

MINUTES OF THE HOUSE COMMITTEE ON ENVIRONMENT.

The meeting was called to order by Chairperson Joann Freeborn at 3:30 p.m. on February 19, 2002 in Room 231-N of the Capitol.

All members were present except: Representative Jeff Peterson - excused

Committee staff present: Emalene Correll, Kansas Legislative Research Department  
Raney Gilliland, Kansas Legislative Research Department  
Mary Torrence, Revisor of Statute's Office  
Mary Ann Graham, Committee Secretary

Conferees appearing before the committee: Bill Bider, Director, Bureau of Waste Management, KS Department of Health and Environment, 1000 SW Jackson, Ste 320, Topeka, KS 66612-1366  
Leslie Kaufman, Associate Director, Public Policy Division, Kansas Farm Bureau, 2627 KFB Plaza, Manhattan, KS 66503-8508  
M. S. Mitchell, Chairman, Kansas Building Industry Association, 2206 SW 29<sup>th</sup> Terr., Topeka, KS 66611  
Kerri Ebert, Executive Secretary, KS Dairy Association, 4210 Wamtehu Drive, Wamego, KS 66547  
Sharon Falk, Manager, Big Bend Groundwater Management District #5, PO Box 7, Stafford, KS 67578  
Pat Lehman, Groundwater Management District #4, PO Box 3510, Lawrence, KS 66046  
Gary Blackburn, Director, Bureau Environmental Remediation, KS Department Health and Environment, 1000 SW Jackson, Ste 410, Topeka, KS 66612  
Guen Easley, Assistant Attorney General, Memorial Hall, Topeka, KS 66612

Others attending: See Attached Sheet

Chairperson Joann Freeborn called the meeting to order at 3:30 p.m. She announced that the Environment Sub-Committee on **HB2703** - Concerning Classes of construction and demolition landfills, has a meeting scheduled for 7:00 a.m., Wednesday, February 20, in room 423-S. Sub-Committee members are; Rep. Joann Freeborn, Chairperson; Rep. Don Myers; Rep. Bill Light; Rep. Laura McClure; and Rep. Dan Thimesch.

Rep. Becky Hutchins announced that the Environment Sub-Committee on **SB264** - Concerning the equus beds GMD #2; relating to the powers, duties and operation of the district, has a meeting scheduled on adjournment of the House Agriculture Committee, Wednesday, February 20, in room 423-S.

The Chairperson opened **HB2686** for discussion and possible action.

**HB2686: Solid waste tonnage fees; lower fee for industrial waste disposed of at landfill operated by the generator of the waste.**

Raney Gilliland, Kansas Legislative Research Department, reviewed the proposed substitute bill.

Bill Bider, Director, Bureau of Waste Management, KDHE, reviewed changes relevant to the bill. ( See attachment 1)

Rep. Vaughn Flora made a motion to adopt the proposed substitute bill. Rep. Dan Johnson seconded the motion. Motion carried.

Rep. Vaughn Flora reviewed an amendment submitted to the committee by Kansas Cement Council, (A) "Not

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less than \$1,000 nor more than \$1,500 for any such disposal area which is a monofill for disposal of cement kiln dust from the manufacture of portland and masonry cement.” Bill Bider responded to the amendment submitted by the Cement Council.

Rep. Vaughn Flora made a motion to adopt the amendment by the Kansas Cement Council. Rep. Bruce Larkin seconded the motion. Motion failed.

Rep. Don Myers made a motion to adopt the technical and clarifying language on page 8 of the substitute bill. Rep. Becky Hutchins seconded the motion. Motion carried.

Rep. Vaughn Flora made a motion to pass the substitute bill as amended. Rep. Don Myers seconded the motion. Motion carried. Rep. Bill Light will carry the bill on the House Floor.

The Chairperson welcomed Guen Easley, Assistant Attorney General, to the committee. She addressed the committee on Attorney General Opinion No. 99-44, in reference to Waters and Watercourses–Groundwater Management Districts–District Powers; Rules and Regulations. Groundwater Management Districts (GMDs) may continue, after March 1, 2000, to adopt local standards and policies as authorized by the Kansas Groundwater Management District Act as long as the standards and policies adopted are not of general application and do not have the effect of law. GMDs may also continue to develop local standards for submission to the Chief Engineer in accordance with New Section 12 of 1999 House Substitute for Senate Bill No. 287. For this reason the legislation does not conflict with the authority of GMDs to adopt and enforce local standards and policies pursuant to KSA 82a-1028(n). The legislation requires consolidation into rule and regulation those standards and policies of general application which have the effect of law, and it voids those standards and policies not in compliance with this requirement.

The Chairperson opened the hearing on **HB2710**.

**HB2710: Certain standards, policies and orders of groundwater management districts declared void.**

Leslie Kaufman, Kansas Farm Bureau, was welcomed. She testified in support of the bill and believes this bill seeks to close a loophole in the existing law and fully implement what they believe to be the original intent of existing requirements that GMDs submit their policies and guidelines for promulgation. It is their belief that the intent of that provision was to ensure that GMDs implemented their procedures fairly, that the regulated community was assured of the requirements/restrictions placed on them by the GMD and that the policy making process for GMDs was open and provided for public input, particularly by stakeholders. (See attachment 2)

Mitch Mitchell, Kansas Building Industry Association, was welcomed. He testified in support of the bill and believes this bill simply reiterates what they believe to already be law pursuant to **SB287** in 1999 - that if policies of groundwater management districts that are of general application within the district and have the effect of law are not contained in rules and regulations, they are void. This question was posed to the Attorney General, whose answer in AG Opinion 99-44 states, “(**SB287**) requires consolidation into rule and regulation those standards and policies of general application which have the effect of law and it voids those standards and policies not in compliance with this requirement.” (See attachment 3)

