

MINUTES OF THE SENATE AGRICULTURE COMMITTEE.

The meeting was called to order by Chairperson Derek Schmidt at 8:30 a.m. on March 13, 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:

Doug Wareham, Kansas Fertilizer and Chemical Association  
Jamie Clover Adams, Secretary, Department of Agriculture  
Jere White, Kansas Grain Sorghum Producers Association and  
   Kansas Corn Growers Association  
Al LeDoux, Director, Kansas Water Office  
David Pope, Chief Engineer, Division of Water Resources,  
   Department of Agriculture

Others attending: See attached list

**Proposed substitute for SB 255 - Civil penalties for violation of the fertilizer act**

Dave Wareham, Kansas Fertilizer and Chemical Association (KFCA), testified in support of the **Proposed Sub for SB 255**, stating the legislation enables the Kansas Department of Agriculture (KDA) to better enforce fertilizer storage laws and containment regulations designed to protect against the contamination of soil, surface waters and groundwater in Kansas. It is imperative that KDA is equipped with adequate enforcement tools to enforce the laws and regulations they are charged with, whether they relate to weights and measures, pesticide use, water use, feed manufacturing or fertilizer use. KDA currently has civil penalty authority to ensure laws and regulations relating to weights and measures and pesticide use are enforced; **Proposed Sub for SB 255** provides KDA with the same civil penalty authority when dealing with fertilizer storage laws and containment regulations.

Mr. Wareham submitted an amendment which ensures that any penalties collected by KDA associated with enforcement of the Kansas Commercial Fertilizer Law be deposited in the fertilizer fee fund. Without the proposed amendment the penalties collected would be deposited in the State General Fund. (Attachment 1)

Mr. Wareham requested the Committee and the Senate pass the proposed legislation, holding it over the interim in order to provide the Secretary of KDA time to promulgate regulations regarding bulk liquid fertilizer tank requirements presently not protected by containment structures in Kansas. Mr. Wareham advised he had talked with the Kansas Corn and Sorghum Producers Association and the Kansas Corn Growers Association, who were interested in using the interim time to participated in the rules and regulation process to see if an agreement can be reached.

Jere White, Kansas Grain Sorghum Producers Association and Kansas Corn Growers Association, in responding to a question, stated that the Association is agreeable to the proposed legislation being held over until rules and regulations are promulgated.

Jamie Clover Adams, Secretary, Kansas Department of Agriculture (KDA), testified in support of **Proposed Sub for SB 255**, stating KDA needs the additional enforcement tool for the Kansas Commercial Fertilizer Law which encompasses fertilizer, anhydrous ammonia and bulk fertilizer containment.

Presently the Commercial Fertilizer Law provides KDA with the following enforcement tools: 1) product registration revocation, 2) product stop sale, 3) product misdemeanor/seizure, anhydrous & bulk

## CONTINUATION SHEET

fertilizer containment stop sale/stop use, and 4) anhydrous & bulk fertilizer containment misdemeanor/injunction. In FY 2000, KDA issued four bulk fertilizer containment stop use orders and 28 fertilizer stop sales from 936 samples. Currently, KDA is in a situation where use of the full range of the tools outlined is proving to be both time-consuming and ineffective. Specifically, a first order was issued in late December 1999 and formally advanced no fewer than four alternatives to the firm in the form of consent orders to avoid further administrative or judicial adjudication. The firm, however, continued to resist KDA efforts for bulk fertilizer containment compliance, and the matter is presently in district court under the criminal misdemeanor provisions of the statute. This experience has illustrated the need for other options.

**Proposed Sub for SB 255** provides an enforcement tool that will allow KDA to more effectively implement the Commercial Fertilizer Law. The proposed legislation gives the Secretary civil penalty authority of not more than \$5,000 per violation, paralleling penalties under the Federal Insecticide, Fungicide and Rodenticide Act, and provides for review of agency actions by the district court. (Attachment 2)

The Secretary, in responding to a question, stated there currently is approximately \$500,000 in the fertilizer fund. The fertilizer tonnage fee is assessed in the amount of \$1.67 per ton. Of that amount, \$1.40 goes to the state water plan fund, \$0.04 goes to the fertilizer research fund at Kansas State University and \$0.23 goes to the fertilizer fee fund at KDA. The KDA portion of the money, by law, can only be used for the purposes of administering the provisions of the Fertilizer Act.

