

Approved: 2-7-95
Date

MINUTES OF THE SENATE COMMITTEE ON ENERGY & NATURAL RESOURCES.

The meeting was called to order by Chairperson Don Sallee at 8:00 a.m. on January 31, 1995 in Room 254-E- of the Capitol.

All members were present except:

Senator Phil Martin
Senator Bill Wisdom, Excused

Committee staff present: Raney Gilliland, Legislative Research Department
Dennis Hodgins, Legislative Research Department
Mike Corrigan, Revisor of Statutes
Clarene Wilms, Committee Secretary

Conferees appearing before the committee:

Douglas K. Hoskinson, Hoskinson Sand and Gravel, Hutchinson
Terry Beamis, Hutchinson
Blake Henning, Land Reclamation Specialist, State Conservation Commission
Edward R. Moses, Kansas Aggregate Producers Association
Senator David Kerr

Others attending: See attached list

SCR 1604: Requesting that the U. S. Congress amend the Nuclear Waste Policy Act to provide states and their political subdivisions with funding and assistance to prepare for shipments of spent fuel from nuclear facilities.

Following a brief explanation Senator Morris made a motion for passage of SCR 1604. Senator Lawrence seconded the motion and the motion carried.

SB 114: Concerning the surface-mining land conservation act; exempting sand and gravel dredging operations.

Douglas Hoskinson, Hoskinson Sand and Gravel, Hutchinson, appeared and presented written testimony in support of **SB 114**. Mr. Hoskinson stated his business has experienced a tremendous rise in valuation for tax purposes in recent years as well as coming under supervision of the Bureau of Mines and the State Water Resources Board. Mr. Hoskinson felt the surface-mining land conservation act passed last year should not cover sand and gravel dredging operations as they are already under considerable other supervision, also nature restores and reclaims the area in a matter of a few years (Attachment 1).

Terry Beamis, Hutchinson, told the committee he was originally from central Nebraska along the Platte river which has conditions similar to those in Kansas. He stated if there was too much overburden to remove a producer will not even work with it as it is not profitable and a sandy beach from which top soil has been removed and sold is most desirable.

Blake Henning, Land Reclamation Specialist, State Conservation Commission, appeared and presented testimony in opposition to **SB 114** stating requirements of the Surface-Mining Land Conservation and Reclamation Act passed in 1994 required licensing of public and private mine operators, required development of a reclamation plan for each site and a bond posted to insure reclamation (Attachment 2). Mr. Henning was of the opinion such regulations forced the owner to think about the final results as a business was shutting down. A further concern expressed was that dry surface miners would be paying higher fees should sand and gravel dredging be exempted from the 1994 act. Mr. Henning questioned how Section 3, a) and b) would be handled should c) be set aside.

Edward R. Moses, Kansas Aggregate Producers' Association spoke to the committee and presented written testimony in opposition to **SB 114** (Attachment 3). Mr. Moses made two points, 1) that the bill would cause a shift to occur and become a burden to the rock producers only and 2) in some areas and situations nature has not taken care of the reclamation situation. He further stated businesses were presently receiving orders from other

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, Room 254-E
Statehouse, at 8:00 a.m. on January 31, 1995.

regulators which were at times conflicting.

Senator David Kerr commented that from earlier testimony it appeared sand and gravel dredgers had been brought into the bill to provide funding for other operators. Senator Kerr expressed the opinion that sand and gravel dredging appeared to raise the value of land as water becomes more valuable. He further encouraged the committee not to regulate one party as a source of revenue for another.

The chairperson called for a Subcommittee report on **SB-76**. Senator Vancrum reported that the balloon for the bill was similar to one drawn by Clark Duffy for the purpose of dealing with criticism raised in testimony. The subcommittee made several changes which Senator Vancrum explained. (Attachment 4)

Further discussion expressed concern about the extension of privilege issue. A member stated concern about conflict with laws already in place and that the bill would create privileged information which has numerous ramifications.

Senator Vancrum moved adoption of the subcommittee report with the proviso **SB 76** be held in committee for further amendments. Senator Lee seconded the motion and the motion carried.

Senator Lawrence moved adoption of the minutes for January 19, 24, 25 and 26. Senator Morris seconded the motion and the motion carried.

The meeting adjourned at 8:48 a.m.

The next meeting is scheduled for February 1, 1995.

**SENATE COMMITTEE ON ENERGY & NATURAL
RESOURCES GUEST LIST COMMITTEE**

DATE: January 31, 1995

NAME	REPRESENTING
Leland & Rolf	DWR - KSDA
GEORGE AUSTIN	DWR - KSDA
Blake Henning	SCC
Dayna M. Meader	SCC
Ken Kern	SCC
JOE DICK	BPUKCK
Chuck Breckel	Adi General's Dept.
Wesley Mas	ICAPP
Tracy Stubbs	SCC
Dale Lambly	KDB
Gene Jennings	NWH
Douglas Mackinnon	Kernman Seeds Group
Bill Cover	KURC / SIENA
ED SCHAU B	WESTERN RESOURCES
Mickey Damon	Pete Whill's Associates

Douglas K. Hoskinson
Hoskinson Sand and Gravel
Hutchinson, KS.
Phone 316-662-7783

SUBJECT Senate Bill 114.

I have been in the sand and gravel business for over thirty years and the stated purpose of the bill in section 2 simply should not cover sand and gravel dredging operations for the following reasons.

1. I have long since been offered a great deal of money several times in years past to abandon my dredging operation in favor of a lakeside housing development and resort which would make my over 90 acres much more valuable for taxing purposes and would certainly not leave my land in unusable condition.
2. My previous operation across 4th street to the south is now being used for fishing, hunting and other recreational uses of the 2 lakes left after dredging operations were done.
3. We remove the topsoil and sell it as the top layer of fill for lawns etc. along with the other dirt that is used as fill dirt. Saving this material for future use in grading the banks of the pit would cause a considerable loss of money to my operation as well as covering over desirable beaches.
4. Section 11 items 2 and 2c run counter to the likely future use of the land after dredging operations cease.
5. Section 11 item 1 runs counter to the Bureau of Mines requirement that there be a three foot high berm around the operating pit to prevent machinery from running off in the lake.
6. The inclusion of dredging operations in the bill will serve only to substantially raise the price of the material to the very consumers you are attempting to protect.
7. And finally, My operation is currently under the supervision of the Bureau of Mines and the State Water Resources Board and we must already comply with many regulations put out by these two regulators and the County where we operate.

I respectfully ask that this bill be passed in its present form.

Senate Energy & Nat'l Res.
January 31, 1995
Attachment 1



State Conservation Commission

109 SW 9th Street
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Topeka, KS 66612-1299
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TESTIMONY ON SENATE BILL 114 SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

January 31, 1995

Blake L. Henning
Land Reclamation Specialist

Thank you for the opportunity to appear before the Committee and testify on Senate Bill No. 114.

The Surface-Mining Land Conservation and Reclamation Act (Land Reclamation Act) was passed into law by the 1994 Legislature. The purpose of the law is to preserve natural resources, protect and perpetuate the taxable value of property and protect and promote the health, safety and general welfare of the citizens of this state.

The Act affects the mining of aggregate and minerals such as stone, sand, gravel, gypsum, clay, shale, silt, and volcanic ash but not coal, oil or gas. Requirements include that public and private mine operators be licensed, register their sites, develop a reclamation plan for each site and post a bond to insure reclamation.

In developing the program, the State Conservation Commission has found that many mine operators do not have written operation or reclamation plans for their sites. The Act causes mine operators to consider the post-mining landuse of a site and to take steps early on in the mining operation to achieve reclamation and the final landuse. This has several benefits to the public and to the mine operator including reclamation of natural resources and protection of water quality at the site, enhanced public relations with neighbors, improved public safety conditions,

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January 31, 1995
Attachment 2

and preservation of the property value for future use.

Most sand and gravel dredging operations occur in the floodplain. Today, on most Kansas streams, flood flows do not occur in sufficient volume or frequency to insure natural reclamation of these pits. Public safety and natural resource protection issues in these areas can be addressed through reclamation plans.

Implementation of the Land Reclamation Act is 100% fee funded by aggregate and mineral producers. Fees are collected based on site registration and licensing. To date, 117 private companies have been licensed to mine in the state. Approximately 30% of these companies are sand and gravel dredge operations and operate a minimum of 63 sites across the state. Exemption of these operations would result in a significant fee shift within the industry. Fees charged to other mine operators still subject to the Act would increase approximately 40%.

Within the sand and gravel industry itself there are a significant number of operations that do not use dredging. These operators would remain subject to the Land Reclamation Act and be placed on unequal terms with dredge operators.

In conclusion, the State Conservation Commission opposes Senate Bill No. 114 for the above reasons.

KAPA

Kansas Aggregate
Producers' Association

Edward R. Moses
Managing Director

TESTIMONY
of
The Kansas Aggregate Producers Association
before the
Senate Committee on Energy & Natural Resources

on
Senate Bill No. 114
January 31, 1995

Mr. Chairman and members of the committee I am Edward R. Moses appearing before you today on behalf of the Kansas Aggregate Producers in opposition to Senate Bill No. 114 as drafted. The Kansas Aggregate Producers Associations represents over 100 firms and associates actively engaged in the responsible extraction of over 90% of our state's aggregate resources.

