due to a situation which occurred in 1985. KDHE held a public meeting in Hutchinson where KDHE officials informed the public and the press that groundwater contamination in a public well had been caused by the nearby grain elevators' use of carbon tetrachloride, a common cleaning agent which was also an ingredient in grain fumigants. Since very small amounts of carbon tetrachloride, in a gaseous form, were used to treat grain, it is extremely unlikely that carbon tetrachloride use by grain elevators could cause groundwater contamination, unless there was a spill or leak from the chemical's containers.

KDHE instructed the grain companies involved to drill wells on their sites to test for carbon tetrachloride. The companies refused and when the agency later drilled a test well, it found the real "responsible party", an old oil dump just 20 foot plume of sludge. No apology was ever given or retraction made to the press. Our industry was outraged by this guilty until proven innocent approach and the ability of the agency to make accusations, as if fact, with no substantiation whatsoever. When asked why they believed the elevators to be responsible when many other businesses use carbon tet as well, KDHE officials replied that when they find carbon tet in groundwater, they can look around and see a grain elevator. One can look around most places in Kansas and see a grain elevator; they are a prominent part of the landscape in communities throughout the state. We do not believe that such unscientific statements should be permitted in something so serious as determining a responsible party for groundwater contamination.

In another instance, carbon tetrachloride was found in private drinking wells in a small community. It is possible that the contamination was caused by a leak or spill at the grain elevator years ago. The present owner has owned the facility for about seven years, during which time he has

never kept carbon tet on site, so a release could not have occurred. But should he have known when he bought the site that contamination was present? The estimated cost for cleanup is enough to buy and sell the elevator many times over. The average cleanup could put most, if not all, of our members out of business overnight. In this particular case, the agency has been very understanding, recognizing that the present owner did not contribute to the contamination (and it is unclear if the previous owner might have) and that the elevator, as one of the few businesses, is important to the community.

Among the remaining questions we have are the following:

In lines 0144 through 0146 on page 4, the agency is given authority to issue investigation and remedial action orders to any person. Would a nonresponsible party be ordered to conduct cleanup activities?

In lines 0319 through 0321 on page 9, the Secretary is allowed to provide reasonable compensation for the property taken or damage done in cleanup. Does this give the agency the power to take property? Shouldn't the agency be <u>required</u> to provide any <u>reasonable</u> compensation?

How will determination of responsible party be made? Will the Department be required to follow some procedure in determining responsibility or simply take a guess and call a press conference?

As I said at the beginning of my statement, we do have several concerns about this bill, but definitely support its purpose. We hope that you will be able to address the many issues surrounding this bill in order to favorably act on it this session. I will respond to any questions you may have.

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

500 First National Tower One Townsite Plaza Topeka, KS 66603-3460 (913) 357-6321

A consolidation of the
Kansas State Chamber
of Commerce,
Associated Industries
of Kansas,
Kansas Retail Council

SB 455

March 17, 1988

Testimony Before the

House Committee on Energy and Natural Resources

by

Rob Hodges
Executive Director
Kansas Industrial Council

Mr. Chairman, members of the committee, I appreciate this opportunity to present the Chamber's position on SB 455, a bill to enact the Environmental Contamination Response Act.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

KCCI's involvement with SB 455 began last November, when Dennis Murphey of the Department of Health and Environment made a presentation to the KCCI Energy and Natural Resources Committee. Dennis distributed copies of what was then a draft

Attachment 3
House Energy & NR 3-17-88

proposal of the bill, explained the concepts behind the proposal, and answered questions of members. Early this session, when the proposal was printed as SB 455, I mailed 15-20 copies to several of those same people who had heard Dennis' presentation, asking them to review the "new" version and give me their input.

Let me quote a sentence which I believe fairly represents the input I received. "Generally, I feel KDHE needs the statutory authority which will allow them to investigate and remediate a site in lieu of a responsible party; and this bill provides it." Another member has responded to an inquiry for input in these words: "...without knowing the legislative history, I would tend to support this legislation with some minor changes." It is in this spirit of support, with minor changes, that KCCI would like to offer some suggestions.

First, let me say that we support the change made in the Senate Committee which deleted the registry of contaminated sites from the bill's provisions. Also, we applaud the Senate amendment which removed the priority lien provision from the bill.

