

MINUTES OF THE HOUSE COMMITTEE ON ENVIRONMENT.

The meeting was called to order by Chairperson Joann Freeborn at 3:30 p.m. on February 20, 2001 in Room 231-N of the Capitol.

All members were present except:

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: Jamie Clover-Adams, Secretary of Kansas Department of Agriculture, 109 SW 9<sup>th</sup> Street, 4<sup>th</sup> Floor, Topeka, KS 66612  
David Pope, Chief Engineer, Water Resources Program, Kansas Department of Agriculture, 109 SW 9<sup>th</sup>, 2<sup>nd</sup> Floor, Topeka, KS 66612  
Margaret Fast, Kansas Water Office, 901 S. Kansas Ave., Topeka, KS 66612-1249  
Steve Frost, Executive Director, Groundwater Management #3, 409 Campus Drive Ste. 106, Garden City, KS 67846

Others attending: See Attached Sheet

Chairperson Joann Freeborn called the meeting to order at 3:30 p.m. She called the committee's attention to a document that had been distributed from Charles Benjamin, Sierra Club, Kansas Chapter, concerning frequently asked questions about water quality standards proposed for Kansas by the U.S. Environmental Protection Agency (EPA). (See attachment 1)

The Chairperson opened the hearing on **HB2316**.

**HB2316: An act concerning water; providing civil penalties for certain violations of laws and orders, terms, conditions and limitations relating thereto.**

Raney Gilliland, Legislative Research, explained the bill.

Jamie Clover-Adams, Secretary of Agriculture, was welcomed to the committee. She appeared before the committee in support of the bill and the testimony of David Pope, Chief Engineer, Division of Water Resources, KDA. She answered questions raised by the committee concerning the bill. The Kansas Department of Agriculture needs a more efficient and effective mechanism than is currently available to enforce the provisions of the Kansas Water Appropriations Act. She feels we face stagnate resources and must find new ways to continue to fulfill our statutory obligations. (See attachment 2)

David Pope, Chief Engineer, Water Resources Program, KDA, was welcomed. He provided testimony in support of the bill. Diverting water for beneficial uses other than domestic ones requires a permit or water right. These permits and water rights have conditions and limitations imposed on them to protect other water users from impairment and to ensure that water is available to all citizens. Water users who exceed their limits, or violate conditions of their water rights, may jeopardize other users with a right to access a water supply. Total water appropriations are approaching the volume of water available for use, so it is increasingly important for regulatory authorities to effectively enforce compliance with the conditions and limitations of existing water rights. Implementing this bill will improve the division of water resource's ability to administer the Kansas Water Appropriation Act by giving KDA the tools to more effectively and efficiently enforce provisions of the Act. (See attachment 3)

Margaret Fast, Kansas Water Office, was welcomed to the committee. She testified in support of the bill and believes enforcement of the Water Appropriation Act is consistent with the goals, policies, and objectives of

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON ENVIRONMENT, Room 231-N of the Capitol  
at 3:30 p.m. on February 20, 2001.

the Kansas Water Plan, especially those provisions in the bill related to: Water conservation plans; Installation or maintenance of a water measurement device; Maximum annual quantity or rate of diversion ; and Minimum desirable stream flow orders. The Kansas Water Authority adopted a position on water rights banking that states that water right enforcement is critical in the operation of a water right bank for both the participants in the bank and those who do not participate. There would be little incentive to lease available water from a bank if there were no or very light penalties associated with over pumping. (See attachment 4)

Steve Frost, Executive Director, SW Groundwater Management #3, was welcomed to the committee. He testified in support of the bill. The District is aware that compliance with “overpumping”, conservation plans, meter installation/operations, and special water right change approvals is a significant problem that can be improved with the deterrent prospects of civil penalty impositions. The District is currently negotiating with the Chief Engineer’s office to effectuate a stronger enforcement presence from the Division of Water Resources in their area. The success of increasingly sophisticated management strategies such as the “two pools” concept, “flex-appropriations”, and “long-moves” will necessarily require that an enhanced level of awareness and compliance be instituted well in advance of these mechanisms being implemented. (See attachment 5)

There were no opponents to the bill. The Chairperson closed the hearing on **HB2316**. She asked if the committee wished to make a motion.

Rep. Tom Sloan made a motion the amendment proposed by David Pope be adopted. (See attachment 3) Rep. Dennis McKinney seconded the motion. Motion carried.

Rep. Tom Sloan made a motion the bill be passed favorably as amended. Rep. Vaughn Flora seconded the motion. Motion carried. Rep. Clay Aurand will carry the bill on the House Floor.

The Chairperson opened **HB2047** for discussion or possible action.

**HB2047: An act concerning water rights; relating to water banking; enacting the Kansas water banking act.**

Mary Torrence, Revisor of Statutes, distributed copies of the Sub-Committee report and explained the changes that had been made to the bill. (See attachment 6) Questions and discussion followed.

Rep. Tom Sloan made a correction on page 5, line 27, to change “operated” to “operate”.

Rep. Vaughn Flora made a motion to adopt the balloon and include correction on page 5, line 27, change “operated” to “operate”. Rep. Dan Johnson seconded the motion. Motion carried.

Rep. Laura McClure made a motion to amend Section 5 (c) on page 5 to provide that not more than one water bank shall be established before July 1, 2002, and one additional one may be chartered on or after July 1, 2002. Rep. Dennis McKinney seconded the motion. Motion carried.

Margaret Fast distributed copies of an amendment to the bill and a copy of Safe Deposit Examples, for review. (See attachment 7) No action was taken on the amendment.

Rep. Tom Sloan made a motion the bill be passed as amended. Rep. Dennis McKinney seconded the motion. Motion carried. Rep. Joann Freeborn will carry the bill on the House Floor.

