

## SENATE BILL No. 204

By Committee on Natural Resources

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AN ACT concerning the waters of the state; relating to classified streams; amending K.S.A. 2000 Supp. 65-171d and repealing the existing section.

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

Section 1. K.S.A. 2000 Supp. 65-171d is hereby amended to read as follows: 65-171d. (a) For the purpose of preventing surface and subsurface water pollution and soil pollution detrimental to public health or to the plant, animal and aquatic life of the state, and to protect beneficial uses of the waters of the state and to require the treatment of sewage predicated upon technologically based effluent limitations, the secretary of health and environment shall make such rules and regulations, including registration of potential sources of pollution, as may in the secretary's judgment be necessary to: (1) Protect the soil and waters of the state from pollution resulting from underground storage reservoirs of hydrocarbons and liquid petroleum gas; (2) control the disposal, discharge or escape of sewage as defined in K.S.A. 65-164 and amendments thereto, by or from municipalities, corporations, companies, institutions, state agencies, federal agencies or individuals and any plants, works or facilities owned or operated, or both, by them; and (3) establish water quality standards for the waters of the state to protect their beneficial uses.

(b) The secretary of health and environment may adopt by reference any regulation relating to water quality and effluent standards promulgated by the federal government pursuant to the provisions of the federal clean water act and amendments thereto, as in effect on January 1, 1989, which the secretary is otherwise authorized by law to adopt.

(c) For the purposes of this act, including K.S.A. 65-161 through 65-171h and K.S.A. 2000 Supp. 65-1,178 through 65-1,198, and amendments thereto, and rules and regulations adopted pursuant thereto:

(1) "Pollution" means: (A) Such contamination or other alteration of the physical, chemical or biological properties of any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to the plant, animal or aquatic life of the state or to other designated beneficial uses; or (B) such discharge as will or is likely to exceed state effluent standards

1 predicated upon technologically based effluent limitations.

2 (2) "Confined feeding facility" means any lot, pen, pool or pond: (A)  
3 Which is used for the confined feeding of animals or fowl for food, fur  
4 or pleasure purposes; (B) which is not normally used for raising crops;  
5 and (C) in which no vegetation intended for animal food is growing.

6 (3) "Animal unit" means a unit of measurement calculated by adding  
7 the following numbers: The number of beef cattle weighing more than  
8 700 pounds multiplied by 1.0; plus the number of cattle weighing less  
9 than 700 pounds multiplied by 0.5; plus the number of mature dairy cattle  
10 multiplied by 1.4; plus the number of swine weighing more than 55  
11 pounds multiplied by 0.4; plus the number of swine weighing 55 pounds  
12 or less multiplied by 0.1; plus the number of sheep or lambs multiplied  
13 by 0.1; plus the number of horses multiplied by 2.0; plus the number of  
14 turkeys multiplied by 0.018; plus the number of laying hens or broilers,  
15 if the facility has continuous overflow watering, multiplied by 0.01; plus  
16 the number of laying hens or broilers, if the facility has a liquid manure  
17 system, multiplied by 0.033; plus the number of ducks multiplied by 0.2.  
18 However, each head of cattle will be counted as one full animal unit for  
19 the purpose of determining the need for a federal permit. "Animal unit"  
20 also includes the number of swine weighing 55 pounds or less multiplied  
21 by 0.1 for the purpose of determining applicable requirements for new  
22 construction of a confined feeding facility for which a permit or registra-  
23 tion has not been issued before January 1, 1998, and for which an appli-  
24 cation for a permit or registration and plans have not been filed with the  
25 secretary of health and environment before January 1, 1998, or for the  
26 purpose of determining applicable requirements for expansion of such  
27 facility. However, each head of swine weighing 55 pounds or less shall be  
28 counted as 0.0 animal unit for the purpose of determining the need for  
29 a federal permit.

30 (4) "Animal unit capacity" means the maximum number of animal  
31 units which a confined feeding facility is designed to accommodate at any  
32 one time.

33 (5) "Habitable structure" means any of the following structures which  
34 is occupied or maintained in a condition which may be occupied and  
35 which, in the case of a confined feeding facility for swine, is owned by a  
36 person other than the operator of such facility: A dwelling, church, school,  
37 adult care home, medical care facility, child care facility, library, com-  
38 munity center, public building, office building or licensed food service or  
39 lodging establishment.

40 (6) "Wildlife refuge" means Cheyenne Bottoms wildlife management  
41 area, Cheyenne Bottoms preserve and Flint Hills, Quivera, Marais des  
42 Cygnes and Kirwin national wildlife refuges.

