

LEGISLATIVE BILL 754

Approved by the Governor April 15, 1992

Introduced by Schmit, 23; Schrock, 39

AN ACT relating to ethanol; to amend sections 66-1301, 66-1303, 66-1307 to 66-1307.02, 66-1320, 66-1324, and 66-1326, Reissue Revised Statutes of Nebraska, 1943; to define and eliminate terms; to change provisions relating to a report and to the deposit, distribution, and transfer of certain funds as prescribed; to change provisions relating to grants or loans for approved projects; to change provisions relating to the ethanol tax credit and the funding of such credit; to create a fund; to provide a tax credit for producers of ethyl tertiary butyl ether; to authorize agreements as prescribed; to harmonize provisions; to provide operative dates; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 66-1301, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

66-1301. Sections 66-1301 to ~~66-1325~~ 66-1326 and sections 9 to 11 of this act shall be known and may be cited as the Ethanol Authority and Development Act.

Sec. 2. That section 66-1303, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

66-1303. For purposes of the Ethanol Authority and Development Act, unless the context otherwise requires:

(1) Agricultural production facility shall mean a plant or facility related to the processing, marketing, or distribution of any products derived from grain components, coproducts, or byproducts;

(2) Board shall mean the Ethanol Authority and Development Board;

(3) Capital cost shall mean expenditures which include, but are not limited to, expenditures incurred for design and engineering, for land acquisition and related costs, financing fees, plant construction, and such other appropriate costs incurred prior to the

commencement of the operation of an ethanol or agricultural production facility or a facility related to the processing, marketing, or distribution of ethanol or any products derived from ethanol components, coproducts, or byproducts;

(4) Electric supplier shall mean any legal entity supplying, producing, or distributing electricity within the state for sale at wholesale or retail;

(5) Fund shall mean the Ethanol Authority and Development Cash Fund; and

(6) (5) Grain shall mean wheat, corn, and grain sorghum; and

(6) Name plate design capacity shall mean the original designed capacity of a production facility. Capacity may be specified as bushels of grain ground or gallons of ethanol produced per year.

Sec. 3. That section 66-1307, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

66-1307. (1) There is hereby created the Ethanol Authority and Development Cash Fund which shall be used by the board to carry out its responsibilities under the Ethanol Authority and Development Act. The fund may be used:

(a) To defray the expenses of the board;

(b) To secure bonds;

(c) To acquire an ethanol or agricultural production facility or a facility related to the processing, marketing, or distribution of ethanol or any products derived from ethanol components, coproducts, or byproducts or to purchase shares of stock or otherwise make an investment in such a facility pursuant to sections 66-1307.01 and 66-1307.02;

(d) To make grants or loans pursuant to sections 66-1317 to 66-1325;

(e) To make grants or loans to facilitate the development or marketing of new, nonfood products derived from ethanol or ethanol components, coproducts, or byproducts;

(f) To provide equity financing for construction of ethanol production and distribution facilities pursuant to Chapter 70; and

(g) As the board may otherwise direct, including the acquisition of equipment or construction, acquisition, or expansion of ethanol or agricultural production facilities, except that not more than three million dollars shall be used to fund ethanol research and development projects.

The fund shall not be used to pay operating

expenses of an applicant but shall only be used for capital investment purposes.

(2) When determining whether to recommend construction of a project for the production and distribution of ethanol or other agricultural byproducts or how funds should be distributed pursuant to the act and sections 70-301, 70-601, 70-601.01, 70-604, 70-604.02, 70-626, 70-628.01 to 70-628.04, 70-631, 70-632, 70-636, 70-637, 70-646, 70-655, 70-657, 70-667, 70-802, 70-1402 to 70-1404, 70-1409, 70-1413, 70-1416, and 70-1417, the board's considerations shall include, but not be limited to, job creation, economic return to the state, size of the plant, byproducts or coproducts, if any, date construction would be commenced and completed, the financial stability of the applicant, and the amount of funds needed to commence construction of the plant or facility.

(3) When awarding grants or loans pursuant to subdivision (1)(e) of this section, the board's considerations shall include, but not be limited to, the jobs to be created by the applicant, the potential commercial success of the product to be developed, the financial stability of the applicant, and the amount of funds requested.