Chairperson Freeborn thanked the guests and the committee members for their attention.

The meeting adjourned at 5:05 p.m. The next meeting has not been scheduled.

# HOUSE ENVIRONMENT COMMITTEE GUEST LIST

DATE: February 20, 2001

NAME	REPRESENTING
RON APPLETOFT	WATER DIST. No 1 of Jo Co.
STEVEN FROST	SWKS GMD
Chris Wilson	SW KS GMD
Pat Lehman	GMD 4
David L Pope	KVA

# FAQs



## EPA Proposal Regarding Water Quality Standards for Kansas

September 2000

Following are frequently asked questions about water quality standards proposed for Kansas by the U.S. Environmental Protection Agency (EPA):

**Q.** Why is EPA proposing federal water quality standards in Kansas?

**A.** The federal Clean Water Act (CWA) requires EPA to approve or disapprove state water quality standards when the state revises its standards and submits them to EPA for review. EPA must then "promptly" prepare and publish proposed federal replacement standards if the agency finds that the revised standards are inconsistent with the CWA and its implementing regulations. The CWA also requires EPA to issue replacement standards as federal regulations if the state does not revise its standards. EPA must publish the proposed federal regulations and give due consideration to public comment before issuing the replacement standards.

The Kansas Department of Health and Environment (KDHE) has worked very hard to improve the quality of water for the citizens of Kansas. EPA's proposal to issue a handful of standards to ensure that all of the requirements of the CWA are met does not diminish the great strides Kansas has taken to improve its water quality standards. EPA has and will continue to work with Kansas to resolve these water quality issues.

*(A number of federal water quality standards already exist in Kansas. EPA, under the National Toxics Rule, issued water quality criteria for toxic pollutants for Kansas and several other states where they lacked specific water quality criteria. EPA will remove Kansas and those other states from the National*

*Toxics Rule when they adopt water quality criteria for the pollutants in their state water quality standards.)*

## **PRIVATE WATERS**

**Q.** What does the Kansas regulation say about private waters, and why did EPA disapprove it?

**A.** The Kansas regulation excludes from the state's water quality standards any "freshwater reservoir and farm pond" that is privately owned, with all surrounding land under common ownership, unless such waters are open to the public for use. The Kansas regulation is based on state law. EPA disapproved this provision because of the possibility that some of these excluded waters could be "waters of the United States."

The CWA and water quality standards based on the CWA apply to "waters of the United States." Some waters of the United States may be excluded when a category of waters, such as reservoirs, are excluded. EPA has not identified any privately held waters of the United States in Kansas, but the provision conflicts with the CWA.

EPA alerted the state in 1987 that this provision was inconsistent with the CWA. EPA, in disapproving the Kansas regulations concerning private waters, performed its own review and considered an earlier opinion by the Kansas attorney general. The attorney general issued an opinion in October 1987 that stated:

"We believe that situations could arise in which a discharge would be prohibited by federal law, but not prohibited by state law. For example, if a pond or reservoir is so constructed as to preclude seepage or discharge from the body of water into waters of the state, and a water quality standard is not designed to protect the health of persons using the pond or reservoir, then such a water quality standard would not apply to the pond or reservoir. However that pond or reservoir could theoretically be a navigable water, into which the unpermitted discharge of pollutants is prohibited by federal law. Therefore, it is our opinion that the state law is not as broad as the federal law in this area."

Although KDHE proposed an amendment to Kansas law to correct this provision in the early 1990s, no revision to the state law or regulation was made.

Therefore, EPA is proposing a regulation to ensure that all waters of the United States are protected by the Kansas water quality standards.

**Q.** What is the definition of a "water of the United States?"

**A.** Waters of the United States are defined as:

*(a) All waters which are currently used, were used in the past or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;*

*(b) All interstate waters, including interstate "wetlands;"*

*(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce;*

*(d) All impoundments of waters otherwise defined as waters of the United States under this definition;*

*(e) Tributaries of waters identified in paragraphs (a) through (b) of this definition;*

*(f) The territorial sea; and*

*(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.*

*Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. [Note: This next sentence was suspended in 1980. "This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States."]*

*Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.*

(Source: Code of Federal Regulations 40 Part 122)

**Q.** Are any water bodies, such as farm ponds, specifically excluded from the definition of waters of the United States?

**A.** There are no regulatory definitions of excluded waters. The U.S. Corps of Engineers and EPA, however, included in preambles to their regulations a description of waters that would generally be excluded from consideration as water of the United States. Among the waters generally excluded are "artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing."

**Q.** Are there some examples of waters wholly on private properties that could also be "waters of the United States?"

**A.** Yes. Waters from which fish could be taken and sold for interstate purposes or are used by interstate travelers for recreational purposes, such as private recreational lakes used by tourists, or waters used by migratory birds, such as wetlands, are considered waters of the United States. In contrast, livestock and other farm ponds created by excavating dry land -- and waste treatment systems created in uplands -- generally are not considered "waters of the United States." Whether a water body is a water of the United States is determined on a case-by-case, as-needed basis.

**Q.** What is EPA proposing for private waters?

**A.** EPA is proposing to make state water quality standards applicable to all waters of the United States, whether on public or private land. This essentially narrows the state exclusion so that all waters of the United States are protected by water quality standards, should the need arise. This would allow privately

owned waters that are not waters of the United States to remain exempt from the state's water quality standards.

**Q.** What would be the likely effect of EPA's proposal for private waters?

**A.** In practical terms, the overall effect is likely to be small, if any, for a combination of reasons.

EPA has not identified any specific waters that would be affected by the proposal and has no plans to search for any.

If there are any waters on private land that have significant beneficial uses, the state is likely to classify the waters to protect their beneficial uses (and may have already done so).

If a landowner is using the water in question for interstate commerce (e.g., to raise fish), the owner is likely to want to maintain the beneficial uses to protect the business.

