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ATTORNEY GENERAL OPINION NO. 90- 67

The Honorable Phil Martin  
State Senator, 13th District  
403 W. Euclid  
Pittsburg, Kansas 66762

Re: Public Health -- Solid and Hazardous Waste; Solid  
Wastes -- Solid Waste Processing Facility Permit;  
Authority to Issue.

Synopsis: The secretary of health and environment has the  
authority to issue a solid waste disposal facility  
permit upon receiving and approving a complete  
application from the proposed permittee. The  
completed application must include certification  
from the board of county commissioners that the  
proposed facility is consistent with the official  
county plan for the management of solid waste  
within such county. Cited herein: K.S.A. 65-3405;  
65-3406; 65-3407.

\* \* \*

Dear Senator Martin:

As Senator for the Thirteenth District of Kansas, you request  
our opinion as to whether the secretary of health and  
environment has the authority to issue a permit for a landfill  
without the approval of the county commission.

We initially note that pursuant to K.S.A. 65-3405 each county  
is required to organize a solid waste management committee  
which is then required to submit to the secretary of health

and environment a workable plan for the management of solid waste within such county. Further, that plan is required to be adopted by the governing body of such county. The requirements of the solid waste management plan are set forth in K.S.A. 65-3405(c).

The secretary of health and environment is authorized to issue a permit for the operation of a solid waste processing facility, and it is unlawful for any person to operate such a facility without first obtaining a permit from the secretary. K.S.A. 65-3406(i), K.S.A. 65-3407(a). To obtain a permit to operate a solid waste processing facility, an application is made to the secretary of health and environment. K.S.A. 65-3407(a).

"Upon receipt of any application and payment of the fee, the secretary, with advice and counsel from the local health authorities and the county commission, shall make an investigation of the proposed solid waste processing facility or disposal area and determine whether it complies with the provisions of this act and any rules and regulations and standards adopted thereunder. When the investigation reveals that the facility or area does conform with the provisions of the act and the rules and regulations and standards adopted thereunder the secretary shall approve the application and shall issue a permit for the operation of each solid waste processing or disposal facility or area set forth in the application." K.S.A. 65-3407(b).

Thus, it is clear that the secretary of health and environment, not the county commission, has the authority to approve the application and issue an operating permit, although the county commission and the local health authorities may offer advice and counsel to the secretary during the investigatory process.

The board of county commissioners does have one responsibility in connection with the permit application process. This responsibility is set forth in K.A.R. 28-29-6(e):

"Conformity with official plan. Permits shall not be issued by the secretary until the applicant has secured, from the board of county commissioners or from the mayor of an incorporated city having an official plan, certification that the proposed facility is consistent with the official plan."

If the proposed facility is consistent with the official plan, the board of county commissioners should so certify. That certification becomes a part of the application submitted by the proposed permittee to the secretary of health and environment. We note that the department of health and environment does have the authority to grant a variance in "exceptional circumstances." K.A.R. 28-29-2. Presumably a county's dilatory compliance with the certification could be deemed an "exceptional circumstance."

In conclusion the secretary of health and environment does have the authority to issue a solid waste disposal facility permit upon receiving and approving a complete application from the proposed permittee. The completed application must include, however, certification from the board of county commissioners that the proposed facility is consistent with the official plan. In other words, the board of county commissioners is not authorized to either approve or disapprove the permit application, but does have authority to certify whether the proposed facility is consistent with the county plan developed in accordance with K.S.A. 65-3405(c).

Very truly yours,



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RTS:JLM:CN:bas