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ATTORNEY GENERAL OPINION NO. 91- 121

The Honorable Dave Kerr
State Senator, 34th District
6 Golf Green Drive
Hutchinson, Kansas 67502

The Honorable Eugene Shore
State Representative, 124th District
Route 2
Johnson, Kansas 67855

The Honorable Michael O'Neal
State Representative, 104th District
2605 Heather Parkway
Hutchinson, Kansas 67502

Re: Public Health -- Solid and Hazardous Waste -- Kansas Storage Tank Act; Reimbursement from Trust Fund for Corrective Action Costs, When; Violation of Equal Protection Clause

Synopsis: To the extent discussed herein the statutory classifications for determining eligibility for and amounts of reimbursement from the underground petroleum storage tank trust fund as set forth in K.S.A. 1990 Supp. 65-34,119 violate the equal protection clause of the United States constitution. Other provisions of the Kansas storage tank act are severable and therefore not affected by this opinion. Cited herein: K.S.A. 1990 Supp. 65-34,100; 65-34,104; 65-34,106; 65-34,107; 65-34,114; 65-34,115; 65-34,119; 65-34,120; 65-34,125; P.L. 98-616; 40 C.F.R. § 280.

* * *

Dear Senator Kerr, Representative Shore and Representative O'Neal:

You request our opinion regarding whether the classification scheme for reimbursement from the petroleum storage tank release trust fund as established within the Kansas storage tank act, K.S.A. 1990 Supp. 65-34,100 et seq., violates the equal protection clause of the constitution. For the reasons set forth in this opinion, we find that classification scheme violative of constitutional equal protection guarantees.

The Kansas storage tank act (KSTA) was enacted in response to federal legislation, the hazardous and solid waste amendments of 1984 (P.L. 98-616), which amended the resource, conservation and recovery act by adding subtitle I, which created a new, comprehensive regulatory program for underground storage tanks. The United States environmental protection agency (EPA) administers the federal law unless a state adopts an underground storage tank program that is approved by the EPA as being in substantial compliance with the federal law and rules and regulations adopted by the EPA. In such a case, the appropriate state agency will have primary enforcement responsibility for the state program. Accordingly, in 1989, the Kansas storage tank act was enacted by the Kansas legislature.

The overall purpose of the KSTA is found in the statement of legislative findings as set forth in K.S.A. 1990 Supp. 65-34,100:

> "The legislature finds that:
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> "(a) protection of the environment of this state promotes the health and general welfare of the citizens of this state; and
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> "(b) the state's responsibility to promote the public health and welfare requires a comprehensive approach to protect the environment by preventing and remedying the pollution of the state's natural resources and providing funding of the management, conservation and development of those resources."

The KSTA, among other things, requires that owners or operators of underground storage tanks of petroleum and other regulated substances register the tanks with the Kansas department of health and environment (KDHE). K.S.A. 1990 Supp. 65-34,104. The owner or operator of a tank must

notify KDHE of the tank's existence, including age, size, type, location, associated equipment, and uses. K.S.A. 1990 Supp. 65-34,104. The act prohibits any person from constructing, modifying or operating an underground storage tank unless a permit or other approval is obtained from the secretary of KDHE. K.S.A. 1990 Supp. 65-34,106. Such approval is based, in part, on demonstrated compliance by tank owners and operators with required performance standards and evidence of financial responsibility. K.S.A. 1990 Supp. 65-34,106 and K.S.A. 1990 Supp. 65-34,107.

Financial responsibility within the meaning of the KSTA means:

> "Insurance, guarantee, surety bond, letter of credit, qualification as a self-insurer or any other method satisfactory to the secretary to provide for taking corrective action, including clean-up and restoration of any damage to the land, air or waters of the state, and compensating third parties for clean-up, bodily injury or property damage resulting from a sudden or non-sudden release of a regulated substance arising from the construction, relining, ownership or operation of an underground storage tank and in the amount specified in the federal act." K.S.A. 1990 Supp. 65-34,102(f).

