

MINUTES OF THE HOUSE ENVIRONMENT COMMITTEE

The meeting was called to order by Chairperson Joann Freeborn at 3:30 p.m. on March 16, 2004 in Room 231-N of the Capitol.

All members were present except:

Representative Gary Hayzlett- excused

Committee staff present:

Raney Gilliland Legislative Research Department

Mary Torrence, Revisor of Statutes

Mary Ann Graham, Committee Secretary

Conferees appearing before the committee: Woody Moses, KS Aggregate Producers' Association, 800 SW Jackson, #1408, Topeka, KS 66612; Chris Wilson, KS Building Industries Association, 212 SW 8th Avenue, Suite 201, Topeka, KS 66603; Carl Nuzman, PE, Consulting Hydrologist, 3314 NW Huxman Rd., Topeka, KS 66539; Clint Patty, Frieden, Haynes & Forbes Law Firm, 555 S Kansas Avenue, Topeka, KS 66603; Jim Gregory, The Kansas Chamber, 835 SW Topeka Blvd. Topeka, KS 66612-1671; Nadine Stannard, Associated Material & Supply, PO Box 4476, Wichita, KS 67204-0476; Wess Galyon, Wichita Area Homebuilders Association, 730 N Main, Wichita, KS 67203; Dane Barclay, Alsop Sand Co., Inc., PO Box 331, Concordia, KS 66901; Gary Rainbolt, Larned Sand & Gravel, Inc., PO Box 227, E. Hwy 19, Larned, KS 67550; Dan Ward, KS Wildlife Federation, 214 SW 6th Avenue, Ste. 205, Topeka, KS 66603; Greg Foley, Assistant Secretary, KS Department of Agriculture, 109 SW 9th Street, Topeka, KS 66612-1280; Pat Lehman, Northwest KS Groundwater Management District #4, PO Box 3510, Lawrence, KS 66046; Charles Benjamin, KS Chapter of Sierra Club, PO Box 1642, Lawrence, KS 66044-8642; Gerald T. Blain, PE, Water & Sewer Department, 455 N Main, Wichita, KS 67202-1679

Others attending:

See Attached List.

Chairperson Joann Freeborn called the meeting to order. She announced that in today's committee meeting, due to the large number of conferees, she will be limiting the time for conferees to speak. She reviewed the committee agenda for next Thursday, March 18, possible action on **SB 396** - Creates the radiation control operations fee fund and **SB 416** - Allows cities and counties to use certain moneys for programs dealing with recyclables. She opened the hearing on **HB 2919**.

HB2919: Concerning the beneficial use of groundwater.

Raney Gilliland, Legislative Research Department, explained the bill.

The Chairperson welcomed the first proponent to the committee.

Woody Moses, Kansas Aggregate Producers Association, testified in support of the bill and believes the purpose of this bill is to ask for a policy decision. This bill provides the Legislature the means to make such a determination with respect to the mining of sand and gravel and its relationship to other water uses in this state. As the Sand and Gravel industry was not regulated until 1993 most of the areas the industry operates in were already closed or restricted for available water, making it almost impossible to secure water. (See attachment 1)

CONTINUATION SHEET

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Chris Wilson, Kansas Building Industry Association, testified in support of the bill. This bill is needed to address the current situation with the sand and gravel industry in Kansas. Kansas builders rely on having an adequate supply of raw materials so that homebuilding may continue. The homebuilding industry has been a bright spot in the economy, helping to lead the way out of the recent recession. In order to continue to have a strong homebuilding industry in Kansas, these raw materials are essentials. Areas that do not have sand and gravel available do not have significant development occurring. (See attachment 2)

Carl Nuzman, Consulting Engineer/Hydrologist, presented testimony in support of the bill. Many areas of the state are now closed to the new appropriation of water. It is essential that the aggregate producers be able to continue to operate in all areas of the state. It is difficult to find good deposits of sand and gravel that are economical to mine and have the gradation of grain sizes to meet the specifications for concrete, asphalt, well gravel filter pack material, and other uses. The resulting sand pits are not detrimental to our water supply. The removal of sand and gravel increases the storage yield of an aquifer. (See attachment 3)

Clinton Patty, Attorney with the law firm of Frieden, Haynes and Forbes, testified in support of the bill and represented the Kansas Aggregate Producers Association. He presented testimony regarding the proper interpretation of the phrase "substantially adverse impact" as it appears in KSA 82a-734 and why the proposed definitions in this bill are appropriate as a matter of law. (See attachment 4)

Jim Gregory, The Kansas Chamber of Commerce, testified in support of the bill and believes for many years our state's natural resources have fueled the Kansas economic engine and kept our commercial centers and agriculture competitive. In order to build on this strength it is important to have a stable and predictable source of building materials. They believe this bill will improve the stability of the state's sand and gravel industry, while at the same time provide a framework for the proper management of our state's water resources. (See attachment 5)

Nadine Stannard, President of Associated Material and Supply Company, Inc., testified in support of the bill and believes it helps create a fair, user-friendly business environment in Kansas, because it supplies a certain and uniform standard which reasonably protects groundwater, but does not arbitrarily hinder the business of sand and gravel plant operators. Indeed Kansas would benefit further by allowing business to export more sand outside Kansas. She is afraid to develop those markets because when she runs out of reserves she doesn't know where she will go. Her business will close. (See attachment 6)

Wess Galyon, President/CEO of the Wichita Area Builders Association, presented testimony in support of the bill and believes the construction industry needs an ongoing supply of readily available sand and gravel, which is used in numerous applications and products during the various phases of construction of homes, commercial and industrial buildings, and construction of infrastructure. As far as they have been able to ascertain, there is no scientific evidence that evaporation from the surface of active or retired sand and gravel pits has impaired anyone's legitimate water rights. (See attachment 7)

Dane Barclay, President of Alsop Sand Company, Inc., testified in support of the bill. Alsop Sand Company is a third generation business. Their individual locations are representative of small sand producers across Kansas. Because of tremendous expenditures, for land, equipment and start up cost these are long-term commitments of twenty to fifty plus years. He believes they need legislation and regulations that recognize the long-term nature of the industry and supports this bill as a way to address the issue. (See attachment 8)

Gary Rainbolt, Larned Sand and Gravel, Inc., presented testimony in support of the bill. They applied for their permits with the Department of Water Resources in 2001. They waited approximately two years to receive their permits for their new ground. Now the DWR wants them to have water exposed by December 31, 2004. Originally they had 5 years to accomplish this. This means they will have to turn down work so they can concentrate their efforts to get this new pit open. This will hurt them financially by concentrating on this instead of spreading it out by working on it when between jobs. (See attachment 9)

CONTINUATION SHEET

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Written only testimony in support of the bill was submitted by M.S. Mitchell, a consulting engineer and Legislative Chair of the Kansas Building Industry Association. He believes this provides statutory definition of the term “substantial adverse impact” as used in KSA 82a-734 to mean that anyone questioning the effect of the exposed groundwater resulting from sand and gravel mining on an existing water right must be able to prove that effect. (See attachment 10)

Written only testimony in support of the bill was submitted by Joe Tarbet, Vice President of Tarbet, Inc., Ulysses, Kansas. The passage of this bill is essential in order to provide some type of resolution regarding how the Kansas Water Appropriations Act is applied to sand and gravel operations. Recently they were unable to quote at any price a proposed 43 mile Hamilton County road project. (See attachment 11)

Written only testimony in support of the bill was submitted by Lance Latham, Director of Communications and Public Affairs for Ash Grove Cement Company, and believes this bill would provide a means of implementing a workable policy with respect to sand and gravel operations, and their interaction with the aquifer. (See attachment 12)

Written only testimony in support of the bill was submitted by Victor Klotz, Klotz Sand Company, Inc. His company is unable to achieve suitable and stable financing from their bankers and other investors who are unwilling to extend capital to a business that has no assurance that they will be allowed to continue past one to five years. (See attachment 13)

Written only testimony in support of the bill was submitted by Richad Boeckman, Keenan and Boeckman Attorneys at Law, Great Bend, Kansas. He believes KSA 82a-734 as it is presently written contains a definition of “substantially adverse impact on the area.” As a practicing attorney he finds that definition to be vague. It is his opinion it would be helpful to practitioners to have a more clear definition of the term “substantially adverse impact on the area.” (See attachment 14)

Written only testimony in support of the bill was submitted by Ken Johnson, Vice President, APAC Shears, Hays, Kansas. He believes if water is truly reserved for the benefit of the people in this state then surely the public benefits by having reasonable access to a supply of sand and gravel which is used in many ways from eyeglasses to highways, from insulation to the silica used in computer chips. Next to water, ubiquitous sand and gravel is one of our most needed basic materials in our society. (See attachment 15)

Written only testimony in support of the bill was submitted by Ron Cornejo, Cornejo & Sons, Inc., a large street and highway construction company. Sand and aggregate materials are a necessary component to the production of asphalt and concrete materials. The local production of sand and aggregate materials is critical to maintaining an adequate supply of quality products for construction projects, particularly street and highway construction. (See attachment 16)

Committee questions and discussion followed.

Chairperson Freeborn thanked the proponents for their interest and participation and welcomed the first opponent to **HB 2919** to the committee.

Dan Ward, Executive Director of the Kansas Wildlife Federation, presented testimony in opposition to the bill. He believes whether the issue is wetland areas, stream flow, water quality, waterfowl hunting, drinking water supplies, or fishing and other water recreation, groundwater use is a theme that is quite literally an underlying problem. In order to be successful at stabilizing water use and then restoring our aquifers, the Division of Water Resources needs the help of the Legislature. The key problem is that aquifers are oversubscribed, and this body needs to weigh in with ways to diminish water use before the wells run dry. (See attachment 17)

Greg Foley, Assistant Secretary of the Kansas Department of Agriculture, was welcomed to the committee. He testified in opposition to the bill and believes this bill would amend KSA 82a-734 to essentially remove sand and gravel operations from regulation of water consumption under the Kansas

CONTINUATION SHEET

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Water Appropriation Act. This is accomplished by defining terms in a way that ensures that evaporation from these operations is considered neither a beneficial use nor a diversion of water. This bill ignores the indirect, but not insignificant, effect sand and gravel operations can have on groundwater and other water users. According to current law, if there is no substantial adverse impact to the area groundwater supply, then evaporation from a sand and gravel operation is not a beneficial use. Consequently, under this bill, no permit or water right would be needed for most sand and gravel operations. (See attachment 18)

Pat Lehman, testified in opposition to the bill, on behalf of the Northwest Kansas Groundwater Management District #4. They believe this bill amends KSA 82a-734 by defining "direct impairment" and "substantial adverse impact on the area", and stating that evaporation from exposed sand and gravel pits, if deemed a beneficial use, shall be non-consumptive. KSA 82a-734 currently says that the evaporative losses from sand and gravel operations is not a beneficial use of water (requiring a water right) unless the operation has a substantial adverse impact on the area. (See attachment 19)

Charles Benjamin, Kansas Chapter of the Sierra Club, testified in opposition to the bill. One of the concerns of Kansas Sierrans is the sustainability of water use from aquifers in Kansas and the potential for pollution to those aquifers. This bill is of concern to Kansas Sierra Club because it would make it the policy of the state of Kansas to no longer regulate evaporation from aggregate pits as a diversion of water from aquifers. (See attachment 20)

Gerald Blain, Water Supply Projects Administrator, Water and Sewer Department, City of Wichita, testified in opposition to the bill. He stated that the City of Wichita is very concerned about several issues that are included in this bill. It appears that the general intent of the bill is to treat water usage from sand and gravel pits separately from any other water users. The most troubling portion of the proposed bill is item 2 (d), which contends that even though water is lost from a sand or gravel pit through evaporation, it will still be considered "non-consumptive". The existing water appropriations act, and the regulations used by the Department of Agriculture, Division of Water Resources, provides a comprehensive set of standards that is used to manage the State's water supplies. Water lost through evaporation from a sand or gravel pit has been, and must be, considered water usage. (See attachment 21)

Written only testimony in opposition to the bill was submitted by Michael Dealy, Manager, Equus Beds Groundwater Management District #2. The bill seeks to exempt sand and gravel pit operations from obtaining a water permit to divert surface or groundwater by exposing the water body to evaporation during mining operations. Aggregate mining is an environmentally intrusive process that removes millions of cubic yards of sand and gravel overlying the Equus Beds aquifer, exposing the shallow aquifer to the evaporative process. (See attachment 22)

Committee questions and discussion followed.

Chairperson Freeborn thanked the conferees for their participation and the committee for their attention. She closed the hearing on **HB2919**.

The meeting adjourned at 5:40 p.m. The next meeting is scheduled for Thursday, March 18, 2004.

