

MINUTES OF THE SENATE NATURAL RESOURCES COMMITTEE

The meeting was called to order by Chairman Carolyn McGinn at 8:30 A.M. on March 11, 2005 in Room 423-S of the Capitol.

All members were present.

Committee staff present:

Emalene Correll, Kansas Legislative Research Department  
Lisa Montgomery, Kansas Revisor of Statutes  
Gina Poertner, Committee Secretary

Conferees appearing before the committee:

Bill Bider, Director, Bureau of Waste Management  
Wendy Harms, Associate Director, Kansas Aggregate Producer's Association  
M. S. Mitchell, Legislative Chairman, Kansas Building Industry Association  
Steve Swaffar, Director of Natural Resources, Kansas Farm Bureau  
Dennis Schwartz, Kansas Water Authority

Others attending:

See attached list.

Emalene Correll briefed the Committee on HB 2052.

Bill Bider was recognized to present testimony in support of the bill (Attachment 1). Mr. Bider stated that this bill was introduced to provide flexibility in the management of contaminated soil.

The Chairman asked if there were any questions for Mr. Bider. Seeing none, Senator Teichman made a motion to pass the bill out of Committee. This was seconded by Senator Franciso and the motion was approved by voice vote.

Senator McGinn asked Mrs. Correll to brief the Committee on HB 2014. This bill creates the statute under which the Kansas Water Authority (KWA) operates.

Wendy Harms of the Kansas Aggregate Producer's Association presented testimony in support of the bill (Attachment 2).

Senator Lee asked for an example in which an ex officio member's motion interfered with the work of the KWA. Woody Moses of the KAPA stated that there was an instance in western Kansas regarding water planning.

Senator Francisco asked if the committee of the whole would be considered another committee. Mrs. Correll stated that it would not.

M. S. Mitchell of the Kansas Building Industry Association was then recognized (Attachment 3). He presented testimony in favor of the bill.

Senator Lee asked the same question of Mr. Mitchell, requesting an example of interference. Mr. Mitchell stated he had no specific instances, he simply did not agree with the practice of allowing ex officio members to make motions and vote.

Senator McGinn then introduced Steve Swaffar of Kansas Farm Bureau to testify (Attachment 4). During his testimony in support of the bill, he cited an instance where a KWA director made a motion.

Senator Lee asked if the director voted. Mr. Swaffar stated the director did not vote, however, the motion forced a vote from the committee.

Senator Francisco asked if it is appropriate for ex officio members to make suggestions to members during or outside of a meeting. Mr. Swaffar related that they have that ability anyway. This bill will not control that aspect, but it will limit action in committee.

## CONTINUATION SHEET

MINUTES OF THE Senate Natural Resources Committee at 8:30 A.M. on March 11, 2005 in Room 423-S of the Capitol.

Senator Teichman asked for clarification on how long KWA has been using this practice. Mr. Swaffar stated it has been going on since the KWA's inception. Senator Teichman asked if it is only due to the latest problem that prompted this request for change, to which Mr. Swaffar replied that, in his opinion, legislative intent is that ex officio members serve in an advisory capacity only. She then asked if one incident should cause this change, going further to ask if an ex officio member would have an incentive to attend these meetings if they were not allowed to make motions. Mr. Swaffar stated that they should still want to attend committee meetings and give their presentations. Senator Teichman then asked why the KWA was not included in the total process and why ex officio members were not made full members. Mr. Swaffar stated that they are to serve as advisors, but that they could be made full members.

Dennis Schwartz of the Kansas Water Authority was then introduced to oppose the bill (Attachment 5).

Senator Bruce asked if the KWA took a vote on its position on this bill. Mr. Schwartz stated it did in January. Mr. Schwartz stated that as a part of the deliberations as the position on this bill, the KWA researched the minutes and found only a small number of ex officio motions.

Senator McGinn asked for further questions. Seeing none, the meeting was adjourned at 9:10 a.m.

