

MINUTES OF THE HOUSE COMMITTEE ON ENVIRONMENT.

The meeting was called to order by Chairperson Joann Freeborn at 3:30 p.m. on March 21, 2000 in Room 231-N of the Capitol.

All members were present except: Rep. Douglas Johnston - excused
Rep. Ray Merrick - excused

Committee staff present: Raney Gilliland, Kansas Legislative Research Department
Mary Torrence, Revisor of Statute's Office
Mary Ann Graham, Committee Secretary

Conferees appearing before the committee: Terry Duvall, Kansas Water Office, 109 SW 9th, Ste 300,
Topeka, KS 66612-1249

Others attending: See Attached Sheet

Chairperson Joann Freeborn called the meeting to order at 3:30 p.m.

The Chairperson recognized Rep. Sharon Schwartz. She stated given the fact that fuel prices continue to go up and we depend on imported oil and at the same time grain prices seem to be in a slump, it seems to make sense, coming from a state with agriculture being the number one industry, to be supporting agriculture and corn based fuel, such as ethanol. She introduced a House Concurrent Resolution on Ethanol and the Clean Air Act Oxygenate Requirement. (See attachment 1)

Rep. Dennis McKinney made a motion the Resolution (Attachment 1) be introduced. Rep. Vaughn Flora seconded the motion. Motion carried.

The Chairperson called attention to a document that had been distributed for review by Jan Sides, Director, Bureau of Air and Radiation, Kansas Department of Health and Environment, from the United States Department of Agriculture, "Clinton-Gore Administration Acts to Eliminate MTBE, Boost Ethanol." (See attachment 2)

Mary Torrence distributed copies of the Subcommittee Report on **SB388**, and explained the changes that had been made. (See attachment 3)

Rep. Tom Sloan made a motion the Subcommittee Report be adopted. Rep. Becky Hutchins seconded the motion. Motion carried.

Rep. Melvin Minor made a motion to strike section 11 (a). Rep. Vaughn Flora seconded the motion. Motion carried. 9 yeas 5 nays.

Rep. Tom Sloan made a motion to strike (E) and (F) page 5. Rep. Becky Hutchins seconded the motion. Motion failed. 3 yeas 9 nays.

Chairperson Joann Freeborn distributed a proposed amendment to **SB388**. (See attachment 4)

Rep. Joann Freeborn made a motion to adopt the amendment. Rep. Dan Johnson seconded the motion. Motion carried.

Rep. Laura McClure made a motion that one of three water banks be a surface water bank. Rep. Sharon Schwartz seconded the motion. Motion withdrawn.

Rep. Clay Aurand made a motion one of first five groundwater banks to be a surface water bank. Rep. Laura McClure seconded the motion. Motion failed. 5 yeas 9 nays.

Rep. Becky Hutchins made a motion page 5 (E) and (F) strike "each" and insert "a". Rep. Tom Sloan

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON ENVIRONMENT, Room 231-N of the Capitol
at 3:30 p.m. on March 21, 2000.

seconded the motion. Motion failed. 5 yeas 7 nays.

Rep. Gerry Ray made a motion SB388 be passed as amended. Rep. Vaughn Flora seconded the motion. Motion carried.

The Chairperson opened Substitute for SB469 for discussion and possible action.

Substitute for SB469: **An act prohibiting sales of certain motor-vehicle fuel and providing penalties for violations.**

Mary Torrence distributed a balloon to the bill. (See attachment 5)

Rep. Gerry Ray distributed a proposed amendment. (See attachment 6)

Rep. Gerry Ray made a motion to adopt proposed amendment. Rep. Bill Light seconded the motion.

Rep. Clay Aurand made a motion to table Substitute for SB469. Rep. Dan Johnson seconded the motion. Motion carried.

Chairperson Freeborn opened SB634 for public hearing.

SB634: **An act authorizing the Kansas water office to obtain loans under certain prescribed conditions; relating to the pooled money investment board.**

Terry Duvall, Kansas Water Office, was welcomed to the committee. She testified in support of the bill. This bill was introduced by the Committee on Ways and Means as a companion to SB639, which included the appropriations for the Kansas Water Office for FY2001. SB634 would allow the Kansas Water Office to borrow money from the pooled money investment board to be used to meet any unusual expenses relating to operation, maintenance and repair costs associated with the Kansas Water Marketing Program. K.S.A. 82a-1315(c) (b) (5) was enacted in 1991 to allow the KWO to maintain a reserve account within the Kansas Water Marketing Fund to meet any shortfall in revenue or unusual expenses. The primary objective of that statutory change in 1991 was to stabilize the annual rate charged for water so customers would not be subject to dramatic one year increases in rates and so future customers could be assured of a stable rate. Passage of the bill would simply authorize the KWO to meet these unusual circumstances through a loan rather than by a reserved account. (See attachment 7) Attached to the testimony are graphs for Annual Operation and Maintenance Costs; 1996 through 1999 Water Marketing Fund; and a proposed amendment to the bill. Questions and discussion followed.

Chairperson Freeborn, Vice-Chairperson Gerry Ray and Ranking Minority Leader Vaughn Flora, decided not to take final action today on SB634, as more time is needed to look at the bill. The bill could possibly have final action at the rail. Rep. Laura McClure made available a proposed amendment to the bill, if bill has final action, regarding amounts recovered by the State of Kansas from any settlement, judgment or decree in the litigation brought by the State of Kansas against the State of Nebraska to resolve disputes arising under the Republican River compact shall be deposited in the state treasury and credited, etc.

The Chairperson closed the hearing on SB634.

An Attorney General Opinion to Rep. Laura McClure was distributed, regarding Public health, Secretary of Health and Environment, Activities, Abatement of Nuisances; Prevention of Water Pollution; Confined Feeding Facilities for Swine; Standards and Requirements; Application; Air Quality Control; Powers of Secretary of KDHE. (See attachment 8) Also, written testimony in support of SB388, was submitted from Jerry Blain, Superintendent of Water Production, City of Wichita, Water Banking Task Force Member. (See attachment 9)

The meeting adjourned at 5:35 p.m. No further meetings are scheduled.

HOUSE ENVIRONMENT COMMITTEE GUEST LIST

DATE: March 21, 2000

NAME	REPRESENTING
Tom Bruno	MGA
Ron Appletoft	Water Dist. No 1 of JoCo.
EARL CRESS	SELF (water DIST 13)
TOM PALACE	AMCA OF KS.
David L Pope	KDA
Ken Peterson	KS Petroleum Council
Charles Benjamin	KNRC/Sierra Club
Cynthia Smith	KOPL
Leo Alnow	Ks Geol. Survey
Jim Carlmen	KS Dept. of Ag
Mary Jane Fathman	"
JAN SIDES	KDHE
Gary Blackburn	KDHE
Nina Atencio	Buttenberg + Assoc.
JOHN IRWIN	Western Resources
Leo Schwartz	Pack Chap Assoc.
Mike Beam	KS. LUSTK. ASSN.
ROBERT LITTLE	KS. DIV. WATER RES.
EDWARD ROWE	LEAGUE OF WOMEN VOTERS/KS

HOUSE ENVIRONMENT COMMITTEE GUEST LIST

DATE: March 21, 2000

NAME	REPRESENTING
Woody Moses	KAPA
Margaret Fast	Ks Water office
Jussy Russell	"

Resolution On
Ethanol and the Clean Air Act Oxygenate Requirement

- Whereas,** The Clean Air Act requires the use of an oxygenate in reformulated gasoline used in non-attainment areas; and
- Whereas,** This requirement has resulted in important air quality benefits to our nation; and
- Whereas,** The decision of petroleum refiners to use MTBE rather than clean, renewable ethanol has resulted in serious degradation of groundwater in some regions; and
- Whereas,** Eliminating the oxygenate requirement is not necessary to allow states to ban MTBE, and would harm efforts to achieve the air quality goals in the Clean Air Act; and
- Whereas,** The USDA has determined that ethanol can replace MTBE in reformulated gasoline nationwide within three years, without increases in price or supply disruption; and
- Whereas,** The use of ethanol not only reduces toxins and improves air quality, it reduces America's dependence on imported petroleum and thereby reduces our nation's trade deficit by some \$12 billion over the next ten years, increases farm income by an estimated \$1 billion annually, and reduces farm program costs by creating important new markets for grain; now therefore be it
- RESOLVED,** Further resolved, that the state of Kansas encourage U.S. Congress to maintain its commitment to the federal Clean Air Act by retaining the oxygenate requirement of the reformulated gasoline program and by implementing standards that ensure the opportunity for the use of ethanol blended gasoline in any reformulated gasoline program, thereby preserving the natural environment, protecting the public health, and reducing the nation's dependence upon foreign petroleum.

House Environment
3-21-00
Attachment 1



**FOR IMMEDIATE RELEASE CONTACT: 202 564-9828 or 260-2587, EPA
MARCH 20, 2000 202 720-4623, USDA**

**CLINTON-GORE ADMINISTRATION ACTS TO
ELIMINATE MTBE, BOOST ETHANOL**

WASHINGTON, March 20, 2000 -- EPA Administrator Carol M. Browner and Agriculture Secretary Dan Glickman today announced actions by the Clinton-Gore Administration to significantly reduce or eliminate use of the fuel additive MTBE and boost the use of safe alternatives like ethanol. The Clinton-Gore Administration is taking these actions in order to protect drinking water, preserve clean-air benefits, and promote greater production and use of renewable fuels like ethanol.

Browner and Glickman released a legislative framework to encourage immediate Congressional action to reduce or eliminate MTBE and promote renewable fuels like ethanol. Browner also announced the beginning of regulatory action by EPA to eliminate MTBE in gasoline.

The legislative framework being sent to Congress includes the following three recommendations, which taken together as a single package, provide an environmentally sound and cost effective approach:

- **First, Congress should amend the Clean Air Act to provide the authority to significantly reduce or eliminate the use of MTBE.** This step is necessary to protect America's drinking water supplies.
- **Second, as MTBE use is reduced or eliminated, Congress must ensure that air quality gains are not diminished.** The Clinton-Gore Administration is deeply committed to providing Americans with clean air and clean water.
- **Third, Congress should replace the existing oxygenate requirement in the Clean Air Act with a renewable fuel standard for all gasoline.** By preserving and promoting continued growth in renewable fuels, particularly ethanol, this step will increase farm income, create jobs in rural America, improve our energy security, and help protect the

*House Environment
3-21-00
Attachment 2*

environment.

(more)

"Threats posed by MTBE to water supplies in many areas of the country are a growing concern," Browner said. "Action by Congress is the fastest and best way to address this problem. We need to begin now to eliminate MTBE from gasoline and move to safer alternatives, like ethanol because Americans deserve both clean air and clean water -- and never one at the expense of the other."

