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June 20, 1991

ATTORNEY GENERAL OPINION NO. 91- 68

Marvin Stottlemire
Acting Assistant Secretary and General Counsel
Department of Health and Environment
Landon State Office Building
Topeka, Kansas 66612-1290

Re: Public Health -- Secretary of Health and Environment, Activities; Water Supply and Sewage -- Definition of "Sewage" Compared to Definition of "Pollution"; Intervention of Actions by Persons Having an Identifiable Interest

Synopsis: The definition of the term "sewage" contained in K.S.A. 1990 Supp. 65-164(b) is narrower than the definition of "pollutant" as set forth in 33 U.S.C.A. § 1362(b) (West 1986). The requirements for citizen intervention in certain environmental enforcement proceedings contained in K.S.A. 1990 Supp. 65-170e do not comply with the minimum federal standards for intervention promulgated by the environmental protection agency at 40 C.F.R. § 123.27(e). Cited herein: K.S.A. 2-2413; 65-161; K.S.A. 1990 Supp. 65-164; 65-165; 65-167; 65-170e; K.S.A. 65-171a; 33 U.S.C.A. §§ 1251, 1342, 1362, 1370; 40 C.F.R. § 123.27.

* * *

Dear Mr. Stottlemire:

On behalf of the Kansas department of health and environment, your predecessor requested our opinion concerning the natural pollution discharge elimination system (NPDES) program. Specifically, you ask the following questions:

1) Is the definition of "sewage" contained in K.S.A. 1990 Supp. 65-164(b) as broad as the definition of "pollutant" as set forth in 33 U.S.C.A. § 1362(6) (West 1986), the general definition section of the clean water act, 33 U.S.C.A. §§ 1251-1376 (West 1986)?

2) Do the requirements for citizen intervention in certain environmental enforcement proceedings contained in K.S.A. 1990 Supp. 65-170e comply with the minimum federal standards for intervention promulgated by the environmental protection agency (EPA) at 40 C.F.R. § 123.27(d)?

As to your initial inquiry, K.S.A. 1990 Supp. 65-164(a) prohibits the discharge of "sewage" into the waters of the state, except as allowed by the permit program set forth in K.S.A. 1990 Supp. 65-165 et seq. "Sewage" is defined in K.S.A. 65-164(b) as:

> "[A]ny substance that contains any of the waste products or excremental or other discharges from the bodies of human beings or animals, or chemical or other wastes from domestic, manufacturing or other forms of industry."

You ask whether this definition should be construed as broadly a the definition of "pollutant" in 33 U.S.C.A. § 1362(6) (West 1986), the general definition section of the clean water act, which states:

> "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . ." (Emphasis added).

The regulatory scheme set forth in the Kansas statutes pertaining to water supply and sewage, K.S.A. 65-161 through 65-171, are concerned with the discharge of waste materials into waters of the state. See Taylor v. Dept. of Health and Environment, 230 Kan. 283, 286 (1981). Pursuant to K.S.A. 1990 Supp. 65-171d(b), the secretary of health and environment is authorized to promulgate rules and regulations designed to prevent pollution in the form of waste

materials. Id. Pollution itself is defined in K.S.A. 1990 Supp. 65-171d(c) as:

> "(1) Such contamination or other alteration of the physical, chemical or biological properties of any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to the plant, animal or aquatic life of the state or to other designated beneficial uses; or (2) such discharge as will or is likely to exceed state effluent standards predicated upon technologically based effluent limitations."

"Sewage," as defined in K.S.A. 1990 Supp. 65-164(b), is that type of pollution containing waste products, refuse or superfluous materials which are harmful to humans. Taylor, 230 Kan. at 285. Animals and aquatic life are protected from pollution in the form of waste products by K.S.A. 65-171a et seq. Id.

The Taylor case was concerned with an aerial chemical spraying that inadvertently came to rest in a stream killing aquatic life. The court held that pollution from pesticide use was not a waste product -- it was a "useful product" coming to rest in an area causing damage -- and was thus not covered by the water supply and sewage statutes, K.S.A. 65-161 to 65-171. This type of pollution was covered by the Kansas pesticide use law, K.S.A. 2-2413 et seq.