There being no further conferees, the hearing was concluded.

The Chair informed the Committee that action on the bill is deferred until next week.

### **HB 2316 - Civil penalties for violations of water laws and orders; terms, conditions and limitations imposed by the chief engineer of the division of water resources**

Jamie Clover Adams, Secretary, KDA, testified in support of **HB 2316**. Ms. Adams stated KDA needs an enforcement mechanism that is more efficient and effective than is currently available to enforce the provisions of the Kansas Water Appropriations Act.

Ms. Adams testified that **HB 2316** spells out consequences of violating the Water Appropriations Act, provides innovative ways to give flexibility to individual water right holders, and increases responsibility in establishing adequate administrative control over the appropriation of water to prevent injury to established uses and the underlying source of water supply.

Ms. Adams submitted an amendment for consideration clarifying existing law regarding the sole authority of the chief engineer to appropriate water in Kansas. (Attachment 3)

Al LeDoux, Kansas Water Office, testified in support of **HB 2316**, stating enforcement of the Water Appropriation Act is consistent with the goals, policies, and objectives of the Kansas Water Plan. (Attachment 4)

David Pope, Chief Engineer, Division of Water Resources, KDA, testified in support of **HB 2316**, stating that permits and water rights have conditions and limitations imposed on them to protect other water users from impairment and to ensure that water is available to all citizens. Implementing **HB 2316**, improves the division of water resource's ability to administer the Kansas Water Appropriation Act by providing a tool to more effectively and efficiently enforce provisions of the act.

Currently the court has the authority to require the enforcement of the administrative order of the chief engineer for violation of water right permits; however, there is no monetary penalty association with noncompliance. Court enforcement options include: 1) bringing of civil enforcement action of administrative orders, 2) request the county attorney to conduct criminal proceedings as a class C misdemeanor, 3) request the attorney general to bring an enforcement action in the name of the state.

**HB 2316** provides KDA a direct, consistent and effective method of assessing civil penalties for compliance violations. The bill establishes limits on penalties. Enforcement actions follow current rules established in the chief engineer's enforcement regulation, except that an administrative fine or suspension

## CONTINUATION SHEET

become options. The options authorized by **HB 2316** replaces the time-consuming, costly and often inconsistent court procedures currently used to assess penalties. A penalty matrix with violation categories arranged in order of severity is envisioned depending on damage to others, the impact on water supplies, and the cost to the public. Three categories of violations are envisioned based on the violator's circumstances and past actions, these include: 1) least severe penalty - circumstances indicate the violation is not apparent without observation and possibly measurements; 2) more severe penalty - violator had knowledge or should have had knowledge, that a violation occurred, yet made no effort to correct the violation; and 3) most severe civil penalty - repeat offenders who have ignored prior legal notice of an offense; made an obvious effort to circumvent or avoid compliance requirements, or, made an attempt to cover up an obvious violation.

Mr. Pope stated water appropriations are nearing the limit of available water supplies, and it is essential that KDA have enforcement options in place to protect water users. **HB 2316** improves the ability of KDA to bring enforcement actions against violators, and brings a more direct and consistent approach to resolving violations of the Kansas Water Appropriation Act. The proposed penalties provide a meaningful enforcement tool in circumstances where currently none exist, and repeat offenders hopefully will be deterred by the threat of enhanced penalties. (Attachment 5)

The hearing was continued to Tuesday, March 20, 2001.

**Upon motion by Senator Downey, seconded by Senator Umbarger, the Minutes of the Meetings of March 6<sup>th</sup> and March 7<sup>th</sup>, 2001, were unanimously approved.**

The meeting adjourned at 9:30 a.m.

The next meeting is scheduled for March 14, 2001.