Our opposition to the measure before today is based on the following reasons:

- SB114, as drafted, appears to effectively exempt all Sand & Gravel mining operations from the Surface Mining and Land Reclamation Act as passed by this legislature last year. The effect of such an exemption would be to transfer the costs of administering this act to rock crushing operations. And, more importantly, deprive Kansans of the orderly post mining closure of depleted sand & gravel pits.
- The current language of Surface Mining and Land Reclamation Act allows the State Conservation Commission adequate leeway to alter standards regarding the reclamation of high banks in sand & gravel pits. As many of you already know the Kansas Aggregate Producers sponsored and participated in the drafting of this measure. This participation, we feel, resulting in a firm but flexible method of providing for reclamation throughout our state. Consequently, it would appear the relief provided for in SB114 is superfluous.

We conclude by urging you to take no further action on SB114. Thank you for the opportunity to provide these comments.

Senate Energy & Nat'l Res.
January 31, 1995
Attachment 3

SENATE BILL No. 76

By Committee on Energy and Natural Resources

1-19

Senate Energy & Nat'l Res.
January 31, 1995
Attachment 4

9 AN ACT concerning environmental compliance; establishing procedures
10 for voluntary environmental audits; defining terms.

11
12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. As used in this act:

14 (a) "Audit" means a voluntary, internal and comprehensive evaluation
15 of any facility or operation regulated under environmental laws or of man-
16 agement systems related to such facility or operation, that is designed to
17 identify and prevent noncompliance and to improve compliance with such
18 laws. An audit may be conducted by the owner or operator of such facility
19 or operation, by the owner's or operator's employees or agents or by
20 independent contractors retained by the owner or operator.

21 (b) "Audit report" means a set of documents, each labeled "Audit
22 Report: Privileged Document" and prepared as a result of an audit. An
23 audit report may include the following supporting information, if col-
24 lected or developed for the primary purpose and in the course of an audit:
25 Field notes and records of observations, opinions, suggestions, conclu-
26 sions, drafts, memoranda, drawings, photographs, computer-generated or
27 electronically recorded information, maps, charts, graphs and surveys. An
28 audit report, when completed, may have three components:

29 (1) An audit report prepared by the auditor, which may include the
30 scope of the audit, the information gained in the audit, conclusions and
31 recommendations, together with exhibits and appendices;

32 (2) memoranda and documents analyzing all or part of the audit re-
33 port and discussing potential implementation issues; and

34 (3) an implementation plan that addresses correcting past noncom-
35 pliance, improving current compliance and preventing future noncom-
36 pliance.

37 [(c) "Environmental laws" means state environmental statutes and
38 rules and regulations administered by the state corporation commission
39 or the division of environment of the department of health and environ-
40 ment, and the federal and local counterparts or extensions of such statutes
41 and rules and regulations.]

42 Sec. 2. (a) An audit report shall be privileged and shall not be subject
43 to any discovery procedure or admissible as evidence in any legal action

assessment, evaluation or review, not otherwise required by environmental law, that is performed by the owner or operator; the owner's or operator's employees; or a qualified auditor and initiated by the owner or operator of a facility for the express and specific purpose of determining whether a facility, operation within a facility or facility management system complies with environmental laws. Once initiated an audit shall be completed within a reasonable period of time. Nothing in this section shall be construed to authorize uninterrupted or continuous auditing.

(c) "Facility" means all contiguous land, structures and other appurtenances and improvements on the land.

(d) "Qualified auditor" means a person or organization with education, training and experience in preparing studies and assessments.

(e) "Environmental law" means any requirement contained in state environmental statutes and in rules and regulations promulgated under such statutes.

1 in any civil, criminal or administrative proceeding, except as specifically
2 provided by this act.

3 (b) If an audit report, or any part thereof, is subject to the privilege
4 recognized in this section, neither any person who conducted the audit
5 nor anyone to whom the audit results are disclosed, unless such disclosure
6 constitutes a waiver of the privilege under section 3, can be compelled to
7 testify regarding any matter which was the subject of the audit and which
8 is addressed in a privileged part of the audit report.

9 Sec. 3. (a) The privilege recognized in section 2 does not apply to
10 the extent that the privilege is waived by the person who owns or operates
11 the facility [or operation] at which the audit was conducted and who pre-
12 pared or caused to be prepared the audit report. [The privilege cannot be
13 waived except by or with the concurrence of the owner or operator of the
14 audited facility or operation or as provided by subsection (b) of section
15 4.]