43 (7) (A) "*Classified streams*" shall include all streams that have:

1 (i) An actual flow during the seven day 10 year low flow equal to or  
2 greater than one cubic foot per second as evidenced by flow data;

3 (ii) an actual flow during the seven day 10 year low flow less than  
4 one cubic foot per second and actually inhabited by any species listed as  
5 threatened or endangered by state or federal law as evidenced by flow  
6 and biological data; or

7 (iii) studies conducted by the department show that pooling of water  
8 during periods of zero flow provides important refuges for aquatic life  
9 and permits biological recolonization of intermittently flowing segments.

10 (B) "Classified streams" may include streams that meet the require-  
11 ments of (A), and the department has conducted scientific, economic and  
12 social reviews and determined by clear and convincing evidence that the  
13 benefits of classification outweigh the social, economic and regulatory  
14 costs that may arise from classification of the stream.

15 (C) (i) Any stream segment classified on the effective date of this act  
16 that the department cannot prove meets the definition of a classified  
17 stream shall not be classified.

18 (ii) Any definition of "classified surface water" or "classified stream"  
19 in rules and regulations or law that is inconsistent with this definition is  
20 hereby declared null and void.

21 (D) Prior to designating a stream as a classified stream pursuant to  
22 paragraphs (A)(ii) or (A)(iii), the department shall establish, through a  
23 procedure adopted in rules and regulations, that all of the reviews and  
24 findings have been met in such paragraphs.

25 (8) Designated uses of surface waters are defined as follows:

26 (A) "Agricultural use" means classified surface waters that:

27 (i) Flow to, through, or from agricultural operations, which shall in-  
28 clude, but not be limited to, cropland, pastureland, wooded or nonpro-  
29 ductive vegetation;

30 (ii) provide for irrigation by withdrawing the surface waters and ap-  
31 plying such water to land; or

32 (iii) provide water for livestock.

33 (B) (i) "Recreational use" means:

34 (a) Class A primary contact recreation use is classified streams that  
35 are used during the period from May 1 through September 30; that are  
36 open to and accessible by the public; and of a depth capable of supporting  
37 the recreational activities of swimming, skin diving, water skiing or wind  
38 surfing where the body is intended to be immersed in surface water to  
39 the extent that some inadvertent ingestion of water is probable;

40 (b) class A secondary contact recreation use is classified streams that  
41 are open to, and accessible by the public and of a depth capable of sup-  
42 porting the recreational activities of wading, boating, fishing and mussel  
43 harvesting where the body is not intended to be immersed and where

1 ingestion of surface water is not probable;

2 (c) class B primary contact recreation is classified streams that are  
3 used during the period from May 1 through September 30; that are not  
4 open to and accessible by the public under Kansas law, except with written  
5 permission of the land owner; and of a depth capable of supporting the  
6 recreational activities of swimming, skin diving, water skiing or wind  
7 surfing where the body is intended to be immersed in surface water to  
8 the extent that some inadvertent ingestion of water is probable; or

9 (d) class B secondary contact recreation is classified streams that are  
10 used during the period from May 1 through September 30; that are not  
11 open to and accessible by the public under Kansas law, except with written  
12 permission of the land owner; and of a depth capable of supporting the  
13 recreational activities of wading, boating, fishing and mussel harvesting  
14 where the body is not intended to be immersed and where ingestion of  
15 surface water is not probable.

16 (ii) Recreational use designations shall not apply to nonnavigable wa-  
17 ter, as defined by Kansas law, overlying private lands where the public  
18 has no right to the use of such waters for recreation and such condition  
19 has existed since 1975.

20 (iii) Recreational use designations shall not apply to surface waters  
21 or streams where the natural, ephemeral, intermittent or low flow con-  
22 ditions or water levels prevent recreational activities.

23 (iv) Any stream designation on the effective date of this act that is  
24 inconsistent with the categories outlined in (A) or (B)(i)(a) through  
25 (B)(i)(d) is hereby repealed and shall be redesignated by the department  
26 on or before January 1, 2002. In redesignating such stream segments, the  
27 department shall follow the provisions of this section.

28 (d) In adopting rules and regulations, the secretary of health and en-  
29 vironment, taking into account the varying conditions that are probable  
30 for each source of sewage and its possible place of disposal, discharge or  
31 escape, may provide for varying the control measures required in each  
32 case to those the secretary finds to be necessary to prevent pollution. If  
33 a freshwater reservoir or farm pond is privately owned and where com-  
34 plete ownership of land bordering the reservoir or pond is under common  
35 private ownership, such freshwater reservoir or farm pond shall be ex-  
36 empt from water quality standards except as it relates to water discharge  
37 or seepage from the reservoir or pond to waters of the state, either surface  
38 or groundwater, or as it relates to the public health of persons using the  
39 reservoir or pond or waters therefrom.

