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# **Chapter III**

# **Legal Authority for Pollution Control**

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<b>Introduction</b>	<b>III-1</b>
<b>Statutory Authority of KDHE</b>	<b>III-2</b>
<b>Regulatory Authority of KDHE</b>	<b>III-3</b>
<b>Statutory Authority to Form Sewer Benefit Districts</b>	<b>III-5</b>
<b>Local Authority of Particular Importance</b>	<b>III-6</b>
<b>Authority Over Total Maximum Daily Loads</b>	<b>III-8</b>

## INTRODUCTION

The Clean Water Act, passed in 1972 by the US Congress, is the backbone of consistent water pollution control law throughout the nation. This Act sets the goal of achieving feasible and swimmable water for all waters of the United States. To accomplish this, the act contains provisions for control of pollution from point sources and nonpoint sources. Implementation of this act is delegated to the US Environmental Protection Agency (EPA). Point sources are regulated by the issuance of permits which establish allowable levels of pollutants that can be discharged into receiving waters. Nonpoint sources are addressed by the establishment of total maximum daily loads which are intended to ensure that the total amount of pollution, including point source and nonpoint source, entering a water body does not result in a violation of established water quality standards.

In Kansas as in most states, implementation of the Clean Water Act is delegated by EPA to the state. This is referred to as “primacy” for program implementation. States that have primacy for the Clean Water Act establish their own laws and regulations and then implements these. EPA still provides oversight and assures that minimum national standards are met. Kansas Department of Health and Environment (KDHE) is charged with protecting water quality in Kansas.

The authority for pollution control in Kansas is divided between state and local governments and in many cases it is shared. Whenever authority is shared, the enforcement of local rules and regulations is the preferred method of achieving pollution control. Local authority predominates in the control and regulation of onsite wastewater, nonpoint source pollution, and land use management. Local rules and regulations must be at least as strict as state standards.

A statute is a law enacted by a legislative body. Kansas Statutes Annotated (K.S.A.) contains the statutes effective in the state. A regulation is a set of procedures to implement a statute and has the force of law. Kansas Administrative Regulations (K.A.R.) contain the regulations effective in the state. An ordinance is a statute or regulation, typically adopted by a municipal government. A resolution is a formal statement of a decision put before, or adopted, by a governmental assembly. In this chapter the statutory and regulatory authority for control and management of pollution to water within the state is set forth. This will help the local authority better understand and implement the controls for which they are responsible.

**Note:** Statutes are listed as Chapter; Article; and Section. For example, “K.S.A. 65-159” is section 59 (Abatement of Nuisances, etc.) of article 1 (Secretary of Health and Environment) of chapter 65 (Public health). Regulations or “K.A.R.s” also use a three-part system of numbers divided by hyphens. The first number indicates the agency; the second number indicates the article (a group of regulations of such agency upon the same subject); the last number indicates the specific section or regulation within the article. For example, “28-5-4” refers to agency No. 28 (KDHE); article No. 5 (Sewage and Excreta Disposal) and section No. 4 (Public Health Nuisances).

## STATUTORY AUTHORITY OF KDHE

The Kansas Department of Health and Environment (KDHE) publication, January 1997 is available on request from KDHE by calling (785) 296-5506. These statutes are primarily concerned with point source discharges. The following paragraphs contain summary **excerpts of pertinent materials** contained in Kansas Statutes governing domestic wastewater.

### Chapter 65 - Public Health

#### Article 1 - Secretary of Health and Environment, Activities

Article 1 includes the water pollution control and water quality protection objectives for Kansas. Briefly stated these statutes provide that all human or human induced activity shall be carried out in a manner that will not result in impairment of the quality of the state's surface water and groundwater resources.

**K.S.A. 65-159. Abatement of nuisances, failure to remove, penalties.** This statute outlines the authority that KDHE and the county commissioners or the county board of health have in investigating nuisances, sources of filth and causes of sickness. Whenever these conditions exist on any private property or upon any watercourse, KDHE or the county has the power and authority to order, in writing, that the owner or occupant remove the condition at their expense. If the owner or occupant fails to obey the order, a fine of not less than ten dollars (\$10) nor more than one hundred dollars (\$100) shall be assessed. Each day's continuance of the condition after the owner or occupant has been notified to remove the condition shall be a separate offense.

**Note:** This statute clearly establishes the authority of county health boards and/or county commissions to abate pollution conditions within their jurisdictional borders.

