



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

October 26, 1987

MAIN PHONE: (913) 296-2215  
CONSUMER PROTECTION: 296-3751  
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 87- 154

L. Patricia Casey  
Senior Counsel  
Department of Health and Environment  
Forbes Field  
Topeka, Kansas 66620-0001

Re: Public Health -- Secretary of Health and Environment, Activities; Water Supply and Sewage -- Implementation of Clean Water Act; N.P.D.E.S. Program

Synopsis: The partial transfer of authority from the Kansas Department of Health and Environment to the Kansas Corporation Commission does not allow a discharge of pollution in violation of the federal National Pollution Discharge Elimination System (N.P.D.E.S.) permit requirements.

State law defines pollution as broadly as it is defined by federal law.

With the exception of some privately owned farm ponds and reservoirs, regulation of discharges into waters of the state include discharges into bodies of water defined by federal law.

State enforcement provisions include civil penalties which appear to be as stringent as required by federal law. However, the criminal penalties provided by state law are less stringent.

Variations granted under state law are limited to those allowable under federal law.

Legislative amendments appear necessary to conclude that the state program meets all the requirements of the federal act. Cited herein: K.S.A. 60-224; 65-101; 65-102a; 65-161; 65-162a; K.S.A. 1986 Supp. 65-163; 65-163a; 65-164; K.S.A. 65-165; 65-166; 65-167; 65-169; 65-170b; 65-170c; 65-170g; K.S.A. 1984 Supp. 65-171d; K.S.A. 1986 Supp. 65-171d; K.S.A. 65-171m through 65-171t; L. 1986, ch. 201, § 22; K.A.R. 28-16-28b(35); 28-16-57; 28-16-58; 28-16-62; 82-3-400; 82-3-401; 33 U.S.C.A. §§ 1318, 1362(6), 1362(7); 40 C.F.R. §§ 122.2, 123.27 (1986).

\*

\*

\*

Dear Ms. Casey:

As Senior Counsel for the Kansas Department of Health and Environment, you have requested our opinion concerning several issues involving the National Pollution Discharge Elimination System (N.P.D.E.S.) program. Your request of August 27, 1987 reflects concerns raised by the United States Environmental Protection Agency in April of this year regarding Kansas statutory and regulatory compliance with federal law.

I. Initially, you ask whether jurisdiction over N.P.D.E.S. regulated discharges has been transferred from the Department of Health and Environment (KDHE) to the Kansas Corporation Commission (KCC). Prior law allowed KDHE to protect the waters of the state from pollution by oil, gas and salt water injection wells. K.S.A. 65-171d (1984). This section was amended by L. 1986, ch 201, § 22, which transferred certain duties to the KCC, while retaining in KDHE jurisdiction over the clean up of such pollution. We believe that this transfer of authority does not effect the state N.P.D.E.S. permit program.

Pursuant to the transfer of authority, a memorandum of understanding (MOU) was entered into between the KCC and KDHE. The agreement, dated July 1, 1986, assures cooperation between the agencies regarding the prevention and clean-up of pollution. The KCC has jurisdiction to prevent pollution by oil and gas activities. Such jurisdiction is to be exercised in cooperation with KDHE. Oil and gas activities are to be in compliance with applicable federal and state statutes and regulations. MOU, at page 4. Authority

for prevention or clean-up of pollution resulting from transportation, storage or refining of oil and gas is vested in KDHE. MOU, at page 5. The KCC has jurisdiction to prevent pollution in the drilling, injection and disposal phases of oil and gas activities. These activities are subject to application and approval pursuant to K.A.R. 82-3-400 et seq. Such application must show that injection or disposal will be contained within a zone, and will not enable the fluid to enter fresh or usable water strata. K.A.R. 82-3-401. In short, we believe that prior to commencing oil and gas activities regulated by KCC, approval is required, and assurances must be made that the injection will not result in the degradation of water resources.