# SENATE NATURAL RESOURCES COMMITTEE

Guest Roster

3/11/05

Name	Representing
Wendy Williams	KAPA
M.S. Mitchell	KBIA
Woody Mass	KRMCA
Bill Bider	KDHE
Steve Swaffar	Ks Farm Bureau
Kent Askren	" " "
Mike Haych	KDWP
Gloria Fox	KDWP
Mam Stuck	KWO
Dennis Schwartz	Ks Water Authority



# K A N S A S

RODERICK L. BREMBY, SECRETARY

DEPARTMENT OF HEALTH AND ENVIRONMENT

KATHLEEN SEBELIUS, GOVERNOR

**Testimony on House Bill 2052**  
**Revision of 'Clean Rubble' Definition**  
**to**  
**Senate Natural Resources Committee**  
**by**  
William L. Bider  
Director, Bureau of Waste Management  
March 11, 2005

KDHE appreciates this opportunity to provide testimony on HB 2052. This bill was introduced by KDHE to provide flexibility in the ways that lowly contaminated soil may be managed. According to current law, all "contaminated," but non-hazardous, soil must be disposed of in a permitted landfill, regardless of how low the contamination may be. Soils that present little or no risk may not be used as beneficial fill, but must instead be landfilled consuming valuable and limited landfill space. This is because soil with any level of contamination fails to conform to the statutory definition of "clean rubble" which can only include "uncontaminated" soil.

The proposed change to the law directs KDHE to define "contaminated soil" in rules and regulations. This will give KDHE an opportunity to define "uncontaminated soil" as soil that actually contains low levels of contamination, if it can be demonstrated that risks to human health and the environment are acceptable. At this time, KDHE intends to use the department's "RSK Manual" to establish contaminant levels that are considered safe. These risk-based standards are presently used by KDHE regulatory programs to determine if corrective measures are necessary at a contaminated site. If contaminant levels in the soil are below the standards, no further action or controls are required. It follows that soil with contaminant levels below these standards should be usable as beneficial fill rather than require landfill disposal.

Since KDHE already has the RSK Manual and since it is routinely reviewed and updated as appropriate, no additional staff effort is required. Therefore, this bill has no fiscal impact to the state. Benefits of this bill to Kansas would be: (1) lower clean-up costs to responsible parties; (2) conservation of soil by allowing its use as fill; and (3) conservation of landfill space.

Thank you for your time and consideration of this proposal to increase flexibility in how lowly contaminated soil is managed.

DIVISION OF ENVIRONMENT  
Bureau of Waste Management  
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Voice 785-296-1600 Fax 785-296-8909 <http://www.kdhe.state.ks.us/waste>

*Senate Natural Resources*  
*3/11/05*  
*Attachment 1*

**KAPA**

Kansas Aggregate  
Producers' Association

Edward R. Moses  
Managing Director

**TESTIMONY**

By the

**Kansas Aggregate Producers' Association**

Before the

**Senate Natural Resources Committee**

Regarding HB 2014

An Act Concerning the Kansas Water Authority

March 11, 2005

Madame Chair and members of the committee my name is Wendy Harms, Associate Director of the Kansas Aggregate Producers' Association. The Kansas Aggregate Producers' Association (KAPA) is a statewide trade association, comprised of over 250 members, producing sand, gravel, crushed rock, and other various aggregate products, and one of the few industries to be represented in every county in this state.

We thank you for the opportunity to come before you today to express our support for HB 2014, regarding the voting procedures and privileges of the ex officio members of the Kansas Water Authority (KWA). In conducting my research in preparation for this hearing, it is obvious from the Webster's Dictionary, that the concept of an ex officio is quite broad. For example, Webster defines ex officio as "by virtue or because of an office then gives the example...the Vice President serves as ex officio of the president of the Senate". To say the least, just what does ex officio mean? What capacities can they serve? This is and can be very confusing.

In order to resolve this confusion with respect to the KWA and to ensure that the KWA can concentrate on its mission, we support any effort to clearly define the procedures and privileges of ex officio members. To us it is apparent your predecessors meant to provide technical and advisory support to the KWA by creating ex officio members. However, in recent years the roles of ex officio members of the KWA have become unclear. HB 2014 seeks to make this relationship clearer by defining the powers of ex officio membership.

In closing we support HB 2014 and we thank you for the opportunity to come before you today, and I will be happy to respond to any questions at this time.

*Senate Natural Resources*  
*3/11/05*  
*Attachment 2*





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**STATEMENT OF KANSAS BUILDING INDUSTRY ASSOCIATION  
TO THE SENATE NATURAL RESOURCES COMMITTEE  
SENATOR CAROLYN MCGINN, CHAIR  
REGARDING H.B. 2014**

**MARCH 11, 2005**

Madam Chairman and Members of the Committee, I am M.S. Mitchell, Legislative Chairman of the Kansas Building Industry Association (KBIA). KBIA is the professional and trade association of the state's home building industry, representing over 3,000 members.