Kerri Ebert, Kansas Dairy Association, was welcomed. She testified in support of the bill and believes the question this bill addresses has arisen where groundwater management districts have submitted their policies to the Chief Engineer in compliance with **SB287** from 1999. What happens when those policies are submitted but not promulgated by the Chief Engineer? The Dairy Association believes the answer is clear from the legislative intent in **SB287** and also from the Supreme Court Ruling in the case of *Bruns v Kansas State Board of Technical Professions*, that those policies that are of general application and have the force and effect of law must be in statute or regulation, not just internal policies that have not been formally adopted pursuant to KSA Chapter 77, Article 4, regarding procedure for rules and regulations. (See attachment 4) Discussion followed.

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at 3:30 p.m. on February 19, 2002.

Sharon Falk, Groundwater Management District #5, was welcomed to the committee. She testified in opposition to the bill and believes this bill was created to clarify the language in KSA 82a-1903, which relates to standards and policies of the GMDs. She is not sure this bill accomplishes any such clarification and believes the suggested language could even be interpreted as being redundant. Changes may be necessary in order to clarify the various interpretations, however, she believes a systematic approach should be developed to include the objectives of each governmental agency affected by these statutes, both local and state. (See attachment 5)

Pat Lehman, representing Groundwater Management District #1, #2, and #4, was welcomed. He testified in opposition to the bill. The groundwater management districts see the most important issue involved in the debate of this bill as being this: How can the state, in conjunction with the GMDs, most efficiently and effectively monitor and enforce all regulations and policies, all of which are either already state law or must be consistent with state law? They believe the citizens of Kansas deserve such a system. They also recognize that the current system is a little more sophisticated than usual and is a mixture of: (a) State generated regulations that apply within the GMDs; (b) GMD generated policies that are within the authority of KDHE or KCC, and which both the appropriate state agency and the GMD want monitored and or enforced by the state agency; (c) GMD generated policies that are within the authority of KDHE or KCC, and which both the appropriate state agency and the GMD want monitored and or enforced by the GMD; (s) GMD generated regulations that are within the authority of DWR, and which both DWR and the GMD want monitored and enforced by DWR; and (e) GMD generated regulations/policies that are within the authority of DWR, and which both DWR and the GMD want monitored and enforced by the GMD. (See attachment 6) Discussion followed.

The Chairperson closed the hearing on **HB2710** and opened hearing on **HB2830**.

**HB2830:**      **Environmental use controls; prohibition or restriction of activities on or use of property where contamination has occurred.**

Gary Blackburn, Director, Bureau Environmental Remediation, KDHE, was welcomed to the committee. He testified in support of the bill. The Kansas Department of Health and Environment works with responsible parties to address hundreds of contaminated properties throughout the state each year. Ideally, cleanup of these properties would return them to a condition allowing unrestricted use, such as use for residential development. In many instances, however, the time required to cleanup these properties may be years and the cost is often prohibitive. Many property owners simply can not afford the costs it would take to restore a property to pristine conditions. The proposal to establish Environmental Use Controls provides property owners and developers with a method of selecting less costly and time consuming cleanup solutions by establishing limits for the future property use. If a land development is intended for commercial or industrial use, a less restrictive cleanup standard may be used where future residential use is not intended. Under the proposed legislation, the property owner may apply for an Environmental Use Control as part of a site remediation plan. If approved, the property owner would complete the cleanup and place the agreed upon use restrictions on the property. Although it is very difficult to determine the number of property owners who may apply to participate in this program, the legislation is being supported without a request for additional staff. The contaminated sites that would participate in this program are likely to be those already being addressed through programs which are administered by the agency. This legislation provides an additional method of resolving the environmental risks these sites pose. (See attachment 7) Discussion followed.

Rick Bean, Chief, Remedial Section, Bureau Environmental Remediation, KDHE, was in attendance to answer questions concerning the proposed bill.

The Chairperson closed the hearing on **HB2830** and announced that final action may be taken on the bill in the next committee meeting.

The meeting adjourned at 5:40 p.m. The next meeting is scheduled for Thursday, February 21, 2002.

# HOUSE ENVIRONMENT COMMITTEE GUEST LIST

DATE: February 19

NAME	REPRESENTING
MARK SCHREIBER	Westar Energy
Sharon Falk	GMD #5
Dan Hattans	Hein Law firm.
Pat Lehman	GMD #4
Edward Rowe	League of Women Voters/KS
Lynn Rowe	
STACEY BINGHAM	WASHBURN UNIVERSITY - SOCIAL WORK DEPT.
SHARON BRUNKOW	WASHBURN UNIVERSITY SOCIAL WORK DEPT.
JOHN C. BOTTENBERG	Doffenbaugh
Chris Wilson	GMD 3
Andy Shaw	Waste Mgmt of KS
Vicki Mithel	Budget
Gene Easley	AG's office
Larry Kopley	Farmer - 54 Irr. Assoc
E. L. Moss	Ks Cement Council
TERRY LEATHERMAN	KCCI
Margaret Faust	Ks Water Office
Leslie Kaufman	Ks Farm Bureau
Dennie Kirl	Interested Citizens <sup>&amp; BOARD member</sup> Great Plains Foundation

Charles Benjamin

Kansas Sierra Club

Foundation



The information in this note is relevant

HB 2686

Bill Bider



William Bider

02/15/02 02:58 PM

To: schmidt@senate.state.ks.us, Joe Fund/Kdhe

cc: Ron Hammerschmidt/Kdhe, tyson@senate.state.ks.us, Pat Kuester/Kdhe

cc:

Subject: Probable annual Permit Renewal Fees for On-Site Industrial Landfills

Dear Senator Schmidt,

Following our discussion this morning, I worked with KDHE staff to estimate the average costs to KDHE of overseeing permitted on-site industrial landfills. As you know, the proposed substitute bill for SB 519 instructs KDHE to develop annual permit renewal fees in rules and regulations for these facilities ranging from \$1,000 to \$4,000. The fees are to be based upon landfill characteristics which impact the department's oversight costs.