**Kansas Aggregate Producers
Association**

Testimony
before the
House Environment Committee
regarding
HB 2919
March 16, 2004

**Kansas Aggregate Producers
Association**

We thank you for the opportunity to
come address you on an issue vital
to our industry as well as the
thousands of consumers of sand
located throughout the state of
Kansas

Policy Decision

◆ The purpose of HB 2919 is ask this
body for a policy decision

*House Environment
3-16-04
Attachment 1*

Policy Decision

◆ Black's Law Dictionary defines the word **POLITICAL** as:
"Pertaining or relating to the policy or the administration of government, state or national. "

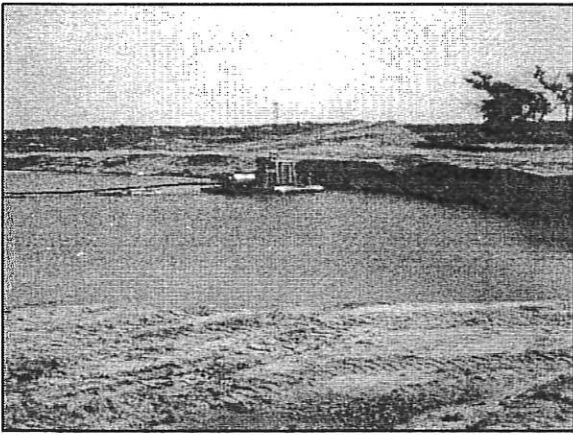
Policy Decision

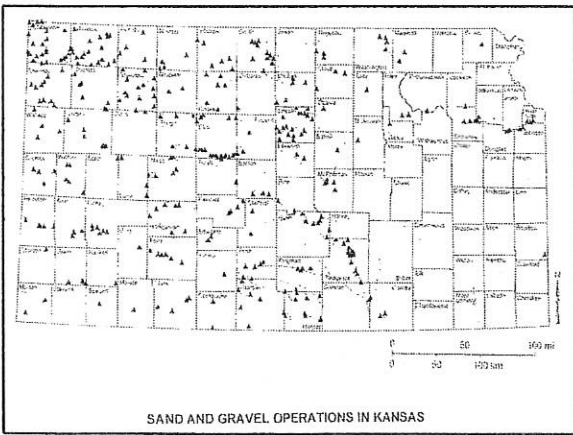
◆ Black's Law Dictionary the word **POLITICAL ECONOMY** as:
"The science which describes the methods and laws of the production, distribution, and consumption of wealth, and treats of economic and industrial conditions and laws, and the rules and principles of rent, wages, capital, labor, exchanges, money, population, etc. The science which determines what laws men ought to adopt in order that they may, with the least possible exertion, procure the greatest abundance of things useful for the satisfaction of their wants, may distribute them justly, and consume them rationally. "

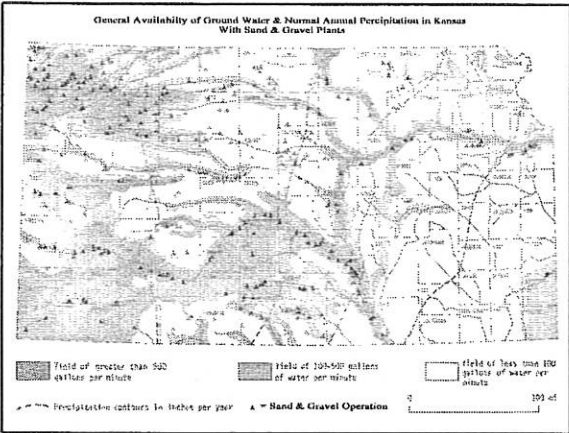
Policy Decision

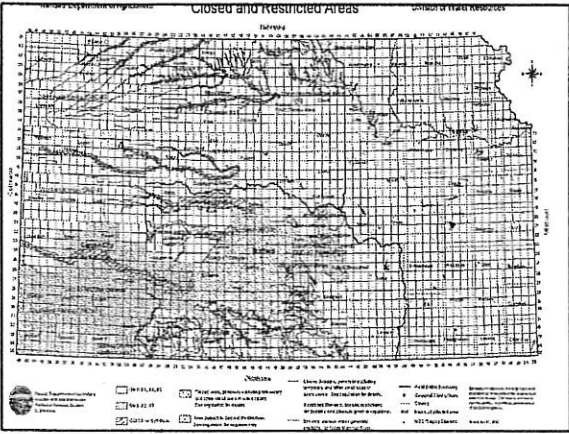
◆ HB 2919 provides this Legislature the means to make such a determination with respect to the mining of sand & gravel and its relationship to other water uses in this state











Observation:

As the Sand & Gravel industry was not regulated until 1993

Most of the areas the industry operates in were already closed or restricted for available water

Making it almost impossible to secure water

Economic Limitations

- ◆ The price of Sand doubles every 15 miles
- ◆ \$.15 per ton mile x 15 miles = \$2.25 per ton
- ◆ Must be close to markets
- ◆ Industry is capital intensive
- ◆ As Sand and Gravel has a low unit value it takes a considerable amount of time to recover investments
- ◆ Lenders will not finance insecure operations

Operating Limitations

- ◆ Sand and Gravel must be mined where it is found
- ◆ Mineable deposits in the appropriate gradations are usually found in the alluvial floodplain and intermingled with groundwater
- ◆ The exposure of groundwater during the process is incidental to the overall operations
- ◆ Sand and gravel markets and deposits are highly variable

Operating Limitations

- ◆ It is way more efficient to mine a dry deposit as water weighs 8 lbs. per gallon and must be moved in order to extract the minerals.
- ◆ Unfortunately this process brings the industry into conflict with the Kansas Water Appropriations Act as interpreted by the Kansas Division of Water Resources (DWR)

Regulatory Limitations

- ◆ Current DWR Rules & Regulations require Sand & Gravel operators to have a Water Right or Permit to Appropriate Water prior to the commencement of operations
- ◆ Once secured DWR requires the industry to commence operations within one year despite the fact that reserves may not be needed for up to 30 years
- ◆ Once operations are commence DWR will only give an operator up to 40 years to perfect the Water Right

Regulatory Limitations

- ◆ As many operations may take up to 70 or 100 years to complete
- ◆ This is the equivalent of requiring a 70 year mortgage on a house one can only live in for 40 years

Policy Determination

- ◆ This combination of Economic, Operating and Regulatory Limitations has brought us before this committee today
- ◆ Seeking a policy determination as contained in the provisions of HB 2919

Policy Determination

- ◆ In order to do this three questions deserve your consideration
 - Is the use of water by evaporation as a result of sand & gravel operations a "beneficial use"
 - What is "substantially adverse impact" ?
 - Is the evaporation of water consumptive or non-consumptive?

What is a "beneficial use"?

- ◆ The very term implies that the user should derive a benefit
- ◆ Is a byproduct of the removal process
- ◆ It is not brought under control pursuant to K.S.A. 82a-701
- ◆ It is not a specific quantity of water as required by K.S.A. 82a-701
- ◆ In fact evaporation is highly variable both over space and time

What is a "beneficial use"?

- ◆ No diversion works to bring water control as anticipated in K.S.A. 82a-706b are constructed to bring water under "control"
- ◆ No special efforts are made to apply the water to beneficial use.

WHAT IS A BENEFICIAL USE OF WATER?

It would appear from 1976 interim committee notes and sections of §2a-701 et. seq. the following questions should be asked in the determination of a beneficial use.

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

What is "substantially adverse impact" ?

- ◆ The concept of "substantially adverse impact" was the result of the passage of HB 2476 in 1995
- ◆ The result of our first attempt to resolve the future of the Sand & Gravel industry
- ◆ HB 2476 passed this House 121-3 and in the Senate 31-7
- ◆ In 1996 attempts to repeal HB 2476 failed

What is "substantially adverse impact" ?

- ◆ Despite the overwhelming legislative support of this measure
- ◆ DWR never accepted this statement of legislative intent
- ◆ At one point the Sand & Gravel industry had over 14 permits on "hold"

What is "substantially adverse impact" ?

- ◆ Eventually DWR defined "substantially adverse impact" as 18" or more of annual net evaporation
- ◆ This in effect provided an exemption for the eastern 1/3 of the state, where there is no Sand & Gravel
- ◆ Leaving the bulk of the industry in limbo

What is "substantially adverse impact" ?

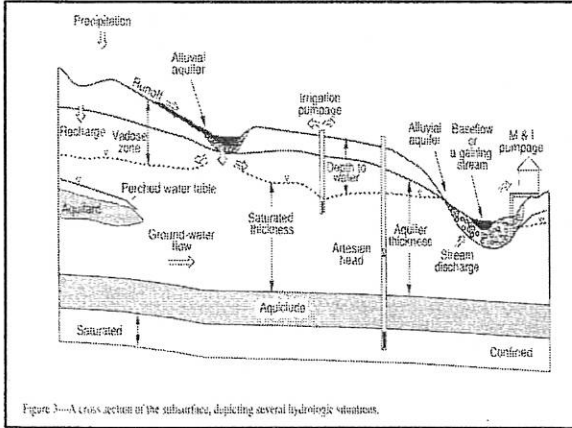
- ◆ We believe the legislature intended a higher standard to be applied
- ◆ HB 2919 provides this higher standard by requiring a direct impairment of another water user be the test of a "substantially adverse impact"
- ◆ In our opinion this higher standard is appropriate given the non-consumptive nature of the use

Is the use consumptive ?

- ◆ No one, including the Division of Water Resources, knows definitively
- ◆ The issue has never been researched
- ◆ However, what we know is

Is the use consumptive ?

- ◆ Unlike water wells, a Sand & Gravel pit has no "cone of depression" and creates no draw down
- ◆ There is no apparent effect on surrounding water tables
- ◆ Anecdotal evidence suggests the opposite may be true



Is the use consumptive ?

- ◆ Studies conducted in the Wet Walnut Watershed, Scandia and Olathe indicate bodies of water located within the alluvial aquifer may assist with recharge
- ◆ Recharge does happen in California

California Special Report (p.15)

Special Report 113
SURFACE AND GROUNDWATER MANAGEMENT
OF EXEMPT SAND RECHARGE

By
JAMES W. HARRIS
California State Water Resources Institute
1989

Division of Water Resources
California State Water Resources Institute

OPERATIONS BELOW THE SEASONAL HIGH WATER TABLE

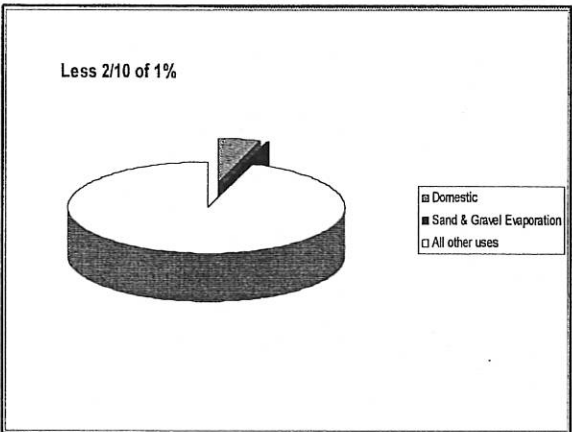
Common end uses for sand and gravel pits excavated below the water table include recreational or residential lake development, wildlife habitat, runoff storage and groundwater recharge enhancement (water spreading).

Is the use consumptive ?

- ◆ While a diversion may take place we maintain the apparent use of water is not a beneficial or consumptive use as envisioned in the Kansas Water Appropriations Act

Another Consideration

- ◆ Is requiring a water right for a non-consumptive use wise public policy?
- ◆ Sand & Gravel evaporation accounts for less than 2/10 of 1%
- ◆ Even in the exempt areas
- ◆ 2,500 Acre Feet (\pm) compared to 6,600 acre feet for the Circle K



Another Consideration

- ◆ Is this minute use worth:
 - Depriving other water users of the over 25,000 acre feet DWR requires for our industry
 - Making the limited resources (SB 463) of DWR available to regulate such use
- ◆ The regulation of Domestic use makes more sense

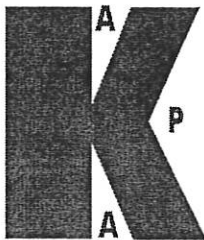
Is current policy working?

- ◆ No, existing or proposed operations in:
 - Great Bend,
 - Syracuse,
 - Larned,
 - and several in Wichita
- ◆ Are unable to get permits
- ◆ Efforts to compromise have failed
 - Aggregate & Groundwater Resources Task Force (1999)
 - SB 409 (Extension of Perfection Period)

A solution is needed

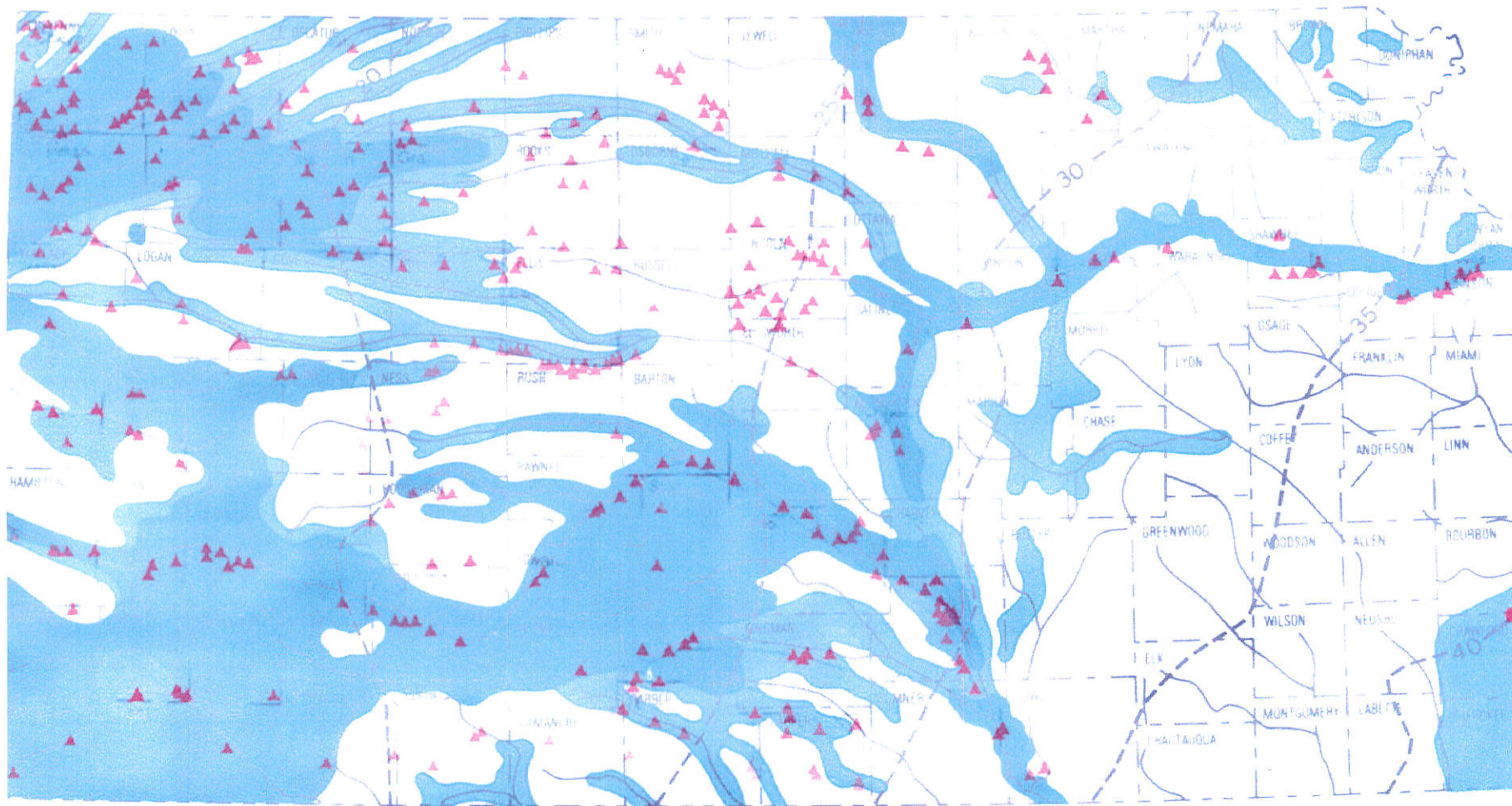
- ◆ To provide public access to a vital mineral resource
- ◆ To provide building materials at competitive costs for development in urban and rural areas
- ◆ To protect other water users
- ◆ To reduce administrative workload on DWR







