Approved: 3-21-95
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 March 15, 1995 in Room 254-E- of the Capitol.

All members were present:

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

Conferees appearing before the committee:
Larry Knoche, Director, Bureau of environmental Remediation
David Traster, Foulston & Siefkin, Kansas Drycleaner Environmental Committee
Gene Leonard, Concordia, Kansas
Connie Tweito, Hutchinson, Kansas
Written testimony only, Scott E. Shmalberg, President of Scotch Fabric Care Services of Lawrence and Topeka, also Select Dry Cleaners of Kansas City
Written testimony only, John Neal, Ineeda Cleaners, Hutchinson, Kansas
Edward R. Moses, Managing Director, Kansas Aggregate Producers' Association
Michael Lally, P.E., President, Lane Geo Sciences
Written testimony only, L. James Ralston, Asphalt Construction Company, Wichita, Kansas
Written testimony, Victor & Yvette Holzmeister Klotz, Klotz Sand Company, Holcomb, Kansas
Written Testimony, Nadine Stannard, Associated Material & Supply, Wichita, Kansas
David L. Pope, Chief Engineer, Division of Water Resources, Kansas State Department of Agriculture

Others attending: See attached list

Substitute for HB 2256: An act concerning drycleaning; providing for regulation of certain facilities; providing for payment of certain costs of remediation of pollution from drycleaning activities; imposing certain taxes and fees; prohibiting certain acts and providing penalties for violations

Larry Knoche, Bureau of Environmental Remediation, Division of Environment, KDHE, presented testimony in support of **Substitute for HB 2256** but noted concern that funding for this type of program was not included in the governor's budget recommendations. He also stated that the Department did not concur with the creation of a separate sales tax as a funding mechanism and recommended further evaluation of funding alternatives. (Attachment 1)

In answer to members' questions Mr. Knoche stated that the bill does call for some type of tax or surcharge on the cleaning solvent itself for a funding mechanism, however, in his opinion it would not be sufficient funding. Ultimately the cost would be passed on to users of the service.

A copy of the fiscal note for **Substitute for HB 2256** was requested and provided to committee members. (Attachment 2)

David M. Traster, Foulston & Siefkin, representing the group, Kansas Drycleaner Environmental Committee, presented testimony in support of **Substitute for HB 2256** as well as a balloon of the bill. (Attachments 3 and 4) Mr. Traster stated the bill will accomplish three things. (1) create a program which will stop any new releases

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

of drycleaning solvent (2) raises funds (3) sets out corrective action. Mr. Traster stated that the passage of CERCLA with its resulting liability has created a monumental problem for all industries which have utilized chlorinated solvents. **Substitute for HB 2256** is designed to soften the impact on individual drycleaners by spreading the costs of remediation over the industry.

Mr. Traster testified that the balloon of **Substitute for HB 2256** proposes amendments, some of which are technical, some requested by the chairman of the House Energy and Natural Resources Committee and some were requested by the Revisor of Statutes' office. Mr. Traster went through the requested changes which were set out in his testimony.

Discussion touched on KDHE's opposition to regulating the bill due to the fact that funding was not in the Governor's budget, also that the department opposed the revenue tax issue. Mr. Traster told members the Governor was aware of this problem prior to his election, his office was informed prior to introduction of the bill and they have said it was not in the budget but would have to await the outcome. He further stated there was overwhelming support for the bill. In answer to a question Mr. Traster stated there were no state general funds included in the bill, that administration by KDHE would be paid for out of the fund.

Discussion continued with a comment that both the Department of Revenue and Department of Health and Environment would have some costs involved in dealing with **Substitute for HB 2256**, that of collecting the tax and operating the program.

Mr. Traster stated his group had made numerous changes in the bill while it was in the House in an effort to reduce the costs of the program, therefore the early fiscal notes could be somewhat high.

Gene Leonard, Concordia, Kansas, presented testimony supporting **Substitute for HB 2256** . (Attachment 5) Mr. Leonard told members many innocent entities can be pulled into Superfund's web even though at the time it happened disposal actions were legal. Mr. Leonard stated this bill will restore value to his business thereby keeping the property on the tax roles. The bill will involve the consumer and restore fairness to Kansas Drycleaners.

Connie Tweito, Hutchinson, Kansas, presented testimony in support of **Substitute for HB 2256** and related to the committee experience in dealing with pollution which occurred many years ago and for which her brother, sister and herself are now liable. She told members that people should not be held responsible for a problem which they did not cause or contribute to and setting up a trust fund similar to the gasoline trust fund is the only fair way to correct this problem. (Attachment 6)

Written testimony was presented to committee members by Scott E. Shmalberg, President of Scotch Fabric Care Services of Lawrence and Topeka who stated the people involved in preserving the dry cleaning industry in Kansas were attempting to find a solution to the difficulties in which the industry now finds itself. (Attachment 7)

Written testimony was presented by John Neal, Ineeda Cleaners, which stated that due to contamination of soil and groundwater on property owned by his company to this date they have spent or are committed to spend over $40,000 on legal and consulting fees with no end in sight. Mr. Neal stated **Substitute HB 2256** was very similar to the Kansas Underground Storage Tank legislation passed a few years ago. (Attachment 8)

Senator Emert moved to remove the Advisory Board (Section 9) from the bill. Senator Vancrum seconded the motion.

Discussion touched on who would supervise without the advisory board and whether the board was needed. Mr. Traster stated the advisory board was not in the original bill and had been added by the House.

The motion carried.

A member commented there was no direct funding mechanism, that there is no place in the bill that affirmatively says that moneys shall be expended from the fund for the cost of administration and enforcement.

Senator Vancrum moved to amend line 11, page 6 to say "moneys in the fund may be expended only for the following purposes and for no other government purpose and listing cost of administration and cost of corrective action. Senator Lee seconded the motion and the motion carried.

Senator Hardenburger moved adoption of the balloon for **Substitute for HB 2256** with a second by Senator Morris. The motion carried.

Senator Morris moved to report **Substitute for HB 2256** as amended favorable for passage. Senator

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, ROOM 254-E-Statehouse, at 8:00 a.m. on March 15, 1995.

Hardenburger seconded the motion and the motion carried.

HB 2476: An act concerning sand and gravel pits; relating to the application of certain statutes to evaporation therefrom

Edward R. Moses, Managing Director, Kansas Aggregate Producers' Association, presented testimony to the committee in support of **HB 2476.** (Attachment 9) Mr. Moses pointed out the industry position as well as the position of the first three Chief Engineers of the Division of Water Resources, was that the legislature never intended for the "evaporation created by the opening of sand and gravel pits" to be regulated as a beneficial use of water under the act. The Kansas Division of Water Resources current position, relying on "sameness", as defined by rule and regulation, is that evaporation is a beneficial use of water and as such requires a water right to be secured prior to appropriation.

Michael Lally, P.E., President of Lane Geo Sciences, presented testimony as a technical representative for the Kansas Aggregate Producers Association. (Attachment 10) Mr. Lally reviewed the sequence of events related to water issues, acknowledged that the Division of Water Resources desires to have some type of knowledge as to where sand pits are operating, their location and their size. He felt this could be handled through the use of a term permit for the duration of the active mining of the pits. Further, he determined there is no need for any type of permanent water right to account for evaporation losses after the pit is closed as this is contrary to the intent of the original Water Appropriation Act. He further stated that evaporative or consumptive water use is not properly defined as a beneficial use of water for appropriation purposes and asked the committee to correct this inequity.

Written testimony was submitted by L. James Ralston, Asphalt Construction Company, who stated **HB 2476** is simple, to the point, and would have no affect on other water users in the state. (Attachment 11)

Written testimony was submitted by Victor and Yvette Holzmeister Klotz, representing Klotz Sand Company, Holcomb, Kansas. (Attachment 12) Mr. and Mrs.Klotz stated after continual delays concerning their water permit from the Division of Water Resources, which caused major financial lost revenue, they hired an attorney who finally was able to receive the permit, all at the Klotzs' expense. They further stated water rights are not readily available and the ones available are extremely expensive. They were concerned whether they would be able to continue operating in the State of Kansas.

Written testimony was submitted by Nadine Stannard, Associated Material and Supply, Wichita, Kansas, which explained the process of obtaining sand. Ms. Stannard related the difficulties of obtaining water rights and stated she would have to lay off some of her employees if an alternative is not available. (Attachment 13)

David Pope, Chief Engineer, Division of Water Resources, Kansas State Department of Agriculture, appeared before the committee to present testimony in opposition to **HB 2476**. (Attachment 14) Mr. Pope stated the Division of Water Resources disagrees with the concept of exempting evaporation from sand pits from regulation due to concern the Kansas Water Appropriation Act has regulated the use of water within the State of Kansas and exemption of any one type of use made it difficult to hold the line on other exemptions. Failing any other solution Mr. Pope suggested changing language in **HB 2476** as shown following page 9 of Attachment 14. This language would keep the users within the system by allowing their existing operations as well as the land they have under ownership and lease, in essence to be grandfathered in, and consequently put them on an even field with everybody else for everything else.

Due to lack of time the chairman told the committee hearings on **HB 2476** would be continued tomorrow, March 16, 1995 at 8 a.m.

The next meeting is scheduled for March 16, 1995.

SENATE COMMITTEE ON ENERGY & NATURAL RESOURCES GUEST LIST COMMITTEE

DATE: March 15, 1995

NAME	REPRESENTING
Wayland Anderson	DWR/KDAg
Leland E. Rolfs	" " " "
Connie Tweito	Larkland Shopping
David [illegible]	
Ross [illegible]	[illegible] Bros. Cleaners
Bill Bider	KDHE
Michael Lally	Layne GeoSciences, Inc / KAPA
Zandra Carmichael	Scotch Fabric Care Services
Marlene Showalter	Scotch Dry Cleaners
A. T. Drummond	Kaw Valley Sand
Dave Barclay	Alsop Sand Co
Nadine Stannard	Associated Material & Supply Co
Jimmy Ralston	Student
Jim Ralston	J.H. Shears Sons Inc.
Woody Moses	KAPA
Marvin Zielsdorf	Hamm Companies
Bob Totten	Ks Contractors Association

State of Kansas

Bill Graves Governor

Department of Health and Environment
James J. O'Connell, Secretary

Testimony presented to

Senate Committee on Energy and Natural Resources

by

The Kansas Department of Health and Environment

Substitute House Bill 2256

While conducting environmental investigations required by other state and federal environmental programs, several sources of contamination associated with drycleaning facilities have been discovered. In the majority of the pollution sites discovered, the potential responsible party is a small business person who is operating or has operated a family owned drycleaning facility. Due to the small quantity of waste being generated, specific product and waste handling regulations may not be applicable to the facilities. The longevity of the drycleaning solvents that are released into the environment is long, due to the slow degradation process of chlorinated solvents. Many of the known pollution problems associated with drycleaning activities are being discovered 20 - 30 years after the closure of the facility.

It is KDHE's opinion that by the registration of existing drycleaning facilities and the establishment of operational performance standards, a positive approach for future pollution prevention activities will be accomplished. The establishment of a drycleaning facility trust fund will allow environmental remediation activities to be implemented on past problems as well as any new sites that are discovered which threaten the public health and the environment.

KDHE supports the industry concept to create a process to address the environmental problems associated with the dry cleaning industry. However, it should be noted that the funding for this type of program was not included in the governor's budget recommendations and KDHE does not concur with the creation of a separate sales tax as a funding mechanism and recommends further evaluation of funding alternatives.

Thank you for allowing me to speak today.

Testimony presented by:

Larry Knoche
Bureau of Environmental Remediation
Division of Environment
March 15, 1995

Senate Energy & Nat'l Res.
March 15, 1995
Attachment 1

Division of Environment, Bureau of Environmental Remediation
Forbes Field, Building 740, Topeka, KS 66620-0001

Telephone: (913) 296-1660
FAX: (913) 296-1686

Printed on Recycled Paper

MEMORANDUM

TO: Ms. Gloria M. Timmer, Director
Division of Budget

DATE: March 1, 1995

FROM: Kansas Department of Revenue

RE: Substitute for House Bill 2256 As Amended By House Committee of the Whole

BRIEF OF BILL:

Substitute for House Bill 2256, as amended by House Committee of the Whole, is new legislation enacting the Kansas Drycleaner Environmental Response Act.

Section 1 merely names the act.

Section 2 provides definitions of numerous terms used in the act.

Section 3 provides the Secretary of Health and Environment with the authorization to adopt rules and regulations to administer and enforce the act. The secretary is also given guidelines regarding certain mandatory rules and regulations.

Section 4 provides the secretary with legislative intent and guidance regarding expenditures from the Drycleaning Facility Release Trust Fund which is created by this act.

Section 5 outlines unlawful acts under this legislation.

Section 6 provides for the annual registration, of drycleaning facility owners, with the Department of Health and Environment on forms provided by that Department.

Section 7 establishes the Drycleaning Facility Release Trust Fund in the State Treasury and provides guidelines for the deposit of certain funds to that fund; and dates for transfers to the fund from the State General Fund of certain interest earnings.

Section 8 limits the liability of the State, the fund, the secretary or the department or agents or employees thereof, under this act.

Section 9 establishes the Drycleaner Facility Release Compensation Advisory Board; lists the board's composition; and provides its duties.

Section 10 does not affect the Department of Revenue in that it provides the Secretary of Health and Environment with guidelines regarding contamination at drycleaning facilities posing a threat to human health or the environment.

Section 11 imposes, effective July 1, 1995, a gross receipts tax, at the rate of 2%, for the privilege of engaging in the business of laundering and drycleaning garments and other household fabrics at a drycleaning facility in this State. The Department of Revenue is charged with collecting and administering the new tax.

Section 12 imposes, effective July 1, 1995, a tax on the sale or transfer of drycleaning solvent to any person owning or operating a drycleaning facility. The rate is set at $3.50 per gallon in 1995; thereafter the rate is increased $.25 per year to a maximum of $5.50.

Section 13 states that, whenever on April 1 of any year the fund balance equals or exceeds $4 million the tax will be suspended commencing the next July 1. When, on April 1 of any year, the fund balance equals $2 million or less the taxes will again be levied commencing the next July 1. The Director of Accounts and Reports is charged with notifying the Department of Revenue, not later than April 5 of each year, of the fund balances as of April 1 of each year.

Senate Energy & Nat'l Res.
March 15, 1995
Attachment 2

Section 14 provides for a hearing procedure with the Secretary of Health and Environment for those persons adversely affected by any order or decision of the secretary.

Section 15, inserted by the House Committee of the Whole, provides reporting guidelines for the Secretary of Health and Environment to the Legislature.

Section 16 provides that if any provision of this act is held invalid, such invalidity shall not affect other provisions of the act.

The House Committee of the Whole amendment does not impact the Department of Revenue.

The effective date of this bill would be July 1, 1995.

FISCAL IMPACT:

It is estimated that passage of this bill would increase state revenues $1.11 million in Fiscal Year 1996 and $1.161 million in Fiscal Year 1997.

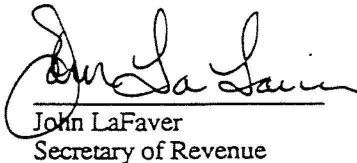
This estimate was calculated based on information received from the Dry Cleaners' Trade association. It is estimated that 300 of the dry cleaning facilities in Kansas would be affected by this bill. The following is an detailed explanation of the estimates.

	FY96	FY97
Tax on dry cleaning solvents average of 200 gallons per year per facility	$210,000	$225,000
Tax on gross sales of Dry Cleaning Services @ 2% (est. $45 million annual sales)	$900,000	$936,000
Total	$1,110,000	$1,161,000

ADMINISTRATIVE IMPACT:

It is estimated that enactment of this bill would result in the following costs: In the Information Systems Bureau an estimated 800 hours of Application Programmer/Analyst II time at $19.15 per hour for a total of $15,320 in one-time expenses to establish a new excise tax system on the Department's mainframe.

APPROVED BY:



John LaFaver
Secretary of Revenue

Gragg/Neske

STATE OF KANSAS

DIVISION OF THE BUDGET
Room 152-E
State Capitol Building
Topeka, Kansas 66612-1504
(913) 296-2436
FAX (913) 296-0231

Bill Graves
Governor

Gloria M. Timmer
Director

February 24, 1995

AMENDED

The Honorable Carl Holmes, Chairperson
House Committee on Energy and Natural Resources
Statehouse, Room 115-S
Topeka, Kansas 66612

Dear Representative Holmes:

SUBJECT: Amended Fiscal Note for HB 2256 by House Committee on Energy and Natural Resources

In accordance with KSA 75-3715a, the following amended fiscal note concerning HB 2256 is respectfully submitted to your committee.

Substitute for HB 2256 would create the Kansas Drycleaner Environmental Response Act. It would establish a procedure and funding source for the remediation of hazardous waste resulting from improper disposal of solvents used in drycleaning operations. Revenue to finance the program would be raised through a 2.0 percent gross receipts tax and a $3.50 per gallon fee for the purchase or acquisition of drycleaning fluid. The fee would increase by $0.25 annually until it reached $5.50 per gallon. The Department of Revenue would have responsibility for the collection of the revenues, which would be deposited in a new Drycleaning Facility Release Trust Fund.

The Secretary of Health and Environment would be responsible for administration of the site remediation program and a permitting program as well as the establishment of performance standards for drycleaning facilities. The substitute bill would create an eight-member advisory board to make recommendations to the Secretary of Health and Environment on the administration of the program, including the expenditure of monies from the Drycleaning Facility Release Trust Fund. Members who are not state employees would be eligible to receive compensation for attendance at meetings. The

Department of Health and Environment (KDHE) would have flexibility in designating sites for remediation, and the fund would not be liable for payment of remediation costs exceeding $2.0 million at any single site.

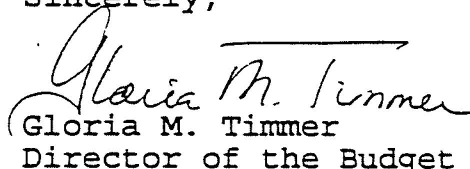
Estimated State Fiscal Impact				
	FY 1995 SGF	FY 1995 All Funds	FY 1996 SGF	FY 1996 All Funds
Revenue	--	--	--	$1,110,000
Expenditure	--	--	--	$1,110,000
FTE Pos.	--	--	--	3.0

The passage of Substitute for HB 2256 would have an impact on state revenues and expenditures. According to estimates from the Department of Revenue, which are based on information from the Dry Cleaner's Trade Association, the tax and fee established by the bill would raise $1,110,000 in FY 1996 and $1,161,000 in FY 1997. The FY 1996 estimate is composed of $210,000 from the tax on the sale of drycleaning solvent and $900,000 from the 2.0 percent tax on gross sales based on $45.0 million in annual sales.

The Department of Revenue indicates it would require expenditures of $15,320 from the Drycleaning Facility Release Trust Fund in FY 1996 to pay the one-time costs of establishing a new excise tax system on its mainframe computer. The Department of Health and Environment (KDHE) indicates that it would require 3.0 new FTE positions and $142,068 from the new fee fund for FY 1996. These positions would be used to establish performance standards, provide technical assistance, and approve workplans for the remediation activities. A total of $952,612 would be available for remediation activities after the $157,388 in administrative costs of the two state agencies have been paid.