(4) The State Treasurer shall credit to the fund such money as shall be (a) appropriated to the fund by the Legislature, (b) received from the tax levied pursuant to section 66-1308, and (c) donated as gifts, bequests, grants, or other contributions to the fund from public or private sources, ~~and~~ (d) repaid by cities, counties, villages, or postsecondary educational institutions pursuant to section 66-1324, and (e) received as a return on investment pursuant to sections 66-1307-01 and 66-1307-02. Funds made available by any department or agency of the United States may also be credited to the fund if so directed by the board. Any money in the fund available for investment shall be invested by the state investment officer pursuant to sections 72-1237 to 72-1276. Until January 1, 1993, the Department of Revenue shall, at the end of each calendar quarter, notify the State Treasurer of the amount of motor fuel tax that was not collected in the preceding calendar quarter due to the credit provided in section 66-1326. The State Treasurer shall transfer from the Ethanol Authority and Development Cash Fund to the Highway Trust Fund an amount equal to one-half of such credit. The amounts shall be transferred through December August 31, 1992. The State Treasurer shall transfer from the Ethanol

Production Incentive Cash Fund to the Highway Trust Fund an amount equal to one-half of such credit commencing September 1, 1992, through December 31, 1992.

Sec. 4. That section 66-1307.01, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

66-1307.01. (1) ~~The~~ Until April 30, 1992, the board may use the ~~fund~~ Ethanol Authority and Development Cash Fund (a) to acquire an ethanol or agricultural production facility or a facility related to the processing, marketing, or distribution of ethanol or any products derived from ethanol components, coproducts, or byproducts or (b) to purchase shares of stock or otherwise make an investment to facilitate the construction, acquisition, or expansion of such a facility. The board shall establish the necessary criteria or guidelines for determining when the fund will be invested in such facilities. The investment shall be for capital investment purposes only and shall not be used to pay operating expenses of the applicant. Application for an investment shall be made pursuant to procedures publicly announced by the board. The board shall establish application review procedures which recognize priority considerations similar to those enumerated in section 66-1323.

(2)(a) The board may make an investment pursuant to subsection (1) of this section only after receipt of an application which contains:

(i) A business plan, including a description of the applicant and its management, product, and market and the proposed project;

(ii) A statement of the amount, timing, and projected use of the capital required;

(iii) A statement of the potential economic impact of the project, including the number, location, and types of jobs expected to be created; and

(iv) Such other information as the board shall request.

(b) Approval of the investment by the board may be made after the board finds, based upon the application submitted by the applicant and such additional investigation as the staff of the board shall make and incorporate in its minutes, that:

(i) The proceeds of the investment will be used only to facilitate the construction, acquisition, or expansion of facilities of the applicant;

(ii) The project has a reasonable chance of success;

(iii) The board's participation is necessary

to the success of the project or its retention in the state;

(iv) The project has the reasonable potential to create employment within the state;

(v) The applicant has already made or is contractually committed to make a substantial financial and time commitment to the project;

(vi) There is a reasonable possibility that the board will recoup at least its initial investment; and

(vii) Binding commitments have been made to the board by the applicant for adequate reporting of financial data to the board which shall include a requirement for an annual report or, if required by the board, an annual audit of the financial and operational records of the applicant and for such control on the part of the board as shall be considered prudent over the management of the project so as to protect the investment of the board, including, in the discretion of the board and without limitation, the right of access to financial and other records of the applicant relating to the project.

(3) Before an investment is made pursuant to subsection (1) of this section, the applicant shall sign an agreement with the board stating that the funds invested are for capital investment purposes and not for operating expenses.

(4) In carrying out its functions under this section, the board is encouraged to create an investment committee to assist in evaluating potential investments. The membership of this investment committee may include both members and staff of the board and other persons drawn from sources other than the board who are recognized by their peers for outstanding knowledge and leadership in their fields, all of whom shall serve at the pleasure of the board. Members of the investment committee shall be reimbursed for any reasonable expenses incurred by them in the performance of duties assigned by the board pursuant to sections 81-1174 to 81-1177.

(5) The board shall not make an initial investment in any project in excess of the amount necessary to own more than forty-nine percent of such project except when the board acquires the facility. Such investment shall be matched dollar for dollar by any other investors in the project. If in the judgment of the board the project is experiencing financial difficulty, a greater percentage of such investment may be acquired by the board.

(6) The board shall adopt procedures to carry out this section and shall provide necessary assistance to applicants to properly and rapidly process investment requests.

(7) On January 1, 1990 ~~1993~~, and each year thereafter, the board shall submit a report to the Legislature detailing investments made pursuant to subsection (1) of this section. The report shall include a statement of (a) the current amount invested in each company, (b) the current market value of assets of such company, and (c) the market value of the assets of such company at the time of the initial investment by the board.

