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STATE OF NEBRASKA
OFFICIAL
APR 8 1998
DEPT. OF JUSTICE

DATE: April 8, 1998

SUBJECT: Constitutionality of LB 1126, the Buffer Strip Act; Unconstitutional Delegation of Legislative Authority to the Nebraska Pesticide Board

REQUESTED BY: Senator John A. Hilgert
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Dale A. Comer, Assistant Attorney General

You presented your opinion request regarding the constitutionality of LB 1126 to us late in the day on April 7, 1998, and it is our understanding that the bill will be considered by the Legislature on Final Reading sometime during the day on April 8, 1998. Obviously, the short time frame surrounding your opinion request provides us with little opportunity for detailed research regarding the question you presented and little time for consideration of the issues involved. Therefore, while we will accommodate your late request, our opinion must necessarily be brief.

LB 1126 creates the Buffer Strip Act. The bill pertains to the creation of buffer strips around cultivated land for the purpose of reducing the levels of pesticides and other materials introduced into surface water resources so as to improve water quality. The bill provides for the establishment of a Buffer Strip Incentive Fund and for various procedures whereby persons who wish to create a buffer strip around their property may apply to a natural resources district and the Department of Agriculture (the

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"Department") to do so. Persons establishing buffer strips under this procedure can be eligible for payments from the Buffer Strip Incentive Fund. The Department is specifically required to promulgate rules and regulations for the "enforcement and administration" of the Buffer Strip Act by Section 11 of the bill.

Section 4 of LB 1126 also creates the Nebraska Pesticide Board "to advise and provide recommendations to the department [of Agriculture] regarding the administration of the Buffer Strip Act, the use of proceeds from the Buffer Strip Incentive Fund, and the approval or disapproval of the buffer strip plan required in section 5 of this act." Section 5 of the bill then provides, in its entirety:

> The department shall devise a statewide buffer strip plan with its priority being the improvement of the quality of the domestic and public water supply. Upon the approval of the board, the department shall submit the plan to the Legislature by December 1, 1998.

Apart from a definition of the Nebraska Pesticide Board in Section 3 of LB 1126, there is no mention of that Board other than the provisions pertaining to the Board found in Sections 4 and 5 of the bill.

In your opinion request letter, you state that LB 1126 appears to delegate authority to the Nebraska Pesticide Board to adopt the statewide buffer strip plan without limitations and standards reasonably adequate, sufficient, and definite to guide the Board in exercising its authority. You then ask, "[p]lease advise at your earliest convenience whether such delegation to the board runs afoul of Nebraska's separation of powers provision, or any other provision which may be applicable due to a study of this topic being done." For the reasons discussed below, we do not believe that the provisions of LB 1126 unconstitutionally delegate legislative authority to the Nebraska Pesticide Board.

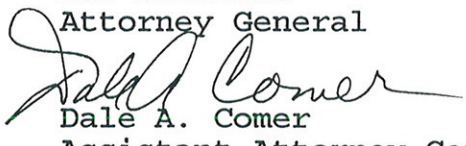
The Legislature may not delegate its legislative authority, power, or functions to an administrative or executive authority or to private individuals. ***Bosselman, Inc. v. State***, 230 Neb. 471, 432 N.W.2d 226 (1988); Neb. Const. art. III, § 1 (the Legislative authority of the state shall be vested in the Legislature). However, the Legislature may authorize an administrative or executive department to make rules and regulations to carry out an express legislative purpose, or to completely operate and enforce a law within designated limitations. ***Bosselman, Inc. v. State, supra***. Those designated limitations and the standards by which the powers granted are to be administered must be clearly and definitely stated in the authorizing act. ***Id***. Those standards must be reasonably adequate, sufficient, and definite to guide the

agency in exercising the power conferred upon it and must enable those affected to know their rights and obligations. ***Id.*** If the Legislature provides reasonable limitations and standards for carrying out delegated duties, there is not an unconstitutional delegation of legislative authority. ***Id.*** The Nebraska Supreme Court has also indicated that the modern tendency is to be more liberal in permitting grants of discretion to an administrative agency in order to facilitate the administration of laws as the complexity of administration and governmental conditions increases. ***State ex rel. Douglas v. Nebraska Mortgage Finance Fund***, 204 Neb. 445, 283 N.W.2d 12 (1979).

Under the standards set out above, we cannot say that the provisions of LB 1126 unconstitutionally delegate legislative authority to the Nebraska Pesticide Board. For one thing, Section 11 of the bill provides directions as to the nature of the rules and regulations which must be promulgated by the Department for administration of the Buffer Strip Act, and presumably those considerations would govern the nature of the statewide buffer strip plan which must be devised by the Department and approved by the Nebraska Pesticide Board. More importantly, however, it is not clear that any act of the Pesticide Board in approving a statewide buffer strip plan under Section 5 of the bill will have any ultimate independent effect. Section 5 of the bill requires that the Nebraska Pesticide Board must approve a buffer strip plan devised by the Department, and upon such approval, "the department shall submit the plan to the Legislature by December 1, 1998." While Section 5 does not state the purpose of that submission, the Legislature is presumably free to take further action with respect to the plan, and the remaining provisions of LB 1126 are silent as to any effect of the statewide plan on the other administrative provisions of the bill. Therefore, we do not believe that LB 1126 involves an unconstitutional delegation of legislative authority in this area since it is not clear that there has even been any delegation of authority to the Nebraska Pesticide Board with respect to the statewide buffer strip plan at issue.

Sincerely yours,

DON STENBERG
Attorney General



Dale A. Comer
Assistant Attorney General

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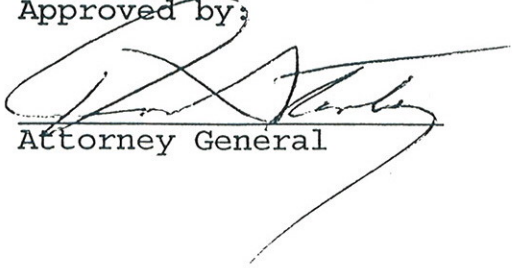
cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved by:



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