# SENATE AGRICULTURE COMMITTEE GUEST LIST

DATE: March 13, 2001

NAME	REPRESENTING
Doug Wareham	KUFA/KFOA
Jen White	KCGA - KGSFA
Kerri Ebert	KS Dairy Association
George Bush	Ks. Dept. of Agric.
Shao A. Krizic	KS. PEST CONTROL ASSOC.

# KANSAS FERTILIZER AND CHEMICAL ASSOCIATION

Statement of the

Kansas Fertilizer and Chemical Association

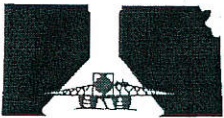
Presented to the

Senate Agriculture Committee

Senator Derek Schmidt, Chair

Regarding Substitute for Senate Bill 255

March 13, 2001



KFCA IS  
COMMITTED TO  
PROFESSIONAL  
DEVELOPMENT  
AND BUSINESS  
VIABILITY FOR  
THE PLANT  
NUTRIENT AND  
CROP  
PROTECTION  
INDUSTRY IN  
KANSAS.

Senate Agriculture Committee  
Date *March 13, 2001*

Attachment # *1-1 thru 1-3*



Chairman Schmidt and members of the Senate Agriculture Committee, my name is Doug Wareham and I serve as Vice President, Government Affairs for the Kansas Fertilizer and Chemical Association (KFCA). KFCA is the professional trade association for the state's plant nutrient and crop protection industry. KFCA's over 550 members are primarily retail dealers scattered across Kansas which sell and custom apply crop protection chemicals and fertilizers for Kansas producers.

I appreciate the opportunity to appear in support of Substitute for S.B. 255 and before I outline our support for this measure, let me first thank this committee for introducing what we believe is a very important topic that requires your immediate attention. As Mr. Jerry Boettcher and I indicated to this committee 2 weeks ago, our membership has grown increasingly concerned over the significant number of bulk liquid fertilizer storage tanks that require, but fail to be protected by, containment structures in Kansas. During the past week, we have held meetings with Secretary Adams on this matter and understand that she believes the authority provided by Substitute for S.B. 255 will enable the Kansas Department of Agriculture (KDA) to better enforce fertilizer storage laws and containment regulations designed to protect against the contamination of soil, surface waters and groundwater in Kansas.

We believe it is imperative that the KDA be equipped with adequate enforcement tools to enforce the laws and regulations they are charged with, whether they relate to weights and measures, pesticide use, water use, feed manufacturing or fertilizer use. I want to once again state for the record, that the KDA currently has civil penalty authority to ensure laws and regulations relating to weights and measures and pesticide use are enforced in Kansas. It also appears that House Bill 2316 and Senate Bill 334 are well on their way to providing KDA with civil penalty authority to better enforce the commercial feeding stuffs law and the Kansas Water Appropriation Act.

After conferring with our organization's steering committee, we do have one amendment we would like to propose for your consideration this morning. I have attached language that would ensure that any penalties (funds) collected by KDA associated with enforcement of the Kansas Commercial Fertilizer Law would be deposited in the fertilizer fee fund. It is my understanding that penalties collected by KDA for enforcement of the weights and measures law are kept with the Department and we simply ask for that same consideration. Without this language, it is my understanding that any penalties (funds) collected would go to the State General Fund.

Thank you for the opportunity to appear in support of Substitute for S.B. 255 and I would be happy to answer any questions.

**SB 255 - Civil Penalty Amendment for Fertilizer Violations; Annual Inspection**

*New Sec. 1.* K.S.A. 2-1201b is hereby amended to read as follows: 2-1201b. (a) It shall be deemed a violation of this act for any person to sell or distribute in this state any custom blended fertilizer who does not hold a valid license as required by this act; or fail to comply with the requirements of K.S.A. 2-1201a hereof, and the provisions of K.S.A. 2-1208, except subsection (1) (a), and the penalties as provided therein shall apply.

