

SESSION OF 2003

**CONFERENCE COMMITTEE REPORT BRIEF
HOUSE BILL NO. 2247**

As Agreed to April 2, 2003

Brief *

Environmental Use Controls. HB 2247 would establish the intent for this legislation as being a voluntary mechanism to assist existing state programs to address environmental contamination in a cost effective manner that is protective of human health and the environment. The bill would establish a process where owners of environmentally contaminated property could apply to the Kansas Department of Health and Environment (KDHE) for approval of an "environmental use control" to prohibit or restrict use of properties that are contaminated or that have been or currently are subject to environmental remediation activities.

Under the bill "environmental use control" means an institutional or administrative control, a restriction, prohibition, or control of one or more uses of, or activities on, a specific property to ensure future protection of public health and the environment when environmental contamination, which exceeds departmental standards for unrestricted use, remain on the property following the appropriate assessment and or remedial activities as directed by KDHE. For purposes of the bill, environmental contamination does not mean animal or process waste from a confined feeding facility, livestock operation, or the application of livestock waste for use as a plant nutrient. The environmental use control created under the bill would run with the property and is binding on the owner and subsequent owners, lessees, and other users of the land.

The bill would specifically exempt solid waste disposal areas from the provisions of the bill, except for the tracking system described below. The bill also would exempt confined feeding facilities from the provisions of the bill.

*Conference committee report briefs are prepared by the Legislative Research Department and do not express legislative intent. No summary is prepared when the report is an agreement to disagree. The conference committee summary report may be accessed on the Internet at <http://www.kslegislature.org/kldr>

If the owner elects to voluntarily restrict the owner's property, then the owner of the property makes application to KDHE on forms provided by the agency. KDHE would review the application. If the application is disapproved, the applicant may modify the application in a manner necessary to obtain KDHE's approval.

If the environmental use control has been approved, the owner must register the environmental use control with the register of deeds in the county where the property is located. Certain information must be included with the filing. The applicant must provide KDHE a notarized copy of the recorded environmental use control agreement.

The bill would require funding in order to administer this program. The funding requirement is to be determined on a property-by-property basis. Funding requirements for an application would be based on a one-time payment for the property made by the original applicant. The bill would establish three categories of property. KDHE may require applicants of Category 3 property to provide "financial assurance." Financial assurance would include a bond, letter of credit, qualification as a self-insurer, or other demonstration of financial capabilities. Category 1 property has a fee not to exceed \$2,000 and Category 2 has a fee of not to exceed \$10,000.

The environmental use control may be granted either in perpetuity or for a term of years. The environmental use control could be removed if the property owner demonstrates that the original risk to human health or the environment is no longer present. The owner must submit a request to KDHE for approval to remove all or a portion of the control. If KDHE approves the request then the owner would file the approval with the register of deeds in the county where the property is located.

The bill would provide for what is to be in the environmental use control, including the restriction and prohibition of activities at or uses of the property. The restrictions would include such things as notification of transfer of the property, any change in use, the maintenance of protective structure or remedial systems, access to the property, and an obligation to reduce or eliminate risks. Restrictions, prohibitions, and zoning requirements placed on property by a local or state government may be substituted in place of an environmental use control. These types of requirements may be utilized in addition to any environmental use controls approved by KDHE.

If there is information that an approved environmental use control is not being implemented in accordance with the agreement or that property subject to an approved environmental use control presents a hazard to human health or the environment, then the Secretary of KDHE may take actions as are necessary to protect human health or the environment. Legal action may be taken upon a finding that the controls are not being implemented or not being fully or properly implemented.

The bill would require KDHE to provide oversight of the environmental use control to ensure that the property is being used only for the purposes permitted by the terms of the control. In addition, the bill would require KDHE to maintain an environmental use control tracking system on all approved controls.

The bill also would establish the Environmental Use Control Fund. The Secretary would be required to adopt rules and regulations to implement the provisions of the act and KDHE would be required to publish annually in the *Kansas Register* a summary of the number of approved environmental use control agreements.

Any person aggrieved by any order or decision may request, in writing, a hearing. All actions are subject to review in accordance with the Act for Judicial Review and Civil Enforcement of Agency Actions.

Waste and Used Tires. In addition, the bill would make several modifications to the group of statutes dealing with waste and used tires. Specifically, the bill would modify the definition of “beneficial use” to include such uses as bumpers for boat docks, playground equipment, silo covers, traffic control, feed bunks, water tanks, windbreaks constructed of baled tires or in a manner consistent with rules and regulations of the Secretary, erosion control on the face of an earthen dam and stabilization of soil or sand blow-outs caused by wind (beneficial uses may include other types of uses) and, as determined by the Secretary, causes no adverse impacts to human health or the environment and complies with all applicable zoning requirements.

In addition, the bill would create a new definition for the term “illegal waste tire accumulation” and define that term to mean any waste tire pile containing more than 50 waste tires except for accumulations on solid waste disposal facilities when managed in accordance with the conditions of the permit and waste tire accumula-

tions which are exempt from the waste tire collection center permit.