In light of the regulatory scheme implemented by KCC, and the clarification of duties of KCC and KDHE, we believe that the transfer of authority between the agencies does not allow an unpermitted discharge of pollution to occur which would otherwise be subject to N.P.D.E.S. requirements. Pollution is defined by 33 U.S.C.A. § 1362(6) (B) as not including "water, gas, or other material which is injected into a well to facilitate production of oil or gas ... if the well ... is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources." These conditions being met, it is our opinion that the 1986 amendments to K.S.A. 65-171d do not allow a discharge of pollution in violation of the federal act.

II. Your second question involves updating statutory reference to federal law. The secretary of KDHE is authorized by K.S.A. 1986 Supp. 65-171d(b) to adopt regulations promulgated by the federal government pursuant to the clean water act and the 1981 amendments thereto. The clean water act, however, has been amended in 1983 and 1987. For the secretary to implement these amendments, legislative action is required which incorporates these updates.

III. Your third question is whether the Kansas definition of pollution is broad enough to encompass the definition of pollution as used in the clean water act. Pursuant to K.S.A. 1986 Supp. 65-171d(b), the secretary has adopted by reference the federal definition of pollution, as it appears in 33 U.S.C.A. § 1362(6) (as in effect Dec. 27, 1977, Pub.L. 95-217, § 33(b), 91 Stat. 1577). K.A.R. 28-16-58(1), 87 Kan. Register 647-48 (1987).

IV. Your fourth question is whether point source discharges into farm ponds and fresh water reservoirs are subject to N.P.D.E.S. permit requirements. Farm ponds and fresh water reservoirs are exempt from water quality standards if they are privately owned and all land bordering the pond or reservoir is under common private ownership. This exemption does not apply, however, if the water quality standard relates to a discharge into waters of the state, or if the standard relates to the public health of persons using the pond or reservoir. K.S.A. 1986 Supp. 65-171d(d). The question arises whether a discharge into such farm ponds or reservoirs is subject to N.P.D.E.S. permit requirements.

The clean water act regulates pollution of navigable waters. Navigable waters include waters of the United States and territorial seas. 33 U.S.C.A. § 1362(7). The term "waters of the United States" is defined as including intrastate bodies of water, "the use, degradation, or destruction of which would affect or could effect interstate or foreign commerce . . . ." 40 C.F.R. § 122.2 (1986).

We believe that situations could arise in which a discharge would be prohibited by federal law, but not prohibited by state law. For example, if the pond or reservoir is so constructed as to preclude seepage or discharge from the body of water into waters of the state, and a water quality standard is not designed to protect the health of persons using the pond or reservoir, then such water quality standard would not apply to the pond or reservoir. However, that pond or reservoir could theoretically be a navigable water, into which the unpermitted discharge of pollutants is prohibited by federal law. Therefore, it is our opinion that state law is not as broad as federal law in this area.

V. Your fifth question is whether the definition of "Waters of the State" includes the items specified in the federal definition of "Waters of the United States."

"Waters of the State" are defined as:

"[A]ll streams and springs, and all bodies of surface and subsurface waters within the boundaries of the state."  
K.S.A. 65-161(a). (Emphasis added).

The federal definition appears much broader as it includes items such as "mudflats, sandflats, wetlands, sloughs,

prairie potholes and wet meadows." 40 C.F.R. § 122.2 (1986). However, "surface waters" are defined by state regulation as:

"all streams and rivers, including springs, water in alluvial aquifers available for flow to streams, and riparian wetlands, and all lakes and wetlands." K.A.R. 28-16-28B(35).

While terminology may differ between federal and state provisions, we believe them to be practically synonymous. In light of the previous discussion regarding certain farm ponds and reservoirs, it should be noted that those bodies are not excluded from waters of the state as defined by the regulation. Those farm ponds and reservoirs are simply excluded from water quality standards in some situations.

VI. Your sixth question is whether state enforcement provisions are as strict as those required by federal law. First, state law must authorize an injunction for violations or threatened violations of any program requirement or permit condition. 40 C.F.R. § 123.27(a)(2) (1987). At the request of the secretary of KDHE, the attorney general is authorized to seek to enjoin violations of K.S.A. 65-162a, 1986 Supp. 65-163, 1986 Supp. 65-163a, 65-170b and 65-171m through 65-171g and amendments, inclusive. Such enforcement extends to rules and regulations promulgated pursuant to those sections. K.S.A. 65-171t. In addition, the secretary has broad authority to take steps necessary to protect the public health under K.S.A. 65-101, as explained in Dougan v. Shawnee County Commissioners, 141 Kan. 554, 560 (1935). In short, if a permit condition is a response to a statutory or regulatory requirement, or if a permit condition protects public health, then we believe the violation of that permit condition may be enjoined.