Nearly every member who responded to our call for input mentioned the "strict liability" provision for cleanup responsibility. We wholeheartedly support this concept and would oppose any attempt to replace it with a "joint and several" liability provision because of its potential for "deep pockets" application.

Along this same line, and in the interest of consistency, we have two specific suggestions for change on page 4 of the bill. In line 0145, a member suggested deleting the comma and the words "including any person responsible." Our member believes that leaving the words "including any person responsible" in the bill could create the impression that someone other than a responsible person could be ordered to conduct remediation. We don't believe this is the intention of the bill. Then in line 0148, our suggestion is to add the following language before the semicolon "equal to the proportion such person is responsible for contamination at a site." Again, we feel this reinforces the strict liability concept and would permit recovery of money expended from the fund without allowing any single party to bear all the costs of a multiple party contamination remediation.

Turning to page 9, in line 319, we suggest the word "may" should be replaced with "shall." It seems appropriate the Secretary would be required to provide reasonable compensation for the taking of property or any damage done in remedial action.

Our final recommendation for change is more conceptual in nature. In two places in the bill, the Secretary is told to adopt rules and regulations. We would prefer that language be inserted which would keep the legislature involved in these two areas. Specifically, on page 2, in line 0055, and on page 7, in line 0266, we ask that this committee delete the word "adopt" and insert the following: "propose criteria to the legislature to be used in adopting." Our members agree that the crux of this matter is two fold. First, determining what is a contaminant, and then deciding how clean is clean? It's our feeling that those are policy questions and they should be answered by the legislature, not through authority granted to promulgate rules and regulations outside the legislative process.

Mr. Chairman, members of the committee, that reflects the input we have received from members to date. I'll attempt to answer any questions you may have.

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 17, 1988

TO: HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE

REPRESENTATIVE DENNIS SPANIOL, CHAIRMAN

FROM: MIKE BEAM, EXECUTIVE SECRETARY, COW-CALF/STOCKER DIVISION

RE: SENATE BILL 455

Thank you Mr. Chairman and committee members for allowing us the opportunity to comment on the proposed Kansas Environmental Contamination Response Act as outlined in Senate Bill 455. The Senate Energy Committee has addressed a couple of our concerns which we voiced earlier in the session. We were glad to see a refined definition of "release". In essence, the new language says a release does not mean the proper and legal application of agricultural chemicals. This clarification was needed because of the current definition of contaminant which is outlined in subsection b at the top of page 2.

A second concern that we voiced, before the Senate committee, was the lien provisions in lines 516-523. Had this language not been omitted, the act could cause havoc to any landowner who has a mortgage against his property. What lender would want to loan money on a land purchase if the state could potentially come in and place a lien that would have priority over the existing mortgage?

There are still several points of the bill which concern us and force

us to continue our opposition. The new subsection (a) of Section 1 and definition of "Contaminant" scare me. Section 1 addresses "past, present, and future contamination" of our resources ... **including air.** Now look at the definition of "contaminant." It specifically says "pose a significant present or **potential** hazard to human health or the environment."

To some, I may appear to be over reacting. The effectiveness and discretionary use of this proposed act lies soley with the responsible, professional, and dedicated agency staff. I hope no one in the future would abuse the authority created by SB 455. I can see, however, how an irritated neighbor could hassle one of our members with a broad interpretation of this law.

Let's say a livestock operator has developed a confined livestock feeding operation. A new neighbor purchases property near this location at a time of year when the odor is minimal. At a later date, the new neighbor claims the odor is unbearable and it could cause a **potential** human health problem and it **contaminates** the **air.** His attorney advises him to take up his complaint with the Kansas Department of Health and Environment under the Environmental Contamination Response Act created way back in 1988. This could be one more vehicle for harassment to farmers and ranchers who may be running a clean and responsible operation.

The definition of "contaminated site" (lines 57-61) appears too vague. Does contiguous land mean the surrounding six acres, 60, or 600? The provision does not talk about property lines. It looks to me like a neighbor of a person who has a contamination site could have his property tied up until that neighbor was able to clean up and settle with the state.

Yesterday a conferee mentioned his concern for the language about compensation for "taking property or damage done in the process of

performing" remedial action. I am glad to see such provision for damages, but why is there a reference to the "taking of property?" Maybe I have missed it, but I've found no provisions in SB 455 for the authority to "take property."

