

Approved: February 13, 2001
Date

MINUTES OF THE SENATE AGRICULTURE COMMITTEE.

The meeting was called to order by Chairperson Derek Schmidt at 8:30 a.m. on February 6, 2001 in Room 423-S of the Capitol.

All members were present except:

Committee staff present: Raney Gilliland, Legislative Research Department
 Jill Wolters, Revisor of Statutes
 Betty Bomar, Secretary

Conferees appearing before the committee:

 Charles Benjamin, Attorney for the Kansas Sierra Club
 Greg A. Foley, Assistant Secretary of Agriculture
 Kerri Ebert, Kansas Dairy Association

Others attending:

Upon motion by Senator Downey, seconded by Senator Umbarger, the Minutes of the January 30 and January 31 meetings were unanimously approved.

SCR 1605 - Requesting President Bush to permanently withdraw certain EPA regulations

Charles M. Benjamin, Attorney, appeared in opposition to **SCR 1605** on behalf of his clients, the Kansas Sierra Club AND Kansas Natural Resource Council. Mr. Benjamin testified in light of the rhetoric and myths circulated about outcomes of certain lawsuits instituted by the Kansas Sierra Club and the Kansas Natural Resource Council, it is hard to inject rationality or civility into a discussion.

Mr. Benjamin stated the passage of **SCR 1605** requests the President of the United States to disobey the law when ordering the EPA Administrator to withdraw the standards published in the July 3, 2000 Federal Register, as the EPA Administrator would be violating the Clean Water Act and the Sierra Club would file suit.

The July 3, 2000 Federal Register contained the EPA's proposed water quality standards for Kansas replacing those water quality standards first proposed by Kansas in 1994, which did not meet the requirements of the Clean Water Act.

The application of water quality standards to privately owned water bodies in Kansas are subject to provisions of state law, (KSA 65-171d), which provides that if a freshwater reservoir or farm pond is privately owned, and where complete ownership of land bordering the reservoir or pond is under common private ownership, it shall be exempt from water quality standards. The exception is for water discharges or seepage from the reservoir or pond to waters of the state, either surface water or ground water, or as it relates to the public health of persons using the reservoir or pond or waters from that reservoir or pond.

The EPA believes this provision of state law is inconsistent with the Clean Water Act and the EPA regulations implementing the Act. EPA believes state law would potentially exempt from water quality standards, surface water, regardless of its ownership characteristics. The EPA first identified this discrepancy and communicated the same to the Kansas Department of Health & Environment in October 1987. The legislature has taken no action on this issue since it was identified.

Mr. Benjamin further testified that any citizen may commence a civil action on his own behalf against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under the Clean Water Act which is not discretionary with the Administrator. The EPA Administrator has failed to perform her non-discretionary duty to promulgate water quality standards for Kansas when it was determined that water quality standards proposed by the state did not meet the Clean Water Act.

CONTINUATION SHEET

The Sierra Club in Kansas continues to exercise its rights to seek remedies in the courts when the Clean Water Act is not carried out in Kansas. The lawsuits filed by the Sierra Club have been filed as a last resort. The EPA has been out of compliance with the Clean Water Act in Kansas for many years. Members of the Kansas Sierra Club believe that environmental laws of the United States apply to Kansas and they intend to continue seeing that those laws are fully carried out in Kansas. **SRC 1605** will not deter the Sierra Club. (Attachment 1)

In response to questions from the Committee, Mr. Benjamin stated that in any suit filed by the Sierra Club, he, as the attorney, does not get any payment unless the suit has merit and attorney fees are ordered. Otherwise, the cost of the suit is borne by the attorney. He also declined to specify what actions, if any, he believes Kansas farmers and ranchers should take to improve water quality in the state. He further declined to state what cost he believes would be incurred by farmers and ranchers to comply fully with EPA regulations.

There being no further conferees, the hearing was concluded.

Senator Corbin moved that SCR 1605 be recommended favorably for passage. Senator Lee made a substitute motion, seconded by Senator Corbin that SCR 1605 be amended at Page 1, Line 15 by striking “One regulation subject to the moratorium is a”, and inserting the word “The”; and further on line 17, before the “(;)” the following “should be subject to the moratorium”. The voice vote was in favor of the substitute motion.