Please Support HB 2919

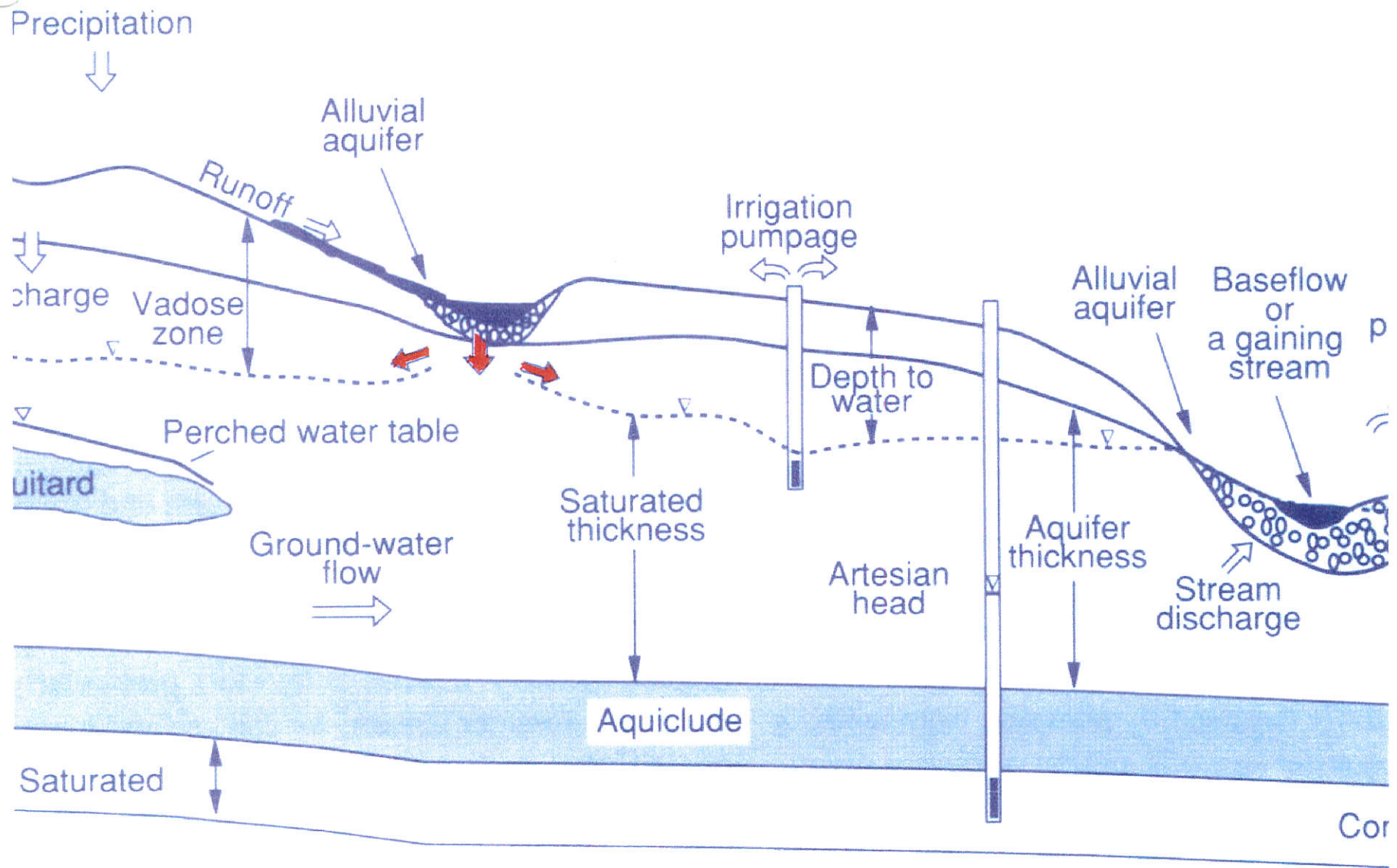


THANK YOU FOR
YOUR ATTENTION
AND
CONSIDERATION
OF THIS MATTER

General Availability of Ground Water & Normal Annual Percipitation in Kansas With Sand & Gravel Plants



 Yield of greater than 500 gallons per minute	 Yield of 100-500 gallons of water per minute	 Yield of less than 100 gallons of water per minute
 Precipitation contours in inches per year	 = Sand & Gravel Operation	



cross section of the subsurface, depicting several hydrologic situations.



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STATEMENT OF THE KANSAS BUILDING INDUSTRY ASSOCIATION

TO THE HOUSE ENVIRONMENT COMMITTEE

REPRESENTATIVE JOANN FREEBORN, CHAIR

REGARDING H.B. 2919

MARCH 16, 2004

Madam Chair and Members of the Committee, I am Chris Wilson, Executive Director of the Kansas Building Industry Association. KBIA represents over 2300 members, who are involved in the residential building industry in Kansas. We are in strong support of H.B. 2919.

This bill is needed to address the current situation with the sand and gravel industry in Kansas. Kansas builders rely on having an adequate supply of raw materials so that homebuilding may continue. The homebuilding industry has been a bright spot in the economy, helping to lead the way out of the recent recession. In order to continue to have a strong homebuilding industry in Kansas, these raw materials are essentials. Areas that do not have sand and gravel available do not have significant development occurring.

There is a great deal of history involved with the current situation. Historically, sand and gravel pits were not subject to the provisions of the water appropriation act. However, in the mid-1990's, the Division of Water Resources sought to require pits to have an appropriation. In 1995, the Legislature addressed this situation through the passage of the statute in this bill, K.S.A. 82a-734. It should be pointed out that this statute is not part of the water appropriation act. It states that "unless the chief engineer determines



that it has a substantially adverse impact on the area groundwater supply, the evaporation of water exposed as the result of the opening or operation of sand and gravel pits shall not be construed to be a beneficial use or diversion of water for purpose of the Kansas water appropriation act.”

After the passage of this act, those who wanted sand and gravel pits to be required to have a water appropriation came back to the Legislature with other bills. They proposed SB 621 in 1996, and HB 2251 in 1999, and neither were passed by the Legislature. In 1997, a task force convened on this issue and made recommendations for compromise. However, when DWR promulgated new regulations in 2000, a regulation was adopted which in effect accomplishes what those wanting pits to be required to have regulations wanted and does not include the recommendations of the task force.

Since the 2000 regulations were adopted, no new sand and gravel pits have opened. A chill is on the industry. Despite numerous attempts, companies have not been able to locate new sites and secure water rights for them through the requirements in the regulations. KBIA believes that situation will continue until relief is granted.

Should a water right be required for sand and gravel pits? Those who would say yes, and therefore oppose this bill, believe that pits are a consumptive use of water due to evaporation. I have been unable to find scientific evidence for this belief. Instead, hydrologists tell us that the removal of sand and gravel from an aquifer increases the storage yield of an aquifer and that local rainfall around a sand pit flows into the pit, thereby increasing the recharge to the aquifer in that area which would otherwise be runoff. Hydrologists conclude that sand pits contribute to the aquifer recharge, and do not constitute a consumptive use of water.

Do sand and gravel pits present a quality issue? The only study we have on the issue is one conducted by the Kansas Geological Survey, Open-File Report 98-51. It showed to the contrary that not only was there not a quality problem, but that pits may

improve the quality of stormwater runoff water into the pits by acting as a filter as the water returns to the aquifer.

Committee, we suggest that there is a problem here that needs to be fixed so that sand and gravel pits may continue to be opened and to provide the resources we need for building, transportation, agriculture and industry. The regulation in place is not working and we believe is not in concert with the statute passed in 1995. This problem may be corrected with the passage of HB 2919, defining the terms in the 1995 statute (consistent with case law and drafted by a leading water attorney in Kansas), and clarifying that sand and gravel pit exposure of water is a non-consumptive use of water.

Thank you for your consideration, and I would be glad to respond to questions at the appropriate time.

KANSAS HOUSE COMMITTEE

MARCH 16, 2004

Historically evaporation was not subject to regulation under the provisions of the Water Appropriation Act. An "Appropriation right" is a right, acquired under the provisions of article 7 of chapter 82a K.S.A. ... to divert from a definite water supply a specific quantity of water at a specific rate of diversion,, and to apply such water to a specific beneficial use or uses in preference to all appropriations right of later date.

Diversion means the act of bringing water under control by means of a well, pump, dam, or other device for the delivery and distribution for a proposed beneficial use. There is no man-made control of evaporation nor specific rate of diversion subject to physical capture by a diversion works, therefore evaporation from a water body was not subject to control by the water appropriation act.

In the early 1990's there was an attempt to implement full regulation of sand and gravel pit operators through evaporation loss of water from groundwater aquifers. In 1995, K.S.A. 82a-734 was passed by the legislature to define the role of the Chief Engineer and the use as industrial for the purposes of assessing the water protection fee pursuant to K.S.A. 82a-954. The result was some sand and gravel operators had previously filed for water rights, new operations were exempt subject to the reporting to the Chief Engineer, and a very few fell through the cracks. The purpose of the present legislation is to clarify this matter and correct this injustice.

As you know, many areas of the state are now closed to the new appropriation of water. It is essential that the aggregate producers be able to continue to operate in all areas of the state. It is difficult to find good deposits of sand and gravel that are economical to mine and have the gradation of grain sizes to meet the specifications for concrete, asphalt, well gravel filter pack material and other uses.

The resulting sand pits are not detrimental to our water supply. The removal of sand and gravel increases the storage yield of an aquifer. An irrigation well in the Republican River valley used to break suction before a sand pit was constructed up-gradient, and now pumps a full stream during mid-summer due to the increased volume of water available to the aquifer. Local rainfall around a sand pit flows into the pit increasing the recharge to the aquifer in that area which would otherwise runoff. Sand pits contribute to aquifer recharge.

Concern has been expressed in the past that pits could contaminate the aquifer. Not a single case of aquifer contamination has been reported to KDHE involving a sand pit. The City of Olathe has a large sand pit operation adjacent to their well field and annual water quality testing for many years has never found any contamination. Leaves, grasses and other organic material decay in the sand pits and form a natural filter lining that absorbs the contaminants that may occur from storm water runoff.

In the Wichita area, the sand lakes make very attractive housing developments. The water loss due to evaporation is very small compared to the large losses from phreatophyte vegetation along our rivers and streams. The cost of sand and gravel affects the cost of every street and highway and every building you enter that has concrete or mortar. Please simplify K.S.A. 82a-734.

Carl E. Nuzman, P.E., P.Hg.
Consulting Engineer/Hydrologist

*House Environment
3-16-04
Attachment 3*

TESTIMONY

By

Clinton E. Patty

Before the

House Environment Committee

Regarding HB 2919

March 16, 2004

Chair Freeborn, members of the committee, my name is Clint Patty. I am an attorney with the law firm of Frieden, Haynes and Forbes in Topeka, Kansas, and am here representing my client, the Kansas Aggregate Producers Association. I have been asked to provide testimony regarding the proper interpretation of the phrase "substantially adverse impact" as it appears in K.S.A. 82a-734, and why the proposed definitions in HB 2919 are appropriate as a matter of law.

This controversy arises over the term "substantially adverse impact", and what that phrase means with regard to groundwater regulation of sand and gravel pits. The Chief Engineer has suggested that the phrase provides a low standard for regulation regarding water use. The industry believes the phrase implies a high standard for groundwater regulation, and the meager use by most sand and gravel pit operations does not rise to the high standard for regulation in the statute. HB 2919 is necessary to finally resolve this dispute, and provide the sand and gravel industry with a fair standard to conduct business operations without unreasonable regulation.

Although the phrase "substantially adverse impact" is not currently defined in the statute, its language indicates that the use of water by sand and pit operations cannot be regulated unless the use is "substantial". Ordinarily, when a statute does not clearly define a term, and language is plain and unambiguous, courts interpret a statute applying the rule of "plain meaning". As the Kansas Supreme Court has stated on numerous occasions, "we should give words in common usage their natural and ordinary meaning....". International Ass'n of Firefighters v. City of Kansas City, 264 Kan. 17, Syl. ¶ 2, 954 P.2d 1079 (1998). The American Heritage Dictionary defines the term "substantial", in relevant part as "[c]onsiderable in importance, value, degree, amount or extent: *won by a substantial margin.*" It goes on to define the word "adverse" as meaning, "something that opposes or hinders progress: *an adverse wind; adverse circumstances*". (American Heritage Dictionary, 2nd College Ed. At 1213, 144 (comparing "adverse with term "averse"). Applying plain meaning of these words to the phrase "substantially adverse" at K.S.A. 82a-734, sand and gravel operations should not be regulated for their use of water unless the impact of that use is considerable as to amount and effect on the groundwater table. It is our belief that any other interpretation is inconsistent with the plain language of the statute. Applying the plain meaning, it would appear the

Legislature intended a high standard be met prior to regulation of a sand and gravel pits by the Chief Engineer.

