

Approved 2-16-88
Date

MINUTES OF THE SENATE COMMITTEE ON ENERGY & NATURAL RESOURCES

The meeting was called to order by Senator Merrill Werts at
Chairperson

8:00 a.m./~~p.m.~~ on February 11, 1988 in room 123-S of the Capitol.

All members were present except:

Committee staff present:

Ramon Powers - Research	Laura Howard - Research
Don Hayward - Revisor	Raney Gilliland - Research
Nancy Jones - Secretary	

Conferees appearing before the committee:

Chairman Werts stated the Division of Environment has requested the re-introduction of the following bill:

1987 SB 287 - Relating to public water supply systems; concerning lead in construction thereof.

A motion was made by Senator Hayden to re-introduce SB 287, seconded by Senator Langworthy. Motion carried.

Chairman Werts asked committee members to note responses to SB 455 issues from the KDHE. (Attachment I)

Committee members were reminded of the invitation from AG Stephen to attend a briefing on the Colorado Arkansas River Compact lawsuit, February 12 at 7:00 a.m.

Discussion by committee on:

SB 455 - Enacting the environmental contamination response act.

Page 7 of the original Interim Committee bill draft was distributed by Chairman Werts which included language pertaining to responsible parties, as the committee might wish to consider amending this portion back into SB 455. Deletions made by the Interim Committee before the bill was introduced were noted. (Attachment II)

Section I of SB 455 - no changes were proposed.

Section II - Committee feels a more precise definition of products included in the language "contaminates" is needed.

A conceptual motion was made by Senator Kerr to add a proviso that chemicals applied according to label instructions would not be in violation in the definition of "release", seconded by Senator Langworthy. Motion carried.

Contaminated sites were discussed and language defining "responsible person" as proposed by KDHE was provided by the Department. (Attachment III)

Into the definition of "responsible person", Senator Werts suggested the addition of "knowingly" before "contributed" and "accepts or accepted".

A conceptual motion was made by Senator Hayden to add "and by such action significantly threatens the public health & environment", seconded by Senator Langworthy.

Jim Power proposed the use of the phrase "may reasonably be anticipated" in Section (a) defining hazardous waste as this would be less encompassing than "significantly". (Attachment IV)

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON ENERGY & NATURAL RESOURCES,
room 123-S Statehouse, at 8:00 a.m./~~p.m.~~ on February 11, 1988

Mr. Power stated that crude oil and crude products are excluded in the Federal Superfund; therefore salt water contamination needs to be addressed in this bill as 50% of the known contamination sites are petroleum related with no recourse for remedial action.

In response to a question from Senator Feleciano, Don Schnacke stated that under KSA 65-3430 oil and oil produced brines are not considered to be hazardous wastes. The EPA is currently recommending that wastes from oil drilling such as mud and produced brines be classified as non-hazardous. It is felt too much authority is being granted KDHE in SB 455 to take action on off-lease sites.

Senator Feleciano made a substitute motion to adopt language from Section 101 (33) of the Federal Superfund Act as the definition of "contaminants", seconded by Senator Martin. Motion failed.

The primary motion remains before the committee.

Meeting adjourned. The next meeting will be February 16, 1988.

2-11-88
Quest List

Stanley Grant

KDHE

James Power

KDHE

Tom Hammerdamm

KDAE

Pat Casey

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Dennis Murphy

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Margaret Baggs

KWO

MaryAnn Bradford

League of Women Voters-KS Topeka

Kathy Duncan

Ken PETERSON

KS Petroleum Council

Ross Martin

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Margaret Akers

Ks. Chapter Senior Club

Leland E. Rolp

DWR-KSBA

Charlene Starnard

Ks Natural Resource Council

Bill Bryson

KCC

David Cortiss

Lg. of Ks Municipalities

Rock McKee

Kansas Livestock Assoc.

Prepared by Kansas Department of Health & Environment Staff
for Senator Merrill Werts (CONFIDENTIAL)
February 3, 1988

Responses to Issues Raised Regarding
Senate Bill 455

Cleanup Standards

Despite the concern voiced regarding duplication of effort with the Environmental Protection Agency and extensive work hours required for the state to develop specific cleanup standards, much of the basic work has been done. Target cleanup criteria assembled by the Kansas Department of Health and Environment, based upon health and environmental criteria developed by the U.S. Environmental Protection Agency, have been utilized as guidelines of "how clean is clean" in the state's negotiation of consent agreements for remediation with numerous responsible parties. These criteria and the scientific evidence supporting them would serve as the nucleus for rule and regulation development of specific cleanup standards. No comparable listing of numerical cleanup standards exists at present under federal law.