40 (e) (1) Whenever the secretary of health and environment or the  
41 secretary's duly authorized agents find that the soil or waters of the state  
42 are not being protected from pollution resulting from underground stor-  
43 age reservoirs of hydrocarbons and liquid petroleum gas or that storage

1 or disposal of salt water not regulated by the state corporation commission  
2 or refuse in any surface pond is causing or is likely to cause pollution of  
3 soil or waters of the state, the secretary or the secretary's duly authorized  
4 agents shall issue an order prohibiting such underground storage reservoir  
5 or surface pond. Any person aggrieved by such order may within 15 days  
6 of service of the order request in writing a hearing on the order.

7 (2) Upon receipt of a timely request, a hearing shall be conducted in  
8 accordance with the provisions of the Kansas administrative procedure  
9 act.

10 (3) Any action of the secretary pursuant to this subsection is subject  
11 to review in accordance with the act for judicial review and civil enforce-  
12 ment of agency actions.

13 (f) The secretary may adopt rules and regulations establishing fees  
14 for the following services:

15 (1) Plan approval, monitoring and inspecting underground or buried  
16 petroleum products storage tanks, for which the annual fee shall not ex-  
17 ceed \$5 for each tank in place;

18 (2) permitting, monitoring and inspecting salt solution mining oper-  
19 ators, for which the annual fee shall not exceed \$1,950 per company; and

20 (3) permitting, monitoring and inspecting hydrocarbon storage wells  
21 and well systems, for which the annual fee shall not exceed \$1,875 per  
22 company.

23 (g) Prior to any new construction of a confined feeding facility with  
24 an animal unit capacity of 300 to 999, such facility shall register with the  
25 secretary of health and environment. Facilities with a capacity of less than  
26 300 animal units may register with the secretary. Any such registration  
27 shall be accompanied by a \$25 fee. Within 30 days of receipt of such  
28 registration, the department of health and environment shall identify any  
29 significant water pollution potential or separation distance violations pur-  
30 suant to subsection (h). If there is identified a significant water pollution  
31 potential, such facility shall be required to obtain a permit from the sec-  
32 retary. If there is no water pollution potential posed by a facility with an  
33 animal unit capacity of less than 300, the secretary may certify that no  
34 permit is required. If there is no water pollution potential nor any viola-  
35 tion of separation distances posed by a facility with an animal unit capacity  
36 of 300 to 999, the secretary shall certify that no permit is required and  
37 that there are no certification conditions pertaining to separation dis-  
38 tances. If a separation distance violation is identified, the secretary may  
39 reduce the separation distance in accordance with subsection (i) and shall  
40 certify any such reduction of separation distances.

41 (h) (1) Any new construction or new expansion of a confined feeding  
42 facility, other than a confined feeding facility for swine, shall meet or  
43 exceed the following requirements in separation distances from any hab-

1 itable structure in existence when the application for a permit is  
2 submitted:

3 (A) 1,320 feet for facilities with an animal unit capacity of 300 to 999;  
4 and

5 (B) 4,000 feet for facilities with an animal unit capacity of 1,000 or  
6 more.

7 (2) A confined feeding facility for swine shall meet or exceed the  
8 following requirements in separation distances from any habitable struc-  
9 ture or city, county, state or federal park in existence when the application  
10 for a permit is submitted:

11 (A) 1,320 feet for facilities with an animal unit capacity of 300 to 999;

12 (B) 4,000 feet for facilities with an animal unit capacity of 1,000 to  
13 3,724;

14 (C) 4,000 feet for expansion of existing facilities to an animal unit  
15 capacity of 3,725 or more if such expansion is within the perimeter from  
16 which separation distances are determined pursuant to subsection (k) for  
17 the existing facility; and

18 (D) 5,000 feet for: (i) Construction of new facilities with an animal  
19 unit capacity of 3,725 or more; or (ii) expansion of existing facilities to an  
20 animal unit capacity of 3,725 or more if such expansion extends outside  
21 the perimeter from which separation distances are determined pursuant  
22 to subsection (k) for the existing facility.

23 (3) Any construction of new confined feeding facilities for swine shall  
24 meet or exceed the following requirements in separation distances from  
25 any wildlife refuge:

26 (A) 10,000 feet for facilities with an animal unit capacity of 1,000 to  
27 3,724; and

28 (B) 16,000 feet for facilities with an animal unit capacity of 3,725 or  
29 more.

30 (i) (1) The separation distance requirements of subsections (h)(1)  
31 and (2) shall not apply if the applicant for a permit obtains a written  
32 agreement from all owners of habitable structures which are within the  
33 separation distance stating such owners are aware of the construction or  
34 expansion and have no objections to such construction or expansion. The  
35 written agreement shall be filed in the register of deeds office of the  
36 county in which the habitable structure is located.

37 (2) (A) The secretary may reduce the separation distance require-  
38 ments of subsection (h)(1) if: (i) No substantial objection from owners of  
39 habitable structures within the separation distance is received in response  
40 to public notice; or (ii) the board of county commissioners of the county  
41 where the confined feeding facility is located submits a written request  
42 seeking a reduction of separation distances.

