

1 **As Amended by House Committee**

2
3 **[As Amended by Senate Committee of the Whole]**

4 *Session of 2001*

5
6 **Substitute for SENATE BILL No. 204**

7
8 By Committee on Natural Resources

9
10 3-2

11
12 AN ACT concerning the waters of the state; relating to classified stream
13 segments and designated uses of classified stream segments.

14
15 *Be it enacted by the Legislature of the State of Kansas:*

16 Section 1. As used in this act:

17 (a) (1) "Classified stream segments" shall include all stream seg-
18 ments that are waters of the state as defined in subsection (a) of K.S.A.
19 65-161, and amendments thereto, and waters described in subsection (d)
20 of K.S.A. 65-171d, and amendments thereto, that:

21 (A) Are indicated on the federal environmental protection agency's
22 reach file 1 (RF1) (1982) and have the most recent 10-year median flow
23 of equal to or in excess of 1 cubic foot per second based on data collected
24 and evaluated by the United States geological survey or in the absence of
25 stream segment flow data, calculations of flow conducted by extrapolation
26 methods provided by the United States geological survey;

27 (B) have the most recent 10-year median flow of equal to or in excess
28 of 1 cubic foot per second based on data collected and evaluated by the
29 United States geological survey or in the absence of stream segment flow
30 data, calculations of flow conducted by extrapolation methods provided
31 by the United States geological survey;

32 (C) ~~that~~ are actually inhabited by threatened or endangered aquatic
33 species listed in rules and regulations promulgated by the Kansas de-
34 partment of wildlife and parks or the United States fish and wildlife serv-
35 ice; ~~or~~

36 (D) (i) scientific studies conducted by the department show that
37 pooling of water during periods of zero flow provides important refuges
38 for aquatic life and permits biological recolonization of intermittently
39 flowing segments; and

40 ~~(ii) social and economic studies by the department indicate, by clear~~
41 ~~and convincing evidence, that the benefits of stream segment classifica-~~
42 ~~tion outweigh the social, economic or regulatory costs to the state and~~
43 ~~the regulated community.~~

1 ~~[(ii) the department conducts a cost/benefit analysis that takes~~
2 ~~conducted by the department and taking into account the economic~~
3 ~~and social impact of classifying the stream segment and such anal-~~
4 ~~ysis indicates that the benefits of classifying the stream segment~~
5 ~~outweigh the costs of classifying the stream segment , as consistent~~
6 ~~with the federal clean water act and federal regulations; or~~

7 ~~[(E) are at the point of discharge on the stream segment and~~
8 ~~downstream from such point where the department has issued a~~
9 ~~national pollutant discharge elimination system permit. This par-~~
10 ~~agraph shall not include permits for confined animal feeding op-~~
11 ~~erations other than a permit for a confined feeding facility, as de-~~
12 ~~finied in K.S.A. 65-171d, and amendments thereto.]~~

13 (2) Classified stream segments **other than those described in sub-**
14 **section (a)(1)(E)** shall not include ephemeral streams; grass, vegetative
15 or other waterways; culverts; or ditches.

16 (3) Any definition of classified stream or “classified stream segment”
17 in rules and regulations or law that is inconsistent with this definition is
18 hereby declared null and void.

19 (b) “Department” means the department of health and environment.

20 (c) “Designated uses of classified stream segments” shall be defined
21 as follows:

22 (1) “Agricultural water supply use” means the use of a classified
23 stream segment for agricultural purposes, including the following:

24 (A) “Irrigation” means the withdrawal of water from a classified
25 stream segment for application onto land; or

26 (B) “livestock watering” means the provision of water from a classi-
27 fied stream segment to livestock for consumption.

28 (2) “Aquatic life support use” means the use of a classified stream
29 segment for the maintenance of the ecological integrity of streams, lakes
30 and wetlands, including the sustained growth and propagation of native
31 aquatic life; naturalized, important, recreational aquatic life; and indige-
32 nous or migratory semi aquatic or terrestrial wildlife directly or indirectly
33 dependent on surface water for survival. Categories of aquatic life support
34 use include:

35 (A) “Special aquatic life use **waters**” means classified stream seg-
36 ments that contain combinations of habitat types and indigenous biota
37 not found commonly in the state, or classified stream segments that con-
38 tain representative populations of threatened or endangered species, that
39 are listed in rules and regulations promulgated by the Kansas department
40 of wildlife and parks or the United States fish and wildlife service.

