

MINUTES OF THE HOUSE COMMITTEE ON ENVIRONMENT.

The meeting was called to order by Chairperson Joann Freeborn at 3:30 p.m. on February 14, 2002 in Room 231-N of the Capitol.

All members were present except: Representative Jeff Peterson - excused
Representative Ted Powers - excused

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

Conferees appearing before the committee: Representative Jerry Henry
Bill Bider, Director, Bureau of Waste Management, 1000 SW Jackson, Ste. 320, Kansas Department Health and Environment, Topeka, KS 66612
Jeff Weatherly, Atchison Casting Corporation, PO Box 188, Atchison, KS 66002-0188
Steve Miller, Sunflower Electric Power Corporation, PO Box 980, Hays, KS 67601
Edward Moses, Managing Director, Kansas Cement Council, 800 SW Jackson, Suite 1408, Topeka, KS 66612
James Wadley, Professor of Law, Washburn University School of Law, 1700 SW College Avenue, Topeka, KS 66604

Others attending: See Attached Sheet

Chairperson Joann Freeborn called the meeting to order at 3:30 p.m. She opened **HB2704** for discussion and possible action.

HB2704: Solid waste management planning process.

Bill Bider, Director, Bureau of Waste Management, Kansas Department of Health and Environment, was welcomed to the committee. He reviewed a proposed amendment submitted by the Department. (See attachment 1)

Rep. Vaughn Flora made a motion to adopt the amendment proposed by KDHE, on page 3, line 6, after submitted "or as revised by the county commission". Rep. Becky Hutchins seconded the motion. Motion carried.

Rep. Vaughn Flora made a motion the bill be passed favorably as amended. Rep. Becky Hutchins seconded the motion. Motion carried.

The Chairperson opened **HB2705** for discussion and possible action.

HB2705: Reports required regarding recycling, reuse and composting of materials.

Bill Bider, Director, Bureau of Waste Management, Kansas Department of Health and Environment, explained the proposed amendment by KDHE. (See attachment 2)

Rep. Vaughn Flora made a motion to adopt the proposed amendment by KDHE, line 23, (E) "that directly transfer such material to an end-user"; line 31, add sub-section (d) "failure of a business or facility to complete and submit the recycling, reuse, and composting annual report form to the department shall disqualify the business or facility from receiving any solid waste grants". Rep. Laura McClure seconded the motion. Motion carried. Rep. Dennis McKinney voted no. Rep. Sharon Schwartz voted no.

Rep. Vaughn Flora made a motion the bill be passed favorably as amended. Rep. Ray Merrick seconded the motion. Motion carried. 9 yeas, 5 nays.

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The Chairperson called the committee's attention to a Kansas Recycling Survey - 2001, that had been distributed by the Kansas Department of Health and Environment, for review. (See attachment 3)

The Chairperson opened hearing on **HB2686**.

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

Representative Jerry Henry was welcomed. He presented a copy of a **Substitute Bill for HB2686**, which he had requested. He introduced Bill Bider, KDHE. (See attachment 4)

Bill Bider, Director, Bureau of Waste Management, Kansas Department of Health and Environment, was welcomed. He presented testimony in support of the substitute bill developed to replace **HB2686**. The department initially worked with Atchison Casting Corporation to develop the original bill which establishes a new solid waste tonnage fee schedule for solid waste disposed of in on-site industrial landfills. The new fee schedule would reduce the tonnage fee paid by some businesses and eliminate the tonnage fee exemption in current law for some wastes including cement kiln dust, electric power plant fly ash and bottom ash, and foundry sand. The maximum tonnage fee that any business would pay under the bill, as proposed, would be \$3,000 per year. KDHE believes that the substitute bill provides a fair method of fee collection for the facilities which operate on-site industrial landfills. There is another benefit to the substitute bill compared to the original bill. Landfill owners will be able to submit all of their fees as part of the annual permit renewal process which they are already carrying out. They will not need to submit monthly or quarterly reports with tonnage fee payments. Much less paperwork will be required. (See attachment 5)

Jeff Weatherly, Atchison Steel Casting and Machining, was welcomed to the committee. He testified in support of the substitute bill. Revisions made to the bill greatly improve current requirements for ASCM who owns and operates a solid waste landfill solely for company nonhazardous wastes. The strength of the proposed language comes from a united effort between industry and the Kansas Department of Health and Environment. He believes the support of this bill will ultimately benefit the regulator as well as the regulated. Time and resources will be saved and the KDHE cost recovery assessment will be more fairly distributed in a more simplified manner. (See attachment 6) Discussion followed.

