

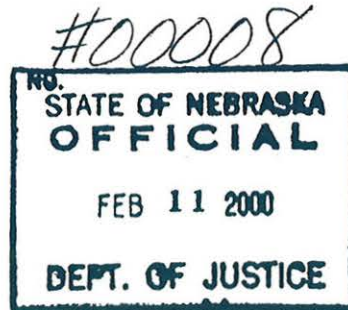


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DATE: February 8, 2000

SUBJECT: Neb. Rev. Stat. §54-2404(3)(c)(1999 Supp.); Authority of Department of Environmental Quality to Deny or Restrict Livestock Waste Control Facility Permits to Protect Cold Water Class A Streams.

REQUESTED BY: Senator Gene Tyson, Legislative District 19

WRITTEN BY: Don Stenberg, Attorney General  
Mark D. Starr, Assistant Attorney General

According to your letter, you have offered Legislative Bill 1426 in an attempt to clarify the authority of the Nebraska Department of Environmental Quality (NDEQ) with regard to the denial or modification of a permit for a livestock waste control facility. You have indicated an intention to withdraw the bill if NDEQ already has the authority under Neb. Rev. Stat. § 54-2404(3)(c) (1999 Supp.), to deny or modify a permit due to the potential degradation of a Cold Water Class A Stream.

Ordinarily, we will not give an opinion to the Legislature concerning existing legislation, but because an interpretation of existing law directly bears upon your plans for proposed legislation, we will attempt to answer your question. Your letter indicates that you have a proposed dairy in mind, but you have not supplied enough facts for us to address that particular situation. Consequently, we will limit our response to the operation of section 54-2404(3)(c) (1999 Supp.), as it is this provision which appears to be the focus of your inquiry.

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The section in question gives NDEQ the authority to "deny or restrict an application for a permit regarding a transfer or modification of an existing permit based upon the potential degradation of a cold water class A stream." By its terms, it applies only where one requests a transfer or modification of an existing permit.

The reference to an application for a transfer seemingly contemplates the situation where there is a change in ownership of the livestock operation and the new owner seeks to operate under the authority of the permit issued to the previous owner. See *e.g.*, Neb. Rev. Stat. § 54-2407(3) and § 54-2409(3) (Supp. 1999), which do not expressly mandate such an application but appear to envision that one would be filed. An application for a modification may be triggered by a number of things. Examples would be a proposed increase in the number of animal units beyond what the permit allows or in excess of the design capacity of the permitted class of the livestock waste control facility.

We do not believe section 54-2404(3)(c) addresses an application for a construction permit for a new livestock waste control facility or the expansion of an existing facility which does not possess a permit. If NDEQ is to have the authority to deny an application for a new permit based upon the potential degradation of a cold water class A stream, then such authority must be found elsewhere. We would add that it is the potential for pollution which triggers the need for a permit in the first place. See Neb. Rev. Stat. §§ 54-2404(1)(1999 Supp.) and 81-1504(20) (1999).

It is hoped that this discussion has helped answer your question about the extent of NDEQ's authority under section 54-2404(3)(c) so that you may make an informed assessment of the need for the legislation you have in mind.

Sincerely,

Don Stenberg  
Attorney General



Mark D. Starr  
Assistant Attorney General

Approved:



Attorney General