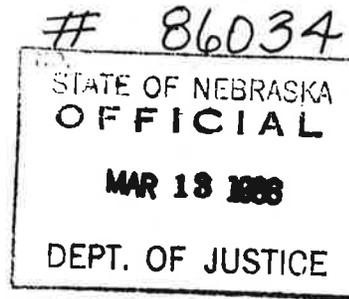


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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DATE: March 11, 1986

SUBJECT: LB 1239, Environmental Protection Act, Exemption
for Political Subdivisions

REQUESTED BY: Senator Rod Johnson
Nebraska State Legislature

WRITTEN BY: Robert M. Spire
Attorney General

Ruth Anne Evans
Assistant Attorney General

You have requested an opinion from our office concerning a proposed exemption for political subdivisions from the requirements of the Environmental Protection Act relative to Nebraska water quality standards. The proposed language in Neb.Rev.Stat. §81-1528 (Supp. 1984) is as follows:

(7) The Environmental Protection Act shall not apply to any political subdivision with respect to the ownership, control, or operation of any dam, water control structure, or hydroelectric plant or facility if the activities of such political subdivision with respect to the ownership, control, or operation of such dam, water control structure, or hydroelectric plant or facility do not result in the introduction of any toxic substance or agent into the air, water, or land.

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We note that subsection (1) of §81-1528 provides that:

The Environmental Protection Act shall not apply in any political subdivision which provides for the control of air, water, or land pollution by resolution, ordinance, or regulation not inconsistent with the substantive provisions of the Environmental Protection Act or any rule or regulation adopted pursuant to such act, except that no such resolution, ordinance, or regulation shall become effective until a certificate of exemption has been issued by the director. Such certificate of exemption shall be available for inspection in the office of the county, city, or village clerk as the case may be.

(Emphasis added.) It is evident that political subdivisions may be exempted from the Environmental Protection Act under certain circumstances. However, those political subdivisions must provide for their own regulation not inconsistent with the general provisions of the Environmental Protection Act and any rules and regulations adopted pursuant to the same. Title 117, Nebraska Water Quality Standards for Surface Waters of the State, Chapter 1, Application of Standards, provides in part as follows:

024 "Surface Waters shall mean all waters within the jurisdiction of this State, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, springs, canal systems, drainage systems, and all other bodies or accumulations of water, natural or artificial, public or private, situated wholly or partly within or bordering upon the State.

The provisions of Title 117, Chapter 3 set forth the antidegradation requirements. Subsection 001 indicates that:

The environmental quality of surface waters, consistent with uses applied in these standards, shall be maintained and protected. Water quality degradation which would adversely affect existing recognized uses will not be allowed.

Beneficial water uses are set forth in Chapter 4 relative to recreation, aquatic life, water supply, and aesthetics and public health. Subsection 001 of Chapter 3 provides that "the environmental quality of surface waters, consistent with uses applied in these standards, shall be maintained and protected." Chapter 4 sets forth general numeric criteria applicable to all surface waters of the State with respect to beneficial uses

relative to hydrogen ion concentrations, temperatures, turbidity, petroleum oil, toxic substances, and primary and secondary contact recreation.

The proposed exemption in LB 1239 would exempt political subdivisions with respect to the ownership, control, or operation of any dam, water control structure, or hydroelectric plant or facility if the activities of the same did not result in "the introduction of any toxic substance or agent into the air, water, or land." Thus, these political subdivisions would, in essence, be exempt from the requirements of Title 117 regulating other water quality standards such as temperature, hydrogen ion concentrations, etc.

It is our opinion that the exemption of political subdivisions from the requirements of the Environmental Protection Act is unconstitutional as a violation of Article III, Section 18 of the Nebraska Constitution which prohibits the passing of local or special laws. It is a general proposition of law that even though questions of classification are primarily for the Legislature, there must be some rational basis for the classification. State ex rel. Douglas v. Marsh, 207 Neb. 598, 300 N.W.2d 181 (1980). In general, the Legislature may make reasonable classifications, resting on grounds of public policy, or some substantial difference of situation or circumstance that would naturally suggest the justice or expediency of diverse legislation with respect to the object being classified. Duerfeldt v. State Game and Parks Commission, 184 Neb. 242, 166 N.W.2d 737 (1969).

Our reading of the Environmental Protection Act reveals that political subdivisions may be exempted from the Act only in certain circumstances. Those circumstances arise when the political subdivision by resolution, ordinance, or regulation provides for the control of air, water, or land pollution which is not inconsistent with the substantive provisions of Act. The proposed exemption for political subdivisions would make the Act applicable to them only in the event of the introduction of any toxic substance or agent into the air, water, or land. That exemption is inconsistent with the general provisions of the Act relative to the maintenance of adequate water quality standards for surface waters of the state. Therefore, it is our conclusion that the proposed exemption is unconstitutional. Further, we see no reasonable basis for this classification or any substantial difference in situation or circumstance to treat political subdivisions differently with respect to the purposes of the Environmental Protection Act to protect surface waters of the State.

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To the extent that we have answered the first question concerning the constitutionality of this exemption, we find it unnecessary to address the other questions posed in your opinion request. Should you have further questions, please do not hesitate to contact this office.

Very truly yours,

ROBERT M. SPIRE
Attorney General



Ruth Anne Evans
Assistant Attorney General

RAE:cw

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

Approved:


Attorney General