Steve Miller, Sunflower Electric Power Corporation, was welcomed to the committee. He provided testimony in opposition to the bill as written and expressed support of the proposed substitute bill. He was accompanied by Wayne Penrod, Sunflower's Senior Manager, Environment and Production Planning, to answer any technical questions the committee might have regarding their landfill operations at their coal-fired power plant near Garden City, Kansas. The cost to operate the landfill is expensive, very expensive, but Sunflower is committed to operating it according to the established rules and regulations. All of these requirements are imposed by a regulatory structure created by and in accordance with federal, state and local statutes and ordinances. They would like for the bill to be modified so that KDHE would be granted the authority to revise its current fee schedule to one that more closely matches its cost of regulating each landfill operator, and hopes those fees are not mileage sensitive. (See attachment 7)

Edward Moses, Managing Director, representing Kansas Cement Council, was welcomed. He testified in opposition to the bill and is aware the proposed substitute bill would address many of the concerns listed in their testimony. The Council is prepared to provide limited support for this compromise pending the receipt of more detailed information on how the fees in the substitute would be assessed. Specifically, they support language that would cap the fees for Cement Kiln Dust at \$1,000 per anum. They simply urge the committee and the legislature to carefully consider the impacts a policy change may have upon this industry, which provides employment to over 400 people, and products that keep construction costs competitive in Kansas communities. (See attachment 8) Mr. Moses introduced Robert Hickman, Safety Engineer Manager, Ash Grove Cement; Jim Shea, Plant Manager, Fredonia; and Paul Peters, Lafarge Corporation, in attendance today.

Written only testimony was submitted by Joe Dick, Kansas City Board of Public Utilities, in opposition to the original bill. (See attachment 9) Discussion followed.

The Chairperson closed the hearing on **HB2686**.

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Chairperson Freeborn welcomed James Wadley, Professor of Law, Washburn University School of Law, to the committee. He addressed the committee on Kansas Water Law. He stated that Kansas has a very interesting water rights structure that distinguishes it in some important ways from other states and puts it ahead of the curve. Other states have looked to Kansas for direction on how to solve some difficult water problems. Water problems are not going away and are becoming increasing more frequent. One thing that always seems to crop up when dealing with water problems are property rights, on one hand you have the State's interest in managing the resource and on the other you have individual interests which are very tightly tied to their own well being and economic success. Water is a life sustaining resource and how to deal with the water rights issue is always a difficult question. The State owns the water as it exists in place as a resource and that empowers the State to do an awful lot of things. It has empowered this State to determine the rules that would be appropriate for accessing the resource. In 1945 the State decided to change the rules, through the Legislature. It changed from a system from which the State granted its permission to someone who wanted access to the water from a land ownership base system to a system where you needed to apply to the system to acquire that water right. The applications go to the Chief Engineer, Division of Water Resources, Kansas Department of Agriculture. That permission is granted in a very formal type of way, whether or not that permission is granted depends on things that the Legislature can control. Those water rights are granted on the type of use and the use has to be beneficial. Individuals do not get ownership of the water, what they get is a right to access the water. The law describes this as "usufruct", the concept is of use and enjoyment. In our system this is known as a real property right, you own the right as real property but you do not own the water. As you exercise the right and reduce the water to possession the interest changes, and then the water is actually owned as personal property by the water right holder. So the exercise through the usufruct kind of idea converts the State's interest in the water in place into a personal interest on the part of the water right holder. Once the system has granted that permission it becomes quite difficult for the system to restrict the ability to use it. Water rights are not unlimited rights, they are limited in a variety of ways. They are limited by the nature of the right being a usufruct right it is tied to the question of use and to the question of propriety of use. Our system in Kansas works on a propriety basis and we tend to recognize superiority in those who have acquired their water rights earlier than those who might wish to be granted a right later in time. Late comers may have their rights reduced or even terminated if a water shortage exists. The State does have a fair amount of control over some of those limitations. It is the job of the Legislature to define what constitutes beneficial use, we haven't chosen to do that, the statute doesn't give us a very correct definition, and we have to depend on the courts to give us some meaning. The Chief Engineer has defined beneficial uses through rules and regulations. The Legislature has control over the circumstances and conditions under which permission is granted. The public has some trust obligations to the public at large as to how the water is used. The Legislature can determine the circumstances under which individuals can qualify for water rights prospectively and in the meaning of what is beneficial. What the Legislature cannot do is destroy property rights. The way the law currently stands, unless there is a direct physical intrusion into the property interest, in most instances there has to be a complete destruction of the economic value of that interest before it constitutes a taking. Recent decisions by the United States Supreme Court suggests that antecedent claims against the property where the system may insert those at some later point in time doesn't constitute taking. Discussion followed.