The reason for the proposed rule is this: A surface water in Kansas might become polluted at some time in the future. If, at that time, the water is determined to be a water of the United States, EPA and the state could work to improve the quality of that water.

**Q.** Has EPA taken similar actions in any other states? If so, what has been the outcome?

**A.** Yes. EPA developed similar language for Idaho. No special effort has been made to determine which private waters are waters of the United States in the three years that the federal rule has been in place.

**Q.** Would this federal regulation mean that the state or EPA would travel around the state to determine which private waters are waters of the United States?

**A.** No. The CWA establishes the basic limit of protection for waters of the United States. The Kansas standard, as it is written, excludes privately owned "freshwater reservoirs and farm ponds" from state water quality standards. The federal rule simply proposes that if those private waters, such as reservoirs, are



waters of the United States, then state water quality standards apply to them. EPA will not make a special effort to determine which surface waters in Kansas are (or are not) waters of the United States.

## **DESIGNATED BENEFICIAL USES: UPGRADE OF PRIMARY CONTACT RECREATION**

**Q.** Why is EPA proposing primary contact recreation use designations for approximately 1,400 classified waters in Kansas?

**A.** The CWA assumes that waters of the United States will support primary contact recreation (swimming) unless information about that water body demonstrates that it will not. Approximately 1400 classified water bodies in Kansas are not designated as primary contact recreation, and Kansas has not provided information to EPA to demonstrate that they will not support this use. The designation of primary contact recreation for these water bodies has been an issue in Kansas since 1984.

Kansas has a program specifically set up to determine the appropriate uses for a water body, and, in 1986, Kansas did begin performing a large number of use attainability analyses (UAAs) for waters that were not designated for primary contact recreation. EPA has approved the vast majority of those use changes.

A UAA is used to determine the specific conditions of each water that may affect its use. Examples would be natural contamination, irreversible human made conditions, or too little flow to support aquatic life. A UAA may be a simple or complex review, depending on the circumstances of the water being reviewed. For example, if a stream is dry for most of the year, not much more information is needed.

However, Kansas has not performed the necessary UAAs to address approximately 1,400 classified water bodies. EPA is therefore proposing primary contact designations for those waters because no contrary information has been gathered about their quality or appropriate uses.

Recent revisions to the Kansas UAA protocol provide a detailed explanation of how a UAA should be conducted and what kinds of information are needed to conduct a UAA. This revised UAA protocol allows entities other than the state to conduct UAAs. This protocol will lead to consistency in analyses and will provide

predictability to the regulated community. As the UAAs provide new information about the appropriate use of these waters, Kansas may revise its water quality standards to adopt new designated uses and submit them for EPA review.

## **ECONOMIC ANALYSIS**

**Q.** How did EPA determine the potential costs of this rule?

**A.** EPA asked KDHE for specific information to help to determine the potential economic impact of the proposed rule on the regulated community. EPA looked at past permitting information for facilities and municipalities and compared the past permit limits to the potential costs if the rule were to be finalized. EPA considered the use upgrades likely to result and how a potential upgrade would translate to more or different water quality treatment practices. EPA also made conservative assumptions where it had little information. EPA acknowledged in the proposed rule that it could not get all of the information it needed to perform the economic analyses and has asked the public for information during the public comment period. EPA is working with Kansas to gather more permitting information that will help in developing the final rule.

**Q.** What is the effect of these rules on farmers?

**A.** Normal farming practices are not regulated by EPA under the CWA. That is why EPA does not believe these rules will have a direct effect on farmers. Kansas has programs and legal authority to address point and non-point sources of pollution and has discretion to determine how to use these programs to ensure water quality standards are met.

**Q.** Will the potential costs of this rule play a role in any final federal regulations?

**A.** EPA provides an economic analysis to inform the public of potential costs associated with implementing a federal regulation. The cost analysis is for information purposes only. While economic factors may be considered in designating uses, scientific and technical factors must justify criteria to meet those uses. For example, actual facility-specific and community-specific cost data is taken into consideration by the state at the time a regulatory decision needs to be made, such as when issuing a pollutant discharge permit. The state may decide

at that time, based on the cost information, that certain standards are not appropriate for a particular water body and that regulatory relief is warranted. The state may choose to revise a designated use or develop site-specific water quality criteria. The state may also grant a variance until a facility is able to meet the water quality standard. The state may also develop an alternate stream design flow or authorize an alternate mixing zone. Kansas would retain significant flexibility to take costs into consideration when issuing permits or establishing total maximum daily pollutant loads a water can accept, even if the federal rule goes into effect.

## **EFFLUENT CREATED HABITAT PROVISION**

**Q.** Why should water quality standards apply to effluent dominated streams?

**A.** The presumed fishable/swimmable use for a water may be changed with stream-specific data and information. EPA's concern is that streams not be used for waste transport and that full public participation be ensured before lowering a water body's level of protection.

The Kansas water quality standards included a mechanism to gather the necessary information. It appears, however, that the state did not intend to adopt the use change in its water quality standards before issuing a permit based on that information. EPA is proposing that Kansas adopt the results of the state's analysis in their water quality standards and provide the public and affected stakeholders an opportunity to comment on the information before the decision takes effect in a permit.

## **ANTI-DEGRADATION IMPLEMENTATION PROCEDURES**

**Q.** Is EPA trying to regulate non-point source pollution in Kansas?

**A.** EPA is not trying to regulate non-point sources of pollution in Kansas. EPA does not have the authority to regulate non-point sources of pollution under the CWA. However, where states have non-point source authority, EPA may ensure that it is implemented. EPA's proposed anti-degradation implementation policy is intended to ensure that the state uses its own authorities and programs to control pollution, whether it is from a point source or a non-point source. This proposed rule does not create any new authority for either EPA or the state.