The Kansas legislature determined that, except as provided otherwise by the KSTA, an owner or operator of an underground petroleum storage tank is to be liable for all costs of corrective action taken in response to a release from such petroleum storage tank. K.S.A. 1990 Supp. 65-34,115. In other words, the legislature has as a matter of policy determined that the responsibility for necessary corrective action is to be borne by the owner or operator of the tank and not the government.

To assist owners/operators of underground petroleum storage tanks in meeting that obligation, the state established and administers a petroleum storage tank release trust fund. K.S.A. 1990 Supp. 65-34,114. This trust fund is funded from the proceeds of an environmental assurance fee of $.01 on each gallon of petroleum product, other than aviation fuel, manufactured in or imported into this state. The environmental assurance fee is paid by the manufacturer, importer or distributor first selling, offering for sale, using or delivering petroleum products within this state. K.S.A. 1990 Supp. 65-34,117.

The purpose of the petroleum storage tank release trust fund is to assist owners and operators of underground petroleum storage tanks in providing the required evidence of financial responsibility for corrective action required by a release from any such tank. K.S.A. 1990 Supp. 65-34,114(a) and (b). Eligibility to participate in the petroleum storage tank release trust fund may be submitted as evidence of financial responsibility required of owners and operators of underground petroleum storage tanks. K.S.A. 1990 Supp. 65-34,115.

The classification system as set forth in K.S.A. 1990 Supp. 65-34,119 determines which owners and operators are eligible for reimbursement from the fund in the event corrective action is required and the amount of such reimbursement (up to a maximum of $1,000,000, K.S.A. 1990 Supp. 64-34,120). It is this classification system which is the subject of your inquiry.

The specific classification scheme as set forth in K.S.A. 1990 Supp. 65-34,119(a)(1) through (5) and (16)(B) is as follows:

> "(a) An owner or operator of an underground petroleum storage tank, other than the United States government or any of its agencies, who is in substantial compliance, as provided in subsections (d) and (e), and who undertakes corrective action, either through personnel of the owner or operator or through response action contractors or subcontractors, is entitled to reimbursement of reasonable corrective action costs from the fund, subject to the following provisions:
>
> "(1) Except as provided in subsection (a)(5), an owner or operator who is not a petroleum marketer and who owns or operates not more than four underground petroleum storage tanks shall be liable for the first $5,000 of costs of corrective action taken in response to a release from any such petroleum storage tank, provided all petroleum or petroleum products are not stored for purposes of resale;
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> "(2) Except as otherwise provided by subsections (a)(1) and (a)(5), the owner or operator of not more than 12 underground petroleum storage tanks shall be liable for the first $10,000 of costs

of corrective action taken in response to a release from any such petroleum storage tank;

"(3) except as provided by subsection (a)(5), the owner or operator of at least 13 and not more than 99 underground petroleum storage tanks shall be liable for the first $20,000 of costs of corrective action taken in response to a release from any such petroleum storage tank;

"(4) except as provided by subsection (a)(5), the owner or operator of more than 99 underground petroleum storage tanks shall be liable for the first $60,000 of costs of corrective action taken in response to a release from any such petroleum storage tank;

"(5) an owner or operator who complies with the provisions of subsection (a)(16)(B) shall be liable for the first $100,000 of costs of corrective action taken at any one location of one or more underground petroleum storage tanks unless the owner or operator submits to the secretary proof, satisfactory to the secretary, that: (A) Such owner or operator is an association organized under the cooperative marketing act (K.S.A. 17-1601 et seq. and amendments thereto); (B) all businesses in which such association's underground petroleum storage tanks are used are owned and operated by such association; and (C) such association is not engaged in production or refining of petroleum products;

. . . .

"(16) the owner or operator submits to the secretary proof, satisfactory to the secretary, that: (A) such owner or operator is unable to satisfy the criteria for self-insurance under the federal act; or (B) such owner or operator is able to satisfy the criteria for self-insurance under the federal act but is not engaged

in production or refining of petroleum products;. . . ."