We performed detailed calculations for two types of facilities: (1) a very simple landfill receiving inert waste such as foundry sand only and (2) a very complex landfill such as the cement kiln dust landfill which Ash Grove uses in Chanute. A summary of the department's typical annual costs for these two types of facilities follows:

	<u>Simplest Landfill</u>	<u>Complex Landfill</u>
Engineer/Permitting	\$528.29	\$ 713.77
Groundwater Monitoring	0	\$1,478.44
Financial Assurance Reviews	81.29	81.29
Administrative Costs	41.97	41.97
Inspections and Follow-Up	216.20	742.33
Central Office Inspection Reviews	37.73	37.73
Subtotal	\$905.	\$3,096
Indirect Transfers (20%)	\$181	\$ 619
Grand Total	\$1,086	\$3,715

Please note that these costs include salaries, fringes, operating costs, travel, laboratory testing, and a 20% overhead cost to cover indirect transfers from the fund which the legislature has recently implemented. A detailed cost breakdown by job tasks and staff positions (e.g. engineers, geologists, inspectors, etc.) is available and can be provided upon request.

From this data you can see that the range for annual renewal fees proposed in the bill is very appropriate for these types of landfills. I will FAX a copy of this note to Woody Moses since I do not have a e-mail address for him. Please let me know if you have any questions.

Bill Bider  
Director  
KDHE Bureau of Waste Management

House Environment  
2-19-02  
Attachment 1



## **Kansas Farm Bureau**

2627 KFB Plaza, Manhattan, Kansas 66503-8508 • 785.587.6000 • Fax 785.587.6914 • www.kfb.org  
800 S.W. Jackson, Suite 817, Topeka, Kansas 66612 • 785.234.4535 • Fax 785.234.0278

### **Public Policy Statement**

## **HOUSE COMMITTEE ON THE ENVIRONMENT**

**RE: HB 2710 -- clarifying that policies and/or orders of a groundwater management district must be enacted into rule and regulation to have the force and effect of law.**

**February 19, 2002  
Topeka, Kansas**

**Prepared by:  
Leslie Kaufman, Associate Director  
Public Policy Division  
Kansas Farm Bureau**

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Chair Freeborn and members of the House Environment Committee, thank you for the opportunity to appear today in support of HB 2710, clarifying that policies and/or orders of a groundwater management district (GMD) must be implemented into rule and regulation if they are to have the force and effect of law. I am Leslie Kaufman, Associate Director of Public Policy for Kansas Farm Bureau.

*KFB policy supports the Groundwater Management District Act and our members further clarified this support by refining policy language at our 83<sup>rd</sup> Annual Meeting this fall. The farm and ranch delegates added the new language cited below to our 2002 KFB Resolutions:*

***"We support efforts to ensure that policies or guidelines of groundwater management districts are only applicable once they have been finally adopted as a regulation through the rule making process."***

Additionally, our members added new language to our Farm Bureau policy on regulatory reform:

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Attachment 2*

***“Policies or guidelines of agencies, governmental bodies or quasi-governmental entities should be subject to a public input process. We prefer lawmaking by statute, but recognize public participation afforded under the current rulemaking process is preferable to imposing policies or guidelines as law.***

HB 2710 seeks to close a loophole in the existing law and fully implement what we believe to be the original intent of existing requirements that GMDs submit their policies and guidelines for promulgation. It is our belief that the intent of that provision was to ensure that GMDs implemented their procedures fairly, that the regulated community was assured of the requirements/restrictions placed on them by the GMD and that the policy making process for groundwater management districts was open and provided for public input, particularly by stakeholders.

As such, we respectfully request the committee act favorably on HB 2710.

Thank you.

*Kansas Farm Bureau represents grassroots agriculture. Established in 1919, this non-profit advocacy organization supports farm families who earn their living in a changing industry.*

# LEGISLATIVE TESTIMONY



2206 SW 29th, Terr., Topeka, KS 66611 ♦ 785-267-2936 Fax 785-267-2959 ♦ E-mail: janetstubbs@worldnet.att.net

## HOUSE ENVIRONMENT COMMITTEE

~~SB 264~~ HB 2710

February 19, 2002

### MADAM CHAIR AND MEMBERS OF THE COMMITTEE:

My name is M.S. Mitchell, Legislative Chairman of the Kansas Building industry Association. We appreciate the opportunity to comment today in support of H.B. 2710 and appreciate the Committee's introduction of this legislation at KBIA's request.

HB 2710 simply reiterates what we believe to already be law pursuant to SB 287 in 1999—that if policies of groundwater management districts that are of general application within the district and have the effect of law are not contained in rules and regulations, they are void. This question was posed to the Attorney General, whose answer in AG Opinion 99-44 states, "(S.B. 287) requires consolidation into rule and regulation those standards and policies of general application which have the effect of law and it voids those standards and policies not in compliance with this requirement."