Any revenues or expenditures resulting from the passage of this act would be in addition to amounts included in *The FY 1996 Governor's Budget Report.*

Sincerely,



Gloria M. Timmer
Director of the Budget

cc: Laura Epler, KDHE

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MEMORANDUM

TO:	Ms. Gloria M. Timmer, Director Division of Budget	DATE:	February 22, 1995
FROM:	Kansas Department of Revenue	RE:	Substitute for House Bill 2256 As Introduced

BRIEF OF BILL:

Substitute for House Bill 2256, as introduced, is new legislation enacting the Kansas Drycleaner Environmental Response Act.

Section 1 merely names the act.

Section 2 provides definitions of numerous terms used in the act.

Section 3 provides the Secretary of Health and Environment with the authorization to adopt rules and regulations to administer and enforce the act. The secretary is also given guidelines regarding certain mandatory rules and regulations.

Section 4 provides the secretary with legislative intent and guidance regarding expenditures from the Drycleaning Facility Release Trust Fund which is created by this act.

Section 5 outlines unlawful acts under this legislation.

Section 6 provides for the annual registration, of drycleaning facility owners, with the Department of Health and Environment on forms provided by that Department.

Section 7 establishes the Drycleaning Facility Release Trust Fund in the State Treasury and provides guidelines for the deposit of certain funds to that fund; and dates for transfers to the fund from the State General Fund of certain interest earnings.

Section 8 limits the liability of the State, the fund, the secretary or the department or agents or employees thereof, under this act.

Section 9 establishes the Drycleaner Facility Release Compensation Advisory Board; lists the board's composition; and provides its duties.

Section 10 does not affect the Department of Revenue in that it provides the Secretary of Health and Environment with guidelines regarding contamination at drycleaning facilities posing a threat to human health or the environment.

Section 11 imposes, effective July 1, 1995, a gross receipts tax, at the rate of 2%, for the privilege of engaging in the business of laundering and drycleaning garments and other household fabrics at a drycleaning facility in this State. The Department of Revenue is charged with collecting and administering the new tax.

Section 12 imposes, effective July 1, 1995, a tax on the sale or transfer of drycleaning solvent to any person owning or operating a drycleaning facility. The rate is set at $3.50 per gallon in 1995; thereafter the rate is increased $.25 per year to a maximum of $5.50.

Section 13 states that, whenever on April 1 of any year the fund balance equals or exceeds $4 million the tax will be suspended commencing the next July 1. When, on April 1 of any year, the fund balance equals $2 million or less the taxes will again be levied commencing the next July 1. The Director of Accounts and Reports is charged with notifying the Department of Revenue, not later than April 5 of each year, of the fund balances as of April 1 of each year.

Section 14 provides for a hearing procedure with the Secretary of Health and Environment for those persons adversely affected by any order or decision of the secretary.

Section 15 provides that if any provision of this act is held invalid, such invalidity shall not affect other provisions of the act.

The effective date of this bill would be July 1, 1995.

FISCAL IMPACT:

It is estimated that passage of this bill would increase state revenues $1.11 million in Fiscal Year 1996 and $1.161 million in Fiscal Year 1997.

This estimate was calculated based on information received from the Dry Cleaners' Trade association. It is estimated that 300 of the dry cleaning facilities in Kansas would be affected by this bill. The following is an detailed explanation of the estimates.

	FY96	FY97
Tax on dry cleaning solvents average of 200 gallons per year per facility	$210,000	$225,000
Tax on gross sales of Dry Cleaning Services @ 2% (est. $45 million annual sales)	$900,000	$936,000
Total	$1,110,000	$1,161,000

ADMINISTRATIVE IMPACT:

It is estimated that enactment of this bill would result in the following costs: In the Information Systems Bureau an estimated 800 hours of Application Programmer/Analyst II time at $19.15 per hour for a total of $15,320 in one-time expenses to establish a new excise tax system on the Department's mainframe.

APPROVED BY:

John LaFaver
Secretary of Revenue

Gragg/Neske

STATE OF KANSAS

DIVISION OF THE BUDGET
Room 152-E
State Capitol Building
Topeka, Kansas 66612-1504
(913) 296-2436
FAX (913) 296-0231

Bill Graves
Governor

Gloria M. Timmer
Director

February 16, 1995

The Honorable Carl Holmes, Chairperson
House Committee on Energy and Natural Resources
Statehouse, Room 115-S
Topeka, Kansas 66612

Dear Representative Holmes:

SUBJECT: Fiscal Note for HB 2256 by House Committee on Energy and Natural Resources

In accordance with KSA 75-3715a, the following fiscal note concerning HB 2256 is respectfully submitted to your committee.

HB 2256 would create the Kansas Drycleaner Environmental Response Act. It would establish a procedure and funding source for the remediation of hazardous waste resulting from improper disposal of solvents used in drycleaning operations. The Secretary of Health and Environment would be responsible for administration of the site remediation program and a permitting program as well as the establishment of performance standards for drycleaning facilities. Revenue to finance the program would be raised through permit fees on drycleaning establishments, a 2.0 percent gross receipts tax, and a tax on the sale or transfer of drycleaning solvent. The Department of Revenue would have responsibility for the collection of the revenues, which would be deposited in a new Drycleaning Facility Release Trust Fund.

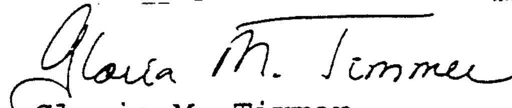
Estimated State Fiscal Impact				
	FY 1995 SGF	FY 1995 All Funds	FY 1996 SGF	FY 1996 All Funds
Revenue	--	--	--	$1,125,000
Expenditure	--	--	--	$1,125,000
FTE Pos.	--	--	--	8.0

The passage of HB 2256 would have an impact on state revenues and expenditures. According to estimates from the Department of Revenue, which are based on information from the Dry Cleaner's Trade Association, the taxes and fees established by the bill would raise $1,125,000 in FY 1996 and $1,171,500 in FY 1997. The FY 1996 estimate is composed of $15,000 from the drycleaner permit fee (300 facilities each paying a $50 fee), $210,000 from the tax on the sale of drycleaning solvent, and $900,000 from the 2.0 percent tax on gross sales based on $45.0 million in annual sales.

The Department of Revenue indicates it would need 5.0 new FTE positions and $151,505 from the new fee fund for FY 1996 to cover costs of collecting and administering the new taxes in the bill. Of the total, $27,950 would be one-time costs for equipment. The Department of Revenue estimates it would invest 800 hours of programming time to develop the new excise tax system. The Department of Health and Environment (KDHE) indicates that it would require 3.0 new FTE positions and $142,068 from the new fee fund for FY 1996. These positions would be used to establish performance standards and the permitting process and to provide technical assistance and approve workplans for the remediation activities. A total of $831,427 would be available in FY 1996 for the actual remediation of contaminated sites after the $293,573 in administrative costs of the two state agencies have been paid.

Any revenues or expenditures resulting from the passage of this act would be in addition to amounts included in *The FY 1996 Governor's Budget Report.*

Sincerely,



Gloria M. Timmer
Director of the Budget

cc: Laura Epler, KDHE

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MEMORANDUM

TO: Ms. Gloria M. Timmer, Director
Division of Budget

DATE: February 8, 1995

FROM: Kansas Department of Revenue

RE: House Bill 2256
As Introduced

BRIEF OF BILL:

House Bill 2256, as introduced, is new legislation enacting the Kansas Drycleaner Environmental Response Act.

Section 1 merely names the act.

Section 2 provides definitions of numerous terms used in the act.

Section 3 provides the Secretary of Health and Environment with the authorization to adopt rules and regulations to administer and enforce the act. The secretary is also given guidelines regarding certain mandatory rules and regulations.

Section 4 provides the secretary with legislative intent and guidance regarding expenditures from the Drycleaning Facility Release Trust Fund which is created by this act.

Section 5 outlines unlawful acts under this legislation.

Section 6 provides for the establishment of a permit system and the paying of an annual fee of $50 for such permits by persons owning drycleaning facilities.

Section 7 establishes the Drycleaning Facility Release Trust Fund in the State Treasury and provides guidelines for the deposit of certain funds to that fund; and dates for transfers to the fund from the State General Fund of certain interest earnings.

Section 8 limits the liability of the State, the fund, the secretary or the department or agents or employees thereof, under this act.

Section 9 further amplifies the authority of the secretary regarding expenditures from the fund and the authorized payments.

Section 10 does not affect the Department of Revenue in that it provides the Secretary of Health and Environment with guidelines regarding contamination at drycleaning facilities posing a threat to human health or the environment.

Section 11 imposes, effective July 1, 1995, a gross receipts tax, at the rate of 2%, for the privilege of engaging in the business of laundering and drycleaning garments and other household fabrics at a drycleaning facility in this State. The Department of Revenue is charged with collecting and administering the new tax.

Section 12 imposes, effective July 1, 1995, a tax on the sale or transfer of drycleaning solvent to any person owning or operating a drycleaning facility. The rate is set at $3.50 per gallon in 1995; thereafter the rate is increased 5% per year to a maximum of $5.50.

Section 13 states that, whenever on April 1 of any year the fund balance equals or exceeds $4 million the tax will be suspended commencing the next July 1. When, on April 1 of any year, the fund balance equals $2 million or less the taxes will again be levied commencing the next July 1. The Director of Accounts and Reports is charged with notifying the Department of Revenue, not later than April 5 of each year, of the fund balances as of April 1 of each year.

Section 14 provides for a hearing procedure with the Secretary of Health and Environment.

Section 15 provides that if any provision of this act is held invalid, such invalidity shall not affect other provisions of the act.

The effective date of this bill would be July 1, 1995.

FISCAL IMPACT:

It is estimated that passage of this bill would increase state revenues $1.125 million in Fiscal Year 1996 and $1.171 million in Fiscal Year 1997.

This estimate was calculated based on information received from the Dry Cleaners' Trade association. It is estimated that 300 of the dry cleaning facilities in Kansas would be affected by this bill. The following is an detailed explanation of the estimates.

	FY96	FY97
Permit Fees:		
300 facilities @ $50.00 annually	$15,000	$15,000
Tax on dry cleaning solvents average of 200 gallons per year per facility	$210,000	$220,500
Tax on gross sales of Dry Cleaning Services @ 2% (est. $45 million annual sales)	$900,000	$936,000
Total	$1,125,000	$1,171,500

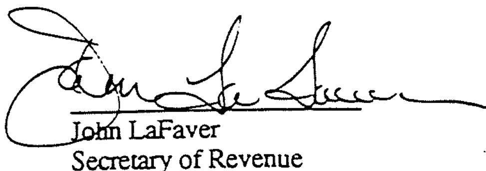
ADMINISTRATIVE IMPACT:

It is estimated that enactment of this bill would result in the requirement to add one additional Office Assistant III in the Quality Control Bureau; one additional Office Assistant III in the Document Processing Services Bureau; one additional Tax Examiner I in the Business Tax Bureau; and two additional Tax Examiner II's in the Taxpayer Assistance Bureau.

The annual salary costs would be 2 TE II's @ $27,784 ($55,568); 2 OA III's @ $21,382 ($42,764); and 1 TE I @ ($24,358). The fiscal year 1996 One-Time Operating Expenses for these five positions would be $27,950 (5 x $5,590) and the fiscal year 1996 Annual Other Operating Expenditures would be $1,225 (5 x $245). Note: the one-time expenses include microcomputer system, Herman Miller workstation, chair, electrical outlets, telephone, cables and cable installations.

In addition to the above costs, the Information Systems Bureau would incur an estimated 800 hours of Application Programmer/Analyst II time at $19.15 per hour for a total of $15,320 in one-time expenses to establish a new excise tax system on the Department's mainframe.

APPROVED BY:



John LaFaver
Secretary of Revenue

Gragg/Neske

TESTIMONY BEFORE THE SENATE, ENERGY & NATURAL RESOURCES COMMITTEE
Substitute for House Bill 2256

by David M. Traster
Foulston & Siefkin
Wichita, Kansas

March 15, 1995

My name is David M. Traster. I am an attorney with the law firm of Foulston & Siefkin in Wichita, Kansas; my practice emphasizes environmental law. Between May of 1989 and May of 1991, I was the general counsel and the assistant secretary and general counsel at the Kansas Department of Health & Environment. I have been retained by a group of Kansas drycleaners, called the Kansas Drycleaner Environmental Committee, to draft legislation which you now have before you in the form of Substitute for House Bill 2256. My testimony will be an explanation of the provisions of this bill.

I utilized the Kansas Storage Tank Act, model legislation drafted by a national drycleaning group and a few provisions from similar legislation in Florida. We reviewed this bill very carefully with several KDHE Bureau of Environmental Remediation officials and received their support for the language used in the bill, as well as several proposed amendments you have before you today. I understand that they cannot support the funding for the bill at this time.

Summary

The act is principally designed to provide for corrective action, or remediation, where there has been a release of drycleaning solvents from drycleaning facilities. These releases have occurred in the past three to five decades and have been the result of normal and generally accepted operating practices. There was a general lack of understanding by many industries of the impact that chlorinated solvents of all kinds have on the environment. Further, there was a dramatic change in the liability of any party who released chlorinated solvents when the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or Superfund) was enacted in 1980. The historic releases and the dramatic change created by the enactment of CERCLA imposing strict, joint, several and retroactive liability have combined to create a monumental problem for all industries which have utilized these solvents. Because drycleaners have typically been small, family-operated businesses the impact of these changes has been disproportionately harsh. This bill is designed to soften the impact on individual drycleaners by spreading the costs of remediation over the industry as a whole.

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Attachment 3

Performance Standards

The act imposes a set of operating or performance standards, requires reporting of releases, an immediate response after a known release and registration of operating drycleaners with KDHE. These provisions are designed to reduce the possibility of future releases of solvents. Thus, the fund should primarily be used primarily to address historical problems.

Revenue

The act creates an environmental surcharge in the form of a two percent gross revenue tax on drycleaning and laundry service provided by commercial drycleaning facilities. There is also a $3.50 per gallon tax on chlorinated solvents used at a drycleaning facility and a 35¢ per gallon tax on non-chlorinated drycleaning solvents. These revenues are deposited in a separate fund and utilized for purposes of this statute. There is no state general fund impact from the bill.

The Kansas Drycleaner Environmental Committee believes that imposing this tax is a wise policy choice for Kansas. The cost of drycleaning over the last three or four decades has been artificially low in relationship to the impact that drycleaning services have had on the environment. There was no way to predict the cost that is now being or will be incurred by Kansas drycleaners caused by the passage of CERCLA in 1980. This act has had a devastating effect on individual drycleaners. This tax will level the playing field, spreading the cost of environmental remediation across the range of people who utilize drycleaning services and provide for prompt and effective remediation of historic releases. Without the act, there will be numerous facilities that will simply not be remediated.

Corrective Action

The fund will be used by KDHE to perform corrective action at drycleaning facilities. Corrective action includes investigation, remediation, operation and maintenance costs and monitoring. Corrective action will be performed according to a system of priorities to be established by KDHE in rules and regulations. KDHE will have the authority to rearrange the priority of individual sites as facts change and new sites are brought into the system. Clean up will be to specific standards which will be set out in rules and regulations. Both existing drycleaning operations and facilities at which drycleaning operations have occurred in the past are eligible for corrective action under the act.

The amendments to the bill which will be before the committee will include the addition of a $2,500.00 per site deductible. This was included at the request of the Chairman of the House Energy and Natural Resources Committee. The bill includes a cap of $2,000,000 of correction action costs at any site. The fund is responsible only for the portion of corrective action costs attributable to a release from a drycleaning facility. Thus, where there is a plume of mixed contaminants, the fund will be responsible only for the release from the drycleaning

facility. KDHE has the discretion to determine the percentage of the total cost at each site that will be paid from the fund.

The act does not change Kansas law relating to third party liability except in the area of corrective action costs. Since the fund is available to pay for corrective action, a third party will not be allowed to bring a claim under state law for these same costs. There is nothing in the act that changes federal law. A lawsuit can be brought in federal court under CERCLA seeking corrective action costs.

The act deals with commercial drycleaning facilities. It does not cover governmental organizations or linen and uniform supply companies. While coin operated drycleaning machines that are available to the general public can gain access to the fund, they will not be required to pay the tax. Corrective action will also be provided for facilities that were drycleaners but are now used for other purposes.

Section by Section Analysis

Recitals

This section reiterates the importance of environmental protection, discusses the impact of drycleaning solvents on the environment and recites the need for funding to address this problem.

The Chairman of the House Energy and Natural Resources Committee requested that these recitals be stricken.

Section 1

This section merely names the act as the Kansas Drycleaner Environmental Response Act.

Section 2

The terms defined in this section are used throughout the act.

"Chlorinated drycleaning solvent" generally means perchloroethylene.

"Corrective action" includes investigation, remediation, operation and maintenance costs, and monitoring.

"Drycleaning solvent" includes both perchloroethylene and petroleum solvents. Petroleum solvents are treated differently than perchloroethylene under Section 12 because they

pay one-tenth of the solvent tax. Nevertheless, facilities utilizing petroleum solvents have full access to the fund for payment of corrective costs.

The term "immediate response" means containment and control as well as reporting of known releases in excess of reportable quantities. The concept is to insure that known problems are reported and addressed immediately. In this way long term consequences of spills occurring after the enactment of this statute can be minimized. This provision is not designed to address small drips, nor is it designed to require immediate response to problems of which the owner or operator is not aware.

The term "owner" means a person with a past or present interest in a drycleaning business. Generally, owners have greater responsibility under the act but are not the only parties who benefit from the correction action provisions.

The definition of the term "person" is broad but does not include governmental organizations.

The term "release" includes any spill and is taken directly from the Underground Storage Tank statute.

The term "reportable quantity" sets out the size of a spill that requires an immediate response. For chlorinated solvents the amount is one quart and for petroleum solvents the amount is one gallon.

Section 3

This section authorizes the secretary to adopt rules and regulations which are protective of the waters of the state, public health, and the environment generally. Sections a.1 and 2 are key elements of this bill because they give KDHE the authority to establish rules and regulations setting performance standards for drycleaning facilities. This is very similar to the storage tank act which requires tightness testing, cathodic protection, recordkeeping and other performance standards to insure that new problems are not created. The performance standards include authority for rules and regulations which are "at least as protective of human health and the environment as the following. . . ." (1) proper storage and disposal of waste; (2) a prohibition on the discharge of wastewater containing drycleaning solvent into either septic tanks or publicly owned treatment works; (3) a requirement that drycleaners using perchloroethylene comply with the NESHAPs promulgated by EPA under the Clean Air Act; (4) containment for drycleaning machines, solvent and waste storage areas; (5) sealed floors; and (6) delivery systems that reduce the chance of spills.

These performance standards will be effective for new facilities upon the promulgation of rules and regulations and would contain a five year phase-in for the retrofitting of existing facilities.

KDHE is also given authority to establish rules and regulations for closure of facilities, for prioritizing expenditure from the fund and clean up criteria. The priority for expenditures from the fund and clean up criteria must be based on a risk benefit analysis and on the impact on human health and the environment.

Section 4

Section 4 is designed to give KDHE guidance regarding the administration of the fund. This section encourages the department to take the lead at drycleaning sites but does not prohibit KDHE from seeking the involvement of the United States Environmental Protection Agency in appropriate cases. This section also encourages early corrective action which will reduce risk and cost and encourages the use of innovative technology.

Section 5

Section 5 makes it unlawful to violate the act or the rules and regulations promulgated by KDHE. A civil penalty of up to $500.00 can be imposed.