"These principles provide a strong, unified framework for promoting the continued growth of renewable fuels like ethanol," said Glickman. "Ethanol will play an important role in ensuring that we maintain the air quality gains we have achieved to date, and the renewable fuels standard will encourage substantial new growth in the use of ethanol and other renewable fuels across the country. That's good news for our farmers, for our energy security, and for the environment."

In addition to the legislative framework, Browner also announced that EPA today formally began regulatory action to eliminate or phase down MTBE, issuing an Advance Notice of Proposed Rulemaking under Section 6 of the Toxic Substances Control Act.

"To ensure that our water supplies will be protected, I am also directing EPA to take an additional insurance policy by starting a regulatory process aimed at phasing out MTBE," Browner added. "However, this action can require time to complete; that is why it is in the best interest of the American people for Congress to take quick action now."

Section 6 of the Toxic Substances Control Act gives EPA authority to ban, phase out, limit or control the manufacture of any chemical substance deemed to pose an unreasonable risk to the public or the environment. EPA expects to issue a full proposal to ban or phase down MTBE within six months, after which more time is required by the law for analysis and public comment before a final action can be taken.

-30-30-30-

**EPA ADMINISTRATOR CAROL M. BROWNER
REMARKS AS PREPARED FOR DELIVERY
Press Conference
March 20, 2000**

Today I am here to deliver a very simple but important message: It is imperative that we significantly reduce or eliminate the fuel additive MTBE from gasoline and boost the use of safe alternatives like ethanol in order to protect U.S. water supplies and to preserve air quality benefits.

Today, we are moving on two fronts to ensure that MTBE is significantly reduced or eliminated from gasoline:

First, the Clinton/Gore Administration is providing Congress with a legislative framework, which, if fully adopted, will significantly reduce or eliminate MTBE while preserving clean-air benefits by ensuring the use and growth of ethanol and other safe renewables in fuels.

Second, as a backstop measure, today we are announcing that EPA is beginning regulatory action aimed at eliminating MTBE from gasoline. Under Section 6 of the Toxic Substances Control Act, we are taking the first step by issuing what is called an Advance Notice of Proposed Rulemaking to ban MTBE from gasoline. This action is the best tool legally available for eliminating the use of MTBE.

The principles for legislative action that we are sending to Congress must be viewed and accepted as a single package and will provide an environmentally sound and cost effective approach to dealing with this issue:

First, we are calling on Congress to amend the Clean Air Act to significantly reduce or eliminate the use of MTBE in gasoline, in order to protect drinking water.

Second, we are calling on Congress to strengthen the Clean Air Act to guarantee that clean air benefits are preserved.

And finally, we are calling on Congress to remove the requirement from the Clean Air Act that has led to a three-fold increase in the use of MTBE, while, at the same time, taking the unprecedented step of providing content levels for ethanol and other safe biofuels in gasoline.

These principles will ensure that the MTBE problem is addressed as soon as possible. . . that our commitment to cleaner air is preserved . . . that America's waters are protected . . . and that we continue to create important opportunities for renewable fuels in our nation's energy supply.

Legislative action is our first priority and the best way for America to address the MTBE problem.

As I noted, however, we also are taking out an additional insurance policy today. We are backing up our request for timely legislation with the first step in a regulatory action under the Toxic Substances Control Act.

That Act gives EPA authority to ban, phase out, limit or control the manufacture of any chemical substance deemed to pose an unreasonable risk to the public or the environment. But the procedural burdens required by the Act can be weighty and time consuming. That is why we still are requesting that Congress act immediately to significantly reduce or eliminate MTBE in gasoline. Legislative action is the first and best line of defense. We look forward to working with the Congress to achieve that critical legislative goal.

The use of MTBE in gasoline in the U.S. has increased three-fold primarily in the last decade. Because of growing environmental concerns, I convened a Blue Ribbon Panel in 1998 which concluded that MTBE did, in fact, pose unique threats to water supplies. As a result, last summer we first called on Congress to phase out the use of MTBE in gasoline. Today, we are taking the next steps.

EPA continues to work with those cities and states that need help cleaning up existing problems. Remediation will be challenging, but essential. And we are working to develop and promote new cleanup technologies. We also are strengthening our efforts to make storage tanks more secure.

MTBE is a problem that must be addressed. If we delay too long, the problem will become worse. The time has come to take action. Americans deserve both clean air and clean water and never one at the expense of the other.

**LEGISLATIVE PRINCIPLES FOR
PROTECTING DRINKING WATER SUPPLIES, PRESERVING CLEAN AIR
BENEFITS, AND PROMOTING RENEWABLE FUELS**

The Federal Reformulated Gasoline Program (RFG) established in the Clean Air Act Amendments of 1990 has provided substantial reductions in the emissions of a number of air pollutants from motor vehicles, most notably volatile organic compounds and nitrogen oxides (precursors of ozone), carbon monoxide, and air toxics (benzene, 1,3-butadiene, and others). In most cases these reductions have exceeded those required by law.

However, the use of methyl tertiary butyl ether ("MTBE") in our nation's fuel supply has created a significant and unacceptable risk to drinking water and ground water resources. As a result of these concerns, last year EPA commissioned a Blue Ribbon Panel on MTBE and Oxygenates in Gasoline (the "Panel"). On July 27, 1999 the Panel issued recommendations on ways to maintain air quality while protecting water quality from the risks associated with MTBE. Significantly, the Panel called for a substantial reduction in the use of MTBE as well as action by Congress to remove the current 2% oxygenate requirement from the Clean Air Act. EPA endorsed the Panel's recommendations and committed to work with Congress to make targeted amendments to the Clean Air Act.

In the months since the Panel issued its recommendations, detections of MTBE in water supplies have grown and Congress has not yet acted to address this issue. It is of increasing importance to enact legislation that addresses this problem in an environmentally sound and cost-effective way. Such legislation should provide authority to phase out MTBE while avoiding gasoline supply shortages and ensuring price stability.

The following legislative principles, taken together as a single package, are designed to maintain air quality and enhance water quality protection while preserving the significant role of renewable fuels, most importantly ethanol. In addition, it is the Administration's intention that the resulting legislation provide sufficient flexibility with respect to both time and range of technological choices so as to allow for continued adequate supplies of gasoline at reasonable prices for consumers.

Recommendation #1: Amend the Clean Air Act to provide the authority to significantly reduce or eliminate the use of MTBE.

The rising number of MTBE detections in ground and surface water in some areas of the nation have increased the urgency for preventing further MTBE contamination. In some cases, communities have been forced to abandon their drinking water supply. To effectively address this growing problem, the Administration recommends that Congress amend the Clean Air Act to provide the authority to significantly reduce or eliminate the use of MTBE.

Recommendation #2: As MTBE use is reduced or eliminated, ensure that air quality

gains are not diminished.

The clean burning Reformulated Gasoline Program has helped bring clean air to cities across the nation. In many cases, Americans have enjoyed air quality improvements that have exceeded expectations. The Administration recommends that as Congress significantly reduces or eliminates MTBE, it institute measures that maintain our air quality gains.

Recommendation #3: Replace the existing oxygen requirement contained in the Clean Air Act with a renewable fuel standard for all gasoline.

Reducing or eliminating MTBE in no way diminishes the continued need for other oxygenates, such as ethanol, to control mobile source emissions. In addition, a significant role for renewable fuels is important to our nation's energy supply (see, EO 13134 in which President Clinton sets a goal of tripling the use of renewable bio-energy by 2010). Thus, the Administration recommends that Congress replace the 2% oxygenate requirement in the Clean Air Act with a renewable fuel annual average content for all gasoline at a level that maintains the current level of renewable fuel (1.2% of the gasoline supply) and allows for sustained growth over the next decade.

Congressional action on these recommendations is essential if we are to continue to achieve the clean air public health benefits of cleaner burning gasoline while avoiding unacceptable risks to our nation's water supplies. The Administration urges Congress to address this request for legislation as quickly as possible. We remain committed to working with Congress to provide a targeted legislative solution to this matter.

Subcommittee Report

As Amended by Senate Committee

SENATE BILL No. 388

By Special Committee on Environment

12-15

House Environment
3-21
Attachment 3

10 AN ACT ~~enacting the Kansas water banking act.~~ concerning water rights; relating to water banking;

11
12 *Be it enacted by the Legislature of the State of Kansas:* Sections 1 through 13, and amendments thereto,

13 Section 1. ~~This act~~ may be cited as the Kansas water banking act.
14 Sec. 2. As used in this ~~act~~ sections 1 through 13, and amendments thereto,

15 (a) "Bank boundary" means the geographic area where a water bank
16 operates and conducts the functions of a water bank **and may encompass**
17 **more than one hydrologic unit.**

18 (b) "Bank charter" means a document that sets out the articles of
19 incorporation and principal functions of a water bank.

20 (c) "Bankable water right" means a water right that has been deter-
21 mined pursuant to section 4, and amendments thereto, to be bankable.

22 (d) "Chief engineer" means the chief engineer of the division.

23 (e) "Conservation element" means the portion of a deposit that is
24 taken out of use for the duration of the deposit and is not allowed to be
25 withdrawn and used by subsequent users.

26 (f) "Consumptive use" means the gross diversion of water minus: (1)
27 Waste of water; and (2) amounts returned to the source of water supply.

28 (f) "Deposit," other than as used in "safe deposit account," re-
29 fers to the deposit of a water right, or portion of a water right, in a
30 water bank for the purpose of having the bank lease water from
31 such water right, or portion of a water right, to another person or
32 entity.

33 (g) "Division" means the division of water resources of the Kansas
34 department of agriculture.

35 (h) "Hydrologic unit" means ~~the defined area of hydraulically hy-~~ a defined area where water rights authorizing diversion of water from a source of supply may be deposited and water
36 ~~drologically connected sources of water supply.~~ from the same source of supply may be leased, in accordance with the provisions of this act, without causing
37 (i) "Linked water rights" means two or more water rights that impairment of existing water rights or a significantly different hydrological effect to other users of water from the same
38 authorize common points of diversion or a common place of use, or source or hydraulically connected sources of supply
39 both.

40 (i) (j) "Safe deposit account" means a personal account held in a
41 water bank where unused water from a bankable water right is deposited
42 placed for use in future years.

43 (j) (k) "Term permit" means a permit to appropriate water for a spec-

ified period of time.

(*) (l) "Water bank" means a private not-for-profit corporation that leases: (1) Leases water from water rights that have been deposited in the bank ; and (2) provides safe deposit accounts. A water bank may be a groundwater bank or a surface water bank, or both.