Definition of Contaminant and Release

A concern was raised regarding "permitted releases." Language could be added which would exempt from liability those releases of contaminants which occur in compliance with permits for discharge of pollutants issued by the state or the U.S. Environmental Protection Agency.

It is important that the definition of contaminant be left intact as currently drafted. The provision of an exemption for substances harmful to public health or environment based upon the type of activity which caused the release would restrict KDHE's ability to require private parties to remediate such problems or to utilize state resources, even if the problem threatened or contaminated a public water supply. The inclusion of substances on the listing to be developed in accordance with Section 2(a) of Senate Bill 455 would not subject those substances to additional regulatory controls, such as the requirements for management of hazardous wastes. It would only require that corrective action be taken if those substances were found in the environment in concentrations and locations where they would constitute a present or potential hazard to human health or the environment.

ATTACH I
2-11-88

Innocent Landowners

One conferee expressed concerns regarding an innocent landowner being held liable as a responsible party. However, beginning on line 0340 the bill provides an affirmative defense for a variety of circumstances, including the situation where the unilateral act of a third person resulted in the contamination. Unless a contractual relationship or other association existed between the landowner and the person whose actions resulted in the contamination, the landowner would not be liable. The department does not intend to further penalize victims of contamination problems.

Administrative/Judicial Review

A number of commenters have made general references to concerns regarding due process and opportunities for review and appeal of staff decisions. The provisions of Section 9 (beginning on line 0404) includes a right of administrative and judicial review broad enough to ensure due process for any party adversely affected by any decision or action of the secretary under this act.

Liability for Remediation Contractors

The current draft of Senate Bill 455 does not contain language that limits the liability of contractors performing remediation activities. The limitation of liability to a negligence standard for these contractors was proposed in the original bill draft. The absence of this limitation will cause serious problems for the state and responsible parties in obtaining remediation services.

Both the state and responsible parties will have a reduced number of contractors willing to perform remediation services and increased cost for all work performed.

(d) (1) The liability of any person performing environmental contamination mitigation or cleanup services in accordance with procedures established pursuant to state or federal law for any injury to a person or property caused by or related to these services shall be limited to acts or omissions of the person during the course of performing these services which can be shown, based on a (preponderance of the evidence) to have been negligent. For the purposes of this act, the demonstration that acts or omissions of a person performing mitigation or cleanup services were in accordance with generally accepted practice and state-of-the-art scientific knowledge, and utilized the best technology reasonable available to the person at the time the mitigation or cleanup services were performed shall create a rebuttable presumption that the acts or omissions were not negligent.

(2) When a person has taken remedial action with the department's approval, such action shall not be admissible in evidence to establish that person's responsibility for the contamination.

(e) (1) Any authorized officer, employee or agent of the department may enter onto any property or premises, at reasonable times and upon notice to the owner or occupant, to oversee and monitor the investigation or remedial action efforts of a responsible person. Notice to the owner or occupant is not required if the delay to provide such notice is likely to result in an imminent risk to public health or welfare or the environment.

(2) Any authorized officer, employee or agent of the department or any person under contract with the department may enter onto any property or premises, at reasonable times and upon notice to the owner or occupant, to take remedial action where the secretary determines that such action is necessary to protect the public health or welfare or the environment. The secretary may provide reasonable compensation for any taking of property or damage done in the process of performing such remedial action.

Definition of Responsible Person(s) for Senate Bill 455

"Responsible Person" means (1) any owner or operator who knew or should have known at the time a release occurred that the release was likely to threaten public health or the environment; (2) any person whose act or omission whether occurring before or after the effective date of this act, contributed to a contaminated site or threat of contamination requiring remedial action to protect public health or the environment; (3) owner who purchases the land where a contaminated site is located only if the owner knew or should have known of the existence of the contaminated site at the time of purchase; (4) any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged for transportation of the contaminants to the contaminated site; (5) any person who accepts or accepted materials which led to contamination at the contaminated site; (6) any person violating any applicable statutes, rule and regulation, plan approval, or order in effect at the time the contamination occurred, and the violation caused or contributed to the contamination at the site; (7) any subsidiary or parent corporation of an owner or operator meeting the criteria in the other sections of this definition.