We find the waste product/useful product distinction to be helpful in comparing the term "sewage" found in K.S.A. 65-164(b) with the term "pollutant" in 33 U.S.C.A. § 1362(6) (West 1986). Using this approach, it appears that the term "sewage" is not broad enough to encompass all of the types of "pollutants" listed in 33 U.S.C.A. § 1362(6) (West 1986).

First, "sewage" is listed under the federal law as a type of pollutant. This in itself is not conclusive, of course, as the federal definition of "sewage" does not necessarily comport with that contained in K.S.A. 1990 Supp. 65-164(b). The clean water act does not define "sewage" but the common meaning of the term is "refuse and foul matter, solid or liquid, carried off by sewer." Black's Law Dictionary 1540 (4th ed. 1968). In our opinion, this is consistent with the construction of sewage as a waste product in the Taylor case.

Second, it appears that many of the "pollutants" listed in 33 U.S.C.A. § 1362(b) are not necessarily "waste" products. Munitions, rock, sand, even discarded equipment could, depending on the factual circumstances, be characterized as "useful products" discharged into water.

Third, we note that the water pollution statute was originally drafted in 1907 and has retained the same basic provisions to the present day. The "sewage" definition in K.S.A. 1990 Supp. 65-164(b) was enacted in 1909 and has never been substantively amended. The words of a statute must be taken in the sense in which they were understood at the time the statute was enacted. United Parcel Service, Inc. v. Arnold, 218 Kan. 102, 107 (1975) (citing State, ex rel. v. Moore, 154 Kan. 193 (1941). Given this well-established rule of statutory construction, it is our opinion that the term "sewage" was intended to encompass the lay meaning of the word. Such a reading would clearly restrict "pollutants" such as radioactive materials from the definition of sewage -- this type of waste was simply not envisioned in 1909.

Thus, it is our opinion that the term "sewage" as defined in K.S.A. 1990 Supp. 65-164(b) is not defined broadly enough to encompass all of the items embodied by the definition of pollutant set forth in 33 U.S.C.A. § 1362(6) (West 1986). We note that federal law requires that all state effluent limitations and standards comply with those in effect under the clean water act. 33 U.S.C.A. § 1370 (West 1986). State standards that are less stringent cannot be adopted or enforced. Id.

The next question you pose is whether K.S.A. 1990 Supp. 65-170e(d), which provides for the right of citizen intervention in civil and administrative enforcement actions, is equivalent to that which is required by 40 C.F.R. § 123.27(d).

As part of the clean water act, 33 U.S.C.A. §§ 1251 et seq. (West 1984), provides for a water pollution control program known as the natural pollution discharge elimination system (NPDES) which regulates discharges into the navigable waters of the United States. States may administer their own pollution control programs but must at all times be in compliance with the guidelines of the NPDES program in order to retain authority to operate independently of the federal government. 33 U.S.C.A. § 1342(c)(2)(3) (West 1986). One such guideline is found at 40 C.F.R. § 123.27(d) which provides in pertinent part:

> "Any State administering a program shall provide for public participation in the State enforcement process by providing . . . authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; . . . ."

The above-referenced paragraphs provide:

> "(a) Any State agency administering a program shall have available the following remedies for violations of State program requirements:
>
> "(1) To restrain immediately and effectively any person by order or by suit in State court from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment;
>
> "(2) To sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit;
>
> "(3) To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, as follows: . . . ."

40 C.F.R. § 123.27(a)(3)(ii) provides further detail concerning the "criminal remedies, including fines," requirement:

> "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 $10,000.00 a day for each violation.

In an attempt to meet the federal requirement, the Kansas legislature enacted K.S.A. 65-170e(b) which provides:

> "Any person having an identifiable interest which is affected shall have the right to intervene in any civil actions brought under this section or K.S.A. 65-171b, and amendments thereto, or in administrative actions subsequent to the issuance of an administrative order by the agency pursuant to K.S.A. 65-164, 65-170d or 65-171d and amendments thereto or Article 6 of Chapter 77 of the Kansas Statutes Annotated to enforce the provisions of the National Pollution Discharge Elimination System Program as approved by the administrator of the United States Environmental Protection Agency pursuant to Sections 318, 402 and 405 of the Clean Water Act, as in effect on January 1, 1989, which seek:
>
> "(1) restraint of persons from engaging in unauthorized activity which is endangering or causing damage to the public health or the environment;
>
> "(2) injunction of threatened or continuing violations of this act, rules and regulations promulgated thereunder and permit conditions;
>
> "(3) assessment of civil penalties for violations of this act, rules and regulations promulgated thereunder, permit conditions or orders of the director of environment or secretary of health and environment."

