

Approved: 3-10-98
Date

MINUTES OF THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES.

The meeting was called to order by Chairperson David Corbin at 8:11 a.m. on March 5, 1998 in Room 254-E of the Capitol.

All members were present except: Senator Pugh

Committee staff present: Raney Gilliland, Legislative Research Department
Mary Ann Torrence, Revisor of Statutes
Lila McClafin, Committee Secretary

Conferees appearing before the committee:
Gary Mitchell, Secretary, Kansas Department of Health and Environment
Ron Hammerschmidt, Director, Division of Environment

Others attending: See attached list

Chairperson David Corbin explained the purposes of scheduling Secretary Mitchell was the recent EPA ruling that Kansas had 90 days to clean up the waters of the state or EPA would do it.

Secretary Mitchell distributed a copy of the letter he received from U. Gale Hutton, Director, Water, Wetlands and Pesticides Division, United States Environmental Protection Agency. The EPA's letter responded to the surface water quality standards that were submitted to them by the State in 1994. Secretary Mitchell's testimony is a response to EPA's letter. Included with his testimony is a Kansas clean water timeline listing, a state map showing counties that have municipalities with discharging lagoons, another map showing municipalities that discharge into default low flow stream, a listings of municipalities discharging into outstanding natural resource waters (ONRWS) and a listing of those ONRWS by stream name and basin (Attachment 1).

In summarizing his remarks, Secretary Mitchell said, "it is interesting to note that it took nearly 39 months for EPA to respond to the Surface Water Quality Standards. By this slowness, it is safe to assume that EPA saw no imminent threats to public health in the 1994 Standards." In many of the 250 communities that would be impacted by EPA's proposed change in minimum stream flows are populated with the working poor and the elderly just getting by on Social Security, and he wondered were they would find the resources for the upgrade of their wastewater treatment facility.

Secretary Mitchell and Mr. Hammerschmidt responded to questions regarding EPA's letter. They thought it was of the utmost importance for KDHE and EPA to work to together to solve the problems, and with the passage of Substitute for HB 2368 last session, they thought this was being done. Secretary Mitchell suggested the question of how the State and the EPA view the private waters of the state needed to be resolved. He thought EPA needed to answer some other questions such as: What needs to be done to clean up the waters? Does the EPA really mean 90 days? Are they willing to work with the State? If they really mean 90 days or they refuse to work with us it would probably mean a law suit.

The next meeting is scheduled for March 6, 1998.

The meeting adjourned at 9:00 a.m.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

February 19, 1998

SENT VIA FEDERAL EXPRESS

RECEIVED

FEB 20 1998

**SECRETARY OF
DEPT. of HEALTH & ENVIRONMENT**

Gary R. Mitchell, Secretary
Kansas Department of Health and Environment
Landon State Office Building
900 S.W. Jackson, Suite 620
Topeka, Kansas 66612

Dear Secretary Mitchell:

We have completed our review of the revisions to the Kansas surface water quality standards under Kansas Administrative Regulations (K.A.R.), Title 28, Article 16, submitted to the United States Environmental Protection Agency (EPA) on October 31, 1994, for approval as required under federal regulations at 40 C.F.R. § 131.5. These revisions were approved by the Kansas Attorney General and subsequently adopted by the state and became effective on August 29, 1994. Submitted with the revised standards were the Kansas Surface Water Register (June 20, 1994), the Kansas Surface Water Register Maps (June 20, 1994) and the Kansas Surface Water Quality Implementation Procedures (October 18, 1994).

Under Section 303(c) of the Clean Water Act (CWA), 33 U.S.C. § 1313(c), states are to submit revised or new water quality standards to EPA for approval no less frequently than every three years. Federal regulations at 40 C.F.R. §§ 131.21 and 131.22 implement these requirements. Kansas' last review and revision of its water quality standards regulations were completed and adopted December 10, 1985. Although outside the time period specified by the CWA, the revisions to K.A.R. 28-16-28 represent a tremendous advancement in the sophistication and protectiveness of Kansas' water quality standards. The development of a very detailed listing of state surface waters and maps contained within the Kansas Surface Water Register represents an improvement in the level of protection afforded Kansas waters and in the public's ability to understand the water quality standards themselves.

These revisions were adopted by the State during a review of water quality standards conducted by the Kansas Department of Health and Environment (KDHE). As part of the review process, KDHE held five public meetings and two public hearings to receive public input and comment on the proposed water quality standards revisions between October 3, 1993, and May 27, 1994. EPA considers the adoption of revisions to K.A.R. Title 28, Article 16, along with

Senate Energy & Natural Resources

Attachment: 1

Date: 3-5-98

EARTH IS A WATER PLANET.