Mr. Chairman, these are a few of the specific provisions of the bill which concern us. Overall, we think that it does give the department broad powers and authority which could be abused in the future. I hope this committee will ask if this bill is really needed for the state to address any environmental concerns we have or may have in the future. Let's not create a monster that could later get out of control and cause serious economic problems to our private businesses. Thank you.

THE CHAMBER

TESTIMONY REGARDING

SB 455: Kansas Environmental Contamination Response Act

Presented to the:
House Energy and Natural Resources Committee

By

Bernie Koch
Vice President-Government Relations
Wichita Area Chamber of Commerce

March 16, 1988

Wichita Area Chamber of Commerce
350 West Douglas Avenue
Wichita, Kansas 67202-2970
316 265-7771

Partner, Wichita/Sedgwick County

Attachment 5
House Energy & NR 3-17-88

TESTIMONY REGARDING SB 455
Presented by
Bernie Koch, Vice President-Government Relations
Wichita Area Chamber of Commerce

The Wichita Area Chamber of Commerce fully supports the stated objective of SB 455 which is effective and the proper protection of the public health and environment from past, present and future contamination of air, soil and water resources. We have been involved in environmental issues through our Water Resources Committee, which has been chaired by Arthur T. Woodman for approximately 10 years. Mr. Woodman is also the chairman of the Lower Arkansas Basin Advisory Committee as called for in the State Water Plan.

The Chamber's Water Resources Committee has been actively interested in SB 455 throughout its development. A number of meetings and conversations have been held with state officials including Secretary Grant, and we are pleased that many of our recommendations are included in the proposed bill.

We understand that a number of organizations and businesses are now supporting SB 455 in its present form. The Chamber also supports the concept of the bill. However, a few specifics for consideration remain which are significant and which could have major impact on small businesses as well as the individual. It is our understanding that comprehensive legislation exists to allow proper jurisdiction of the matter through 1988. It is for these reasons, that we continue to suggest that an interim study is appropriate to assure effective and proper legislation.

Significant improvements and major changes have been made and we are pleased with those revisions. Through the process, the possibility exists that all necessary revisions may not have been carried throughout the bill consistent with the major changes now incorporated. An example of this is the total removal of revised Section 8 which called for liability to the state constituting a debt to the state. Other sections remain in the bill which allow the state to take financial action against a person which, in essence, constitutes debt. So, we encourage review of the bill to ensure that this particular area has been fully revised as well as all other areas wherein major change has occurred.

This is one example of the complexities of the bill. Other areas in which we continue to express concern are as follows:

1. The bill, in its present form, does not provide definitions and provisions for an "innocent landowner" or for a "de minimis contributor." We are to assume that the bill makes no distinction between a person who has contributed significantly to contamination as compared to the individual who is innocent or has only a one percent or less contribution. Agency accountability and coordination of terminology with federal legislation are paramount to fair and equitable enforcement.

2. The definition of remedial action can include the possibility of cleanup to the point of total elimination of contaminates. This definition does not include financial considerations and may require cleanup beyond recognizable standards for any contaminate whether or not scientifically justified. While Section 4 subparagraph d requires the secretary to adopt cleanup standards for the state within one year, it still may be possible, under the definition of remedial action, to require total elimination of contaminates. This possibility seems to be excessive and cleanup to recognizable standards should be included within the definition.

3. Section 4 subparagraph b requires consideration of a hazard ranking system in determining the sequence of remedical action. However, hazard ranking is not defined to allow an understanding of what priorities should be considered by the secretary. Also, when combining the hazard ranking concept with the definition of contaminate, it is possible that cleanup could be required in situations which are not high priority. Clarification in this area is recommended.

4. The secretary is given the power to enter onto any property or premises with prior written notice. We appreciate the written notice provision being included within the bill. The secretary is given power to determine if a site is contaminated, to determine and impose remedial action and incur costs without accountability. Also, Section 7 subparagraph b, gives the secretary powers equal to the court to make assessments against persons who are in violation of the act based upon similar judgements. It is important that remedial action take place while retaining rights of individuals and corporations. We recommend that these and related matters be reviewed in this context including Section 9 which provides for judicial review for any person adversely affected to determine if consistency exists.