KBIA appreciates the opportunity to come before you in support of H.B. 2014 and the language contained in section 1(a) lines 29-34 on page 2 of the bill. The reason for this position is that it has been my long experience as a member of elected and appointed advisory boards that staff personnel are there to serve as a resource, to provide studies and information as requested. As contained in the current law, the Legislature has provided that the ex officio members of the Water Authority are non-voting. My experience is that non-voting members don't make motions or even participate in the discussion of a motion.

We encourage your favorable consideration of H.B. 2014.

*Senate Natural Resources  
3/11/05  
Attachment 3*



**Kansas Farm Bureau**  
**POLICY STATEMENT**

**Senate Natural Resources Committee**

**Re:HB 2014 An Act Concerning the Kansas Water Authority**

**March 11, 2005**

**Submitted by:**

**Steve M. Swaffar**

**Director of Natural Resources**

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Chairperson McGinn and members of the committee, thank you for this opportunity to provide testimony today in favor of House Bill 2014. Kansas Farm Bureau believes that the voting procedures and privileges of the *ex-officio* members of the Kansas Water Authority are extremely important to the success and transparency of the Kansas water planning process and the grassroots basin advisory committee structure. The advisory role these members play is a critical technical and educational function of the Kansas Water Authority. However, we believe *ex-officio* members should retain an advisory capacity status and be restricted from voting, making motions, and seconding motions in meetings of the full Kansas Water Authority.

In actuality, the question of voting rights and the right to make and second motions for *ex-officio* members has been asked before. In 1981, at the request of the Chairman of the Water Authority at the time, the Attorney General issued opinion 82-47 that stated, "Ex-officio members of the Kansas Water Authority are precluded by K.S.A. 1981 supp 74-2622 from voting on matters considered by the Authority..." The opinion goes on to state that *ex-officio* members are not specifically precluded by statute from making and seconding motions as those actions are considered "part of the deliberative process and the ensuing discussion of the motion."

Clearly from the Attorney General's opinion, *ex-officio* members cannot vote but have motion and seconding rights. Under this opinion, HB 2014 need not address the issue of voting rights. However, it is our understanding that a 2004 internal policy of the Water Authority does allow *ex-officio* members to vote in select committees. This internal policy clearly conflicts with the AG's opinion. HB 2014, if passed as written, will clearly set the boundaries for voting rights of *ex-*

Senate Natural Resources  
3/11/05  
Attachment 4

*officio* members, but a revision of the Water Authority's internal policy is also required to abide by the AG's opinion.

Annually the Kansas Water Authority makes recommendations to the Governor and Legislature about how Kansas Water Plan Fund allocations should be divided between State agencies. It is inappropriate for the individuals heading those agencies to move initiatives that potentially increase or decrease their budgets. This does not occur in the legislative budgeting process, therefore it should not be allowed in the Water Planning process. KFB believes this is the key issue for limiting the actions of *ex-officio* members. The potential conflict this presents for Kansas citizens and agency heads needs to be remedied.

We also believe it is in the best interest of the people of Kansas to limit the ability of *ex-officio* members to make and second motions in full Authority meetings. If in a full Authority meeting an *ex-officio* member makes a motion on a particular issue and, a second is provided by another *ex-officio* member, then a vote is required of the voting members of the full Authority regardless. Our concern is this type of vote could be forced without adequate discussion or study.

Eleven *ex-officio* members with motion abilities could significantly change the dynamics of the Water Authority. As members of the Governor's cabinet and civil servants, those individuals could potentially be influenced to forward a particular issue or budget item based on the interests of the Administration or agency. This may not coincide with the interests of the majority of Kansans or the recommendations forwarded by the BACs. Although we have no particular concerns with individuals currently serving on the Water Authority or actions they have taken, we do have serious concerns about motions made by past *ex-officio* Water Authority members. By restricting the motion making abilities of *ex-officio* members, and passing HB 2014, this committee and the Legislature will prevent these types of events from occurring in the future. We encourage the committee to act favorably on HB 2014.

Thank you for this opportunity to provide testimony.





STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

February 22, 1982

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ATTORNEY GENERAL OPINION NO. 82-47

Patrick J. Regan, Chairman  
Kansas Water Authority  
1400 Kansas State Bank Building  
125 North Market Street  
Wichita, Kansas 67202

Re: State Boards, Commissions and Authorities -- Kansas  
Water Office and Kansas Water Authority -- Powers of  
Authority's Ex Officio Members.

Synopsis: Ex Officio members of the Kansas Water Authority are precluded by K.S.A. 1981 Supp. 74-2622 from voting on matters considered by the Authority, but such members are entitled to participate fully in that body's deliberations regarding such matters. Participation in the Authority's deliberative process includes the ability to make or second a motion, which is but a formalized expression of proposed action, and is not an integral part of the voting process whereby members of the Authority cast their votes to express approval or disapproval. Cited herein: K.S.A. 1981 Supp. 74-2622.

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Dear Mr. Regan:

You have inquired whether a nonvoting member of the Kansas Water Authority may make or second motions for consideration at meetings of the Authority. Your question is predicated on the provisions of K.S.A. 1981 Supp. 74-2622, concerning the establishment of the Kansas Water Authority and providing in relevant part:

"The state geologist, the chief engineer of the division of water resources of the state board of agriculture, the director of the division of environment of the department of health and environment, the director of the Kansas water office and the director of the agricultural experiment stations of Kansas state university of agriculture and applied sciences shall be nonvoting members of the authority ex officio." (Emphasis added.)

We recognize that the term "ex officio" may generate some confusion. However, simply stated, it means "by virtue of the office." Black's Law Dictionary 661 (Rev. 4th Ed. 1968). In this instance, then, the legislature is prescribing that by virtue of holding certain specified offices, the officers designated in the statute shall also be members of the Kansas Water Authority.

The general rule in regard to the power and authority of ex officio members of a board is that "[e]x officio members of a public body are members for all purposes." (Footnotes omitted.) 1 Am.Jur.2d Administrative Law §61. However, as evidenced by K.S.A. 1981 Supp. 74-2622, this general rule is at times subject to an express legislative direction that the powers of ex officio members be limited. In this instance, the legislature has precluded ex officio members of the Authority from voting.

While we have found no pertinent Kansas decisions addressing the scope of such a limitation, and although there is not an abundance of relevant case law from other jurisdictions, the cases we have reviewed indicate the power and authority of ex officio members of a body should be limited only by those restrictions specified in the pertinent legislation. See, generally, Louisville and Jefferson County Planning Comm. v. Ogden, 210 S.W.2d 771 (1948); Matter of Farrel v. Board of Health, 243 App. Div. 332 (N.Y. 1938). In Farrel, supra, the court noted that "[o]rdinarily a membership on any board or body carries with it a right to vote." Id. at 334. Furthermore, "a restriction upon such power will not be extended beyond the limitation clearly intended to be imposed by the law, rule or order creating the restraint." Id.

Accordingly, we believe that the limitation in 74-2622 on the Authority's ex officio members should not be extended beyond the clearly intended restriction of these members' voting power. Thus, for example, we believe these members are entitled to full participation in the Authority's deliberative process regarding matters under consideration by the

Authority. They are entitled to partake fully in discussions, by suggesting courses of action, indicating their support of or opposition to proposed action and otherwise expressing their opinions on matters before the Authority.

However, even though the restriction on the ex officio members' powers is not to be extended beyond the statutory preclusion of their right to vote, the question arises as to whether the making or formal endorsement of a motion is an integral part of voting. Although we are unaware of any case law precisely pertinent to this issue, we note that "[a] 'motion' is usually a proposal for action by [a] deliberative assembly. Lindahl v. Independent School Dist. No. 306 of Hubbard County, 133 N.W.2d 23, 26, 270 Minn. 164." 27A Words and Phrases (1981 P.P.) 27. It is a formal proposal made to evoke action, and when acted upon it becomes the formal expression of a deliberative body's will. 27A Words and Phrases (1961) 354. It also should be recognized that in parliamentary procedure, a motion proposing action by a body is required in many instances as a condition precedent to the discussion of such proposed action by the body.