Section 6

Section 6 requires currently operating drycleaning facilities to register with KDHE.

Section 7

This section establishes the drycleaning release trust fund and is modeled after the storage tank fund. Monies from the fund are to be used for costs of administration and correction action only. There will be no impact on the state general fund. All expenditures are subject to the budget act so that the legislature will retain control over the manner in which funds are expended.

Section 8

Section 8 insures that the fund will be utilized for corrective action and not for loss of business or for taking of property associated with corrective action. This is a provision similar to that found in the storage tank act.

Paragraph b insures that the state does not incur liability beyond the monies in the fund.

Paragraph c limits third party claims under state law for corrective action costs. Because KDHE has a fund and a system of priorities for performing corrective action at various sites, the expenditure of funds for corrective action by individual is not needed. A third party is thus

prohibited from making a claim for corrective action costs under state law. This provision in no way limits the ability of a third party to bring any other type of claim, such as diminution in property value.

Section d makes it clear that the fund shall be not used for compensating third parties for costs other than corrective action.

Section 9

This section creates an eight member advisory board to work with KDHE on the implementation of the act.

Section 10

Section 10 sets out the requirements for corrective action. Corrective action includes investigation and assessment, remediation, operation and maintenance and monitoring.

Subsection b limits the use of the money so that it may only be used to pay for actual corrective action costs for releases of drycleaning solvents at drycleaning facilities. Thus, if there is a release of drycleaning solvent from a drycleaning facility that commingles with other contaminants the fund is responsible only for that portion of the corrective action costs which relate to remediation of the drycleaning solvent. Further, to the extent that perchloroethylene or other drycleaning solvents are used for other purposes, the fund will not provide for corrective action costs. Section b also makes it clear that the fund will not be used at sites which are listed on the United States Environmental Protection Agency national priorities list. Once a site has been listed as a Superfund site with EPA, funds may no longer be used from the fund.

Section c provides that the department can modify its system of priorities to expend monies at the locations where they are most needed.

Sections d and e authorize the secretary to pay the proportionate share of liability which is attributable to the release of drycleaning solvents from a drycleaning facility. Once KDHE has made a determination of the percentage of liability, that percentage is binding until the secretary modifies the order. This percentage is also binding during the pendency of any appeal.

Section f allows the secretary access to property for the purpose of conducting corrective action. This section is modeled after current law.

Section g allows the secretary to deny an owner or operator access to the fund if the owner or operator has engaged in certain specified acts. In order to deny an owner or operator access to the fund the secretary must, however, find that the denial will not prejudice another person who is entitled to benefits under the act. Thus, if denying access to the fund causes

another party who would otherwise be eligible to be prejudiced, the secretary must proceed with corrective action costs from the fund.

The last paragraph of subsection g insures that successive owners are not prohibited from obtaining access where a predecessor interest violated the act but the current owner did not. Thus, the sale of a drycleaning facility can either be an asset sale or a stock sale without denying the purchaser access to the fund because the seller was a bad actor.

Section h places a limit of $2,000,000 on corrective action costs at any site.

Section 11

This section imposes an environmental surcharge in the form of a two percent tax on drycleaning and laundering performed at a drycleaning facility. There is an exception for coin operated devices. Coin operated drycleaning units which are available for use by the public do not have to pay the tax but do have access to the fund for corrective action. There is also an exclusion for laundering of rental or commercial uniforms and linens and an exclusion for the State of Kansas and political subdivisions which is modeled after the Kansas sales tax exclusion.

The balance of the provisions of section 11 are procedural aspects of collection of the tax which are modeled after the state sales tax law. The intent of these sections is to make the imposition and collection of this two percent gross revenue tax as much like the Kansas sales tax that drycleaning facilities already have to pay.

Section 12

Section 12 imposes an additional tax of $3.50 per gallon on chlorinated drycleaning solvents purchased by owners of drycleaning facilities. There is a tax of 35¢ on non-chlorinated (petroleum) solvents.

The balance of the provisions in this section are designed to allow the collection of the tax.

Section 13

Section 13 is modeled after the Storage Tank Act. To the extent that the balance in the fund exceeds $4 million on April 1 in any year, the tax will not be collected for the following year. If, after the collection of the tax has stopped, the balance drops below $2 million on April 1 of any ensuing year, the tax will then again be levied. The environmental fee imposed by the storage tank act is turned on and off on a month by month basis rather than a year by year basis.

Section 14

Section 14 is a standard provision allowing for appeals under the Kansas Administrative Procedures Act and the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions.

Section 15

The House added an amendment requiring that KDHE make annual reports to the legislature.

Section 16

Section 16 is a severability clause making it clear that the invalidity of a particular section does not affect the rest of the provisions.

It's been a pleasure to testify before this committee once again. If there are any questions, I'd be glad to answer them.

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[As Amended by House Committee of the Whole]

Session of 1995

Substitute for HOUSE BILL No. 2256

By Committee on Energy and Natural Resources

2-20

10 AN ACT concerning drycleaning; providing for regulation of certain fa-
11 cilities; providing for payment of certain costs of remediation of pol-
12 lution from drycleaning activities; imposing certain taxes and fees; pro-
13 hibiting certain acts and providing penalties for violations.
14
15 ~~WHEREAS, Protection of the environment of this state promotes the~~
16 ~~health and general welfare of the citizens of this state; and~~
17 ~~WHEREAS, The state's responsibility to promote the public health~~
18 ~~and welfare requires a comprehensive approach to protect the environ-~~
19 ~~ment by preventing and remedying the pollution of the state's natural~~
20 ~~resources and providing funding for the management, conservation and~~
21 ~~development of those resources; and~~
22 ~~WHEREAS, Discharges of drycleaning solvents have occurred and~~
23 ~~may pose a threat to the quality of the soils and waters of the state; and~~
24 ~~WHEREAS, When contamination of the soils and waters of the state~~
25 ~~has occurred, remedial measures are often delayed for long periods while~~
26 ~~liability issues are resolved and such delays result in greater damage to~~
27 ~~the environment and significantly higher costs to contain and remove the~~
28 ~~contamination; and~~
29 ~~WHEREAS, Adequate financial resources must be readily available to~~
30 ~~provide a means for the investigation and remediation of contaminated~~
31 ~~sites without delay: Now, therefore,~~
32 *Be it enacted by the Legislature of the State of Kansas:*
33 Section 1. This act shall be known and may be cited as the Kansas
34 drycleaner environmental response act.
35 Sec. 2. As used in this act:
36 (a) "Chlorinated drycleaning solvent" means any drycleaning solvent
37 which contains a compound which has a molecular structure containing
38 the element chlorine.
39 (b) "Corrective action" means those activities described in subsection
40 (a) of section 10.
41 (c) "Corrective action plan" means a plan approved by the secretary
42 perform corrective action at a drycleaning facility.
43 (d) "Department" means the department of health and environment.

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Attachment 4

1 (e) "Drycleaning facility" means a commercial establishment that op-
2 erates, or has operated in the past, in whole or in part for the purpose of
3 cleaning garments or other ~~household~~ fabrics utilizing a process that in-
4 volves any use of drycleaning solvents. Drycleaning facility includes all
5 contiguous land, structures and other appurtenances and improvements
6 on the land used in connection with a drycleaning facility but does not
7 include prisons or governmental entities.
8 (f) "Drycleaning solvent" means any and all nonaqueous solvents
9 used or to be used in the cleaning of garments and other fabrics at a
10 drycleaning facility and includes but is not limited to perchloroethylene,
11 also known as tetrachloroethylene, and petroleum-based solvents, and the
12 products into which such solvents degrade.
13 (g) "Drycleaning unit" means a machine or device which utilizes dry-
14 cleaning solvents to clean garments and other fabrics and includes any
15 associated piping and ancillary equipment and any containment system.
16 (h) "Fund" means the drycleaning facility release trust fund.
17 (i) "Immediate response to a release" means containment and control
18 of a known release in excess of a reportable quantity and notification to
19 the department within 48 hours of any known release in excess of a re-
20 portable quantity ~~known release.~~
21 (j) "Owner" means any person who owns or leases, or has owned or
22 leased, a drycleaning facility and who is or has been responsible for the
23 operation of drycleaning operations at such drycleaning facility.
24 (k) "Person" means an individual, trust, firm, joint venture, consor-
25 tium, joint-stock company, corporation, partnership, association or lim-
26 ited liability company. Person does not include any governmental organ-
27 ization.
28 (l) "Release" means any spill, leak, emission, discharge, escape, leak
29 or disposal of drycleaning solvent from a drycleaning facility into the soils
30 or waters of the state.
31 (m) "Reportable quantity" means a known release of a chlorinated
32 drycleaning solvent in excess of one quart over a 24-hour period or a
33 known release of a nonchlorinated drycleaning solvent in excess of one
34 gallon over a 24-hour period.
35 (n) "Retailer" means any business that: (1) Is registered for purposes
36 of the Kansas retailers sales tax act and provides laundry ~~or~~ drycleaning
37 services to final consumers; or (2) has provided a laundry ~~or~~ drycleaning
38 facility with a resale exemption certificate and is responsible for charging
39 and collecting retailers' sales tax from final consumers of drycleaning or
40 laundry services.
41 (o) "Secretary" means the secretary of health and environment.
42 Sec. 3. The secretary is authorized and directed to adopt rules and
43 regulations necessary to administer and enforce the provisions of this act.

drycleaning or

and

and

drycleaning or

Any rules and regulations so adopted shall be reasonably necessary to preserve, protect and maintain the waters and other natural resources of this state and reasonably necessary to provide for prompt corrective action of releases from drycleaning facilities. Consistent with these purposes, the secretary shall adopt rules and regulations:

(a) Establishing performance standards for drycleaning facilities first brought into use on or after the effective date of regulations authorized by this subsection. Such performance standards shall be effective when the rules and regulations adopted by the secretary become final. The secretary shall make the secretary's best efforts to adopt such rules and regulations so that they become final within 180 days after the effective date of this act. The performance standards for new drycleaning facilities shall allow the use of new technology as it becomes available and shall at a minimum include provisions which are at least as protective of human health and the environment as the following:

(1) A requirement for the proper storage and disposal of those wastes which are generated at a drycleaning facility and which contain any quantity of drycleaning solvent.

(2) A prohibition of the discharge of wastewater from drycleaning units or of drycleaning solvent from drycleaning operations to any sanitary sewer or septic tank or to the waters of this state.

(3) A requirement of compliance with ~~all applicable standards pursuant to the federal clean air act as in effect on the effective date of this act~~ the national emission standards for hazardous air pollutants for perchlorethylene dry cleaning facilities promulgated by the United States environmental protection agency on September 22, 1993.

(4) A requirement that dikes or other containment structures be installed around each drycleaning unit and each drycleaning solvent or waste storage area, which structures shall be capable of containing any leak, spill or release of drycleaning solvent.

(5) A requirement that those portions of all diked floor surfaces upon which any drycleaning solvent may leak, spill or otherwise be released be of epoxy, steel or other material impervious to drycleaning solvents.

(6) A requirement that all chlorinated drycleaning solvents be delivered to drycleaning facilities by means of closed, direct-coupled delivery systems, but only after such systems become generally available.

(b) Adopting a schedule requiring the retrofitting of drycleaning facilities in existence on or before the effective date of rules and regulations authorized by subsection (a) to implement the performance standards established pursuant to subsection (a). The schedule may phase in the standards authorized by this subsection at different times but shall make all standards effective no later than five years after the effective date of this act.

(c) Establishing requirements for removal of drycleaning solvents and wastes from drycleaning facilities which are to be closed by the owner in

4-3

1 order to prevent future releases.
2 (d) Establishing criteria to prioritize the expenditure of funds from
3 the drycleaning facility release trust fund. The criteria shall include con-
4 sideration of:
5 (1) The benefit to be derived from corrective action compared to the
6 cost of conducting such corrective action;
7 (2) the degree to which human health and the environment are ac-
8 tually affected by exposure to contamination;
9 (3) the present and future use of an affected aquifer or surface water;
10 (4) the effect that interim or immediate remedial measures will have
11 on future costs;
12 (5) the amount of moneys available for corrective action in the dry-
13 cleaning facility release trust fund; and
14 (6) such additional factors as the secretary considers relevant.
15 (e) Establishing criteria under which a determination may be made
16 by the department of the level at which corrective action shall be deemed
17 completed. Criteria for determining completion of corrective action shall
18 be based on the factors set forth in subsection (d) and:
19 (1) Individual site characteristics including natural remediation proc-
20 esses;
21 (2) applicable state water quality standards;
22 (3) whether deviation from state water quality standards or from es-
23 tablished criteria is appropriate, based on the degree to which the desired
24 remediation level is achievable and may be reasonably and cost effectively
25 implemented, subject to the limitation that where a state water quality
26 standard is applicable, a deviation may not result in the application of
27 standards more stringent than that standard; and
28 (4) such additional factors as the secretary considers relevant.
29 Sec. 4. It is the intent of the legislature that, to the maximum extent
30 possible, moneys in the fund be utilized to address contamination result-
31 ing from releases of drycleaning solvents. The department is directed to
32 administer the Kansas drycleaner environmental response act under the
33 following criteria:
34 (a) To the maximum extent possible, the department itself should
35 deal with contamination from drycleaning facilities utilizing moneys in
36 the fund. The department should discourage other units of government,
37 both federal and local, including the United States environmental pro-
38 tection agency, from becoming involved in contamination problems re-
39 sulting from releases from drycleaning facilities.
40 (b) The department should make every reasonable effort to keep sites
41 where drycleaning solvents are involved off of the national priorities list,
42 as defined in 40 C.F.R. 300.5.
43 (c) The department should not seek out contaminated drycleaning

1 facility sites because of the existence of the fund or the other provisions
2 of this act. The moneys are made available for use as sites are discovered
3 in the normal course of the business of the agency.
4 (d) Careful consideration should be given to interim or early correc-
5 tive action which may result in an overall reduction of risk to human
6 health and the environment and in the reduction of total costs of correc-
7 tive action at a site. Such interim or early corrective action should receive
8 consideration by the department as a high priority.
9 (e) The department, in its discretion, may use innovative technology
10 to perform corrective action.
11 Sec. 5. (a) It shall be unlawful for any person to:
12 (1) Operate a drycleaning facility in violation of this act, rules and
13 regulations adopted pursuant to this act or orders of the secretary pur-
14 suant to this act;
15 (2) prevent or hinder a properly identified officer or employee of the
16 department or other authorized agent of the secretary from entering,
17 inspecting, sampling or responding to a release as authorized by this act;
18 (3) knowingly make any false material statement or representation in
19 any record, report or other document filed, maintained or used for the
20 purpose of compliance with this act;
21 (4) knowingly destroy, alter or conceal any record required to be
22 maintained by this act or rules and regulations adopted under this act;
23 (5) willfully allow a release or knowingly fail to make an immediate
24 response to a release in accordance with this act and rules and regulations
25 pursuant to this act.
26 (b) A person who violates any provision of this section may incur, in
27 a civil action brought by the secretary, a civil penalty in an amount not to
28 exceed $500 for every violation.
29 (c) In assessing any civil penalty under this section, the district court
30 shall consider, when applicable, the following factors:
31 (1) The extent to which the violation presents a hazard to human
32 health;
33 (2) the extent to which the violation has or may have an adverse effect
34 on the environment;
35 (3) the amount of the reasonable costs incurred by the state in de-
36 tection and investigation of the violation; and
37 (4) the economic savings realized by the person in not complying with
38 the provision for which a violation is charged.
Sec. 6. Each owner [of an operating drycleaning facility] shall register annually with the department on a
form provided by the department.
Sec. 7. (a) There is hereby established in the state treasury the dry-
42 cleaning facility release trust fund. The fund shall be administered by the
43 secretary. Revenue from the following sources shall be deposited in the

1 state treasury and credited to the fund:
2 (1) Any proceeds from the taxes and fees imposed by this act;
3 (2) any interest attributable to investment of moneys in the dryclean-
4 ing facility release trust fund;
5 (3) moneys recovered by the state under the provisions of this act,
6 including any moneys paid under an agreement with the secretary or as
7 civil penalties; and
8 (4) moneys received by the secretary in the form of gifts, grants, re-
9 imbursements or appropriations from any source intended to be used for
10 the purposes of this act.
11 (b) Moneys in the fund shall not be expended for any governmental
12 purpose other than payment of:
13 (1) The direct costs of administration and enforcement of this act;
14 and
15 (2) the costs of corrective action as provided in section 10.
16 (c) It is the intent of the legislature that the fund shall remain intact
17 and inviolate for the purposes set forth in this act, and moneys in the
18 fund shall not be subject to the provisions of K.S.A. 75-3722, 75-3725a
19 and 75-3726a, and amendments thereto.
20 (d) On or before the 10th day of each month, the director of accounts
21 and reports shall transfer from the state general fund to the drycleaning
22 facility release trust fund, the amount of money certified by the pooled
23 money investment board in accordance with this subsection. Prior to the
24 10th day of each month, the pooled money investment board shall certify
25 to the director of accounts and reports the amount of money equal to the
26 proportionate amount of all the interest credited to the state general fund
27 for the preceding period of time specified under this subsection, pursuant
28 to K.S.A. 75-4210a and amendments thereto, that is attributable to mon-
29 eys in the drycleaning facility release trust fund. Such amount of money
30 shall be determined by the pooled money investment board based on: (1)
31 The average daily balance of moneys in the drycleaning facility release
32 trust fund during the period of time specified under this subsection as
33 certified to the board by the director of accounts and reports; and (2) the
34 average interest rate on the purchase agreements of less than 30 days'
35 duration entered into by the pooled money investment board for that
36 period of time. On or before the 5th day of the month for the preceding
37 month, the director of accounts and reports shall certify to the pooled
38 money investment board the average daily balance of moneys in the fund
39 for the period of time specified under this subsection.
40 (e) All expenditures from the fund shall be made in accordance with
41 appropriation acts upon warrants of the director of the accounts and re-
42 ports issued pursuant to vouchers approved by the secretary for the pur-
43 poses set forth in this section.

drycleaning facility release trust fund

drycleaning facility release trust fund

Sec. 8. (a) The state of Kansas, the fund, the secretary or the department or agents or employees thereof, shall not be liable for loss of business, damages or taking of property associated with any corrective action taken pursuant to this act.

(b) Nothing in this act shall establish or create any liability or responsibility on the part of the secretary, the department or the state of Kansas, or agents or employees thereof, to pay any corrective action costs from any source other than the fund or to take corrective action if the moneys in the fund are insufficient to do so.

(c) To the extent that an owner or other person is eligible, under the provisions of this act, to have corrective action costs paid by the fund, no administrative or judicial claim may be made under state law against any such owner or other person by or on behalf of a state or local government or by any person to compel corrective action or seek recovery of the costs of corrective action which result from the release of drycleaning solvents from a drycleaning facility.

(d) Moneys in the fund shall not be used for compensating third parties for bodily injury or property damage caused by a release from a drycleaning facility, other than property damage included in the corrective action plan approved by the secretary.