   Should any state official or agency be misguided in its determination causing undue damage on a person or their reputation, then recourse should exist to the person. This provision should be specifically made available within the bill. The 15-day time limit may not be sufficient in such situations.

5. To preclude misguided action, it would be appropriate that all decisions be made following thorough scientific review and documented evidence that contamination exists on any site. The bill in its present form requires only the gathering of data and we would encourage more comprehensive and explicit language to require scientific proof and documented evidence prior to decisions being made.

6. The bill requires the secretary to investigate all suspected sites for contamination irrespective of the ranking system or the potential contaminate involved. In carrying out this mandate, the state will incur a sizeable financial obligation. An appropriate question is what is the amount of funding required, has it been appropriated and what is the proposed funding source?

Expeditious cleanup of contaminated sites to protect the environment with minimal cleanup cost should be an objective of any final bill. Implementation of the ranking system, the investigation of suspected contaminated sites and resulting cleanup of those determined to be contaminated must protect the public health and the environment and must also be cost-effective. The bill at present does not require cost benefit standards and accountability. A revision in this regard would be most appropriate.

Environmental contamination is a serious matter. We support the need for and intent of SB 455. The items mentioned above are significant and a comprehensive review with appropriate revisions should be conducted prior to passage of any bill. Sufficient time must exist in order to complete a thorough review to ensure that sufficient clarity exists, potential contradictions are eliminated, and the best bill is developed for the state of Kansas. We support this action and on this basis, reiterate the recommendation for the interim committee.

The rights of commerce and industry, small businesses and the individual must be protected. Likewise, contamination must not be permitted and remediation must be undertaken. We believe it is possible to accomplish these objectives in a fair, cost-effective manner and obtain the support of all citizens and businesses.

Thank you very much.

DEPARTMENT OF ENVIRONMENTAL RESOURCES

HISTORIC COURTHOUSE
510 NORTH MAIN
WICHITA KANSAS

TELEPHONE: (316) 268-7380

Testimony Regarding SB 455
Presented By
Dr. Douglas R. Hahn, Director
Sedgwick County Department of Environmental Resources

I am Dr. Douglas R. Hahn, Director, Sedgwick County Department of Environmental Resources, and appear here to testify regarding Senate Bill 455, otherwise known as the Environmental Contamination Response Act. In addition to my current position, I am a member of the Water Resources Committee of the Wichita Area Chamber of Commerce and a member of the Lower Arkansas River Basin Advisory Committee on the Kansas Water Plan. My professional memberships include the Water Pollution Control Federation, the American Fisheries Society, the Ecological Society of America, and the American Association for the Advancement of Science. My entire professional life has been directed toward dealing with environmental concerns including water contamination issues.

Preventing the degradation of water quality and remediating instances where contamination has occurred are key environmental issues in Kansas. I believe that steps should be taken to provide machinery and tools for appropriate officials to undertake the necessary actions to protect and improve water quality in the state of Kansas. The water resources of Kansas are critical to the needs of its citizens, to the natural environment, to business and industry, and to present and future economic development in

the state. However, I believe that it is possible to develop programs to remediate water contamination without abridging the constitutional rights of citizens and without ignoring the rational, scientific, technical, and economic bases for decision making related to that issue. After reviewing Senate Bill 455, it is my opinion that the authors of the Act have laudible goals but have developed some flawed mechanisms with which to achieve those goals. The bill needs detailed study and consideration and should be sent to an interim committee for that purpose.

I hold numerous concerns and reservations regarding the bill. Time will not allow me to list those concerns; however, I am submitting a written critique of the bill which I believe addresses those matters. In summary, I make the following observations:

1) The language of the bill is too broad and too general, allowing interpretations which tread on citizen rights.
2) Instances of slight water contamination of water of naturally poor quality not used by anyone are treated exactly the same as contamination of a water supply affecting large numbers of people. A system of prior-tization should be included recognizing that time, funding, and manpower will always be limited.
3) A system of benefit/cost methodology should be included again noting limitations on time, funding, and manpower. For example, if site A, which is a water supply, can be

decontaminated for "x" dollars per gallon and site B, which is not a water supply, can be decontaminated for "4x" dollars per gallon, we should direct efforts to decontaminate site A. The current bill doesn't do that. We should also recognize, unfortunate though it may be, that some instances of contamination can not be rectified technically or economically.