**Q.** What is anti-degradation, and what is EPA proposing?

**A.** The anti-degradation implementation procedures are very important for ensuring that existing water quality is protected, even where water quality is better than the minimum required. Kansas has its own authority to address non-point sources of pollution, including voluntary and incentive-based approaches. EPA, by proposing this rule, would ensure that the state uses its own programs, established under state authority, to address non-point source pollution before authorizing certain increases in point-source discharges of pollution.

The effect of this rule on landowners would be determined by the state's non-point source programs and its authorities established under state law.

## **WATER QUALITY CRITERIA**

**Q.** What are alpha and beta endosulfans and why is EPA proposing to promulgate water quality criteria for these two pollutants?

**A.** Alpha and beta endosulfans are broad-spectrum insecticides in a group of compounds called polycyclic chlorinated hydrocarbons. Both compounds are restricted in their usage, but significant commercial use of the compounds for insect control on vegetables, fruits, and tobacco continues. EPA is proposing water quality criteria for these two toxic pollutants because Kansas does not have criteria to protect human health from these pollutants. Kansas is proposing criteria for these two pollutants, which may remove the need for these federal water quality criteria.

## **ASSUMED FLOW PROVISION**

**Q.** What is the assumed flow provision, and why is EPA proposing to establish design flows for Kansas?

**A.** Kansas has a provision in its water quality standards that allows for the use of "assumed flows" rather than actual stream flows in the calculation of National Pollutant Discharge Elimination System permit limits. This provision results in an assumption that stream flow is available to dilute pollutants when, in actuality, the

stream may be dry. If the stream is dry, the higher concentrations of pollutants in the stream may endanger aquatic life. The calculation of permits based on stream flow that does not exist may fail to protect aquatic life and is not scientifically justified. Numeric water quality criteria are developed on the presumption that actual stream flow data will be the basis of a permit. The concern is that water quality criteria would be violated more often than they should be and that aquatic life would not be protected. The proposed rule allows the state the flexibility to use several stream design flows for acute and chronic aquatic life criteria to ensure that the water quality criteria are met and aquatic life is protected.

**Q.** What will be the economic impact of this rule on my community?

**A.** EPA is continuing to gather permitting data from Kansas regarding facilities that discharge to streams with very low flow. There is uncertainty about the economic effects on specific communities because the state has flexibility in determining how this provision would be implemented. The state may choose, for example, to revise a designated use or develop a site-specific water quality criterion. The state may also grant a variance until a facility is able to meet the water quality standard. The state may also develop an alternate stream design flow or authorize an alternate mixing zone.

STATE OF KANSAS

BILL GRAVES, GOVERNOR

Jamie Clover Adams, Secretary of Agriculture  
109 SW 9th Street  
Topeka, Kansas 66612-1280  
(785) 296-3556  
FAX: (785) 296-8389



KANSAS DEPARTMENT OF AGRICULTURE

**House Environment Committee**

**H.B. 2316**

**February 20, 2001**

**Jamie Clover Adams, Secretary**

Madam Chairperson and members of the committee, I am Jamie Clover Adams, Kansas Secretary of Agriculture. I appear today to support House Bill 2316 and the testimony of David Pope. We appreciate the opportunity to provide information on needed enforcement tools for the Kansas Water Appropriations Act.

As you are aware, the Kansas water resource is a mature resource and as such, requires a different set of regulatory tools than were necessary fifty years ago. As we look for new and innovative ways to give flexibility to individual water right holders, we also have an increased responsibility to establish adequate administrative control over the appropriation of water to prevent injury to established uses and the underlying source of water supply. Further, it is important that consequences of a violation of the Act are clearly spelled out as they are in H.B. 2316. In this way, everyone knows what the rules are and how they will be applied. They can also have increased confidence that the priority of their water right will be protected.

On a more practical note, the Kansas Department of Agriculture needs a more efficient and effective mechanism than is currently available to enforce the provisions of the Kansas Water Appropriations Act. As I am sure you are aware, we face stagnate resources and must find new ways to continue to fulfill our statutory obligations.

I appreciate the opportunity to appear in support of H.B. 2316. I would be glad to answer any questions you may have at the appropriate time.

STATE OF KANSAS

BILL GRAVES, GOVERNOR  
Jamie Clover Adams, Secretary of Agriculture  
109 SW 9th Street  
Topeka, Kansas 66612-1280  
(785) 296-3558  
FAX: (785) 296-8389



Division of Water Resources  
David L. Pope, Chief Engineer  
109 SW 9th Street, 2nd Floor  
Topeka, KS 66612-1283  
(785) 296-3717 FAX (785) 296-1176

KANSAS DEPARTMENT OF AGRICULTURE

House Committee on Environment

February 20, 2001

Testimony Regarding Senate Bill 2316

David Pope, Chief Engineer  
Division of Water Resources, Kansas Department of Agriculture

Madam Chairperson and members of the committee, thank you for the opportunity to present testimony regarding House Bill 2316. I am David L. Pope, and I appear on behalf of the Kansas Department of Agriculture.

Diverting water for beneficial uses other than domestic ones requires a permit or water right. These permits and water rights have conditions and limitations imposed on them to protect other water users from impairment and to ensure that water is available to all citizens. Water users who exceed their limits, or violate conditions of their water rights, may jeopardize other users with a right to access a water supply.

Total water appropriations are approaching the volume of water available for use, so it is increasingly important for regulatory authorities to effectively enforce compliance with the conditions and limitations of existing water rights. Implementing this bill will improve the division of water resource's ability to administer the Kansas Water Appropriation Act by giving us the tools we need to more effectively and efficiently enforce provisions of the Act.

