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September 1, 1987

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ATTORNEY GENERAL OPINION NO. 87- 130

Pat Casey  
Special Assistant to the Secretary  
Department of Health and Environment  
Forbes Field  
Topeka, Kansas 66620-0001

Re: Public Health--Water Supply and Sewage--State  
Statutory Implementation of the National Pollutant  
Discharge Elimination System Program

Synopsis: Although a permit term or condition is not considered a "provision of the act" under K.S.A. 65-171t, and thus an action may not be brought pursuant to that section, injunctive relief may be sought through the broad powers granted to the secretary under K.S.A. 65-101. K.S.A. 65-170b grants broad authority to KDHE representatives to make inspections of records relating to a permitted facility to determine compliance with statutory and regulatory provisions relating to water pollution or public water supply. K.S.A. 65-171b does not provide for an override of the thirty day notice period provided by K.S.A. 65-165, but the same result may be achieved through injunctive relief. K.S.A. 60-224(b) (2) provides for permissive intervention when an applicant has a claim or defense with a question of law or of fact in common with the main action. "Sewage," as defined by K.S.A. 1986 Supp. 65-164 would include wastes with elevated temperatures, as long as they are "from domestic, manufacturing or other forms of industry." Cited herein: K.S.A. 60-224(b) (2); K.S.A. 65-101; K.S.A. 1986 Supp. 65-164; K.S.A.

65-165; 65-170b; 65-171b; K.S.A. 1986 Supp.  
65-171d; K.S.A. 65-171t.

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Dear Mr. Casey:

As Special Assistant to the Secretary of Health and Environment, Mr. Charles Hamm requested our opinion on several questions concerning the administration of the National Pollutant Discharge Elimination System (NPDES) program. Specifically, he inquired:

"1. Is the language of K.S.A. 65-171t broad enough to include bringing an action to prevent violations of permit conditions as issued under the authority in K.S.A. 65-165? Or stated another way, is a permit term or condition considered a 'provision of the act' under K.S.A. 65-171t?

"2. Is the statutory language of K.S.A. 65-170b broad enough to include the authority to enter property upon which records are kept concerning a permitted facility even if such property is not otherwise subject to K.S.A. 65-161 through 65-171?

"3. Will a finding of 'abatable pollution' pursuant to K.S.A. 171b be sufficient to override a 30 day notice period to the permittee as required by K.S.A. 65-165?

"4. Whether the provisions of K.S.A. 60-224(b)(2) required an applicant to have a cause of action for permissive intervention?

"5. Is the statutory definition of 'sewage' in K.S.A. [1986 Supp.] 65-164 broad enough to cover discharges with elevated temperatures?

"6. What types of discharges are not subject to NPDES permitting in relation to K.S.A. 1986 Supp. 65-171d?"

As to your initial inquiry, K.S.A. 65-171t states:

"The attorney general, upon the request of the secretary of health and environment, shall bring an action in the name of the state of Kansas to seek injunctive relief to prevent the violation, or to enjoin any continuing violation, of any provision of

this act or any rule and regulation adopted pursuant to the provisions of this act[\*]."

The asterisk following the text of the statute indicates that the language "this act" refers to Chapter 212 of the 1977 Session Laws. K.S.A. 65-165, which sets out the authority of the secretary to issue sewage discharge permits, was not affected by this act. Therefore, it is our opinion that your question must be answered in the negative.

However, it is well-settled that health authorities may seek injunctive relief to prevent an anticipated health menace.

"They are not compelled to wait until the health menace--discomfort, ill health, and perhaps death--is actually present. To be of real value health authorities must have authority to take such action as is necessary to prevent a health menace which is reasonably likely to occur under the facts and circumstances applicable thereto." Dougan v. Shawnee County Commissioners, 141 Kan. 554, 560 (1935).

So, if a violation of the permit condition warranted such action, injunctive relief could be sought through the broad powers granted to the secretary under K.S.A. 65-101.