Sec. 5. That section 66-1307.02, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

66-1307.02. Notwithstanding the investment standards and fiduciary obligations of the state prescribed in sections 72-1246 and 72-1247, the state investment officer shall purchase shares of stock or otherwise make an investment utilizing the fund Ethanol Authority and Development Cash Fund when so directed by the board. The board shall not direct the state investment officer to purchase shares of stock or otherwise make an investment which utilizes all or part of the fund unless the board finds that any amounts of the fund so utilized will provide a reasonable return on investment to the state. All management, custodial, and service costs, as defined in section 72-1249.02, incurred by the state investment officer in purchasing shares of stock or otherwise making an investment pursuant to section 66-1307.01 shall be charged to the fund. Such costs shall be approved by the Nebraska Investment Council. Any return on investment received pursuant to section 66-1307.01 and this section and any money available due to failure to fulfill conditional requirements pursuant to investment agreements entered into prior to April 30, 1992, shall be remitted to the State Treasurer and shall be placed in the fund credited to the Ethanol Production Incentive Cash Fund.

For purposes of this section, reasonable return on investment shall not be construed to mean those returns realized pursuant to the standards and fiduciary obligations prescribed in sections 72-1246 and 72-1247 but shall be based on the expectation of a viable ethanol or agricultural production facility or facility related to the processing, marketing, or distribution of ethanol or any products derived from ethanol components, coproducts, or byproducts being

constructed which will create jobs, generate economic return to the state, produce byproducts or coproducts, provide a market for grain, and otherwise provide an opportunity to receive interest and dividends and recover any principal invested or loaned for redistribution for additional new or expanded facilities.

Sec. 6. That section 66-1320, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

66-1320. Any application made under section 66-1319 shall be filed with the board. The board shall establish application review procedures. No new investment may be made or letters of commitment given to an applicant that has not received approval of its final application by April 30, 1992.

Sec. 7. That section 66-1324, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

66-1324. Any repayment of a loan made pursuant to the Ethanol Authority and Development Act shall be remitted to the State Treasurer and shall be placed in the fund credited to the Ethanol Production Incentive Cash Fund.

Sec. 8. That section 66-1326, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

66-1326. Through December 31, 1997, each (1) Each producer of ethanol shall receive a credit pursuant to this section of twenty cents per gallon of ethanol produced in Nebraska, which credit shall be in the form of a transferable motor fuel tax credit certificate. After July 1, 1994, no such credit shall be given for ethanol produced at an ethanol facility which was in production on or before January 1, 1992, unless on or before July 1, 1994, the name plate design capacity for the production of ethanol, before denaturing, at the facility has been expanded to equal at least two times the name plate design capacity for production of ethanol, before denaturing, existing at the facility as of January 1, 1992.

(2) Any ethanol facility which is in production at the rate of at least twenty-five percent of its name plate design capacity for the production of ethanol, before denaturing, on or before December 31, 1992, shall receive a credit of twenty cents per gallon of ethanol produced beginning with the first month for which it is eligible to receive such credit and ending not later than December 31, 1997.

(3) Any ethanol facility which is not in production on or before December 31, 1992, but which is in production at the rate of at least twenty-five percent of its name plate design capacity for the production of ethanol, before denaturing, on or before December 31, 1995, shall receive a credit of twenty cents per gallon of ethanol produced for sixty months beginning with the first month for which it is eligible to receive such credit and ending not later than December 31, 2000.

(4) Any ethanol facility eligible for a credit under subsection (1), (2), or (3) of this section shall also receive a credit of twenty cents per gallon of ethanol produced in excess of the original name plate design capacity which results from expansion of the facility completed on or before December 31, 1995. Such credit shall be for sixty months beginning with the first month for which production from the expanded facility is eligible to receive such credit and ending not later than December 31, 2000.

(5) The credit shall be given only for ethanol produced at a plant in Nebraska at which all fermentation, distillation, and dehydration takes place. Not less than two million gallons and not more than twenty-five million gallons of ethanol produced annually at a plant an ethanol facility shall be eligible for the credit, and the credit may only be claimed by a producer for an eighty-four-month period after the first credit certificate is received the period specified in subsection (2), (3), or (4) of this section.

(6) The Department of Revenue shall prescribe an application form and procedures for claiming the credit and shall adopt and promulgate rules and regulations to carry out this section.

Sec. 9. (1) There is hereby created the Ethanol Production Incentive Cash Fund which shall be used by the board to pay the credits created in section 66-1326 to the extent provided in this section. Any money in the fund available for investment shall be invested by the state investment officer pursuant to sections 72-1237 to 72-1276. On or before April 30, 1992, the State Treasurer shall transfer to the Ethanol Production Incentive Cash Fund the sum of eleven million dollars from the Ethanol Authority and Development Cash Fund and thereafter shall transfer such additional money as shall be (a) appropriated to the Ethanol Production Incentive Cash Fund by the Legislature, (b) given as gifts, bequests, grants, or other contributions to the Ethanol Production Incentive Cash Fund from public or

private sources, (c) made available due to failure to fulfill conditional requirements pursuant to investment agreements entered into prior to April 30, 1992, (d) received as return on investment of the Ethanol Authority and Development Cash Fund, and (e) otherwise credited to the fund from sources deemed appropriate by the Legislature.