4) Documented, empirical, scientific evidence should be the criteria for assessing contaminated sites and taking action of them. The present bill does not impose such a standard.

5) All citizens and parties should be afforded due process and judicial review. Environmental remediation should not be an excuse to suspend the constitution and personal rights. Very few instances of water contamination are that time sensitive.

6) The bill grants far too much discretionary authority to the regulators. Legislative oversight is needed.

7) The bill should distinquish levels of contribution and responsibility for a given incident of contamination rather than always pursuing the "deep pockets" approach.

In summary, I support the concept of Senate Bill 455, but have serious and profound disagreements with the mechanisms of the bill. I oppose the bill in its present form and believe it should be sent to an interim committee for careful review and study to address the identified concerns.

DEPARTMENT OF ENVIRONMENTAL RESOURCES

HISTORIC COURTHOUSE
510 NORTH MAIN
WICHITA KANSAS

TELEPHONE: (316) 268-7380

March 11, 1988

TO: Willie Martin
Intergovernmental Coordinator

FROM: Dr. D. R. Hahn, Director
Sedgwick County Dept. of Environmental Resources

RE: Review and Critique of Senate Bill No. 455

As per your request, I have reviewed Senate Bill 455, otherwise known as the Environmental Contamination Response Act, following its recent passage in the Senate. Water quality concerns and responses to those concerns, preventing the degradation of water quality and remediating instances where contamination has occurred, are the principal water issues on the minds of Kansans as shown through public hearings and meetings on the Kansas Water Plan across the state of Kansas. I share those concerns and believe that steps should be taken to provide machinery and tools for appropriate officials to undertake the necessary actions to protect and improve water quality in the state of Kansas. The water resources of Kansas are critical to the needs of its citizens, to the natural environment, to business and industry, and to present and future economic development in the state. However, I believe that it is possible to develop programs to remediate water contamination without abridging the constitutional rights of citizens and without ignoring the rational and economic bases for decision making. After reviewing Senate Bill 455, it is my opinion that the authors of the Act have laudible goals but have developed some flawed mechanisms with which to achieve those goals. I would offer the following comments in that regard:

1. In general, a greater level of proof and evidence, both scientific and legal, should be required before actions are taken under the provisions of this bill. When such levels of evidence are provided, the bill should require stiffer penalties than are provided.

2. Lines 30-37 define the term "contaminant" under the provisions of the Act. The definition provided is

too broad and too ambiguous. Essentially, under this definition, anything could be considered a contaminant including naturally occurring compounds and/or levels of materials so low as to pose either no harm or risk or an extremely minute harm or risk. In fact, the presence of virtually anything in levels above zero would meet this definition of contaminant and would provide a potential tool of harassment. Under the proposed definition, a "contaminant" which would increase a health risk by 1 in 2 would be classified in the same manner as a contaminant posing an increase in risk by 1 in 1 quadrillion. Furthermore, words such as "significant", "significantly", "serious", and "potential hazard" are used to define "contaminant"; who determines what such words mean?

3. The bill defines terms such as "owner or operator" (lines 43-49) and "person" (lines 50-53) but does not define terms such as "responsible person" or "responsible party" although these terms or variations of them are used throughout the bill. Further, the mechanism for determining a responsible party is not well defined.

4. Corresponding federal legislation provides for "innocent landowner" and "de minimis contributor" defenses for site remediation situations. I believe there are valid reasons for those categories and corresponding language should be provided in a bill of this nature.

5. The term "remedial action" is defined in lines 59-62. This definition is flawed in at least two regards. First, it provides for all cleanup, containment, or corrective action measures whether or not such measures are needed, valid, or justified. In short, the language would cover unreasonable as well as reasonable costs and measures. Second, "remedial action" means to eliminate the presence of contaminants in any medium. Presumably, the term "eliminate" implies zero levels which in many cases are unattainable either technically or economically. Besides being unrealistic, the definition provides opportunity for use as a tool of harassment.

6. Section 3 (lines 65-99) provides broad powers to the Secretary to access sites, gather information, and provide for remediation activities prior to any type of judicial review or redress by the affected parties.