**K.S.A. 65-164. Sewage: definitions, complaints, investigations, orders, administrative review.** This statute states that it is illegal to discharge sewage into any of the waters of the state. Sewage is defined as any waste products from the bodies of human beings or animals; or chemical; or other wastes from domestic, manufacturing, or other forms of industry. It also states that whenever a complaint is received by KDHE from a mayor of any city or by a local health officer of the county, complaining of a polluted condition of any waters of the state it shall be the duty of KDHE to investigate the complaint.

**K.S.A. 65-171d. Prevention of water pollution; standards; permits; exemption; . . . .** This statute requires KDHE to establish standards to prevent surface and subsurface water and soil pollution detrimental to health and life of the state; and water quality standards to protect designated uses of the waters of the state. It also directs KDHE to make regulations to control the disposal, discharge or escape of sewage as defined in K.S.A. 65-164. KDHE is allowed to adopt by reference any federal regulation relating to water quality and effluent standards.

This statute defines pollution as contamination of any waters of the state that creates or is likely to create a nuisance or be detrimental to the designated use of the water body or a

discharge that exceeds state effluent standards. Pollution applies to both point and nonpoint sources. The statute defines confined animal feeding, animal unit, animal unit capacity, habitable structure, wildlife refuge and defines minimum separation distances from existing habitable structures.

**K.S.A. 65-171h. Minimum standards for sanitary water and sewage systems.** KDHE is empowered to develop minimum standards of design, construction, and maintenance of sanitary water and sewage systems.

**K.S.A. 65-184 through 189f** establishes requirements for water supply, wastewater and refuse disposal in areas surrounding certain water impoundments. Also known as the Sanitation Zone Law. This applies to zones surrounding the large, federal reservoirs.

### **Article 33 - Water Pollution Control**

**K.S.A. 65-3301 through 3313** establishes the State Water Pollution Control account to provide financial assistance to municipalities, which includes any county, city, sewer district or other public agency, to abate and prevent the pollution of water by constructing water pollution control facilities. This article contains the authority for the development of countywide wastewater management plans and outlines the Kansas Water Pollution Control Revolving Fund.

**K.S.A. 65-3321 through 3329** establishes the Kansas Water Pollution Control Revolving Fund that is funded by EPA.

### **Article 45 - Certification of Operators of Public Drinking Water Supply Systems and Wastewater Treatment Facilities**

**K.S.A. 65-4501 through 4517** sets forth requirements for operator certification.

### **Chapter 68 - Roads and Bridges**

#### **Article 5 - County and Township Roads**

**K.S.A. 68-545 County and Township Roads** (not administered by KDHE, but relevant) states, in part, that it is unlawful to dump sewage on any highway or any ditch along any highway. This makes it unlawful for sewage to enter the ditch of any public road in the state.

### **REGULATORY AUTHORITY OF KDHE**

The entire set of pertinent regulations can be found in the KDHE document entitled *Article 5, Article 16, Article 18, Water Pollution Control Regulations*, September 1996 and is available upon request from KDHE by calling (785)296-5506.

## Agency 28 - KDHE

### Article 5 - Sewage and Excreta Disposal

**K.A.R. 28-5-1 through 9**, sets forth the regulations by which sewage is discharged to the environment from both public and private systems. These regulations were revised effective July 1997 and set forth minimum separation distances of wastewater systems to water wells, direct the discharge of wastewater to a KDHE approved public sewer or a private system approved by KDHE or appropriate local authority that is located, designed, and operated in accordance with standards set forth in KDHE Bulletin 4-2, *Minimum Standards for Design and Construction of Onsite Wastewater Systems*.

The revised regulations contain a statement that if a county sanitary code was adopted before June 30, 1997, the county code would provide the minimum standards. All county codes are reviewed for consistency with existing statutes and regulations prior to KDHE approval. The revisions in Bulletin 4-2 present some requirements that are more stringent than those contained in some county codes that were adopted prior to June 30, 1997. These codes may remain in effect until such time as a provision in the code that is also addressed in Bulletin 4-2 is amended. At that time, the provision must be brought into compliance with the standards set forth in Bulletin 4-2.

### Article 16 - Water Pollution Control

Article 16 covers Sewage Discharge Permits; River Basin Water Quality Criteria; Surface Water Quality Standards; Requirements for Water and Wastewater Operator Certification; State Grants to Municipalities; Critical Water Quality Management Areas; Countywide Wastewater Management Plans; and Pretreatment. Pertinent sections are summarized below.

**Surface Water Quality Standards.** The regulations for surface water quality standards in Kansas are found in **K.A.R. 28-16-28(b) through (f)**. As directed in the federal Clean Water Act, each state must specify appropriate water uses to be achieved and protected. The classification of the waters of a state must take into consideration the use and value of water for public water supplies; protection and propagation of fish, shellfish, and wildlife; recreation in and on the water; agricultural, industrial, and other purposes, including navigation. Each state sets their standards for the beneficial uses that they define with EPA approval. States may not adopt waste transport or waste assimilation as a designated use for any waters of the state.