41 (B) “Expected aquatic life use **waters**” means classified stream seg-
42 ments containing habitat types and indigenous biota commonly found or
43 expected in the state.

1 (C) “Restricted aquatic life use waters” means classified stream seg-
2 ments containing indigenous biota limited in abundance or diversity by
3 the physical quality or availability of habitat, due to natural deficiencies
4 or artificial modifications, compared to more suitable habitats in adjacent
5 waters.

6 (3) “Domestic water supply” means the use of a classified stream
7 segment, after appropriate treatment, for the production of potable water.

8 (4) “Food procurement use” means the use of a classified stream
9 segment for the obtaining of edible forms of aquatic or semi aquatic life
10 for human consumption.

11 (5) “Groundwater recharge use” means the use of a classified stream
12 segment for the replenishing of fresh or usable groundwater resources.
13 This use may involve the infiltration and percolation of surface water
14 through sediments and soils or the direct injection of surface water into
15 underground aquifers.

16 (6) “Industrial water supply use” means the use of a classified stream
17 segment for nonpotable purposes by industry, including withdrawals for
18 cooling or process water.

19 (7) (A) “Recreational use” means:

20 ~~(i) Class A primary contact recreation use is use of a classified stream~~
21 ~~segment for recreation during the period from April 1 through October~~
22 ~~31 of each year; such classified stream segment is open to and accessible~~
23 ~~by the public; and capable of supporting the recreational activities of~~
24 ~~swimming, skin diving, water skiing, wind surfing, boating or mussel har-~~
25 ~~vesting where the body is intended to be immersed in surface water to~~
26 ~~the extent that some inadvertent ingestion of water is probable;~~

27 ~~—(ii) Class A secondary contact recreation use is use of a classified~~
28 ~~stream segment for recreation; such classified stream segment is open to~~
29 ~~and accessible by the public; and capable of supporting the recreational~~
30 ~~activities of wading and fishing where the body is not intended to be~~
31 ~~immersed and where ingestion of surface water is not probable;~~

32 ~~—(iii) Class B primary contact recreation use is use of a classified stream~~
33 ~~segment that is used during the period from April 1 through October 31~~
34 ~~of each year; such classified stream segment is not open to and accessible~~
35 ~~by the public under Kansas law, except with written permission of the~~
36 ~~land owner; and capable of supporting the recreational activities of swim-~~
37 ~~ming, skin diving, water skiing, wind surfing, boating or mussel harvesting~~
38 ~~where the body is intended to be immersed in surface water to the extent~~
39 ~~that some inadvertent ingestion of water is probable. If written permission~~
40 ~~of the landowner has not been granted, no recreational use shall be at-~~
41 ~~tainable and no recreational designation shall be assigned; or~~

42 ~~—(iv) Class B secondary contact recreation use is use of a classified~~
43 ~~stream segment used during the period from April 1 through October 31~~

1 of each year; such classified stream segment is not open to and accessible
2 by the public under Kansas law, except with written permission of the
3 land owner; and capable of supporting the recreational activities of wading
4 and fishing where the body is not intended to be immersed and where
5 ingestion of surface water is not probable. If written permission of the
6 landowner has not been granted, no recreational use shall be attainable
7 and no recreational designation shall be assigned.

8 ***[(i) Primary contact recreational use is use of a classified stream***
9 ***segment for recreation during the period from April 1 through Oc-***
10 ***tober 31 of each year, provided such classified stream segment (a)***
11 ***by law or written permission of the landowner is open to and ac-***
12 ***cessible by the public; and (b) is capable of supporting the recrea-***
13 ***tional activities of swimming, skin diving, water-skiing, wind surf-***
14 ***ing, boating or mussel harvesting where the body is intended to be***
15 ***immersed in surface water to the extent that some inadvertent in-***
16 ***gestion of water is probable;***

17 ***[(ii) Secondary contact recreational use:***

18 ***[(a) is use of a classified stream segment for recreation, pro-***
19 ***vided such classified stream segment (1) by law or by written per-***
20 ***mission of the landowner is open to and accessible by the public;***
21 ***and (2) is capable of supporting the recreational activities of wading***
22 ***and fishing where the body is not intended to be immersed and***
23 ***where ingestion of surface water is not probable; or***

