



STATE OF KANSAS

Office of the Attorney General

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Attorney General

December 1, 1977

ATTORNEY GENERAL OPINION NO. 77- 370

The Honorable Shelby Smith
Lieutenant Governor of Kansas
Office of the Lieutenant Governor
2nd Floor - State Capitol Building
Topeka, Kansas 66612

Re: - Waters--Dams--Permits

Synopsis: The chief engineer of the Division of Water Resources of the State Department of Agriculture has no presently enforceable authority for the entry upon private property to assure compliance with the conditions, restrictions or other terms of any consent or permit which is issued under K.S.A. 82a-301 through -305, where consent for entry is denied by the landowner. The chief engineer may make such consent a condition of the issuance of a permit, however. The chief engineer has no existing authority to require modification, repair or removal of such dams or other obstructions when deemed necessary in the public interest. The chief engineer has authority to adopt rules and regulations only regarding work which is permitted under a permit or consent granted under the act, and under this act, has no existing general administrative and regulatory authority to oversee the existing conditions of water retaining structures in this act, independently of the permit process provided by this act. The act provides no administrative remedies or sanctions available to the chief engineer for enforcement thereof.

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Dear Lieutenant Governor Smith:

You inquire concerning questions which have arisen before a subcommittee of the Governor's Task Force on Water Resources regarding

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the authority of the chief engineer of the Division of Water Resources of the State Department of Agriculture under K.S.A. 82a-301 through -305.

Before reaching those questions, it may be helpful to review those provisions briefly. K.S.A. 82a-301 makes it unlawful to construct any dam or other water obstruction, or to make any change in or addition to any existing dam or other water obstruction without first obtaining the consent of or a permit from the chief engineer. Under K.S.A. 82a-302, each application therefor must be accompanied by complete maps, plans, profiles and specifications of the proposed work, and such other information as the chief engineer may require. Under K.S.A. 82a-303, the chief engineer may grant or withhold his consent or permit, and may incorporate therein such "conditions, regulations and restrictions as may be deemed by him advisable." It is unlawful to construct or make any change in any dam except in accord with the terms, conditions and restrictions of the permit. Under K.S.A. 82a-305, violation of the act is a misdemeanor, punishable by a fine not exceeding one thousand dollars. In certain instances, this office is authorized to seek preventive injunctions against any work which is about to be undertaken without a permit, and to seek mandatory relief requiring the modification or removal of any such structure which has been constructed without a permit.

You inquire first whether the chief engineer is authorized to enter upon private land for the purpose of insuring compliance with any condition, restriction or other terms of a permit or consent which he has issued under these provisions. There is no express authority for the chief engineer to enter upon any private property for this purpose. I have no doubt that he may require, as a condition of the permit itself, the applicant to agree to permit such inspections as the chief engineer deems necessary to assure that the work is undertaken and completed in compliance with the terms of the permit. It may be argued that where such consent has not been obtained, however, that the authority to enter upon private property for the purpose of assuring compliance with any permit or consent granted under the act should be implied, that such authority is but a modest and reasonable incident of the police power asserted under this act, and that such inspections entail little or no intrusion upon the landowner's privacy. Even if the implication of such authority were assumed, the right of entry would extend no further than necessary to inspect the work in progress and upon completion, and would not support regular or periodic inspections of any completed dam or other obstruction after completion of the work authorized by the permit.

Absent the consent of a permit applicant, there is, as stated above, no express authority for the chief engineer to enter upon private property in order to inspect ongoing work or to conduct tests regarding any construction being undertaken or completed pursuant to a permit issued under this act. While a reasonable argument may be made that such authority should be implied, an arguable implication, in and of itself, is scant authority for the chief engineer in the face of a landowner's stated refusal to permit entry upon his or her property. In sum, it is my opinion that the chief engineer has no presently enforceable authority to enter upon private property for the purpose of assuring compliance with a permit under this act.

