



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 89- 26

Stanley C. Grant, Ph.D.
Secretary
Department of Health and Environment
Forbes Field
Topeka, Kansas 66620-0001

Re: Public Health -- Secretary of Health and Environment, Activities; Water Supply and Sewage -- Prevention of Water Pollution; Financial Responsibility for Underground Petroleum Storage Tanks

Synopsis: Guaranty and suretyship agreements are enforceable obligations in this state for purposes of establishing financial responsibility of owners and operators of storage tanks containing petroleum. Cited herein: K.S.A. 1988 Supp. 65-171(d)(f)(1); 40 C.F.R. §§ 280.93, 280.96, 280.98.

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Dear Secretary Grant:

As Secretary of the Kansas Department of Health and Environment, you have requested our opinion regarding financial responsibility requirements applicable to owners and operators of underground storage tanks containing petroleum. Specifically, you ask whether guarantees and surety bonds are enforceable obligations in this state. This question arises out of your enforcement powers regarding underground storage tanks, pursuant to K.S.A. 1988 Supp. 65-171d(f)(1).

The financial responsibility requirements of underground storage tank owners and operators are satisfied by the use of a surety bond or guaranty if such agreements comply with federal requirements. 40 C.F.R. § 280.93. We have examined the prescribed recitations which must appear in the agreement. See 40 C.F.R. § 280.98(b) (Surety bonds) and 40 C.F.R. § 280.96(c) (Guaranties). Those provisions do not appear to conflict with Kansas law.

A guaranty is a contractual obligation, "founded upon consideration, by which one person promises to answer for the debt, default or miscarriage of a third person, and in a legal sense, has relation to some other contract or obligation with reference to which it is a collateral undertaking. [Citation omitted]." Haysville U.S.D. No. 261 v. GAF Corp., 233 Kan. 635 (1983), Sylv. ¶ 7; Bomud Co. v. Yockey Oil Co., 180 Kan. 109 (1956) Syl. ¶ 1. A suretyship is likewise a contractual obligation whereby one person promises to answer for the debt, default or miscarriage of another, and is distinguishable from the obligation of the party which is primarily liable. Federal Land Bank v. Heath, 160 Kan. 645, 649 (1945). The distinction between a guaranty and a suretyship is explained in United States v. Gonzales, 541 F. Supp. 783, 785 (1982).

In conclusion, it is our opinion that guaranty and suretyship agreements are enforceable obligations in this state for purposes of establishing financial responsibility of owners and operators of underground storage tanks containing petroleum.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Mark W. Stafford
Assistant Attorney General

RTS:JLM:MWS:bas