Sec. 9. (a) There is hereby established the drycleaner facility release compensation advisory board composed of eight members as follows: (1) The director of the division of environment of the department; (2) one member from a drycleaning company owning in excess of five drycleaning facility locations; (3) one member from drycleaning companies owning at least three but no more than five drycleaning facility locations; (4) three members from drycleaning companies owning at least one but no more than two drycleaning facility locations; (5) one member who utilizes only nonchlorinated drycleaning solvents; and (6) one member who is not an owner of a drycleaning facility. The governor shall appoint the appointed members of the board. No more than four of the appointed members shall be members of the same political party. Of the members first appointed to the board, two shall serve one-year terms, two shall serve two-year terms and three shall serve three-year terms, as designated by the governor. After the expiration of the initial terms, all subsequently appointed members shall serve two-year terms. The governor shall designate a member of the board to serve as chairperson of the board for a term of one year. The chair shall serve at the pleasure of the governor. The secretary shall provide staff to support the activities of the board.

(b) Appointed members of the board attending meetings of the board, or attending a subcommittee meeting thereof authorized by the board, shall receive the amounts provided in subsection (e) of K.S.A. 75-3223 and amendments thereto.

(c) The board shall provide advice and counsel and make recommen-

1 dations to the secretary regarding the rules and regulations and amend-
2 ments thereto to be promulgated by the secretary, the disbursement of
3 moneys from the fund and the administration and enforcement of this
4 act.
5 Sec. 10. (a) Whenever a release poses a threat to human health or
6 the environment the department, consistent with rules and regulations
7 adopted by the secretary pursuant to subsections (d) and (e) of section 3
8 ~~and a corrective action plan for the site~~, shall expend moneys available in
9 the fund to provide for:
10 (1) Investigation and assessment of a release from a drycleaning fa-
11 cility, including costs of investigations and assessments of contamination
12 which may have moved off the drycleaning facility;
13 (2) necessary or appropriate emergency action, including but not lim-
14 ited to treatment, restoration or replacement of drinking water supplies,
15 to assure that the human health or safety is not threatened by a release
16 or potential release;
17 (3) remediation of releases from drycleaning facilities, including con-
18 tamination which may have moved off of the drycleaning facility, which
19 remediation shall consist of clean up of affected soil, groundwater and
20 surface waters, using the most cost effective alternative that is technolog-
21 ically feasible and reliable, provides adequate protection of human health
22 and environment and to the extent practical minimizes environmental
23 damage;
24 (4) operation and maintenance of corrective action;
25 (5) monitoring of releases from drycleaning facilities including con-
26 tamination which may have moved off of the drycleaning facility;
27 (6) payment of reasonable costs incurred by the secretary in providing
28 field and laboratory services;
29 (7) reasonable costs of restoring property, as nearly as practicable to
30 the conditions that existed prior to activities associated with the investi-
31 gation of a release or clean up or remediation activities;
32 (8) removal and proper disposal of wastes generated by a release of
33 a drycleaning solvent; and
34 (9) payment of costs of corrective action conducted by entities other
35 than the department but approved by the department, whether or not
36 such corrective action is set out in a corrective action plan.
37 (b) Nothing in subsection (a) shall be construed to authorize the de-
38 partment to obligate moneys in the fund for payment of costs which are
39 ntegral to corrective action for a release of drycleaning solvents ~~at~~ a
40 eaning facility. Moneys from the fund shall not be used: (1) For
41 corrective action at sites that are contaminated by solvents normally used
42 in drycleaning operations where the contamination did not result from
43 the operation of a drycleaning facility; (2) for corrective action at sites,

the department or by

provided however, reimbursement for corrective action costs incurred before the effective date of this act shall be limited to $100,000 per site.

from

1 other than drycleaning facilities, that are contaminated by drycleaning
2 solvents which were released while being transported to or from a dry-
3 cleaning facility by a party other than the owner of such drycleaning fa-
4 cility or the owner's agents or employees; (3) to pay any costs associated
5 with any fine or penalty brought against a drycleaning facility owner under
6 state or federal law; or (4) to pay any costs related to corrective action at
7 a drycleaning facility that has been included by the United States envi-
8 ronmental protection agency on the national priorities list or at any facility
9 which is a hazardous waste disposal facility, as defined in K.S.A. 65-3430
10 and amendments thereto.
11 (c) Nothing in this act shall be construed to restrict the department
12 from:
13 (1) Modifying, in the discretion of the secretary, the priority status of
14 a site where warranted under the system of priorities established pursuant
15 to subsection (d) of section 3; or
16 (2) temporarily postponing completion of corrective action for which
17 moneys from the fund are being expended whenever such postponement
18 is deemed necessary in order to make moneys available for corrective
19 action at a site with a higher priority.
20 (d) At any multisource site, the secretary shall utilize the moneys in
21 the fund to pay for the proportionate share of the liability for corrective
22 action costs which is attributable to a release from one or more drycIean-
23 ing facilities and for that proportionate share of the liability only.
24 (e) At any multisource site, the secretary is authorized to make a
25 determination of the relative liability of the fund for costs of corrective
26 action, expressed as a percentage of the total cost of corrective action at
27 a site, whether known or unknown. The secretary shall issue an order
28 establishing such percentage of liability. Such order shall be binding and
29 shall control the obligation of the fund until or unless amended by the
30 secretary. In the event of an appeal from such order, such percentage of
31 liability shall be controlling for costs incurred during the pendency of the
32 appeal.
33 (f) Any authorized officer, employee or agent of the department or
34 any person, under order or contract with the department, may enter onto
35 any property or premises, at reasonable times and upon written notice to
36 the owner or occupant, to take corrective action where the secretary de-
37 termines that such action is necessary to protect the public health or
38 environment. If consent is not granted by the person in control of a site
39 or suspected site regarding any request made by any employee or agent
40 of the ~~secretary~~ under the provisions of this section, the secretary may
41 issue an order directing compliance with the request. The order may be
42 issued after such notice and opportunity for consultation as is reasonably
43 appropriate under the circumstances.

,

officer,

department, or any person under order or contract with the department,

(g) Notwithstanding the other provisions of this act, in the discretion of the secretary, an owner may be responsible for up to 100% of the costs of corrective action attributable to such owner if the secretary finds, after notice and an opportunity for a hearing in accordance with the Kansas administrative procedure act, that:

(1) Requiring the owner to bear such responsibility will not prejudice another owner or person who is eligible, under the provisions of this act, to have corrective action costs paid by the fund; and

(2) the owner:

(A) Caused a release by willful or wanton actions and such release was caused by operating practices contrary to those generally in use at the time of the release;

(B) is in arrears for moneys owed pursuant to this act, after notice and an opportunity to correct the arrearage;

(C) substantially obstructs the efforts of the department to carry out its obligations under this act, provided, however, that the exercise of legal rights shall not constitute a substantial obstruction;

(D) caused or allowed the release because of a material violation of the performance standards established in this act or the rules and regulations adopted by the secretary under this act; or

(E) has more than once failed to report or failed to take an immediate response to a release, knowing or having reason to know of such release.

For purposes of this subsection (g), unless a transfer is made solely to take advantage of this provision, purchasers of stock or other indicia of ownership and other successors in interest shall not be considered to be the same owner or operator as the seller or transferor of such stock or indicia of ownership even though there may be no change in the legal identity of the owner or operator.

(h) The fund shall not be liable for the payment of ~~corrective action~~ costs in excess of $2,000,000 ~~to address a release or releases at any one site~~.

for corrective action at any contaminated drycleaning site. For purposes of this subsection (h), "contaminated drycleaning site" means the areal extent of soil or groundwater contamination with drycleaning solvents.

(i) There shall be a deductible of $2,500.00 of corrective action costs incurred because of a release from a drycleaning facility. Nothing herein shall prohibit the department from taking corrective action because it cannot obtain the deductible.

Sec. 11. (a) Subject to the provisions of section 13, there is hereby imposed on and after July 1, 1995, an environmental surcharge in the form of a gross receipts tax for the privilege of engaging in the business of laundering and drycleaning garments and other household fabrics in this state. The tax shall be at a rate of 2% of the gross receipts received from drycleaning or laundering services. The tax shall be paid by the consumer to the retailer and it shall be the duty of the retailer to collect [illegible] the consumer the full amount of the tax imposed or an amount as [illegible]ly as possible or practicable to the average thereof.

(b) Gross receipts otherwise taxable pursuant to this section shall be exempt from the tax imposed by this section if they arise from:

(1) Services rendered through a coin-operated device, whether au-

1 tomatic or manually operated, available for use by the general public;
2 (2) the laundering without use of drycleaning solvents of uniforms,
3 linens or other textiles for commercial purposes, including any rental of
4 uniforms, linens or dust control materials; or
5 (3) charges or services to entities that qualify for exemption from
6 retailers' sales tax on laundering and drycleaning services pursuant to
7 K.S.A. 79-3606 and amendments thereto.
8 (c) The tax imposed by this section shall be imposed on the same tax
9 base as the Kansas retailers' sales tax and shall be in addition to all other
10 state and local sales or excise taxes.
11 (d) The secretary of revenue shall remit daily the taxes paid under
12 this act to the state treasurer, who shall deposit the entire amount in the
13 state treasury to the credit of the fund. For the purpose of this section,
14 the proceeds of the tax shall include all funds collected and received by
15 the director of taxation pursuant to this section, including interest and
16 penalties on delinquent taxes.
17 (e) Every retailer liable for the payment of taxes imposed by this
18 section shall report the taxes for the same periods and at the same time
19 as the returns that the retailer files under the Kansas retailers' sales tax
20 act, as prescribed by K.S.A. 79-3607 and amendments thereto. Each re-
21 tailer shall report the tax imposed by this act on a form prescribed by the
22 secretary of revenue.
23 (f) All taxes imposed by this section and not paid at or before the
24 time taxes are due from the retailer under the Kansas retailers' sales tax
25 act shall be deemed delinquent and shall bear interest at the rate pre-
26 scribed by subsection (a) of K.S.A. 79-2968 and amendments thereto from
27 the due date until paid. In addition, there is hereby imposed upon all
28 amounts of such taxes remaining due and unpaid after the due date a
29 penalty on the unpaid balance of the taxes due in the amounts and per-
30 centages prescribed by K.S.A. 79-3615 and amendments thereto.
31 (g) Whenever any taxpayer or person liable to pay tax imposed by this
32 section refuses or neglects to pay the tax, the amount of the tax, including
33 any interest or penalty, shall be collected in the manner provided by law
34 for collection of delinquent taxes under the Kansas retailers' sales tax act.
35 (h) Insofar as not inconsistent with this act, the provisions of the Kan-
36 sas retailers' sales tax act shall apply to the tax imposed by this section.
37 (i) The secretary of revenue is hereby authorized to administer and
38 enforce the provisions of this section and to adopt such rules and regu-
39 lations as may be necessary to carry out the responsibilities of the sec-
40 retary of revenue under this section.
41 Sec. 12. (a) Subject to the provisions of section 13, there is hereby
42 imposed on and after July 1, 1995, a fee on the purchase or acquisition
43 of drycleaning solvent by any owner of a drycleaning facility. The fee shall

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1 be paid by the person who acquires the solvent to the director of taxation.
2 (b) The amount of the fee imposed by this section on each gallon of
3 drycleaning solvent shall be an amount equal to the product of the solvent
4 factor for the drycleaning solvent and the following fee rate:
5 (1) For any purchase or acquisition on and after July 1, 1995, and
6 before January 1, 1996, $3.50 per gallon; and
7 (2) thereafter, $3.50 plus .25 added on January 1 of each successive
8 calendar year beginning in 1996 until the fee rate reaches a maximum of
9 $5.50 per gallon.
10 (c) The solvent factor for each drycleaning solvent is as follows:

	Drycleaning solvent	*Solvent Factor*
11		
12	Perchloroethylene	1.00
13	Chlorofluorocarbon-113	1.00
14	1,1,1-trichloroethane	1.00
15	Other chlorinated drycleaning solvents	1.00
16	Any nonchlorinated drycleaning solvent	0.10

17 (d) In the case of a fraction of a gallon, the fee imposed by this section
18 shall be the same fraction of the fee imposed on a whole gallon.
19 (e) If any fee is paid pursuant to this section with respect to788 dryclean-
20 ing solvents that are subsequently resold for use other than in a dryclean-
21 ing facility or are actually used other than in a drycleaning facility, the
22 purchaser shall be entitled to claim, pursuant to rules and regulations
23 adopted by the secretary of revenue, a refund or credit for any fee paid.
24 (f) The secretary of revenue shall remit daily the fees paid pursuant
25 to this section to the state treasurer, who shall deposit the entire amount
26 in the state treasury to the credit of the fund. For the purpose of this
27 section, the proceeds of the fee shall include all funds collected and re-
28 ceived by the director of taxation pursuant to this section, including in-
29 terest and penalties on delinquent fees.
30 (g) Subject to rules and regulations adopted pursuant to this section,
31 the fees imposed by this act shall be paid to the director of taxation for
32 the same reporting period and on the same reporting date as the pur-
33 chaser or user of the solvent reports Kansas retailers' sales tax, as pre-
34 scribed in K.S.A. 79-3607 and amendments thereto. The fees imposed by
35 this section shall be reported on a form prescribed by the secretary of
36 revenue.
37 (h) Subject to rules and regulations adopted pursuant to this section,
38 all fees imposed under the provisions of this section and not paid on or
39 before the 25th day of the month succeeding the reporting period in
40 which the solvent was purchased shall be deemed delinquent and shall
41 bear interest at the rate prescribed by subsection (a) of K.S.A. 79-2928
42 and amendments thereto from the due date until paid. In addition, there
43 is hereby imposed upon all amounts of such fees remaining due and

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1 unpaid after the due date a penalty on the unpaid balance of the fees due
2 in the amounts and percentages prescribed by K.S.A. 79-3615 and
3 amendments thereto.
4 (i) Whenever any person liable to pay the fee imposed by this section
5 refuses or neglects to pay the fee, the amount of the fee, including any
6 interest or penalty, shall be collected in the manner provided by law for
7 collection of delinquent taxes under the Kansas retailers' sales tax act.
8 (j) Insofar as not inconsistent with this act, the provisions the Kansas
9 retailers' sales tax act shall apply to the fees imposed by this section.
10 (k) The secretary of revenue is hereby authorized to administer and
11 enforce the provisions of this section and to adopt such rules and regu-
12 lations as may be necessary to carry out the responsibilities of the sec-
13 retary of revenue under this section.
14 Sec. 13. (a) Whenever on April 1 of any year the unobligated prin-
15 cipal balance of the fund equals or exceeds $4,000,000, the taxes imposed
16 by sections 11 and 12 shall not be levied on or after the next July 1.
17 Whenever on April 1 of any year thereafter the unobligated principal
18 balance of the fund equals $2,000,000 or less, the taxes imposed by sec-
19 tions 11 and 12 shall again be levied on and after the next July 1.
20 (b) The director of accounts and reports, not later than April 5 of
21 each year, shall notify the secretary of revenue of the amount of the
22 unobligated balance of the fund on April 1 of such year. Upon receipt of
23 the notice, the secretary of revenue shall notify taxpayers under sections
24 11 and 12 if the levy of taxes under those sections will terminate or re-
25 commence on the following July 1.
26 Sec. 14. (a) Any person adversely affected by any order or decision
27 of the secretary under this act may, within 15 days of service of the order
28 or decision, make a written request for a hearing. Hearings under this
29 section shall be conducted in accordance with the provisions of the Kansas
30 administrative procedure act.
31 (b) Any person adversely affected by any final action of the secretary
32 pursuant to this act may obtain a review of the action in accordance with
33 the act for judicial review and civil enforcement of agency actions.
34 **[Sec. 15. On or before the first day of the regular legislative**
35 **session each year, the secretary shall submit to the members of the**
36 **standing committees on energy and natural resources of the house**
37 **of representatives and the senate a report regarding:**
38 **[(a) Receipts of the fund during the preceding calendar year**
39 **and the sources of the receipts;**
40 **[(b) disbursements from the fund during the preceding calen-**
41 **dar year and the purposes of the disbursements;**
42 **[(c) the extent of corrective action taken under this act during**
43 **the preceding calendar year; and**

1 [(d) **the priorization of sites for expenditures from the fund.]**
2 Sec. ~~15~~ [16]. If any provision of this act or the application thereof to
3 any person or circumstance is held invalid, the invalidity shall not affect
4 other provisions or applications of this act which can be given effect with-
5 out the invalid provision or application. To this end, the provisions of this
6 act are severable.
7 Sec. ~~16~~ [17]. This act shall take effect and be in force from and after
8 its publication in the statute book.

TESTIMONY

March 15, 1995

To: SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

SUBJECT: SUBSTITUTE FOR HB #2256 KANSAS DRYCLEANERS ENVIRONMENTAL RESPONSE ACT

BY: GENE LEONARD
1606 HIGHLAND DRIVE
CONCORDIA, KS

Chairman Sallee, Vice Chairman Vancrum, Minority Leader Martin, and each committee member, thank you for letting me testify today.

Fifty years ago my Grandfather started the Rite-Way Laundry & Dry Cleaners. As a cleaning solvent he chose perchlorethylene (perc), the "newest and best" system available. In 1968 I became the third generation to enter the family business and took over completely in 1978 when my father retired. By that time our primary business was commercial laundry, and in March of 1980 we opened a separate cleaning location, discontinuing drycleaning at 217 West 3rd. Perc hasn't been used there since.

In December of 1980 the Federal government passed CERCLA commonly known as Superfund. This is well intentioned legislation designed to force polluters to clean up their problems. Instead it has become an aberration that threatens the financial security of many small and large businesses. Because Superfund's liability is strict, retroactive and joint and several, Drycleaners and many other businesses face devastating liability to pay for clean up of the groundwater and soil under or near their property. While Superfund's goals must be met, it can cripple or bankrupt Drycleaners and others whose disposal actions were (and are) legal. Many innocent entities can be pulled into Superfund's web such as banks, landlords, previous owners, adjoining property owners, heirs and occasionally even taxing agencies who levy unpaid taxes. Much of the money spent in a clean up is wasted on legal fees as everyone involved tries to protect themselves or find others to pay all or part of the cost.

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The average small Kansas Drycleaner probably has gross annual sales of $150,000 or less, and will be unable to pay even the legal fees associated with being named a Potentially Responsible Party (PRP). If they are named, the business will close long before they could hire an engineering firm to develop and implement a remedial action plan. Kansas would then lose a business, jobs and tax revenue while retaining a polluted property for the taxpayers to clean up.

Contamination at a Drycleaning site is typically from past disposal practices, sometimes dating back to the 30's. Until the mid 80's, our industry thought that perc evaporated so quickly that it couldn't possibly create a problem, but we now know that perc is a "sinker" and can penetrate solid concrete, continuing downward into the water table. We also have found that the wastewater from our distillation process contains trace amounts of solvent and can contaminate the ground thru leaking municipal sewer systems. Today we handle perc differently and have greatly reduced the risk of ongoing contamination; however, we still have clean up problems from the past.

In June 1985 as part of a statewide scan of all Public Water Wells, the Bureau of Water Protection tested well #17 located one block from our facility. The test indicated that Volatile Organic Chemicals were present and the well was ultimately removed from service. The ensuing site investigation performed by KDHE targeted us as a PRP. I became aware of our involvement when Rick Bean from Environmental Remediation came to my office to inform me that KDHE would be drilling wells around our property. Until that day I thought that Superfund dealt only with "polluters" such as Times Beach or Love Canal. Little did I know that we would soon be labeled as such and have our business, with a drilling rig next to it, pictured on the front page of the paper. Insurance denied coverage, banks refused any new loans and ultimately I sold my home to raise cash for the clean up effort. Financial ruin seemed to be at hand.