Sec. 3. (a) A water bank shall be authorized to enter into contracts with holders of water rights for deposit in the bank of all or a portion of any water right from a source of supply within the bank boundary, subject to the following:

(1) The bank shall accept for deposit only a water right, or portion of a water right, that has been determined to be a bankable water right under section 4, and amendments thereto;

(2) a deposit of a groundwater water right shall be for a period of not more than five years;

(3) a deposit shall be subject to such terms and conditions as provided by the contract between the bank and the depositor, including penalty provisions for breach of any contract conditions; and

(4) a deposit shall be subject to such terms and conditions, and such approval by the chief engineer, as provided by rules and regulations of the chief engineer.

(b) A water bank shall be authorized to lease water from any water right, or portion of a water right, that has been deposited in the bank, subject to the following:

(1) Any water leased must be used within the bank boundary and in the same hydrologic unit from which the water is leased deposited;

(2) use of leased water shall be subject to all provisions of the Kansas water appropriation act, including but not limited to all requirements relating to: Term permits; changes in the place of use, the point of diversion and the use made of water; and water use reporting term permits;

(3) a lease shall be subject to such terms and conditions as provided by the contract between the bank and the lessor, including penalty provisions for breach of any contract conditions; and

(4) a lease shall be subject to such terms and conditions, and such approval by the chief engineer, as provided by rules and regulations of the chief engineer.; and

(5) a water bank's decision of whether or not to lease water shall not be based on the proposed use of the water.

(c) A water bank shall be authorized to provide safe deposit accounts where a holder of a water right may place unused water from the water right for future withdrawal, subject to the following:

(1) A water right holder shall place in a safe deposit account only water from a water right that has been determined to be a bankable water right under section 4 and amendments thereto;

be authorized to

hydrologic unit

water right authorizing diversion of the water is

1 (2) only water that was unused in the immediate past calendar year
2 may be placed in a safe deposit account and the amount that shall be
3 placed in such account shall be less than the total amount of unused water
4 from the bankable water right in that year;

5 (3) only water from one water right shall be placed in a safe deposit
6 account and water from a water right shall not be placed in more than
7 one safe deposit account, *except that water from linked water rights*
8 *may be placed in a single safe deposit account;*

9 (4) each calendar year that water remains in a safe deposit account,
10 the amount of water held in the account shall decrease by a percentage
11 established by the charter of the bank but in no case less than 10% an-
12 nually of all amounts placed in the account;

13 (5) the total amount of water placed *accumulated* in a safe deposit
14 account shall not exceed the maximum annual quantity authorized to be
15 diverted under the water right *or the aggregate maximum quantity*
16 *authorized to be diverted under all linked water rights from which*
17 *water is deposited in the account;*

18 (6) use of water withdrawn from a safe deposit account shall be sub-
19 ject to all provisions of the Kansas water appropriation act, including but
20 not limited to all requirements relating to: ~~Term permits; changes in the~~
21 ~~place of use, the point of diversion and the use made of water; and water~~
22 ~~use reporting~~ *term permits;*

23 (7) a safe deposit account shall be subject to such terms and condi-
24 tions as provided by the contract between the bank and the account
25 holder, including penalty provisions for breach of any contract conditions;
26 and

27 (8) a safe deposit account shall be subject to such terms and condi-
28 tions, and such approval by the chief engineer, as provided by rules and
29 regulations of the chief engineer.

30 (d) A water bank may provide services to facilitate the sale or lease
31 of water rights.

32 (e) *A water bank shall not own, buy or sell water rights.*

33 Sec. 4. (a) Before a water right or portion of a water right shall be
34 accepted for deposit in a water bank or water from a water right shall be
35 placed in a safe deposit account, the bank, with the assistance of the
36 division, shall determine whether the water right is bankable, as follows: (a)

37 (1) The right is vested or has been issued a certificate of appropriation; (a)
38 and (2) the right has not been abandoned and is in good standing, based (b)
39 on past water usage and compliance with the terms of the holder's permit
40 and all applicable provisions of law and orders of the chief engineer.

41 *Determination of the portion of a water right that is bankable shall*
42 *be based on the maximum annual quantity authorized to be diverted*
under the water right and shall not take into account actual prior

~~use of less than that amount.~~

~~(b) The division may charge a water bank for the actual cost of assistance provided pursuant to subsection (a) or for the actual cost of any other services provided to a water bank pursuant to this act.~~

Sec. 5. (a) Before a water bank is authorized to operate in the state, the bank's charter must be approved by the chief engineer. Prior to approval, the body wishing to charter the bank shall submit to the chief engineer the proposed bank charter and any other information required by rules and regulations of the chief engineer to determine whether the bank shall be chartered to operate in the state.

(b) The chief engineer shall approve the charter of a water bank only if the chief engineer determines that:

(1) The charter ensures that the operations and policies of the bank will be consistent with the provisions of this act, the state water plan and all applicable statutes, rules and regulations, findings and orders of the chief engineer, groundwater management district policies and water assurance district operations plans;

(2) there is sufficient participation by water right holders and water users to make the operations of the bank practical and feasible;

(3) the governing body of the bank is reasonably representative of public and private interests in water within the bank boundary;

~~(4) the boundary of the bank does not overlap with the boundary of any other chartered water bank;~~

~~(4) the bank would not lease or accept for deposit water from the same source of supply as another chartered water bank;~~

(5) the charter ensures that, for each calendar year, the aggregate amount of all bank deposits (determined by multiplying the amount of each water right deposited by the length of time of the deposit and then adding together the resulting amounts for all deposits) will equal or exceed the sum of the aggregate amount of water leased by the bank (determined by multiplying the amount of each lease by the length of time of the lease and then adding together the resulting amounts for all leases) plus the aggregate conservation element of all leases (determined by multiplying the conservation element of each lease by the length of the lease and then adding together the resulting amounts for all leases);

(6) the charter ensures that the operations of the bank will not result in impairment of existing water rights or an increase in depletion of severely depleted groundwater aquifers or stream courses; ~~and~~

(7) the charter ensures that the operations of the bank will result in a savings of 10% or more in the total amount of groundwater consumed pursuant to water rights deposited in the bank, excluding groundwater located in an intensive groundwater use control area; ~~and~~

~~(8) if the bank is a groundwater bank, the charter ensures that the~~

has at least five members and

placement in a safe deposit account water from the same hydrologic unit as another chartered bank or accept for deposit a water right that authorizes diversion of water from the same hydrologic unit

where corrective control provisions have reduced the allocation of groundwater to less than the quantity previously authorized by water rights in the area;

(8) the charter provides a procedure for resolution of complaints by bank participants and others impacted by the bank policies, practices and operations ; and

(9) the charter ensures that the determination of the portion of a water right that is bankable shall be subject to the following:

(A) The determination shall be primarily based on a representative period of average water consumption for the hydrologic unit from which water is authorized to be diverted under the water right;

(B) the method of determination shall not penalize past implementation of water conservation practices;

(C) deposit of a portion of a water right for irrigation pursuant to subsection (a) of section 3, and amendments thereto, shall not be allowed unless: (i) A proportional amount of the authorized place of use of water diverted under the water right will not receive water during the period that the water right is deposited in the bank; or (ii) the conservation element is applied to the portion of the water right that is not deposited; and

(D) the method of determining the portion of a water right that is bankable for purposes of placing of water in a safe deposit account pursuant to subsection (c) of section 3, and amendments thereto, shall include: (i) Consideration of the reasons why such water was unused, including, but not limited to, adequate rainfall and the supply of water's being unavailable for use; and (ii) criteria that assures the bank's safe deposit account operations do not result in a net increase in consumptive use in the affected hydrologic unit

1 operations of the bank will not result in an increase in consumptive use
2 of water within the boundary of the bank.

3 (c) ~~Not more than five~~ ~~10~~ water banks shall be chartered to operate
4 in the state and at least one such bank shall be a surface water bank.

5 (d) A water bank shall be chartered for a period of not more than
6 seven years, at which time the bank shall be subject to review in accord-
7 ance with section ~~6~~ and amendments thereto, to determine whether the
8 bank's charter shall be extended.

9 (e) **Any amendment to the charter of a water bank must be ap-
10 proved by the chief engineer prior to adoption of the amendment.**

11 Sec. 6. (a) Not later than five years after the establishment of a water
12 bank, the ~~chief engineer shall convene a team to evaluate the operation~~
13 ~~of the bank. The team shall consist of:~~

- 14 (1) The chief engineer or the chief engineer's designee;
- 15 (2) the director of the Kansas water office or the director's designee;
- 16 (3) ~~one representative of the governing body of the bank;~~
- 17 (4) a ~~one~~ representative of each groundwater management district
18 located partly or wholly within the boundary of the bank in the state,
19 which representative shall be selected by the board of directors of the
20 district;

21 (5) a ~~one~~ representative of each assurance district located partly or
22 wholly within the boundary of the bank, which representative shall be
23 selected by the board of directors of the district;

24 (6) ~~two~~ representatives of water right holders and water users who
25 have used the bank's services, which representatives shall be selected by
26 the chief engineer; **and**

27 (7) a representative of the water bank task force familiar with the
28 operation of the bank; and

29 (8) any additional members that the foregoing members determine
30 useful to the team's evaluation.

31 (7) ~~two legislators appointed by the legislative coordinating~~
32 ~~council:~~

33 (b) ~~A legislator serving on the team shall be paid compensation,
34 travel expenses and subsistence expenses or allowances as provided
35 by K.S.A. 74-3212, and amendments thereto, for attendance at any
36 meeting of the team or any subcommittee meeting of the team au-
37 thorized by the team.~~

38 (b) (c) Not more than one year after a team is convened pursuant to
39 this section, the team shall submit a report of its evaluation and recom-
40 mendations to the governor, the Kansas water office, the Kansas water
41 authority, the secretary of agriculture, the chief engineer and the senate
42 standing committee on energy and natural resources and the house stand-
43 ing committee on environment, or the successors to such committees

Prior to January 1, 2001, not more than one water bank

7
Sec. 6. (a) On or before February 10 of each year, each water bank shall submit to the chief engineer a report containing the following:

(1) With regard to water rights or portions of water rights on deposit in the bank during the last year: (A) The total quantity of water authorized to be diverted annually pursuant to each such water right or portion of a water right; (B) the total quantity of water used, by purpose of use, and acres irrigated for the portion authorized to be used for irrigation, during the last year as a result of leases of such water rights or portions of water rights; and (C) the total quantity of water used, by purpose of use, and acres irrigated for the portion authorized for irrigation pursuant to such water rights or portions of water rights during the two years preceding the last year; and

(2) with regard to water in each safe deposit account in the bank: (A) An accounting of the total quantity of water placed in such accounts during the past year and a balance at year end; (B) the total quantity of water used during the past year, and acres irrigated if an irrigation water right, from the account; (C) the total quantity of water authorized to be diverted annually, the quantity actually used and the acres irrigated, if an irrigation water right, during the past year pursuant to the water rights or linked water rights related to such account; and (E) the total quantity of water used and acres irrigated pursuant to such water rights during the two years preceding the last year.