(2) Commencing January 1, 1993, the Department of Revenue shall, at the end of each calendar quarter, notify the State Treasurer of the amount of motor fuel tax that was not collected in the preceding calendar quarter due to the credits provided in section 66-1326. The State Treasurer shall transfer from the Ethanol Production Incentive Cash Fund to the Highway Trust Fund an amount equal to such credits less the following amounts:

(a) For 1993, 1994, and 1995, the amount generated during the calendar quarter by a one cent tax on motor fuel pursuant to sections 66-489 and 66-605.07;

(b) For 1996, the amount generated during the calendar quarter by a three-quarters cent tax on motor fuel pursuant to such sections;

(c) For 1997, the amount generated during the calendar quarter by a one-half cent tax on motor fuel pursuant to such sections; and

(d) For 1998, 1999, and 2000, no reduction.

The amounts shall be transferred through December 31, 2000. For 1993 through 1997, if the amount generated pursuant to subdivisions (a), (b), and (c) of this subsection and the amount transferred pursuant to subsection (1) of this section are not sufficient to fund the credits provided in section 66-1326, then the credits shall be funded through the Ethanol Production Incentive Cash Fund but shall not be funded through either the Highway Cash Fund or the Highway Trust Fund. For 1998, 1999, and 2000, the credits provided in section 66-1326 shall be funded through the Ethanol Production Incentive Cash Fund but shall not be funded through either the Highway Cash Fund or the Highway Trust Fund.

(3) On February 15, 2001, the State Treasurer shall transfer any unexpended and unobligated funds from the Ethanol Production Incentive Cash Fund to the Highway Trust Fund.

Sec. 10. Through December 31, 2000, each producer of Nebraska-produced ethyl tertiary butyl ether shall receive a nonrefundable credit of fifty cents per gallon of each gallon of Nebraska-produced ethyl tertiary butyl ether sold for delivery outside the State

of Nebraska, which credit shall be in the form of a transferable income tax credit certificate which may be applied only to the income tax liability of the producer, its parent, or a subsidiary thereof. A credit certificate may not be applied to income tax liability incurred prior to the year the credit certificate was earned. Not more than two and one-half million gallons of ethyl tertiary butyl ether produced annually at a plant shall be eligible for such credit. The credit shall be given only for ethyl tertiary butyl ether produced at a plant in Nebraska at which all fermentation, distillation, and dehydration takes place. The credit shall be reduced by the amount of any producer's credit earned pursuant to section 66-1326 by the producer of the ethyl tertiary butyl ether on ethanol used to produce ethyl tertiary butyl ether and shall be claimed no later than the due date, including extensions, of the tax return filed for the taxable year of the claimant ending not more than thirty-six months after the taxable year of the claimant in which the certificate is issued. The Department of Revenue shall prescribe an application form and procedures for claiming the credit and shall adopt and promulgate rules and regulations to carry out this section.

Sec. 11. The Tax Commissioner and the producer eligible to receive credit under section 66-1326 shall enter into a written agreement. The producer shall agree to produce ethanol at the designated facility and any expansion thereof. The Tax Commissioner, on behalf of the State of Nebraska, shall agree to furnish the producer the tax credits as provided by and limited in section 66-1326 in effect on the date of the agreement. The agreement to produce ethanol in return for the credit shall be sufficient consideration, and the agreement shall be binding upon the state. No credit shall be given to any producer of ethanol which fails to produce ethanol in Nebraska in compliance with the agreement. The agreement shall include:

- (1) The name of the producer;
- (2) The address of the ethanol facility;
- (3) The date of the initial eligibility of the ethanol facility to receive such credits;
- (4) The name plate design capacity of the ethanol facility as of the date of its initial eligibility to receive such credits; and
- (5) The name plate design capacity which the facility is intended to have after the completion of any proposed expansion. If no expansion is contemplated at

the time of the initial agreement, the agreement may be amended to include any proposed expansion.

Sec. 12. Section 10 of this act shall become operative for tax years beginning or deemed to begin on or after January 1, 1992, and the other sections of this act shall become operative on April 30, 1992.

Sec. 13. That original sections 66-1301, 66-1303, 66-1307 to 66-1307.02, 66-1320, 66-1324, and 66-1326, Reissue Revised Statutes of Nebraska, 1943, are repealed.

Sec. 14. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.