In July, 1989 I met with KDHE in Topeka. I was informed that even though we were not found responsible for the closing of well #17, that perc contamination had been found on our property and we had to clean it up. It was made clear that we had no choice and even bankruptcy would not remove the liability. If we refused to do this voluntarily and the government cleaned up the site, we would be responsible for triple the cost under Superfund's treble damages clause.

Our contamination was minor and with great cooperation from Rick Bean and KDHE we put together a simple remedial action plan using the water to launder clothes. After four years we have pumped thirty million gallons of water and lowered the contamination to below the State action level for safe drinking water. Even with this success we are over two years away from reclassification.

We were required to pay for clean up of a problem that began in innocence the year I was born and continued for 35 years. **Everything** we did in our day to day operations was normal and legal. In fact any ongoing contamination ended at least eight months before Superfund was passed. With it's enactment, fairness ended in December 1980.

My story is representative of a problem about to be experienced by others in this room and fifteen additional sites already identified by KDHE. I believe that the bill before you today is the only funding alternative for them and other sites yet to be found.

This bill will restore value to our business and as such will keep property on the tax roles. It will allow for clean up of active or abandoned sites. It will spend more money on clean up and less on legal actions. It will involve the consumer where in the past they have not been charged for the liability we've innocently incurred. It will once again allow Drycleaners to pass the business on to their children. It will restore "fairness" to Kansas Drycleaners and keep them from living the nightmare I have experienced these past six years.

Gene Leonard

MARCH 15, 1995

TO: SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

SUBJECT: BILL 2256 KANSAS DRYCLEANNERS ENVIRONMENTAL RESPONSE ACT

BY: CONNIE TWEITO
3918 WILSON ROAD
HUTCHINSON, KS 67502

LARKLAND SHOPPING CENTER WAS DEVELOPED IN 1955 BY MY FATHER, HARRY COBERLY, AND VIV MAMMEL. MR. MAMMEL OPERATED A GROCERY STORE AND MR. COBERLY OPERATED A DRUG STORE. THE REMAINING SPACE IN THE 12,000 SQUARE FOOT STRIP CENTER WAS LEASED TO OTHER RETAILERS. ONE OF THE ORIGINAL TENANTS WAS A ONE HOUR MARTINIZING DRY CLEANERS. IT WAS IN OPERATION FROM 1956 UNTIL 1958 OR 1959.

IN THE LATE 1960'S MR. MAMMEL CLOSED HIS GROCERY STORE AND SOLD HIS INTEREST IN LARKLAND TO HARRY COBERLY. AT THAT TIME, HARRY GAVE MY SISTER, AND MY BROTHER AND ME EACH A 17% INTEREST IN LARKLAND.

IN 1993 K.D.H.E. CONDUCTED AN INVESTIGATION AND FOUND PCE AND TCE (PCE AND TCE ARE BROKEN DOWN CHEMICALS USED IN DRY CLEANING) IN THE GROUND WATER AT THE OLD DRY CLEANING LOCATION. ANOTHER OLD DRY CLEANING LOCATION WAS ALSO IDENTIFIED ONE-HALF BLOCK AWAY. WE WERE TOLD THAT THE GROUND WATER WAS PROBABLY CONTAMINATED BY THE 2 CLEANING ESTABLISHMENTS. THEY PROBABLY PUT PCE AND TCE INTO THE CITY'S SEWER. THIS WAS A LEGAL AND COMMON WAY OF DISPOSAL AT THAT TIME.

SINCE NOTIFICATION OF THE CONTAMINATION, WE HAVE MET

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WITH K.D.H.E. DURING OUR VISIT, WE WERE TOLD IT WOULD BE VERY EXPENSIVE TO CLEAN UP. WE HAVE CONTACTED FORMER EMPLOYEES OF ONE HOUR, AS WELL AS THEIR CORPORATE OFFICE, AND HIRED A PRIVATE INVESTIGATOR TO FIND THE ORIGINAL OWNERS OR OPERATORS. AT THIS POINT, THE ORIGINAL OWNERS ARE EITHER DECEASED OR UNKNOWN. WE FIND OURSELVES IN A SITUATION WHERE POLLUTION WHICH OCCURRED WHEN WE WERE TEENAGERS HAS LEFT US WITH THE RESPONSIBILITY AND THE LIABILITY FOR THE COST OF CLEAN UP.

THE OWNER OF THE OTHER IDENTIFIED LOCATION, 1/2 BLOCK AWAY PURCHASED HIS BUILDING 5 TO 10 YEARS AFTER IT WAS USED FOR DRYCLEANING. HE ALSO FACES TOTAL LIABILITY FOR THE CLEAN UP COST.

WHEN MY FATHER DIED IN JUNE, 1994, MY BROTHER, MY SISTER, AND I BECAME SOLE OWNERS OF LARKLAND SHOPPING CENTER. WITH GROSS REVENUE OF $ 70,000. PER YEAR, AND A UNDETERMINED COST FOR CLEANUP, BANKRUPTCY IS PROBABLY INEVITABLE.

PART OF GOVERNMENT RESPONSIBILITY IS TO PROTECT INNOCENT CITIZENS FROM THIS TYPE OF CALAMITY. PEOPLE SHOULD NOT BE HELD RESPONSIBLE FOR A PROBLEM WHICH THEY DID NOT CAUSE OR CONTRIBUTE TO. SETTING UP A TRUST FUND, SIMILAR TO THE GASOLINE TRUST FUND, IS THE ONLY FAIR WAY TO CORRECT THIS PROBLEM.

The testimony of Scott E. Shmalberg regarding Sub. HB No. 2256

before the Senate Energy and Natural Resources Committee

March 15, 1995

My name is Scott E. Shmalberg, I am the President of Scotch Fabric Care Services of Lawrence and Topeka as well as Select Dry Cleaners of Kansas City. I also stand before you today in my position as the elected President of the Mid America Fabricare Association, which is the trade association representing dry cleaners in Kansas and Missouri.

I, along with my fellow dry cleaners, have not come here today to argue against the pollution standards that have been established for our solvents or to complain that our industry's treatment has been unfair, but rather we are here in an attempt to find a solution to the contamination problem by providing the state with the funds necessary to take corrective action while preserving the dry cleaning industry in Kansas.

The persons who appear before you in this room are not criminals, simply hard working business owners who awoke one morning to the news that the laws had been changed. They learned that the standard industry practices for the disposal of dry cleaning by-products, that had been common and legal for the past 50 years, were no longer acceptable. Our industry quickly implemented new waste disposal systems and installed new equipment but then we discovered we would be expected to correct the contamination which existed prior to the establishment of the current standards and herein lies the issue of Retroactive Liability and the subsequent clean up dilema.

My company operates 25 stores in Northeast Kansas, ten of these locations are production facilities. We are in the fairly unique situation of operating plants using perchloroethylene

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solvent as well as petroleum solvent plants. To date no dry-cleaning solvent contamination has been discovered on any of my properties, yet I am here today in support of Bill 2256 in an effort to preserve our industry as well as individual business owners whose financial futures may be put in jeopardy by contamination.

The cleaners who are at the greatest risk of financial devastation from a contaminated site are not the larger cleaners with multiple plant exposures but rather the smaller one plant operators. Our company could probably deal with one or two contaminated sites, incurring great financial pains but we would survive. A small operator, whose total annual sales might average $150,000 per year, could not survive the legal fees to respond to the initial complaint. A significant clean up action would simply force the cleaner out of business and into personal bankruptcy. A business is closed, employees laid off, tax dollars lost but more importantly the site is never cleaned because neither KDHE or the Federal government have the funds to deal with these situations. My personal opinion is that fewer than 10% of the dry cleaners in Kansas would have the financial resources to deal with a $200,000 clean up action. The bill before you is an attempt to remediate these sites and keep the cleaners in business.

Our industry in Kansas is extremely fragmented, many owners with a diverse set of opinions. This bill before you was drafted with input from cleaners across the state, large and small, rural and city, to gain concensus. There are a few in our industry who use non-chlorinated petroleum solvents who feel that the contamination issue is not their problem and they should be excluded from the funding of this Trust. As the

owner of two petroleum solvent plants I am here to tell you, that is a false assumption on their part. The drinking water standards established for chlorinated solvents (Perc) were set lower than those for petroleum so the immediate focus has been on Perchloroethylene. If your constituents learn that dry cleaning solvents have migrated into their city water well, they really aren't going to care whether its chlorinated or non-chlorinated solvent, they will simply demand immediate action.

You may perceive the solvent tax as high if you compare it to our current gasoline taxes, what you need to understand is that solvent purchases are not a major cost for our businesses. To provide you with a reference, the proposed taxes would increase the operating costs for my company four-tenths of one percent (.004). For a cleaner, who is operating reasonably modern equipment and is in compliance with the Clean Air Act, these additional costs will not be a burden and will actually promote solvent conservation.

For the dry cleaning Industry in Kansas, this issue is not one of profits and bottom lines, it is a matter of survival. My company's oldest division was founded in 1881 here in Topeka, my family has operated the business through three generations since 1946. The issues surrounding pollution liability could very well be the determining factor in the decision as to whether a fourth generation of our family enters the Kansas dry cleaning industry.

In closing I would like to reiterate that we are before you today not to ask for a hand out or a subsidy but simply to request an opportunity to work with the state, through this bill, to resolve our industry's problems while insuring that dry cleaning in Kansas remains a viable industry for decades and generations to come.

TESTIMONY BEFORE THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
By
John Neal
Ineeda Cleaners
Hutchinson, Kansas
on
MARCH 15, 1995

Regarding
SUBSTITUTE HOUSE BILL NO. 2256

My name is John Neal. I own Ineeda Cleaners, a family-owned company which has been in the laundry and dry cleaning business since 1946. In 1984 and 1987, respectively, Ineeda purchased two dry cleaning facilities in Hutchinson, which are the only two facilities which Ineeda operates at this time. Prior to our purchase of these plants, they had been in continuous operation as drycleaning plants since the 1960's. When they were purchased, I was not aware of any environmental problems at either of these sites. It was only later that our industry literature began to discuss the possibility of soil and groundwater contamination throughout the country from the use of drycleaning solvents.

In 1994 I was notified by the Kansas Department of Health and Environment that there was contamination of soil and groundwater at both sites caused by the drycleaning solvent, perchloroethylene, and that the groundwater contamination extended several blocks beyond one of the sites. Ineeda Cleaners was named as a potentially responsible party (PRP) for cleanup costs at that site. As a PRP, Ineeda Cleaners was asked to sign an open-ended agreement to pay for **all** corrective action costs at that site. It was explained that if no PRP signed such an agreement, the matter would be turned over to the EPA, and that if the EPA cleaned up the site it could, and likely would, charge treble damages for the the costs of cleanup.

Faced with this situation, we felt that we needed to hire an attorney. Since then we have had to hire an environmental consulting and testing firm. To date my company has spent or committed to spend over $40,000 on legal and consulting fees, with no

Senate Energy & Nat'l Res.
March 15, 1995
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end in sight. The ultimate potential costs of complete corrective action, including investigation and cleanup costs, over a five to ten year period are unknown. There is, however, little doubt that they will exceed our ability to pay. If some method of relief is not found, my family and I are faced with the ultimate loss of our business.

How could this happen? We have always operated environmentally clean plants. We have never had a spill. We have complied with, and in many cases exceeded, every environmental requirement placed on our industry by state or federal laws and regulations.

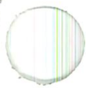
The answer is that under the Superfund law my company can be held responsible because under that law liability is **strict, retroactive, and joint and several**. This means that even if the occurrence of contamination was unknown to us, even if it occurred in spite of our taking every reasonable and required precaution to prevent it, or if the contamination occurred before Ineeda owned the property, as it almost certainly did, Ineeda Cleaners can be held responsible to pay for all cleanup costs!

We are not alone. While Ineeda is one of the first drycleaning operations in Kansas to be notified that it is a potentially responsible party for solvent contamination, at least fifteen (15) other Kansas cleaners have been identified by the KDHE as facing the same scenario. Drycleaners in every state are living this horror story, as we read every month in our industry literature. In the absence of a change in the Superfund law at the federal level, which we have worked hard for but which appears unlikely, our only hope for avoiding bankruptcy while also addressing the need to clean up the environment, is the creation of a trust fund such as that outlined in Substitute House Bill No. 2256.

The approach taken in Substitute House Bill No. 2256 is very similar to that taken in the Kansas Underground Storage Tank legislation passed a few years ago by this Legislature. It is also similar to legislation passed in 1994 in Florida and Connecticut and being prepared in at least seven or eight other states.

One of the features of Substitute House Bill No. 2256 is that it provides for cleanup of old or abandoned drycleaning sites as well as current operating facilities. Anyone who owns property on which a drycleaning facility has operated in the past, even if they have never operated such a facility themselves, is faced with liability for cleanup of environmental contamination coming from the drycleaning facility--just by virtue of their ownership of the land!

Clearly there has to be end to such madness. Substitute House Bill No. 2256 offers a solution where everyone wins. Hardworking small business people avoid financial ruin while at the same time an affordable way is found to address the very real need of cleaning up soil and groundwater contamination. Our industry wants very much to be a part of the solution, but we need your help, by passing this bill, to make this solution a reality.



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KAPA

Kansas Aggregate
Producers' Association

Edward R. Moses
Managing Director

Testimony

before the

Senate Energy & Natural Resources Committee

by the
Kansas Aggregate Producers' Association
on
HB2476 - Relating to Sand & Gravel Pits

March 15, 1995

Mr. Chairman and members of the committee I appreciate the opportunity to appear before you today on behalf of HB2476. My name is Woody Moses, Managing Director of the Kansas Aggregate Producers' Association. I am accompanied by members of the Kansas sand & gravel industry also here today advocating your consideration and approval of House Bill No. 2476.

Justice Oliver Wendall Holmes once wrote what the law should be about is "fairness" not "sameness". But all too often in today's society those who administer the law seek to achieve "sameness". It is such a question of fairness that brings us before you today. Since 1987, the Kansas Aggregate Producers' Association has endeavored to represent Kansas sand & gravel producers in development of a reasonable regulatory model for our industry in compliance with Kansas Water Appropriation Act (82a-701). After a lot of struggle we have finally come to the conclusion that the best method of resolving this matter is to bring it before this committee. Our dilemma centers around the inability of the sand & gravel producers to achieve a mode of regulation that satisfies both producers and the Kansas Division of Water Resources. We believe this inability is due to the way the Kansas Water Appropriations Act is construed rather than a lack of cooperation on either the part of Kansas Aggregate Producers' Association or the Kansas Division of Water Resources (DWR).

Since the passage of the Water Appropriations Act in 1945 water users have been allowed to file for and protect water rights (but were not required to receive permission prior to the actual appropriation of water). In the intervening years, past Chief Engineers of the Kansas Division of Water Resources have reviewed the dynamics of sand & gravel operations in the alluvial acquifer and determined that the removal of sand and gravel did not constitute a "beneficial use" of water.

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This determination was based on four factors: a) sand & gravel was being removed and the water, previously intermingled with sand, actually remained at the site b) no diversion works as defined and or anticipated in the Water Appropriation Act were constructed; c) water was not brought under control, and d); the diversion, if any, was not specific or measurable. As a result of this determination the sand & gravel industry for a period of 48 years was not encouraged or later required to secure permanent water appropriations rights.

In 1978, faced with the rapidly escalating use of groundwater in Western Kansas as a result of dryland irrigation, the legislature amended the Water Appropriations Act, making it a requirement for water users to secure a permit from DWR prior to the appropriation of water.

In 1988, with a new Chief Engineer and different staff input at the DWR, a change of philosophy took place and an administrative policy was developed requiring sand & gravel producers to obtain a hydraulic dredging permit before commencing operations. After discussion with the DWR, sand & gravel producers reluctantly agreed to the new policy. Agreed, because hydraulic dredging certainly brought water under control (for 3-5 minutes) in the classic sense. Reluctantly, because we still had difficulty with it being a "beneficial use". In a sand & gravel operation water is an unavoidable but unwanted **byproduct** of the process. The energy needed to extract sand from water puts "wet operations" at a disadvantage when compared to "dry operations". All things being considered a dry operation is more efficient than a wet one; therefore it is difficult to see where our industry receives a beneficial use.

In 1992 the DWR began developing a new policy which would further require sand & gravel operators to obtain a permanent water appropriation right to cover the evaporation from sand & gravel pits. We met with DWR in November, 1992 to discuss the ramifications. At that time we were assured that existing operations would be covered and sand & gravel operators would not have an inordinate amount of trouble securing rights to cover their operations. The new policy was instituted by DWR in May of 1993. Relying on DWR assurances, once again we reluctantly agreed to try and comply. At the inception it became readily apparent to sand & gravel producers that this new policy was not going to work for three reasons. First, DWR defined existing operations as being the limit of the water surface of the pit as of May 1993, and thus did not cover existing operations as envisioned by sand & gravel producers. Second, as other water users have been receiving water appropriation rights in alluvial basins since 1945 most areas in which our operations are conducted were classified as overappropriated by DWR and closed to the issuance of new water rights several years ago. Thus forcing sand & gravel producers to compete with other water appropriators who had secured their water rights up to 48 years earlier. Even today we

have several producers who would have qualified for vested rights, had they known rights were going to be needed.

We spent the summer of 1993 trying to secure water rights and found the task impossible. The problem grew so difficult that by December of 1993 four producers were facing actual shut down of their operations. If it had been allowed to happen, this shut down would have resulted in the loss of over 100 jobs and an almost total inability to supply sand & gravel in the Arkansas River Basin from Hutchinson to Dodge City. This situation was fortunately adverted when upon our petition DWR agreed to provide an additional 15 acre feet of water under a term permit for up to five years.

Since that time we have asked the Division to grant water rights to existing sand & gravel operations which would put us on an equal footing with other users since 1945. This request was refused by DWR as being unfair to current water right holders. We then requested DWR to return to the policy of covering evaporation through the use of Terms Permits, this was rejected as being impractical. Finally, we have conducted research at a cost of approximately $10,000, and based upon that research have requested a waiver of sand & gravel operations from the "safe yield rule". Our research demonstrates that sand & gravel pits create water storage beneficial to our State in excess of any net evaporation from water exposed by their opening. As of this date the Division has not responded to this request.

Our position, and the position of the first three Chief Engineers of the Division of Water Resources, is that the legislature never intended for the "evaporation created by the opening of sand & gravel pits" to be regulated as a beneficial use of water under the act. The Kansas Division of Water Resources current position, relying on "sameness", as defined by rule and regulation, is that evaporation is a beneficial use of water and as such requires a water right be secured prior to appropriation.