As to your second inquiry, K.S.A. 65-170b states in relevant part:

"In performing investigations or administrative functions relating to water pollution or a public water supply system as provided by K.S.A. 65-161 to 65-171j, inclusive, or any amendments thereto, the secretary of health and environment or the secretary's duly authorized representatives upon presenting appropriate credentials, may enter any property or facility which is subject to the provisions of K.S.A. 65-161 to 65-171j, inclusive, or any amendments thereto, for the purpose of observing, monitoring, collecting samples, examining records and facilities to determine

compliance or noncompliance with state laws and rules and regulations relating to water pollution or public water supply." (Emphasis added.)

In our opinion, the language gives broad authority to KDHE representatives to make inspection of records relating to a permitted facility to determine compliance with statutory and regulatory provisions relating to water pollution or public water supply. Our opinion is buttressed by a letter issued by the Attorney General on May 23, 1973 to Jerome H. Svore, which concludes that state law enables an authorized representative of the state to

"[h]ave a right of entry to, upon, or through any premises of a permittee or of an industrial user of a publicly-owned treatment works in which premises an effluent source is located or in which any records are required to be maintained," p. 7. (Emphasis added.)

As to your third inquiry, K.S.A. 65-171b states:

"It shall be the duty of the attorney general, on presentation by the secretary of health and environment of evidence of abatable pollution of the surface waters detrimental to the animal or aquatic life in the state, to take such action as may be necessary to secure the abatement of such pollution." (Emphasis added.)

The statutory language does not specifically provide for an override of the thirty day notice period under K.S.A. 65-165. However, the same result may be achieved through injunctive relief where warranted by the circumstances, as discussed under your initial inquiry. Our opinion is again buttressed by Kansas Attorney General Opinion of May 23, 1973 to Jerome H. Svore which states in relevant part:

"State law provides authority to:

"a. Abate violations of:

. . . .

"b. Apply sanctions to enforce violations

described in paragraph (a) above,  
including the following:

"(1) Injunctive relief, without the necessity of a prior revocation of the permit;" p.13.  
(Emphasis added.)

As to your fourth inquiry, K.S.A. 60-224(b)(2) provides for permissive intervention

"[W]hen an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."  
(Emphasis added.)

The statutory language requires that the claim or defense of the applicant have a question of law or fact in common with the main action. The statute also makes the grant or denial of the application discretionary with the court. Thus, an applicant with a claim or defense may, in the discretion of the court, be denied intervention if the intervention would unduly delay or prejudice the rights of the original parties.

As to your fifth inquiry, K.S.A. 65-164 states in relevant part:


"For the purposes of this act, sewage is hereby defined as any substance that contains any of the waste products or excrementitious or other discharges from the bodies of human beings or animals, or chemical or other wastes from domestic, manufacturing or other forms of industry." (Emphasis added.)

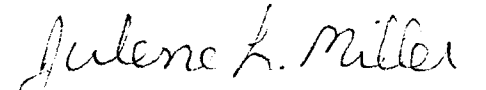
In our opinion, the language "other wastes" would include those with elevated temperatures, as long as they are "from domestic, manufacturing or other forms of industry."

As to your sixth inquiry, to this date our office has not been provided with the additional information needed to adequately address your question.

In conclusion, although a permit term or condition is not considered a "provision of the act" under K.S.A. 65-171t, injunctive relief may be sought through the broad powers granted to the secretary under K.S.A. 65-101. K.S.A. 65-170b grants broad authority to KDHE representatives to make inspections of records relating to a permitted facility to determine compliance with statutory and regulatory provisions relating to water pollution or public water supply. K.S.A. 65-171b does not provide for an override of the thirty day notice period provided by K.S.A. 65-165, but the same result may be achieved through injunctive relief. K.S.A. 60-224(b)(2) provides for permissive intervention when an applicant has a claim or defense with a question of law or of fact in common with the main action. "Sewage," as defined by K.S.A. 1986 Supp. 65-164 would include wastes with elevated temperatures, as long as they are "from domestic, manufacturing or other forms of industry."

Very truly yours,

  
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Julene L. Miller  
Deputy Attorney General

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