16 (b) The audit report and information generated by the audit may be
17 disclosed to any person employed by the owner or operator of the audited
18 facility [or operation], any legal representative of the owner or operator or
19 any independent contractor retained by the owner or operator to address
20 an issue or issues raised by the audit, without waiving the privilege rec-
21 ognized in section 2.

22 (c) Disclosure of the audit report or any information generated by
23 the audit under the following circumstances shall not waive the privilege
24 recognized in section 2:

25 (1) Disclosure under the terms of an agreement which expressly pro-
26 vides that the information provided be kept confidential between the
27 owner or operator of the facility [or operation] audited and a potential
28 purchaser of the operation or facility; or

29 (2) disclosure under the terms of a confidentiality agreement be-
30 tween governmental officials and the owner or operator of the facility [or
31 operation] audited, which expressly provides that the information provided
32 be kept confidential.

33 (d) In a civil, criminal or administrative proceeding, a court or ad-
34 ministrative tribunal of record shall require disclosure of material for
35 which the privilege recognized in section 2 is asserted, after *in camera*
36 review consistent with the code of civil procedure, if such court or ad-
37 ministrative tribunal determines that:

38 (1) The privilege is asserted for a fraudulent purpose;

39 (2) the party asserting the privilege has not implemented a manage-
40 ment system consistent with the primary characteristics prescribed by
41 [Section 3] to assure compliance with environmental [safety] laws [of this
42 state, or of the federal or local counterpart or extension of such laws.]

43 [(3) a management system shall be deemed to satisfy the requirements]

. Depending on the nature of the entity including its size, its financial resources and assets and the environmental risks posed by its operations, and based on a qualitative assessment of the totality of circumstances, a management system shall be deemed to satisfy the requirements

1 of this act if it contains the following primary characteristics:

2 (A) A system that covers all parts of the company's operations regu- entity's
3 lated under one or more environmental statutes. laws

4 (B) a system that regularly takes steps to prevent and remedy non-
5 compliance;

6 (C) a system that has the support of senior management; entity

7 (D) the company implements a system that has policies, company
8 standards and procedures that highlight the importance of assuring com-
9 pliance with all environmental laws; entity's

10 (E) the company's policies, standards and procedures are communi- entity's
11 cated effectively to all in the company whose activities could affect com-
12 pliance achievement; entity

13 (F) specific individuals within both high-level and plant- or operation-
14 level management are assigned responsibility to oversee compliance with
15 such standards and procedures; entity

16 (G) the company undertakes regular review of the status of compli- entity
17 ance, including routine evaluation and periodic auditing of day-to-day
18 monitoring efforts, to evaluate, detect, prevent and remedy noncompli-
19 ance;

20 (H) the company has a reporting system which employees can use to entity
21 report unlawful conduct within the organization without fear of retribu-
22 tion; and

23 (I) the company's standards and procedures to ensure compliance are entity's
24 consistently enforced through appropriate employee disciplinary mech-
25 anisms; and performance evaluations and

26 [J] environmental compliance is a factor considered by the company
27 in its regular performance evaluations of its employees and officers; (3)

28 [4] the material is not subject to the privilege; or

29 [5] even if subject to the privilege, the material shows evidence of (4)
30 noncompliance with the environmental laws, and appropriate efforts to
31 achieve compliance with such laws were not promptly initiated and pur-
32 sued with reasonable diligence upon discovery of noncompliance.

33 (e) (1) Subject to the provisions of subsection (2), a party asserting
34 the audit privilege recognized in section 2 has the burden of demonstrat-
35 ing the applicability of the privilege. If there is evidence of noncompliance
36 with environmental laws, such party must prove that appropriate efforts
37 to achieve compliance were promptly initiated and pursued with reason- upon discovery
38 able diligence.

39 (2) A party seeking disclosure under subsection (d)(1) has the burden
40 of proving that the privilege is asserted for a fraudulent purpose or to
41 prevent disclosure of past noncompliance and, in a criminal proceeding,
42 the state has the burden of proving the conditions for disclosure under
43 subsection (d)(4).

1 Sec. 4. (a) The state, having probable cause to believe a criminal
2 offense has been committed under state environmental laws based upon
3 information obtained from a source independent of an audit report, may
4 obtain an audit report for which a privilege is asserted under section 2
5 pursuant to a search warrant, criminal subpoena or discovery as allowed
6 by the Kansas code of criminal procedure. The state shall immediately
7 place the audit report under seal and shall not disclose the contents of
8 the report.