*(b) Any person or custom blender who violates any provision of article 12 of chapter 2 of the Kansas Statutes Annotated and amendments thereto or the rules and regulations adopted, may incur a civil penalty in an amount not more than \$5,000 per violation, and in the case of a continuing violation every day such violation continues may be deemed a separate violation. Such civil penalty may be assessed in addition to any other penalty provided by law. Any civil penalty assessed pursuant to this subsection is subject to review in accordance with the act for judicial review and civil enforcement of agency actions.*

*(c) The secretary shall remit all moneys received under this section to the state treasurer at least monthly. Upon receipt of any such remittance, the state treasurer shall deposit the entire amount thereof in the state treasury and the same shall be credited to the fertilizer fee fund.*



STATE OF KANSAS

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KANSAS DEPARTMENT OF AGRICULTURE

Senate Agriculture Committee

March 13, 2001

Testimony Regarding Senate Substitute for Senate Bill 255

Jamie Clover Adams, Secretary of Agriculture

Mr. Chairman and members of the committee, I am Jamie Clover Adams, Kansas Secretary of Agriculture. I appear today to support Senate Substitute for Senate Bill 255. I appreciate the opportunity to provide information on needed enforcement tools for the Kansas Commercial Fertilizer Law that encompasses fertilizer, anhydrous ammonia and bulk fertilizer containment.

Background

The Commercial Fertilizer Law provides the Kansas Department of Agriculture (KDA) with the following enforcement tools:

*Product Registration Revocation.* The Secretary is authorized to revoke a product registration if the tonnage fee is not paid. A penalty of \$5 per day of violation must be assessed against the registrant and they will be unable to sell fertilizer in Kansas. (K.S.A. 2-1205)

*Product Stop Sale.* The Secretary may issue and enforce a stop sale order against any commercial fertilizer which is not registered, is not labeled as required, is misbranded or bears a false or misleading statement on the registration application, the label or accompanying advertising. The stop sale order prohibits further sale and movement of the fertilizer. The stop sale is subject to review in accordance with the act for judicial review and civil enforcement of agency actions. (K.S.A. 2-1206)

*Product Misdemeanor / Seizure.* Any person who violates the act is guilty of a misdemeanor and must be fined not more than \$100 for the first violation. A second violation carries a mandatory fine between \$100 and \$500. Any commercial fertilizer not in compliance with the act can be deemed a nuisance and is subject to seizure in a proceeding before the court. (K.S.A. 2-1208)

Senate Agriculture Committee

Date March 13, 2001

Attachment # 2-1 thru 2-2



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*Anhydrous & Bulk Fertilizer Containment Stop Sale / Stop Use.* The Secretary may issue and enforce a stop sale or stop use order against any facility or equipment used for storage, handling or transportation of anhydrous ammonia or bulk fertilizer containment not in compliance with the act. The stop sale or stop use is subject to review in accordance with the act for judicial review and civil enforcement of agency actions. (K.S.A. 2-1222, K.S.A. 2-1232)

*Anhydrous & Bulk Fertilizer Containment Misdemeanor / Injunction.* Any person who violates the anhydrous ammonia or bulk fertilizer containment provisions is guilty of a misdemeanor and must be fined not more than \$500. The county attorney can file a petition in the district court and ask for an injunction. (K.S.A. 2-1219, K.S.A. 2-1231)

**Effectiveness of Current Enforcement Tools**

In fiscal year 2000, KDA issued four bulk fertilizer containment stop use orders and 28 fertilizer stop sales from 936 samples. KDA is currently in a situation where use of the full range of the tools outlined above is proving to be both time-consuming and ineffective. Specifically, we issued our first order in late December 1999 and formally advanced no fewer than four alternatives to the firm in the form of consent orders to avoid further administrative or judicial adjudication of the matter. However, the firm continued to resist our efforts for bulk fertilizer containment compliance, and we are now in district court under the criminal misdemeanor provisions of the statute. This experience illustrates the need for other options. Even if we do prevail, the firm will be required only to come into compliance and pay up to a \$500 fine, yet it has continued to operate, which puts our environment at risk and other firms at a competitive disadvantage.