The granting of such powers seems unreasonable and unconstitutional. Further, while I am not an attorney, my reading of Item "a" under Section 3 (lines 66-70) appears to violate constitutional provisions against self-incrimination. I also find Item "i" (lines 91-93) absolutely mind-boggling in that it provides for the issuance of orders to any person regardless of their level of association with the contamination in question. Further, this section provides for the recovery of monies expended regardless of the validity of the expenditures. As if the provisions of Section 3 are not broad enough in nature, Item "k" allows the adoption of any rules and regulations necessary to carry out the Act.

7. The bill essentially provides an unrestricted hunting license to a state agency regarding "potentially" contaminated sites and areas. An assumption of the bill is that the state agency will always make wise judgments with such unrestricted powers. However, as we all know, people in agencies can and do make mistakes from time to time which subsequent evidence will reveal. There must be a mechanism for parties to recover damages should the state agency blight their property, impugn their reputation, and cause them financial losses in the event state allegations prove groundless or less than charged.

8. Lines 176 and 177 indicate that the Department shall investigate all suspected contaminated sites. Can the state financially afford to do that? How long will it take? Until such investigations are completed, is the site to remain in limbo until resolution occurs several years later and the affected parties have been severely inconvenienced?

9. I believe that Item "d" (lines 206-209) and Item "g" (lines 235-241) are highly desirable provisions in this Act and will aid in the expeditious cleanup of contaminated sites.

10. Throughout the Act, the Secretary of the Kansas Department of Health and Environment is presumed to be the objective arbiter in disputes between Kansas Department of Health and Environment staff and affected parties. Such an assumption hardly meets any notion of judicial fairness given the vested interests of the Secretary.

11. Lines 222-224 indicate that the Secretary may provide reasonable compensation for taking of property or damage done in the process of performing remedial action. That sentence suggests that the Secretary, who is responsible for taking the property or causing the damage, decides whether or not he should compensate the party for it and what the level of compensation should be. Again, this mechanism scarcely meets concepts of judicial review and fairness.

12. As has been noted previously relative to specific items, the Act continually provides for broad and extensive actions to be taken against parties without any opportunity for legal redress until after the episode is concluded, which may take years. This may be an indiscrete granting of power.

13. Section 7(a)(1) (lines 312-318) holds an owner or operator responsible if the person knew or should have known that the activities were likely to threaten the public health or the environment. Further, a party can also be held responsible if they knew of contamination at the time they purchased the property. This section holds a person liable even if the activities conducted were in compliance with the law at the time they were conducted. Further, the "should have known" provision holds a person accountable for "general knowledge" which may not be specific. The ramifications of this section are significant.

14. Section (3)(A) (lines 329-339) provides for liability for a responsible party for contamination at a site regardless of time of occurrence or legality at the time of occurrence. One problem I have with this section and related sections on liability and compensation of damages or costs to the state is that efforts are not made to ascertain that the actions of the regulatory agency requiring compensation are held to any kind of standard of reasonableness and validity. In short, the Act gives a blank check to the regulatory agency to do anything it chooses. Further, effort is not made to apply a benefit-cost analysis either to the chosen methods for site remediation or to a determination as to whether a benefit would be realized by remediating a particular site.

15. The phrase "on the basis of information available to the Secretary" on lines 377 and 378 is far too loose. That phrase could refer to anything ranging from general gossip to quantified, detailed, scientific data.

16. In my opinion, the penalties provided on page 11 are not stringent enough.

17. The phrase "Secretary or a court" (e.g. line 383) is used in several places in the bill as if the two were equivalents. This situation should be rectified.

In summary, I support the concept of Senate Bill 455, but have serious and profound disagreements with the mechanisms provided therein. I believe that the bill requires a substantial and significant rewrite and a different philosophical approach. I strongly recommend advocating that the bill be sent to an interim committee or held over for a major revision. If you have any questions about my comments, please contact me.

cmh

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Harold Warner, Jr. 1984
Joe Pashman 1985
Jay Schrock 1986
Richard Hill 1987

TESTIMONY BEFORE
HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE
MARCH 16, 1988
BY
M. S. MITCHELL, PRESIDENT
HOME BUILDERS ASSOCIATION OF KANSAS

Mr. Chairman and Members of the Committee:

You have heard today from others who have pointed out that SB 455 gives the Secretary of KDHE and his department a too broad range of powers which can have a negative impact on business and industry in Kansas.