9 (b) Within 30 days after the state obtains an audit report, the owner
10 or operator who prepared the report or caused the report to be prepared
11 may file a petition with the appropriate court requesting an *in camera*
12 review of whether all or part of the audit report is privileged or subject
13 to disclosure under this act. Failure by the owner or operator to file such
14 petition shall waive the privilege.

15 (c) Upon filing a petition under subsection (b), the court shall issue
16 an order scheduling an *in camera* review, to be held within 45 days of
17 the filing of the petition, to determine whether all or part of the audit
18 report is privileged or subject to disclosure under this act. Such order
19 shall allow the county or district attorney or attorney general to place
20 appropriate limitations on distribution and review of the report to protect
21 against unnecessary disclosure. The county or district attorney or attorney
22 general may consult with enforcement agencies regarding the contents of
23 the report as necessary to prepare for the *in camera* review.

24 (d) Failure to comply with the disclosure or use prohibitions of this
25 section shall be the basis, in any civil, criminal or administrative proceed-
26 ing, for suppression of any evidence arising or derived from the unau-
27 thorized review, disclosure or use.

28 (e) The parties at any time may stipulate to entry of an order directing
29 that specific information contained in an audit report is or is not subject
30 to the privilege recognized in section 2.

31 (f) Upon making a disclosure determination under subsection (d) of
32 section 3, the court may compel the disclosure of only those portions of
33 an audit report relevant to issues in dispute in the proceeding.

34 Sec. 5. The privilege recognized in section 2 shall not extend to:

35 (a) Documents, communications, data, reports or other information
36 required to be collected, developed, maintained or reported to a regu-
37 latory agency pursuant to federal, state or local statute, ordinance, reso-
38 lution, rule and regulation, permit or order;

39 (b) information obtained by observation, sampling or monitoring by
40 any regulatory agency; or

41 (c) information obtained from a source independent of the audit.

42 Sec. 6. Nothing in this act shall limit, waive or abrogate the scope or
43 nature of any statutory or common-law privilege, including but not limited

1 to the work-product doctrine and the attorney-client privilege.

2 Sec. 7. (a) If any person or entity makes a voluntary disclosure of a
3 violation of environmental laws, there shall be a rebuttable presumption
4 that the person or entity is immune from any administrative, civil or crim-
5 inal penalties for the violation disclosed if the disclosure is ~~promptly~~

6 (1) Made promptly after knowledge of the information disclosed is
7 obtained by the person or entity;

8 (2) made to an agency having regulatory authority with regard to the
9 violation disclosed;

10 (3) arising out of an audit;

11 (4) for which the person or entity making the disclosure initiates ac-
12 tion in a diligent manner to resolve the violations identified in the disclo-
13 sure; and

14 (5) in which the person or entity making the disclosure cooperates
15 with the appropriate agency in connection with investigation of the issues
16 identified in the disclosure.

17 (b) A disclosure is not voluntary for purposes of this section if it is
18 required by state law to be reported to a regulatory authority.

19 (c) The presumption recognized in subsection (a) may be rebutted
20 and penalties may be imposed under state law if it is established that:

21 (1) The disclosure was not voluntary within the meaning of this sec-
22 tion;

23 (2) the violation was committed intentionally and willfully by the per-
24 son or entity making the disclosure;

25 (3) the violation was not fully corrected in a diligent manner; or

26 (4) significant environmental harm or a public health threat was
27 caused by the violation.

28 (d) In any enforcement action brought against a person or entity re-
29 garding a violation for which the person or entity claims to have made a
30 voluntary disclosure within the meaning of this section, the burden of
31 proof concerning voluntariness of the disclosure shall be allocated as fol-
32 lows:

33 (1) The person or entity making the voluntary disclosure claim shall
34 have the burden of establishing a prima facie case that the disclosure was
35 voluntary within the meaning of this section; and

36 (2) once a prima facie case of voluntary disclosure is established, the
37 ~~enforcement authority~~ shall have the burden of rebutting the presump-
38 tion recognized in subsection (a) by a preponderance of the evidence.

39 Sec. 8. If a person or entity has implemented an environmental man-
40 agement system, consistent with the primary characteristics prescribed
41 by subsection (d)(3) of section 3, a court or administrative tribunal which
42 finds a violation of such laws, or extension of such laws, shall give consid-
43 eration to that fact in determining whether to impose administrative, civil

| opposing party

1 or criminal penalties and in determining the severity of any penalties
2 imposed.

3 Sec. 9. This act shall take effect and be in force from and after its
4 publication in the statute book.

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