Currently, the Act contains an economic incentive to continue to violate conditions and limitations of water right permits. Court enforcement of the administrative orders of the chief engineer usually require the violator to comply, however there is no obvious monetary penalty attached to that compliance. Court enforcement options include:

1. Bring civil enforcement action of administrative orders before the district court pursuant to K.S.A. 77-624 *et seq.*; the agency files an action to enforce an order and the court decides whether to compel the violator to comply with the order.
2. Request that the county attorney conduct criminal proceedings pursuant to K.S.A. 82a-728 as a class C misdemeanor; the county attorney decides whether or not the case will proceed and the specific action or penalty is decided by the district court.

House Environment  
2-20-01  
Attachment 3

3. Request the attorney general to bring an enforcement action in the name of the state, pursuant to K.S.A. 82a-706d; the appropriate district court decides whether to enjoin the unlawful acts claimed by the state.

House Bill 2316 gives KDA a direct, consistent and effective method to assess civil penalties for compliance violations. Upon any violation of the Water Appropriation Act, the chief engineer may impose a fine or suspension. The bill establishes limits on the extent of penalties that may be assessed. It is KDA's intent to set, by regulation, specific penalties for specific categories of violations based on the possible impact the violations have on water resources, on other appropriators and whether the owner is responsive to agency actions. This bill, combined with appropriate regulations adopted by the chief engineer, will provide a method for consistent and timely response to compliance violations and as a means to deter continuing violators.

Enforcement actions will follow current rules established in the chief engineer's enforcement regulation (K.A.R. 5-14-1; copy attached), except that an administrative fine or suspension will become options. Administrative and enforcement steps in this regulation include:

1. An investigation of suspected violations and a written report of the investigation results prepared by the chief engineer. [K.A.R. 5-14-1(a)(b)(c)]
2. An order is issued describing the violation, the steps required to correct it and a time frame to be in compliance. [K.A.R. 5-14-1(d)(2)]
3. A conference hearing before the chief engineer, or his designee, may be requested to appeal the order but it must be requested within 15 days. An order is either sustained, rescinded, or alternative action is required. [K.A.R. 5-14-1(d)(2)(E)]
4. If a violator fails to correct violations as ordered, further enforcement action may be taken such as an order to cease the illegal act or diversion of water. [K.A.R. 5-14-1(f)]

At step four, options authorized by House Bill 2316 will replace the time-consuming, costly and often inconsistent court procedures currently used to assess penalties. We envision a penalty matrix with violation categories arranged in order of severity depending on their damage to others, impact on water supplies, or their cost to the public. However, before assessing a civil penalty, the chief engineer will review the suspected violator's compliance history. Three categories of violation are envisioned based on the violator's circumstances and past actions. These include:

1. The least severe penalties would be assessed when circumstances indicate the violation would not be apparent without some observation, and possibly measurements, and the owner or water user was previously informed of a similar violation.
2. More severe penalties would be assessed if the violator had knowledge or it is reasonable to expect the violator to have been aware a violation was occurring, yet he or she did not make a reasonable effort to correct it.



3. The most severe civil penalties would be assessed on repeat offenders who have ignored prior legal notice of an offense; made an obvious effort to circumvent or avoid compliance requirements; or, made an attempt to cover up an obvious violation. The division of water resources could, as a last resort, suspend a water right, when suspension is warranted by repeated or egregious violations.

Water appropriations are nearing the limit of available water supplies, so it is essential that KDA has enforcement options in place to protect water users. This bill improves KDA's ability to bring enforcement actions against violators, and it will bring a more direct and consistent approach to resolving violations of the Kansas Water Appropriation Act. It is needed now to supplement KDA's current enforcement activities aimed at ending blatant and recurring over pumping, where we have encountered a few individuals who consider it to their benefit to resist our regulatory efforts. The penalties, as proposed would provide a meaningful enforcement response for KDA in circumstances where none now exist and deter repeat offenders with the threat of enhanced penalties. These repeat offenders challenge our determination and ability to enforce compliance. Also, effective enforcement capability will be essential if we are to implement other water management alternatives, such as five-year allocations, water banking, the Walnut and Rattlesnake creek basin special management areas, and other, more innovative approaches, where water use restrictions must be enforced if they are to be successful.

Thank you for the opportunity to provide testimony in this matter. I will be glad to answer any questions you may have.

## REGULATION ON ENFORCEMENT

**K.A.R. 5-14-1. Enforcement.** (a) Except as set forth in subsection (i), the procedure set forth below shall be followed whenever enforcement action is taken by the chief engineer after becoming aware that a person may be performing any of the following:

- (1) Violating any provision of K.S.A. 82a-701 et seq., and amendments thereto;
  - (2) violating any provision of a regulation adopted pursuant to that act; or
  - (3) violating a term, condition, or limitation of an approval of application or water right.
- (b) The alleged violation shall be investigated by the chief engineer.
- (c) A written report of the investigation shall be prepared by the chief engineer. This report shall include any documents regarding the matter that were relied upon or prepared by the chief engineer. This report shall be made a part of the official record of the chief engineer. If an approval of application or a water right is involved, the report shall be made an official part of that file.
- (d) (1) If the investigation shows that no violation has occurred or that enforcement action is not warranted, no further enforcement action shall be taken at that time.
- (2) If the investigation determines that a violation has occurred, an order shall be issued by the chief engineer. The owner or owners of the approval of application or water right, as shown in the records of the chief engineer, shall be served by delivering a copy in person or sending a copy of the order by restricted mail. The order shall specify the following:
- (A) What the violation is;
  - (B) what actions are necessary to correct the violation;
  - (C) what a reasonable time is in order to correct the violation. Extensions of time to correct a violation may be granted by the chief engineer if good cause is shown by the violator or owner;
  - (D) that the order will become effective immediately; and
  - (E) that a hearing may be requested within 15 days of the issuance of the order. The request for a hearing may include a request for a stay of the order. If the person shows good cause why a stay should be granted, a stay may be granted by the chief engineer.
- (e) If the violation is corrected within the time specified by the chief engineer, the violator shall notify the chief engineer. An inspection shall be conducted by the chief engineer to determine if the violation has been corrected. If the violation has been corrected, the diversion of water may continue within the terms, conditions, and limitations of the approval of application or water right.
- (f) If the violation is not corrected within the time specified by the chief engineer, an order requiring that unauthorized or illegal diversion of water cease until the violation is corrected shall be issued by the chief engineer.
- (g) If the violator ceases diversion of water and then corrects the violation, the violator shall notify the chief engineer when the violation is corrected. The diversion works and the authorized place of use, as appropriate, shall be inspected by the chief engineer to determine if the violation has been corrected. If the chief engineer determines that the violation has been corrected, the order prohibiting diversion of water shall be rescinded by the chief engineer as soon as possible. When the owner or violator receives notice from the chief engineer that the order prohibiting the diversion of water has been rescinded, the diversion of water may recommence.