**Provisions of Senate Substitute for SB 255**

Senate Substitute for SB 255 provides an enforcement tool we believe will allow us to more effectively implement the Commercial Fertilizer Law. Specifically, the bill gives the Secretary of Agriculture civil penalty authority of not more than \$5,000 per violation, which parallels penalties under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). It also provides for review of agency actions by the district court. Civil penalties which parallel FIFRA are important because many facilities use shared containment for both fertilizer and pesticides. Enforcement will be difficult if penalties did not correspond in these situations.

I appreciate the opportunity to appear in support of Senate Substitute for SB 255. I will be glad to answer your questions at the appropriate time.

STATE OF KANSAS

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KANSAS DEPARTMENT OF AGRICULTURE

**Senate Agriculture Committee**

**March 13, 2001**

**Testimony Regarding HB 2316**

**Jamie Clover Adams, Secretary of Agriculture**

Mr. Chairman and members of the committee, I am Jamie Clover Adams, Kansas Secretary of Agriculture. I appear today to support House Bill 2316 and the testimony of David Pope. We appreciate this opportunity to provide information on needed enforcement tools for the Kansas Water Appropriations Act.

As you know, the Kansas water resource is a mature resource and, as such, it requires a set of regulatory tools different from those that were necessary 50 years ago. As we look for new and innovative ways to give flexibility to individual water right holders, we also have an increased responsibility to establish adequate administrative control over the appropriation of water to prevent injury to established uses and the underlying source of water supply. Further, it is important that consequences of a violation of the Act are clearly spelled out as they are in HB 2316. In this way, everyone knows what the rules are and how they will be applied. They also can have increased confidence that the priority of their water right will be protected.

On a more practical note, the Kansas Department of Agriculture needs an enforcement mechanism that is more efficient and effective than is currently available to enforce the provisions of the Kansas Water Appropriations Act. As I am sure you are aware, we face stagnate resources and must find new ways to continue to effectively fulfill our statutory obligations.

Attached to my testimony is the amendment I discussed with each of you in early February to clarify existing law regarding the sole authority of the chief engineer to appropriate water in Kansas.

I appreciate the opportunity to appear in support of HB 2316. I also respectfully request the inclusion of the attached amendment. I will be glad to answer any questions you may have at the appropriate time.

Senate Agriculture Committee

Date *March 13, 2001*

Attachment #

*3-1 thru 3-2*



STATE OF KANSAS

BILL GRAVES, GOVERNOR

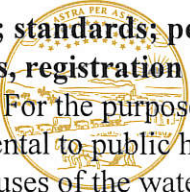
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**65-171d. Prevention of water pollution; standards; permits; exemption; orders; hearings; appeals; fees; confined feeding facilities; registration prior to construction, separation distance requirements, exemptions.**

(a) For the purpose of preventing surface and subsurface water pollution and soil pollution detrimental to public health or to the plant, animal and aquatic life of the state, and to protect beneficial uses of the waters of the state and to require the treatment of sewage predicated upon technologically based effluent limitations, the secretary of health and environment shall make such rules and regulations, including registration of potential sources of pollution, as may in the secretary's judgment be necessary to: (1) Protect the soil and waters of the state from pollution resulting from underground storage reservoirs of hydrocarbons and liquid petroleum gas; (2) control the disposal, discharge or escape of sewage as defined in K.S.A. 65-164 and amendments thereto, by or from municipalities, corporations, companies, institutions, state agencies, federal agencies or individuals and any plants, works or facilities owned or operated, or both, by them; and (3) establish water quality standards for the waters of the state to protect their beneficial designated uses. *In no event shall the secretary's authority be interpreted to include authority over the beneficial use of water, water quantity allocations, protection against water use impairment of a beneficial use, or any other function or authority under the jurisdiction of the Kansas Water Appropriation Act and amendment thereto, K.S.A. 82a-701 et seq.*

(b) The secretary of health and environment may adopt by reference any regulation relating to water quality and effluent standards promulgated by the federal government pursuant to the provisions of the federal clean water act and amendments thereto, as in effect on January 1, 1989, which the secretary is otherwise authorized by law to adopt.