Senator Umbarger moved, seconded by Senator Schmidt, that SCR 1605 be further amended at Page 2, Line 34 following the word “withdraw” by adding “or withdraw, review and possibly revise”;

Senator Morris made a substitution motion, seconded by Senator Downey that SCR 1605 be amended at Page 2, Line 34 following the word “withdraw” by adding “or withdrawn, review and revise”. The voice vote was in favor of the substitute motion.

Senator Umbarger moved, seconded by Senator Schmidt, that SCR 1605 be amended at Page 2, Line 35, following the word “Resolution” by adding the following: “to fully accommodate the concerns expressed by Kansans during the public hearings conducted by the Environmental Protection Agency”; The voice vote was in favor of the motion.

Senator Corbin moved, seconded by Senator Umbarger, that SCR 1605 be recommended favorably for passage as amended. The voice vote was unanimous in favor of the motion.

SB 60 - Repealing the statute requiring the statistics division of the department of agriculture to work with county appraisers to collect agricultural data from producers.

The Chair informed the Committee that a letter from Paul A. Welcome, legislative chair for the Kansas County Appraisers' Association, had been received supporting **SB 60**. Copies were distributed to the Committee. (Attachment 2)

A letter from Judy A. Moler, Kansas Association of Counties, in support of **SB 60** was distributed to the Committee. (Attachment 3)

Senator Morris moved, seconded by Senator Huelskamp that SB 60 be recommended favorably for passage and placed on the consent calendar. The voice vote was unanimous in favor of the motion.

SB 59 - Update, clarify and streamline the Kansas dairy law

Greg A. Foley, Assistant Secretary of Agriculture, testified that **SB 59** is the result of a review of the rules and regulations, areas of duplication, unclear language and obsolete articles, undertaken by the Department of Agriculture at the direction of the Governor.

SB 59 consolidates the two existing dairy fee funds into one fund; eliminates discrepancies in statutes relating to penalties for late fee payments; removes obsolete statutes; and reorganizes the statutes

CONTINUATION SHEET

into general categories relating to ungraded milk, grade A milk, manufacturing milk and frozen dairy desserts. The changes proposed do not have a fiscal impact on dairy producers or on the Department's revenues.

SB 59 removes all references to "dairy commissioner" and replaces it with "secretary of agriculture; it consolidates definitions into one section; it deletes definitions for "milk tester," "lowfat milk" and "skim milk," which are all obsolete terms; it incorporates current definitions found in federal reference documents, including the Code of Federal Regulations, that relate to standards of identity for various milk and dairy products; and allows for the use of civil penalties against any licensee. The current statute allows the use of civil penalties only against dairy manufacturing plants. (Attachment 4)

Mr. Foley stated **SB 59** should be amended at Page 10, Line 31, by inserting "(d)" before the "or". The subsection was inadvertently omitted.

Kerri Ebert, Executive Secretary, Kansas Dairy Association, testified in support of **SB 59**, stating the bill consolidates fee funds and organizes the dairy statute. Passage of **SB 59** is important to the dairy industry as the statutes define how dairy farms and processing plants are inspected and licensed by the Department of Agriculture. The legislation does not increase inspection fees and does not change the on-farm inspection process. The Dairy Association supports the proposed changes in **SB 59**. (Attachment 5)

Frances Kastner, Executive Director, Kansas Food Dealers Association, distributed a statement to the Committee opposing passage of **SB 61**. (Attachment 6)

The Committee adjourned at 9:30 a.m.

The next meeting is scheduled for February 7, 2001.

Charles M. Benjamin, Ph.D., J.D.
Attorney at Law
P.O. Box 1642
Lawrence, Kansas 66044-8642
(785) 841-5902
(785) 841-5922 fax

February 6, 2001

To: Kansas Senate Agriculture Committee
Re: Senate Concurrent Resolution No. 1605

I want to thank Chairman Schmidt for his invitation to testify in opposition to SCR No. 1605. I met with the Chairman in his office about a week and a half ago, primarily to clarify to him various aspects of our lawsuits against the EPA and to dispel certain myths about the outcomes of those lawsuits, the motives of my clients, the Kansas Sierra Club in filing them, and the Clean Water Act generally. I have been doing the same with other legislators who are ranking majority and minority leaders of the Senate and House committees dealing with environmental and agricultural issues.