My testimony consists of a number of suggested changes in language and questions about specific elements of the bill. These concerns are specifically related to the effect that passage would have on builders and small developers which are the backbone of our Association.

It is our position that, with the number of issues on which there is no agreement among experts in the environmental field, SB 455 should not be passed out of this committee, but rather should be set for further study--this time with an opportunity for those who may be greatly affected by such legislation to have input to the study committee.

Attachment 7
House Energy & NR 3-17-88

803 Merchants National Bank Building • 8th and Jackson Street • Topeka, Kansas 66612 • (913) 233-9853

SB455 as amended by Senate Committe of a whole

LINE COMMENTS

0048 ... and, federal agencies and after holding public hearings.

0054 remove " or potential"

0056 of each contaminant after holding public hearings.

0057 remove "all"

0059 replace "a release of a contaminant or contaminants has occurred." with the presence of a contaminant has been scientifically documented.

0068 add within ten years before "prior to any such conveyance."

0089 add or the release of materials which were not identified as contaminants at the time of release.

0092 remove "eliminate"

0115 add (8) except any person, corporation or owner who qualifies as an innocent landowner or deminimus contributor under federal guidelines.

0119-0123 Delete entire sub-section.

0125 add based on scientific determination of the hazard ranking of the site.

0130 deny entry to anyone except responsible party or party's agent

0134 add only after a remediation plan, budget and cost/benefit report have been made available to responsible party and to public;

0141 add cleanup, only after a remediation plan, budget and cost/benefit report have been made available to responsible party and to public, except that no funding.....

0143 add as budgeted in approved remediation plans;

0145 responsible for scientifically documented environmental contamination;

0148 add per budget approved with remediation plan;

0230 substitute scientific evidence for "data"

0241 the term "hazard ranking" has not been defined in this act and has no generally accepted meaning.

0248 "other relevant factors" is too broad, without definition it should be deleted.

0257 "those actions" should not include access to site or information without a court order, and should be subject to preparation of a remediation plan, budget and cost/benefit report which is made available to the public.

0266 insert after opportunity for public hearings before "adopt rules and regulations...."

0269 - 0270 delete "be admissible in evidence to"

0287 insert submit a written request to owner or occupant to before "enter"

0288 delete "upon written notice to owner or occupant,"

0293 substitute or site for which scientific evidence indicates contamination for "or suspected contaminated site"

0301 substitute scientific evidence for "reasonable basis"

0302 substitute may for "shall"

0305 substitute may for "shall"

0319 substitute must for "may"

0332 Is "any person" same as responsible person?

0335-0338 Is "the person" same as responsible person?

0406 Is "any person" same as responsible person?

0434 Who is "any other person"?

0435 Who is "other person"?

0436 add if such response costs were included in the budget for the remediation plan and cost/benefit report.

Is "such person" the responsible person? If so, substitute responsible for "such".

Who determines amount of compensation which "such person" is liable for? Who has input to that determination?

0442 - 0448 Sec.6 (b) would be a good location to add the defense of innocent landowner and deminimus contributor per federal law and regulation.

0456 - 0457 delete, "including all legal costs of any recovery action."

0473 - 0486 Sec. 6 (f) this subsection should also have a provision to exempt an innocent landowner or deminimus contributor for "releases" which were not negligent at the time of occurrance.

0491 "usable aquifer" is not defined in this act.

0495 Same as above.

0502 - 0503 Delete "The Secretary or"

0508 Same as above.

KANSAS ELECTRIC COOPERATIVES, INC.

Testimony Before the House
Energy and Natural Resources Committee

Senate Bill No. 455
The Kansas Environmental Contamination Response Act

Wednesday, March 16, 1988

Attachment 8
House Energy & NR 3-17-88

Members of the Committee, my name is Conni McGinness, and I am here to testify on behalf of Kansas Electric Cooperatives, Inc. and our 36 rural electric cooperative members regarding S.B. 455.

To begin with, our organization is not opposed to the concepts behind the Kansas Environmental Contamination Response Act. In fact, as electric utilities, we have been complying with federal EPA rules and regulations governing these same issues for a number of years. Further, we believe that Kansas should take an active role in ensuring that our natural resources remain free from harmful contaminants.

