



Since 1894

To: Senate Committee on Agriculture and Natural Resources
Sen. Dan Kerschen, Chair

From: Aaron M. Popelka, V.P. of Legal & Governmental Affairs, Kansas Livestock Association

Re: **SB 153 AN ACT concerning the department of health and environment; relating to water and soil pollutants; spill program.**

Date: February 19, 2019

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing nearly 5,600 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf, and stocker cattle production; cattle feeding; dairy production; swine production; grazing land management; and diversified farming operations.

Thank you, Chairman Kerschen and members of the Committee, for the opportunity to testify. KLA appears to today as an opponent of SB 153.

KLA is opposed to the SB 153 because the proposed definition of "pollutant" under this bill is too broad and could give the Kansas Department of Health and Environment (KDHE) wide sweeping authority over even the most common and innocuous substances. The effective language in the definition of "pollutant" gives KDHE authority over "any substance that causes . . . alteration of the natural physical, chemical, or biological properties of any waters or soils of the state or is likely to create a nuisance . . ." Nearly every activity taken by humankind has the effect of altering the natural properties of water or soil. Although it is unclear what is meant by the word "natural", in this context it seems to assume that "natural" is the state of water and soil in the absence of human activities.

What is more, even if a substance does not alter a natural property of the water or soil, KDHE could deem the substance a pollutant because it is a "nuisance". The term "nuisance" is undefined, giving regulators limitless authority through the KDHE rulemaking authority in subsection (b) to define the term as the agency sees fit. Depending on your perspective, many agricultural activities could be viewed as a nuisance, but are not actually harmful to the environment.

KLA is concerned that KDHE could use the authority in this bill against everyday activities of farmers and ranchers if limits are not put in place. Even if the agency chose to overlook agricultural activities, without a clear directive from the legislature, environmental groups opposed to modern agricultural practices could sue KDHE to force regulation of agriculture. This has happened in other states where an analogous federal remediation statute was used by environmental groups to push out and penalize agricultural operations that did not fit the groups' vision. KLA had internally discussed whether an amendment to K.S.A. 65-171v was

necessary after these national cases were decided, but concluded our statute did not pose as significant of a threat when compared to other state or federal laws. The broad, all-encompassing language proposed by KDHE in this bill would make the statute a threat to agriculture in Kansas.

Therefore, KLA opposes the passage of SB 153 unless the following amendment (additions in bold and underline font) is made to paragraph (a)(6):

(5) "pollutant" means any substance that causes contamination or alteration of the natural physical, chemical or biological properties of any waters or soils of the state or is likely to create a nuisance or render such waters or soils harmful, detrimental or injurious to public health, or to the plant, animal or aquatic life of the state or to other designated uses, **but shall not mean any substance originating from or utilized by an agricultural operation, including animal or crop waste, manure, or fertilizer or constituents derived from such animal or crop waste, manure, or fertilizer;** and

Adding the above amendment should clarify that SB 153 applies to hazardous, industrial waste and not to Kansas farmers and ranchers and the inputs used to grow food for a hungry world.

KLA also concurs with the amendment proposed by the Kansas Grain and Feed Association (KGFA), limiting KDHE's penalty authority to a maximum civil penalty of \$5,000 and a maximum continuing violation to \$15,000. In recent years, KLA has observed KDHE abuse its discretion in regard to continuing violations, even assessing penalties in excess of its own internal guidance. Not only does KLA agree with KGFA's amendment to this statute, but KLA also recommends making the same limiting language apply to K.S.A. 65-170d and K.S.A. 65-171f. KLA suggest that if KGFA's amendment is adopted, the Committee should also make the following amendments:

K.S.A. 65-10d(a): . . . an amount of up to \$5,000. In the case of a continuing violation, the maximum civil penalty shall not exceed \$15,000 ~~\$ 10,000 for every such violation. In the case of a continuing violation, every day such violation continues shall, for the purpose of this act, be deemed a separate violation.~~

K.S.A. 65-171f: . . . not more than \$5,000. In the case of a continuing violation, the maximum civil penalty shall not exceed \$15,000 ~~ten thousand dollars (\$ 10,000). Each day in which the failure to comply with such requirements and orders continues shall constitute a separate offense.~~

The above amendments would appropriately limit the Secretary's penalty authority and make the Secretary's penalty authority consistent if the KGFA amendment passes.

Thank you for the opportunity to submit testimony. KLA asks that the Committee oppose SB 153 unless the amendments recommended above are made to the bill.