(b) The chief engineer may require owners of water rights deposited in a water bank, owners of water rights that have placed water in safety deposit accounts in a water bank and persons leasing water from a water bank to file annual water use reports at a date earlier than that provided by K.S.A. 82a-732, and amendments thereto.

(c) The report required by this section shall be in the form prescribed by the chief engineer.

[renumber sections 6 - 8 accordingly]

director of the Kansas geological survey shall convene a team to evaluate the operation of the bank. The team shall consist of:

(1) The director of the Kansas geological survey, or the director's designee, who shall serve as chairperson of the team;

(2) two members who represent water right holders and water users who have used the bank's services, which members shall be selected by the governing body of the bank; and

(3) members selected by the chief engineer as follows: (A) Two members engaged in teaching or research at institutions of postsecondary education in subjects involving water resources, including but not limited to water resources engineering and hydrology; (B) a member who is an economist with knowledge and experience in water resources; (C) one member having knowledge and experience in water law; (D) two members having knowledge and experience in water policy issues and residing outside the bank boundary, who shall represent the public interest; (E) one representative of each groundwater management district located in whole or in part within the bank boundary; and (F) one representative of each water assurance district located in whole or in part within the bank boundary.

(b) The staff of the Kansas geological survey shall provide staff assistance to the evaluation team.

1 regarding:

2 (1) The operations and policies of the bank and whether they are
3 consistent with the provisions of this act, the state water plan and all
4 applicable statutes, rules and regulations, findings and orders of the chief
5 engineer, groundwater management district policies and water assurance
6 district operations plans;

7 (2) whether the operations of the bank are achieving the goals and
8 objectives of water banking as set out in the state water plan and whether
9 changes could be made to further those goals and objectives;

10 (3) whether the charter of the bank should be extended;

11 (4) the terms under which the bank's charter should be allowed to
12 lapse, if the team recommends that the charter not be extended; and

13 (5) any other matters that the team determines relevant to the future
14 of water banking in the state.

15 (c) (d) Unless otherwise provided by law, the chief engineer, in ac-
16 cordance with the recommendations of the team, ~~shall~~ **may** extend the
17 charter of the bank for an additional period not to exceed seven years or
18 ~~shall~~ **may** allow the bank charter to lapse under the terms recommended
19 by the team.

20 Sec. 7. Depositing a water right in a water bank or placement of
21 water in a safe deposit account in a water bank shall constitute due and
22 sufficient cause pursuant to K.S.A. 82a-718, and amendments thereto, for
23 failure to use water for a lawful, beneficial use for the term of the deposit
24 or the placement.

25 Sec. 8. The chief engineer may adopt rules and regulations to ad-
26 minister and enforce the provisions of this act.

27 Sec. 9. This act shall take effect and be in force from and after its
28 publication in the statute book.

3-6
Sec. 10. (a) In addition to any other provision of this act or the Kansas water appropriation act, and subject to the provisions of subsection (b), the chief engineer may suspend the use of water under a term permit, an approved application for a permit to appropriate water for beneficial use, an appropriation right or a vested right, acquired pursuant to the provisions of the Kansas water appropriation act, for the failure to comply with the provisions of this act. The suspension may be for a defined period in a subsequent calendar year or years but does not include or prevent the enforcement of the terms, conditions and limitations of a water right or permit during the current year of use.

(b) The chief engineer shall suspend the use of water under a permit or water right pursuant to subsection (a) only upon notice and hearing in accordance with the provisions of the Kansas administrative procedure act.

(c) Orders of the chief engineer issued pursuant to this section are subject to review in accordance with the provisions of K.S.A. 1999 Supp. 82a-1901, and amendments thereto.

Sec. 11. (a) No state moneys shall be used to establish a water bank.

(b) Each water bank shall pay all costs incurred by the division and by the Kansas geological survey for assistance and services provided pursuant to this act, including, but not limited to, costs for personnel necessary to provide such assistance and services.

Sec. 12. (a) There is hereby created in the state treasury the water resources cost fund. The chief engineer shall remit to the state treasurer all moneys received by the division to reimburse costs as required by section 11, and amendments thereto. Upon receipt, the state treasurer shall deposit the entire amount in the state treasury and credit it to the water resources cost fund.

(b) Moneys in the water resources cost fund shall be expended only for the division's costs of providing assistance and services as provided by this act.

(c) On or before the 10th of each month, the director of accounts and reports shall transfer from the state general fund to the water resources cost fund interest earnings based on:

- (1) The average daily balance of moneys in the water resources cost fund for the preceding month; and
- (2) the net earnings rate for the pooled money investment portfolio for the preceding month.

(d) All expenditures from the water resources cost fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the chief engineer for the purposes set forth in this section.

Sec. 13. (a) There is hereby created in the state treasury the geological survey cost fund. The director of the Kansas geological survey shall remit to the state treasurer all moneys received by the geological survey to reimburse costs as required by section 11, and amendments thereto. Upon receipt, the state treasurer shall deposit the entire amount in the state treasury and credit it to the geological survey cost fund.

(b) Moneys in the geological survey cost fund shall be expended only for the Kansas geological survey's costs of providing assistance and services as provided by this act.

(c) On or before the 10th of each month, the director of accounts and reports shall transfer from the state general fund to the geological survey cost fund interest earnings based on:

- (1) The average daily balance of moneys in the geological survey cost fund for the preceding month; and
- (2) the net earnings rate for the pooled money investment portfolio for the preceding month.

(d) All expenditures from the geological survey cost fund shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the director of the Kansas geological survey for the purposes set forth in this section.

[renumber remaining section accordingly]

Rep. Freeborn

PROPOSED AMENDMENT TO S.B. 388

Amend lines 3 and 4 on page 5 to read as follows:

(c) Prior to July 1, 2001, not more than one water bank shall be chartered to operate in the state. On or after July 1, 2001, and before July 1, 2002, not more than two additional water banks shall be chartered to operate in the state. On or after July 1, 2002, and before July 1, 2003, not more than two additional water banks shall be chartered to operate in the state. On and after July 1, 2003, no additional water banks shall be chartered to operate in the state until the first report of an evaluation team is submitted pursuant to section 7, and amendments thereto.

*House Environment
3-21-00
Attachment 4*

Substitute for SENATE BILL No. 469

By Committee on Energy and Natural Resources

2-21

House Environment
3-21-00
Attachment 5

9 AN ACT prohibiting sales of certain motor-vehicle fuel and providing
10 penalties for violations.

11
12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. (a) ~~No person shall sell or offer for sale in Kansas any~~
14 motor-vehicle fuel, as defined in K.S.A. 79-3401, and amendments
15 thereto, containing methyl tertiary-butyl ether (MTBE), except as pro-
16 vided in this act.

As used in this section, terms have the meanings provided by K.S.A. 79-3401, and amendments thereto.

17 ~~[(b) On and after July 1, 2002, no] motor-vehicle fuel delivered to any~~
18 ~~[service station] within Kansas shall contain MTBE in quantities greater~~
19 ~~than 0.5% by volume. [On and after July 1, 2003, no] motor-vehicle fuels~~
20 ~~delivered at the pump to any motor vehicle in Kansas shall contain MTBE~~
21 ~~in quantities greater than 0.5% by volume.~~

(b)

(c) No

distributor or retailer

No

22 ~~[(c) On and after July 1, 2002, the] motor-vehicle fuel retailer shall be~~
23 ~~provided, at the time of delivery of motor-vehicle fuel, on an invoice, bill~~
24 ~~of lading, shipping paper or other documentation, a declaration of the~~
25 ~~MTBE content, by volume percent, in the motor-vehicle fuel delivered.~~

(d) No

26 ~~[(d) On and after July 1, 2001, a] notice stating "THIS FUEL CON-~~
27 ~~TAINS MTBE" shall be displayed on each dispenser from which motor-~~
28 ~~vehicle fuel containing MTBE in excess of the detection limit of the~~
29 ~~approved test method is sold to the public. The letters on the notice shall~~
30 ~~be at least 1/2 inch in height and 1/16 inch stroke (width of type). The notice~~
31 ~~shall be conspicuously displayed on the upper 50% of the dispenser front~~
32 ~~panel in a position clear and conspicuous from the driver's position.~~

(e) A

33 ~~[(e)] Determination of the volume percentage of MTBE in motor-ve-~~
34 ~~hicle fuel shall be by one or more test methods approved by the secretary~~
35 ~~of agriculture.~~

(f)

36 ~~[(f)] In no event shall the provisions of this act be interpreted to au-~~
37 ~~thorize quantities of MTBE in motor-vehicle fuels to exceed those spec-~~
38 ~~ified in any applicable Kansas or federal statute.~~

(g)

39 ~~[(g)] The secretary of health and environment or the director of the~~
40 ~~division of environment, upon a finding that a person knowingly and will-~~
41 ~~fully has violated this section, may impose a penalty not to exceed \$10,000~~
42 ~~which shall constitute an actual and substantial economic deterrent to the~~
43 ~~violation for which it is assessed. In the case of a continuing violation,~~

(h)

1 every day such violation continues shall be deemed a separate violation.
 2 No such penalty shall be imposed except after notice of violation and
 3 opportunity for hearing upon the written order of the secretary or the
 4 director of the division of environment issued to the person who com-
 5 mitted the violation. The order shall state the violation, the penalty to be
 6 imposed and the right to request a hearing thereon. The request for
 7 hearing shall be in writing, directed to the secretary and filed with the
 8 secretary within 15 days after service of the order. The hearings shall be
 9 conducted in accordance with the Kansas administrative procedure act.

10 ~~[(h)]~~ Nothing in this section shall be construed to abridge, limit or
 11 otherwise impair the right of any person to damages or other relief on
 12 account of injury to persons or property and to maintain any action or
 13 other appropriate proceeding therefor.

14 ~~[(i)]~~ The provisions of this section shall not take effect until the United
 15 States environmental protection agency grants a waiver allowing the state
 16 of Kansas to control or prohibit the use of MTBE in motor-vehicle fuels.

17 Sec. 2. This act shall take effect and be in force from and after its
 18 publication in the statute book.

(i) It shall be an affirmative defense in any proceeding against a distributor or retailer under subsection (h), and in any other action or proceeding against a distributor or retailer arising out the sale or furnishing of motor vehicle fuel with an MTBE content in excess 0.5%, that the invoices, bills of lading, shipping papers or other documentation of the sale or furnishing of motor fuel provided to the distributor or retailer for the three months preceding the alleged violation show the MTBE content of such motor vehicle fuel to be 0.5% or less.