As you saw from the account in the High Plains Journal of the EPA hearing held in Dodge City last September, it was impossible to inject any kind of rationality or civility to such a discussion in the midst of a mob that had been whipped up into an emotional frenzy. During the 16 years that I was a Harvey County Commissioner, I attended many Farm Bureau events and consider many of their members friends. In addition, I had a very cordial relationship with one of my fellow county commissioners who I served with for 12 years and who was very active in the Farm Bureau and Kansas Livestock Association. I have lived in Kansas for 21 years and I know that what I witnessed in Dodge City last summer would not have happened had certain individuals and the leadership of their organizations not deliberately used those hearings to beat up on EPA, the Sierra Club and me personally. I intend to hold the leadership of those organizations fully accountable for any physical harm that may come to me or my family as a result of threats made by their membership.

I told Chairman Schmidt that I would speak to four issues in my testimony: 1) the request contained in SCR 1605 that the "administration of President George W. Bush to permanently withdraw each of the regulations described in this Concurrent Resolution"; 2) the issue of private farm ponds and how it is or is not impacted by the current proposed EPA rules on Kansas water quality; 3) why EPA is proposing to reclassify some 1400 water bodies for primary contact recreation; 4) why the Sierra Club and the Kansas Natural Resource Council filed suit against EPA in August 1999 for EPA's failure to promulgate water quality standards for Kansas.

1

Senate Agriculture Committee
Date 2-06-01

Attachment # 1-1 thru 1-5

Section 303(c)(1) requires that "the Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with the date of enactment of the Federal Water Pollution Control Act Amendments of 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator (of EPA)."

Section 303(c)(3) states that "If the Administrator (of EPA), within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this Act, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this Act, he shall not later than the ninetieth day after the submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

Section 303(c)(4) states that the Administrator (of EPA) shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved –

- (A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this Act, or
- (B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this Act.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this Act.

On June 23, 2000 the Administrator of EPA signed and submitted to the Federal Register standards for water quality in Kansas to replace water quality standards submitted by Kansas in 1994, and re-submitted in 1999, that the Administrator had determined were inconsistent with the Clean Water Act. This was done as part of a consent decree to settle a lawsuit filed by Sierra Club and the Kansas Natural Resource Council alleging that the EPA had failed to carry out its non-discretionary duties under Section 303(c)(3) of the Clean Water Act. These proposed EPA water quality standards for Kansas were published in the July 3, 2000.

Section 303(c)(4) states that the Administrator of EPA shall promulgate any revised or new standard ...not later than ninety days after he publishes such

proposed standards..." The date for EPA to promulgate water quality standards came and went on October 4, 2000. In the alternative the state could adopt "a revised or new water quality standard which the Administrator determines to be in accordance with this Act." However, the state of Kansas has not adopted such a revised or new water quality standard. Therefore, the EPA has not carried out its non-discretionary duty under the Clean Water Act and Sierra Club and KNRC sued EPA again, after giving the agency the required "sixty day notice" on December 13, 2000.

The bottom line is that the federal statutory language, passed by Congress, cited above is binding on EPA and the President of the United States. There can be only two outcomes to the current situation involving water quality standards for Kansas. Either EPA promulgates the standards they published in the July 3, 2000 Federal Register or the state of Kansas adopts those same standards. Either way those standards will become the law of the state of Kansas.

I can assure you that if the President of the United States orders the EPA Administrator to withdraw the standards published in the July 3, 2000 Federal Register, as you are urging him to do in SCR No. 1605, then the Sierra Club will file suit against the EPA Administrator for violating the Clean Water Act.

II

Last fall I was asked by the editors of the Planet Kansas, published by the Kansas Sierra Club, to clarify how the proposed EPA water quality standards for Kansas affects "farm ponds." Members of the Kansas Sierra Club who own farm ponds were as concerned as members of the Kansas Farm Bureau and Kansas Livestock Association with the actual effect of the proposed EPA standards. I would like to briefly walk you through my analysis and submit it along with this statement.