As those in the industry have, and will testify, the insignificant use of water created by the operation of a sand and gravel pit is not done in a manner that meets the high standard imposed by the phrase "substantially adverse". The interpretive definitions of "substantially adverse impact" and "direct impairment" contained in HB 2919 are consistent with the intent of the Legislature in allowing regulation of a sand and gravel operations. This proposed addition to K.S.A. 82a734 resolves the dispute between the Chief Engineer and the industry, and strikes a balance between damaging the sand and gravel industry, and protection of our state's water resources.

Thank you once again for allowing me the opportunity to provide my client's position on this important matter.



The Force for Business

835 SW Topeka Blvd.
Topeka, KS 66612-1671
785-357-6321
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E-mail: info@kansaschamber.org
www.kansaschamber.org

Legislative Testimony

HB 2919

March 16, 2004

**Testimony before the Kansas House Environment Committee
By Jim Gregory, The Kansas Chamber**

Madame Chair and members of the committee my name is Jim Gregory, representing the Kansas Chamber of Commerce. The Kansas Chamber appears before you today in support of HB 2919, as this legislation is consistent with a goal of reducing business costs and improving the Kansas business climate.

For many years our state's natural resources have fueled the Kansas economic engine and kept our commercial centers and agriculture competitive. In order to build on this strength it is important to have a stable and predictable source of building materials. We believe HB 2919 will improve the stability of the state's sand and gravel industry, while at the same time provide a framework for the proper management of our state's water resources.

We encourage your support of HB 2919. I will be happy to answer any questions at this time.

The Kansas Chamber is the statewide business advocacy group, with headquarters in Topeka. It is working to make Kansas more attractive to employers by reducing the costs of doing business in Kansas. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have nearly 7,500 member businesses, including local and regional chambers of commerce and trade organizations. The Chamber represents small, large and medium sized employers all across Kansas.

*House Environment
3-16-04
Attachment 5*



Plant Location
53rd St. N. & Hoover
Wichita, KS
(316) 721-3848

ASSOCIATED MATERIAL & SUPPLY CO. INC.
SAND • ROCK • GRAVEL • TOP SOIL
P.O. Box 4476, Wichita, Kansas 67204-0476
(316) 721-3848

Plant Location
Hwy. 53, West of Big River
Mulvane, KS
(316) 777-1421

HOUSE BILL No. 2919

My name is Nadine Stannard. I am president of Associated Material and Supply Company, Inc., located in Wichita, Kansas. Thank you for the opportunity for me to express my support for House Bill 2919

Associated Material & Supply Co. is a small business engaged in operation of Sand and gravel production facilities in S. Central KS. Associated operates two facilities. One is located near Mulvane, KS in Sumner Co. The other is located in Sedgwick County, North of Wichita near Maize & Valley Center KS.

As you are probably aware, sand is an irreplaceable ingredient in many products from road building materials, such as concrete and asphalt, to bricks, mortar, even toothpaste and glass. The concrete in this beautiful Capitol build is composed of about 50% sand mixed with rock, cement and water. The construction industry and other businesses obviously need sand and gravel to continue their commercial enterprises. Even the state of KS contracts with sand producers for ice control sand, road gravel and other products. Our KS economy would be seriously handicapped without a readily available source of sand and gravel. Passage of House Bill 2919 will spur growth in our economy by reducing the regulatory burden on small producers who can't afford or who no longer have the energy to fight the regulatory battle.

AMS was established at Mulvane in 1934 by my father-in-law and some of his friends. The company was established to provide building materials to the paving industry. My husband grew into the business through his father and took over the business at my father-in-laws death.

*House Environment
3-16-04
Attachment 6*



Plant Location
53rd St. N. & Hoover
Wichita, KS
(316) 721-3848

ASSOCIATED MATERIAL & SUPPLY CO.
SAND • ROCK • GRAVEL • TOP SOIL INC.
P.O. Box 4476, Wichita, Kansas 67204-0476
(316) 721-3848

Plant Location
Hwy. 53, West of Big River
Mulvane, KS
(316) 777-1421

I grew into the business through my husband and took it over when my husband retired. Unless something is done the business will not continue beyond me, because our mineral reserves will be gone and under the present regulatory burden they cannot be acquired. It's a small business, but it will be missed by far more than anyone realizes.

My business isn't the only one! I have expressed these concerns to David Pope a number of years ago. He asked me why I wanted 20 years worth of reserves anyway. He said that I couldn't possibly know where I was going to be in 20 years. Notwithstanding Mr. Pope's viewpoint, all businesses must be able to plan years in advance, especially when continuity of business depends on acquisition of reserves of natural resources such as sand.

I have a new deposit ready to open. In 2003 I asked for a two-year extension so that I could utilize the present reserves. DWR told me they would not grant the extension for longer than one year. That is not an economical use of reserves. Nonetheless, I am hurrying to open the new facility so that I won't lose my permits from DWR. While I should stay at the facility I'm at now for another two years, I will risk losing my permits if I don't move by the end of the year to the new facility. By moving early I will be leaving some reserves that should be utilized. That constitutes waste for my business as well as the State of KS.



ASSOCIATED MATERIAL & SUPPLY CO. INC.

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Plant Location
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Mulvane, KS
(316) 777-1421

We all know that in order to operate in a free economy, all businesses need laws that impose certain and reasonable standards which are uniformly applied. The amendments to KSA 821-734 proposed by House Bill 2919 help to accomplish these needs. A few years ago, this legislature and governor wisely amended KSA 82 to provide in material part as follows:

“ Unless the chief engineer determines that it has a substantially adverse impact on the area groundwater supply, the evaporation of water exposed as the result of the opening or operation of sand and gravel pits shall not be construed to be a beneficial use or diversion of water for the purposes of the Kansas water appropriations act.”

Ever since the legislature has amended KSA 82a-734, the term, “substantial adverse impact on the area” has not been defined either by any Kansas statute or any appellate court. This lack of definition created uncertainty in our business environment. In fact, the two Associated Material and Supply sand plants have been subject to different levels of scrutiny, although no Kansas agency has ever determined that either plant allowed evaporation to cause an substantial adverse impact on the area groundwater. Obviously, if this treatment were between two different operations, the different levels of scrutiny would provide an unfair advantage to one operator over the other. The map used by DWR to determine the amount of evaporation in a given area shows this. By the addition of pertinent definitions in KSA 82a-734, as proposed in House Bill 2919, all sand and gravel pits in Kansas would be subject to the same reasonable standard, and not subject to some arbitrary rule of thumb as shown on the maps.



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Thus, House Bill 2919 helps create a fair, user-friendly business environment in Kansas, because it supplies a certain and uniform standard which reasonably protects groundwater, but does not arbitrarily hinder the business of sand and gravel plant operators. Indeed KS would benefit further by allowing business to export more sand outside KS. I'm afraid to develop those markets because when I run out of reserves I don't know where I will go. My business will close.

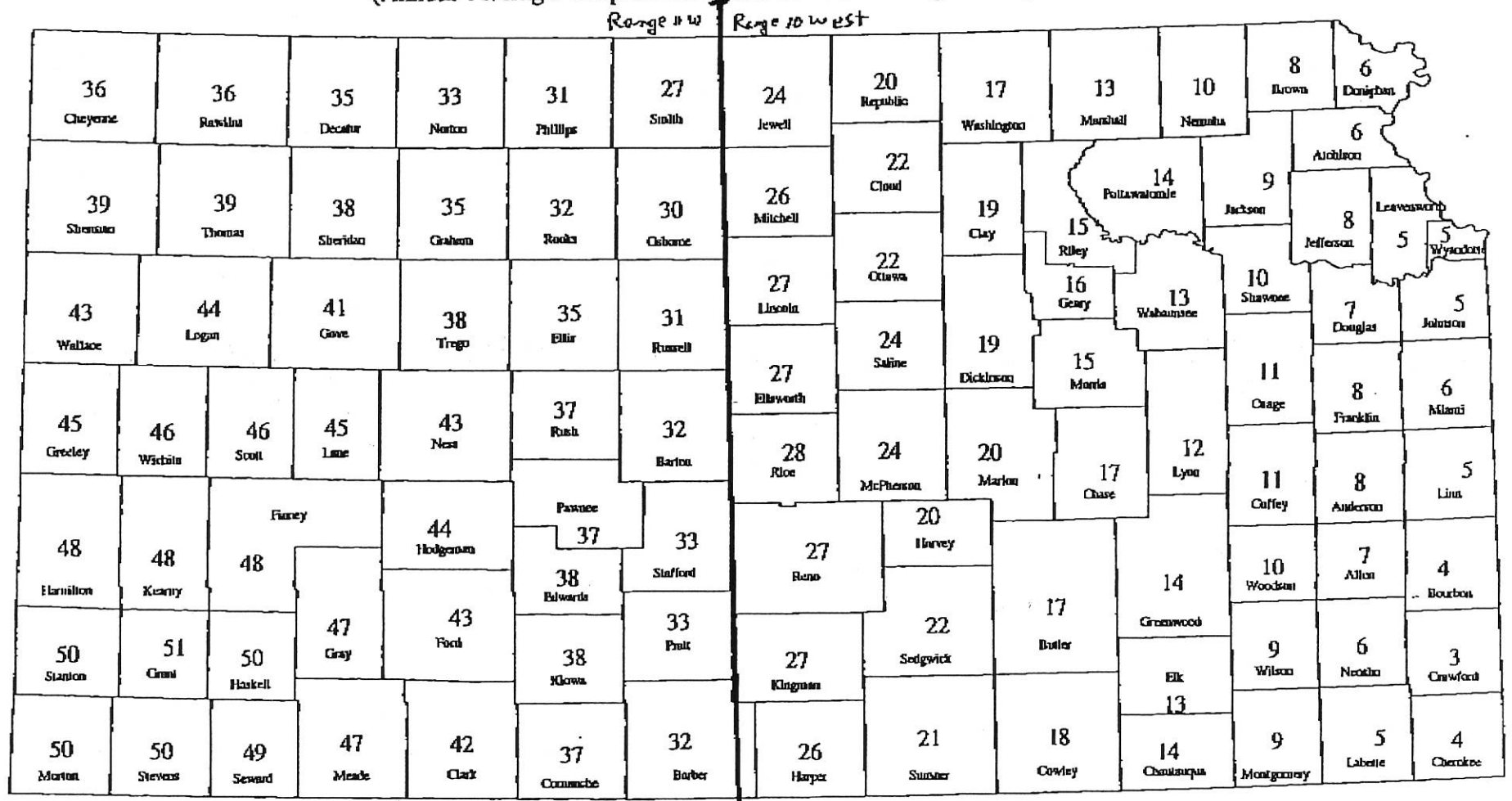
As a business person, I want to express my support for the proposed amendments to KSA 82a-734 set forth in this bill.

Are there questions I might be able to answer.

Thank you.

Potential Net Evaporation, in Inches, for Kansas Counties

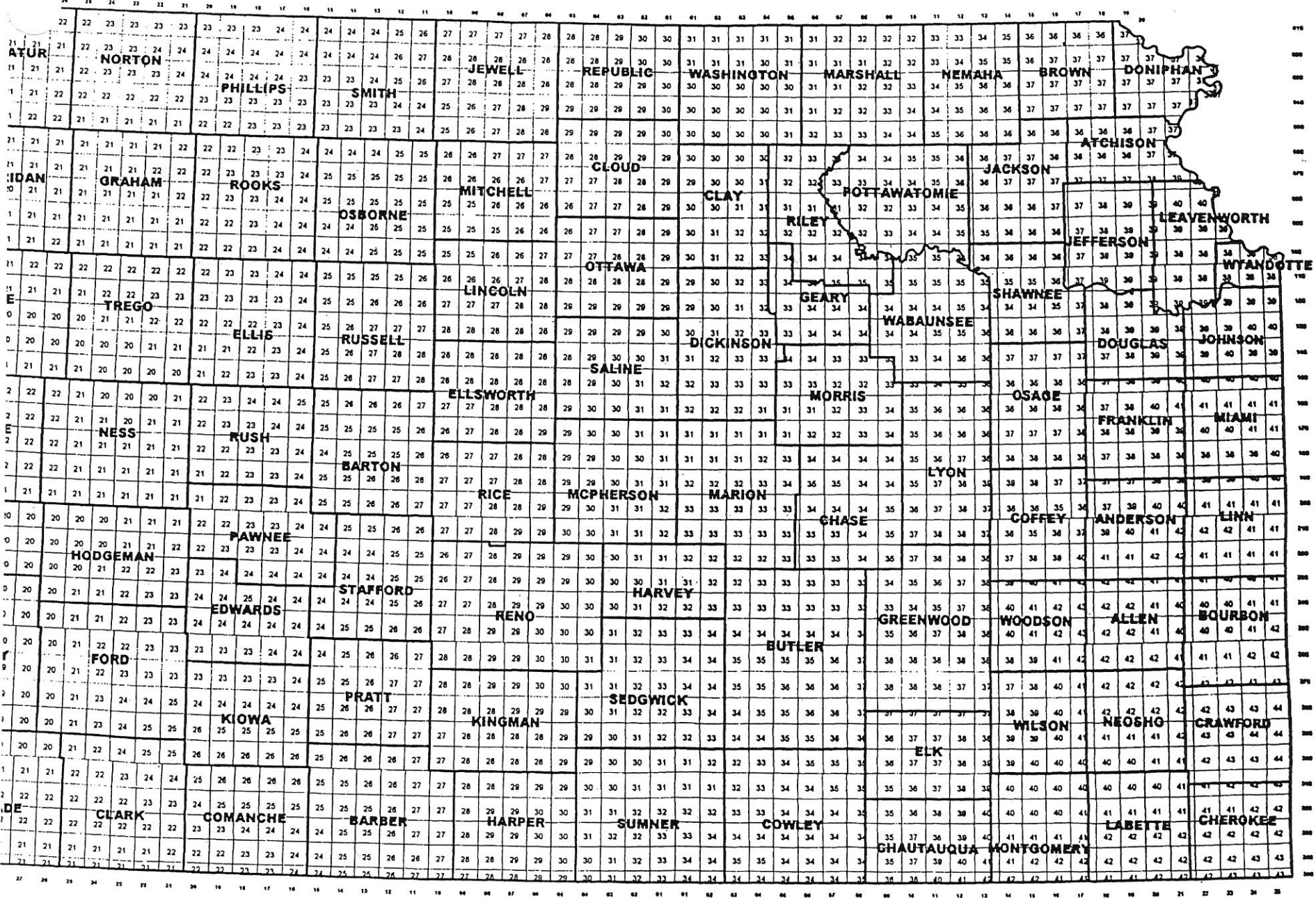
(Annual Average Evaporation minus Annual Average Precipitation)



Map Source- NOAA Technical Report NWS 33, 'Evaporation Atlas for the Contiguous 48 United States' and USWEST Optical Publishing, 'CLIMATEDATA-Summary of the Day, 1992'

Normal Annual Precipitation, by TOWNSHIP, 1961-1990

← Ranges W | - Ranges E →



← Ranges W | - Ranges E →

6-6

Normal Annual Precipitation, in inches, as interpolated from NOAA Climatology of the United States No. 81 "Monthly Station Normals of Temperature, Precipitation, and Heating and Cooling Degree Days 1961-1990, Kansas."