SENATE BILL No. 455

By Special Committee on Energy and Natural Resources

Re Proposal No. 12

12-16

0018 AN ACT enacting the environmental contamination response
 0019 act; prescribing authorities and duties for the secretary of
 0020 health and environment relating thereto; providing for crimes
 0021 and penalties for violations thereof, repealing K.S.A. 65-171w,
 0022 65-3452 to 65-3455, inclusive, and 65-3457 and K.S.A. 1987
 0023 Supp. 65-3456.

0024 *Be it enacted by the Legislature of the State of Kansas:*

0025 Section 1. This act shall be known and may be cited as the
 0026 Kansas environmental contamination response act.

0027 Sec. 2. As used in this act, unless the context clearly requires
 0028 otherwise, the following words and phrases shall have the
 0029 meaning respectively ascribed thereto:

0030 (a) "Contaminant" means a substance which because of its
 0031 presence in the environment and its quantity, concentration, or
 0032 physical, chemical or biological characteristics will cause or
 0033 significantly contribute to an increase in mortality or an increase
 0034 in serious irreversible or incapacitating illness, or pose a signifi-
 0035 cant present or potential hazard to human health or the environ-
 0036 ment. The secretary shall adopt rules and regulations for a listing
 0037 of each contaminant.

0038 (b) "Contaminated site" means all contiguous land, struc-
 0039 tures and other appurtenances and improvements on the land
 0040 wherein a release of a contaminant or contaminants has occurred.

0041 (c) "Department" means the Kansas department of health
 0042 and environment.

0043 (d) "Owner or operator" means any person owning a con-
 0044 taminated site or operating a facility at a contaminated site and,
 0045 in the case of any contaminated site, title or control of which was

de function
 passed & OK
 KSA 65-3430

KSA 65-3430

(f) "Hazardous waste" means waste or combination of wastes which because of its quantity, concentration or physical, chemical, biological or infectious characteristics or as otherwise determined by the secretary to cause, or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported or disposed of or otherwise managed. Hazardous waste shall not include: (1) Household waste; (2) agricultural waste returned to the soil as fertilizer; (3) mining waste and overburden from the extraction, beneficiation and processing of ores and minerals, if returned to the mine site; (4) drilling fluids, produced waters and other wastes associated with the exploration, development and production of crude oil, natural gas or geothermal energy; (5) fly ash, bottom ash, slag and flue gas emission control wastes generated primarily from the combustion of coal or other fossil fuels; (6) cement kiln dust; or (7) materials listed in 40 CFR 261.4, as in effect on July 1, 1983.

*Federal Superfund
 Title I Section 101*

(33) The term "pollutant or contaminant" shall include, but not be limited to, any element, substance, compound, or mixture, including disease-causing agents, which after release into the environment and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will or may reasonably be anticipated to cause death, disease, behavioral abnormalities, cancer, genetic mutation, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring, except that the term "pollutant or contaminant" shall not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of paragraph (14) and shall not include natural gas, liquefied natural gas, or synthetic gas of pipeline quality (or mixtures of natural gas and such synthetic gas).

wide definition - 12/15/88

1. "Operator" means any person who operates a site or facility or who permits the disposal of waste at a site or facility under his or her management or control for consideration, regardless of whether the site or facility remains in operation and regardless of whether the person operates or permits disposal of waste at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.
2. "Owner" means any person who owns or who receives direct or indirect consideration from the operation of a site or facility regardless of whether the site or facility remains in operation and regardless of whether the person owns or receives consideration at the time any environmental pollution occurs. This term includes a subsidiary or parent corporation.
3. "Subsidiary or parent corporation" means any business entity, including a subsidiary, parent corporation or other business arrangement which has elements of common ownership or control or uses a long-term contractual arrangement with any person to avoid direct responsibility for conditions at a site or facility.

*EDHE draft
1/25/80*

ATTACHED
2-11-88