The Groundwater Management District Act was adopted in the 1970's, providing for the GMD's to adopt policies and recommend them to the Chief Engineer for promulgation as regulations. (See K.S.A 82a-1028 (o).) KBIA concurs with the interpretation of Professor Wadley who indicated to you last week that it was legislative intent that policies would be recommended by the GMDs to the Chief Engineer, and that such policies would have to be adopted as rule and regulation prior to being enforced at the local level. In any event, we believe that both the Legislature and the Kansas Supreme Court have solidified the requirement that policies with the force and effect of law must be in rule and regulation through the passage of SB 287 during the 1999 Session and the Supreme Court ruling *Burns v. Kansas State Board of Technical Professions*, 255 Kan. 728, 877 P.2d 391 (1994).

The Supreme Court in the *Brunns* case said, "that K.S.A. 77-425 says that "(a)ny rule and regulation not filed and published as required by this act shall be of no force or effect." "We then concurred with the Court of Appeals reasoning that K.S.A. 77-415(4), defining rules and regulations, "characterizes a rule or regulation as a statement of policy of general application that has the effect of law." 255 Kan. At 733. We agreed with the Court of Appeals' finding that the BTP's internal policy was a "rule" or "regulation" as defined by statute (255 Kan. At 734) and held that the BTP treated the policy as having the effect of law.."

"The BTP's internal written policy is the type of requirement that should receive public dissemination."

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Attachment 3



The Kansas Building Industry Association believes that those requirements that are of general application and have the force and effect of law must be adopted through the rule and regulation process prescribed by state law. These requirements should be adopted in the daylight of the public process of development of regulations and available to all citizens as regulations are.

So why have we requested H.B. 2710, even though we believe the intent of S.B. 287 to be clear in this regard, as well as the *Bruns* decision? We have been told by some patrons of a groundwater management district that they understand S.B. 287 requiring submission of the policies was all about seeing that those policies were adopted as regulations, if appropriate, and that they would be void if not promulgated. We would hope to clarify this through H.B. 2710 and not through a court of law.

Another question arises as to when policies that have the force and effect of law, that have been submitted to the Chief Engineer, would become void if not promulgated as regulations. We believe that such policies would become void when the Chief Engineer promulgates regulations for that GMD, making a decision not to promulgate specific ones, for instance because they are out of the scope of his statutory authority to do so. Then, such policies would be void and unenforceable at the local level unless they were pursuant to some other authority, such as water quality regulations might be adopted pursuant to the authority of Kansas Department of Health and Environment.

KBIA has relied upon five authorities for our position in support of H.B. 2710. In chronological order, they are K.S.A. 82a-1028 (o) of 1978, the Supreme Court case of *Bruns v. Kansas State Board of Technical Professions of 1994*, S.B. 287 of 1999, AG Opinion 99-44, and finally Professor Wadley's testimony of last week.

Thank you for your consideration of H.B. 2710, and we ask that you report it favorable for passage.

**STATEMENT OF KANSAS DAIRY ASSOCIATION  
TO THE HOUSE ENVIRONMENT COMMITTEE  
REPRESENTATIVE JOANN FREEBORN, CHAIR**

**REGARDING H.B. 2710**

**FEBRUARY 19, 2002**

Madam Chair and Members of the Committee, I am Kerri Ebert, Executive Secretary of the Kansas Dairy Association, representing the more than 500 dairies in our state. We appear in support of H.B. 2710. The question this bill addresses has arisen where groundwater management districts have submitted their policies to the Chief Engineer in compliance with S.B. 287 from 1999. What happens when those policies are submitted but not promulgated by the Chief Engineer?

We believe the answer is clear from the legislative intent in S.B. 287 and also from the Supreme Court Ruling in the case of *Bruns v. Kansas State Board of Technical Professions*, that those policies that are of general application and have the force and effect of law must be in statute or regulation, not just internal policies that have not been formally adopted pursuant to KSA Chapter 77, Article 4, regarding procedure for rules and regulations.

We concur with Professor Wadley's testimony before this Committee last week that the groundwater management district authority is derived from the Chief Engineer's authority. Attached for your review is the contents page from Chapter 82a of the statutes, showing the placement of the GMD Act with laws regarding water appropriation. Professor Wadley described the relationship of GMDs to the Division of Water Resources as akin to a subagency. It seems clear that GMDs started out with the legislative intent to deal with issues of water quantity. Questions of the authority of the GMDs have arisen over the years as water quality concerns have arisen in addition to quantity. Policies of some GMDs have been developed to address these quality as well as quantity concerns. The GMD Act, S.B. 287 and the *Bruns* case all seem to point us in the direction of requiring those policies with the effect of law to be in regulation. The difficulty is that the Chief Engineer is charged with promulgating GMD regulations yet does not have the statutory authority to promulgating GMD regulations dealing with water quality.

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Attachment 4*

We have developed a flow chart for determining status of the GMD policies.

**1. Are the policies of internal nature, not of general application and not having the force of law?**

If so, then they do not have to be in rule and regulation.

If not, then they must be in regulation to be enforceable. Go to question 2.

**2. If no, have they been submitted to the Chief Engineer as required in S.B. 287?**

If yes, then they continue in effect until promulgated as regulations. Go to question 3.

If they have not been submitted, then they are void.

**3. If they have been submitted, what is the outcome of promulgation?**

If the Chief Engineer, approves the regulation, it is valid.

If the Chief Engineer denies the regulation, the policy is void – or – must be otherwise enforced, i.e. through a memorandum of agreement or delegation of authority from an appropriate agency.

Kansas Dairy Association supports H.B. 2710 as an effort to clarify for GMDs the law regarding their policies. We believe this would be helpful to the districts and their constituents, so that those affected can know what regulations pertain to them. We respectfully request you recommend H.B. 2710 favorable for passage.