As an aid to understanding this reimbursement classification scheme we have developed a chart as follows:

K.S.A. 65-34,119:	Number of Tanks	Marketer	Petroleum stored only for purpose of resale	Reimbursement from fund to O/Op* for corrective action costs over:
Subsection (a)(1)	1 - 4	NO	NO	$5,000
(a)(2)	1 - 4	NO	YES	$10,000
(a)(2)	1 - 4	YES	NO	$10,000
(a)(2)	1 - 4	YES	YES	$10,000
(a)(2)	5 - 12	YES/NO	YES/NO	$10,000
(a)(3)	13 - 99	YES/NO	YES/NO	$20,000
(a)(4)	100+	YES/NO	YES/NO	$60,000
(a)(5)	Any number if O/Op qualifies for self insurance and is not engaged in producing or refining	YES/NO	YES/NO	$100,000
	Except for cooperative associations not engaged in production or refining and all businesses in which such association's USTs** are used or owned and operated by such association	----------	----------	See above (a)(1) through (a)(4)
(a)(16)(B)	Any number if O/Op qualifies for self insurance and is engaged in producing or refining	YES/NO	YES/NO	O/Op cannot qualify for any reimbursement from fund

*O/Op = owner or operator
**UST = underground storage tank

The threshold criteria for self insurance under the federal act is a tangible net worth of at least $10 million. Additional financial criteria are set forth in 40 C.F.R. § 280, subpart H.

We now turn to the law relating to the equal protection clause and quote from Farley v. Engelken, 241 Kan. 663 (1987):

> "While equality is the rule and classification the exception, it is readily apparent that complete numerical equality of treatment for all persons is impossible, particularly in a pluralistic, diverse society such as the United States. Thus, some types of classification are inescapable even though they create burdened as well as benefited classes. Classification in application of the law, by its very nature, creates preference to the benefited class. Thus, classification is discriminatory. However, discrimination under proper rules is not prohibited. For instance, equal protection does not require a state to license a blind person to drive a motor vehicle merely because it licenses those with good vision. Nor does equal protection prevent the state from regulating sanitary conditions in restaurants where it does not regulate such conditions in repair shops. We could go on with many illustrations showing that unequal treatment of persons under proper circumstances is essential to the operation of government. On the other hand, the equal protection clause forbids some types of classification. The court's problem has thus been to articulate principles by which constitutional differentiations can be separated from unconstitutional differentiations.
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> "The United States Supreme Court has utilized varying standards in distinguishing constitutional from unconstitutional classification. It currently recognizes and applies three standards or 'levels of scrutiny' in analyzing equal protection claims. The standard of scrutiny increases with the

> perceived importance of the right or interest involved and the sensitivity of the classification. Of the three articulated tests, the least strict is the 'rational' or 'reasonable' basis test. In McGowan v. Maryland, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961), the court discussed the rational basis test:
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> > 'The Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in inequality. A statutory discrimination will not be set aside if any stated facts reasonably may be conceived to justify it.' 366 U.S. at 425-426."
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> . . . .
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> "Justice (now Chief Justice) Prager, writing for the court, first reviewed the various tests applied when considering whether a statute offends the equal protection clause and noted that in cases involving 'suspect classifications' or 'fundamental interests' the courts adopt an attitude of active and critical analysis, requiring the courts to consider the nature of the rights affected by the legislation, the classification established and the governmental interests necessitating the classification." Farley at 668-669, 671.

As the classification statute under consideration does not involve a "suspect classification" or a "fundamental interest," the applicable equal protection analysis must use the "rational basis" test.

Syllabus section 3 of Farley sets forth the "rational basis" test for determining whether a statutory classification is constitutional to be consideration of whether the classification bears some reasonable relationship to a valid legislative objective. This is the converse manner of stating that a classification scheme is violative of equal protection if it rests on grounds wholly irrelevant to the achievement of the state's objective.

As noted, the general purpose of the KSTA is prevention of and remedying pollution of the state's natural resources. To accomplish this purpose owners and operators of underground storage tanks are required to demonstrate their financial responsibility to take corrective action in the event of a release of a regulated substance into the environment. Evidence of such financial responsibility is provided in part if an owner or operator qualifies for reimbursement for a portion of clean up costs from the petroleum storage tank release trust fund. As indicated, this fund is financed in part from the environmental assurance fee proceeds paid by manufacturers, importers and distributors of petroleum products.