III

Section 101(a)(2) of the Clean Water Act establishes the national goal of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and ...recreation in and on the water, wherever attainable. This national goal is commonly referred to as the "fishable/swimmable" goal of the Clean Water Act.

Section 303(c)(2)(A) requires State water quality standards to "protect the public health and welfare, enhance the quality of water, and serve the purposes of this Act." EPA's regulations found at 40 CFR Part 131 interpret and implement these CWA provisions by requiring that water quality standards provide for CWA section 101(a) goals unless those uses have been shown to be unattainable, effectively creating a rebuttable presumption of attainability. In other words, the default is that CWA Section 101(a) goals should apply to water

quality standards unless the State proves otherwise. The mechanism in EPA's regulations used to rebut this presumption is a "use attainability analysis."

Under 40 CFR 131.10(j) States are required to conduct a use attainability analysis (UAA) whenever the State designates or has designated uses that do not include the CWA Section 101(a) goal uses, or when the State wishes to remove CWA section 101(a) goal uses, or when the State adopts subcategories of uses that require less stringent criteria. A UAA is defined in 40 CFR 131.3(g) as a "structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors." In a UAA, the physical, chemical and biological factors affecting the attainment of a use are evaluated through a water body survey and assessment.

This rebuttable presumption approach is designed to preserve the State's paramount role in establishing water quality standards in weighing any available evidence regarding the attainable uses of a particular water body. The rebuttable presumption approach does not restrict the discretion that States have to determine that CWA section 101(a) goal uses are not, in fact, attainable in a particular case. Rather, if the water quality goals articulated by Congress are not to be met in a particular water body, the regulations simply require that such a determination be based upon a credible "structured scientific assessment" of use attainability.

Since the early 1980's EPA has identified the State's lack of justification for waters not designated with Section 101(a) goal uses, particularly primary contact recreation, as a significant issue that the State has failed to address. Nevertheless, as part of its 1998 approval action, EPA approved over 300 revised use designations as a result of use attainability analyses that were submitted by KDHE. However, Kansas did not include supporting use attainability analyses for all the surface waters that the State did not designate for primary contact recreation. EPA therefore disapproved those use designations as being inconsistent with 40 CFR 131.10(g).

IV

Section 505(a)(2) of the Clean Water Act states that "any citizen may commence a civil action on his own behalf against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator." The fact is that the EPA Administrator has failed to perform her non-discretionary duty to promulgate water quality standards for Kansas when she determined that water quality standards proposed by the state did not meet the requirements of the Clean Water Act.

The members of the Sierra Club in Kansas will continue to exercise their rights to seek remedies in the courts of the United States when the Clean Water Act is not carried out in Kansas. Congress gave the citizens of the United States the

opportunity to bring a civil suit in U.S. District court when the EPA Administrator fails to carry out the Clean Water Act. My clients in the Kansas Sierra Club have filed these lawsuits only as a last resort. In every case the EPA was out of compliance with the Clean Water Act for many years. The members of the Kansas Sierra Club believe that environmental laws of the United States apply to Kansas and they intend to continue seeing to it that those laws are fully carried out in Kansas.

STATE OF KANSAS

BILL GRAVES, GOVERNOR

Jamie Clover Adams, Secretary of Agriculture

109 SW 9th Street

Topeka, Kansas 66612-1280

(785) 296-3556

FAX: (785) 296-8389



KANSAS DEPARTMENT OF AGRICULTURE

Senate Agriculture Committee

Tuesday, February 6, 2001

Testimony Regarding SB 59

Greg A. Foley, Assistant Secretary of Agriculture

Good morning Chairman Schmidt and members of the committee. I am Greg Foley, Assistant Secretary of Agriculture, and I am here today to discuss four primary issues that have the potential to enhance dairy program efficiencies for the Kansas Department of Agriculture (KDA).

Program History

Late in 1999, an extensive internal review of the dairy program was undertaken to assess current procedures, to evaluate needs in computerization and record keeping and to examine the day-to-day functions of the program. One finding from the review highlighted the need to update the current dairy law.