(j)

(k)

24 months after

Substitute for SENATE BILL No. 469

By Committee on Energy and Natural Resources

2-21

House Environment
3-21-00
Attachment 6

9 AN ACT prohibiting sales of certain motor-vehicle fuel and providing
10 penalties for violations.

11
12 *Be it enacted by the Legislature of the State of Kansas:*

13 Section 1. (a) No person shall sell or offer for sale in Kansas any
14 motor-vehicle fuel, as defined in K.S.A. 79-3401, and amendments
15 thereto, containing methyl tertiary-butyl ether (MTBE), except as pro-
16 vided in this act.

17 (b) ~~On and after July 1, 2002,~~ no motor-vehicle fuel delivered to any [subject to subsection (i) of this
18 service station within Kansas shall contain MTBE in quantities greater section,

19 than 0.5% by volume. ~~On and after July 1, 2003, no motor-vehicle fuels~~ \$ 2% [subject to subsection (i) of this
20 delivered at the pump to any motor vehicle in Kansas shall contain MTBE section

21 in quantities greater than 0.5% by volume. \$ 2% [subject to subsection (i) of this
22 (c) ~~On and after July 1, 2002,~~ the motor-vehicle fuel retailer shall be section,

23 provided, at the time of delivery of motor-vehicle fuel, on an invoice, bill
24 of lading, shipping paper or other documentation, a declaration of the

25 MTBE content, by volume percent, in the motor-vehicle fuel delivered. [subject to subsection (i) of this
26 (d) ~~On and after July 1, 2001,~~ a notice stating "THIS FUEL CON- section

27 TAINS MTBE" shall be displayed on each dispenser from which motor-
28 vehicle fuel containing MTBE in excess of the detection limit of the

29 approved test method is sold to the public. The letters on the notice shall
30 be at least 1/2 inch in height and 1/16 inch stroke (width of type). The notice

31 shall be conspicuously displayed on the upper 50% of the dispenser front
32 panel in a position clear and conspicuous from the driver's position.

33 (e) Determination of the volume percentage of MTBE in motor-ve-
34 hicle fuel shall be by one or more test methods approved by the secretary
35 of agriculture.

36 (f) In no event shall the provisions of this act be interpreted to au-
37 thorize quantities of MTBE in motor-vehicle fuels to exceed those spec-
38 ified in any applicable Kansas or federal statute.

39 (g) The secretary of health and environment or the director of the
40 division of environment, upon a finding that a person knowingly and will-
41 fully has violated this section, may impose a penalty not to exceed \$10,000

42 which shall constitute an actual and substantial economic deterrent to the
43 violation for which it is assessed. In the case of a continuing violation,

6-2

1 every day such violation continues shall be deemed a separate violation.
2 No such penalty shall be imposed except after notice of violation and
3 opportunity for hearing upon the written order of the secretary or the
4 director of the division of environment issued to the person who com-
5 mitted the violation. The order shall state the violation, the penalty to be
6 imposed and the right to request a hearing thereon. The request for
7 hearing shall be in writing, directed to the secretary and filed with the
8 secretary within 15 days after service of the order. The hearings shall be
9 conducted in accordance with the Kansas administrative procedure act.

10 (h) Nothing in this section shall be construed to abridge, limit or
11 otherwise impair the right of any person to damages or other relief on
12 account of injury to persons or property and to maintain any action or
13 other appropriate proceeding therefor.

14 (i) The provisions of this section shall not take effect until the United 24 months after
15 States environmental protection agency grants a waiver allowing the state
16 of Kansas to control or prohibit the use of MTBE in motor-vehicle fuels.

17 Sec. 2. This act shall take effect and be in force from and after its
18 publication in the statute book.

STATE OF KANSAS



Bill Graves, Governor

KANSAS WATER OFFICE
Al LeDoux
Director

TESTIMONY TO
HOUSE COMMITTEE ON ENVIRONMENT
ON SENATE BILL 634
March 21, 2000
By Terry Duvall
Kansas Water Office

901 S. Kansas Ave.
Topeka, Kansas 66612-1249

785-296-3185
FAX 785-296-0878
TTY 785-296-6604

Senate Bill 634 was introduced by the Committee on Ways and Means as a companion to Senate Bill 639 which included the appropriations for the Kansas Water Office for FY 2001. Senate Bill 634 would allow the Kansas Water Office to borrow money from the pooled money investment board to be used to meet any unusual expenses relating to operation, maintenance and repair costs associated with the Kansas Water Marketing Program.

K.S.A. 82a-1315(c) (b) (5) was enacted in 1991 to allow the Kansas Water Office to maintain a reserve account within the Kansas Water Marketing Fund to meet any shortfall in revenue or unusual expenses. The primary objective of that statutory change in 1991 was to stabilize the annual rate charged for water so customers would not be subject to dramatic one year increases in rates and so future customers could be assured of a stable rate.

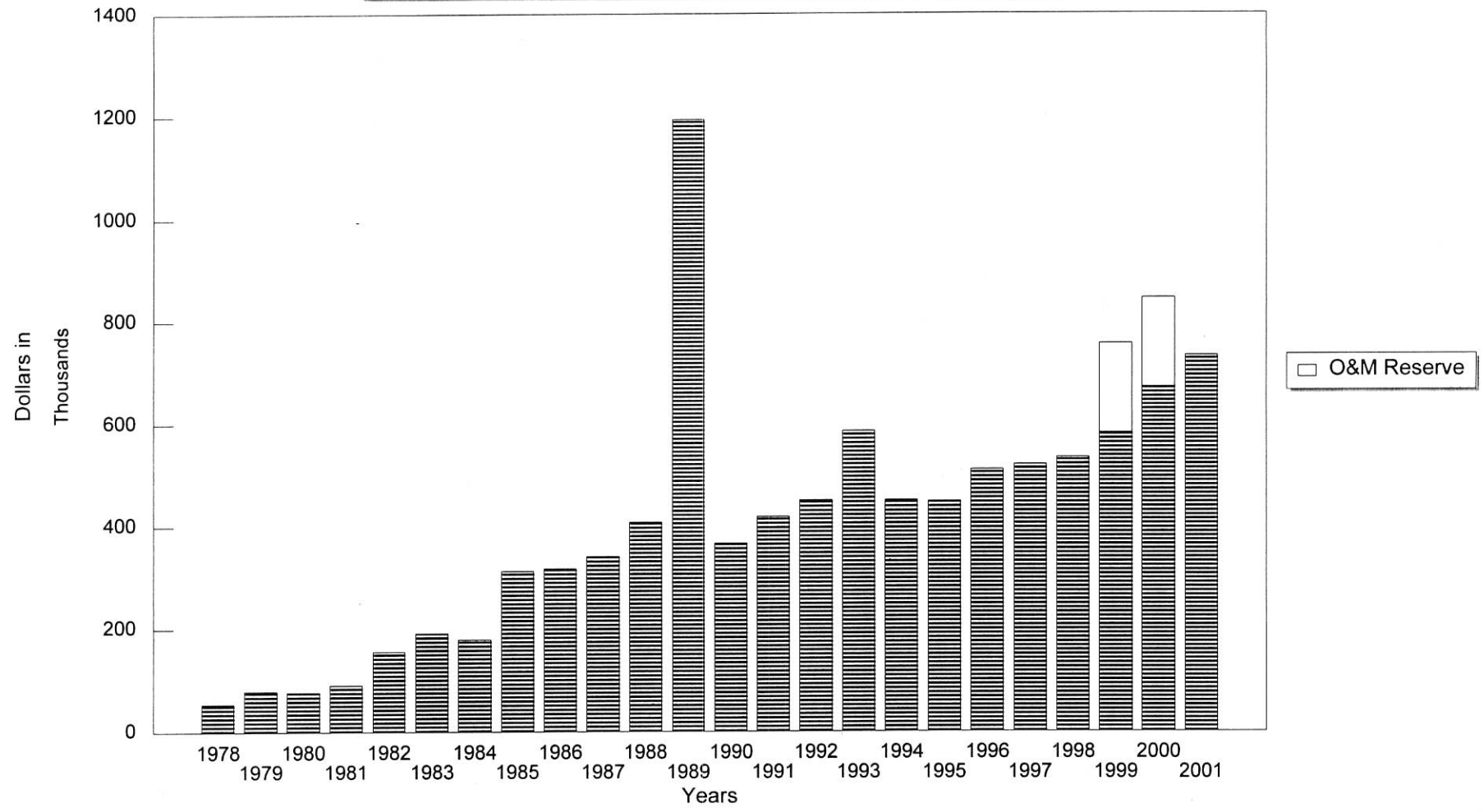
Passage of Senate Bill 634 would simply authorize the Kansas Water Office to meet these unusual circumstances through a loan rather than by a reserved account. The combined impact of passage of Senate Bill 634 and the associated provisions of Senate Bill 639 would be as follows.

1. Deposit \$633,360.00 in the State General Fund from the "reserve account" (Senate Bill 639).
2. Decrease the rate charged to water marketing customers in calendar year 2001 from .14490 cents to .14330 cents. A savings of .00220 cents per 1,000 gallons. This small reduction would continue in ensuing calendar years (Senate Bill 639).
3. Authorize the Kansas Water Office to meet short term "cash flow" needs from the pooled money investment board instead of from the "reserve account" (Senate Bill 639. This is done by proviso and would have to be done annually to allow the Kansas Water Office to meet this need. We would suggest an amendment to the bill to allow the Office to borrow interest free for no more than one year.)
4. Authorize the Kansas Water Office to borrow money for up to 5 years to meet unusual expenses associated with the program. When these unusual expenses occur it is anticipated that the actual rate increase would be less than 1 cent per thousand gallons (Senate Bill 634).