24 ***[(b) ~~may apply to classified stream segments that are~~ is use of***
25 ***a classified stream segment for recreation, provided such classified***
26 ***stream segment (1) is not open to and accessible by the public under***
27 ***Kansas law ~~provided such classified stream segment~~ and (2) is ca-***
28 ***pable of supporting the recreational activities of swimming, skin***
29 ***diving, water-skiing, wind surfing, boating, mussel harvesting, wad-***
30 ***ing or fishing.]***

31 **(B) If opposite sides of a classified stream segment would have**
32 **different designated recreational uses due to differences in public**
33 **access, the designated use of the entire classified stream segment**
34 **may be the higher attainable use, notwithstanding that such des-**
35 **ignation does not grant the public access to both sides of such**
36 **segment.**

37 ~~(B)~~ **(C) Recreational use designations shall not apply to stream seg-**
38 **ments where the natural, ephemeral, intermittent or low flow conditions**
39 **or water levels prevent recreational activities.**

40 **(d) “Ephemeral stream” means streams that flow only in response to**
41 **precipitation and whose channel is at all times above the water table.**

42 **(e) “Secretary” means the secretary of health and environment.**

43 **Sec. 2. Notwithstanding any other provisions of law and in addition**

1 to the powers of the secretary pursuant to K.S.A. 65-171d, and amend-
2 ments thereto, the secretary shall establish classified stream segments in
3 Kansas and, following such classification, designate use of such classified
4 stream segments pursuant to sections 3 and 4, and amendments thereto.

5 Sec. 3. (a) Prior to December 31, 2002, the department shall review
6 all stream segments listed on the 1999 Kansas surface water register and
7 determine whether such stream segments meet the definitions of classi-
8 fied stream segments pursuant to paragraph (a)(1)(A) or (a)(1)(B) of sec-
9 tion 1, and amendments thereto. The department shall begin the review
10 with stream segments listed on the 1999 Kansas surface water register
11 west of the 98th longitude line and consider stream flow data or meth-
12 odologies of extrapolating flow from the United States geological survey.

13 (b) Prior to December 31, 2005, the department shall review all
14 stream segments listed on the 1999 Kansas surface water register which
15 do not meet the definitions of classified stream segments pursuant to
16 paragraph (a)(1)(A) or (a)(1)(B) of section 1, and amendments thereto,
17 and determine whether such stream segments meet the definitions of
18 classified stream segments pursuant to paragraph (a)(1)(C) or ~~(a)(1)(D)~~,
19 **(a)(1)(D) or (a)(1)(E)** of section 1, and amendments thereto. The de-
20 partment shall establish a procedure, adopted in rules and regulations,
21 requiring that all of the reviews and findings have been met pursuant to
22 paragraph (a)(1)(D) of section 1, and amendments thereto.

23 (c) All current stream classifications shall remain in effect until De-
24 cember 31, 2005, or as deleted or changed through the procedures set
25 forth above.

26 ~~Sec. 4. (a) Prior to July 15, 2001, the department shall make available~~
27 ~~a listing of all currently classified stream segments for which designated~~
28 ~~use attainability analyses have been completed, and such stream segments~~
29 ~~for which designated use attainability analyses have not been completed.~~

30 ~~(b) For classified stream segments identified in subsection (a) for~~
31 ~~which designated use attainability analyses have not been completed, the~~
32 ~~department, at a minimum, shall complete a designated use attainability~~
33 ~~analyses for aquatic life support and recreation use according to the fol-~~
34 ~~lowing schedule:~~

35 **Sec. 4. (a) Prior to October 15, 2001, the department shall**
36 **make publicly available a listing of all currently classified stream**
37 **segments for which: (1) Designated use attainability analyses for**
38 **recreational use have been completed; (2) recreational use has**
39 **been determined not attainable; or (3) designated use attainability**
40 **analyses for recreational use have not been completed. For such**
41 **classified stream segments for which designated use attainability**
42 **analyses for recreational use have not been completed, the de-**
43 **partment, at a minimum, shall complete a designated use attain-**

1 **ability analysis for recreational use according to the following**
2 **schedule:**

3 ~~(1)~~ **(A)** An aggregate of at least ~~30%~~ **25%** of such classified stream
4 segments shall have a designated use attainability analyses **for recrea-**
5 **tional use** completed prior to October 31, 2002.