Historically, until 1988, the legislature nor even the DWR has ever expressed an interest in our industry. In the course of representing member producers in this area for the last eight years I have conducted a lot of research and not found one reference to Sand & Gravel operations in any of the material considered by the legislature, the Division of Water Resources or any other state agencies since 1945. Yet sand & gravel operations have been documented as early as the building of Caesaria Maritima in 68 A.D. If we have been creating a loss of water since then why has this crisis only been recognized in one state and not prior to 1988. Looking beyond Kansas we have been unable to find any other examples of where evaporation has been considered to be a diversion

of water and thus creating a **beneficial use**. Many states do use an evaporation calculation in the determination of **consumptive use** but only **after** a diversion works have been constructed and water has been diverted and put to beneficial (i.e.: the construction of a dam). Additionally, we are unable to find one single court case in which a sand & gravel operator has been held to impair the rights of neighboring water users as a result of evaporation. We think the reason for this is obvious. Many experts before us have asked and been unable to answer the following questions. How is evaporation bringing water under control? How do you control the uncontrollable? Where does the point of diversion occur? How is the diversion specific and measurable? Under current law (82a-714) the Chief Engineer is required to inspect a diversion works upon its completion and prior to the issuance of a certified water appropriation right. If the digging of a sand & gravel pit is deemed the construction of a diversion works then - - When will the diversion works be completed and ready for inspection? Sand & gravel operations normally last 40 - 50 years. Many others from time to time have studied these issues and came to the same commonsense conclusion that it was pointless to try and regulate sand & gravel pits on the basis of evaporation.

During my research one interesting item did surface. In the report of the 1976 Special Interim Committee on Water Issues to the legislature the following excerpt appeared in a paragraph on diversion "In any event all diversions must be specific and measurable". We think the legislative committee purposely used that language because it feared a broad interpretation of diversion by regulators. Now let's take the concept of a broad interpretation one step further. If the sand & gravel industry adversely effects water conservation by creating evaporation, then - - Who will be next? Does not a farmer planting a seed and growing a plant create evaporation? We submit to you that questions such as these led the legislature to prefer a narrow interpretation of "beneficial use", "control" and "diversion".

Another confusing issue: If evaporation is a "beneficial use" and we are unable to receive a water right are sand & gravel producers still not entitled to remove minerals under their private property rights. If this is not true then we respectfully request the state of Kansas to remove the public's water from our sand.

Technically, the sand & gravel industry does not create a net loss of water through our physical operations; rather, the dynamics of sand & gravel operations actually improve the retention of water throughout the state of Kansas. As a result of the storage which is created once the solids are removed. Our technical representative, Mr. Mike Lally, P.E., will be addressing this in his testimony which will immediately follow mine. He will be presenting the research of Mr. Carl Nuzman, P.E., our consulting hydrologist who is unable to be here today.

promulgate, and enforce such reasonable rules, regulations, and standards necessary for the discharge of his or her duties and for the achievement of the purposes of this act pertaining to the control, conservation, regulation, allotment, and distribution of the water resources of the state.

History: L. 1957, ch. 539, § 9; L. 1977, ch. 356, § 4; Jan. 1, 1978.

Law Review and Bar Journal References:

Powers and duties of chief engineer of the Kansas state board of agriculture discussed, Mike Foust, 11 W.L.J. 251, 255 (1972).

82a-706b. Diversion of water prohibited, when; unlawful acts; enforcement by chief engineer. It shall be unlawful for any person to prevent, by diversion or otherwise, any waters of this state from moving to a person having a prior right to use the same, or for any person without an agreement with the state of Kansas to divert or take any water that has been released from storage under authority of the state of Kansas or that has been released from storage pursuant to an agreement between the state and federal government. Upon making a determination of an unlawful diversion the chief engineer or his or her authorized agents, shall direct that the headgates, valves, or other controlling works of any ditch, canal, conduit, pipe, well, or structure be opened, closed, adjusted, or regulated as may be necessary to secure water to the person having the prior right to its use, or to secure water for the purpose for which it was released from storage under authority of the state of Kansas or pursuant to an agreement between the state and federal government. The chief engineer, or his or her authorized agents, shall deliver a copy of such a directive to the persons involved either personally or by mail or by attaching a copy thereof to such headgates, valves, or other controlling works to which it applies and such directive shall be legal notice to all persons involved in the diversion and distribution of the water of the ditch, canal, conduit, pipe, well, or structure. For the purpose of making investigations of diversions and delivering directives as provided herein and determining compliance therewith, the chief engineer or his or her authorized agents shall have the right of access and entry upon private property.

History: L. 1957, ch. 539, § 10; L. 1965, ch. 557, § 1; June 30.

Research and Practice Aids:

Waters and Water Courses ⇐ 78 1/2.

C.J.S. Waters § 59.

Law Review and Bar Journal References:

Powers and duties of chief engineer of the Kansas state board of agriculture discussed, Mike Foust, 11 W.L.J. 251, 254 (1972).

"The Parting of the Waters—The Dispute Between Colorado and Kansas Over the Arkansas River," Mark J. Wagner, 24 W.L.J. 99 (1984).

82a-706c. Meters, gages and other measuring devices; waste and quality checks. The chief engineer shall have full authority to require any water user to install meters, gages, or other measuring devices, which devices he or she or his or her agents may read at any time, and to require any water user to report the reading of such meters, gages, or other measuring devices at reasonable intervals. He or she shall have full authority to make, and to require any water user to make, periodic water waste and water quality checks and to require the user making such checks to report the findings thereof.

History: L. 1957, ch. 539, § 11; June 29.

82a-706d. Duties of attorney general. Upon request of the chief engineer the attorney general shall bring suit in the name of the state of Kansas, in courts of competent jurisdiction to enjoin the unlawful appropriation, diversion, use of the waters of the state, and waste or loss thereof.

History: L. 1957, ch. 539, § 12; June 29.

82a-706e. State field offices and commissioners. The chief engineer, subject to the approval of the state board of agriculture, may establish field offices within this state to secure the best protection to all claimants of water therein and the most economical supervision thereof. Subject to the approval of the state board of agriculture, the chief engineer may appoint a water commissioner for each field office so established, in accordance with the Kansas civil service laws, who shall be his or her agent in supervising the distribution of waters within the area served by such field office, according to the rights and priorities of all parties concerned, and who shall perform such other duties as the chief engineer may direct.

History: L. 1957, ch. 539, § 13; June 29.

Law Review and Bar Journal References:

Powers and duties of chief engineer of the Kansas state board of agriculture discussed, Mike Foust, 11 W.L.J. 251, 255 (1972).

82a-707. Principles governing appropriations; priorities. (a) Surface or groundwaters

9-5

and acts amendatory thereof and supplemental thereto.

(f) "Appropriation right" is a right, acquired under the provisions of article 7 of chapter 82a of the Kansas Statutes Annotated and acts amendatory thereof and supplemental thereto, to divert from a definite water supply a specific quantity of water at a specific rate of diversion, provided such water is available in excess of the requirements of all vested rights that relate to such supply and all appropriation rights of earlier date that relate to such supply, and to apply such water to a specific beneficial use or uses in preference to all appropriations right of later date.

(g) "Water right" means any vested right or appropriation right under which a person may lawfully divert and use water. It is a real property right appurtenant to and severable from the land on or in connection with which the water is used and such water right passes as an appurtenance with a conveyance of the land by deed, lease, mortgage, will, or other voluntary disposal, or by inheritance.

History: L. 1945, ch. 390, § 1; L. 1957, ch. 539, § 1; L. 1977, ch. 356, § 3; Jan. 1, 1978.

Research and Practice Aids:

Waters and Water Courses ⚷ 128.

C.J.S. Waters § 157 et seq.

Law Review and Bar Journal References:

Case in annotations Nos. 7 and 8 below analyzed, 11 K.L.R. 558, 559 to 561 (1963).

Constitutionality of act discussed, "Constitutional and Administrative Law," Glenn E. Opie, 12 K.L.R. 143, 144 (1963).

"Municipal Corporations," Albert B. Martin, 12 K.L.R. 285, 294 (1963).

"Real Property and Future Interests," James K. Logan, 12 K.L.R. 304, 328 (1963).

Modification or abolition of certain property rights under police power of state, Robert L. Guenthner, 15 K.L.R. 346, 362 (1967).

The water depletion deduction in Kansas, 25 K.L.R. 453, 454, 458 (1977).

"Kansas Water Rights: More Recent Developments," Arno Windscheffel, 47 J.B.A.K. 217, 218, 220, 223 (1978).

"Kansas Groundwater Management Districts," John C. Peck, 29 K.L.R. 51, 58, 59 (1980).

Attorney General's Opinions:

Appropriation of water for beneficial use; application for permits; duties of chief engineer as to applications. 80-130.

Recordation of certificate of appropriation of water for beneficial use; signature of grantor; acknowledgment. 86-141.

CASE ANNOTATIONS

1. Cited but not applied in refusing mandatory injunction to remove dams. Heise v. Schulz, 167 K. 34, 45, 204 P.2d 706.

2. Various constitutional objections considered and act held valid; discussed; construed. State, ex rel., v. Knapp, 167 K. 546, 549, 551, 552, 556, 207 P.2d 440.

3. Purpose of statute mentioned in mandamus action. Artesian Valley Water Conservation Assn. v. Division of Water Resources, 174 K. 212, 213, 255 P.2d 1015.

4. Mentioned; granting injunction enjoining appropriation of spring feeding stream not error. Weaver v. Beech Aircraft Corporation, 180 K. 224, 229, 303 P.2d 159.

5. Constitutionality of act erroneously determined at unauthorized pretrial conference. City of Hesston v. Smrha, 184 K. 223, 224, 229, 231, 336 P.2d 428.

6. Act mentioned; declaratory judgment action to determine water rights of riparian owners. Huber v. Schmidt, 188 K. 36, 38, 360 P.2d 854.

7. Various federal and state constitutional objections considered and act held valid; construed; discussed. Williams v. City of Wichita, 190 K. 317, 318, 319, 325, 326, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 343, 344, 345, 347, 348, 350, 352, 353, 354, 355, 356, 358, 359, 362, 364, 374 P.2d 578.

8. Vested right definition in subsection (d) premised upon beneficial use of water and not upon nonuse. Williams v. City of Wichita, 190 K. 317, 334, 335, 336, 345, 346, 354, 356, 358, 374 P.2d 578.

9. Act is constitutional; notice; vested rights must be recognized. Baumann v. Smrha, 145 F.Supp. 617, 618, 619, 621, 625. Affirmed: 352 U.S. 863, 77 S.Ct. 96, 1 L.Ed.2d 73.

10. Federal court will refuse to determine property rights in water until state court makes determination under statute. Williams v. City of Wichita, Kansas, 279 F.2d 375, 377.

11. Mentioned; constitutionality of statute cannot be questioned by trial court without petition or other pleadings before it. Williams v. Smrha, 192 K. 473, 389 P.2d 756.

12. Act is constitutional under state and federal constitutions. City of Hesston v. Smrha, 192 K. 647, 391 P.2d 93.

13. Mentioned; issues in case held controlled by previous decisions. City of McPherson v. Smrha, 193 K. 556, 396 P.2d 269.

14. Mentioned; issues in case held controlled by previous decisions. Williams v. Smrha, 193 K. 557, 396 P.2d 270.

15. Section applied; service of process sufficient under 82a-724. Frontier Ditch Co. v. Chief Engineer of Water Resources, 1 K.A.2d 186, 189, 563 P.2d 509.

16. Act cited in upholding 82a728; no denial of equal protection or unlawful taking of property. F. Arthur Stone & Sons v. Gibson, 230 K. 224, 227, 230, 630 P.2d 1154 (1981).

82a-702. Dedication of use of water. All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed.

History: L. 1945, ch. 390, § 2; June 28.

Law Review and Bar Journal References:

Constitutionality of water rights regulation, John Scurlock, 1 K.L.R. 125, 128, 134, 298, 307 (1953).

Waters and watercourses and appropriation of water, 5 K.L.R. 470, 472 (1957).

Cases in annotations Nos. 1 and 3 below analyzed, 11 K.L.R. 558, 559 to 561 (1963).

9-6

WHAT IS A BENEFICIAL USE OF WATER?

It would appear from 1976 interim committee notes and sections of 82a-701 et. seq. the following questions should be asked in the determination of a beneficial use.

	Types of Diversions			
	Irrigation	Reservoir	Canals	Sand & Gravel Pit
Is water brought under control?	By well	By Floodgate	By Headgates	None
Are diversions works constructed?	Pump	Dam	Headgates, Ditches & Valves	None
Can the Chief Engineer order the diversion stopped?	Yes	Yes	Yes	No
Is the diversion specific?	Yes	Yes	Yes	No
Is the diversion measurable?	Yes	Yes	Yes	No

Economically, we think it makes sense to approve this legislation. Attached you will find a comparison illustrating the proportions of the sand & gravel industry throughout the state of Kansas when compared to agricultural production. We ask you to take a look at the relative amounts of water used to support each industry. Given the ratios--does it make sense to shut down almost 100% of sand production in the state of Kansas and sacrifice almost 50 million dollars worth of economic activity? Just for the sake of being consistent with the "paper water" accounting system currently employed by the state. Also, attached for your review is a recent article on aggregates from "The Wall Street Journal".

Finally on the practical level, in a day and age when voters and constituents are demanding less government, less regulation and better use of government resources we ask if it really makes sense to expend the time and effort the DWR has over the last 7 1/2 years to account for less than 2/10 of 1 % (per tabulation of 1991 water use reports) of all water use, in the state, as computed on the gross assumption of evaporation used by DWR. A calculation which is not even adjusted for the water storage created. Our use would be minute if credit for storage were allowed. We maintain as a matter of good public policy that the DWR has bigger problems to deal with such as water issues with the states of Nebraska and Colorado. The amount of time and attention they have devoted to regulating the sand & gravel industry is ridiculous in comparison to the water actually utilized, if any, by our industry.

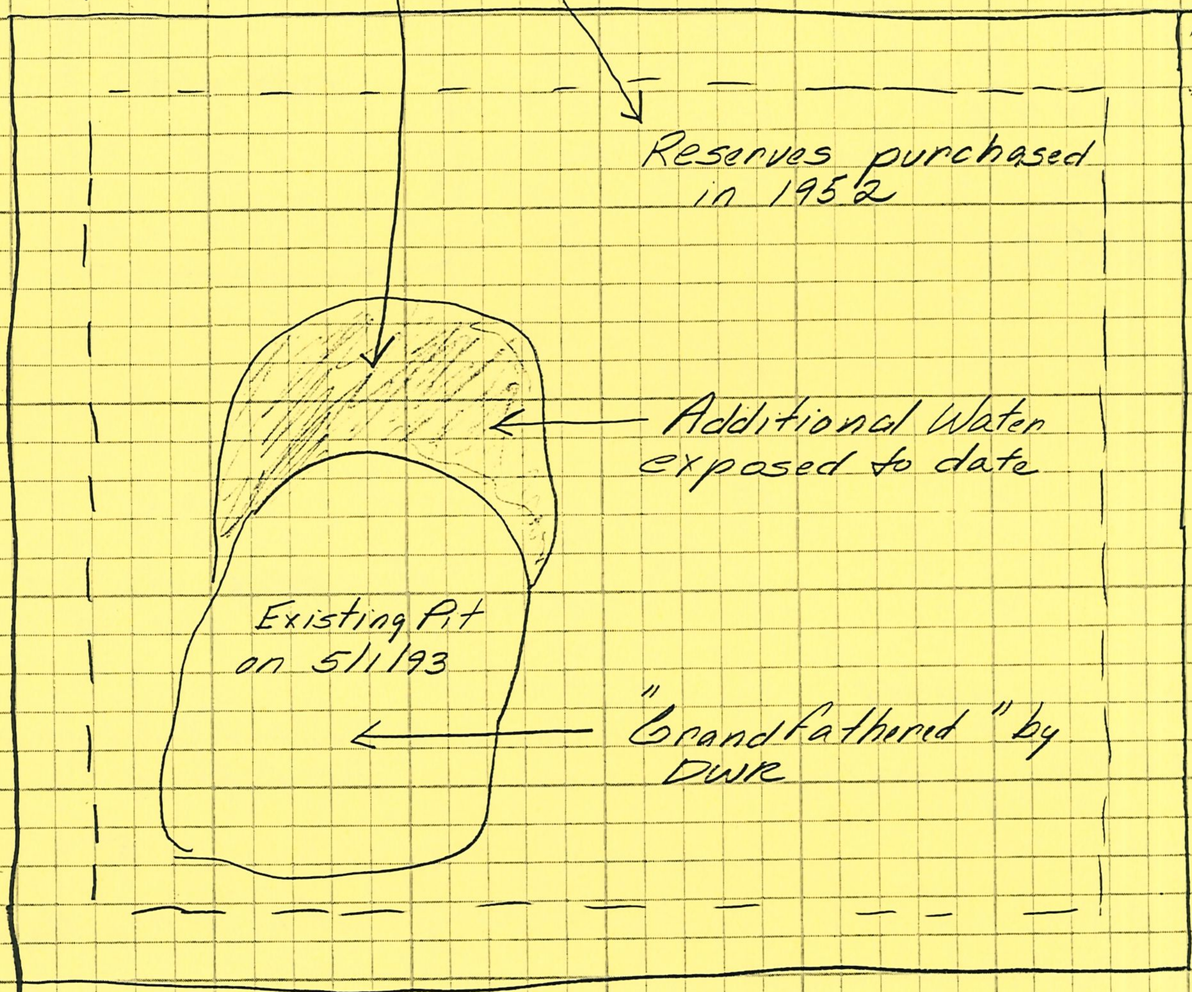
In closing we would like to stress that the industry is not requesting an exemption. Our hydraulic dredges our currently regulated by term permit and we are not asking for relief from this regulation. What we are asking for is a policy decision or reaffirmation of legislative intent. Furthermore, we are not here to bash the Division of Water Resources. The DWR has worked with us patiently and cooperatively for the last eight years trying to resolve this problem. We feel the inability to resolve this matter lies in the fact that the law is designed to regulate irrigation and those uses where the diversion is **specific** and **measurable**. For this and the many reasons outlined above and out of fairness and commonsense, we ask you to report HB2476 out favorable for passage.

Thank you for your time and consideration of this very important matter.