In designating uses of a water body and the appropriate criteria for those uses, the State must take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters.

All perennial streams in Kansas have been classified as to their designated uses according to state statutes and regulations as summarized above. Based on these designated uses, certain numeric water quality standards apply. Any discharge into these streams must not, by itself

or cumulatively with other discharges, result in a violation of the water quality standards. For example if a water body is designated for primary contact recreation (swimming or other activity that would easily allow ingestion of water), the fecal coliform count cannot exceed 200 colonies/100 ml. If a nonpoint or point source wastewater discharge will cause that count to be exceeded, it is not allowed and a higher level of treatment must be achieved before discharge of that wastewater.

**Point Source Discharge Permitting.** Regulations for point sources are found in **K.A.R. 28-16-1 through 28a**. Every point source discharge, including municipal and industrial discharges and certain livestock facilities, must have and comply with a permit from KDHE. The permit will state the quality of the effluent allowed to be discharged. These permit limitations are based on the designated use of the receiving water, the water quality standards associated with that use, the stream flow, and the discharge flow.

**Note:** This provision prohibits onsite wastewater system discharge to the surface. KDHE does not issue discharge permits for individual systems.

**Requirements for Certified Operator.** **K.A.R. 28-16-30 through 36** establish requirements for operator certification. Any wastewater collection and treatment system operating under a permit from KDHE must be operated by a certified wastewater operator.

## STATUTORY AUTHORITY TO FORM SEWER BENEFIT DISTRICTS

### Chapter 19 - Counties and County Officers

#### Article 27a - Sewer Districts

These statutes included in Article 27a outline the authority of counties to form sewer districts, designate the Board of County Commissioners as the governing body of the district, define those conditions that can cause a sewer district to be formed (by petition or unsanitary conditions), conditions of the preliminary survey; requirements for public notification, resolution of the district, cost of the project, lateral districts, and maintenance funds.

Also addressed in this article is sewage received from other districts, costs of combined or enlarged districts, disposal works and pumping station costs, joint sewer districts, enlargement of boundaries, annexation, alteration of boundaries, inspections, acceptance of federal aid, public bidding requirements, and uses of expended bond proceeds. Finally, deficits in bond and interest funds, revenue bonds, delinquency in payment, annexation of territory within a city, additional user charges, districts in Sedgwick County, and existing districts are discussed.

### Chapter 12 - Cities and Municipalities

#### Article 5 - Additions, Vacation and Lot Frontage

**K.S.A. 12-519 through 537** covers when and how a city can annex a county sewer district, including conditions which permit annexation, petitions, fire district annexation, filing of ordinances, effective dates, severability, annexation of lands located in water districts, use of other funds, and other aspects of the authority of cities to annex land.

## LOCAL AUTHORITY OF PARTICULAR IMPORTANCE

**K.S.A. 19-101(a) through 101(f)** establishes home rule powers; limitations, restrictions and prohibitions; and procedures.

**K.S.A. 12-3301 through 3305** describes procedures to be followed to adopt codes by reference in cities and counties.

**Note:** Article 33 gives counties the authority to adopt KDHE Bulletin 4-2 or the *Environmental Health Handbook* by reference.

**K.S.A. 65-3308 through 3313** and **K.A.R. 28-16-76 through 82** establishes the authority for the development of County Wastewater Management Plans. These plans were required to be developed until 1983 when funding through the Construction Grants Program was converted to the State Low Interest Revolving Loan Fund. The plans provide comprehensive countywide management of wastewater to be effective throughout the county. The five required elements of the plans are:

- a. City and county cooperation in management of existing point sources of pollution
- b. The management of onsite residential wastewater treatment facilities, including septic tanks
- c. Industrial waste treatment
- d. Procedures for approval of water delivery and wastewater systems for new developing areas
- e. Urban storm water runoff

**K.S.A. 65-3313** of the act states “No provision of this act shall be deemed mandatory until seventy-five percent or more of the moneys necessary to implement such provisions are certified by the secretary of health and environment to be available from the federal government.” These moneys are no longer available, thus the requirement is no longer in place. Even though they are no longer required, development of and adherence to County Wastewater Management plans is still highly recommended when planning for future development.