- (h) (1) Any of the actions listed in paragraph (h) (2) may be taken by the chief engineer if the violator performs any of the following acts and fails to cease the diversion of water as ordered by the chief engineer:
- (A) Violates any provision of K.S.A. 82a-701 et seq., and amendments thereto;
  - (B) violates any provision of a regulation adopted pursuant to that act; or
  - (C) violates a term, condition, or limitation of an approval of application or a water right.
- (2) If the violator performs any act listed in paragraph (h)(1), any of the following actions may be taken by the chief engineer:
- (A) Bring an action to enforce the orders of the chief engineer pursuant to the act for judicial review and civil enforcement of agency actions, K.S.A. 77-624 et seq., and amendments thereto;
  - (B) request the attorney general to bring an action in the name of the state of Kansas;
  - (C) request that criminal proceedings be brought pursuant to K.S.A. 82a-728, and amendments thereto;
  - (D) enter into a consent order with the violator specifying the remedial actions that shall be taken by the violator;
  - (E) take any other legally permissible enforcement action; or
  - (F) any combination of the above actions.
- (i) The provisions of this regulation shall not apply to any actions taken by the chief engineer pursuant to K.S.A. 82a-706b, and amendments thereto, to enforce water right priorities and to prevent direct impairment by either of the following:
- (1) Junior water rights; or
  - (2) illegal diversions of water.
- (j) After the violator has been issued an order as specified in subsection (f), the violator may request an administrative hearing before the chief engineer in accordance with the provisions of K.A.R. 5-14-2. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-706, 82a-706b, 82a-706d, and 82a-728; effective Sept. 22, 2000.)

HOUSE BILL No. 2316

By Committee on Environment

2-5

AN ACT concerning water; providing civil penalties for certain violations of laws and orders, terms, conditions and limitations relating thereto.

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

Section 1. (a) As used in this section:

(1) "Chief engineer" means the chief engineer of the division of water resources of the department of agriculture.

(2) "Secretary" means the secretary of agriculture.

(b) Any person who commits any of the following may incur a civil penalty as provided by this section:

(1) Any violation of the Kansas water appropriation act (K.S.A. 82a-701 et seq., and amendments thereto) or any rule and regulation adopted thereunder;

(2) any violation of an order issued pursuant to K.S.A. 82a-1038, and amendments thereto, relating to an intensive groundwater use control area; or

(3) any violation of a term, condition or limitation imposed by the chief engineer as authorized by law, including, but not limited to: (A) Failure to divert water from an authorized point of diversion; (B) failure to limit the use of water to the authorized place of use; (C) failure to submit or comply with the terms of conservation plans as required pursuant to K.S.A. 82a-733, and amendments thereto; (D) failure to comply with the maximum annual quantity or rate of diversion authorized; (E) failure to properly install, maintain or assure the accuracy of acceptable water measurement devices; (F) failure to comply with orders related to minimum desirable stream flow, unlawful diversion, impairment of senior water rights or waste of water; or (G) failure to limit the use of water to an authorized type of use.

(c) The amount of the civil penalty provided for by this section shall be not less than \$100 nor more than \$1,000 per violation. In the case of a continuing violation, each day such violation continues may be deemed a separate violation. Such civil penalty may be assessed in addition to any other penalty provided by law.

(d) The chief engineer or the chief engineer's duly authorized agent, upon a finding that a person has committed a violation specified in sub-

Diversion of water from an unauthorized point of diversion;



STATE OF KANSAS



Bill Graves, Governor

KANSAS WATER OFFICE  
Al LeDoux  
Director

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

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

**TESTIMONY BEFORE THE HOUSE ENVIRONMENT COMMITTEE**

**February 20, 2001**

**House Bill 2316**

**Presented by Margaret Fast, Kansas Water Office**

The Kansas Water Office supports HB 2316. Enforcement of the Water Appropriation Act is consistent with the goals, policies, and objectives of the Kansas Water Plan, especially those provisions in HB 2316 related to:

- Water conservation plans,
- Installation or maintenance of a water measurement device,
- Maximum annual quantity or rate of diversion and
- Minimum desirable streamflow orders.

As a rule, the Kansas Water Plan includes recommendations that emphasize a voluntary and incentive based approach to water management and conservation. Examples are technical assistance on conservation plan preparation and the importance of metering through the Kansas Water Office, financial assistance on irrigation efficiency measures and retrofitting meters to read in acre feet through the State Conservation Commission, and information outreach on irrigation scheduling and best management practices for conservation water use through the Kansas State University Research and Extension.