6 ~~(2)~~ **(B)** An aggregate of at least ~~60%~~ **50%** of such classified stream
7 segments shall have a designated use attainability analyses **for recrea-**
8 **tional use** completed prior to October 31, 2003.

9 ~~(3)~~ **(C)** An aggregate of at least ~~90%~~ **75%** of such classified stream
10 segments shall have a designated use attainability analyses **for recrea-**
11 **tional use** completed prior to October 31, 2004.

12 ~~(4)~~ **(D)** All of such classified stream segments shall have designated
13 use attainability analyses **for recreational use** completed prior to Oc-
14 tober 31, 2005.

15 **(b) Prior to October 15, 2002, the department shall make pub-**
16 **licly available a listing of all currently classified stream segments**
17 **for which: (1) Designated use attainability analyses for use other**
18 **than recreational use have been completed; (2) use other than rec-**
19 **reational use has been determined not attainable; or (3) designated**
20 **use attainability analyses for use other than recreational use have**
21 **not been completed. For such classified stream segments for which**
22 **designated use attainability analyses for use other than recrea-**
23 **tional use have not been completed, the department, at a mini-**
24 **imum, shall complete a designated use attainability analysis for use**
25 **other than recreational use according to a schedule adopted be-**
26 **fore June 1, 2004, by rules and regulations of the secretary.**

27 (c) Barring flooding or acts of God, which would prevent the de-
28 partment from completing designated use attainability analyses, the
29 ~~schedule outlined in subsection (b)~~ **schedules provided for pursuant**
30 **to subsections (a) and (b)** shall be accelerated to allow for completion
31 of designated use attainability analyses ~~prior to October 31, 2005.~~ **for all**
32 **designated uses on or before December 31, 2007.**

33 (d) All current designated uses of classified stream segments listed
34 on the Kansas surface water register 1999 shall remain in effect until
35 December 31, ~~2005~~ **2007**, or until deleted or changed through the pro-
36 cedures set forth above.

37 Sec. 5. (a) ~~Prior to October 31~~ **December 1, 2001**, the secretary
38 shall publish as guidance designated use attainability analysis protocols
39 for the revision and adoption of designated uses of classified stream seg-
40 ments to protect the public health or welfare and to enhance the quality
41 of classified stream segments. The secretary shall take into consideration
42 the uses and values of such waters for public water supplies, propagation
43 of fish and wildlife, navigation and recreational, agricultural, industrial

1 and other purposes.

2 (b) The designated use attainability analysis protocols shall include,
3 **if applicable for the respective designated use**, procedures for:

4 (1) **Analysis Review** of physical, chemical, biological and economic
5 and social factors affecting attainment of a use or uses;

6 (2) **analysis review** of naturally-occurring pollutant concentrations
7 and conditions affecting attainment of a use or uses;

8 (3) **analysis review** of natural, ephemeral, intermittent or low flow
9 conditions or water levels affecting attainment of a use or uses;

10 (4) **analysis review** of human conditions that prevent attainment of
11 a use or uses, including state laws, and that cannot be remedied or that
12 would cause more damage or an inproportionate cost to remedy than to
13 leave in place;

14 (5) ~~analysis of hydro-logic~~ **review of hydrologic** modifications such
15 as dams and diversions affecting attainment of a use or uses;

16 (6) **analysis review** of physical conditions related to natural features
17 such as lack of proper substrate, cover, flow, depth, pools, riffles and other
18 stream morphology affecting attainment of a use or uses;

19 ~~(7) analysis of economic and social factors, and for determining~~
20 ~~whether economic and social impact would be caused that is not out-~~
21 ~~weighed by the benefits of attainment of a use or uses;~~

22 ~~(8) analysis of whether there are~~ (7) **identification and descrip-**
23 **tion of** cost-effective and reasonable best management practices for non-
24 point source pollutant control where such control would be needed to
25 attain a use or uses; and

26 ~~(9)~~ (8) qualified persons outside the department to conduct desig-
27 nated use attainability analyses.

28 (c) A use or uses shall not be designated unless it is demonstrated
29 that such use or uses are actually existing and attainable, or unless it is
30 demonstrated that the **[adverse]** social and economic ~~impact~~ **[impacts]**
31 of designating a use or uses that are not actually existing are outweighed
32 by the **[social and economic benefits resulting from the]** attainment
33 of such use or uses.