FOR *House Energy & Nat. Res.* LOCATION ________ JOB NO. ________

DATE *23 FEB 95*

SUBJ. *Non effect of Grandfather* BY *KAPA* SHEET *1 of 2*



WC-Form 43

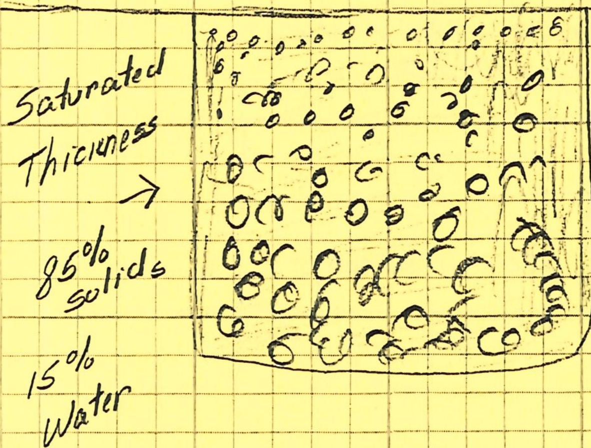
FOR *House Energy & Nat. Res.* LOCATION ______ JOB NO. *HB 2476*

DATE *2/23/95*

SUBJ. *Storage Effects of Sand & Gravel Pits* BY *KAPA* SHEET *2 of 2*

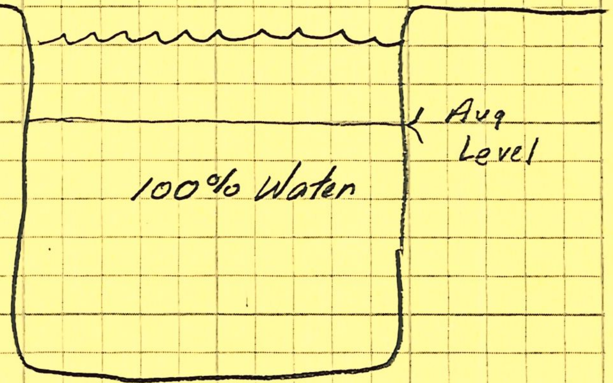
McKinney-#1

Prior to Excavation



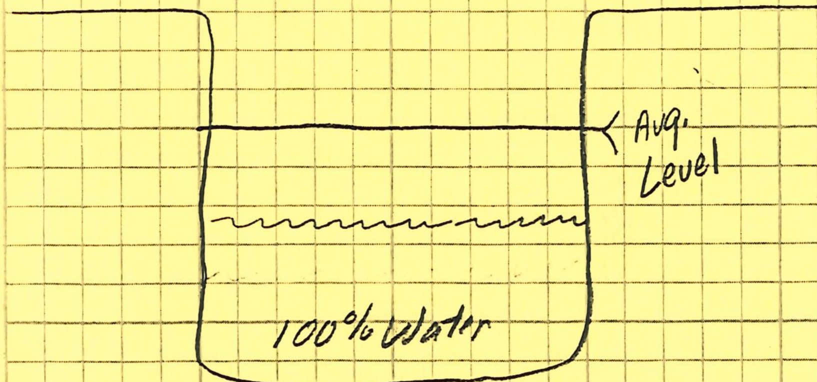
McKinney #1

After Excavation - High Flow



McKinney #1

After Excavation - Low Flow



Assuming the pit covers one-acre, and is 50' deep

1. Prior to excavation the pit holds:

   $1 \times 50 \times 15\% = 7\frac{1}{2}$ A/F

2. At high flow the pit holds:

   $1 \times 48 \times 100\% = 48$ A/F

3. At low flow - 20' below surface. The pit holds:

   $1 \times 30' \times 100\% = 30$ A/F

WC-Form 43

ECONOMIC IMPACT OF THE KANSAS AGGREGATE INDUSTRY

by:
David Cantrell

In trying to determine the impact of our industry on the economy of Kansas I uncovered an interesting fact. Although Kansas is known as the WHEAT STATE and does indeed lead the nation in wheat production it also produces large amounts of corn, sorghum, and soybeans, aggregates do play a large part in the overall scheme of things.

In 1993 Kansas produced 388,500,000 bushels of wheat, 216,000,000 bushels of corn, 176,400,000 bushels of sorghum and 51,800,000 bushels of soybeans, (these figures came from the Kansas State Bureau of Statistics). These are all impressive number and do indeed give you an idea of farming impact on the states economy. We generally refer to our aggregate usage in tons so I broke the crop totals down into tons (realizing that wheat, corn, etc. have a lower specific gravity) to see how we compare. This is when it got interesting, Wheat translated to 11,655,000 tons, Corn 6,480,000 tons, Sorghum 5,292,000 tons and Soybeans 1,544,000 tons. Again these are very impressive numbers. Using U.S. Bureau of Mine Statistics we find that crushed Stone produced 18,600,000 tons which is 38% more than wheat and considerably more than the other grains. When Sand and Gravel production is thrown into the equation at 13,100,000 tons we get a total of 31,700,000 tons of aggregate produced which is more than the crops mentioned combined (24,981,000). While we will always be regarded as a farm state with a farm based economy, mining plays a huge part in the states well-being.

One other note of interest is that in the United States mining and construction are at the top of the average hourly earnings scale for manufacturing jobs at $14.51 and $14.11 per hour respectively. While some people may not want us next door we are vital to the economy of any area that we are operating in.

Sources:

Kansas State Board of Agriculture
U.S. Bureau of Mines
Federal Reserve, 10th District

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★★ MIDWEST EDITION WEDNESDAY, MARCH 1, 1995 DES MOINES, IOWA

Business Is Boring: Some Companies Really Dig Aggregate

* * *

Rocky Road to Open a Pit Can Lead to a Big Payoff; Better Than a Spaceship

By MARJ CHARLIER
Staff Reporter of THE WALL STREET JOURNAL

At parties, Bill Langer loves to talk about rock.

Gravel, too.

As the U.S. Geological Survey's aggregates specialist since 1977, Mr. Langer knows tons about such subjects. He regales people with stories of how the stuff is used in roadways and chicken feed. The average American, he says, uses nine tons of aggregate a year – the equivalent of a 50-pound bag *every day*.

The response? Often, folks "sort of nod off and walk away," he says. "Sand and gravel to most people are stupifyingly dull."

But not anymore. Today, aggregate–whether it consists of sand, gravel or crushed rock–is hot. Really.

Rock On

Just ask Martin Marietta Corp. The company makes products that inspire awe – spacecraft, jet fighters, Titan missiles. But the product that most excites its executives is aggregate. Martin Marietta is deep in aggregate, but not as deep as it wants to be. A big gravel acquisition last year made Martin Marietta the nation's second-largest aggregate producer, behind Vulcan Materials Co. of Birmingham, Ala. And "we want more rocks," declares Norman Augustine, Martin Marietta's chairman.

Mr. Augustine swears that in terms of profit margins, "rocks are a lot better than rockets." Furthermore, he says, "we've never had a rock blow up."

Rocks are a sexy commodity these days because a shortness of supply has caused prices to rise. Not that the stuff itself is rare. What's rare, rather, is government permission to open a new pit. The number of operating pits is dwindling as some run out of reserves. Meanwhile, hundreds of proposed pits have been stopped by environmentalists.

"People want gravel delivered in small bags at night by Federal Express so they don't have to see it," laments Valentin Tepordei, an aggregates expert at the U.S. Bureau of Mines.

Breaking into the rock business is impossible for some. In 1969, with their existing gravel mine near Philadelphia almost played out, Joseph Mignatti and his brothers sought approval to open a second one. The local authorities balked and the Mignattis went to court and won. But by the time the state's top court refused to hear the last appeal by local opponents–21 years later – the Mignattis were no longer in the business. "It was such a long ordeal, we needed to go on to other things," says Mr. Mignatti, who is in construction now.

Everybody Must Get Stoned

Stones have been in demand for ages, of course, but today they are being used for all kinds of things. Gravel is the stuff of concrete, driveways and gardens. It scrubs emissions in coal-fired power plants. It is an ingredient in poultry feed and is replacing grass in the lawns of desert cities. In the Phoenix suburb of Guadalupe, a rock retailer called All-Star Materials sells 25 varieties of gravel, with names such as Apache Pink and Palomino Gold.

The same people creating demand for gravel–those flocking to new suburbs–are limiting its supply, by opposing proposed pits. Along the booming eastern flank of the Rockies in Colorado – where yearly sand, gravel and stone demand is approaching 12 tons per person – no new aggregate mine has been permitted in the

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Business Is Boring: Companies Say Owning a Rock Pit Is a Blast

Continued From First Page

past 20 years. In the suburban areas surrounding Denver, one of the nation's fastest growing cities, vocal citizens have killed three proposed quarries in three years.

Meanwhile, the Denver area is already coming up short of aggregate. Rubble for the new Denver International Airport had to be brought by rail from Wyoming. People who don't want pits in their neighborhood say the rubble should be brought in from elsewhere. But experts say the cost doubles every 30 miles that it is transported by truck. Consequently, in urban areas that are running out of gravel, costs are skyrocketing, and the high prices are drawing sea-faring shipments from Mexico and Canada. While in smaller cities gravel costs as little as $6 a ton, the Philadelphia street department, for example, is paying $11.70 a ton to have gravel delivered.

Little wonder that gravel has caught the eye of big corporations. At Martin Marietta, executives recently decided to spin off their gravel unit – while retaining majority ownership – because they thought its stock would trade at a higher value. Now the stock of Martin Marietta Materials Inc., the aggregates unit, is trading at 15 times earnings, while plain old Martin Marietta is trading at nine times earnings.

The difficulty of meeting regulations and gaining permission "plays right into the hands of the big players," who can afford it, says Stephen P. Zelnak Jr., president of Martin Marietta Materials. Further, he says, after Martin Marietta received some of its permits, local governments tightened the regulations, making it more difficult for others to open new pits and virtually granting his company local monopolies.

It took Martin Marietta 10 years to win all the necessary permits to build a tree-lined quarry in Forsyth County, Ga. When approval came, in 1988, only farmland surrounded the site. Now the land in the area is being re-zoned for residential growth. All that growth feeds demand for gravel, to build new roads and the concrete foundations of new homes.

But that hasn't made the site popular. Every week, angry neighbors who discovered they live near a tree-hidden mine drive up to the small office back in the woods where operations manager Mark Goethel oversees the automated pit's affairs. "They come in hunting me," says Mr. Goethel. "People are putting down $90,000 for a lot and when the leaves fall off the trees they look out and see the hole in the ground."

But even an empty pit may be another man's gold mine. A developer recently placed an advertisement in the industry publication Pit & Quarry, looking for an abandoned, flooded quarry. He wants to turn it into a lake-front subdivision.

GLOSSARY

Acre-foot - the quantity of water required to cover one acre to a depth of one foot; equal to 43,560 cubic feet or 325,851 gallons.

Administration of water rights - the distribution of water according to priority of right.

Appropriation - the act or acts involved in the taking and reducing to personal possession of water occurring in a stream or other body of water, and of applying such water to beneficial uses or purposes.

Aquifer - a saturated underground body of rock or similar material capable of storing water and transmitting it to wells or springs.

CFS (cubic feet per second) - the volume of water which flows in one second; one cubic foot = approximately 7.48 gallons.

Consumptive use - water withdrawn from a supply which, because of absorption, transpiration, evaporation, or incorporation in a manufactured product, is not returned directly to a surface or ground water supply; hence, water which is lost for immediate further use. For example, irrigation is a consumptive use.

Depletion - the withdrawal of water from surface or ground water reservoirs at a rate greater than the rate of replenishment.

Diversion works - pump, motor and other devices used to withdraw water.

Groundwater - water that occurs beneath the land surface and completely fills all pore spaces of the rock material in which it occurs.

Perfection of Water Right - Completion of a diversion works and the full application of water for a beneficial use according to the provisions of the appropriation permit.

Mined water - withdrawal in excess of recharge of a water supply causing an increasing depletion of that supply.

Recharge - addition of water to an aquifer. Occurs naturally from rainfall. Artificial recharge through injection wells, or by spreading surface water where it will infiltrate.

Safe yield - the maximum dependable draft which can be made continuously upon a source of water supply during a period of years during which the probable driest period or period of greatest deficiency in water supply is likely to occur. Dependability is relative and is a function of storage provided and drought probability.

Saturated thickness - that part of an aquifer actually filled with water.

Water quality - chemical, physical and biological characteristics of water in respect to its suitability for a particular purpose.

Well log - a chronological record of the soil and rock formations which were encountered in the operation of sinking a well including the water-bearing characteristics of each formation.

Yield - the rate at which water may be drawn from a formation through a well to cause a drawdown of a stipulated depth. The usual units of measurement are gallons per minute per foot.

Kansas Aggregate Producers Association

Position Paper
on
Kansas Water Rights Issue

The Kansas Aggregate Producers have been placed in a difficult position by the change in the Division of Water Resources, Kansas State Board of Agriculture policy on acquisition of water rights. Policy No. 86-1 is not consistent with the intent of the Kansas Water Appropriation Act. The Kansas Aggregate Producers Association (KAPA) presents this position paper to support the Division of Water Resources in their efforts to create and improve regulations which can be used to properly and efficiently manage the water resources of our state. KAPA further recognizes the need for the chief engineer to identify sand and gravel operations throughout the state so that the Division may properly carry out the duties assigned by the legislature.

When the Kansas Water Appropriation Act was passed in 1945 and amended in 1958, there was no basic change to the definition of a water right, meaning any vested or appropriation right under which a person may lawfully divert and use water. To establish water rights, R.V. Smrha, then Chief Engineer, relied upon K.S.A.82A-706b to define what constituted a diversion of water. This paragraph defines... "upon making a determination of unlawful diversion, the chief engineer or his or her authorized agents shall direct at headgates, valves, or other controlling works of any ditch, canal, conduit, pipe, well or structure be open, closed, adjusted or regulated as may be necessary to secure water to the person having the prior right to its use, or to steer water for the purpose to which it was released from storage under authority of the State of Kansas or pursuant to an agreement between the state and federal government". Smrha found that gravel pits did not comply with the definition of a diversion. Gravel pits had no physical works for diversion that are controllable by man. The evaporation loss from a pit was not in any way a beneficial use of water as defined by the Water Appropriation Act. Therefore, gravel pits were exempt from the authority of the Kansas Water Appropriation Act. Because of this, gravel pit operators historically were not required to establish any type of water right. This historic position denied them the opportunity to establish their priority of time in their appropriations for use along with other water users in the State.

In the 1960's, when federal reservoirs were being constructed by the Corps of Engineers and the Bureau of Reclamation for Irrigation Districts, water right applications were modified. A provision was included for water impounded in a man-made structure that would not otherwise be available for appropriation. Since these reservoirs had large surface areas and lost considerable water to evaporation, it was decided that an allowance for the release and control of water should be made for evaporative losses from surface water reservoirs. In this case, specific diversion works and head gates were available in the structure to control releases of water as determined by the Chief Engineer in the administration of his duties. Somehow this concept was carried over to sand and gravel pits constructed in an aquifer where no man-made diversion works exist for the specific control of water. Since evaporation losses are uncontrollable, and because no actual point of diversion exists, sand and gravel pits should be exempted from the Water Appropriation Act regulations.

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Policy modifications were made by the Division of Water Resources due to a report made by the 1976 Legislative Special Committee on Energy and Natural Resources and subsequent Testimony No. 4 in a 1977 session of the Kansas legislature. Evaporative losses were only considered important by the Division of Water Resources in ascertaining the total safe yield of a basin. Further, the legislature expanded the definition of public interest to be on a broad "economic sense" and not limited to considering the basis of public interest only on "safe yield" of an aquifer system.

Sand and gravel pits within the radius of influence of an operating well are not detrimental. Shallow sand and gravel pits could actually increase the storage yield of the aquifer, thereby increasing the beneficial use that can be made of the groundwater resource. Therefore, sand and gravel pits should be exempted from the safe yield rules and regulations. There is no drawdown or mutual interference effects from gravel pits. The storage yield of the aquifer in that vicinity is changed from 15% to 20% of the volume excavated to 100% water. The benefits to the water yield of the aquifer are far greater than the loss of water by evaporation from the pit. Therefore, the Chief Engineer should not require any type of permanent water right when a pit ceases to become functional in a gravel mining operation.

An example was given by one of the members of the KAPA where an irrigation well existed downgradient from a site acquired for a sand and gravel pit near Scandia, Kansas. The irrigation well was approximately 40 feet deep with an operating radius of influence of about 1300 to 1500 feet, typically in 30 feet of saturated sand and gravel material. (Assuming the permeability of this material is 1500 gpd/ft^2 (200ft/day) this well has a theoretical specific capacity of about 30gpm/ft of drawdown. A typical well in service over several years has an operating efficiency of about 60%, with an actual operating specific capacity of 18gpm/ft. of drawdown.) Prior to the construction and excavation of the pit, the owner tried to operate this well at 400gpm or more and during dry summers the pump would frequently break suction. The sand and gravel pit was excavated upgradient of this well approximately 600 to 700 feet away from the property line and when the next dry period occurred, the irrigation well continued to pump in excess of 400gpm with a specific capacity of about 25gpm/ft. of drawdown. The operating efficiency was increased to about 80% with the sand and gravel pit in place. The increase of storage yield served as an interim source of recharge to this irrigation well, allowing operation during the hot summer months when the well previously broke suction.

As has been adequately acknowledged on term permits for dredging, the consumptive use of a gravel pit operation is extremely minimal. The value of sand and gravel materials to the public is extremely important when the economic impact of each sand and gravel pit operation is fully considered. For example, the facility operated by J. H. Shears' Sons, Inc. in the Hutchinson area supplies 52 small contractors and businesses, 10 municipalities, townships, and public utilities, 9 ready-mix concrete plants, 5 asphalt-mixing plants, and the Department of Transportation highway projects with materials. The number of employees and annual payroll of \$2.3 million historically turns over seven times in the community resulting in a \$16.1 million economic impact. It is estimated the Hutchinson facility of Shears' Sons, Inc. affects 245 employees and has a major economic impact on the cities of Hutchinson, Newton, McPherson, Emporia, Lincoln and Stafford. The amount of water evaporated from sand and gravel pits is estimated to be about 2/10 of 1% of the total water appropriated within the state of Kansas, while the economic impact of these sand and gravel pits exceeds \$100 million to the state of Kansas. Unreasonable rules and

regulations create a serious economic hardship to the sand and gravel pit operators and the general population of the state of Kansas. Therefore, in the public interest, sand and gravel pits should be exempted from the requirement of having a permanent water right for continued evaporation as defined in Policy No. 86-1 of the Division of Water Resources.

Gravel pits provide storm water storage and reduce peak flood flows while providing additional water to recharge the ground water system locally. This is a net benefit to the water resources of the area.

Gravel pits are connected to the aquifer but do not pose a hazard of contamination to the ground water unless a massive chemical spill occurs directly into the pit by accident. The City of Olathe operated their well field beginning in 1967 north of DeSoto in the Kansas River Basin. About 1984, a large gravel pit was beginning to be excavated on the property adjacent to the well field. LGI's recommendation was to maintain a 500-foot buffer from the actual well site to provide adequate filtration. Also, the leaves and grass form an excellent organic filter lining the pit that prevents normal contamination. Pits must be bermed to prevent direct runoff from agricultural farm lands from entering the pit.

It is recognized that the Division of Water Resources desires to have some type of knowledge as to where these pits are operating, their location and their size. This could be handled adequately by the use of the term permit for the duration of the active mining of the pits. This will also allow the Division of Water Resources to obtain the quantity of water circulated by the pit for appropriate water taxation and monitoring by other state agencies. There is no need for any type of permanent water right after the pit is closed to account for evaporation losses. This is contrary to the intent of the original Water Appropriation Act.

In conclusion, evaporative or consumptive water use is not properly defined as a beneficial use of water for appropriation purposes. We ask this committee to correct this inequity.

ASPHALT CONSTRUCTION CO.

316 524-5200 † P.O. BOX 17470 † 3511 S. WEST ST. † 316 524-3651 FAX
Wichita, Kansas 67217-0470

SERVING THE WICHITA AREA SINCE 1961

March 16, 1995

Senate Energy & Natural Resources Committee

Re: HB2476 (Relating to Sand & Gravel Pits)

Dear Committee Members:

Due to the progressive interpretation of the water laws of 1945 by present staff at the Division of Water Resources, the sand and gravel industry finds it's self in a critical situation. I will assume that you are at this point familiar with the issues that we face.

In testimony to the house committee I felt that D.W.R. misrepresented several facts. In my opinion the single biggest issue is that of Grandfathering the existing sand pits. Their view that including only the exposed surface water puts the aggregate producers on a level playing field with water users in the state is ridiculous. I can assure you that we have discussed this with them many times and that they in fact do know that we can not produce sand with out exposing water. Analogies used in testimony comparing sand producers to farmers are not at all representative of the situations we face.

The testimony to the committee that DWR has been responsive to the sand and gravel industries is simply not so. They celebrated a few trivial concession which have delayed, not solved the problems, as workable solutions. They are not.