We have identified four differences between the federal requirements set forth in 40 C.F.R. § 123.27(d) and the Kansas statute by which compliance is measured.

First, the federal regulation requires a mechanism for intervention by any citizen having an interest which is or may be adversely affected. Kansas law allows intervention by any person who has an identifiable interest which is affected. There is a difference in the language used in the federal regulation and the Kansas statute, i.e. "interest" and "identifiable interest." The question is whether that

difference is significant. In our opinion, the difference in language here is negligible because for one to have "an interest," presumably that interest would be "identifiable." It is hard to imagine a situation where a person would have an unidentifiable interest.

Second, the federal regulation requires the state to allow intervention by any citizen having an interest which is or may be adversely affected. Kansas law allows intervention by any person whose identifiable interest is affected. In this instance Kansas law is broader than that which is required by the federal regulation.

Third, the federal regulation requires that states provide for intervention by any citizen having an interest which is or may be adversely affected. Kansas law provides for intervention by any person whose identifiable interest is affected. Interestingly, in 1989 when K.S.A. 65-170e was amended to include the provisions now found in paragraph (b), it granted "any person having an interest which is or may be affected" the right of intervention in civil actions. L. 1989 ch. 185, § 3(b). In 1990 when that statute was amended to include the right of citizen intervention in administrative actions, as well as civil actions, the language "or may be" was deleted. L. 1990 ch. 340, § 3(b).

We find this difference more troublesome than the two differences previously discussed. It appears that the 1990 Kansas Legislature intentionally deleted language which is required by 40 C.F.R. § 123.27(d)(1). The federal regulation clearly requires the state to provide for intervention in relation to events which "may," but have not yet, "adversely affected" a citizen. K.S.A. 1990 Supp. 65-170e(b) does not allow for citizen intervention until the citizen's interest "is affected." Although K.S.A. 1990 Supp. 65-170e(b)(2) purportedly permits a person to intervene in a civil or administrative action which seeks an injunction of "threatened violations," unless the citizen's interest is actually affected, the first sentence of subsection (b) appears to prohibit that intervention. We therefore conclude that K.S.A. 1990 Supp. 65-170e(b)is less stringent than that which is required by 40 C.F.R. § 123.27(d).

Fourth, while K.S.A. 1990 Supp. 65-170e(b) does not address "criminal remedies, including fines" as required by 40 C.F.R. § 123.27(a), criminal remedies are provided by K.S.A. 1990 Supp. 65-167 which provides in pertinent part:

> "Upon conviction, the penalty for the willful or negligent discharge of sewage . . . without a permit as required by this act or in violation of any term or condition of a permit issued by the secretary of health and environment, or in violation of any of the requirements made pursuant to K.S.A. 65-164, 65-165 or 65-166, and amendments thereto, shall be not less than $2,500 and not more than $25,000, and a further penalty of not more than $25,000 per day for each day the offense is maintained. . . ."

Clearly, the Kansas statute falls short of the federal requirement that criminal fines be assessable in at least the amount of $10,000 a day for each violation. For this reason also we conclude that K.S.A. 1990 Supp. 65-170e(d) is less stringent than that which is required by 40 C.F.R. § 123.27(d).

In conclusion, the definition of the term "sewage" contained in K.S.A. 1990 Supp. 65-164(c) is narrower than the definition of the term "pollution" as set forth in 33 U.S.C.A. § 1362(b) (West 1986). In addition, the requirements for citizen intervention in certain environmental enforcement proceedings contained in K.S.A. 1990 Supp. 65-170e do not comply with the minimum federal standards for intervention promulgated by the environmental protection agency at 40 C.F.R. § 123.27(d).

Very truly yours,

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