Clearly, then, a motion is but a formalized expression of proposed action; and even though a motion is a condition precedent to making a decision upon a proposal, it is not, in our judgment, an integral part of the voting process whereby members of the body cast their votes to express their approval or disapproval. Rather, we believe a motion to be as much a part of the deliberative process as is the ensuing discussion of the motion.

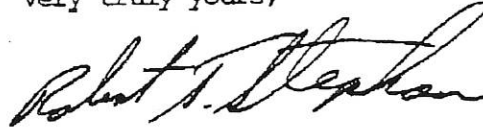
With this in mind, and in recognition of the fact that the legislature has not precluded the ex officio members of the Water Authority from participating in the Authority's deliberative process, we are unable to conclude that the legislature has intended to foreclose such members from formalizing their suggestions or proposals. In our judgment, the legislature has intended only that the Authority's ex officio members be precluded from voting.

In summary, then, it is our opinion that ex officio members of the Kansas Water Authority are precluded by K.S.A. 1981 Supp. 74-2622 from voting on matters considered by the Authority, but such members are entitled to participate fully in that body's deliberations regarding such matters. Participation in the Authority's deliberative process includes the right

Patrick J. Regan  
Page Four

to make or second a motion, which is but a formalized expression of proposed action and is not an integral part of the voting process whereby members of the Authority cast their votes to express approval or disapproval.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



W. Robert Alderson  
First Deputy Attorney General

RIS:WRA:may



**Testimony on Kansas Water Authority  
Ex-Officio Member Provisions**

**Presented to  
The Senate Natural Resources Committee  
HB 2014**

**Dennis Schwartz  
Kansas Water Authority  
March 11, 2005**

Senator McGinn and members of the Committee, I am Dennis Schwartz, a member of the Kansas Water Authority representing Public Water Supply Systems. I appear this morning representing the position of the KWA. The KWA opposes the proposed amendments to K.S.A. 74-2622 as contained in HB 2014 relative to the privileges of the ex-officio members.

The KWA is a 24-member group consisting of 13 appointed members representing various water related interests. The remaining 11 members are ex-officio, non-voting members representing various state agencies/entities as designated in the statute.

The primary function of the KWA is to consider and approve policy recommendations for inclusion in *the Kansas Water Plan*. Once approved, the KWA submits these recommendations to the Governor and Legislature for their consideration. In addition to other functions, the Authority also makes recommendations on spending priorities for the State Water Plan Fund.

As previously mentioned, K.S.A 74-2622 requires ex-officio members to serve in a non-voting capacity. A 1982 Attorney General's Opinion was issued which clarified the definition of non-voting membership. The synopsis of the Attorney General Opinion 1982-047 states:

*Ex-Officio members of the Kansas Water Authority are precluded by K.S.A. 1981 Supp. 74-2622 from voting on matters considered by the Authority, but such members are entitled to participate fully in that body's deliberations regarding such matters. Participation in the Authority's deliberative process includes the ability to make or second a motion, which is but a formalized expression of proposed action, and is not an integral part of the voting process whereby members of the Authority cast their votes to express approval or disapproval.*

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A Memorandum of Internal Policy (IPM-07), adopted by the KWA in January of 2004, further defines the role of ex-officio members. The Memorandum states:

*Ex-Officio members may make or second motions in both Committee of the Whole and Full Authority meetings. Ex-Officio members of the Kansas Water Authority may make and second motions as well as cast votes in select committees established by the Authority. In accordance with K.S.A. 74-2622, ex-officio members of the Kansas Water Authority may not vote on matters of Final Action before the Kansas Water Authority Committee of the Whole or the Full Authority.*

The Kansas Water Authority values the role of ex-officio members and feels strongly that the ability of the ex-officio members to make and second motions as part of the deliberation process is vital to a strong private/public partnership embodied in the Kansas water planning process. The Authority is also committed to maintaining and enhancing the public's trust in this endeavor. To that end, Steve Irsik, KWA Chairman, has agreed to revisit the Memorandum of Internal Policy (IPM-07) at the next meeting of the Authority to determine what changes, if any, need to be made to the policy to ensure consistency with the statute and interpretations made by the Attorney General.

In summary, the Kansas Water Authority is opposed to the proposed changes contained in HB 2014 limiting the participation by ex-officio members in the deliberations process of the Authority. I would like to thank you, Senator McGinn and members of the Committee for the opportunity to share the position of the Kansas Water Authority. I would be happy to stand for questions at the appropriate time.