However, it has been our experience that in order for this type of legislation to be effective it must be clear and concise. And when state laws duplicates areas regulated by the federal government, for the state laws to be effective and easily implemented they must closely track the federal laws and accompanying rules and regulations.

In this instance, we believe that the Kansas Environmental Contamination Response Act can be improved by amending the definitions of "cleanup standard" and "contaminant" to better track definitions presently applied under federal EPA laws and accompanying rules and regulations.

We believe that by tracking federal law, the Kansas Environmental Contamination Response Act will be more easily understood, will decrease the possibility of having additional inconsistent rules and regulations and, therefore, be easier to comply with.

I appreciate the opportunity to address this Committee today and I would be happy to answer any questions that you might have.

Kansas Farm Bureau

PUBLIC POLICY STATEMENT

HOUSE COMMITTEE ON ENERGY AND NATURAL RESOURCES

Re: S.B. 455 - Enacting The Environmental Contamination Response Act

March 17, 1988
Topeka, Kansas

Presented by:
Bill R. Fuller, Assistant Director
Public Affairs Division
Kansas Farm Bureau

Mr. Chairman and Members of the Committee:

My name is Bill Fuller. I am the Assistant Director of the Public Affairs Division of Kansas Farm Bureau. We appreciate this opportunity to provide input on S.B. 455.

Our members desire and expect a clean environment. We believe a strong emphasis must be on the prevention of environmental pollution. However, when pollution does occur, clean-up becomes necessary. We do not oppose the concept contained in S.B. 455.

S.B. 455 is comprehensive. Frankly, we are uncertain of the ramifications involved in its possible implementation. We must point out that we have adopted policy that conflicts with one section of the bill. Also, we have several questions. We appreciate the amendments made by the Senate. We believe they make the proposed legislation more practical, and may lessen our members concerns.

Voting Delegates representing the 105 county Farm Bureaus at the 69th Annual Meeting of Kansas Farm Bureau on December 1, 1987 adopted this policy:

Landowners' Rights

Landowners' rights must be safeguarded and protected. Equitable payment must be made for any land, in any "taking," or "partial taking" by eminent domain power. We believe eminent domain procedures should include development of an agricultural impact statement, complete with public hearing, appeal, and a determination of compensation for disruption of normal farming practices. All utility lines, cables, and pipelines should be properly installed according to appropriate specifications. Such installations should be adequately marked. A landowner or tenant shall not be held liable for any accidental or inadvertent breakage or disruption of service on any lines, cables or pipelines.

Pipeline companies, and electric, telephone and water utilities, should be required to preserve and replace top soil, repair terraces, and reseed those portions of native grass pastures disturbed during construction of above ground and underground facility projects. Approved soil conservation practices will be utilized by all public and private companies. These companies shall bear the cost of deepening the burial of pipelines or cables, and moving utility poles or other structures when permanent soil and/or water conservation measures are added or updated by the landowner.

We believe safeguards should be developed for landowners to protect against costs involved in bringing an abstract up-to-date when these costs are the result of transactions generated or incurred by a gas or oil company or railroad.

We strongly oppose giving the public free access to private property adjacent to rivers and streams. Landowners should be authorized to charge an "access" fee if they choose to allow access to streams and rivers by crossing their property. Access to or across private property for watercraft use on streams and rivers, if granted by the landowner/operator, should be limited to non-motorized fishing boats and canoes. We strongly oppose the addition of any rivers or streams into the category of "navigable" streams.

We oppose legislation or regulations designed to give any person or governmental agency authority for access to private property for inspection or investigation without permission from the property owner or operator.

We have a renewed faith in the "committee process" after the probing and thoughtful questions that attempted to determine the application of this proposal to real-world situations. Many questions from members of the Committee parallel our concerns. Examples include:

1. It appears the broad definition of "contaminate" could include any substance.
2. Who determines what the owner "should have known" about a contaminated site?
3. Access to private property ... we oppose access without permission.
4. Responsible person ... it seems the responsible person should be the one who created the problem.
5. How do you handle a situation where an activity was legal several years ago, but is now found to be a health or environmental threat?

Mr. Chairman, we thank you and the Members of your Committee for allowing us to express our concerns at this Public Hearing. We urge the Committee to continue their thorough study and cautious action on this proposal. We will attempt to respond to any questions you may have.