*AUTHORITY* I would also like to reiterate testimony that Kent Lamb, chairman of the Kansas Water Office offered on HB 2047. The Kansas Water Office adopted a position on water rights banking that states that water right enforcement is critical in the operation of a water right bank for both the participants in the bank and those who do not participate. There would be little incentive to lease available water from a bank if there were no or very light penalties associated with overpumping. *AUTHORITY*

I appreciate the opportunity to speak to you and ask for your support of HB 2316.

*House Environment  
2-20-01  
Attachment 4*



Southwest Kansas  
Groundwater Management District

\* \* \* \* \*

(620) 275-7147  
409 Campus Drive, Suite 106  
Garden City, Kansas 67846

February 20, 2001

Joann Freeborn, Chair  
House Environment Committee  
Kansas State Legislature

RE: H.B. 2316

Dear Chair Freeborn and Associate Representatives,

The District's Board of Directors respectfully request your most serious consideration for support of the proposals embodied in H.B. 2316.

Effective water management and administration requires a strong legal (enforcement) foundation as a backdrop to establish deterrents and disincentives to non-compliance. Although the majority of the water using community is very forthright in their efforts to conserve water and operate conscientiously within their legal boundaries - a minority, unfortunately, is not.

The present provisions for addressing non-compliance with the Water Appropriation Act are relatively very cumbersome and time consuming to implement for most matters. Often, the nature of much non-compliance which occurs during an operating season is not able to be legally abated during the time the infraction is still occurring. It would be very desirable to utilize civil penalties to efficiently and expeditiously penalize the "all but extremely serious" situations which are typically encountered by the Groundwater Management District and the Division of Water Resources.

The District is aware that compliance with "overpumping", conservation plans, meter installation/operations, and special water right change approvals is a significant problem that can be improved with the deterrent prospects of civil penalty impositions. **The District is currently negotiating with the Chief Engineer's office to effectuate a stronger enforcement presence from the Division of Water Resources in this area.** The success of increasingly sophisticated management strategies such as the "two pools" concept, "flex-appropriations", and "long-moves" will necessarily require that an enhanced level of awareness and compliance be instituted well in advance of these mechanisms being implemented.

We appreciate your consideration, and as always, we look forward to working with you in the future! Please write or call if you have any questions or if we can be of any assistance.

Sincerely,

  
Steven Frost  
Executive Director

# HOUSE BILL No. 2047

By Committee on Environment

1-17

Subcommittee Report

House Environment  
2-20-01  
Attachment 6

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

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

13 Section 1. This act may be cited as the Kansas water banking act.

14 Sec. 2. As used in this act:

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) "Deposit," other than as used in "safe deposit account," refers to  
27 the deposit of a water right, or portion of a water right, in a water bank  
28 for the purpose of having the bank lease water from such water right, or  
29 portion of a water right, to another person or entity.

30 (g) "Division" means the division of water resources of the Kansas  
31 department of agriculture.

32 (h) "Hydrologic unit" means a defined area from which water rights  
33 authorizing diversion of water from a source of supply may be deposited  
34 and from which water from the same source of supply may be leased, in  
35 accordance with the provisions of this act, without causing impairment of  
36 existing water rights or a significantly different hydrological effect to other  
37 users of water from the same source or hydraulically connected sources  
38 of supply.

39 (i) "Linked water rights" means two or more water rights that au-  
40 thorize common points of diversion or a common place of use, or both.

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



(k) "Term permit" means a permit to appropriate water for a specified period of time.

(l) "Water bank" means a private not-for-profit corporation that: (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 hydrologic unit 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 right authorizing diversion of the water is 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;

(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;

(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~~ 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

is authorized to provide

may

6-2

ht under section 4 and amendments thereto;

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

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

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

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

(6) use of water withdrawn from a safe deposit account shall be subject to all provisions of the Kansas water appropriation act, including but not limited to all requirements relating to term permits;

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

(8) a safe deposit account 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.

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

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

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

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

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 has at least five members and is reasonably representative of public and private interests in water within the bank boundary;

(4) the bank would not lease or accept for 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 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;

(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 where corrective control provisions have reduced the allocation of groundwater to less than the quantity previously authorized by water rights in the area; for a representative past period

(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

6-4

1 period of average water consumption for the hydrologic unit from which  
2 water is authorized to be diverted under the water right;

3 (B) the method of determination shall not penalize past implemen-  
4 tation of water conservation practices;

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

12 (D) the method of determining the portion of a water right that is  
13 bankable for purposes of placing of water in a safe deposit account pur-  
14 suant to subsection (c) of section 3, and amendments thereto, shall in-  
15 clude: (i) Consideration of the reasons why such water was unused, in-  
16 cluding, but not limited to, adequate rainfall and the supply of water's  
17 being unavailable for use; and (ii) criteria that assure the bank's safe de-  
18 posit account operations do not result in a net increase in consumptive  
19 use in the affected hydrologic unit.

20 ~~(c) Prior to July 1, 2002, not more than one water bank shall be~~  
21 ~~chartered to operate in the state. On or after July 1, 2002, and before~~  
22 ~~July 1, 2003, not more than two additional water banks shall be chartered~~  
23 ~~to operate in the state. On or after July 1, 2003, and before July 1, 2004,~~  
24 ~~not more than two additional water banks shall be chartered to operate~~  
25 ~~in the state. On and after July 1, 2004, no additional water banks shall be~~  
26 ~~chartered to operate in the state until the first report of an evaluation~~  
27 ~~team is submitted pursuant to section 7, and amendments thereto.~~

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

32 (e) Any amendment to the charter of a water bank must be approved  
33 by the chief engineer prior to adoption of the amendment.

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

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

; and

(10) the charter ensures that the total amount of groundwater  
leased each year from each hydrologic unit does not exceed 90% of the  
historic average annual amount collectively diverted pursuant to all  
deposited water rights or portions of water rights from such unit for a  
representative past period

Only one water bank shall be chartered to operated in the state.