Testimony Regarding HB 2919
Presented by Wess Galyon, President/CEO
Wichita Area Builders Association
Tuesday, March 16, 2004

I'm Wess Galyon, President/CEO of the Wichita Area Builders Association. We are a trade Association with a membership of 1300 members engaged in all facets of the housing and light construction industry in Sedgwick, Harvey, Butler, Sumner, Cowley, Harper and Kingman Counties. The majority of our members are small business owners. However, collectively, they employ approximately 18,000 people according to the most recent census data.

The construction industry needs an ongoing supply of readily available sand and gravel, which is used in numerous applications and products during the various phases of construction of homes, commercial and industrial buildings, and construction of infrastructure.

As far as we have been able to ascertain, there is no scientific evidence that evaporation from the surface of active or retired sand and gravel pits has impaired ANYONE'S legitimate water rights.

The construction industry in our state, and the nation, has been one of the bright spots in the economy and especially in South Central Kansas during the recent economic downturn. Most of that industry is dependent on a readily available and reasonably priced supply of sand and gravel in order to sustain itself.

K.A.R. 5-13-2 "Determination of Substantially Adverse Impact on the groundwater supply" was put into effect by the efforts of one Groundwater Management District Director and the Chief Engineer after the Kansas Legislature twice refused to pass such provisions. That Regulation, which equates a "Substantially Adverse Impact" to a surface water evaporation rate table adopted by the Chief Engineer, cannot be directly related to impairment of groundwater resources.

K.A.R. 5-13-4 pretends to provide an "Exemption" to the evaporation regulation by offering to accept the purchase of water rights by a sand and gravel permit applicant in an amount necessary to offset the arbitrary

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evaporation amount set by the Chief Engineer. That provision is not working because most prospective sand and gravel production sites are already totally, or over, appropriated and offsetting water rights are not for sale.

After the legislature refused to require that prospective sand and gravel producers obtain water rights equal to evaporation in 1996, the Director of Groundwater Management District #2 and the Chief Engineer created a Task Force to develop "reasonable and prudent recommendations....to clarify protection inequalities that exist in water law." Had the recommendations of the Task Force been followed, many of the issues that sand and gravel producers have today would have been addressed. Among those Task Force recommendations are the recognition that plants consume groundwater in significant amounts and that encouraging the discharge of surface runoff into groundwater pits would more that offset evaporation from the surface.

Again, I want to reiterate that the construction industry needs a readily available supply of reasonable prices sand and gravel on an ongoing basis, and recognized the need for an ample supply of groundwater. We do not agree with the assumptions that went into the writing of current Regulations, which will eventually shut off the supply, for no valid reason.

Thank you.

**ALSOP SAND CO., INC.
P.O. BOX 331
CONCORDIA, KANSAS 66901**

Good afternoon, my name is Dane Barclay I am President of Alsop Sand Co., Inc. located at Abilene, Concordia, Clay Center, Salina, and Scandia. I am asking for your support of House Bill 2919. The sand and gravel industry is a long-term business with long-term commitments and customers that are long term entities, such as, the Kansas Department of Transportation, County Highway Departments and Municipalities.

Alsop Sand Co. is a third generation business. Our individual locations are representative of small sand producers across Kansas. Because of tremendous expenditures, for land, equipment and start up cost these are long-term commitments of twenty to fifty plus years.

We need legislation and regulations that recognize the long-term nature of our industry.

I am therefore supporting House Bill 2919 as a way to address this issue.

Under current law and regulations implemented by Division of Water Resources (DWR) we are not allowed long term planning.

However, for those of you unfamiliar with water law in regard to the Sand and Gravel Industry I have included a few explanations.

Perfection of a Water Right

Example: With an Agricultural Irrigation right, if the farmer applies for a one hundred (100) Acre Feet Water Right, and he pumps one hundred (100) acre feet in any one of the first five years the right is perfected, at one hundred (100) acre feet. If the farmer only pumps thirty (30) acre feet in each of the first five years he has only perfected thirty (30) acre feet.

However, if a Sand & Gravel producer has enough water rights to cover one hundred (100) acres of sand reserves and the producer pumps an average of one and one half acres per year. And if he gets the theoretical twenty (20) year extension, at the end of forty (40) years he can only have perfected enough water for sixty (60) acres. **So it is impossible to fully perfect this right under the current system.**

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Construction Division Works

Example: To comply an Agricultural Irrigation right holder has to, drill the well; install the pump, and irrigation system. A three-year limit to get this done.

However, a Sand & Gravel Producer must dig a hole down into ground water large enough to float a dredge, install the dredge and screening plant. This is not a problem on existing sites. The problem arises when you look at our non-contiguous sand reserve three or four miles from the existing sand plant. If we are seven to ten years from completing our current site and we only have three years to construct the diversion works, at the new site. The only way we can comply is to start a second sand plant within three to four miles of the existing site. This is not a reasonable solution.

I should mention that we could apply for an extension, as I have done on this property. But in an industry where we plan decades in advance, the one year extension I received, only demonstrates the need for change in the system.

To illustrate another flaw in the current system, at our Salina plant site we have seven to ten years' reserves. With an approximately twenty to thirty years at another site three to four miles south. I believe we should hold more reserves than that have been prospecting for more. However, the Smoky Hill River Valley is over appropriated around Salina, there are no new water rights available. So I have been prospecting in the Saline River Valley where water rights are available, due to the water being salty. If I were able to find a workable sand deposit in the Saline River Valley and applied for and received the water rights to cover the surface of the future lake there is no way to perfect those rights beyond forty years under the current system. And I am currently holding between twenty-seven and forty years of reserves. If the forty years projection were correct we would start producing on the property the same year DWR would take our rights away. Do not forget that by 2007 in order to comply with the deadline for construction of diversion works I would have to open a third sand plant at the Saline River Valley site, within a few miles of the other two. Surely this is not the intent of the legislature.

KDWR History

1945 - Water appropriation act was passed. Water users could file for appropriations on a voluntary basis to protect their rights.

1978 - Legislature makes it mandatory that anyone diverting water for beneficial use must have prior approval from the Chief Engineer.

In 1978 hydraulic dredging in the sand and gravel pits nor any aspect of our industry require prior approval.

1988 - DWR informs us that we must get term permits for hydraulic dredges at each site. That involved only fees and paper work.

1990 -Tax on water use, with the money going to the water protection fund

May 1,1993 - DWR announces that we will be required to acquire appropriations of water to cover the evaporation off the surface of the lakes we create

1995 - House Bill 2476 was passed. The Legislature recognized the uniqueness of the sand and gravel industry. DWR was very unhappy with the sand and gravel industry being "exempted" as they put it. And DWR's standard practice became to sit on new applications. They did not deny the applications; they just did not process them. Personally I had one application in limbo for three years. And it was a non- consumptive term permit; there were no issues to discuss. It should have been a slam dunk.

1997 - It was proposed that the sand and gravel industry join a state- wide task force to try and craft a solution to this ongoing problem. The Aggregate and Groundwater Resources Task Force met monthly, six to eight hours per day, for nearly two years. The Task Force consisted of representatives from Ground Water Management District #2,Kansas Water Office, Kansas Department of Health and Environment, The Kansas Society of Engineers, The State Conservation Commission, Kansas Geological Society, and members of the sand and gravel industry. The Task Force crafted a piece of draft legislation that was workable and agreed upon by all.

2000 - DWR implements part of the Task Force concept, but leaves out key details that would have made the Rules& Regulations workable. In spite of the industry testifying at every single public hearing that a partial implementation of the Task Force concept, would not work. Our testimony fell on deaf ears with DWR.

The part of the Task Force Draft Legislation that DWR left out was the Project Permit. When a producer made an application on a project the water rights were to be granted for as long as the proven sand reserves lasted. Whether that was ten years or two hundred and ten, The Project Permit solved all the problems connected to time limits on Construction of Diversion works and Perfection.

One more piece of history to complete this picture, in 1995 I acquired land in Dickinson County. I bought the land south of the river from the mother and the piece north of the river from her son. All of this land had once belonged to the young man's grandfather. It is one tract bisected by the river.

When I applied for water rights, I was told that DWR would not even process the application, until I reapplied and separated the land into two tracts.

In my innocence, I did as requested. But soon the issue of time limits to construct the diversion works appeared.

In 1995 we started the sand pit south of the river. In 1997, I applied for an extension on the land north of the river and received it. But in 1999 when I applied for another extension and DWR would not grant the extension.

We really do need a workable system, the passage of HB 2919 could resolve this issue.

House Bill 2919 will allow our industry the ability to continue to plan into the future without arbitrary regulatory constraints.

I have included in my written testimony, a copy of the one-year extension I recently received. In an industry where we plan decades in advance with huge financial investments, DWR attempts to micro-manage our industry with unrealistic short term permitting and undermines our ability to serve the state and community in which we operate.

The current system does not work because of the time limits on Construction of Diversion Works and time limit for Perfection of Water Rights.

On a site where we are currently producing sand the deadlines for Construction of Diversion Works are a non-issue. We have already complied. However, on a future site, which we should not be pumping sand on for ten to thirty years, it is not practical or financially reasonable to require us to construct a second sand mining and processing operation within a few miles of the existing operation. However, that is the only way I can comply with the current regulations.

Time limits for Perfection of Water Rights: DWR current regulations allow us twenty years with a theoretical extension of twenty years.

Under current regulations it is impossible for the Sand and Gravel Industry to perfect Water Rights needed beyond forty years.

An irrigator can perfect by pumping their full permitted right once in the first five years. They then own that right in perpetuity.

A municipality can perfect by pumping their full permitted right once in the first twenty years or with a twenty-year extension. That municipality then owns that right in perpetuity.

There is no reasonable method for a Sand and Gravel producer with one hundred years of sand reserves and matching water rights to perfect those water rights beyond forty years.

To illustrate with an example, to comply under current regulation, at my Concordia site to perfect and thereby guarantee my water rights over all my future reserves I would be required to remove all the dirt and sand down to water level and haul that material off. That would mean removing 5,837,000 tons of dirt and sand and disposing of it. To put this in perspective that's 234,000 semi-loads of dirt and sand. Or one acre of dirt piled 2677 feet high, and I must do so before that forty (40) year window closes. To require me to do this to comply is surely not the intent of the legislature.

If this system is not corrected the Sand and Gravel Industry will be forced to duplicate resources and start two to three sand operations within a two to ten mile area, in order to comply with the time limit to Construct Diversion Works. This duplication of equipment, time and money involved will increase the Sand Producers cost significantly.

All of that cost must be passed on to our customers, the majority of which is KDOT, Counties and Municipalities.

In regard to time limits of Perfection period, Agricultural and Municipal rights may be reasonably perfected and go on indefinitely. We are denied equal opportunity under the law.

This prejudicial treatment denies our industry the ability to make long-term decisions and investment to best serve our largest customer, the Kansas Department of Transportation.

We really do need a workable system, the passage of HB 2919 could resolve this issue. It is my sincere hope that you will support HB 2919.



DEPARTMENT OF AGRICULTURE
ADRIAN J. POLANSKY, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

January 2, 2004

ALSOP SAND CO INC
PO BOX 331
CONCORDIA KS 66901

RE: Appropriation of Water
File No. 44,856

Dear Sir or Madam:

In response to your written request, received in this office on December 17, 2003, the Chief Engineer has extended until December 31, 2004, the time in which to complete the diversion works under the above referenced file.

The law requires that the Chief Engineer, Division of Water Resources, Kansas Department of Agriculture, be notified in writing, when construction of the diversion works has been completed. According to the law, failure to complete construction of the diversion works within the time allowed shall result in the dismissal of the above referenced file.

If you have any questions, please contact our office.

