

TESTIMONY TO THE
KANSAS HOUSE OF REPRESENTATIVES
ENERGY AND UTILITIES COMMITTEE

RE: HB 2711

Kansas Statehouse, 313-South
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Chairman Holmes, and members of the Committee:

Thank you for the opportunity to testify about four important, difficult environmental legal issues raised by HB 2711 – and its Senate counterpart SB 515.

First, the bill will only increase regulatory uncertainty in Kansas, despite its supporters' pleas for more certainty in the application of both environmental and administrative law.

Second, the bill guts one of the most important, long-standing principles at the heart of both the Kansas Air Quality Act and the federal Clean Air Act: state primacy for protecting Kansans' health and safety.

Third, the bill unwisely, and unnecessarily, politicizes legal matters long confided by sound precedent to the coordinate branches in the executive and judiciary.

And finally, the bill intervenes directly into several pending administrative and judicial proceedings. Legislative intervention not only complicates and undermines the sound tradition that leaves specific legal decision-making to agencies and courts, but raises the risk of provoking a constitutional collision between this body and both coordinate branches.

I testify as a private citizen who has lived for 12 years in Kansas. I work an associate professor of history and environmental studies with the University of Kansas. I have been a faculty member since earning my doctorate from KU in 2000. I am not testifying in any way as a representative of the University.

My testimony will focus only on four legal issues raised by Sections 30 through 34 of HB 2711. I address only these sections because I am a lawyer with some expertise in administrative and environmental law. I teach environmental law and policy as well as legal history at KU. I have published one book and various scholarly articles on environmental and legal topics. The University Press of Kansas will be publishing in 2009 my next book, a history of American environmental law between the end of World War II and 1970.

After graduating in 1983 from Harvard Law School, I practiced law for a decade in my home state of Idaho representing a multi-national wood-products manufacturer and the clients of a multi-state Western law firm. I belong to the Idaho State Bar, the Bar of the United States Supreme Court, and the Bars of three United States Courts of Appeal.

For six years I sat on “your side of the table,” serving three terms as an Idaho State Senator. I co-chaired the Senate Judiciary Committee in the early 1990s, while the Idaho Legislature re-codified both the system for adopting state administrative rules and the process governing judicial review of state agency actions.

Although I contacted the Great Plains Alliance for Clean Energy to help schedule my testimony today, I am not testifying today in a professional capacity as an attorney for GPACE or any other interest.

Everyone in this room knows HB 2711 was written for one primary reason: to change Kansas law so Sunflower Power could get something indispensable, something the company has so far been unable to obtain through the regular channels of Kansas environmental and administrative law. Somehow, Sunflower has to get the state of Kansas’ permission to build and operate 2 big new coal-burning air-pollution sources.

The Kansas Department of Health & Environment initially dealt with the legal issues raised by Sunflower's request for permission to pollute. Now the Kansas courts are also playing an important role after Sunflower sought judicial review of KDHE's decision denying its permit request. KDHE and the judicial branch are handling Sunflower's request to pollute in a manner consistent with long-standing state statutes and rules enacted and adopted by your legislative predecessors. Those laws' primary purposes are to protect Kansans' health and safety, to safeguard the health and quality of Kansas' natural environment, and to ensure Kansans' constitutional rights to enjoy due process, equal protection, and open access to impartial agencies and courts.

Other witnesses will certainly testify about HB 2711's threats to Kansas' ability to protect our neighbors' safety and our environment's health. I confine my testimony to the bill's radical, unpredictable disordering of the various legal processes Kansas has long used to administer our environmental law, afford judicial review to our aggrieved citizens, and preserve comity with the federal government and our sister states.

This bill would not only upset 40 years of settled precedent, under both state and federal laws. It would actually introduce new layers of unpredictable complexity into an administrative legal system that has so far successfully balanced economic activity, environmental protection, constitutional rights, and federal-state relations.

Even if Sunflower were able to get some version of HB 2711 enacted, its proposed Holcomb plant would be no closer to operating. Not only would Sunflower face new and unpredictable legal problems at the state and federal levels, so would every other electric utility, manufacturing industry, and agriculture processor.

Regulatory Uncertainty

HB 2711's 28 pages make far-reaching changes in at least seven distinct areas of Kansas environmental, energy-management, and administrative law. This Legislature should of course consider all of

these topics, but should do so in an orderly, systematic way. Too much change, enforced too quickly, upsets the steady, sound making of environmental law based on advancing scientific knowledge, technological innovation, and public understanding.

Sections 30 and 31 purport to grant an air-pollution permit to one specific electricity-generating source under the Kansas Air Quality Act. But those Sections, taken together with the other 29 preceding sections of the bill, set in motion far-reaching changes to the entire legal system regulating generation, sale, conservation, and distribution of electricity. They also dramatically change the duties, powers, and objectives of at least a half-dozen other state agencies charged with protecting our health and safety, conserving our vital natural resources, and ensuring equal justice before impartial decision-makers.