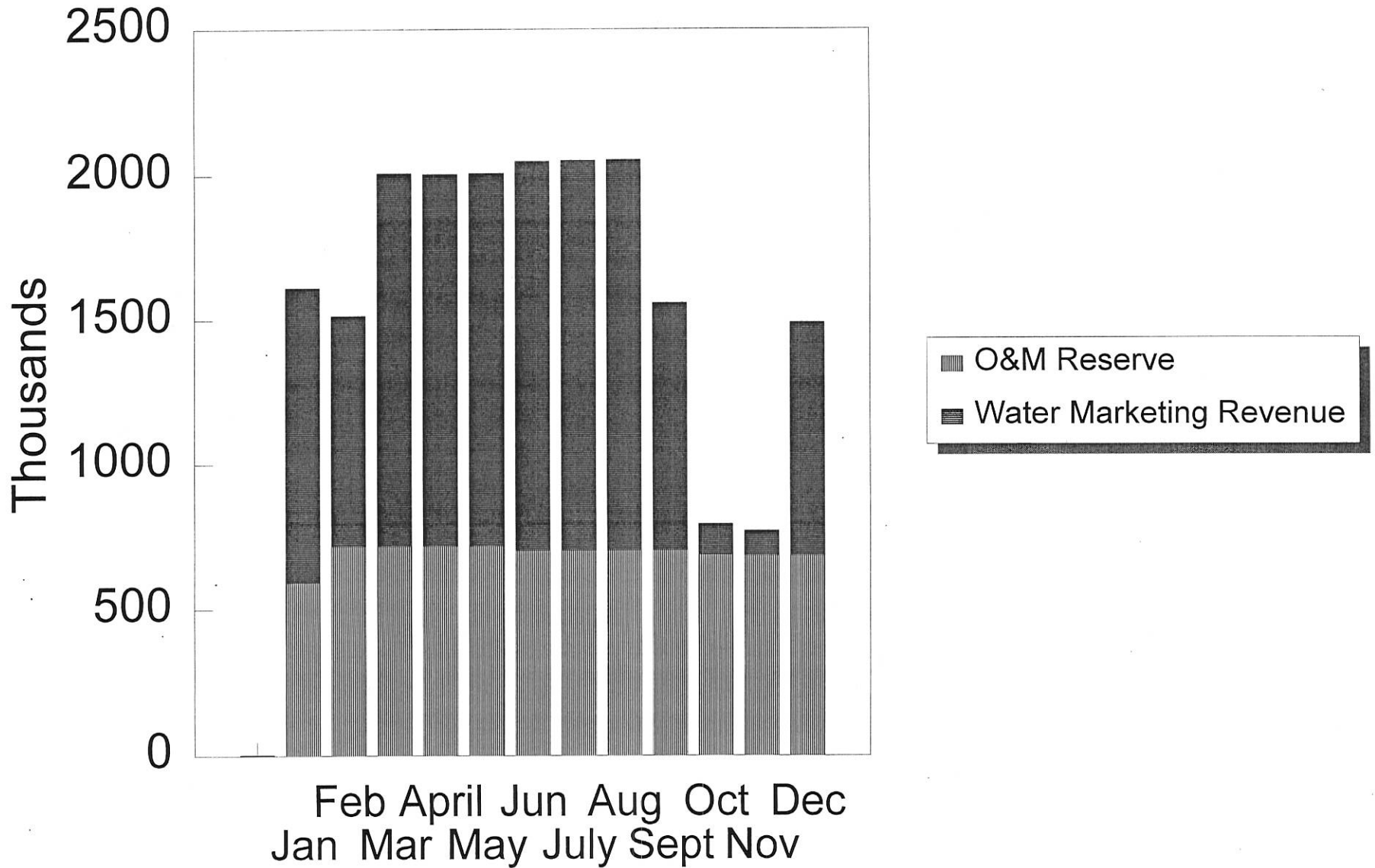
If the committee approves Senate Bill 634, it may want to consider repealing K.S.A. 82a-1315(c)(b)(5) which established the reserve account.

The Kansas Water Office believes Senate Bill 634 is necessary to meet its contractual obligations if Senate Bill 639 is enacted.