Sincerely,

William J. Gilliland, L. G.
Permits Unit Head
Water Appropriation Program

WJG:dws

pc: Stockton Field Office

STATE OF KANSAS

BILL GRAVES, GOVERNOR
Jamie Clover Adams, Secretary of Agriculture
109 SW 9th Street
Topeka, Kansas 66612-1280
(785) 296-3558
FAX: (785) 296-5389

Division of Water Resources
David L. Pope, Chief Engineer
109 SW 9th Street, 2nd Floor
Topeka, KS 66612-1283
(785) 296-3717 FAX (785) 296-1176

KANSAS DEPARTMENT OF AGRICULTURE

January 7, 2003

ALSOP SAND CO INC
DANE Q BARCLAY
P O BOX 331
CONCORDIA KS 66901

Re: Appropriation of Water
File No. 40,458

Dear Mr Barclay:

In response to your request, the Chief Engineer has extended until December 31, 2032, the time in which to perfect the proposed appropriation and maintain records from which the amount of water actually diverted during the calendar year may be readily determined under the above referenced file.

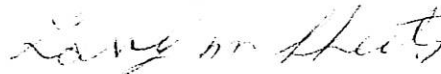
Please note the time in which to perfect the appropriation of water under File No. 40,458 has only been extended for thirty (30) year, not the fifty which you asked for. K.A.R. 5-8-7 of our rules and regulation, dated September 22, 2000, indicates the total time to perfect a water right, for a sand pit, shall not exceed forty (40) years after the approval. Extensions of time to perfect after this time can only be granted when extenuating circumstances are shown. It is the owner of the approval of application's responsibility to document the extenuating circumstances and justify the need for the extension of time to perfect the water right.

If you need an additional extension of time, it will be your responsibility to write to us and ask for an extension of time to perfect your appropriation before the time to perfect your appropriation expires.

You are required to report your water use each year to the Chief Engineer by March 1 following the end of the previous calendar year so that the extent of use becomes a matter of record to protect your right. A water use report form will be sent annually, to be used by you, for reporting your water use to this office.

If you have any questions, please contact our office. If you wish to discuss a specific file, please have the file number ready so that we may help you more efficiently.

Sincerely,



Larry M. Sheets
Environmental Scientist
Water Rights Section

LMS
pc: Stockton Field Office

LARNED SAND AND GRAVEL, INC

P.O. BOX 227, E. HIGHWAY 19, LARNED, KS 67550 620-285-3236 FAX 620-285-3278

March 12, 2004

To: The Environment Committee

Re: House Bill No. 2919

Dear Committee Members,

We are a small Sand & Gravel Company in a small community. We provide sand for Pawnee County, Townships, Cities and local residents. With the economy slow, our sales are way down. We have been working with the DWR for years trying to keep their rules in prospective so that we can keep providing our community with reasonable products. The other gravel pit in our area is trying to retain his reserves for his concrete plant. The next gravel pits are 20 miles west and 30 miles east. We have purchased some new ground to move our operations to. We had to acquire all our permits to do this. We were granted our permits in 2003. With all of the budget cuts that the government agencies have been hit with, our sales being down, we have not been able to proceed with our plans to move our operation. And now DWR says our present location is over our allotted acres. We have been filling out our required paperwork for the DWR since 1995 and now they check us and say we went over on acres. With the economy already depressed, the present rules and regulations are hurting us and even preventing us from expanding and trying to find other ways to benefit our local community and economy.

We applied for our permits in 2001. We waited approximately two years to receive our permits for our new ground. Now the DWR wants us to have water exposed by December 31, 2004. Originally we had 5 years to accomplish this. This means we will have to turn down work so we can concentrate our efforts to get this new pit open. This will hurt us financially by concentrating on this instead of spreading it out or working on it when we are between jobs.

We urge your support of Housebill 2919.

Sincerely,

Gary Rainbolt
Larned Sand & Gravel, Inc.

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STATEMENT OF M.S. MITCHELL
TO THE HOUSE ENVIRONMENT COMMITTEE
REPRESENTATIVE JOANN FREEBORN, CHAIR
REGARDING H.B. 2919

MARCH 16, 2004

Madam Chair and Members of the Committee, I am M.S. Mitchell, a consulting engineer and Legislative Chair of the Kansas Building Industry Association. I am strongly in support of H.B. 2919, and it is a very needed bill.

H.B. 2919 provides statutory definition of the term "substantial adverse impact" as used in K.S.A. 82a-734 to mean that anyone questioning the effect of the exposed groundwater resulting from sand and gravel mining on an existing water right must be able to prove that effect. Seems like a perfectly logical practice. But almost before the ink dried on K.S.A. 82a-734 in April 1995, those persons wanting to cause an adverse impact on the sand and gravel industry in Kansas got busy.

They claim that groundwater is being lost to existing water right holders because of water escaping into the atmosphere from the surface of sand and gravel pits while conveniently overlooking the millions of gallons seeping back into rivers and streams (also subject to evaporation) and being taken up by plants which tap the groundwater and lose it through evapo-transpiration which is the single greatest user of groundwater. These persons and agencies want the sand and gravel operators to won or buy water rights BEFORE they begin to expose groundwater, regardless of whether such exposure will have any affect on an "area groundwater supply" and they set about the create the current Regulation which does that.

The main worry sand and gravel operators had with K.S.A. 82a-734 is that without statutory definition of "substantially adverse impact" on the area groundwater supply, there is no assurance that the Chief Engineer, at any time or place could, with or without justification cause a sand and gravel operation to cease. We are told that not too long after the 1995 passage of K.S.A. 82a-734 the Chief Engineer did shut down two sand pits claiming the constituted a "substantially adverse impact" on an area

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groundwater supply. That action put a chill on sand and gravel industry planning that exists today, and is the reason for offering two definitions that will make the regulatory use of the term "substantially adverse impact" be based on good science, rather than prejudicial.

The other definition proposed in H.B. 2919 is of "direct impairment" which requires measurable evidence that raising or lower of the groundwater table or streamflow is directly attributable to the operation of sand and gravel pits. Together, these definitions assure sand and gravel operators that the effect of the operations will be evaluated by a factual investigation rather than a prejudged opinion that sand and gravel operations are bad for water resources.

Without statutory definitions of the two terms from K.S.A. 82a-734 which intend to free the sand and gravel industry from the requirement to obtain a water appropriations under K.S.A. 82a-954, the industry can get back to its business of providing the state with a ready supply of commercially valuable and inexpensive raw materials for Kansas commerce, industry, agriculture and personal use.

Madam Chair, we urge you and your Committee to favorably act on House Bill 2919. Thank you for your consideration.



TESTIMONY

By the
Tarbet, Inc.

Before the
House Environment Committee

Regarding HB 2919

March 16, 2004

Chair Freeborn, members of the committee, my name is Joe Tarbet, Vice President of Tarbet, Inc., Ulysses, Kansas. Our company Tarbet Inc. was founded by my father Howard "Brick" Tarbet shortly after World War II in the late 1940's. We are the largest concrete producer in southwest Kansas, with plants located in Colby, Elkhart, Syracuse, Ulysses, Johnson, Hugoton and three portables. We currently employ 30 to 40 people on a year round basis. In the course of our business, we deliver 80,000 – 120,000 thousand yards of concrete annually. This requires over 150,000 tons of sand. Recently we were unable to quote, at any price, a proposed 43-mile Hamilton County road project to service their livestock industry. In Stanton County the county owned pit is near exhaustion. They have been unable to locate water rights for a new operation and we are unable to supply them. In order for us to continue serving both the public and private sectors of southwest Kansas we need access to vital raw materials. Included in this category is sand and gravel, which is why we appear before you today in support of HB 2919.

The passage of HB 2919 is essential in order to provide some type of resolution regarding how the Kansas Water Appropriations Act is applied to sand and gravel operations. If there is not some sort of change soon, we will be unable to secure this vital raw material. In the past year we have made several attempts to acquire new sand and gravel reserves. While we have been able to identify the location of these reserves, we have not been able to get water sufficient to cover the net evaporation as required by the Kansas

Division of Water Resources. As our potential reserves are currently located within a closed area as determined by the Kansas Division of Water Resources, no new water is available for appropriation. During the past few years we have made exhaustive attempts to locate water for transfer to our proposed sand and gravel sites. Our success in doing this is almost negligible primarily for three reasons:

1. Given the confusing and complex nature of Division of Water Resources transfer rules and transfer rates, we have been unable to positively identify specific quantities of water.
2. Once we have ascertained that a water right may be available, we are unable to transfer to the proposed location.
3. Unlike other industries, we are not able to move our sites to where water is available.

In our opinion, making water available for sand and gravel operations should not be this complex as it appears to us the use is primarily non-consumptive. In addition to this, we believe the opening of sand and gravel pits in western Kansas assists with both recharge and storage, yet we are not given credit for this particular activity. The opening of sand and gravel pits has been a concept supported by the Kansas Department of Wildlife and Parks, who have emphasized the need for more recreational resources in western Kansas.

We thank you for the opportunity to come before you today and express our opinion and position on HB 2919. We sincerely believe that a more sensible system needs to be developed for sand and gravel operations as they relate to the Kansas Water Appropriations Act, and encourage your support of HB 2919. Thank you very much; I will be happy to respond to any questions at this time.



TESTIMONY

By

Ash Grove Cement Company

Before the

House Environment Committee

Regarding HB 2919

March 16, 2004

Chair Freeborn, members of the committee, my name is Lance Latham, Director of Communications and Public Affairs for Ash Grove Cement Company.

Based in Overland Park, Kansas, Ash Grove has been American-owned since its founding in 1882. We're the largest American-owned producer of Portland cement, and the fifth-largest producer nationally. When you consider that over eighty percent of the industry is foreign-owned, you can see how unique our company really is.

Our roots in Kansas run deep, and we have a significant financial commitment to our home state. Recently, a \$180 million expansion to our Chanute, Kansas plant was completed. In addition, we have, just this winter, moved into a new \$22 million Home Office in Overland Park. In all, our cement operations include nine cement plants, one lime plant, and a large quarry operation.

Additionally, Ash Grove operates numerous subsidiaries. One of the largest of these companies is Ash Grove Materials Corporation, also based in Overland Park. This company operates two large ready mix concrete operations in the Kansas City metro area. Our Materials group employs nearly 300 people.

We thank you for the opportunity to come before you today to express our support for HB 2919, which would provide a means of implementing a workable policy with respect to sand & gravel operations, and their interaction with the aquifer. This issue is vitally important to our industry, and affects not only companies in the sand and gravel business,

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but ready mix concrete customers and cement suppliers, as well, not to mention the thousands of Kansans these industries employ.

Sand is one of the most common construction materials in the world, and it might well be said the extraction of sand is the world's second oldest profession. Yet for all its basic commonness, sand is concentrated and limited in its availability for public and private use. Just like water, sand appears to be plentiful but it is not. The main reason for this is that quality sand & gravel deposits are unique, both in quality and gradation; and located where they were placed millions of years ago. Therefore sand mining, unlike any other water use cannot be readily moved or relocated. Sand must be mined where it is found, unlike irrigated land that can be farmed dry, or livestock operations that can be located near available water.

For these reasons HB 2919 is a vital element for the sand & gravel industry -- and therefore, our customers and our company -- in the state of Kansas in order to continue providing a vital commodity.

Water is important to all Kansans young and old. If water is truly reserved for the benefit of the people in this state then surely the public benefits by having reasonable access to a supply of sand and gravel which is used in many ways from eyeglasses to highways, from insulation to the silica used in computer chips. Next to water, ubiquitous sand and gravel is one of our most needed basic materials in our society. Please join with us today in assuring its future availability by supporting HB 2919.

Thank you once again for allowing Ash Grove the chance to voice our position on this important matter.

KLOTZ SAND COMPANY, INC.

P.O. Box 150 • Holcomb, KS 67851 • (620)277-2627 • Fax (620)277-0505 • After Hours: Victor 277-2068

March 16, 2004

The Honorable Joann L. Freeborn, Chair
House Environment Committee
Kansas House of Representatives
State Capitol
300 SW 10th St., Room 284-W
Topeka, Kansas 66612

Re: HB 2919

Dear Representative Freeborn,

Please consider this my written comments concerning HB 2919. I am a sand and gravel producer located in Holcomb, Kansas operating four different sand and gravel operations in the southwest Kansas area. My company Klotz Sand & Asphalt Paving Co., Inc. was founded by my father in 1977 after he spent several years working in the southwest Kansas construction industry. During this time he and I have worked to develop a viable sand and gravel business in southwest Kansas providing construction materials for several asphalt plants, concrete plants, cities, and counties throughout the area. It is my sincere hope that my hard work and effort will pay off in being able to provide a source of materials for the public and a viable business enterprise for my three young children.

However, the security of my business has been constantly threatened since the change in the position of the Kansas Division of Water Resources in 1987. Up to that point in time the Kansas Division of Water Resources considered the net evaporation created by the extraction of sand and gravel to be at such a minimal use that it did not merit regulation. Since that time, we have been locked in a constant struggle with the Kansas Division of Water Resources which on the one hand wishes us to acquire water rights yet on the other hand will not allow for the fact that our sand and gravel pits are located in areas that are

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closed to further appropriation. In addition to this the Kansas Division of Water Resources Rules and Regulations regarding the acquisition and transfer of water rights is so complicated and enigmatic that no one can understand when or if they have actually bought a water right. As a result of this, we have found that people who do have senior water rights and might be willing to sell them are unwilling to sell them, as they do not know what quantity they have or what value to place on them.

In addition to this, on the other side of the equation, we are unable to achieve suitable and stable financing from our bankers and other investors who are unwilling to extend capital to a business that has no assurance that they will be allowed to continue past one to five years. For these reasons, we strongly urge this committee, the Kansas House of Representatives and this Legislature to approve HB 2919. The approval of HB 2919 is imperative if the Kansas public and our businesses are to survive.

I thank you for the opportunity to provide these comments to you and urge your continued support of this bill.

Sincerely,

A handwritten signature in cursive script, appearing to read "Victor Klotz".

Victor Klotz

KEENAN & BOECKMAN
ATTORNEYS AT LAW, P.A.