Early in calendar year 2000, Governor Graves directed state agencies to review the rules and regulations each administers to find areas of duplication, unclear language and obsolete articles. The KDA review team included a member of the Governor's Agricultural Advisory Board, a member of the secretary's staff, and representatives from the program's field and clerical staff. Although a narrow time frame existed, the rule and regulation review team pinpointed a need to update existing dairy statutes. Therefore, KDA requests amendments to current law to incorporate the findings of the review team, and to bring closure to Governor Graves' executive order.

Summary of the Legislative Package

In brief, our request is to:

1. Consolidate the two existing dairy fee funds into one fund.
2. Eliminate discrepancies in statutes relating to penalties for late fee payments.
3. Remove obsolete statutes.
4. Reorganize the statutes into general categories relating to ungraded milk, grade A milk, manufacturing milk and frozen dairy desserts.

Fiscal Impact

The changes we propose will not have a fiscal impact on dairy producers or on department revenues.

Senate Agriculture Committee

Date *2-06-01*

Attachment # *2-1 thru 2-2*

Consolidation of Dairy Fee Funds

Prior to 1985, the dairy program was divided into grade A and manufacturing areas, and resources and revenues were maintained in two fee funds. During that time, some grade A inspections were subcontracted to county health departments. Since 1985, the program has operated as a single unit within the Department of Agriculture, but the fee funds have remained separate. This proposal does not change the amount of fees collected. Consolidating the two dairy fee funds — grade A fee fund and dairy fee fund — into one will simplify accounting, record keeping and fiscal management of dairy fee revenues.

Discrepancy in the Statute Regarding Penalties for Late Fees

Present law requires payment of a penalty equal to 1% per day or \$5 per day for fees paid late under the grade A fee fund (2805). The penalty under the present dairy division fee fund (2002) requires payment of 1% per day or \$5, whichever is greater. This proposal will create uniformity for late dairy fee payments by establishing a penalty of 1% per day or a flat \$5, whichever is greater.

Removal of Obsolete Statutes

In proposed Senate Bill 59, all obsolete statutes have been removed and the remaining statutes have been reorganized to be more easily understood by the regulated public and KDA staff. The bill does not change the fundamental content of the statute. It merely groups the information into categories for easier reference by the user.

Other Changes in the Dairy Statutes

- The proposed dairy legislation removes all references to “dairy commissioner” and replaces it with “secretary of agriculture.”
- It consolidates definitions into one section of the proposed statute.
- It deletes definitions for “milk tester,” “lowfat milk” and “skim milk,” all of which are obsolete terms. In addition, the proposal incorporates current definitions found in federal reference documents, including the CFR (Code of Federal Regulations), that relate to standards of identity for various milk and dairy products.
- It allows the use of civil penalties against any licensee, while the current statute allows the use of civil penalties only against dairy manufacturing plants.



Kansas Dairy Association

Providing a unified voice for Kansas dairy farmers

Warren Winter
President
Hillsboro

Richard Benoit
Vice President
Damar

Mike Bodenhausen
Muscotah

Joe Hinton
Fort Scott

Dennis Metz
Wellington

Steve Ohlde
Linn

Tim Pauly
Conway Springs

Elwood Schmidt
Riley

Jerry Spielman
Seneca

Office

4210 Wam-Teau Drive
Wamego, KS 66547
785-456-8357
FAX 785-456-9705
email:
ksdairy@hotmail.com

TESTIMONY IN SUPPORT OF SB 59

**SUBMITTED BY:
KERRI EBERT
EXECUTIVE SECRETARY
KANSAS DAIRY ASSOCIATION**

February 6, 2001

The Kansas Dairy Association is our state's dairy producer member organization, representing Kansas' 650 dairy producers. We support SB 59 and believe that this legislation is noncontroversial. We have reviewed the bill ourselves and with staff from the Kansas Department of Agriculture and understand SB 59 to be primarily a necessary housekeeping chore.

The bill, as we understand it, consolidates fee funds, more clearly organizes the dairy statute, and cleans up language that dates back to the old Board of Agriculture.