34 ~~(d) Within 60 days of receipt of a designated use attainability analysis,~~
35 ~~the department shall review and provide a written determination as to~~
36 ~~whether a proposed designated use is approved or disapproved.~~

37 ~~(e) Any person aggrieved by such approval or disapproval may within~~
38 ~~15 days of receipt of such approval or disapproval request in writing a~~
39 ~~hearing on the approval or disapproval. Upon receipt of a timely request,~~
40 ~~a hearing shall be conducted in accordance with the provisions of the~~
41 ~~Kansas administrative procedure act. Any action of the secretary pursuant~~
42 ~~to this subsection is subject to review in accordance with the act for~~
43 ~~judicial review and civil enforcement of agency actions.~~

1 ~~—(f) At least once each calendar year, the department shall publish in~~
2 ~~the Kansas register any changes in the designated uses of any classified~~
3 ~~stream segments.~~

4 **(d) Within 60 days after receipt of submission of a use attain-**
5 **ability analysis, the department shall review and provide a written**
6 **determination of whether the documentation submitted is**
7 **complete.**

8 **(e) Within 60 days after receipt of submission of a complete**
9 **use attainability analysis, the department shall review and provide**
10 **a written determination of whether revision of the designated use**
11 **will be proposed as a rule and regulation. Any person aggrieved**
12 **by such determination may make written request, within 30 days**
13 **after receipt of such determination, for a meeting with the secre-**
14 **tary or the secretary's designee to discuss the determination and**
15 **exchange information.**

16 **(f) All proposed revisions to the surface water register shall be**
17 **proposed for adoption in accordance with the rules and regula-**
18 **tions filing act (K.S.A. 77-415, and amendments thereto).**

19 **(g) Following the promulgation of a revision of the surface wa-**
20 **ter register as a rule and regulation pursuant to subsections (d)**
21 **and (e), any person aggrieved by such promulgation, within 15**
22 **days after publication of the rule and regulation, may request a**
23 **hearing by filing an application for an order under the Kansas**
24 **administrative procedure act. Any action of the secretary in a pro-**
25 **ceeding pursuant to this subsection is subject to review in accord-**
26 **ance with the act for judicial review and civil enforcement of**
27 **agency actions.**

28 **(h) The Kansas surface water register shall be updated and**
29 **published annually.**

30 Sec. 6. (a) Annually, on or before the first day of the legislative ses-
31 sion, the secretary shall prepare and submit a report to the governor and
32 the chairperson, vice-chairperson and ranking minority member of the
33 standing committees of the house of representatives and the senate on
34 environment and natural resources regarding the status of completing the
35 classification of streams as required in section 3, and amendments
36 thereto, and designated use attainability analyses as required in section
37 4, and amendments thereto.

38 (b) On or before February 15, 2003, the secretary shall report to the
39 governor and the chairperson, vice-chairperson and ranking minority
40 member of the standing committees of the house of representatives and
41 the senate on environment and natural resources regarding the status of
42 new methodologies of measuring stream flow, in particular that under
43 development by the United States geological survey.

1 ***[Sec. 7. Subject to appropriations, there shall be an additional***
2 ***employee at the state conservation commission to work on total***
3 ***maximum daily load compliance and to coordinate with the de-***
4 ***partment and other appropriate federal and state agencies to fur-***
5 ***ther implement voluntary incentive based conservation programs***
6 ***to protect water quality.***

7 ***[Sec. 8. Nothing in this act shall be construed to :***

8 **(1) Require the secretary to designate the use of any classified**
9 **stream as secondary contact recreational use pursuant to subsec-**
10 **tion (c)(7)(A)(ii)(b) of section 1, and amendments thereto; or**

11 **(2) authorize public access to private property unless such pub-**
12 **lic access is otherwise authorized by law or by written permission**
13 **of the landowner.]**

14 **Sec. 9. If any provisions of this act or its application to any**
15 **person or circumstances is held invalid, the invalidity does not af-**
16 **fect other provisions or applications of the act that can be given**
17 **effect without the invalid provisions or application. To this end the**
18 **provisions of this act are severable.**

19 **Sec. 7. ~~9.~~ 10.** This act shall take effect and be in force from and
20 after ***[September 1, 2001, and]*** its publication in the statute book.

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