(c) For the purposes of this act, including K.S.A. 65-161 through 65-171h and K.S.A. 2000 Supp. 65-1,178 through 65-1,198, and amendments thereto, and rules and regulations adopted pursuant thereto:

(1) "Pollution" means: (A) Such contamination or other alteration of the physical, chemical or biological properties of any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to the plant, animal or aquatic life of the state or to other designated beneficial uses. *Such contamination or other alteration shall be caused by a discharge from a discreet point source of pollution into the waters of the state and does not include any culvert, dam, channel change, levee, or other water structure;* or (B) such discharge as will or is likely to exceed state effluent standards predicated upon technologically based effluent limitations.

STATE OF KANSAS



Bill Graves, Governor

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**TESTIMONY TO  
SENATE AGRICULTURE COMMITTEE  
ON HOUSE BILL 2316  
March 13, 2001  
By Al LeDoux, Kansas Water Office**

The Kansas Water Office supports House Bill 2316. Enforcement of the Water Appropriation Act is consistent with the goals, policies, and objectives of the Kansas Water Plan, especially those provisions in House Bill 2316 related to:

- Water conservation plans,
- Installation or maintenance of a water measurement devise,
- Maximum annual quantity or rate of diversion, and
- Minimum desirable streamflow orders.

As a rule, the Kansas Water Plan includes a recommendation that emphasizes a voluntary and incentive based approach to water management and conservation. Examples are: technical assistance on conservation plan preparation and the importance of metering through the Kansas Water Office, financial assistance on irrigation efficiency measures and retrofitting meters to read in acre feet through the State Conservation Commission, and information outreach on irrigation scheduling and best management practices for conservation water use through the Kansas State University Research and Extension.

However, there is a place for enforcement. By way of example, the Kansas Water Authority adopted a position on water rights banking that states that water right enforcement is critical in the operation of a water right bank for both the participants in the bank and those who do not participate. There would be little incentive to lease available water from a bank if there were no, or very light, penalties associated with overpumping. The Kansas Water Office testified yesterday in the Senate Natural Resources Committee that House Bill 2316 should be a companion bill to House Bill 2047, Water Rights Banking.

I ask for your support of House Bill 2316. Thank you.

Senate Agriculture Committee

Date *March 13, 2001*

Attachment # *4*



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KANSAS DEPARTMENT OF AGRICULTURE

Senate Committee on Agriculture

March 13, 2001

Testimony Regarding House Bill 2316

David Pope, Chief Engineer  
Division of Water Resources, Kansas Department of Agriculture

Chairperson Schmidt and members of the committee, thank you for the opportunity to present testimony in support of House Bill 2316 as amended. I am David L. Pope, and I appear on behalf of the Kansas Department of Agriculture.

Diverting water for beneficial uses other than domestic ones requires a permit or water right. These permits and water rights have conditions and limitations imposed on them to protect other water users from impairment and to ensure that water is available to all citizens. Water users who exceed their limits, or violate conditions of their water rights, may jeopardize other users with a right to access a water supply.

Total water appropriations are approaching the volume of water available for use, so it is increasingly important for regulatory authorities to effectively enforce compliance with the conditions and limitations of existing water rights. Implementing this bill will improve the division of water resource's ability to administer the Kansas Water Appropriation Act by giving us the tools we need to more effectively and efficiently enforce provisions of the Act.

Currently, the Act provides an economic incentive to continue to violate conditions and limitations of water right permits. Court enforcement of the administrative orders of the chief engineer usually require the violator to comply, however, there is no monetary penalty associated with noncompliance. Court enforcement options include:

1. Bring civil enforcement action of administrative orders before the district court pursuant to K.S.A. 77-624 *et seq.*; the agency files an action to enforce an order and the court decides whether to compel the violator to comply with the order.
2. Request that the county attorney conduct criminal proceedings pursuant to K.S.A. 82a-728 as a class C misdemeanor; the county attorney decides whether or not the case will proceed, and the specific action or penalty is decided by the district court.

Senate Agriculture Committee  
Date *March 13, 2001*

Attachment # *5-1 thru 5-5*

3. Request the attorney general to bring an enforcement action in the name of the state, pursuant to K.S.A. 82a-706d; the appropriate district court decides whether to enjoin the unlawful acts claimed by the state.

House Bill 2316 gives KDA a direct, consistent and effective method to assess civil penalties for compliance violations. Upon any violation of the Water Appropriation Act, the chief engineer may impose a fine or suspension. The bill establishes limits on penalties that may be assessed. It is KDA's intent to set, by regulation, specific penalties for specific categories of violations based on the possible impact the violations have on water resources, on other appropriators and whether the owner is responsive to agency actions. This bill, combined with appropriate regulations adopted by the chief engineer, will provide a method for consistent and timely response to compliance violations, which should deter individuals from repeating or continuing violations.

Enforcement actions will follow current rules established in the chief engineer's enforcement regulation (K.A.R. 5-14-1; copy attached), except that an administrative fine or suspension will become options. Administrative and enforcement steps in this regulation include:

1. An investigation of suspected violations and a written report of the investigation results is prepared by the chief engineer. [K.A.R. 5-14-1(a)(b)(c)]
2. An order is issued describing the violation, the steps required to correct it and a time frame to be in compliance. [K.A.R. 5-14-1(d)(2)]
3. A conference hearing before the chief engineer, or his designee, may be requested to appeal the order, but it must be requested within 15 days. An order is either sustained, rescinded, or alternative action is required. [K.A.R. 5-14-1(d)(2)(E)]
4. If a violator fails to correct violations as ordered, further enforcement action may be taken, such as an order to cease the illegal act or diversion of water. [K.A.R. 5-14-1(f)]

At step four, options authorized by House Bill 2316 will replace the time-consuming, costly and often inconsistent court procedures currently used to assess penalties. We envision a penalty matrix with violation categories arranged in order of severity depending on their damage to others, impact on water supplies, or their cost to the public. However, before assessing a civil penalty, the chief engineer will review the suspected violator's compliance history. Three categories of violation are envisioned based on the violator's circumstances and past actions. These include:

1. The least severe penalties would be assessed when circumstances indicate the violation would not be apparent without some observation, and possibly measurements, and the owner or water user was previously informed of a similar violation.

2. More severe penalties would be assessed if the violator had knowledge, or it is reasonable to expect the violator had knowledge, a violation was occurring, yet he or she did not make a reasonable effort to correct it.
3. The most severe civil penalties would be assessed on repeat offenders who have ignored prior legal notice of an offense; made an obvious effort to circumvent or avoid compliance requirements; or, made an attempt to cover up an obvious violation. The division of water resources could, as a last resort, suspend a water right, when suspension is warranted by repeat or egregious violations.

Water appropriations are nearing the limit of available water supplies, so it is essential that KDA has enforcement options in place to protect water users. This bill improves KDA's ability to bring enforcement actions against violators, and it will bring a more direct and consistent approach to resolving violations of the Kansas Water Appropriation Act. It is needed now to supplement KDA's current enforcement activities aimed at ending blatant and recurring overpumping, where we have encountered a few individuals who consider it to their benefit to resist our regulatory efforts. The proposed penalties provide a meaningful enforcement tool for KDA in circumstances where currently none exist, and repeat offenders will be deterred by the threat of enhanced penalties. These repeat offenders challenge our determination and ability to enforce compliance. Also, effective enforcement capability will be essential if we are to implement other water management alternatives, such as five-year allocations, water banking, the Walnut and Rattlesnake creek basin special management areas, and other, more innovative approaches, where water use restrictions must be enforced if they are to be successful.

Thank you for the opportunity to provide testimony in this matter. I will be glad to answer any questions you may have.

## REGULATION ON ENFORCEMENT

**K.A.R. 5-14-1. Enforcement.** (a) Except as set forth in subsection (i), the procedure set forth below shall be followed whenever enforcement action is taken by the chief engineer after becoming aware that a person may be performing any of the following:

- (1) Violating any provision of K.S.A. 82a-701 et seq., and amendments thereto;
  - (2) violating any provision of a regulation adopted pursuant to that act; or
  - (3) violating a term, condition, or limitation of an approval of application or water right.
- (b) The alleged violation shall be investigated by the chief engineer.
- (c) A written report of the investigation shall be prepared by the chief engineer. This report shall include any documents regarding the matter that were relied upon or prepared by the chief engineer. This report shall be made a part of the official record of the chief engineer. If an approval of application or a water right is involved, the report shall be made an official part of that file.
- (d) (1) If the investigation shows that no violation has occurred or that enforcement action is not warranted, no further enforcement action shall be taken at that time.
- (2) If the investigation determines that a violation has occurred, an order shall be issued by the chief engineer. The owner or owners of the approval of application or water right, as shown in the records of the chief engineer, shall be served by delivering a copy in person or sending a copy of the order by restricted mail. The order shall specify the following:
- (A) What the violation is;
  - (B) what actions are necessary to correct the violation;
  - (C) what a reasonable time is in order to correct the violation. Extensions of time to correct a violation may be granted by the chief engineer if good cause is shown by the violator or owner;
  - (D) that the order will become effective immediately; and
  - (E) that a hearing may be requested within 15 days of the issuance of the order. The request for a hearing may include a request for a stay of the order. If the person shows good cause why a stay should be granted, a stay may be granted by the chief engineer.
- (e) If the violation is corrected within the time specified by the chief engineer, the violator shall notify the chief engineer. An inspection shall be conducted by the chief engineer to determine if the violation has been corrected. If the violation has been corrected, the diversion of water may continue within the terms, conditions, and limitations of the approval of application or water right.
- (f) If the violation is not corrected within the time specified by the chief engineer, an order requiring that unauthorized or illegal diversion of water cease until the violation is corrected shall be issued by the chief engineer.
- (g) If the violator ceases diversion of water and then corrects the violation, the violator shall notify the chief engineer when the violation is corrected. The diversion works and the authorized place of use, as appropriate, shall be inspected by the chief engineer to determine if the violation has been corrected. If the chief engineer determines that the violation has been corrected, the order prohibiting diversion of water shall be rescinded by the chief engineer as soon as possible. When the owner or violator receives notice from the chief engineer that the order prohibiting the diversion of water has been rescinded, the diversion of water may recommence.



- (h) (1) Any of the actions listed in paragraph (h) (2) may be taken by the chief engineer if the violator performs any of the following acts and fails to cease the diversion of water as ordered by the chief engineer:
- (A) Violates any provision of K.S.A. 82a-701 et seq., and amendments thereto;
  - (B) violates any provision of a regulation adopted pursuant to that act; or
  - (C) violates a term, condition, or limitation of an approval of application or a water right.

(2) If the violator performs any act listed in paragraph (h)(1), any of the following actions may be taken by the chief engineer:

- (A) Bring an action to enforce the orders of the chief engineer pursuant to the act for judicial review and civil enforcement of agency actions, K.S.A. 77-624 et seq., and amendments thereto;
- (B) request the attorney general to bring an action in the name of the state of Kansas;
- (C) request that criminal proceedings be brought pursuant to K.S.A. 82a-728, and amendments thereto;
- (D) enter into a consent order with the violator specifying the remedial actions that shall be taken by the violator;
- (E) take any other legally permissible enforcement action; or
- (F) any combination of the above actions.

(i) The provisions of this regulation shall not apply to any actions taken by the chief engineer pursuant to K.S.A. 82a-706b, and amendments thereto, to enforce water right priorities and to prevent direct impairment by either of the following:

- (1) Junior water rights; or
- (2) illegal diversions of water.

(j) After the violator has been issued an order as specified in subsection (f), the violator may request an administrative hearing before the chief engineer in accordance with the provisions of K.A.R. 5-14-2. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-706, 82a-706b, 82a-706d, and 82a-728; effective Sept. 22, 2000.)