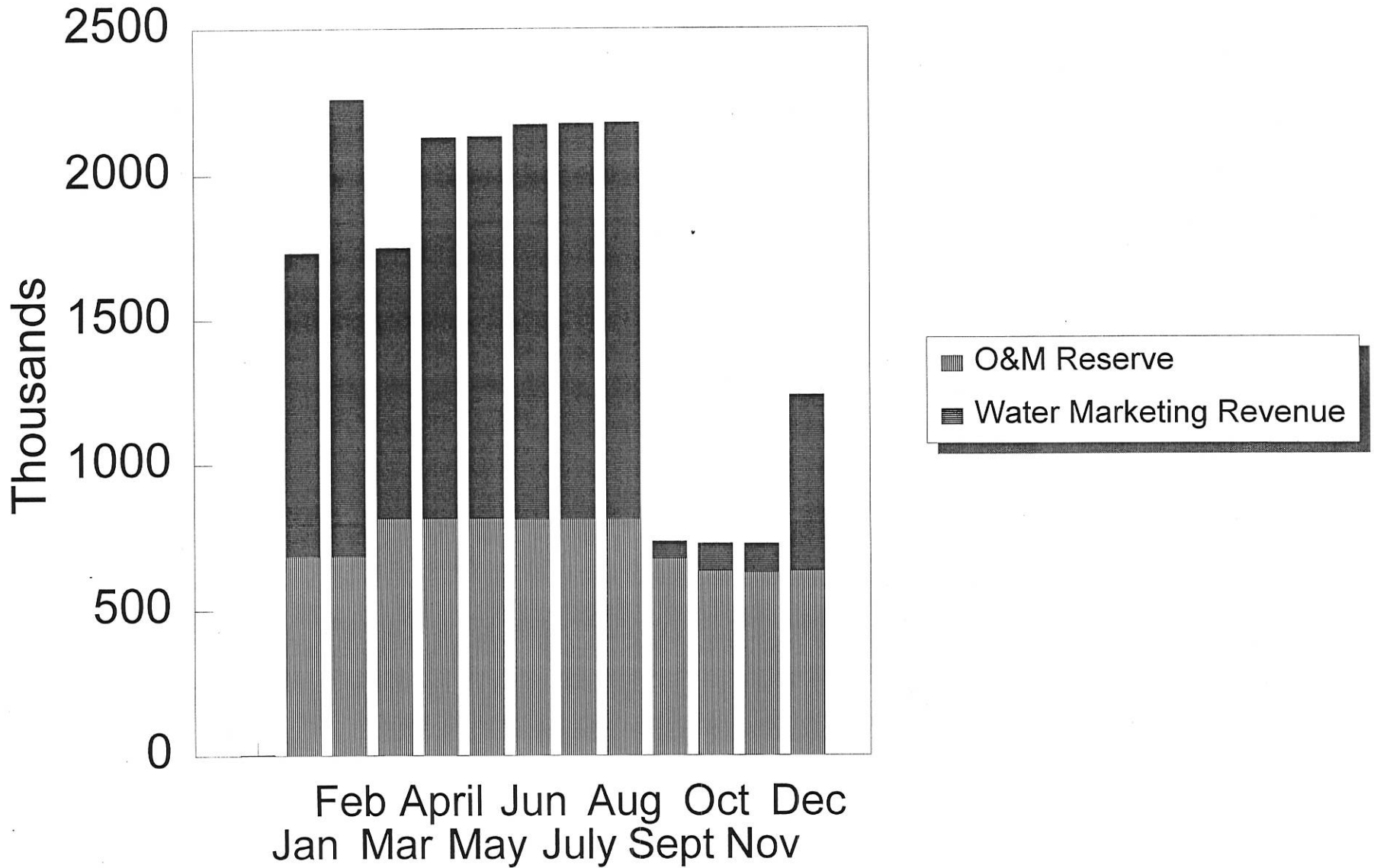
Annual Operation & Maintenance Costs



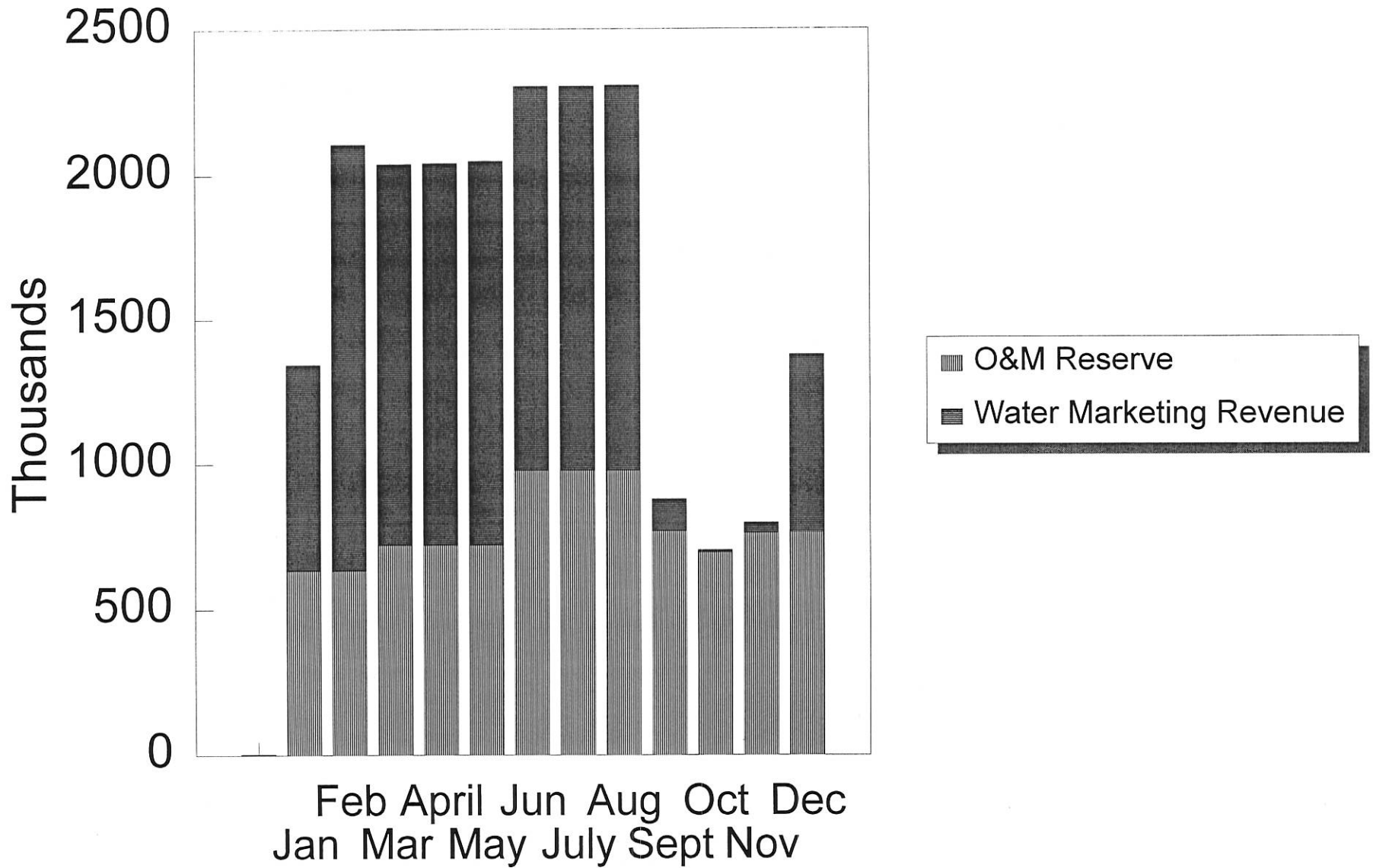
1996 Water Marketing Fund



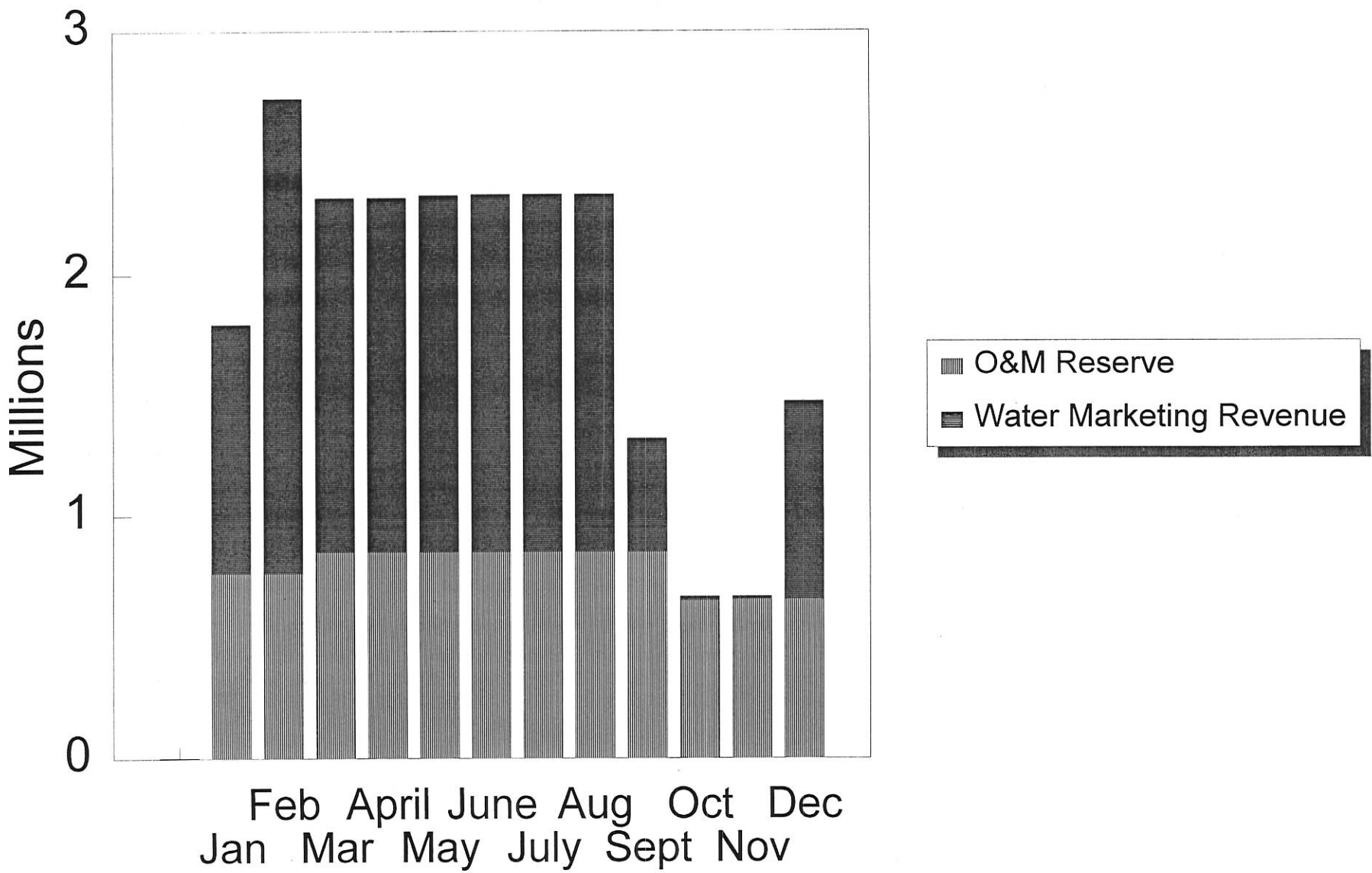
1997 Water Marketing Fund



1998 Water Marketing Fund



1999 Water Marketing Fund



By Committee on Ways and Means

2-15

7-7

11 AN ACT authorizing the Kansas water office to obtain loans under cer-
12 tain prescribed conditions; relating to the pooled money investment
13 board.

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15 Be it enacted by the Legislature of the State of Kansas:

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Section 1. (a) Whenever Subject to the limitations of this section,
whenever it appears that the resources in any fiscal year commencing
after June 30, 2000, are insufficient to meet in full the estimated expend-
itures as they become due to meet duties imposed by law on the water
marketing fund of the Kansas water office as a result of increases in water
rates, fees or charges imposed by the federal government, the pooled
money investment board is authorized and directed to loan to the director
of the Kansas water office sufficient funds to reimburse the water mar-
keting fund for increases in water rates, fees or charges imposed by the
federal government, and to allow the Kansas water office to spread such
increases to consumers over a longer period, except that no such loan
shall be made unless the terms thereof have been approved by the direc-
tor of the budget. The pooled money investment board is authorized and
directed to use any moneys in the operating accounts, investment ac-
counts or other investments of the state of Kansas to provide the funds
for such loan. Each such loan shall bear interest at a rate equal to the
interest rate being paid on state inactive account moneys at the time of
the making of such loan. Such loan shall not be deemed to be an in-
debtedness or debt of the state of Kansas within the meaning of section
6 of article 11 of the constitution of the state of Kansas.

In addition, short-term (less than one year) interest free loans
may be made to the director to cover cash flow shortages.

long-term

(b) Upon certification by the pooled money investment board by the
director of the Kansas water office of the amount of each loan authorized
pursuant to subsection (a), the pooled money investment board shall
transfer each such amount certified by the director of the Kansas water
office from the state bank account or accounts prescribed in subsection
(a) to the water marketing fund of the Kansas water office.

(c) The principal and interest of each loan authorized pursuant to
subsection (a) shall be repaid in payments payable at least annually for a

1 period of not more than five years.

2 (d) The aggregate outstanding balance of all loans pursuant to
3 this section shall not exceed \$1,000,000 at any one time.

4 Sec. 2. This act shall take effect and be in force from and after its
5 publication in the statute book.

7-8



State of Kansas

Office of the Attorney General

120 S.W. 10th Avenue, 2ND FLOOR, TOPEKA, KANSAS 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

March 21, 2000

MAIN PHONE: (785) 296-2215
FAX: 296-6296

ATTORNEY GENERAL OPINION NO. 2000 - 19

The Honorable Laura L. McClure
State Representative, 119th District
State Capitol, Room 278-W
Topeka, Kansas 66612-1504

Re: Public Health--Secretary of Health and Environment, Activities--Abatement of Nuisances; Prevention of Water Pollution; Confined Feeding Facilities for Swine; Standards and Requirements; Application; Air Quality Control; Powers of Secretary of KDHE

Synopsis: Kansas statutes give the Secretary of KDHE discretion to determine what requirements and standards are necessary to prevent water pollution by a confined feeding facility for swine. The Secretary may enact rules and regulations that impose requirements on swine facilities of any size if the Secretary determines the requirements are necessary to prevent water pollution. The Secretary has authority to adopt rules and regulations imposing greater separation distances for confined feeding facilities for swine to prevent water pollution. The Secretary may enact regulations to control odor from confined feeding facilities for swine under the Kansas Air Quality Act. Additionally, the Secretary may adopt rules and regulations for confined feeding facilities for swine that were in operation on May 7, 1998, and are not subject to the standards and requirements provided by K.S.A. 1999 Supp. 65-1,178 *et seq.* Different standards and requirements may be imposed by the Secretary on swine facilities based on site conditions if those standards and requirements are necessary to prevent water pollution. Cited herein: K.S.A. 65-159; K.S.A. 1999 Supp. 65-166a; 65-171d; 65-1,178; 65-1,187; 65-1,196; 65-1,199; 65-3001; 65-3002; 65-3005; 65-3007; 65-3008; K.S.A. 77-415; 77-437; K.A.R. 28-18a-2; 28-18a-12; 28-18a-15; 28-18a-18; 28-18a-20; 28-18a-32; 28-19-1; 1998 Substitute for House Bill No. 2950.

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*

House Environment
3-21-00
Attachment 8

Dear Representative McClure:

You request our opinion concerning the authority of the Secretary of the Kansas Department of Health and Environment (KDHE) to regulate confined feeding facilities for swine. You ask a number of questions regarding the Secretary's authority to impose stricter standards than those enacted in 1998 Substitute for House Bill No. 2950, codified at K.S.A. 1999 Supp. 65-1,178 through 65-1,199). You note that those statutes set certain requirements on swine facilities depending on the size of the facility. Your first question is whether the Secretary of KDHE has authority to impose those requirements on facilities of a smaller size than indicated in the statutes.

In considering the powers of the Secretary of KDHE to regulate a swine finishing facility, the Kansas Supreme Court stated:

"Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency."¹

Thus, we must examine the statutes to determine the Secretary's power to regulate confined feeding facilities for swine. When a statute specifies that its requirements apply only to a facility of a certain size, the Secretary may not apply that statute to a different size facility unless there is another statute or regulation that allows him to do so. K.S.A. 1999 Supp. 65-1,196 addresses the Secretary's general authority to regulate confined feeding facilities for swine, and states in pertinent part:

"(a) The express adoption or authorization of standards and requirements for swine facilities by this act shall not be construed to prohibit or limit in any manner the secretary's authority to adopt and enforce rules and regulations establishing:

"(1) Standards and requirements for swine facilities *that are in addition to or more stringent than those provided by this act* if the secretary determines necessary for the purposes provided by K.S.A. 65-171d and amendments thereto." (Emphasis added.)

K.S.A. 1999 Supp. 65-171d sets forth the Secretary's responsibilities to prevent water pollution and provides in part as follows:

"(a) For the purpose of preventing surface and subsurface water pollution

¹*Pork Motel, Corp. v. Kansas Dept. of Health & Environment*, 234 Kan. 374, 378 (1983).

and soil pollution detrimental to public health or to the plant, animal and aquatic life of the state, and to protect beneficial uses of the waters of the state and to require the treatment of sewage predicated upon technologically based effluent limitations, the secretary of health and environment shall make such rules and regulations, including registration of potential sources of pollution, as may in the secretary's judgment be necessary to: . . . (2) control the disposal, discharge or escape of sewage . . . and (3) establish water quality standards for the waters of the state to protect their beneficial uses.

....

"(d) In adopting rules and regulations, the secretary of health and environment, taking into account the varying conditions that are probable for each source of sewage and its possible place of disposal, discharge or escape, may provide for varying the control measures required in each case to those the secretary finds to be necessary to prevent pollution."

These provisions give the Secretary discretion to determine what standards and requirements are necessary to prevent water pollution by swine facilities, and to enact regulations that are in addition to or more stringent than those provided by K.S.A. 1999 Supp. 65-1,178 *et seq.* In our opinion, enacting more stringent standards includes applying requirements imposed by statute on larger swine facilities to facilities of any size if the Secretary determines that is necessary to effect adequate water pollution control.