Just because this bill is noncontroversial, however, does not mean it is not important to adopt this measure. The information in this bill is very important to our industry, because, among other things, these statutes define how dairy farms and processing plants are inspected and licensed by our department of agriculture. The inspection process is very important both to dairy producers and to consumers.

The dairy producers for whom I work had two questions about this legislation. Does it increase inspection fees? and Does it change the on-farm inspection process from the way it currently exists? The answer to both of those questions is "no". Having answered both of our questions to our satisfaction, the Kansas Dairy Association expresses its support for the Kansas Department of Agriculture and the changes the department seeks to make in the state dairy law contained in SB 59.

Thank you for considering this testimony in your deliberations.

Senate Agriculture Committee

Date *2-06-01*

Attachment # *3*



Johnson County, Kansas

Office of the County Appraiser

January 26, 2001

Senator Derek Schmidt
State House Room 143 North
Topeka, KS 66612

RE: SB 60

Dear Honorable Senator Schmidt;

The Kansas County Appraisers' Association supports SB 60 and the repeal of KSA 74-504d.

I am the legislative chair for the Kansas County Appraisers' Association and if you have any questions, please feel free to contact me at 913-715-0001.

Sincerely,

Paul A. Welcome, CAE
County Appraiser

✓ C: Ms. Rebecca Reed

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ADMINISTRATIVE OFFICE
(913) 715-0000
FAX
(913) 715-0010

JOHNSON COUNTY SQUARE
111 SOUTH CHERRY STREET, SUITE 2100
OLATHE, KANSAS 66061-3468

CUSTOMER SERVICE
(913) 829-9500
WEB SITE
WWW.JCOKS.COM/APPRaiser

Senate Agriculture Committee

Date 2-06-01

Attachment # ~~4~~



February 2, 2001

Senator Derek Schmidt
Kansas State Capitol
300 SW 10th Ave, Room 143-N
Topeka, Kansas 66612-1504

Dear Senator Schmidt:

This is to inform you that the Kansas Association of Counties is in support of the repeal of K.S.A. 74-504d as contained in SB 60. County appraisers that I have spoken to felt that it is no longer necessary to work with the Agriculture Statistics Division to collect farm county census data. In addition, the original goal of this law was to identify new producers. This method is not achieving this goal. Also, county appraisers find the process of mailing out surveys and acting as a collection point to be cumbersome and out of touch with more advanced technology.

This law may have been helpful in the 1970's; however, over twenty years later, it is obsolete.

Again, the Kansas Association of Counties supports the repeal of K.S.A. 74-504d.

Sincerely,

Judy A. Möler
General Counsel/Legislative Services Director

6206 SW 9th Terrace
Topeka, KS 66615
785•272•2585
Fax 785•272•3585
email kac@ink.org

Senate Agriculture Committee

Date 2-06-01

Attachment # 5



EXECUTIVE DIRECTOR
JIM SHEEHAN
Shawnee Mission

January 25, 2001

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**DIRECTOR OF
GOVERNMENTAL AFFAIRS**

FRANCES KASTNER

Senator Schmidt, Chairman
Senate Agriculture Committee

I appreciate your allowing me to detail our views on SB 61. The membership of the Kansas Food Dealers association includes manufactures, distributors and retailers of food products throughout Kansas.

Our members feel that very soon the functions of government now funded by tax dollars flowing to the general fund will become totally fee-funded with no tax dollars used to protect consumers' food purchases.

When I talk to people about the grocery store business I am always asked "Why does Kansas charge sales tax on food?" My answer is: "Sales tax is a major source of income going to the general fund, and inspections of products in the grocery store usually are paid out of the general fund."

If we see a proliferation of fee-funded inspections and registrations, I'll not be able to explain the sales tax on food so easily. Even worse, our customers will pay more for groceries because the fees have to be added to the cost of doing business.

A FEE is a HIDDEN TAX. We respectfully request you not try to save about \$7500 general fund expenses by imposing the \$50 fee on page five.

I will be happy to appear before your committee when you work the bill. Meanwhile if you have any questions please call me at 232-3310 or our Executive Director, Jim Sheehan, at (816) 384-3838.

Frances Kastner, Director
Governmental Affairs KFPA

Senate Agriculture Committee

Date 2-06-01