## Chapter 82a.—WATERS AND WATERCOURSES

### Cross References to Related Sections:

Division of water resources, see 74-506a to 74-506d, 74-509, 74-510.

Watershed districts, see ch. 24, art. 12.

Kansas Water Authority, 74-2622, 74-2606 et seq.

Kansas Water Office, 74-2613 et seq.

### Law Review and Bar Journal References:

"Condemnation of Water and Water Rights in Kansas." John C. Peck and Kent Weatherby. 42 K.L.R. 827 (1994).

### Articles

1. POWER PLANT DAMS. 82a-101 to 82a-116.
2. NAVIGABLE WATERS. 82a-201 to 82a-218.
3. OBSTRUCTIONS IN STREAMS. 82a-301 to 82a-327.
4. COLLECTION, STORAGE AND IMPOUNDING OF WATERS. 82a-401 to 82a-412.
5. INTERSTATE COMPACTS AND AGREEMENTS. 82a-501 to 82a-529.
6. WATER DISTRICTS. 82a-601 to 82a-645.
7. APPROPRIATION OF WATER FOR BENEFICIAL USE. 82a-701 to 82a-734.
8. REGULATION OF WATERCRAFT AND ACTIVITIES RELATING TO WATER. 82a-801 to 82a-836  
(Not in active use).
9. STATE WATER RESOURCE PLANNING. 82a-901 to 82a-954.
10. GROUNDWATER MANAGEMENT DISTRICTS. 82a-1001 to 82a-1040.
11. BANK STABILIZATION PROJECTS. 82a-1101 to 82a-1103.
12. GROUNDWATER EXPLORATION AND PROTECTION. 82a-1201 to 82a-1219.
13. WATER STORAGE. 82a-1301 to 82a-1376.
14. WEATHER MODIFICATION. 82a-1401 to 82a-1425.
15. WATER TRANSFERS. 82a-1501 to 82a-1508.
16. MULTIPURPOSE SMALL LAKES PROGRAM. 82a-1601 to 82a-1609.
17. WATER DEVELOPMENT PROJECTS. 82a-1701 to 82a-1704.
18. WATER LITIGATION. 82a-1801 to 82a-1803.

### Article 1.—POWER PLANT DAMS

Source or prior law:  
59-101 to 59-116.

#### Law Review and Bar Journal References:

"Comments on Practice and Procedure in Eminent Domain," Raymond L. Spring, 35 J.B.A.K. 7, 8 (1966).

"Condemnation of Water and Water Rights in Kansas," John C. Peck and Kent Weatherby, 42 K.L.R. 827, 831 (1994).

#### **82a-101. Erection and maintenance of dams, ditches or races over land of another.**

When any person, corporation or city may be desirous of erecting and maintaining a milldam or dam for generating power upon his, her or its own land across any watercourse, and shall deem it necessary to raise the water by means of such

dam, or occupying grounds for mill yard or power plant structures, so as to damage by overflowing or otherwise real estate not owned by him, her or it nor damaged by consent, and in cases where it is necessary to the more efficient running and operating any such mill or power plant to turn any adjacent stream or spring into the one on which the mill or power plant is situated, the party so desiring to use the same may run the stream over the land of any other person by ditching or otherwise, and he, she or it may obtain the right to erect and maintain said dam and keep up and maintain the necessary ditches or races by proceeding as is prescribed in the act to which this act is amendatory.



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September 7, 1999

**ATTORNEY GENERAL OPINION NO. 99-44**

The Honorable Jim Morrison  
State Representative, 121<sup>st</sup> District  
P.O. Box 366  
Colby, Kansas 67701

Re: Waters and Watercourses--Groundwater Management Districts--  
District Powers; Rules and Regulations

Synopsis:  
Groundwater Management Districts (GMDs) may continue, after March 1, 2000, to adopt local standards and policies as authorized by the Kansas Groundwater Management District Act as long as the standards and policies adopted are not of general application and do not have the effect of law. GMDs may also continue to develop local standards for submission to the Chief Engineer in accordance with New Section 12 of 1999 House Substitute for Senate Bill No. 287. For this reason the legislation does not conflict with the authority of GMDs to adopt and enforce local standards and policies pursuant to K.S.A. 82a-1028(n). The legislation requires consolidation into rule and regulation those standards and policies of general application which have the effect of law, and it voids those standards and policies not in compliance with this requirement. Cited herein: K.S.A. 77- 420; 82a-1028; L. 1999, Ch. 130, § 12.

\* \* \*

Dear Representative Morrison:

You inquire whether 1999 Substitute for Senate Bill No. 287 (S.B. 287) creates a conflict with K.S.A. 82a-1028(n). Specifically, you ask whether groundwater management districts (GMDs) may continue, after March 1, 2000, to develop local standards and policies as authorized by the Kansas Groundwater Management District Act.

New Section 12 of S.B. 287 states:

"(b) (1) On or before March 1, 2000, each groundwater management district shall submit to the chief engineer of the division of water

resources of the department of agriculture recommended rules and regulations containing all current standards, statements of policy and general orders that: (A) Have been issued or adopted by such district; (B) are of general application within the district and have the effect of law; and (C) are not contained in current rules and regulations adopted by the chief engineer.

"(2) If any standard, statement of policy or general order described in subsection (b)(1) is not submitted as required by that subsection, such standard, statement of policy or general order shall be void and of no effect after March 1, 2000, until adopted by rules and regulations."

The new section requires GMDs to submit adopted local rules, standards, statements of policy and orders which have the effect of law and are not already contained in rules adopted by the Chief Engineer, and it makes void those that are not in compliance by March 1, 2000.