The bill would update the statutes to clarify that it is unlawful to have an “illegal waste tire accumulation” or to transfer ownership of waste tires to any person unless the recipient has been issued a permit under solid waste law or under the waste tire statutes, intends to use the waste tires for a beneficial use, or is a tire retailer who collects waste tires from the public or other tire retailers in the ordinary course of business. The bill also would permit the final disposal of small numbers of whole, unprocessed waste tires in landfills if the tires are intermingled with other solid waste and retrieval of the tires out of the other solid waste would be hazardous.

The bill also would change the number of years which certain waste tire transaction records need to be maintained from five to three years. In addition, the bill would clarify that record-keeping requirements for beneficial use would not apply when tire retailers allow customers to retain their old tires at the time of sale.

Further, the bill would require owners or operators of each site that contains a waste tire, used tire, or new tire accumulation of any size to control mosquito breeding and other disease vectors.

The bill also would clarify that the Department of Wildlife and Parks may operate a waste tire collection center or a waste tire processing facility on any state park, state wildlife area, or state fishing lake. In addition, the Department would be authorized to act as a waste tire transporter to any state park, state wildlife area, or state fishing lake.

Further, the bill would permit a watershed district to perform one of more of the following to facilitate a beneficial use of waste tires: (1) operate a waste tire collection center on the premises of a watershed district project or work or improvement; (2) operate a waste tire processing facility on the district's property; or (3) act as a waste tire transporter to transport waste tires to the district's property.

The language of the current statute would be clarified with respect to persons engaged in farming or ranching and would allow them to perform the following beneficial uses of waste tires: operate an on-site waste tire collection center; operate a waste tire processing facility, or act as a waste tire transporter to transport waste tires to the farm, ranch, or feedlot.

In addition, the bill would provide for additional flexibility with respect to the transport of waste tires. Specifically, the bill would allow a person who has an illegal waste tire accumulation to get permission to transport the waste tires to a site that has received a waste tire permit and allow anyone to transport a legal waste tire accumulation of between 5 and 50 tires to a permitted site provided it is a one-time event rather than an ongoing practice. The bill also would allow a tire retailer who also serves as a tire wholesaler to transport waste tires from those retailers back to a central location owned or operated by the wholesalers for consolidation and final disposal or recycling.

Finally, the bill would establish grants to public or private entities for up to 75 percent of the cost to start-up or enhance projects to recycle waste tires or recover energy through waste tire combustion. In state FY 2004, the waste tire grants could not exceed \$200,000. In any following fiscal year the grants could not exceed the amount of unspent excise tax revenue from the preceding year. Waste tire management funds could be used only for waste tire recycling grants.

The bill contains a severability clause.

Background

This bill was introduced at the request of a spokesperson from KDHE. At the hearing on the bill, those appearing in support included representatives of KDHE, Koch Industries, the Kansas Chapter of the Sierra Club, and the Kansas Grain and Feed Association and the Kansas Agribusiness Retailers Association. A representative of the Kansas Livestock Association appeared in opposition to the bill.

The KDHE conferee stated that the bill would establish a voluntary process for responsible parties and landowners to use to obtain cleanup standards which are much easier to achieve at some sites based on property use. The conferee stated that the proposed legislation provides a mechanism to allow a responsible party or landowner the alternative of controlling the access and use of a property as an element of a cleanup action while assuring long-term protection of public health and the environment. The spokesperson also indicated that there had been 15 stakeholders who had been involved in the development of the legislation over the past summer and fall.

The opponent to the bill stated that it was overbroad, placed unbridled discretionary authority with the Secretary of KDHE, granted injunctive powers that are lacking in traditional safeguards against governmental abuse, and was confusing and vague in its application and scope.

After the hearing on the bill, the Chairperson of the House Committee on Environment directed the interested parties to work on the bill in order to reach a compromise. The amendments to the bill reflect the compromise reached by the interested parties.

The Senate Committee on Natural Resources amended the bill to eliminate a provision which allowed restrictions, prohibitions, and zoning requirements placed on property by a local or state government to substitute for environmental use controls. In addition, the Committee amended the bill to provide for an exception to a provision of current law which makes failure of any person or entity to apply for and obtain the proper or required building or demolition permit before undertaking a project that will encroach upon, damage, or destroy any historic property included on the national or state registers of historic places, or the environs of these properties, subject to a civil penalty not to exceed \$25,000 for each violation. This exception would apply to land devoted to agriculture use as defined in KSA 12-519 and land subject to the exemptions under KSA 19-2908 and KSA 19-2921 (the exemption for agricultural land and associated structures from zoning regulations).

The Senate Committee of the Whole amended the bill to add the provisions of SB 155, as amended by House Committee on Environment. In addition, the Senate Committee of the Whole amendment deleted a provision dealing with historic properties which may be agricultural in nature.

The Conference Committee agreed to add back to the bill a House provision which allows restrictions, prohibitions, and zoning requirements placed on property by a local or state government to be substituted in place of an environmental use control.

The fiscal note on the original bill indicates that KDHE believes that no additional staff or operating expenditures would be required since the fee fund would cover the cost of reviewing applications, tracking, and monitoring of the program. The agency is unable to estimate the number of property owners who would be eligible for environmental use controls. The note on the original bill states that

the Office of Judicial Administration is unable to estimate the number of court cases that would be filed as a result of this bill; however, judicial resources may need to be shifted to these cases, which would be given priority status over other cases. The fiscal effect would consist of both judicial and nonjudicial staff time should there be a significant number of cases filed.