DENNIS J. KEENAN

RICHARD A. BOECKMAN

1121 Washington; P.O. Drawer 1586
Great Bend, Kansas 67530
(620) 792-1100 FAX (620) 792-1102
rboeckman@kb-lawfirm.com

March 12, 2004

The Honorable Joann L. Freeborn
House of Representatives
State Capitol
300 S.W. 10th Street, Room 284 West
Topeka, KS 66612

Re: *Background on HB 2919*

Dear Representative Freeborn:

I was asked to testify in Topeka concerning House Bill No. 2919 on Tuesday, March 16. Due to other commitments I may not be able to attend. Please consider this letter as my written comments concerning House Bill No. 2919.

By way of brief introduction, I am an attorney in private practice in Great Bend. In that capacity I have experience in dealing with water issues, including litigation concerning water issues. Additionally, I'm the Barton County Counselor and for the last six weeks I have been acting as interim county administrator for Barton County.

K.S.A. 82a-734 as it is presently written contains a definition of "substantially adverse impact on the area." As a practicing attorney I find that definition to be vague. It is my opinion it would be helpful to practitioners to have a more clear definition of the term "substantially adverse impact on the area."

As a county operating a road system with many miles of paved roads, Barton County has a need for a steady supply of quality and, hopefully, inexpensive sand. Barton County is in the process of exploring its option to purchase sand in the future. Those options include developing a new sand pit. Barton County is fortunate in that Barton County is situated along the Arkansas River where there are deposits of sand. That being the case, it appears it is difficult to locate sand that is in the appropriate gradations. To locate a sand pit in the vicinity

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The Honorable Joann L. Freeborn

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of the Arkansas River requires acquisition of water rights. My observation is that the acquisition of those water rights is a difficult and expensive process. This area is closed to further water appropriation. That means to open a sand pit, the proponent of the sand pit either must have a water right or acquire a water right. Three individuals presently would like to sell land to the county to development a sand pit. None of those individuals have water rights, and either the individual or the county would be required to obtain water rights to develop the sand pit. My observation is that there are difficulties first in obtaining the water right because of distances involved in the transfer of water rights and second, if a water right can be located, it is quite expensive. The effect of this is that if the county chooses to develop its own sand pit, the sand is likely to be considerably more expensive because of the cost in acquiring and developing a water right.

Very truly yours,

KEENAN & BOECKMAN ATTORNEYS AT LAW, P.A.



Richard A. Boeckman
rboeckman@kb-lawfirm.com

RAB/rw

KAPA

Kansas Aggregate
Producers' Association

TESTIMONY

Edward R. Moses
Managing Director

By the

Kansas Aggregate Producers' Association

Before the

House Environment Committee

Regarding HB 2919

March 16, 2004

Chairperson Freeborn, and members of the committee my name is Ken Johnson, of Hays Kansas, Vice President, APAC Shears – Kansas and current Secretary-Treasurer of the Kansas Aggregate Producers' Association. Our company, APAC Shears, is one of the largest construction and mining firms in the state. APAC and its predecessors have been mining sand and gravel continuously for over 70 years in Kansas. Currently we have operations in Wichita, Hutchinson (2), Dodge City and 14 throughout Western Kansas. I personally have been in the business for the past 28 years. The Kansas Aggregate Producers' Association (KAPA) is a statewide trade association, comprised of over 250 members, producing sand, gravel, crushed rock, and other various aggregate products, and one of the few industries to be represented in every county in this state. Our industry produces over 15 million tons of sand annually. Or roughly equivalent to half the Kansas wheat crop in terms of weight, clearly a major contribution to the Kansas economy. Additionally, we provide some of the highest paying jobs in rural Kansas.

We thank you for the opportunity to come before you today to express our support for HB 2919. If enacted HB 2919 would provide a means of resolving state policy with respect to sand & gravel operations, and their interaction with the aquifer.

Sand is one of the most common construction materials in the world, and it might well be said the extraction of sand is the world's second oldest profession. Yet for all its basic commonness, sand is concentrated and limited in its availability for public and private use. Just like water, sand appears to be plentiful but it is not. The main reason for this is that quality sand & gravel deposits are unique, both in quality and gradation; and located where they were placed millions of years ago. Therefore sand mining, unlike any other water use cannot be readily moved or relocated. Sand must be mined where it is found, unlike irrigated land that can be farmed dry, or livestock operations that can be located near available water. For these reasons HB 2919 is a vital element for the sand & gravel industry in the state of Kansas in order to continue providing a vital commodity and properly interrelate with the Kansas Water Appropriations Act.

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Water is important to all Kansans young and old. If water is truly reserved for the benefit of the people in this state then surely the public benefits by having reasonable access to a supply of sand and gravel which is used in many ways from eyeglasses to highways, from insulation to the silica used in computer chips. Next to water, ubiquitous sand and gravel is one of our most needed basic materials in our society. Please join with us today in assuring its future availability by supporting HB 2919.

Thank you for your attention and I will be happy to respond to any questions you may have.

ECONOMIC IMPACT OF THE KANSAS AGGREGATE INDUSTRY

by:
Edward Moses

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

In 2003 Kansas produced 480,000,000 bushels of wheat, 300,000,000 bushels of corn, 130,500,000 bushels of sorghum and 57,000,000 bushels of soybeans, (these figures came from the Kansas Agricultural Statistics Service). These are all impressive numbers and do indeed give you an idea of the farming impact on the states economy. We generally refer to our aggregate usage in tons so I broke the crop totals down into tons (realizing that wheat, corn, etc. have a lower specific gravity) to see how we compare. This is when it got interesting, Wheat translated to 13,440,000 tons, Corn 8,400,000 tons, Sorghum 3,654,000 tons, and Soybeans 1,596,000 tons. Again these are very impressive numbers. Using the U.S. Bureau of Mine Statistics we find that crushed Stone produced 25,400,000 tons, which is 47 percent more, then wheat and considerably more than the other grains. When Sand and Gravel production is thrown into the equation at 15,100,000 tons we get a total of 40,500,000 tons of aggregate produced, which is more than the crops mentioned combined (27,090,000). While we will always be regarded as a farm state with a farm-based economy, mining plays a huge part in the states well being.

One other note of interest is that the United States mining and construction are at the top of the average hourly earnings scale of manufacturing jobs at \$16.72 and \$16.40 per hour respectively. In many rural counties we are also one of the largest and best paying employees. While some people may not want us next door, we are vital to the economy of any area that we are operating in.

Sources:

Kansas State Board of Agriculture
U.S. Bureau of Mines
Kansas Labor Market Information Services

Testimony
Kansas House Environment Committee
HB 2919
March 16, 2004
By Jim Gregory

Cornejo & Sons, Inc., a large street and highway construction company, supports HB 2919. This testimony is also submitted on behalf of Quik Sand, Inc., a Cornejo company in the business of sand and aggregate production, and another Cornejo business – Concrete Materials Company, one of the two largest producers of ready mix concrete in Sedgwick County.

Cornejo and Sons would like to offer the following points in support of HB 2919:

1. Sand and aggregate materials are a necessary component to the production of asphalt and concrete materials.
2. The local production of sand and aggregate materials is critical to maintaining an adequate supply of quality products for construction projects, particularly street and highway construction.
3. Local production not only insures an adequate supply, but also reduces transportation costs significantly, thus reducing the cost of construction projects.
4. Local sand and aggregate production also provides jobs, encourages capital equipment investment by local operators, and eventually provides many attractive and beneficial water features for land development.
5. Current regulations severely restrict the location and size of sand and aggregate mining operations, and place operators in competition for water rights with consumptive users of water, when, as the bill recognizes, the creation of a sand pit water area is in fact a non-consumptive use of water.
6. Sand and aggregate production in those areas of Kansas with substantial sand deposits also provides a necessary supply of such products to southeast Kansas, which has insufficient supplies of locally produced materials to serve the needs of the area for asphalt and concrete production.

Thank you for the opportunity to provide written comments on HB 2919.

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KANSAS WILDLIFE FEDERATION



The voice of outdoor Kansas

Testimony Prepared for the House Environment Committee in Opposition to HB 2919

March 16, 2004

My name is Dan Ward, and I'm the Executive Director of the Kansas Wildlife Federation. KWF is a 53-year old organization dedicated to the wise use, conservation, appreciation, and the restoration of our state's wildlife and natural environment. We approach this mission primarily from the perspective of hunting and fishing, which are important traditions in Kansas. Over 500,000 hunters and anglers spend hundreds of millions of dollars in the state each year.

Whether the issue is wetland areas, stream flow, water quality, waterfowl hunting, drinking water supplies, or fishing and other water recreation, groundwater use is a theme that is quite literally an underlying problem.

Kansas witnesses the same phenomenon that I've seen in New Mexico, California, Oregon, and in my native Texas. Across all of these states – and probably others – streams that once flowed year-round are now empty ditches that only have water during a heavy rain. This is mostly because of over-pumping from the underlying water table.

The Division of Water Resources, to its credit, recognizes that our aquifers are being over-used. In some parts of the state, there is no imminent threat. In others, the lifespan of the water supply can be measured in years, not decades.

In order to be successful at stabilizing water use and then restoring our aquifers, the Division of Water Resources needs the help of the Legislature. The key problem is that aquifers are oversubscribed, and this body needs to weigh in with ways to diminish water use before the wells run dry.

The bill that is in front of you today takes the state in exactly the opposite direction from the way we need to go. It adds to the stress of groundwater use, and doesn't give the Division of Water Resources the tools it needs to monitor or correct these usages.

It's easy to play with words, especially when we're sitting in a hearing room or in an office. But no matter what words we use, the fact of the matter remains that when you

open up a large pit and let the exposed water evaporate, you are consuming water, just as much as if you'd pumped the equivalent amount of water out of the ground. You also expose the groundwater to surface water contamination from stormwater runoff containing pesticides and fertilizers.

Open gravel pits and the evaporation they enable present a real threat to the Equus Water Beds, and hence, the City of Wichita and Sedgwick County. Until and unless we privatize the water market entirely and let free enterprise dictate the cost of water, the Division of Water Resources must have a meaningful ability to affect water consumption. Exempting evaporation from their oversight will affect over 500,000 people in the Wichita Metropolitan area and, by setting a bad precedent, will also threaten the water supply and the streams and rivers of Kansas.



KANSAS

DEPARTMENT OF AGRICULTURE
ADRIAN J. POLANSKY, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Testimony on House Bill 2919

to

The House Committee on Environment

By David L. Pope
Chief Engineer
Division of Water Resources
Kansas Department of Agriculture

March 16, 2004

Good afternoon, Chairperson Freeborn and members of the committee. I am Greg Foley, assistant secretary of the Kansas Department of Agriculture. The testimony I am about to present was prepared by DWR Chief Engineer David Pope, who is attending another meeting at the request of the governor at this time. I am appearing as an opponent to HB 2919.

This bill would amend K.S.A. 82a-734 to essentially remove sand and gravel operations from regulation of water consumption under the Kansas Water Appropriation Act. This is accomplished by defining terms in a way that ensures that evaporation from these operations is considered neither a beneficial use nor a diversion of water.

The bill ignores the indirect, but not insignificant, effect sand and gravel operations can have on groundwater and other water users.

According to current law, if there is no substantial adverse impact to the area groundwater supply, then evaporation from a sand and gravel operation is not a beneficial use. Consequently, under this bill, no permit or water right would be needed for most sand and gravel operations.

In contrast, current rules set out a series of standards to address appropriation of water by evaporation from sand and gravel operations. The rules indicate that a sand and gravel operation has what is termed a "substantially adverse impact on the area groundwater supply" if it is opened or expanded in an area that has average annual evaporation greater than 18 inches per year.

Under current rules, this means that in eastern Kansas, where evaporation is not that great and water supplies typically are not in short supply, sand and gravel operations do not need permits. In central and western Kansas, where evaporation is greater and many areas are fully appropriated, sand and gravel operations are regulated under the Water Appropriation Act.

For example, in the Great Bend area, the net loss to a water supply from a 50-acre groundwater pit for a sand and gravel operation is about 130 acre-feet per year. The impact would be greater the farther west you go. This is about the same as the consumptive use for a typical 130-acre center pivot irrigation system in the same area. Also, that irrigation system is required not to impair more senior water rights, either directly through well drawdown, or indirectly by causing an overappropriation of the water supply.

The bill we are discussing today would redefine direct impairment in such a way as to ensure that other water rights can receive no protection from the consumptive use associated with a groundwater pit.

The groundwater pit and irrigation system in the example just cited can have an indirect effect by consuming some of the water supply. To protect all water rights, and to ensure the local water supply can meet current and future needs, we limit the amount of water that can be used in any given area. This bill would essentially exempt sand and gravel operations from regulation, but it would not provide a similar exemption for irrigation systems or any other use that consumes a comparable amount. Some small towns, individual industries and livestock operations consume less water than a sand pit, but they are not exempt because any one use can have an adverse impact on another water right and their use can contribute to the overall impact on our water supply.

Section (d) of the bill also would declare that evaporation of water from sand and gravel operations, assuming it was found to be a beneficial use, "shall be deemed as non-consumptive." This is factually incorrect. Evaporation is a consumptive use, and it does occur from sand and gravel operations. Evaporation is treated as consumptive from these operations, as well as from reservoirs and other such projects, and is included as part of the beneficial use of many historically granted water rights in Kansas. As an analogy, I do not think we want to define "red" as "blue" by law, when the color has not factually changed.

A special legislative committee on the environment studied this issue in 1999. One of their conclusions was to request the chief engineer to resolve the matter administratively, to the extent possible, by adopting rules and regulations. We did adopt new rules and regulations in 2000 after an extensive effort to incorporate the views of various interests.

We also included most of the recommendations made by the task force created by the Kansas Aggregate Producers Association and the groundwater management districts. They met several times in 1997 and 1998 to find a solution to longstanding disputes over how water use by this industry should be regulated by the Kansas Water Appropriation Act.

The rules include provisions to allow a very liberal exemption from normal regulatory criteria in closed areas, or where permits could not otherwise have been issued for other uses. This allowed existing, active sand and gravel operations – as long as they met certain criteria like having legal control over proven sand and gravel reserves within a certain time frame – to file an application and obtain a permit to appropriate water for evaporation from an existing or proposed groundwater pit. There are further provisions that allow flexibility for such operations to meet future needs, even in fully appropriated areas, by acquiring water rights or supplies in the area to offset the impact of the operation.

The rules include provisions that allowed not only permitting of existing sand and gravel operations, but long-term transition into regulation conceptually similar to that for all other water

users in Kansas, although the rules are somewhat less restrictive. I believe we were successful in our effort and the rules received overall support. To our knowledge, all known existing sand and gravel operations that cause evaporation of groundwater have now been permitted.

This bill essentially would scrap all the cooperative effort that went into creating workable and fair rules. It appears that this bill was requested was to allow construction and use groundwater pits as part of future residential developments in urban areas, either as an exclusive purpose or after sand and gravel mining ceases, without undergoing permitting and regulation as currently required.

I do not believe it is good policy to pass legislation to deregulate one particular industry when their impact is similar to other water users. In closed areas, new users, regardless of type, are not being granted new water rights. They must acquire existing water rights to avoid the adverse impact to the water supply caused by a new use in an overappropriated area. This bill would allow existing or new groundwater pits in the same area to be unrestricted in the amount of water they consume either now or in the future. I do not believe this change is necessary for the sand and gravel industry to operate successfully. Nor do I believe it is fair to other types of water users, or appropriate to put our limited water supplies at risk.

Consequently, the department of agriculture opposes this bill. I would be happy to attempt to answer questions at the appropriate time.

**Testimony to the
House Environment Committee
HB 2919
Presented by Patrick T. Lehman
For the Northwest Kansas Groundwater Management District #4
March 16, 2004**

Thank you, Madame Chair and members of the committee. I am Pat Lehman and I represent the Northwest Kansas Groundwater Management District #4, headquartered in Colby, Kansas. I am testifying for the district in opposition to HB 2919.

HB 2919: Amends KSA 82a-734 by defining "direct impairment" and "substantial adverse impact on the area", and stating that evaporation from exposed sand and gravel pits, if deemed a beneficial use, shall be non-consumptive. KSA 82a-734 currently says that the evaporative losses from sand and gravel operations is NOT a beneficial use of water (requiring a water right) unless the operation has a substantial adverse impact on the area.

GMD 4 opposes this bill for the following reasons:

- 1) The bill is worded such that no evaporative loss situation will be found to have a substantial adverse impact on an area. As a result, no sand and gravel operations' evaporative losses can be construed a beneficial use, thus requiring a water right. Not accounting for these consumptive water losses could overappropriate sand and gravel operational areas to the disadvantage of all other potential water right holders.

Thank you, Madame Chair. I will be glad to answer any questions the committee may have.

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

Testimony in Opposition to HB 2919 – Appropriation of water for beneficial use
On behalf of the Kansas Chapter of the Sierra Club
Before the Kansas House Committee on the Environment
March 16, 2004

Madam Chair and members of the Committee, thank you for the opportunity to testify in opposition to HB 2919. The Sierra Club is the largest grass roots environmental organization in the world with over 750,000 members, including over 4,000 in Kansas.

One of the concerns of Kansas Sierrans is the sustainability of water use from aquifers in Kansas and the potential for pollution to those aquifers. For example, Kansas Sierrans have spoken out for state policies requiring liners on animal waste lagoons in order to protect the aquifers of Kansas from pollution.

Normally, an aquifer is not directly exposed to the atmosphere and suffers no evaporative loss or diversion. Aggregate mining is an intrusive process that removes the sand and gravel layer overlying an aquifer thus exposing the aquifer to the evaporative process. This process also exposes the aquifer to a variety of environmental conditions including water loss due to evaporation and contamination from runoff of untreated flood and storm water.

HB 2919 is of concern to Kansas Sierra Club because it would make it the policy of the state of Kansas to no longer regulate evaporation from aggregate pits as a diversion of water from aquifers. If this were the state's public policy, we are concerned that groundwater diversions due to evaporative loss will exceed the recharge rate thus resulting in a net depletion of the aquifer. This would lead to a statewide situation similar to the policy of "planned depletion" that has lead to the draw down of the High Plains aquifer. Therefore, we support the permitting of all groundwater diversions, including but not limited to evaporation form aggregate mining, so as to provide for the proper management of all the state's aquifers. We ask the Committee to reject HB 2919.

Thank you for your time and attention.

*House Environment
3-16-04
Attachment 20*

Testimony on House Bill 2919
House Environment Committee
City of Wichita, Water and Sewer Department
Gerald T. Blain, P.E, Water Supply Projects Administrator
March 16, 2004

The City of Wichita is very concerned about several issues that are included in House Bill 2919. It appears that the general intent of the bill is to treat water usage from sand and gravel pits separately from any other water users. The most troubling portion of the proposed bill is item 2 (d), which contends that even though water is lost from a sand or gravel pit through evaporation, it will still be considered "non-consumptive".

The existing water appropriations act, and the regulations used by the Department of Agriculture, Division of Water Resources, provides a comprehensive set of standards that is used to manage the State's water supplies. Water lost through evaporation from a sand or gravel pit has been, and must be, considered water usage. In Sedgwick County the net evaporation from a sand and gravel pit is currently calculated at approximately 20-inches per year. Based on that evaporation rate, if there is a 40-acre sand pit, the water lost through evaporation would be approximately 20,850,000 gallons per year. To not call the loss of over 20,000,000 gallons water consumption strikes to the core of the water appropriations law.

While some members of the aggregate industry might question the validity of 20-inches per year of net evaporation, the laws of physics do not leave any doubt that evaporation, at some rate, does occur. The language in Section 2(d) attempts to legislate that someone can use or consume water, but it will not be considered as being used or consumed. If the water consumed by these water users can be declared to not actually be consumed, and be exempt from the requirements of the water appropriations act, what is the basis for not allowing other water users to seek that same declaration?

The City of Wichita has 40,000 acre-feet of water rights in the Equus Beds, which is also the location of a large number of sand and gravel pits. While sand and gravel pits do not have high volume pumps that create a cone of depression, at the end of a year they still use water. If the water used by these pits is not included in the total water used in the Equus Beds, it will increase the water usage from the Equus Beds, and threaten the City's water supplies.

As previously stated, sand and gravel pits do not use high volume pumps to remove the water from the aquifer, but they still remove water from the aquifer. However, in other existing regulations, it is only through the use of pumps that the definitions in Section 1 of this legislation can be met. The City is very concerned about the concept of "unreasonable lowering of the groundwater" as a standard for administration of a request to install a new sand or gravel pit. As a water rights holder, the City believes that **any** lowering of groundwater levels caused by an additional user in an area that is already over appropriated should be considered a direct impairment. In the past, the Chief Engineer has administered reductions in water rights because of their collective impact on the aquifer, and not because an impairment was attributable to a specific water right or a specific water user. To legislate this level of scrutiny for sand and gravel pits grants them a special status not given to all other water users. If sand and gravel pits get that type of status, other water users will have a basis for seeking exemptions and special status too, further deteriorating the premises of the water appropriation act.

Because of the potential impacts to the State's water management regulations, and the potential threat to the City's water supplies, the City urges that you reject this proposed legislation.

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3-16-04
Attachment 21

EQUUS BEDS GROUNDWATER MANAGEMENT DISTRICT NO. 2

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**Testimony before the
House Committee on Environment
concerning
House Bill 2919 – Appropriation of
Water for Beneficial Use
by
Michael T. Dealy, Manager
March 12, 2004**

On behalf of the Board of Directors, Equus Beds Groundwater Management District No. 2, I wish to thank Chairman Freeborn and members of the Committee for the opportunity to present the Board of Directors' concern and opposition to HB 2919.

BILL ISSUES - The bill seeks to exempt sand and gravel pit operations from obtaining a water permit to divert surface or groundwater by exposing the water body to evaporation during mining operations.

Current water law and regulations require such mining operations use of water to obtain a water permit to use the public water resources.

The exemption is created by establishing unreasonable and paradoxical requirements as contained in the bill sections (a)(1) and (a)(2).

Such requirements will make it virtually impossible for the Chief Engineer, Division of Water Resources, to determine whether such a facility's use of surface or groundwater was a beneficial use of water and thus requiring a water permit.

Section (d) of the bill seeks to overturn a basic hydrologic principle, that water evaporating from a body of water, such

as an aquifer, is a loss or diversion and therefore is consumptive by nature.

BACKGROUND INFORMATION - Evaporation is part of the hydrologic cycle. The never-ending cycle transfers water from the earth's land and water bodies to the atmosphere. Evaporation from water bodies is an important consideration in managing water resources and can be measured with an error of plus or minus 10 percent, *Applied Hydrogeology, Fetter, 1980*.

Gross evaporation in the Equus Beds area ranges from 52 inches to 56 inches per year, *Estimates of Freshwater Storage and Potential Natural Recharge for Principal Aquifers in Kansas, Hansen, 1991*. Net evaporation ranges from 22 inches to 25 inches per year averaging 24 inches annually.

Sand and gravel deposits are abundant throughout the State and the Equus Beds area, *Bulletin 189, Kansas Geological Survey, 1968*.

A myriad of sand and gravel mining facilities have developed throughout the State, *Bulletin 199, Kansas Geological Survey, 1970*

Normally, an aquifer is not directly exposed to the atmosphere and suffers no evaporative loss or diversion *Groundwater Manual, US Department of the Interior, 1981*.

Aggregate mining is an environmentally intrusive process that removes millions of cubic yards of sand and gravel overlying the Equus Beds aquifer, exposing the shallow aquifer to the evaporative process.

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EQUUS BEDS GROUNDWATER MANAGEMENT DISTRICT NO. 2

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The aggregate mining process permanently opens up and exposes the Equus Beds aquifer to a variety of imminent environmental conditions, including evaporative losses and contamination from runoff of untreated flood and storm water.

Sand and gravel pits are commonly located near rivers, streams, in flood plains or in flood ways. Without proper siting and adequate safeguards, poor quality flood waters can enter the pit and be directly injected into the aquifer.

As an example, flood waters and effluent from a sewage treatment facility flow into an unpermitted sand and gravel pit located near a public water supply well field. Water quality data near the site indicates a substantial degradation of the groundwater quality has occurred since the untreated flow entered the pit.

A typical sand and gravel operation will mine over a million cubic yards of protective soil overlying the Equus Beds aquifer, creating an opening in the aquifer that is 50 feet to 60 feet deep, one-half mile long and a quarter mile wide.

Each year about 80 million gallons of groundwater is diverted by evaporation from a single pit, enough water to annually irrigate 160 acres or supply the city of Wichita for one day, Hutchinson for a week, Newton for three weeks, McPherson for a month or Pretty Prairie for over a year.

In the Equus Beds District, approximately 1,300 acres have or will be mined, permanently exposing the Equus Beds aquifer to evaporative losses and diverting nearly 1 billion gallons from the aquifer annually.

Certain portions of the Equus Beds aquifer are fully appropriated or

developed. Any additional groundwater diversions in these areas will exceed the recharge rate and the aquifer safe-yield resulting in the depletion of the Equus Beds aquifer.

All groundwater diversions, including evaporation from aggregate mining, **must** be permitted, so as to provide for the proper management and development of the Equus Beds aquifer by balancing aquifer recharge with groundwater diversions and protecting the aquifer from contamination.

SAND AND GRAVEL PIT REGULATIONS - In the late 1990's, it was the concern of both the aggregate industry and the water management community that improperly sited aggregate facilities place groundwater resources at-risk.

Support for the creation of the joint task force to develop permitting, siting and construction requirements included: Kansas Ready Mix and Concrete Association, Kansas Society of Professional Engineers, Kansas Farm Bureau, City of Wichita and the Kansas Groundwater Management Districts Association.

In 1997, the Aggregate and Groundwater Resources Task Force was created and charged with developing reasonable and prudent recommendations for the continued production of the State's aggregate resources and the proper management and protection of the State's groundwater resources.

Task force members included Alsop Sand Company, Shears Construction, L.P., Allied, Inc., Ritchie Sand, Inc., Kansas Groundwater Management Districts Association, Kansas Department of Transportation, Division of Water Resources, Kansas Water Office, Kansas

Department of Health and Environment, Kansas Geological Survey and the Kansas Society of Professional Engineers.

Over a period of 18 months and under the leadership of the task force chair, Rex Buchanan, Kansas Geological Survey, the task force studied and discussed in detail issues involving computation of runoff, transference of water rights, water quality, recharge, and evaporation.

Experts presented the latest information to the task force concerning the State's changing geologic and hydrologic conditions, water use by phreatophytes, underground injection control, evaporation and recharge.

The task force developed recommends to the Chief Engineer, Division of Water Resources, addressing issue of: a) water permits, b) exemptions, c) transference of water rights, d) offsetting water rights, e) credits for groundwater recharge, and f) water use reporting.

The Board of Directors for the Kansas Aggregate Producers Association and the Equus Beds Groundwater Management District have approved the recommendations which formed the basis of sand and gravel pit regulations adopted by the Chief Engineer, September 22, 2000.

DISTRICT RECOMMENDATION - The Equus Beds aquifer is the sole-source of fresh and usable groundwater for industrial, municipal, and irrigation uses throughout south-central Kansas.

Over 2,000 permitted water wells and points of diversion withdraw an average of 51.2 billion gallons from the aquifer annually. HB 2919 places the aquifer at-risk for over-development and contamination.

The Board of Directors, Equus Beds Groundwater Management District No. 2, recommend to the Committee that HB 2919 is NOT passed by the Committee because:

- 1) it would grant an unfair advantage to one water user for use of a public resource over all other users;
- 2) existing regulations have address the concerns of the industry and the water management community; and
- 3) by placing the Equus Beds aquifer at-risk for over-development and contamination the economic, financial and political well-being of south-central Kansas placed in jeopardy.