In our opinion the risk to the environment increases with the number of underground storage tanks owned or operated; and therefore, in so far as the classification scheme set forth in K.S.A. 1990 Supp. 65-34,119 is based on the number of tanks owned or operated, it bears a reasonable relationship to prevention of and remedying pollution caused by releases from underground storage tanks. The greater the number of tanks owned or operated, the greater the risk of a release and therefore the greater the amount of money to be paid by an owner or operator before reimbursement from the fund.

However, the number of tanks owned or operated is not the only criteria by which the dollar amount of reimbursement from the fund is determined. Tank use at the facility, marketer/non-marketer status and financial status are also statutory criteria which must be taken into account in determining whether an owner or operator is entitled to reimbursement from the fund for corrective action costs. We have identified constitutionally problematic issues in relation to each of the latter criteria within the classification scheme as set forth in K.S.A. 1990 Supp. 65-34,119.

First, in relation to tank use at the facility, a non-marketer owner or operator of one to four underground storage tanks is eligible for reimbursement over the first $5,000 in corrective action costs if the petroleum is not stored for purposes of resale. However, if a non-marketer owner of one to four

underground storage tanks stores petroleum for purposes of resale, he will be eligible for reimbursement over the first $10,000 paid in corrective action costs. We are at a loss to discern any reasonable relationship between this distinction in petroleum storage purpose, i.e. whether stored for purposes of resale or not, and the purpose of remedying pollution problems caused by petroleum releases.

Nor can we identify a reasonable relationship between petroleum storage purposes and the purpose of the petroleum storage tank release trust fund, i.e. to assist owners and operators of underground storage tanks in providing evidence of financial responsibility for corrective action required by a release from any such tank. Surely the risk to the environment and any consequent risk to the fund is related to the fact of stored petroleum and not to the purpose for which it is stored. Whether such stored petroleum is held for resale or held for personal use by the owner or operator cannot have any bearing on danger to the environment or risk to the fund established to aid in cleanup costs. We therefore conclude that, insofar as the classification is based on the purpose for which petroleum is stored, it rests on grounds wholly irrelevant to the achievement of the state's objective.

Second, in relation to the marketer/non-marketer status within the classification, a non-marketer owning or operating one to four underground storage tanks will be eligible for reimbursement over the first $5,000 in corrective action costs (if the petroleum is not stored for purposes of resale), while a similarly situated marketer will qualify for reimbursement over the first $10,000 in corrective costs, regardless of the storage purpose. Again, we cannot identify any reasonable relationship between whether an owner or operator is a marketer or non-marketer of petroleum or petroleum products and the purpose of the act or the establishment of the fund. Although this distinction has financial consequences for reimbursement from the fund only within the category of one to four tanks, nevertheless some legitimate governmental purpose must be served by the distinction.

Third, in relation to financial status, an owner/operator of any number of underground storage tanks who meets the self insurance criteria (essentially $10 million in tangible net worth) and is not engaged in producing or refining petroleum or its products is eligible for reimbursement from the fund for amounts over the first $100,000 in corrective action costs. However, an exception is carved out for cooperative associations who would otherwise fall within this category if all businesses in which such associations' underground petroleum storage tanks are used are owned and operated by such association. For such qualifying cooperative

associations the eligibility for reimbursement is not the amount over $100,000, but instead is dependent upon which category within K.S.A. 1990 Supp. 65-34,119(a)(1) through (4) it falls. That is, such qualifying cooperative associations' reimbursement will range from between the amount over the first $5,000 in corrective action costs to the amount over the first $60,000 in corrective action costs.

Again, we cannot discern any reasonable relationship between this statutory distinction and the legitimate purpose of the act to prevent and remedy pollution caused by releases or the purpose of the trust fund to assist owners and operators in providing evidence of financial responsibility.

In conclusion, to the extent discussed in this opinion, the statutory classifications for determining eligibility for and reimbursement from the underground petroleum storage tank trust fund as set forth in K.S.A. 1990 Supp. 65-34,119 violate the equal protection clause of the United States constitution. Other parts of the Kansas storage tank act are severable, K.S.A. 1990 Supp. 65-34,125, and therefore are not affected by this opinion.

Very truly yours,

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