State Environmental-Protection Primacy

Sections 30 and 32 purport to make KDHE enforce the Kansas Air Quality Act and federal Clean Air Act consistently with the federal Environmental Protection Agency's interpretation of the Clean Air Act. Yet since at least 1970, the structure of air-quality law in America has tried to balance federal supremacy with state sovereignty. In fact, Section 110 of the Clean Air Act specifically recognizes states' primary constitutional responsibility for protecting their citizens' health and the quality of natural environments within the states. Sections 3005, 3008, and 3012 of the Kansas Act, in place since 1967, express the Legislature's willingness to take up that important duty.

Yet when Section 30 amends KSA Sections 3005 and 3012 to direct KDHE to conform only with EPA's present construction of the federal Clean Air Act, Kansas surrenders its key powers to make air-quality law responsive to Kansans' needs and this state's unique, distinctive natural environmental conditions.

In particular, Section 33's repeal of the KDHE Secretary's power under KSA Section 3012 to protect citizens from threatened environmental harms from proposed pollution sources menaces our state's ability to keep responsibility for administering the federal

Clean Air Act in this state. EPA does not have to grant primacy under Clean Air Act Section 110 to states. It is likely, especially given the federal government's ongoing efforts to slow climate-warming and restrict carbon emissions, to take a dim view of Kansas' decision to limit its environmental agency's powers when KDHE has attempted, under existing state law, to do the same.

I caution the Legislature to be careful about making this state dependent on whatever current president, congress, and EPA administrator sit in Washington, DC. You may like the present administration of the federal law, but none of us can predict who will sit in the White House, chair the germane congressional committees, or occupy the EPA headquarters or Kansas City regional office.

Politicizing the Legal System

Sections 30 and 31 purport to overrule KDHE's initial denial of Sunflower's request for an air-pollution permit. They purport to remove from the judicial system, as well as the administrative system, several active cases posing difficult legal questions about whether the KDHE secretary correctly applied Sections 3005, 3008, and 3012 of the Kansas Air Quality Act.

One big difference between law and politics is that numbers and dollars help make politics, but rules and reason, precedent and judgment make the law. If this Legislature essentially decides a case in the administrative-law system, by short-circuiting judicial review of agency action under the Kansas Administrative Procedure Act, it sets a dangerous precedent for politicizing not just environmental, but all types of law involving execution of statutes and judicial interpretation of statutes and agency rules applying those statutes to specific cases.

I caution the Legislature about making each request for a permit to pollute, or to change land uses, or to dispose of waste products, the subject of lobbying campaigns, media blitzes, and election results. This Legislature has developed a model system of making and enforcing environmental law, where the legislative branch sets broad

policy goals and objectives, and delegates the executive branch the constitutional duty to apply those broad policies in real-world settings.

Constitutional Conflicts

Sections 30 and 32 purport to instruct EPA to approve any air-pollution permit issued by KDHE under the new rules that will apply if this bill becomes law. I caution the Legislature to be wary of appearing to dictate to EPA how to apply the Clean Air Act in Kansas. Not only EPA, but our sister states, may well consider this challenge to federal administrative discretion a head-on constitutional collision in the making. Comity will certainly suffer, as will Kansas' ability to work cooperatively with sister states and the federal government on emerging environmental problems that cross state lines.

Likewise, Sections 30 through 33 purport to tell KDHE and the Kansas judicial branch how to decide not only the Sunflower Power permit application. But nothing limits the precedent this bill would set to Sunflower at Holcomb. Why would any future permit seeker not try to use its political clout to create a temporary legislative majority that favors its plans? At present, both the Kansas Air Quality Act and the Kansas Administrative Procedure Act acknowledge each of the three coordinate branches enjoy constitutional prerogatives and display practical specialties and strengths in making environmental law. If HB 2711 became law, both of the other coordinate branches may well question the legislature's constitutional right to make permit decisions, to bind agencies to interpret state and federal laws in particular ways, and to decide contested cases in pre-ordained ways should judicial review take place.

Summary

Kansans have developed, over the past 40 years, a model environmental lawmaking system. Both ordinary citizens and elected officials have cooperated in building this system. Legal professionals, as well as regulated businesses and individuals, benefit from the careful blend of politics, law, and administration. This bill would destabilize the system, producing results none of us can now foresee.

Those results, in my opinion, would leave the protection of Kansas air quality more uncertain, the administration of justice more unpredictable, and the reputation of this state for careful balancing of environmental quality and economic growth less respected.

The specific provisions of this bill I have addressed need more careful consideration, in cooperation with representatives of the bar, the bench, the whole regulated community, and those legal professionals who have worked so hard to make administration of environmental law fair, effective, and responsive.