The second aspect of enforcement authority involves a comparison between federal and state civil and criminal penalties for various acts.

Regarding civil penalties, federal regulations provide that a State program have available the following remedies:

"Civil penalties shall be recoverable for the violation of any NPDES permit condition; any NPDES filing requirement; any duty to allow or carry out inspection,

entry or monitoring activities; or, any regulation or orders issued by the State Director. These penalties shall be assessable in at least the amount of \$5,000 a day for each violation." 40 C.F.R. § 123.27(a)(3)(i) (1986).

State law provides for a civil penalty not to exceed \$10,000 for these violations. K.S.A. 1986 Supp. 65-170d(a). This penalty is imposed by the director of the division of environment. K.S.A. 1986 Supp. 65-170d(b). We believe that, while the director might assess all penalties in an amount over \$5,000 to comply with the federal regulation, such is not currently required by statute.

Federal Regulations also provide that the state program have available the following criminal penalties:

"Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any NPDES permit condition; or any NPDES filing requirement. These fines shall be assessable in at least the amount of \$10,000 a day for each violation." 40 C.F.R. § 123.27(a)(3)(ii) (1986),

and

"Criminal fines shall be recoverable against any person who knowingly makes any false statement, representation or certification in any NPDES form, in any notice or report required by an NPDES permit, or who knowingly renders inaccurate any monitoring device or method required to be maintained by the Director. These fines shall be recoverable in at least the amount of \$5,000 for each instance of violation." 40 C.F.R. § 123.27(a)(3)(iii) (1986).

The state penalties relating to activities listed in paragraph (ii) of the federal regulation appear in K.S.A. 65-167. For failing to report a sewage discharge, the fine is \$1,000 per day for each day the offense is maintained. For willfully or negligently violating any applicable standard or limitation under K.S.A. 65-165, any N.P.D.E.S. permit condition under

K.S.A. 65-167, or any requirement of K.S.A. 1986 Supp. 65-164 or 65-166, the penalty is not less than \$2,500 and not more than \$25,000, plus \$25,000 for each day the offense is maintained. The state penalties relating to activities listed in paragraph (iii) of the federal regulation appear at 65-170c, with a fine of not less than \$25 and not more than \$10,000. Each day the violation continues constitutes a separate violation.

The third aspect of enforcement authority involves the penalties listed in K.S.A. 65-169. That section states that failing to furnish, on demand, information required by the secretary is a misdemeanor, punishable by a fine of \$50 to \$500. In addition, failing to fully comply with the requirements of the secretary is a misdemeanor, punishable by a fine of \$25 to \$100. The issue is raised whether this section limits the criminal penalties listed in K.S.A. 65-167, discussed above. We believe that these penalties are in addition to the civil penalties listed in K.S.A. 1986 Supp. 65-170d(a). They do not displace, nor are they in conflict with the criminal penalties listed in K.S.A. 65-167. Section 65-169 deals with orders made by the secretary, while section 65-167 relates to statutory, regulatory and permit requirements.

In summary, the criminal enforcement provisions of state law are less stringent than those required by federal law. The discrepancies are curable only by legislative action. Regarding civil penalties, state law may be enforced consistently with federal law, though the higher federal penalties are not currently required by state law.

VII. Your seventh inquiry involves variances. The federal act and regulations authorize variances from applicable effluent limitations. However, concerns have been raised whether state law allows the secretary to grant variances which are not allowed by federal law. Obtaining a variance is not a matter of right. The only applicable statutory reference to a variance is made in K.S.A. 65-171p, which deals with drinking water standards. Further reference is made in K.A.R. 28-16-62(e), as amended in 87 Kan. Register 647-48 (1987). Both provisions are discretionary with the secretary. While it appears that, in exercising discretion, the secretary could allow a variance which is not authorized by federal law, we believe that the secretary has limited himself to the terms of federal law by promulgating K.A.R. 28-16-57, as amended in 87 Kan. Register 647-48 (1987). That regulation states an intention to comply with the

provisions of the federal water pollution control act relating to the N.P.D.E.S. program as well as the federal regulations adopted pursuant to that act.