Professor Wadley continued by stating that in our system we have given statutory authority to the Chief Engineer to oversee the allocation of water rights where water rights are transferred from one party to another either through the process we are describing or voluntarily. Water rights can be sold to someone else but still have to go through the transfer process with the Chief Engineer, otherwise there is no way to know who has the water rights and who can track it. This sale or exchange becomes an opportunity to reexamine the beneficial use of the water.

The second issue addressed was groundwater, which is particularly difficult to deal with because we can't see it. Our system has developed in such a manner where water right holders make as many judgments as they can about water availability but you really can't do that with groundwater because you can't see it even if you drill a well. It's really hard to tell how deep the resource is. Problems concerning groundwater were what caused our system to take the turn it took in 1945. We didn't have a good system for dealing with water underground. So when the Legislature adopted the 1945 statute, that we describe as prior appropriations, that describes how we deal with water on the surface. Most states have different ways to deal with water underground. When Kansas adopted it's statute in 1945 it became a unified jurisdiction, which says we are going to use the same rules no matter where the water is found. So the rules underground are essentially the same as the rules on the surface. There are places around the state where the need for groundwater far exceeds the surface water availability. We have had to try to adjust our system to be sensitive to that. We have

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adjusted in two ways, one is that we have adopted area wide management and the other is to try to reflect the ability of the resource to regenerate itself. A couple of our groundwater management districts operate on a safe yield policy where people can take what the natural system puts back every year. That is the measure of how much we allow to be appropriated. The up side of this is that it guarantees that there will be water forever. Most of our groundwater districts don't work that way. So we have to follow what is known as a water mining policy for slowly extracting it faster than mother nature can recharge it. The down side of that is at some point we may discover that we don't have any water left. Each groundwater district is going to function differently. In 1968 the Legislature adopted a policy that was so complicated no one tried to institute a groundwater management district. In 1972 the Legislature adopted a policy that is now used by groundwater management districts. The Legislature wanted to give the locals some measure of input into how the water is being used. The difficulty is that the Legislature in choosing how it allocated power between the Chief Engineer and the groundwater management districts choose to give the Chief Engineer the power to make rules and regulations and to the groundwater management districts the power to make policies and recommendations as to what the rules and regulations should be. The Chief Engineer has to do rules and regulations for the entire state and in doing so can make rules and regulations that apply in groundwater management districts also. When the Legislature crafted this policy they clearly wanted some measure of local control and input but did not want this process to eclipse the general management authority over water resources that has been given to the Chief Engineer. So the allocations statutes supercede the groundwater management statutes. Groundwater management districts don't grant water rights, only the Chief Engineer can and the final decision is the Chief Engineer's. Water rights in groundwater management districts is the same for water rights everywhere, someone who owns the water right owns the water right but doesn't own the water. Probably what the Legislature intended is that the groundwater management districts have input into the problem of groundwater management rather than control over the groundwater rights, which are two very different concerns or interests. Discussion followed.

Chairperson Freeborn thanked Professor Wadley for addressing the committee today.

The meeting adjourned at 5:40 p.m. The next meeting is scheduled for Tuesday, February 19, 2002.