**K.S.A. 19-3701 et. seq.** authorizes county commissioners to adopt sanitary codes administered by the local health department or other local agency. Sanitary codes contain rules and regulations designed to minimize or control those environments and environmental conditions that may adversely affect the health and well-being of the public. Such environments and environmental conditions may include, but are not restricted to: sewerage and sewage disposal; water supply; food and food handling; insects and rodents; refuse storage, collection, and disposal; housing, trailers, and trailer courts. Sanitary codes may provide for permits, licenses, or other activities, and fees for these may be adopted. Authority to license septage haulers is also found in this act. County Sanitary Codes may contain provisions that are more restrictive than those required by the state in **K.A.R. 28-5-1 through 9**.

**K.S.A. 75-5657** establishes the Environmental Protection Grant Program. This program provides environmental protection grants to local entities for the purpose of developing and implementing environmental protection plans and programs. Program requirements are outlined in **K.A.R. 28-66-1 through 4**.

Statutes governing planning and zoning are found both in Article 29 of Chapter 19 and Article 7 of Chapter 12. In order for a city or county to be zoned, a county comprehensive plan must have been developed, subjected to public review and approval, and adopted by the city council or county commission. Planning commissions, as subsets of these authorities, are responsible for implementation of the plan, subject to the approval of the city or county commissioners. Townships may request zoning within their boundaries if the county does not have countywide zoning, and must also have a planning commission to implement the requirements. No zoning applies to land used exclusively for agriculture.

- **K.S.A. 19-2901 through 2913** covers zoning within designated townships;
- **K.S.A. 19-2914 through 2966** covers zoning in counties;
- **K.S.A. 12-701 through 732** covers city planning and subdivision regulations;
- **K.S.A. 12-741 through 768** covers county planning and subdivision regulations.

Local regulatory controls present the opportunity to protect resources and prevent the development of public health or pollution problems **before they occur**. Ideally, land use planning occurs on a watershed basis. Comprehensive land-use planning guides land use to appropriate areas, reduces suburban sprawl, and inventories and prioritizes natural resources for protection. Protection of natural resources involves soils based zoning, cluster housing, open space protection, and natural resource inventories. With planning of this nature, areas in watersheds that are not conducive to the use of conventional onsite systems will not be used for these purposes or advanced treatment before discharge to the soil will be required. Factors involved in making these decisions include soil type, slopes, proximity to sensitive water bodies, depth to groundwater, location in a source water protection area, and natural drainage flows.

The current state of land-use planning in Kansas is traditional development oriented, transportation based planning. Areas suitable for development are identified based upon factors such as accessibility to roads, utility lines, and other infrastructure. Often, the entire community is designated suitable for development with the only differentiation being the particular uses and densities allowed in given areas. Natural resources are seldom factored in, unless they pose an obvious significant barrier, such as in areas of federal or state regulation of wetlands.

Land use management happens at the local level. Water resource programs, or any other natural resource initiatives, can no longer be conducted in isolation from other land use planning issues. The emerging realization of the close relationship of natural resource protection to quality of life and community character is a strong factor arguing for the pursuit of watershed management programs.



The charge for those interested in protection of water resources is not to replace local political boundaries with natural watershed boundaries, but to find creative and effective ways to reconcile the two. This must include cooperation with entities located in the same watershed.

### **AUTHORITY OVER TOTAL MAXIMUM DAILY LOADS**

Like many other states, Kansas is under a court decree to establish Total Maximum Daily Loads, or TMDLs, for the impaired stream segments and lakes of the state. A TMDL is the maximum amount of pollutant which may enter a water body without causing a violation of the water quality standards. As of June 2004 Kansas has completed the first round of establishing TMDLs for all impaired waters within the state to meet the requirements of the court decree. Since 1972, states have been required to list the water bodies which are impaired by pollutants and establish TMDLs for those water bodies. Listing began in 1992, but it took litigation on the part of environmental groups to bring about TMDL establishment.

Kansas uses its existing data base to examine water quality and further define the impairment issues relative to seasonal trends and flow conditions. The basic goal of the Kansas TMDL process is to reduce over the long run, the frequency of violations of water quality standards. This goal is achieved by assigning responsibility for corrective actions and management practices to the point and nonpoint sources within a given watershed. Kansas TMDLs rely on watershed management as the pathway for water quality improvement, because of the multitude of sources which may contribute to the impairment and recognition of the pervasive impact of runoff on water quality in our streams and lakes.

Using the State's Water Planning Process, the Kansas TMDL program establishes a hierarchy of priority among the TMDLs. The Basin Advisory Committee in each of the 12 planning basins helps the Department set these priorities, which then become incorporated within each basin plan of the Kansas Water Plan. This setting of priority directs the applicable state programs to pollutants and geographic areas of the highest concern. Medium priority TMDLs are relegated to additional data collection. Many medium priority TMDLs are influenced by natural processes which impair water quality making correction of these problems very difficult.