1 water rights or portions of water rights during the two years preceding  
2 the last year; and

3 (2) with regard to water in each safe deposit account in the bank: (A)  
4 An accounting of the total quantity of water placed in such accounts dur-  
5 ing the past year and a balance at year end; (B) the total quantity of water  
6 used during the past year, and acres irrigated if an irrigation water right,  
7 from the account; (C) the total quantity of water authorized to be diverted  
8 annually, the quantity actually used and the acres irrigated, if an irrigation  
9 water right, during the past year pursuant to the water rights or linked  
10 water rights related to such account; and (D) the total quantity of water  
11 used and acres irrigated pursuant to such water rights during the two  
12 years preceding the last year.

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

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

20 Sec. 7. (a) Not later than five years after the establishment of a water  
21 bank, the director of the Kansas geological survey shall convene a team  
22 to evaluate the operation of the bank. The team shall consist of:

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

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

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

40 (b) The staff of the Kansas geological survey shall provide staff assis-  
41 tance to the evaluation team.

42 (c) Not more than one year after a team is convened pursuant to this  
43 section, the team shall submit a report of its evaluation and recommen-

lations to the governor, the Kansas water office, the Kansas water authority, the secretary of agriculture, the chief engineer and the senate standing committee on energy and natural resources and the house standing committee on environment, or the successors to such committees regarding:

(1) The operations and policies of the bank and whether they are 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) whether the operations of the bank are achieving the goals and objectives of water banking as set out in the state water plan and whether changes could be made to further those goals and objectives;

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

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

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

(d) Unless otherwise provided by law, the chief engineer, in accordance with the recommendations of the team, may extend the charter of the bank for an additional period not to exceed seven years or may allow the bank charter to lapse under the terms recommended by the team.

Sec. 8. Depositing a water right in a water bank or placement of water in a safe deposit account in a water bank shall constitute due and sufficient cause pursuant to K.S.A. 82a-718, and amendments thereto, for failure to use water for a lawful, beneficial use for the term of the deposit or the placement.

Sec. 9. The chief engineer may adopt rules and regulations to administer and enforce the provisions of this act.

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.

1 (c) Orders of the chief engineer issued pursuant to this section are  
2 subject to review in accordance with the provisions of K.S.A. 2000 Supp.  
3 82a-1901, and amendments thereto.

4 Sec. 11. Each water bank shall pay all costs incurred by the division  
5 and by the Kansas geological survey for assistance and services provided  
6 pursuant to this act, including, but not limited to, costs for personnel  
7 necessary to provide such assistance and services.

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

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

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

20 (1) The average daily balance of moneys in the water resources cost  
21 fund for the preceding month; and

22 (2) the net earnings rate for the pooled money investment portfolio  
23 for the preceding month.

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

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

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

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

40 (1) The average daily balance of moneys in the geological survey cost  
41 fund for the preceding month; and

42 (2) the net earnings rate for the pooled money investment portfolio  
43 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.

Sec. 14. This act shall take effect and be in force from and after its publication in the statute book.

6-9



1 right under section 4 and amendments thereto;

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

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

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

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

19 (6) use of water withdrawn from a safe deposit account shall be sub-  
20 ject to all provisions of the Kansas water appropriation act, including but  
21 not limited to all requirements relating to term permits;

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

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

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

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

32 Sec. 4. Before a water right or portion of a water right shall be ac-  
33 cepted for deposit in a water bank or water from a water right shall be  
34 placed in a safe deposit account, the bank, with the assistance of the  
35 division, shall determine whether the water right is bankable, as follows:  
36 (a) The right is vested or has been issued a certificate of appropriation;  
37 and (b) the right has not been abandoned and is in good standing, based  
38 on past water usage and compliance with the terms of the holder's permit  
39 and all applicable provisions of law and orders of the chief engineer.

40 Sec. 5. (a) Before a water bank is authorized to operate in the state,  
41 the bank's charter must be approved by the chief engineer. Prior to ap-  
42 proval, the body wishing to charter the bank shall submit to the chief  
43 engineer the proposed bank charter and any other information required

the amount of water placed in a safe deposit account in any one year shall not exceed 25% of the difference between 85% of the maximum annual quantity authorized to be diverted under the water right and the amount actually diverted under such water right during the immediate past calendar year

*House Environment  
2-20-01  
Attachment 7*

## Safe Deposit Box Examples

### Hypothetical Water Right

Annual Authorized Quantity: 100 AF

Reported Water Use	<u>1997</u>	<u>1998</u>	<u>1999</u>
	70 AF	90 AF	80 AF

Base Average Usage Over 3 Years = 80 AF

Total 3 Year Authorized Allocations = **300 AF**

Projected 3 Year Average Use = **240 AF**

### Example 1. HB 2047- Safe Deposit Box

Any unused portion of a water right minus 10% annually.

	<u>1997</u>	<u>1998</u>	<u>1999</u>
Reported Water Use	70 AF	90 AF	80 AF
Unused Portion	30 AF	10 AF	20 AF
Minus 10%	27AF	9 AF	18 AF
Accumulative Deposit	27 AF	33 AF	48 AF

Projected 3 Year Average Use + Two Years of Safe Deposit Accumulation = **273 AF**

### Example 2. Rattlesnake Creek Management Plan- Safe Deposit Box

25% of the difference between approximately 85% of authorized quantity minus actual use (10% reduction annually).

85% of Authorized Quantity = 85 AF

	<u>1997</u>	<u>1998</u>	<u>1999</u>
Reported Water Use	70 AF	90 AF	80 AF
Difference from 85% Auth Qty	15 AF	0(-5)	5 AF
25% of Difference	4 AF	0 AF	1 AF
Accumulative Deposit	4 AF	3.6AF	4.24 AF

Projected 3 Year Average Use + Two Years of Safe Deposit Accumulation = **244 AF**