The language of the statute appears plain; we will, for this reason, utilize the overriding principle of statutory construction that if legislative intent can be ascertained from the plain language of the statute, it governs and must be given effect.<sup>(1)</sup> The plain language of S.B. 267 clearly mandates submission of local standards and policies to the Chief Engineer in order to consolidate all of the standards, policies and orders having the effect of law into a unified set of rules adopted and filed in accordance with K.S.A. 77-420.<sup>(2)</sup>

At issue is whether this mandate to consolidate conflicts with the power of GMDs to adopt local standards and policies as authorized by the Kansas Groundwater Management District Act after March 1, 2000. Two subsections in K.S.A. 82a-1028 are pertinent.

K.S.A. 82a-1028(n) authorizes GMDs to:

"adopt, amend, promulgate, and enforce by suitable action, administrative or otherwise, reasonable standards and policies relating to the conservation and management of groundwater within the district which are not inconsistent with the provisions of this act or article 7 of chapter 82a of the Kansas Statutes Annotated, and all acts amendatory thereof or supplemental thereto; . . . ."

In our opinion, S.B. 287 does not conflict with the authority of GMDs to adopt local standards and policies, but it does redefine what standards and policies must be submitted as recommended regulations pursuant to K.S.A. 82a-1028(o).<sup>(3)</sup> The standards and policies which must be submitted for filing as regulations are those that 1) have been adopted by a GMD; (2) are of general application within the district and have the effect of law; and 3) are not otherwise contained in current regulations promulgated by the Chief Engineer. The legislation does not abrogate the power of a GMD to develop and adopt local standards not of general application and not having the effect of law. In addition to defining what standards and policies must be recommended, the legislation reiterates the existing requirement found in

K.S.A. 82a-1028(o), which authorizes a GMD to:

"recommend to the chief engineer rules and regulations necessary to implement and enforce policies of the board. Such rules and regulations shall be of no force and effect unless and until adopted by the chief engineer to implement the provisions of article 7 of chapter 82a of the Kansas Statutes Annotated, and all acts amendatory thereof or supplemental thereto. All such regulations adopted shall be effective only within a specified district; . . . ."

Reiterating the existing requirement found in K.S.A. 82a-1028(o), it is plain to see how S.B. 287 redefines what standards must be submitted to the Chief Engineer in order to comply with K.S.A. 82a-1028(o) and S.B. 287. In conclusion, New Section 12 of S.B. 287 requires consolidation into rule and regulation those GMD standards and policies of general application which have the effect of law and are not contained in current promulgated regulations, and it voids those standards not in compliance. The legislation thus redefines what standards and policies must be submitted to the Chief Engineer as recommended regulations pursuant to K.S.A. 82a-1028(o). The legislation does not abrogate the power of a GMD to develop other local standards.

Very truly yours,

CARLA J. STOVALL  
Attorney General of Kansas

Guen Easley  
Assistant Attorney General

CJS:JLM:GE:jm

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### FOOTNOTES

Click footnote number to return to corresponding location in the text.

<sup>1</sup> *State v. Scherzer*, 254 Kan. 926 (1994).

<sup>2</sup> *See* New Section 12(a)(1) (by November 1999, the Chief Engineer is required to submit all current standards, policy and orders as rules and regulations for filing in accordance with K.S.A. 77-420).

<sup>3</sup> *See Bruns v. Kansas State Board of Technical Professions*, 255 Kan. 728, 733 (1994) (internal policy having the effect of law but not promulgated as a rule and regulation is not enforceable.)



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Comments to: [WebMaster, ksag@www.kscourts.org](mailto:ksag@www.kscourts.org).

COMMENTS TO THE  
COMMITTEE ON ENVIRONMENT  
REGARDING - HB 2710

As representative for the Board of Directors, GMD #5, I would like to make the following comments concerning HB 2710.

It is our understanding that this bill was created to clarify the language in K.S.A. 82a-1903, which relates to standards and policies of the GMD's. I am not sure this bill accomplishes any such clarification. The suggested language in HB 2710 could even be interpreted as being redundant.

There have been many different interpretations of the language in these particular statutes that came from House Substitute for SB 237. Even the Attorney General's Office offered their explanation of how it might be interpreted, again indicating that the language already exists within the Groundwater Management Act.

Changes may be necessary in order to clarify the various interpretations. However, we believe a systematic approach should be developed to include the objectives of each governmental agency affected by these statutes, both local and state.

We need to work towards a common goal of achieving a system where we all work together to efficiently and effectively address the challenges we face in enforcing the regulations and policies of related governmental agencies. HB 2710 does not work towards this goal.

In closing, we can only support language that focuses on accomplishing the above goal. I really believe the people of the State of Kansas deserve this.

Thank you,

Respectively Submitted,  
Sharon Falk, Manager  
Big Bend Groundwater Management District #5  
February 19, 2002

*House Environment  
2-19-02  
Attachment 5*



**Testimony to the  
House Environment Committee  
HB 2710  
February 19, 2002  
by Pat Lehman on behalf of the Boards of Directors of  
Groundwater Management Districts #1, 2, and 4**

My name is Pat Lehman, and on behalf of the Boards of Directors of Groundwater Management Districts No. 1, 2, and 4, I would like to make the following comments on HB 2710, which has the stated purpose of clarifying what happens to GMD policies that have the effect of law but are not promulgated as regulations.