It should be noted that several statutes allow the Secretary to impose certain requirements on any confined swine feeding facility regardless of size if he determines the requirements are necessary. For example, K.S.A. 1999 Supp. 65-166a authorizes the Secretary to require a water pollution control permit for a confined feeding facility with an animal unit capacity of less than 300 if the Secretary determines that it has significant water pollution potential. K.S.A. 1999 Supp. 65-171d(g) provides that if a significant water pollution potential is identified for new construction of a confined feeding facility with an animal unit capacity of less than 300, the facility shall be required to obtain a permit from the Secretary.

You next ask whether the Secretary has authority to require more stringent separation distances than those required by statute. Separation distances are set forth in K.S.A. 1999 Supp. 65-171d. Pursuant to the portions of that statute quoted above, and to the authority provided in K.S.A. 1999 Supp. 65-1,196, the Secretary has authority to adopt rules and regulations that impose greater separation distances if the Secretary determines they are necessary to prevent water pollution.

You inquire whether the Secretary may impose more restrictive standards and requirements on confined swine feeding facilities by executive order or whether he must

follow the Rules and Regulations Filing Act.² Both K.S.A. 1999 Supp. 65-171d and 65-1,196 refer to the Secretary's authority to regulate by adopting rules and regulations. We could find no statutory authority for the Secretary to place requirements on swine facilities by executive order. Therefore, it is our opinion that the Secretary must use the statutory procedure set out in the Rules and Regulations Filing Act.

Your next question is whether the Secretary may impose more stringent requirements to control odor from swine facilities. K.S.A. 65-159 gives the Secretary power and authority to examine nuisances, sources of filth and causes of sickness that may be injurious to the health of the inhabitants of any county within the State. If a nuisance, source of filth or cause of sickness is found to exist on any property, the Secretary may order the owner or occupant of the property to remove the nuisance, source of filth or cause of sickness. Additionally, K.A.R. 28-18a-20 allows the Secretary to deny, suspend, revoke or terminate a permit or certification for a confined feeding facility for swine if it is found to violate K.S.A. 65-159. Whether odor from a swine facility constitutes a violation of K.S.A. 65-159 would depend on the specific fact situation.

K.S.A. 1999 Supp. 65-1,187 addresses swine facility odor control. It requires a facility with an animal unit capacity of 1,000 or more to submit an odor control plan which must be approved by KDHE as a condition of issuance of a permit. The statute also provides:

"(c) In promulgating rules and regulations governing odor control plans, the secretary shall take into consideration different sizes of facilities and other relevant factors."

This provision arguably authorizes the Secretary to enact regulations requiring odor control plans for facilities with an animal unit capacity of less than 1,000; because it can be read more than one way, the agency has authority to interpret its provisions.³ The current regulation concerning odor control does not provide for an odor control plan for facilities with a capacity of less than 1,000.⁴ Because odor control is not addressed in K.S.A. 1999 Supp. 65-171d, the authority contained in K.S.A. 1999 Supp. 65-1,196 for the Secretary to enact more stringent requirements through the adoption of rules and regulations to prevent water pollution would not apply to odor control.

The Kansas Air Quality Act⁵ gives the Secretary authority to regulate in this area. The Secretary is given the power to adopt rules and regulations implementing the Act⁶ and to issue orders, permits and approvals as may be necessary to effectuate the purposes of the

²K.S.A. 77-415 through 77-437.

³*State ex rel. Stephan v. Kansas Racing Commission*, 246 Kan. 708 (1990).

⁴K.A.R. 28-18a-15.

⁵K.S.A. 1999 Supp. 65-3001 *et seq.*

⁶K.S.A. 1999 Supp. 65-3005(a).

Act.⁷ The Secretary is required to classify air contaminant sources which, in the Secretary's judgment, may cause or contribute to air pollution.⁸ "Air pollution" is defined as:

"[T]he presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as is, or tends significantly to be, injurious to human health or welfare, animal or plant life, or property, or would unreasonably interfere with the enjoyment of life or property."⁹

"Air contaminant" is defined to include odorous substances.¹⁰ The Act provides that:

"No person shall construct, own, operate, install, alter or use any air contaminant emission stationary source which, in accordance with rules and regulations, the secretary finds may cause or contribute to air pollution, unless an appropriate approval or permit has been issued for the source by the secretary under this act. . . ."¹¹

"'Emission' means a release into the outdoor atmosphere of air contaminants."¹²
"'Stationary source' means any building, structure, facility or installation which emits or may emit any air contaminant."¹³ The rules and regulations adopted pursuant to this Act¹⁴ do not specifically include emissions by swine facilities; however, in our opinion, the Act is broad enough to give the Secretary authority to include regulations regarding odor from swine facilities. We recognize that measuring emissions from a swine facility may be difficult and, therefore, we do not opine on whether in actuality it is possible or practical to use the Act as a mechanism to control odor from swine facilities.

You next inquire whether the Secretary has authority to impose the same requirements on existing swine facilities of any size. K.S.A. 1999 Supp. 65-1,196 provides in pertinent part:

"The express adoption or authorization of standards and requirements for swine facilities by this act shall not be construed to prohibit or limit in any manner the secretary's authority to adopt and enforce rules and regulations establishing:

⁷K.S.A. 1999 Supp. 65-3005(c).

⁸K.S.A. 1999 Supp. 65-3007(a).

⁹K.S.A. 1999 Supp. 65-3001(c).

¹⁰K.S.A. 1999 Supp. 65-3002(a).

¹¹K.S.A. 1999 Supp. 65-3008(a).

¹²K.S.A. 1999 Supp. 65-3002(e).

¹³K.S.A. 1999 Supp. 65-3002(l).

¹⁴K.A.R. 28-19-1 *et seq.*

....

(2) standards and requirements for swine facilities that exist on the effective date of this act and that are not subject to the standards and requirements provided by this act."

This provision allows the Secretary to enact regulations for existing swine facilities. As discussed in our responses to your previous questions, the Secretary may adopt regulations effecting facilities of any size if the Secretary determines the regulations are necessary to prevent water or air pollution.

Finally, you question whether the Secretary may be site specific in imposing additional requirements for confined feeding facilities for swine. You specifically ask whether the Secretary may impose additional restrictions for new or existing facilities located in sensitive groundwater areas as referred to in K.A.R. 28-18a-32. That regulation allows KDHE to require new swine facilities with an animal unit capacity of 3,725 or more or existing facilities that wish to expand to an animal unit capacity of 3,725 or more to line their swine waste-retention lagoons or ponds with an impermeable synthetic membrane liner. The regulation does not apply to smaller facilities, however the provisions of K.S.A. 1999 Supp. 65-171d and 65-1,196 that allow the Secretary to enact rules and regulations with more stringent standards for swine facilities to prevent water pollution would apply to facilities in sensitive groundwater areas. Several statutes and regulations allow the Secretary to be site specific in determining what requirements to place on a specific facility. K.S.A. 1999 Supp. 65-166a(f) allows the Secretary to require a permit for a facility with an animal unit capacity of less than 300 "if the secretary determines that such facility has significant water pollution potential." K.S.A. 1999 Supp. 65-171d(d) provides:

"In adopting rules and regulations, the secretary of health and environment, taking into account the varying conditions that are probable for each source of sewage and its possible place of disposal, discharge or escape, may provide for varying the control measures required in each case to those the secretary finds to be necessary to prevent pollution. . . ." (Emphasis added.)

K.A.R. 28-18a-2 requires any confined feeding facility for swine, regardless of size, to obtain a permit if the secretary determines that it presents a significant water pollution potential. Another regulation that addresses the design and construction of animal waste management systems states in pertinent part:

"If site topography, operating procedures, experience, and other available information indicate that more than the minimum standards of design, construction, and maintenance are required to effect adequate water pollution control, additional provisions may be required."¹⁵

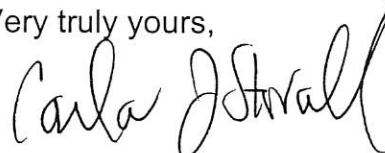
¹⁵K.A.R. 28-18a -12(a).

K.A.R. 28-18a-18(b) provides:

"Any swine facility shall, when required by the department, provide for the installation and sampling of groundwater monitoring wells or the sampling of existing wells in the vicinity of waste-retention lagoons or ponds, waste treatment systems, land application sites, or other areas either known to be or potentially impacted by swine or other process wastes, or where warranted by groundwater, geologic, or construction conditions."

In summary, Kansas statutes give the Secretary of KDHE discretion to determine what requirements and standards are necessary to prevent water pollution by a confined feeding facility for swine. The Secretary may enact rules and regulations that impose requirements on swine facilities of any size if the Secretary determines the requirements are necessary to prevent water pollution. The Secretary has authority to adopt rules and regulations imposing greater separation distances for confined feeding facilities for swine to prevent water pollution. The Secretary may enact regulations to control odor from confined feeding facilities for swine under the Kansas Air Quality Act. Additionally, the Secretary may adopt rules and regulations for confined feeding facilities for swine that were in operation on May 7, 1998, and are not subject to the standards and requirements provided by K.S.A. 1999 Supp. 1,178 *et seq.* Different standards and requirements may be imposed by the Secretary on swine facilities based on site conditions if those standards and requirements are necessary to prevent water pollution.

Very truly yours,



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Testimony on Water Banking Legislation
Senate Bill No. 388

Jerry Blain, Superintendent of Water Production, City of Wichita
Water Banking Task Force Member

Water Rights Banking was identified in 1995 in the State Water Plan as a potential tool to reduce water consumption. The Water Banking Task Force presented a plan to the legislature that it felt meet that goal, and also facilitated moving water usage to users that could achieve a greater benefit from it.

Throughout the state there are significant areas where water rights for groundwater have been appropriated in excess of the safe yield of the aquifer. This has led to a depletion of those aquifers. Water banks have the potential to act as a tool to reduce water usage in those areas that are overdeveloped. However, I am concerned that some of the language that has been inserted into the proposed legislation would not meet that goal, and in fact could lead to an increase in water usage in some areas.

The use of water in Kansas, particularly for irrigation purposes, has greatly increased the economic strength of the state. However, if that resource is not utilized appropriately, it will not continue to provide those economic benefits.

I urge the committee to remove those modifications in the proposed legislation that could lead to increased water usage, and return water banks to a tool to provide economic incentives to increase water conservation. In particular, the language that states that the bank's charter does not have to ensure that there will be no increase in consumptive use, if the bank is a groundwater bank, and that actual prior use will not be taken into account in the determination of a bankable right, should be removed from the legislation.

Water Banks will not be the answer to all of the problems that have been created by the over appropriation of water in Kansas. However, it can be an effective tool to help decrease water use in areas that are over appropriated, and to let water be used by those who can get the most benefit from its use.

Only viable water rights, or portions of water rights, should be deposited in the bank. The bank should only accept water rights that are actually being used for deposits, and a Bank should withhold a portion of the groundwater right as a conservation component.