VIII. Your final question relates to other clarification of current law. First, 33 U.S.C.A. § 1318(a) requires that a state have a right of entry and inspection on premises not only where effluent sources are located, but also on the premises where records for those sources are kept. The secretary has statutory authority to enter property subject to K.S.A. 65-161 through 65-171j. K.S.A. 65-170b. The problem arises when records are not kept on premises subject to those sections. We believe that this problem has been cured, however, by the consent of licensee's to allow entry and inspection. The requirements of 33 U.S.C.A § 1318 have been adopted by reference as a permit condition. K.A.R. 28-16-62(b)(1). We therefore believe that, based on the permit condition, the state has a right to enter and inspect premises where records for effluent sources are kept. Related to this subject is the question of the state's right to sample and apply monitoring, recording and reporting requirements. Such authority is provided by K.S.A. 65-170b.

You have also inquired whether effluent data is available to the public. Records, reports, data, and other information relative to discharges of pollution are required to be available to the public, however there is protection for trade secrets. K.S.A. 65-170g. That section further states that nothing in the act shall be construed to make effluent data, records, reports, permits and applications confidential. We believe, therefore, that since these matters are not confidential, if they relate to environmental concerns, they are to be available to the public pursuant to K.S.A. 65-102a.

Federal regulations require states to have procedures to ensure opportunity for public participation in enforcement proceedings. 40 C.F.R. § 123.27(d). That regulation requires that the state either allow intervention as of right in any civil or administrative action by a citizen who has an interest which may be adversely affected, or provide assurance that the agency will not oppose intervention when such intervention is made permissive by statute. When the second alternative is chosen, settlement of any enforcement action is subject to 30 days public notice and comment. Regarding intervention as of right, the Kansas Rules of Court Procedure parallel federal rules. We do not believe that a citizen having an interest which may be adversely affected is given an unconditional right to intervene under K.S.A. 60-224(a)(1) or

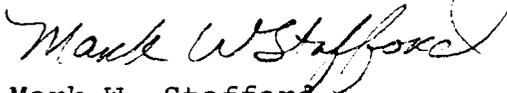
(2). Subsection (a)(1) of the rule allows intervention as of right when a statute grants an unconditional right. We find no statute granting that right. Subsection (a)(2) of the rule allows intervention as of right when the person's interests may be adversely affected, but not when those interests are adequately represented by existing parties. We believe that a court could determine that the individual's interests are adequately represented by either of the existing parties, thereby making intervention as of right not available. Regarding permissive intervention under K.S.A. 60-224(b), we believe that the assurance of non-opposition to intervention must come from the secretary, not from our office. In summary, we believe that public participation is not guaranteed by current Kansas law, and can be guaranteed only through legislation granting intervention as of right. Alternatively, the secretary could assure that intervention will not be opposed, and that the public will be given an opportunity to comment on a proposed settlement agreement after 30 days notice.

In conclusion, in our opinion, the partial transfer authority from KDHE to KCC does not allow a discharge of pollution in violation of N.P.D.E.S. permit requirements. State law defines pollution as broadly as it is defined by federal law. However, some privately owned farm ponds and reservoirs may be exempt from N.P.D.E.S. permit requirements under the state program, which is in derogation of federal law. Other than those exceptions, the state definition of waters of the state are as inclusive as federal definitions. State enforcement provisions include civil penalties which appear to be as stringent as federal civil penalties. However, the criminal penalties provided by state law are less stringent. Variances granted under state law are limited to those allowed under federal law. Other legislative changes appear necessary to conclude that the state program meets all the requirements of the federal clean water act.

Very truly yours,

  
ROBERT T. STEPHAN

ATTORNEY GENERAL OF KANSAS

  
Mark W. Stafford

Assistant Attorney General