The groundwater management districts see the most important issue involved in the debate of HB 2710 as being this: How can the state, in conjunction with the GMDs, most efficiently and effectively monitor and enforce all regulations and policies—all of which are either already state law or must be consistent with state law? We believe the citizens of Kansas deserve such a system. We also recognize that the current system is a little more sophisticated than usual and is a mixture of:

- a. State-generated regulations that apply within the GMDs;
- b. GMD-generated policies that are within the authority of KDHE or KCC, and which both the appropriate state agency and the GMD want monitored and/or enforced by the state agency;
- c. GMD-generated policies that are within the authority of KDHE or KCC, and which both the appropriate state agency and the GMD want monitored and/or enforced by the GMD;
- d. GMD-generated regulations that are within the authority of DWR, and which both DWR and the GMD want monitored and enforced by DWR; and
- e. GMD-generated regulations/policies that are within the authority of DWR, and which both DWR and the GMD want monitored and enforced by the GMD.

*House Environment  
2-19-02  
Attachment 6*

However, it is precisely because of this current arrangement that Kansas has the potential to more efficiently and effectively monitor and enforce a higher percentage of all the regulations and policies currently in place within the groundwater management system. The challenge in obtaining higher efficiencies in any sophisticated system is the effective coordination of effort. The concept is simply *teamwork*, and it's not a new idea.

We agree that attention should be placed upon the proper coordination and delineation of these efforts and responsibilities. The developing FY 2004 State Water Plan also recognizes this very important concept in a number of locations within the document. We are apparently not the only ones to see the huge potential in this current system—admittedly with a few clarifications.

In our opinion, HB 2710 is too narrowly focused to make the best use of the current system's true potential, and it will need to be amended in another fashion to do so. We can support amended language within HB 2710 that solidifies a "teamwork" approach to effective monitoring and enforcement, but not the current language.

In closing, we have to philosophically conclude that either the laws we are all trying to create for efficient monitoring and enforcement capabilities are good ones. They need our best effort, or they need to be eliminated.

Thank you for your attention, and I'd be happy to respond to questions.



**KANSAS**  
**DEPARTMENT OF HEALTH & ENVIRONMENT**  
BILL GRAVES, GOVERNOR  
Clyde D. Graeber, Secretary

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**Testimony on Environmental Use Controls Act**  
**to**  
**House Environment Committee**  
**Presented by Gary Blackburn**

**February 19, 2002**

Chairperson Freeborn and members of the House Environment Committee, I am pleased to appear before you today in support the proposed legislation to establish Environmental Use Controls.

The Kansas Department of Health and Environment works with responsible parties to address hundreds of contaminated properties throughout the state each year. Ideally, cleanup of these properties would return them to a condition allowing unrestricted use, such as use for residential development. In many instances, however, the time required to cleanup these properties may be tens of years and the cost is often prohibitive. Many property owners simply can not afford the costs it would take to restore a property to pristine conditions.

The proposal to establish Environmental Use Controls provides property owners and developers with a method of selecting less costly and time consuming cleanup solutions by establishing limits for the future property use. If a land development is intended for commercial or industrial use, a less restrictive cleanup standard may be used where future residential use is not intended. Under the proposed legislation, the property owner may apply for an Environmental Use Control as part of a site remediation plan. If approved, the property owner would complete the cleanup and place the agreed upon use restrictions on the property.

The agency currently allows some sites to be remediated to non-residential standards if a restriction is placed on the deed. At this time there is no method of tracking these sites to determine if the restrictions on the deed are followed. If the properties changes hands the department has no method of requiring that these restrictions be followed by the new owner. The department staff are concerned that the current process of using deed restrictions within Kansas is inadequate to protect of human health and the environment. This proposed legislation provides a method of tracking and periodically visiting these sites to insure that the Environmental Use Controls are followed. Additionally, those restrictions would follow the property and could not be removed without department approval.

Environmental Use Controls will be established on a site specific basis to protect against the risks a particular property poses. These restrictions may include prohibitions against excavating

though protective caps, drilling wells for domestic use and using the property for residential, day care or schools as a few examples. Although these restrictions are voluntarily established by the property owner they remain on the deed until the requesting party demonstrates to the department's satisfaction that the original risk to the human health or the environment which created the need for the use control is no longer present.

An important element of this legislation is the provision for funding future department maintenance of the site tracking system and periodic site visits to insure compliance with the Environmental Use Controls. The \$1,000 application fee will provide funding for long term tracking of sites that require limited long term oversight. Many sites are likely to require considerably more oversight, which is the reason for the provisions of additional fees. The responsible parties for some of these sites may be allowed to leave significant levels of contamination behind and perform remedies which save them tens of thousands of dollars in cleanup cost. Participation in the program is voluntary so participants will be able to determine if they want to commit adequate funding for long term oversight in exchange for the program benefits.

Concerns over the potential failure of the less costly remedies such as soil covers is the basis for the financial assurance provisions. The financial assurance provisions would be limited to sites where significant concerns of long term risk of remedy failure are present.

The department is faced with many sites where soil is contaminated by lead contaminants from previous operations. The common method of protecting the public from lead contamination is by capping the contaminants in place. Recently a battery waste disposal site was discovered while a new housing development was being constructed (see attached photos). This site was located in the city of Olathe where a battery plant had disposed of waste many years ago. The waste disposal had been performed in accordance with the laws at the time; however, had children been allowed to play in the soil at this site they would have very likely suffered ill effects. Due to the magnitude of the wastes at this site, complete remediation could not be performed, so the waste was stabilized in place and covered with clean soil. The housing development plans had to be abandoned. Without an environmental use control statute, this site will likely be considered for development again some day in the future.