43 (B) The secretary may reduce the separation distance requirements

1 of subsection (h)(2)(A) or (B) if: (i) No substantial objection from owners  
2 of habitable structures within the separation distance is received in re-  
3 sponse to notice given in accordance with subsection (l); (ii) the board of  
4 county commissioners of the county where the confined feeding facility  
5 is located submits a written request seeking a reduction of separation  
6 distances; or (iii) the secretary determines that technology exists that  
7 meets or exceeds the effect of the required separation distance and the  
8 facility will be using such technology.

9 (C) The secretary may reduce the separation distance requirements  
10 of subsection (h)(2)(C) or (D) if: (i) No substantial objection from owners  
11 of habitable structures within the separation distance is received in re-  
12 sponse to notice given in accordance with subsection (l); or (ii) the sec-  
13 retary determines that technology exists that meets or exceeds the effect  
14 of the required separation distance and the facility will be using such  
15 technology.

16 (j) (1) The separation distances required pursuant to subsection  
17 (h)(1) shall not apply to:

18 (A) Confined feeding facilities which were permitted or certified by  
19 the secretary on July 1, 1994;

20 (B) confined feeding facilities which existed on July 1, 1994, and reg-  
21 istered with the secretary before July 1, 1996; or

22 (C) expansion of a confined feeding facility, including any expansion  
23 for which an application was pending on July 1, 1994, if: (i) In the case  
24 of a facility with an animal unit capacity of 1,000 or more prior to July 1,  
25 1994, the expansion is located at a distance not less than the distance  
26 between the facility and the nearest habitable structure prior to the ex-  
27 pansion; or (ii) in the case of a facility with an animal unit capacity of less  
28 than 1,000 prior to July 1, 1994, the expansion is located at a distance not  
29 less than the distance between the facility and the nearest habitable struc-  
30 ture prior to the expansion and the animal unit capacity of the facility  
31 after expansion does not exceed 2,000.

32 (2) The separation distances required pursuant to subsections  
33 (h)(2)(A) and (B) shall not apply to:

34 (A) Confined feeding facilities for swine which were permitted or  
35 certified by the secretary on July 1, 1994;

36 (B) confined feeding facilities for swine which existed on July 1, 1994,  
37 and registered with the secretary before July 1, 1996; or

38 (C) expansion of a confined feeding facility which existed on July 1,  
39 1994, if: (i) In the case of a facility with an animal unit capacity of 1,000  
40 or more prior to July 1, 1994, the expansion is located at a distance not  
41 less than the distance between the facility and the nearest habitable struc-  
42 ture prior to the expansion; or (ii) in the case of a facility with an animal  
43 unit capacity of less than 1,000 prior to July 1, 1994, the expansion is

1 located at a distance not less than the distance between the facility and  
2 the nearest habitable structure prior to the expansion and the animal unit  
3 capacity of the facility after expansion does not exceed 2,000.

4 (3) The separation distances required pursuant to subsections  
5 (h)(2)(C) and (D) and (h)(3) shall not apply to the following, as deter-  
6 mined in accordance with subsections (a), (e) and (f) of K.S.A. 2000 Supp.  
7 65-1,178 and amendments thereto:

8 (A) Expansion of an existing confined feeding facility for swine if an  
9 application for such expansion has been received by the department be-  
10 fore March 1, 1998; and

11 (B) construction of a new confined feeding facility for swine if an  
12 application for such facility has been received by the department before  
13 March 1, 1998.

14 (k) The separation distances required by this section for confined  
15 feeding facilities for swine shall be determined from the exterior perim-  
16 eter of any buildings utilized for housing swine, any lots containing swine,  
17 any swine waste retention lagoons or ponds or other manure or waste-  
18 water storage structures and any additional areas designated by the ap-  
19 plicant for future expansion. Such separation distances shall not apply to  
20 offices, dwellings and feed production facilities of a confined feeding fa-  
21 cility for swine.

22 (l) The applicant shall give the notice required by subsections  
23 (i)(2)(B) and (C) by certified mail, return receipt requested, to all owners  
24 of habitable structures within the separation distance. The applicant shall  
25 submit to the department evidence, satisfactory to the department, that  
26 such notice has been given.

27 (m) All plans and specifications submitted to the department for new  
28 construction or new expansion of confined feeding facilities may be, but  
29 are not required to be, prepared by a professional engineer or a consult-  
30 ant, as approved by the department. Before approval by the department,  
31 any consultant preparing such plans and specifications shall submit to the  
32 department evidence, satisfactory to the department, of adequate general  
33 commercial liability insurance coverage.

34 Sec. 2. K.S.A. 2000 Supp. 65-171d is hereby repealed.

35 Sec. 3. This act shall take effect and be in force from and after its  
36 publication in the statute book.

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