We are all aware that water law is a very complex issue, however, HB2476 is simple, to the point, and will have **no affect** on other water users in the state. I am convinced that if this bill is not passed out of committee that DWR will see it as a vote of confidence, destroying any chance of a workable solution.

Sincerely,

L. James Ralston
Asphalt Construction Co.

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2/23/95

INTRODUCTION: Victor and Yvette Holzmeister Klotz, representing Klotz Sand Co., Holcomb, KS. We currently employ 21 people, and hire on 5 - 8 extra trucks and drivers. My father began our business in 1977, and in 1987, I had a choice to either go to Chiropractic School or take over my fathers sand and gravel business. I chose to follow in my fathers footsteps, because it was what I knew, enjoyed, and believed I could make a decent living for my family with. Since that time, because of the water issues in our industry, I am extremely concerned that we may not be able to afford to stay in business, or continue the employment we currently do.

REASONING: We know the sand business, the problem has come with the obtaining and timeliness of receiving water permits from the Division of Water Resources. Specifically, we had waited the fair amount of time allotted to receive a water permit, but didn't receive it, so we called. We were told the document we needed still needed one signature, and it should go through anytime, but to give them another week. We did this, and were told week after week the same thing. We waited patiently, while continuing to pay employee wages, when we could not operate, hoping that the permit would come through. Finally, we could no longer continue to lose approx. $5,000 a day in lost revenue, continue to pay wages when not having the work to do because we did not have the permit, so we hired an attorney to meet with the DWR to hopefully obtain the signature we needed. Only when the attorney was physically in the DWR office did we receive the required signature, and of course, at our expense.

It has been next to impossible to obtain water rights, we even tried transferring ditch rights, but were told we could not. Water rights are not readily available and the ones that are, are extremely expensive. We have checked into this. These are expenses our company may not be able to overcome and if we can not, the result would be lost jobs, and more unemployment. And if by some chance, we do overcome the expensive burden our industry has been left with, will there be anyone that can afford the cost of our product? 90% of our business is to the State of Kansas - we do our best to save the State dollars in all of the road and highway work, and hope we will be able to continue serving the State of Kansas.

We thank you for giving us the opportunity to speak and we sincerely request you support on HB2476.

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Attachment 12

Nadine Stannard, Associated Material & Supply, Wichita, Kansas

Thank you.

Sand is a basic construction material. Sand is the strength of brick, of concrete, of asphalt, even of glass.

Yet for all its basic commoness sand is concentrated in its availability. To use sand economically we have no choice but to go where the sand is; to extract sand from large commercially viable deposits wherever we can find them.

I am the owner and president of Associated Material & Supply Co. in Wichita. We employ 13 people who produce about a half million tons of sand each year.

The process is to remove the top soil which the trucking industry supplies to top soil contractors. Under the top soil is the fill dirt used for compatable material under buildings and for other construction projects. Under the fill dirt is the sand and gravel which is below the water table, and, therefore, needs to be conveyed to a processing plant in a slurry of sand and water. After the sand is processed, the water seeps out of the sand piles and back into the ground below.

As the dredging process proceeds more land needs to be stripped of the top soil and then fill dirt to expose the clean sand.

After the major deposits have been removed, the clean, clear lake which remains is ready for other benefitial uses. These lakes are perfect backdrops for homesites, parks, native trails, and businesses alike.

I'm from the Wichita, so I'm familiar with the areas that were sand pits there. The zoo and West Sedgwick Park area were sand pits. Twin Lakes was a sand pit. The Moorings, a housing area, was developed on a sand pit.

Associated Material has been in business since 1934 when my father-in-law established the corporation. Later my brother-in-law and husband grew into the business. When they retired in 1989, I bought the company from them.

That's when I became involved in trying to acquire water rights for operations that had been invested in years before. The Division of Water Resources told me that because the pit was already there that body of water would be granted water rights, but that water rights weren't available for any enlargement of the pond. I had to submit two applications for each production site. One application for the existing body of water and another application for additional area to be added to the pond.

I have water rights to allow for the development of part of each parcel of land purchased and permitted for the production of sand. I can not get water rights so I will be laying off some of my employees if some alternative isn't available.

I encourage you to support HB 2476

Are there any questions?

Thank you.

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Attachment 13

Testimony before
the Senate Energy & Natural Resources Committee
RE: HOUSE BILL No. 2476
March 15, 1995
by
David L. Pope, Chief Engineer,
Division of Water Resources
Kansas State Department of Agriculture

Chairman Sallee and Members of the Committee, I thank you for this opportunity to testify in opposition to House Bill No. 2476 which would exempt evaporation from sand and gravel pits from the permitting requirements of the Kansas Water Appropriation Act (Act).

This Legislature has enacted a comprehensive, mandatory statutory system for the regulation for the use of water within the State of Kansas. Until now, this Act has been composed of a seamless fabric regulating all users of water in the state. House Bill No. 2476 is an attempt to pull out one of the threads of this fabric. You all know what can happen if you pull out a thread too hurriedly. The entire fabric can come unraveled. The Division of Water Resources disagrees with the concept of exempting evaporation from sand pits from regulation; however, if you decide to do so, we urge you to very carefully clip off this thread, and here is why.

Keep in mind here that in all the situations complained about by the aggregate industry are at locations where in one way or another no new water is available for appropriation. Otherwise, all the new pit owner would have to do is file for and get a new permit, just like everyone else. The controversies have generally not arisen in water rich areas like Eastern Kansas, only in areas which are already water short under most situations, like the Arkansas River.

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The aggregate industry has generally accused the Division of treating it unfairly because the Division has applied the provisions of the Act to evaporation from the water table caused by their industry. I would like to talk about that for a little bit. It is the feeling of the Division that this legislature enacted the statutory scheme for regulating water use to protect the private property rights (i.e. water rights) of those persons who have complied with the provisions of Act.

One of the basic concepts in the Act is that before the Chief Engineer can issue a new permit to appropriate water, the Chief Engineer must first determine whether water is available for appropriation. Absent any direct impairment of senior rights, those determinations are usually made in the form of rules and regulations and are based on either a safe yield concept (you can not permit more water use than the average annual renewable supply) or an allowable appropriation concept (in an aquifer that is not recharged and is being mined, a set annual rate of depletion is allowed). Once the supply of water is fully appropriated based on those standards, no more new permits can be issued.

Why not continue to issue more new permits if people really need them or the uses are really important? Let us consider River Valley X. After studying the precipitation records, the recharge rates and stream gages, it is determined that the annual renewable supply of water (surface water and groundwater) in River Valley X is 10,000 acre-feet. The Chief Engineer approves new permits to appropriate water until that 10,000 acre-feet limit is reached. Consequently, the area would then be fully appropriated. The water rights now allow water users to use the average annual renewable supply. Another applicant applies for

100 acre-feet of water. Why not approve it, too? If that new application is approved and water is used, where will that water come from? Sooner or later, it will come from all of the existing prior water right holders in the basin. It will take that water from those persons who have already made their economic and sweat equity investments and who are depending on the reliability of the water supply to make their operations go. We can argue all day about the hydrologic calculations in Valley X, but once the best available information is analyzed, the Division uses that to determine the availability of water. The Division always gives the applicant the opportunity to demonstrate that better information is available. If approved, the new applicant's water use will decrease the dependability of the water supply available to those users who already have real property rights to the use of that supply. The same thing is true whether this new applicant is a small municipality, a hog lot, an irrigator, or a sand plant operator wishing to expose the groundwater table to evaporation. All of those uses deprive the system of water. This is why, if you decide to carve out an exemption for evaporation for sand pits, the Division of Water Resources urges that you do it carefully and not allow the fabric of the Act to begin to unravel.

The Aggregate Industry has raised several points and I would like to speak to those at this time.

First, the Division certainly agrees that evaporation is uncontrollable. That is precisely why sand pit operations need to be evaluated before they are constructed, rather than attempting to deal with them afterwards. No water right or permit in the State of Kansas has a right to impair a senior water right.

That is a matter of law and a condition on every water permit that is issued. However, in almost every other case, if the Division of Water Resources makes an incorrect evaluation of the availability of water, either administratively or through the courts, that junior user can be shut off or regulated as necessary to prevent damage to senior water rights. Regulation after the fact is almost impossible in the case of evaporation caused by exposing the groundwater table. This is one important reason why the Division should analyze and determine whether sand pit operations should be permitted before they are constructed.

Second, the Aggregate Industry has contended that this type of regulatory action does not take place anywhere else in the United States. That is simply not the case. We would offer as an example the laws of Colorado. (See SB 89-120 and SB 93-260.) For example, Colorado requires any new evaporation caused by pits exposing the groundwater table to be offset by retiring or acquiring existing water rights.

Third, the Aggregate Industry argues that aggregate pits improve the retention of water in an alluvial stream system. This may be the case. The Industry was given the opportunity to submit technical information to substantiate that on December 20, 1993. However, to date, it has not substantiated that such is a basis for a waiver or extension. We have even studied the matter in house, but to date the results are inconclusive. We are still willing to consider such information. If water is retained in the system longer, it has to come from somewhere. Opening up sand and gravel pits does not create new water in the system. If the water that fills the sand pit can be demonstrated to come from flood flows that would have not benefited anyone and

perhaps harmed others, that should certainly be taken into account in the public interest. If, however, those pits are merely filled from the baseflow of the river at a time when senior water users are needing it, those senior users will be harmed. It is the job of the Division to protect the property rights of those other senior water right holders.

Fourth, the Division cannot continue to issue new permits to appropriate water just because the uses are considered important or the water is desperately needed. At some point, there is no more water available and continuing to issue those permits from those sources takes water from those who are already depending upon that water supply and have real property rights to its use. Requiring new users to obtain their water supplies by acquiring existing water rights is a much better solution.

Fifth, the aggregate industry has contended that the three Chief Engineers who preceded me did not apply the provisions of the Act to the aggregate industry, and because I have applied the provisions of the Act to them, that is somehow unfair. On January 1, 1978, this legislature made an extremely important change in the Kansas Water Appropriation Act by making it mandatory for anyone using water for any purpose, except for domestic and other use, to have a water right or permit to appropriate water (K.S.A. 82a-728). Prior to that time, the aggregate industry had no incentive to apply for a permit to appropriate water because their activities were not illegal and because they could not, from a practical matter, be shut off, so they had nothing to gain by getting permitted. That all changed in 1978. For the next few years after 1978, the Division worked with many different water users across the State of Kansas, getting them in

compliance with the Act. For whatever reason, it took us longer to get to their industry than it did to others. However, largely because of this situation, the aggregate producers were allowed to obtain permits up to their current use, as of May 1, 1993, without meeting all of the normal criteria, plus our regulations allow most of them an additional 15 acre-feet to allow them an opportunity to acquire other sources of water for the long term. In essence, this is a grandfather clause.

One final point, the Aggregate Industry alleges that currently the industry uses only 2/10 of 1% of the total water appropriated and that is insignificant. Therefore, they should not be regulated. Taken by itself, I suppose there is some basis for that position. On the other hand, many other water users in the State of Kansas use insignificant amounts of water. For example, of all the water used in Kansas in 1991, irrigation used 88% of the water, municipalities 8% and industries 3%. All of the other users together used less than 1% of all the water used in Kansas. In fact, because agriculture consistently uses approximately 85% of all water used in this state, all the other uses of water in this state combined are relatively insignificant, at least on a statewide basis, although many are very significant in their local area. All of them would like to be unregulated. Many of them would like to have a preference and have so requested over the past years. If you start exempting one type of use, where do you draw the line?

As you can see from our fiscal note, the amount of water <u>currently used</u> for evaporation is approximately 1,400 acre-feet per year. Gravel pits are <u>currently permitted</u> for approximately 5,500 acre-feet of water per calendar year to be used

for evaporation. As the size of the pits increase, evaporation use by pits will eventually reach this level. 5,500 acre-feet of water is significant. It is enough water to fully supply water for a city the size of Salina or to fully irrigate 2,750 acres of crop land, 21 center pivots, in Finney County.

If you desire to create this exemption for gravel pit owners for evaporation, we urge you to do it in the following manner:

<u>Proposed Alternative Language for House Bill No. 2476</u>

(See attached balloon draft as Exhibit A)

An application for a permit to appropriate water for evaporation of groundwater caused by exposing the water table shall be exempt from meeting the safe yield, allowable appropriation or similar criteria to the extent that the evaporation takes place from existing operations on contiguous land purchased or leased for sand and gravel mining purposes prior to January 1, 1995. To be eligible for this exemption, owners of sand and gravel mining operations must file with the Chief Engineer on or before December 31, 1996, documentation of the extent of land owned or leased contiguous to existing sand or gravel operations as of January 1, 1995, and reasonable projections of the surface area of the groundwater table which will ultimately be exposed on that property.

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This is a preferable way to grant an exemption for evaporation from sand and gravel pits for the following reasons:

(1) It allows the State to keep the industry within the comprehensive regulatory scheme and to require them to have permits (K.S.A. 82a-711) and be subject to mandatory water use reporting requirements pursuant to the provisions of the Act (K.S.A. 82a-732). House Bill No. 2476, as amended, does not require that. Exempting any single type of use of water is a dangerous precedent to set. Even though the statewide total water use by pits is relatively small. The local impact can be quite significant. For example, a sand pit in Finney County which exposes 50 acres of water table has an average annual net evaporation of 48 inches. In an average year, the net evaporation from the surface of that sand pit would be 200 acre-feet. This is a significant amount of water, especially in an area closed to new appropriations, or at least any new appropriations over five acre-feet per year. It makes very little sense to tell someone wishing to drill a well to pump ten acre-feet for stock watering or a small business that they cannot have a new permit, but still allow unregulated construction of a large sand pit in the same area which will appropriate and consume 20 times that amount of water forever.

(2) It will allow the Division to take into account evaporation from permitted pits when permitting later applicants to appropriate water. House Bill No. 2476, as amended, will not allow that.

(3) Our proposed substitute language for House Bill No. 2476 would allow the Division to waive safe yield or allowable depletion criteria to "grandfather" in evaporation from all pits currently in operation up to the extent of their land ownership as of January 1, 1995. We do not agree

that the Division has been unfair, but the above substitute bill totally eliminates any "unfairness" alleged by the Aggregate Industry.

We have worked with the industry since 1986 to get it in compliance. A summary of those efforts is attached as Exhibit B.

(4) It will require any new pit operations operated on new land purchases to compete for water rights or permits on the market, just as any other user, such as a municipality, industry or any other user would have to do.

SUMMARY

The Division of Water Resources opposes the concept of exempting any type of water use from the permitting requirements of the Act, but if the Legislature decides to do so, we urge the Legislature to do it by adopting our proposed alternative language for House Bill No. 2476, as set forth above. We believe this answers all possible unfairness concerns by the industry and still preserves the entire fabric of the Act.

Thank you for the opportunity to appear. I would be happy to answer any additional questions you might have.

EXHIBIT A

As Amended by House Committee

Session of 1995

HOUSE BILL No. 2476

By Committee on Energy and Natural Resources

2-14

10 AN ACT concerning sand and gravel pits; relating to the application of
11 certain statutes to evaporation of water therefrom.
12
13 *Be it enacted by the Legislature of the State of Kansas:*
14 Section 1. ~~Evaporation of water exposed as the result of the opening~~
15 ~~or operation of sand and gravel pits shall not be construed to be a use or~~
16 ~~diversion of water for the purposes of article 7 of chapter 82a of the~~
17 ~~Kansas Statutes Annotated. (a) An operator will notify the chief en-~~
18 ~~gineer of the division of water resources of the state board of ag-~~
19 ~~riculture of the location and area extent of any existing or proposed~~
20 ~~sand and gravel pit to be excavated, expanded or operated by the~~
21 ~~operator.~~
22 ~~(b) Unless the chief engineer determines that it has a substan-~~
23 ~~tially adverse impact on the area groundwater supply, the evapo-~~
24 ~~ration of water exposed as the result of the opening or operation~~
25 ~~of sand and gravel pits shall not be construed to be a beneficial~~
26 ~~use or diversion of water for the purposes of the Kansas water~~
27 ~~appropriation act, K.S.A. 82a-701 *et seq.*, and amendments thereto.~~
28 ~~(c) Evaporation from sand and gravel pits, as calculated by the~~
29 ~~chief engineer, will be reported as an industrial use to the director~~
30 ~~of taxation for the purpose of assessing the water protection fee~~
31 ~~pursuant to K.S.A. 82a-954, and amendments thereto.~~
32 Sec. 2. This act shall take effect and be in force from and after its
33 publication in the ~~statute book~~ Kansas register.

An application for a permit to appropriate water for evaporation of groundwater caused by exposing the water table shall be exempt from meeting the safe yield, allowable appropriation or similar criteria to the extent that the evaporation takes place from existing operations on contiguous land purchased or leased for sand and gravel mining purposes prior to January 1, 1995. To be eligible for this exemption, owners of sand and gravel mining operations must file with the Chief Engineer on or before December 31, 1996, documentation of the extent of land owned or leased contiguous to existing sand or gravel operations as of January 1, 1995, and reasonable projections of the surface area of the groundwater table which will ultimately be exposed on that property.

14-10

EXHIBIT B

The Division of Water Resources has attempted to work with the Aggregate Industry since 1986, to bring it into compliance with the Kansas Water Appropriation Act. While I will not review the history of these efforts in detail, I would like to emphasize certain key points:

(a) On December 3, 1990, at the request of the legislature, I amended the regulations to remove the large quantity of water recirculated for hydraulic dredging from the industrial use category, and coincidentally relieve the aggregate producers from paying the Water Protection Fee for the large quantities of water recirculated solely for hydraulic dredging purposes. K.A.R. 5-1-1(f) and (gg).

(b) As of May 1, 1993, I waived the safe yield or allowable appropriation criteria to allow the aggregate industry to file permits to appropriate water to the extent evaporation was occurring from the size of the water surface of the pits in existence as of May 1, 1993. In essence, all evaporation use occurring as of May 1, 1993, was grandfathered in.

(c) As to future evaporation from pits after May 1, 1993, the aggregate industry had the usual options of obtaining a new permit where water is available or acquiring an existing water right and filing a change application. I also gave the aggregate industry a third option of acquiring an equivalent active existing water right, preferably upgradient, in the same or hydraulically connected source of supply, and permanently retiring it to compensate for future

pit evaporation. This was an unprecedented option I allowed only for the evaporation of groundwater from pits because pits lack a drawdown cone of depression and, therefore, have a unique effect on the stream-aquifer system.

(d) Effective November 28, 1994, by regulation I granted each pit a 15 acre foot exemption from the safe yield criteria to get a permit to cover any evaporation begun since May 1, 1993, to allow pits to continue operations while searching for additional water rights for future evaporation. K.A.R. 5-3-16.

(e) Ever since our meeting with the aggregate industry on December 20, 1993, we have indicated to the industry that we are still willing to consider any scientific or hydrologic information it has which would substantiate why evaporation should be exempt from the safe yield policy. To date, the little information that was submitted by the industry has not substantiated the basis for such a waiver or exemption. We have even studied the matter in-house, but to date the results are inconclusive. There is a possibility that there may be some scientific basis for exempting evaporation from safe yield criteria in the more water rich eastern part of the State of Kansas generally due to the higher rainfall, lower evaporation and proportionally less impact to the hydrologic system. We are willing to continue to consider that possibility, but such an exemption would have to be adopted as a rule and regulation.