Secondly, with respect to existing dams or other obstructions which have not been constructed with the prior consent of the chief engineer, you ask whether that official has authority under this act to require modification, repair or removal of such dams or other obstructions when deemed necessary in the public interest and whether, with respect to lawfully constructed dams or other obstructions, he has authority under this act to require modifications or repairs thereto or removal thereof. The sole authority of the chief engineer under this act is to grant or withhold his permit or consent for the construction of a dam or other obstruction or for any change or addition thereto, or for any work to change or diminish the course, current or cross section of any stream, and to assure that work pursuant to a permit conform thereto. In addition, he may prescribe such conditions, restrictions and regulations as he deems advisable concerning any permit which is authorized under the act. The chief engineer has no general administrative authority, however, independent of the permit process, to oversee the maintenance and soundness of dams and like stream obstructions in this state, and thus, he has no authority to make any requirements such as described in your second question.

Thirdly, you ask what remedies, if any, are available to the chief engineer with respect to noncompliance with the requirements of any permit issued him for the construction of a dam or other obstruction under this act. The chief engineer has no remedies under this act. The act provides no administrative process which he may invoke, and authorizes no administrative penalties which he may impose. The sole sanctions for enforcement of the act are those provided at K.S.A. 82a-305, misdemeanor prosecutions for violation of the act, and injunctive actions by this office only in those instances where permitted under *State ex rel. Fatzer v. Barnes*, 171 Kan. 491, 233 P.2d 724 (1951) and *State ex rel. Fatzer v. Mills*, 171 Kan. 397, 233 P.2d 720 (1951), which limit

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relief sought by the state to instances where some damage is caused or threatened to some public interest, as distinguished from the interests of private landowners and others.

Lastly, you ask whether K.S.A. 82a-303 authorizes the chief engineer to adopt rules and regulations, and if so, whether such rules and regulations include those necessary for the administration and enforcement of K.S.A. 82a-301 through -305. K.S.A. 82a-303 provides in pertinent part thus:

"It shall be unlawful to construct or begin the construction of any such water obstruction, or to make or begin any change or addition aforesaid, except in accordance with the terms, conditions, regulations, and restrictions of such consent or permit, and such rules and regulations, with regard to such obstructions, changes, or additions, as may be prescribed by the chief engineer of the division of water resources." [Emphasis supplied.]

The section is ambiguous as to precisely the scope of the rules and regulations sought to be authorized. It may be argued that the chief engineer is authorized to promulgate any and all rules and regulations which he deems necessary regarding the construction, maintenance, repair or renovation of dams and like obstructions. On the other hand, the breadth of administrative rule-making authority is usually determined by the context of the entire act in which the authority is granted. This 1929 act undertook to exercise the authority of the state to regulate dams and obstructions of streams by requiring a permit therefor, to be issued by the chief engineer. The permit process is the single vehicle of the state regulation asserted in this act, and I view the rules and regulations authorized by the underscored language as only those which the chief engineer deems necessary and advisable to administer that permit process. So viewed, this section does not authorize rules and regulations asserting general continuing administrative authority and responsibility respecting the inspection, maintenance and repair of existing dams and like obstructions whether constructed lawfully with a permit or unlawfully without one.

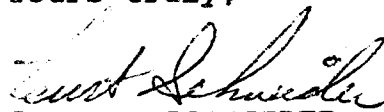
In your letter, you advise that a recent study of the U.S. Army Corps of Engineers and the Division of Water Resources has identified 3,865 water retaining structures throughout the state which

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have been categorized as "extremely hazardous," a classification which does not indicate that the structure is imminently likely to fail, but rather that failure carries great potential for downstream destruction to both human life and property.

The existing act is now nearly a half century old. It does not provide the broad and well-defined administrative and regulatory authority which is needed to address these serious conditions. There is a manifest need for new legislation to furnish the broad and well-defined regulatory powers which are needed to address this area of serious public concern.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj