

**STATE OF KANSAS
DEPARTMENT OF HEALTH AND ENVIRONMENT**

In the Matter of the Application for Stay by)	
)	
Sunflower Electric Power Corporation)	Case No. 11-E-80- BOA
Holcomb Unit 2)	
Holcomb, Kansas)	
<hr/>		

Pursuant to K.S.A. 77-616

ORDER GRANTING APPLICATION FOR STAY

This matter comes before Robert Moser, M.D., Secretary of the Kansas Department of Health and Environment (“KDHE”) on the request of Sunflower Electric Power Corporation (“Sunflower”) for a stay filed June 6, 2011, under K.S.A. 77-616. Briefly, the facts in this matter are that on December 16, 2010, then-Acting Secretary John Mitchell issued the final Prevention of Significant Deterioration (“PSD”) air quality permit to Sunflower for the construction of Holcomb 2. On January 14, 2011, Sierra Club, a participant in the public hearings on the Holcomb 2 permit, filed a petition for judicial review in the Kansas Court of Appeals requesting review of the final permit. The Kansas Supreme Court exercised its authority to transfer the case under K.S.A. 20-3018(c) and judicial review of the PSD permit action is now pending before the Court.

JURISDICTION

1. K.S.A. 65-3008 prohibits the construction of an air emission stationary source unless the Secretary has issued a permit authorizing the source’s construction.
2. K.S.A. 2010 Supp. 65-3008a establishes public comment and hearing procedures for gathering public input on proposed permit actions. The statute permits a participant in the public process who otherwise would have standing under K.S.A. 77-611 to obtain judicial review of the final permit action under the Kansas Judicial Review Act (“KJRA”).

3. Neither K.S.A. 65-3008 nor K.S.A. 2010 Supp. 65-3008a makes reference to the Kansas Administrative Procedure Act (“KAPA”), which is applicable to adjudicative proceedings. As a result, KAPA does not apply to air quality permit actions taken under either K.S.A. 65-3008 or K.S.A. 2010 Supp. 65-3008a. K.S.A. 2010 Supp. 77-503.
4. In contrast to a quasi-judicial function, the issuance of a permit (or license as defined in K.S.A. 77-602(d)) under K.S.A. 65-3008 and K.S.A. 2010 Supp. 65-3008a is an exercise of an administrative function, explicitly subject to judicial review as agency action under the provisions of K.S.A. 2010 Supp. 65-3008a(b), K.S.A. 77-602(b)(3), and K.S.A. 77-607.
5. Neither K.S.A. 65-3008 nor K.S.A. 2010 Supp. 65-3008a makes provision for the stay of a permit or any of the permit terms.
6. The KJRA, however, grants discretion to a state agency to “grant a stay on appropriate terms . . . during the pendency of judicial review.” K.S.A. 77-616(a).
7. Pursuant to the authority of K.S.A. 77-616(a) and as the duly appointed head of the KDHE under K.S.A. 2010 Supp. 75-5601, I find that I have jurisdiction to determine whether and under what conditions a stay should be granted to Sunflower.
8. I further find that Sierra Club’s contention that KDHE has lost jurisdiction over Sunflower’s PSD permit upon its appeal is without merit. Sierra Club’s reliance on *In re Petition of City of Shawnee*, 236 Kan. 1, 15, 687 P. 2d 603 (1984) is misplaced. K.S.A. 77-616(a) plainly grants stay authority to KDHE.

FINDINGS OF FACT

9. During the pendency of judicial review of its PSD permit, Sunflower seeks a stay limited to the permit provision that governs the running of the 18-month period for commencing construction. Sunflower requests the stay to take effect with the date of its application for stay and to run through the date the Kansas Supreme Court enters a final judgment. Upon expiration of the stay, Sunflower requests the extension of the construction period

by the number of days the stay was in effect. Application for Stay dated June 1, 2011, p. 2.

10. General Provision 1 at page 23 of the PSD permit issued to Sunflower, effective December 16, 2010, states:

Except as the term of this permit might be extended in accordance with applicable law, the permit shall expire 18 months from the effective date of its issuance unless construction of the steam generator is commenced within 18 months of the effective date of this permit. If construction of the steam generator approved in this permit is commenced within the specified period following the effective date of this permit, construction can continue on such unit in accordance with the provisions of 40 C.F.R. 52.21(r)(2) and K.A.R. 28-19-301(c).

11. Sunflower submitted the affidavit of Micheal S. McInnes, employed by Tri-State Generation and Transmission Association, Inc. (Tri-State) as Senior Vice President – Production. Tri-State has an option with Sunflower pursuant to a Purchase Option and Development Agreement for real property near Holcomb, Kansas, for the development of new coal-fired electrical generating capacity. Affidavit, p. 1.
12. The sworn affidavit of Micheal S. McInnes provides details of the scope of work involved with commencing construction of an electric power plant unit, including the engineering, legal, and financial work needed to bring the construction project to fruition. The sworn affidavit is unrefuted and is fully incorporated into this decision by this reference.

CONCLUSIONS OF LAW

13. Referenced in the Sunflower permit as a basis for the 18-month construction period, K.A.R. 28-19-301(c) provides, “Each permit or approval issued for the construction or modification of a source shall become void if the construction or modification has not commenced within 18 months after permit issuance or if the activity required to complete the modification or construction has been discontinued for 18 months or more.”

14. For the construction of major stationary sources subject to the PSD provisions of the Clean Air Act, KDHE has adopted additional construction requirements established in K.A.R. 28-19-350. As approved by the U.S. Environmental Protection Agency (EPA) for adoption in the State Implementation Plan (SIP) for implementing the Clean Air Act in Kansas and as in effect on December 16, 2010, K.A.R. 28-19-350 adopts by reference 40 C.F.R. 52.21(r)(2), which provides:

Approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The Administrator¹ may extend the 18-month period upon a satisfactory showing that an extension is justified. This provision does not apply to the time period between construction of the approved phases of a phased construction project; each phase must commence construction within 18 months of the projected and approved commencement date.

15. 40 C.F.R. 52.21(b), which is also adopted by reference in K.A.R. 28-19-350, defines several of the terms included within 40 C.F.R. 52.21(r)(2), specifically:

(8) Construction means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions.

(9) Commence as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time. (Emphasis added.)

(10) Necessary preconstruction approvals or permits means those permits or approvals required under Federal air quality control laws and regulations

¹ K.A.R. 28-19-350(c) substitutes “secretary of health and environment or an authorized representative of the secretary” for “administrator” in 40 C.F.R. 52.21(r)(2).

and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(11) Begin actual construction means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

16. Under K.S.A. 77-616(c), to defeat an agency's grant of a stay during the pendency of judicial review and assuming the stay was justified to protect against a substantial threat to the public health, safety or welfare (a worst case scenario not applicable in this case), the Court would have to find that:

- a. The applicant is likely to prevail when the court finally disposes of the matter;
- b. Without relief the applicant will suffer irreparable injury;
- c. The grant of relief to the applicant will not substantially harm other parties to the proceedings; and
- d. The threat to the public health, safety or welfare relied on by the agency is not sufficiently serious to justify the agency's action in the circumstances.

17. Using the rationale of K.S.A. 77-616(c) to support the inverse proposition that a stay is reasonable in the circumstances presented here (under K.S.A. 77-616(d)), I find that:

- a. With Sunflower as the applicant for stay of agency action rendered in its favor, these facts present a paradox that makes this factor irrelevant to determine reasonableness;²
- b. Without a stay of the running of the 18-month construction period, Sunflower could not proceed to construct Holcomb 2 without incurring considerable capital outlay and entering binding agreements or contractual obligations at substantial risk and expense to Sunflower;
- c. The grant of a stay to Sunflower will stop the construction of Holcomb 2, at least temporarily and favorably to Sierra Club; and
- d. The grant of a stay poses no threat to the public health, safety or welfare.

² K.S.A. 2010 Supp. 77-621, however, places the burden of proving the invalidity of the Sunflower PSD permit decision on Sierra Club and subsection (d) prohibits the court from reweighing the evidence or engaging in de novo review when reviewing the evidence in light of the record as a whole.

18. Sunflower's request for stay is limited to only one provision of the PSD permit, the running of the time to commence construction, 40 C.F.R. 52.21(r)(2). This federal regulation has been duly adopted into the SIP for Kansas and likewise grants the same discretion to the Secretary of KDHE as the EPA Administrator would have to determine the circumstances that show "an extension [of the 18-month commence construction period] is justified."
19. The request for stay is not a request to extend the construction period, but rather a request to stop the construction clock from running during the pendency of judicial review, a time of unknown and unpredictable duration. Although the practical effect of a request for stay and a request for extension may be the same, to lengthen the period for commencing construction, the KJRA stay provision is no less a valid basis for decision than is 40 C.F.R. 52.21(r)(2).

Despite Sierra Club's assertion that K.S.A. 77-616 should not be considered because EPA has not adopted it into the Kansas SIP, a review of the legislative history of the Kansas Air Quality Act ("KAQA") suggests that EPA was, or should have been well aware of its existence. It is of further note that the EPA-approved Kansas SIP, 40 C.F.R. 52.870 – 52.884,³ incorporates by reference duly adopted Kansas regulations authorized by duly enacted Kansas legislation. Adoption by EPA of a duly adopted Kansas regulation into the SIP likewise recognizes the validity of the legislative enactment that provides the regulation's legal basis. Similar to the adoption by reference of state regulations in federal regulations, the Kansas legislature, in effect, adopted the whole of the KJRA by reference into KAQA when it enacted K.S.A. 2010 Supp. 65-3008a.

20. K.S.A. 77-616 was enacted in 1984 and has not been amended since its enactment. K.S.A. 2010 Supp. 65-3008a, from which Sierra Club availed itself of the opportunity to file a petition for judicial review of the Sunflower PSD permit, was first enacted in 1993, at which time the Kansas air quality act was rewritten to

³ The reference to the Kansas SIP for the purposes of determining the issues on appeal in this proceeding is to the Kansas SIP in effect on December 16, 2010, when the Sunflower PSD permit was issued by KDHE.

address the 1990 amendments to the Clean Air Act. See the attached testimony of Charles Jones of KDHE's Division of Environment presented February 24, 1993. K.S.A. 2010 Supp. 65-3008a plainly references the KJRA as the basis for judicial review of a permit issued under its provisions. The KJRA serves as the exclusive means for judicial review of agency action. K.S.A. 77-606.

21. Given the legal and procedural framework of the Kansas Air Quality Act, specifically K.S.A. 2010 Supp. 65-3008a, and the Kansas Judicial Review Act and the relationship of one to the other, I find that the factual circumstances presented here provide a reasonable basis for granting Sunflower's request for stay, thereby stopping the running of the 18-month commence construction period on June 1, 2011, with the remainder of the period (12 months and two weeks) to resume upon final disposition of this matter by the Kansas Supreme Court.

22. A party aggrieved by this Order may file a motion in the Kansas Supreme Court seeking interlocutory review of this Order pursuant to K.S.A. 77-616.

IT IS SO ORDERED.

7/20/2011

Date



Robert Moser, M.D., Secretary
Kansas Department of Health and Environment
1000 SW Jackson Street, Suite 540
Topeka, Kansas 66612-1367

STATE OF KANSAS
BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT
In Re: Air Emissions Source Construction Permit No. 055 0023

AFFIDAVIT OF MICHEAL S. MCINNES
IN SUPPORT OF REQUEST FOR STAY

1. Micheal S. McInnes, being duly sworn hereby declare and state that:

1. I am employed by Tri-State Generation and Transmission Association, Inc. ("Tri-State") as its Senior Vice President- Production.

2. Tri-State is a generation and transmission electric cooperative supplying wholesale electric power to its 44 electric cooperative members. Tri-State generates and transmits electricity to its member systems throughout a 200,000 square-mile area across Colorado, Nebraska, New Mexico and Wyoming serving nearly 1.5 million consumers. Tri-State is headquartered in Westminster, Colorado and employs nearly 1,200 people.

3. Tri-State has an option, pursuant to a Purchase Option and Development Agreement, dated July 27, 2007, with Sunflower Electric Power Corporation, Sunflower Electric Holdings, Inc., Holcomb 2, LLC, and Holcomb Common Facilities, LLC with respect to a portion of certain real property located near Holcomb, Kansas for the development of new coal-fired electrical generating capacity.

4. In my capacity as Senior Vice President for Production, I have personally participated in the planning for the development and construction of the 895 nominal megawatt generating station at Holcomb, Kansas (the "Holcomb Expansion Project" or "Project") to be

constructed and operated under a PSD Air Permit issued by the State of Kansas Department of Health and Environment on December 16, 2010 (the "Permit"). As a result of my participation, I have personal knowledge of the matters stated herein.

5. In our development and planning process Tri-State has consulted with qualified independent engineers and experts on construction. We also have reviewed publicly available information about other power plant construction projects in the United States. It is our conclusion that the Holcomb Expansion Project is likely to cost approximately \$1.5 billion to complete and the construction schedule will extend over a period of approximately five years.

6. Commencing construction of a project of this magnitude requires that contracts and working arrangements be made between our company and engineers and architects to develop and complete construction plans and schedules and to develop appropriate contract terms and conditions. Preparing contract terms for this Project also requires legal work to be performed in conjunction with the architects and engineers. Bids must be solicited and time allowed for prospective contractors to communicate with their suppliers, ascertain costs and delivery times, and then to formulate and submit responsive bids. The bids or contract proposals must then be evaluated and compared and bids awarded. This process requires a significant amount of time and substantial expense for professional services, including engineering, legal, and accounting services.

7. Typically, intensive engineering efforts are necessary to specify and bid the larger, critical path portions of a project. These critical path elements include the steam turbine/generator, the steam generator (or boiler), and the air quality control systems. The PSD permit was issued five months ago. Specifications for the major components for H2 are nearly

complete. Requests for proposals ("RFPs") are expected to be released for bidding within the next 30 days. Amounts invested in this phase of development are in the millions of dollars.

8. Presuming that appropriate bid responses are developed by vendors, and that the permit challenge has not been resolved prior to the conclusion of the bid evaluation, the owners will have to decide whether to make commitments in the tens of millions of dollars by issuing a limited notice to proceed ("LNTP") to one or more of the major vendor contracts. Vendors would then proceed with detailed design of the project components and, with approval, the orders placed for forgings that ultimately become the turbine rotors and shells and the generator rotating element. This work typically takes place 6 to 12 months before local construction work actually begins. Therefore, to meet the permit's current construction deadline, this work must begin during the second half of 2011.

9. If at any point after the specifications are released for bids the project is interrupted by an adverse judicial decision, the project's detailed design process likely would slow or stop because vendors are reluctant to devote time and money responding to an RFP for a threatened project. A vendor response entails major effort (and expenditures that can reach approximately \$1,000,000). With the permit deadline looming, and with no certainty that the vendor's proposal will be accepted, or, if it is, that legal proceedings might interfere with project development, vendors may well allocate resources to other projects and either give general responses conditioned with many caveats, or they may decide not respond at all. Poor or non-responses will necessitate a restart of these preliminary engineering efforts once the permit challenges are concluded.

10. The Holcomb Expansion Project is of such magnitude that it requires financing in amounts that may involve assembling a syndicate or group of participating lenders. The terms

and conditions of the loan will have to be negotiated based on economic conditions, interest rates and other financial market conditions at or near the time the agreements are finalized. The loan transaction will require negotiation and preparation of complex loan agreements and related security instruments, all of which requires very substantial time and expense.

11. The Permit gives Sunflower (and by extension, Tri-State) 18 months to complete all of the actions required to design and plan a project and provides that the Permit expires if construction is not commenced within 18 months of the date of issuance. In the normal course of events, prudent planning and commencement of construction of a project comparable to the Holcomb Expansion Project requires most or nearly all of the time granted by the Permit. Accordingly, the 18 month period is critical to Sunflower and Tri-State.

12. Tri-State's initial expectation upon the filing of the Petition for Review by the Sierra Club was that the Petition would proceed quickly to decision in the courts and any adverse effect from the court proceedings could be mitigated within the 18 month period of the Permit. We have, however, been advised by counsel that the time schedule originally sought, which could have led to argument before the Supreme Court in late August or early September is now unfeasible for reasons beyond the control of Sunflower and Tri-State.

13. To commence construction under the cloud of litigation would impose additional risks and burdens on Tri-State that could result in significant harm because of the uncertainty surrounding the permit. For example, as noted above, should the permit be modified as a result of the litigation, much of the work necessary to commence construction during the pendency of the litigation could be for naught, leading to significant increases in the cost of Holcomb 2. In addition, during the pendency of the litigation, lenders will likely either refuse financing or significantly increase the cost of financing to compensate for the risk inherent with litigation.

14. The grant of a stay will serve to ameliorate some of the substantial financial risks arising solely by reason of the delay and the uncertainty associated with the litigation initiated by those opposed to the project. The stay would provide Sunflower and Tri-State the remaining balance of the commencement deadline period unencumbered by the cloud on the project resulting from the unresolved legal challenge.

I declare under penalty of perjury under the laws of the state of Kansas that the foregoing is true and correct. Executed this 24th day of May, 2011.

Michael S. McInnes
Michael S. McInnes

STATE OF COLORADO)

COUNTY OF Adams)

This Affidavit in Support of Request for Stay was signed and sworn to before me on May 24, 2011 by Micheal S. McInnes.

Margaret V. Chidlaw
Notary Public

My Commission expires: 3/11/14

Margaret V. Chidlaw
Notary Public
State of Colorado

STATE OF KANSAS
BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT
In Re: Air Emissions Source Construction Permit No. 055 0023

AFFIDAVIT OF MICHEAL S. MCINNES
IN SUPPORT OF REQUEST FOR STAY

I, Micheal S. McInnes, being duly sworn hereby declare and state that:

1. I am employed by Tri-State Generation and Transmission Association, Inc. (“Tri-State”) as its Senior Vice President- Production.

2. Tri-State is a generation and transmission electric cooperative supplying wholesale electric power to its 44 electric cooperative members. Tri-State generates and transmits electricity to its member systems throughout a 200,000 square-mile area across Colorado, Nebraska, New Mexico and Wyoming serving nearly 1.5 million consumers. Tri-State is headquartered in Westminster, Colorado and employs nearly 1,200 people.

3. Tri-State has an option, pursuant to a Purchase Option and Development Agreement, dated July 27, 2007, with Sunflower Electric Power Corporation, Sunflower Electric Holdings, Inc., Holcomb 2, LLC, and Holcomb Common Facilities, LLC with respect to a portion of certain real property located near Holcomb, Kansas for the development of new coal-fired electrical generating capacity.

4. In my capacity as Senior Vice President for Production, I have personally participated in the planning for the development and construction of the 895 nominal megawatt generating station at Holcomb, Kansas (the “Holcomb Expansion Project” or “Project”) to be

constructed and operated under a PSD Air Permit issued by the State of Kansas Department of Health and Environment on December 16, 2010 (the "Permit"). As a result of my participation, I have personal knowledge of the matters stated herein.

5. In our development and planning process Tri-State has consulted with qualified independent engineers and experts on construction. We also have reviewed publicly available information about other power plant construction projects in the United States. It is our conclusion that the Holcomb Expansion Project is likely to cost approximately \$1.5 billion to complete and the construction schedule will extend over a period of approximately five years.

6. Commencing construction of a project of this magnitude requires that contracts and working arrangements be made between our company and engineers and architects to develop and complete construction plans and schedules and to develop appropriate contract terms and conditions. Preparing contract terms for this Project also requires legal work to be performed in conjunction with the architects and engineers. Bids must be solicited and time allowed for prospective contractors to communicate with their suppliers, ascertain costs and delivery times, and then to formulate and submit responsive bids. The bids or contract proposals must then be evaluated and compared and bids awarded. This process requires a significant amount of time and substantial expense for professional services, including engineering, legal, and accounting services.

7. Typically, intensive engineering efforts are necessary to specify and bid the larger, critical path portions of a project. These critical path elements include the steam turbine/generator, the steam generator (or boiler), and the air quality control systems. The PSD permit was issued five months ago. Specifications for the major components for H2 are nearly

complete. Requests for proposals (“RFPs”) are expected to be released for bidding within the next 30 days. Amounts invested in this phase of development are in the millions of dollars.

8. Presuming that appropriate bid responses are developed by vendors, and that the permit challenge has not been resolved prior to the conclusion of the bid evaluation, the owners will have to decide whether to make commitments in the tens of millions of dollars by issuing a limited notice to proceed (“LNTP”) to one or more of the major vendor contracts. Vendors would then proceed with detailed design of the project components and, with approval, the orders placed for forgings that ultimately become the turbine rotors and shells and the generator rotating element. This work typically takes place 6 to 12 months before local construction work actually begins. Therefore, to meet the permit’s current construction deadline, this work must begin during the second half of 2011.

9. If at any point after the specifications are released for bids the project is interrupted by an adverse judicial decision, the project’s detailed design process likely would slow or stop because vendors are reluctant to devote time and money responding to an RFP for a threatened project. A vendor response entails major effort (and expenditures that can reach approximately \$1,000,000). With the permit deadline looming, and with no certainty that the vendor’s proposal will be accepted, or, if it is, that legal proceedings might interfere with project development, vendors may well allocate resources to other projects and either give general responses conditioned with many caveats, or they may decide not respond at all. Poor or non-responses will necessitate a restart of these preliminary engineering efforts once the permit challenges are concluded.

10. The Holcomb Expansion Project is of such magnitude that it requires financing in amounts that may involve assembling a syndicate or group of participating lenders. The terms

and conditions of the loan will have to be negotiated based on economic conditions, interest rates and other financial market conditions at or near the time the agreements are finalized. The loan transaction will require negotiation and preparation of complex loan agreements and related security instruments, all of which requires very substantial time and expense.

11. The Permit gives Sunflower (and by extension, Tri-State) 18 months to complete all of the actions required to design and plan a project and provides that the Permit expires if construction is not commenced within 18 months of the date of issuance. In the normal course of events, prudent planning and commencement of construction of a project comparable to the Holcomb Expansion Project requires most or nearly all of the time granted by the Permit. Accordingly, the 18 month period is critical to Sunflower and Tri-State.

12. Tri-State's initial expectation upon the filing of the Petition for Review by the Sierra Club was that the Petition would proceed quickly to decision in the courts and any adverse effect from the court proceedings could be mitigated within the 18 month period of the Permit. We have, however, been advised by counsel that the time schedule originally sought, which could have led to argument before the Supreme Court in late August or early September is now unfeasible for reasons beyond the control of Sunflower and Tri-State.

13. To commence construction under the cloud of litigation would impose additional risks and burdens on Tri-State that could result in significant harm because of the uncertainty surrounding the permit. For example, as noted above, should the permit be modified as a result of the litigation, much of the work necessary to commence construction during the pendency of the litigation could be for naught, leading to significant increases in the cost of Holcomb 2. In addition, during the pendency of the litigation, lenders will likely either refuse financing or significantly increase the cost of financing to compensate for the risk inherent with litigation.

14. The grant of a stay will serve to ameliorate some of the substantial financial risks arising solely by reason of the delay and the uncertainty associated with the litigation initiated by those opposed to the project. The stay would provide Sunflower and Tri-State the remaining balance of the commencement deadline period unencumbered by the cloud on the project resulting from the unresolved legal challenge.

I declare under penalty of perjury under the laws of the state of Kansas that the foregoing is true and correct. Executed this 24th day of May, 2011.

Micheal S. McInnes
Micheal S. McInnes

STATE OF COLORADO)

COUNTY OF Adams)

This Affidavit in Support of Request for Stay was signed and sworn to before me on May 24, 2011 by Micheal S. McInnes.

Margaret V. Chidlaw

Notary Public

My Commission expires: 3/11/14

**Margaret V. Chidlaw
Notary Public
State of Colorado**

State of Kansas
Joan Finney, Governor



Department of Health and Environment

Robert C. Harder, Secretary

Reply to:

Testimony presented to

House Energy and Natural Resources Committee

by

The Kansas Department of Health and Environment

Senate Bill 29

The Department of Health and Environment (KDHE) is pleased to provide testimony in support of Senate Bill 29 relating to the Kansas air quality program. Senate Bill 29 represents enabling legislation to update the Kansas air quality statutes to provide KDHE with the necessary authorities to implement the requirements of the federal Clean Air Act Amendments of 1990 (CAA). Failure to comply with these requirements can subject the state to federal sanctions including the loss of federal highway funds, the loss of federal air grant funds, withdrawal of existing air program approvals, and implementation of a federal program in Kansas in lieu of a continuing state program.

During mid-1991, KDHE convened a work group to guide the agency in preparing recommendations for legislation to update the Kansas air statutes. Representatives from the Office of the Revisor of Statutes, the legal and air program staff from KDHE, and the legal and air program staff from the U.S. Environmental Protection Agency served on this work group. The revisions proposed in Senate Bill 542 (which was introduced and considered by the 1992 Legislature but not enacted into law) were the product of that work group. Over the past year, KDHE has continued to work closely with a broad group of Kansans interested in air quality issues to further discuss and clarify the statutory revisions appropriate for implementing the federal CAA. The Clean Air Act Implementation Advisory Group formed by KDHE to assist in this effort recommended several additions to the revisions included in Senate Bill 542, as did agency staff. These newly-recommended provisions have been incorporated into Senate Bill 29.

While significant new program resources will be required by KDHE (and the local air agencies that provide support) to implement the requirements of the 1990 Amendments to the CAA, this complex new law is not expected to impact Kansas as directly as many other states. The past success of the Kansas program in controlling air pollution has prevented several of the major provisions of the

Handwritten notes and signatures at the bottom right of the page.

Amendments from applying to Kansas. Conversely, the clean motor vehicle fuel provisions of the federal CAA will result in new opportunities to market Kansas products such as natural gas, propane, and ethanol-derived fuels that will be used to reduce urban pollution in many other areas of the United States. The information provided in the attachments to this testimony highlight the major requirements of the federal Amendments and provides insight into their applicability in Kansas. The substantive revisions proposed in Senate Bill 29 are those that must be made in the Kansas statutes in order to implement the mandatory requirements that do apply to Kansas. The most significant requirements occur in the following five areas:

1. Title V (Operating Permits) of the CAA Amendments requires that states develop and implement a broadened operating permit program for all major air pollution sources. Through the operating permit, Title V links the currently regulated major air emission source program with the applicable provisions of Title III (Hazardous Air Pollutants) and Title IV (Acid Rain) of the CAA Amendments. This provision is intended to result in more comprehensive and enforceable air permits issued on a five year basis and will require significant revisions to KDHE's existing major source air permit program. Changes are proposed in Senate Bill 29 to update the procedural requirements of the Kansas air permit program to be consistent with the new federal law.
2. Title V of the CAA Amendments also requires states to fund the new operating permit program with dedicated emission fees assessed on a "dollars per ton of emissions" basis. Because the air program in Kansas is less complex than those in the more heavily polluted areas of the country, the fees required in Kansas are expected to be less than in many other states. Revisions to existing fee authorities have been proposed to establish the framework for the emission fee and for the deposit of these funds into a dedicated fund for use in funding the air program as required by federal law. The larger emission sources in Kansas will primarily be affected by these fees.
3. The federal CAA Amendments require states to have specific enforcement authorities in order to effectively implement the provisions of the Act under state law. Senate Bill 29 proposes to update the current Kansas statutes to provide for administrative penalties of up to \$10,000 per violation per day and for appropriate criminal sanctions as required.
4. The CAA Amendments also require states to establish and implement a Small Business Technical and Environmental

Compliance Assistance Program to assist small businesses in identifying and preventing environmental releases. This program is particularly important to Kansas businesses because the new hazardous air pollutant provisions of Title III of the CAA are expected to affect many small industries that have not been previously regulated. Senate Bill 29 contains revisions to the Kansas statutes that will provide for this program.

5. Several minor administrative changes are also proposed in Senate Bill 29 to update the statutory language, in general, and to make the air program procedures more consistent with the requirements of the Kansas Administrative Procedures Act.

The summary of the proposed changes attached to this testimony provides a more detailed listing of the proposed changes.

As noted earlier, the resources required to implement the new Title V operating permit program in Kansas are required by federal law to be provided by emission fees assessed among the major sources of air emissions. While the total fiscal impact of these new federal requirements cannot be precisely assessed until several additional federal regulations are published that define the process more specifically, KDHE has prepared a comprehensive implementation plan for this program that provides estimates of resource needs through FY 96. This plan provides for incremental increases in resources beginning in FY 94 with full implementation by the end of FY 96.

These estimated funding trends for the air program in Kansas show a transition in the funding mechanisms from an existing combination of permit fees, state and local general funds, and federal grant funds to a system that is more predominantly supported by the new emission fees. Since these fees will be assessed on the basis of the quantity of emissions, the largest sources will be affected most directly by this change. Revenues from these fees will not be available until late in FY 94 because of the procedural restraints associated with the collection of emission fees. Therefore, the first year implementation strategy for Senate Bill 29 provides for a loan from an agency overhead fund early in FY 94 to be repaid during the latter half of the year when CAA fees become available.

In summary, the federal Clean Air Act requires all states, including Kansas, to begin a complex CAA implementation process that will unfold over the next 8-10 years. That segment of the federal law that will have the greatest impact upon the state's program within KDHE is the new Title V operating permit program. This program requires KDHE to submit a comprehensive plan for complying with Title V to the federal EPA by November 15, 1993, and to be prepared to begin processing new five-year operating permits for all major air sources in the state not more than one year later. The state was also required to submit a plan for

implementing the mandatory CAA Small Business Technical Assistance Program by November 15, 1992. Because Kansas failed to enact enabling legislation authorizing this program last year, we have been found in violation of this provision and have received a formal notice of state program deficiency from the federal EPA. KDHE is particularly concerned about the delays in developing the small business assistance program as it is very important for help to be available to small businesses before the effective dates of forthcoming federal CAA regulatory requirements.

The first critical step in responding to these new requirements is the passage of enabling legislation. Because implementation time pressures upon KDHE have increased dramatically as a result of the loss of the air legislation proposed last year, we encourage the 1993 Legislature to not only look favorably upon Senate Bill 29 but to do so early in the session. Early enactment will provide KDHE the opportunity to begin immediately to meet the rapidly approaching federal deadlines and to correct the program deficiency already identified.

Presented by: Charles Jones
Division of Environment
February 24, 1993

Kansas Department of Health and Environment
January 21, 1993

Summary of Statutory Revisions to the Kansas
Air Quality Statutes Proposed in Senate Bill 29
in Response to the
Federal Clean Air Act Amendments of 1990

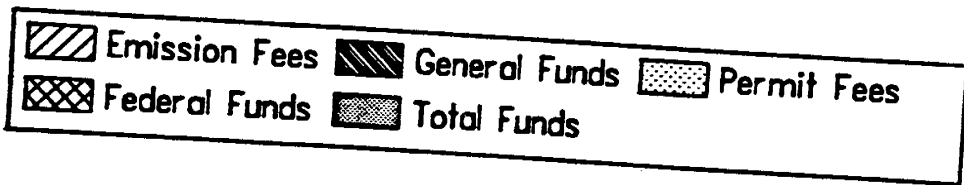
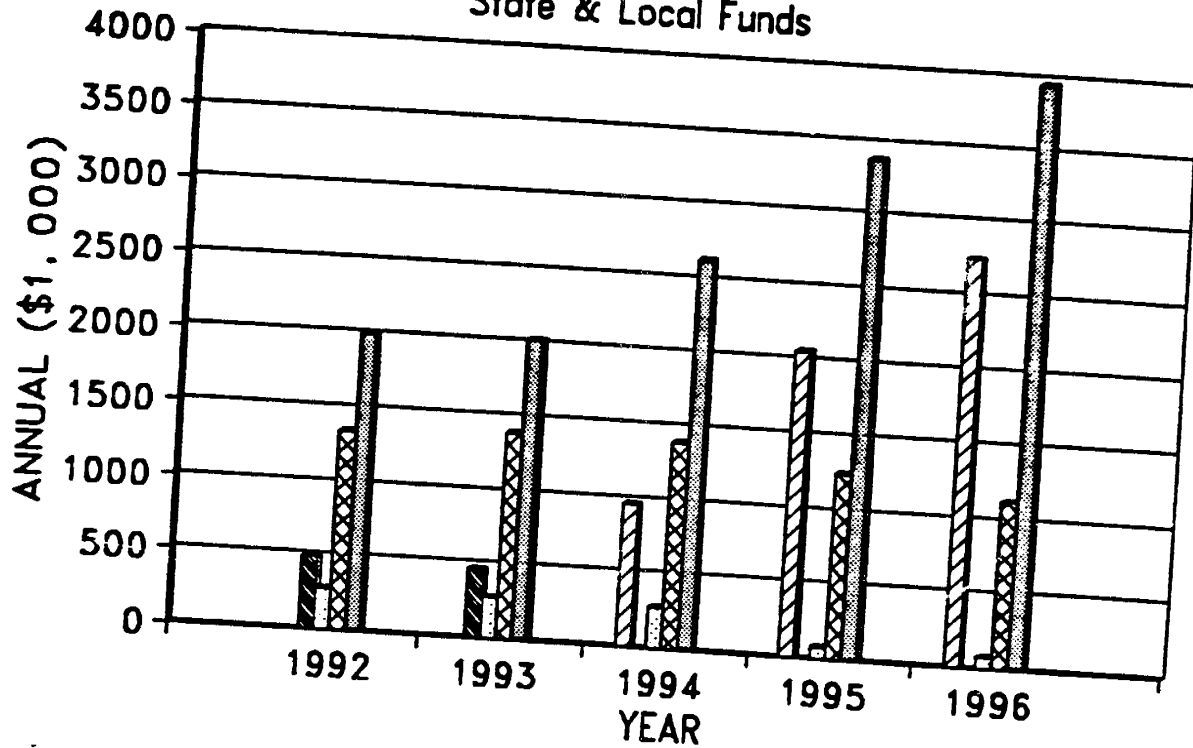
<u>SB 29 Section</u>	<u>SB 29 Page</u>	<u>Summary of Proposed Action</u>
1	1	Amends K.S.A. 65-3001 to provide for a more current format and to identify the Act as the Kansas Air Quality Act.
2	1-2	Amends K.S.A. 65-3002 to clarify additional terms used in the statute.
3	2-4	Amends K.S.A. 65-3005 to further clarify the Secretary's authorities under the Act.
4	4	Amends K.S.A. 65-3007 to further clarify the Secretary's authority to require monitoring of emission sources in response to a federal requirement.
5	4-7	Amends K.S.A. 65-3008 to rewrite the air quality permit process to provide in clear and concise language the requirements of the permit program.
New Section 6	7	Specifies the public comment procedures that apply to the permit program and clarifies the public role in comparison to the role of the permittee.
New Section 7	7-9	Specifies and clarifies those actions that the Secretary may take in administering the air permit program.

SB 29 Section	SB 29 Page	<u>Summary of Proposed Action</u>
New Section 8	9-10	Clarifies the Secretary's authority to collect emission fees to fund air quality activities. Establishes a dedicated fund for receiving emission fee revenues.
9	10-11	Amends K.S.A. 65-3011 to clarify the enforcement authorities of the Secretary in response to the federal requirements and updates outdated statutory language.
New Section 10	11-12	Provides a concise statement of unlawful acts in response to federal requirements and to make the statute more consistent with other environmental statutes.
New Section 11	12	Specifies criminal sanctions as required, generally, by federal law. The specific language was selected to be consistent with the Kansas hazardous waste laws.
12	12-14	Amends K.S.A. 65-3012 to provide an update of the Secretary's emergency authorities to replace outdated language. The specific language was patterned after the Kansas hazardous waste statutes.
13	14	Amends K.S.A. 65-3015 to update provisions relating to public access to agency records and to make these provisions consistent with the new federal requirements.
14	14-15	Amends K.S.A. 65-3018 to assure penalty authorities required by the federal act and to assure consistency with other environmental statutes.

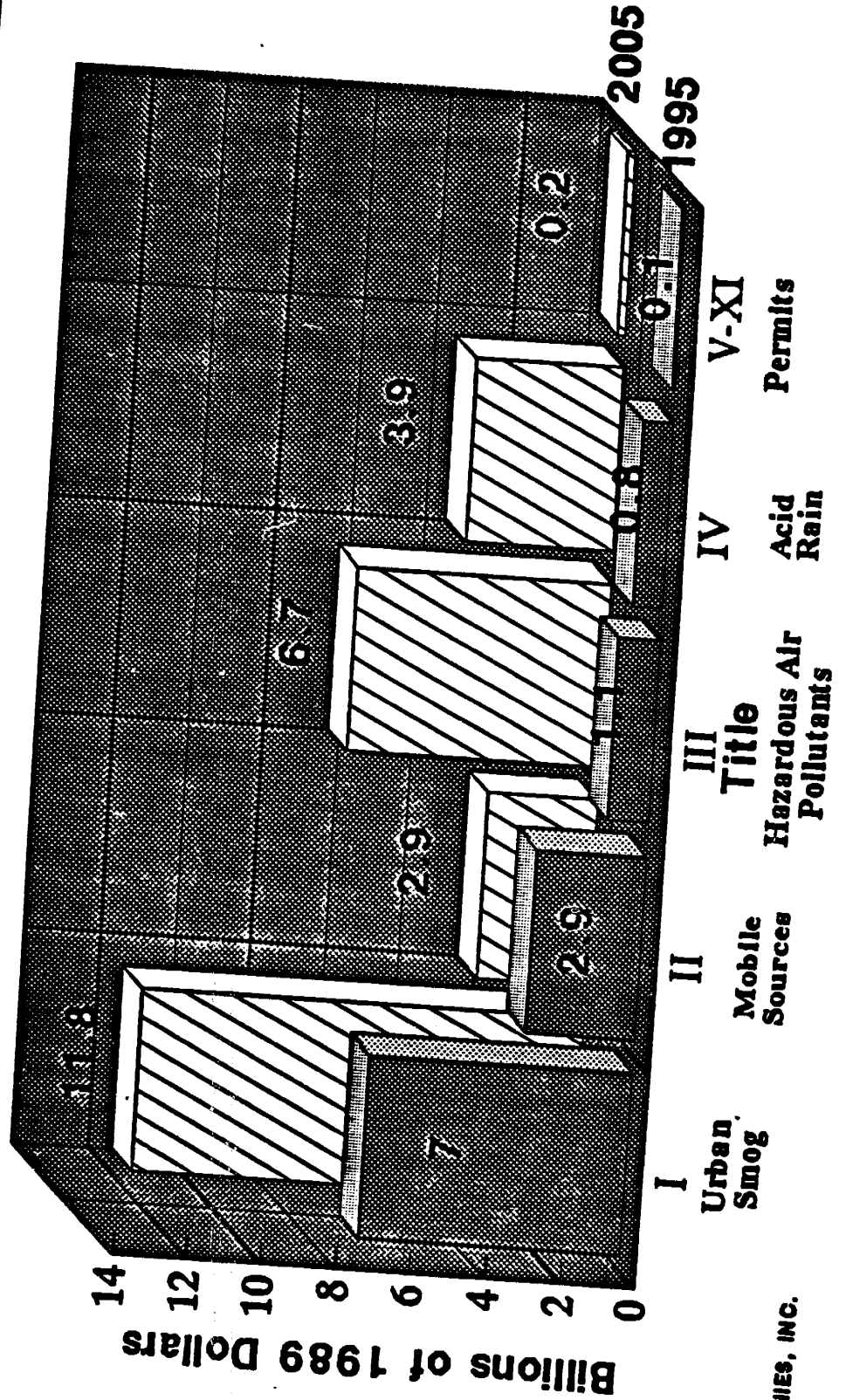
SB 29 Section	SB 29 Page	<u>Summary of Proposed Action</u>
New Section 15	15-18	Creates the Small Business Stationary Source Technical and Environmental Compliance Assistance Program required by the federal Clean Air Act and establishes the procedural requirements for setting up this program. The specific language was derived heavily from the federal Act.
New Section 16	18	Insures current regulations remain effective until the new program is fully implemented.
17, 18, 19	18-19	Amends existing statutes to be consistent with the new statutory changes.
18	19	Deletes K.S.A. 65-3014 which set out procedures for promulgating rules and regulations. The procedures set out at K.S.A. 77-415 <u>et seq.</u> provide sufficient public participation to satisfy federal Act requirements.

KANSAS CLEAN AIR ACT IMPLEMENTATION
RESOURCE TRENDS 1992-1996

State & Local Funds



PROJECTED ANNUAL COST BREAKDOWN 1990 AMENDMENTS

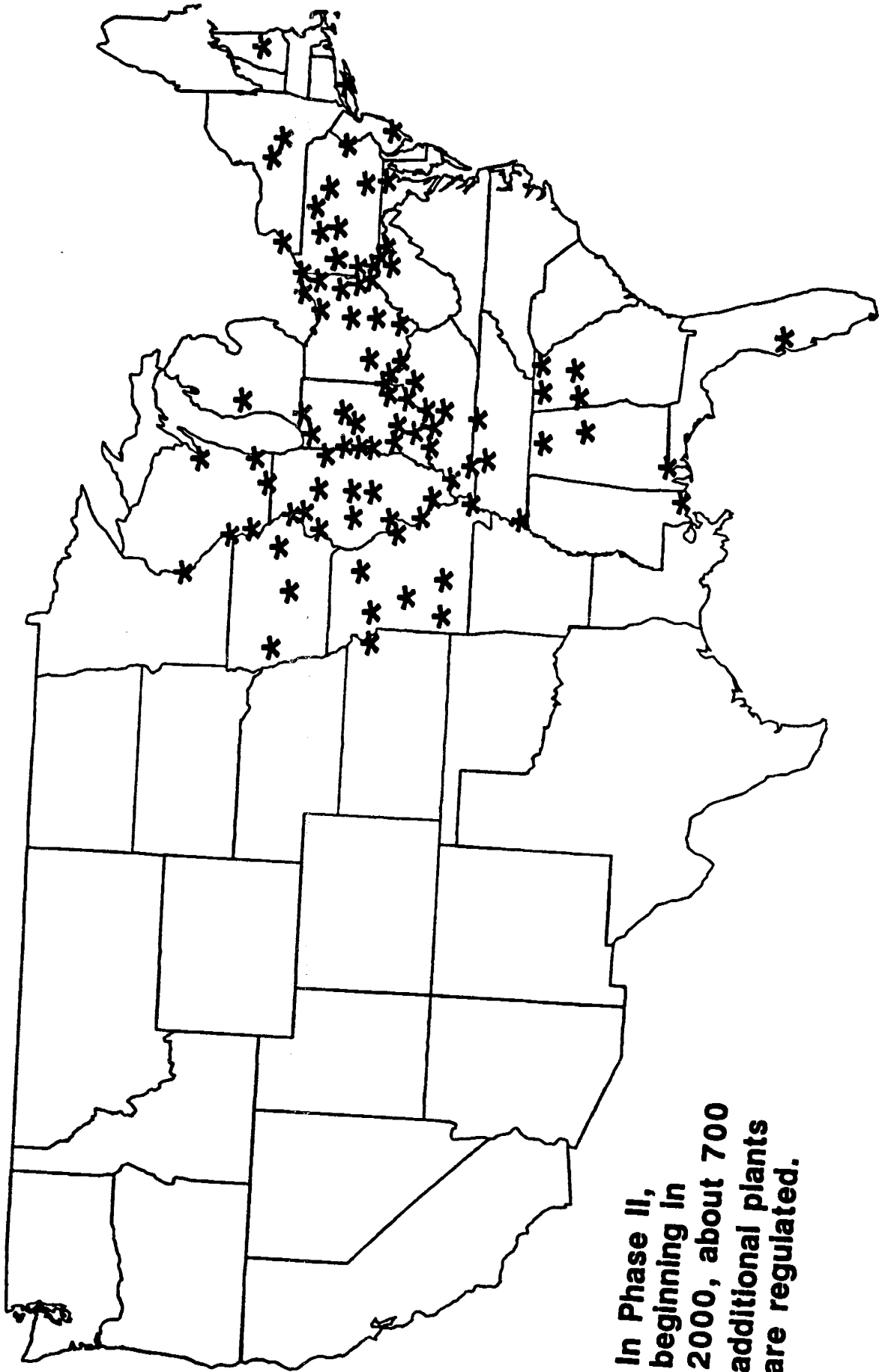


Source: COMPANIES, INC.

**KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT
CLEAN AIR ACT IMPLEMENTATION ADVISORY GROUP**

	REPRESENTING	NAME	TITLE	ORGANIZATION
1	Board of Public Utilities	Adair, Larry	Manager, Electric Supply	Board of Public Utilities
2	Kansas Chamber of Commerce & Industry	Baird, Bob	Environmental Manager	General Motors Corp. - CTC Fairfax Plant
3	Wichita/Sg. Co. Dept. of Community Health	Brown, Jack	Environmental Health Director	Wichita/Sg. Co. Dept. of Community Health
4	Kansas Sierra Club	Cather, William	Chairman	Kansas Chapter of Sierra Club
5	Kansas Association for Small Business	Dial, Keith	Partner	Air Capital Plating, Inc.
6	Kansas Department of Commerce & Housing	Filter, Mikel	Director, Bus. Retention & Expansion	Kansas Department of Commerce & Housing
7	American Lung Association of Kansas	Garcia, Jayne	Program Director	American Lung Association of Kansas
8	Kansas Municipal Utilities, Inc.	Hanson, Gilbert, Jr.	General Manager	Kansas Municipal Energy Agency
9	Kansas Wildlife Federation, Inc.	Hazlett, Jerry	Executive Director	Kansas Wildlife Federation, Inc.
10	Western Resources	Kitchen, Wayne	Director, Env. Serv. & Indus. Hygiene	Western Resources
11	Kansas Grain and Feed Association	Meinhardt, Dan	General Plant Superintendent	The Smoot Grain Company
12	Wyandotte County Health Department	Michael, Richard	Director, Air Pollution Control	Wyandotte County Health Department
13	Kansas Cement Council	Moses, Edward R.	Managing Director	Kansas Cement Council
14	Kansas Chamber of Commerce & Industry	Newman, Dennis	Environmental Supervisor	Vulcan Chemicals
15	Kansas Chamber of Commerce & Industry	O'Kane, Roger	EPA Engineer	Automotive Controls
16	Sunflower Electric Power Corp.	Penrod, Wayne E.	Sr. Manager/Env. & Production Planning	Sunflower Electric Power Corp.
17	Kansas Petroleum Council	Peterson, Ken	Executive Director	Kansas Petroleum Council
18	Kansas Asphalt Pavers Association, Inc.	Popejoy, Don	President	Popejoy Construction Co., Inc.
19	Panhandle Eastern Pipeline Co.	Porter, Donald C.	Director of Environmental Protection	Panhandle Eastern Pipeline Co.
20	Kansas Department of Transportation	Siefker, Myron W.	Systems Evaluation Engineer	Kansas Department of Transportation
21	Kansas Chamber of Commerce & Industry	Spalding, Douglas	Plant Technical Systems Manager	Proctor and Gamble
22	Kansas City Power and Light	Wasson, Ronald G.	Sr. Vice Pres./Admin. & Tech. Services	Kansas City Power and Light
23	Kansas Audubon Council	Wolf, Joyce	Legislative Coordinator	Kansas Audubon Council

**PHASE I PLANTS
SUBJECT TO THE APPLICABLE REQUIREMENTS OF TITLE IV
1995-1999**



**In Phase II,
beginning in
2000, about 700
additional plants
are regulated.**

Counties with Non-Attainment Areas

SUBJECT TO THE APPLICABLE REQUIREMENTS OF TITLES I AND II



- ☐ 03 CO ☐ PM10 ■ 03-CO ☐ 03-PM10 ☐ CO-PM10
- ☐ 03-CO-PM10 ■ 03-CO-PM10-NO2 ☐ S02 ☐ Pb

CERTIFICATE OF SERVICE

I do hereby certify that on this 21st day of July, 2011, a true and correct copy of the foregoing document was deposited in the United States mail, postage prepaid and addressed to:

Mr. Robert V. Eye
Kauffman & Eye, P.A.
123 SW 6th Avenue, Suite 200
Topeka, Kansas 66603

Ms. Amanda W. Goodin
Earthjustice
705 Second Avenue, Suite 203
Seattle, Washington 98104

Mr. Todd D. True
Earthjustice
705 Second Avenue, Suite 203
Seattle, Washington 98104

ATTORNEYS FOR APPELLANT SIERRA CLUB

Mr. Jeffrey A. Chanay
Deputy Attorney General
Office of Attorney General
Derek Schmidt
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597

Mr. Steve Fabert
Deputy Attorney General
Office of Attorney General
Derek Schmidt
120 SW 10th Avenue, 2nd Floor
Topeka, Kansas 66612-1597

ATTORNEYS FOR APPELLEES, ROBERT MOSER, M.D. AND
THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

Mr. W.C. Blanton
Husch Blackwell LLP
4801 Main Street, Suite 1000
Kansas City, Missouri 64112

Mr. Mark D. Calcara
Watkins Calcara, Chtd.
1321 Main Street
Great Bend, Kansas 67530-1110

Mr. Henry V. Nickel
Huntoon & Williams, LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037

Mr. Mark A. Rondeau
Watkins Calcara, Chtd.
1321 Main Street
Great Bend, Kansas 67530-1110

Mr. William L. Wehrum
Huntoon & Williams, LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037

ATTORNEYS FOR INTERVENOR SUNFLOWER ELECTRIC POWER CORPORATION

Mr. Patrick G. Compton
Lindquist & Vennum
600 17th Street, Suite 1800 South
Denver, Colorado 80202

Mr. Howard Kenison
Lindquist & Vennum
600 17th Street, Suite 1800 South
Denver, Colorado 80202

Mr. James D. Oliver
Foulston Siefkin LLP
9 Corporate Woods, Suite 450
9200 Indian Creek Parkway
Overland Park, Kansas 66210-2017

Mr. Johnathan A. Rhodes
Foulston Siefkin LLP
534 South Kansas Avenue, Suite 1400
Topeka, Kansas 66603

ATTORNEYS FOR INTERVENOR TRI-STATE GENERATION AND TRANSMISSION
ASSOCIATION, INC.



KDHE Staff