There are hundreds of sites across the state where contaminated soils are present at a magnitude that makes remediation to a residential standard impractical. Many of these sites are improved dramatically by consolidation and capping of the waste with soil, clay, asphalt or concrete. This process is very effective for commercial or industrial sites where exposure to the soil can be limited. Attached are some photos of sites where contaminants have been capped in place as part of the remedial action. Through an environmental use control program, the property owner can restrict future land use indicating that contamination is present in the soil as part of the remedial action for the site. This would allow the waste to remain on site while the owner is allowed to return the site to productive use. The public can be protected because the land use restriction would clearly state the limitations that the owner had agreed to as part of the cleanup.

Although it is very difficult to determine the number of property owners who may apply to participate in this program, the legislation is being supported without a request for additional staff.



The contaminated sites that would participate in this program are likely to be those already being addressed through programs which are administered by the agency. This legislation provides an additional method of resolving the environmental risks these sites pose.

In closing, KDHE urges support for H.B. 2830.

I thank you for the opportunity to appear before the Environment Committee and will gladly stand for questions the committee may have on this topic.

# Former Battery (Lead) Landfill in Residential Area



Site discovery during residential development



Cap construction nearing completion

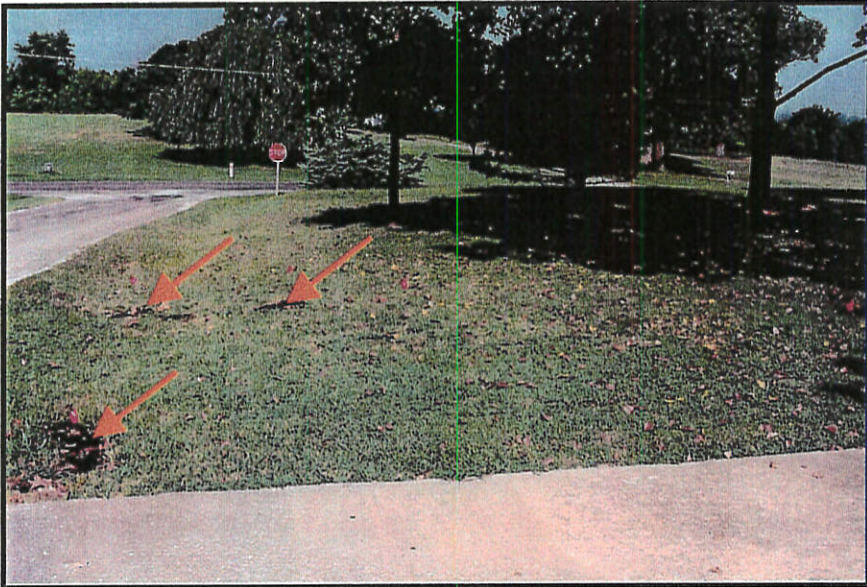




# Former Refinery Property, Montgomery County Residential Property Impact

7-5

**Photo 1**



*Residential property impacted by sludge mobilization and seepage.*

**Photo 2**



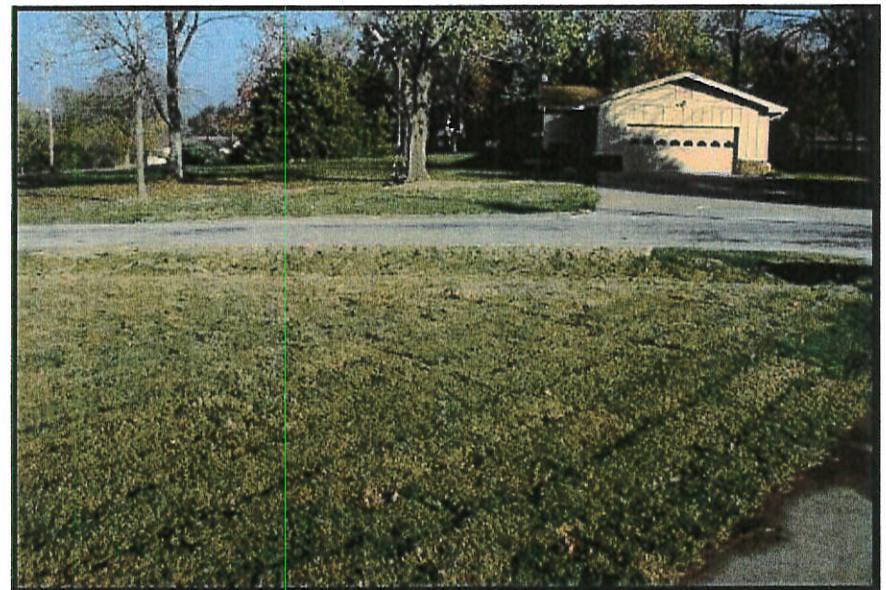
*Closeup of sludge waste seeping through surface on residential property.*

**Photo 3**



*Excavated area of sludge impact on residential property.*

**Photo 4**



*Residential property following remediation and sodding.*



# Former Drum Recycling Facility

7-6



Discovery of Site



Cap construction



Erosion following completion



Erosion following completion



# Former Battery (Lead) Landfill Underlying Golf Course



Cap construction over exposed battery landfill debris



Exposure of battery debris following erosion of cap





# Former Refinery Property Montgomery County

**Photo 1**



*Seepage and mobilization of subsurface sludge associated with former refinery operations.*

**Photo 2**



*Sampling and characterization of sludge material.*

**Photo 3**



*Stabilization of sludge waste. Impacted soils mixed with cement kiln dust to raise pH and demobilize subsurface waste.*

**Photo 4**



*Placement and compaction of clay cap.*

**Photo 5**



*Construction of drainage swale.*

**Photo 6**



*Subject property following remediation, cap construction,*