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the public review and comment process, to constitute the State's triennial review of water quality standards. Based on our review, the procedures are consistent with, and satisfy the procedural requirements of 40 C.F.R. § 131.20.

The State's adoption of a significantly larger number of numeric water quality criteria under this revision provides a greater level of protection for state waters and is consistent with the goals of the CWA. Specifically, revisions to the state's ammonia criteria for the protection of aquatic life represents a strengthening of the scientific foundation for these criteria and a clear signal that the state is committed to the control of this critical pollutant. We recognize that the criteria adopted by the state for the protection of aquatic life for ammonia toxicity are less stringent than EPA's national guidance criteria published in 1984; however, we believe these criteria are protective of designated aquatic life uses in Kansas. EPA also strongly supports and concurs with the state's expansion of the number of waters classified for primary contact recreation and special aquatic life uses, especially the Kansas and Missouri Rivers.

On January 8, 1998, the state submitted a statement to EPA from the Attorney General certifying a criterion for the protection of aquatic life against chronic toxicity for atrazine that was adopted by the state legislature under Kansas House Bill 2368 (HB 2368), effective May 1, 1997. The criterion adopted under this legislative action replaces the criterion adopted by the state under K.A.R. 28-16-28 on October 31, 1994. In its certification statement, the Attorney General clearly indicated that the chronic aquatic life criterion of 3 parts per billion for atrazine adopted by the legislature under HB 2368 is the state chronic criterion for which EPA review and approval is sought. Further, the state has indicated that this value will remain effective only until July 1, 1999, at which time the existing chronic aquatic life criterion for atrazine presently contained in the K.A.R. will again become effective, unless further legislative action has been taken to modify the criterion. EPA will consider any further changes to the criterion during our next review of state standards.

EPA currently has not published water quality criteria guidance for atrazine under the authority of Section 304(a) of the CWA, but does have draft criteria for atrazine that is currently undergoing external peer review. The chronic aquatic life criterion for atrazine identified within the January 8, 1998, state certification is more stringent than is currently contained in EPA's draft guidance. Upon publication of final national criteria guidance for atrazine, we will revisit the effective state criteria for atrazine as part of the state's next review of water quality standards as required by federal regulations at 40 C.F.R. § 131.20. As part of our current review of the 1994 state standards, we are approving the criterion identified within the January 8, 1998, state certification of the chronic aquatic life criterion for atrazine.

As you may be aware, EPA is initiating a national program to protect public health at our nation's beaches. On January 13, 1997, EPA sent a letter to Kansas expressing concern with public health risks posed by contaminated bathing beaches. In keeping with this national priority, the Region strongly encourages Kansas to move to adopt EPA's 1986 updated bacteriological

ambient water quality criteria supporting primary contact recreation uses during the next triennial review period.

Kansas should also consider more refined, biologically-based, aquatic life uses in future revisions. More precisely defined uses allow water quality standards to be implemented more effectively on a watershed basis, and provide a stronger scientific basis on which to select the most appropriate criteria.

By this letter, I am approving all new or revised water quality standards provisions not specifically disapproved below. EPA's approval of the Kansas water quality standards is considered a Federal action for purposes of compliance with the consultation requirements of Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536. EPA has consulted with the United States Fish and Wildlife Service (FWS), as required by the ESA, to determine whether this federal action will affect threatened and endangered species in Kansas. As a result, we determined that there will be no adverse effects on threatened and endangered species in Kansas as a result of this action, and received a letter from the FWS office in Manhattan, Kansas, concurring with EPA's determination. Any necessary, subsequent promulgation of federal water quality standards for Kansas by EPA under the authority of Section 303(c)(4)(A) and (B) of the CWA will be conducted in accordance with Section 7 of the ESA.

Although revisions adopted during the 1994 triennial review represent a significant step forward in the state's efforts to protect water quality, there remain a number of provisions within K.A.R. 28-16-28 which are not consistent with the CWA. These standards provisions include regulatory language under several sections of the K.A.R., a portion of the numeric water quality criteria listed in the tables under K.A.R. 28-16-28e and a number of the use designations for surface waters included in the Kansas Surface Water Register, which were adopted by reference under K.A.R. 28-16-28d.

EPA provided specific comments regarding existing standards provisions, proposed revisions and indicated our intention to disapprove specific portions of the state standards as being inconsistent with the CWA in letters to KDHE dated May 13, 1993, and March 15, 1994, and in written and oral testimony provided during the May 27, 1994, public hearing on the proposed Kansas water quality standards held in Topeka, Kansas. In those communications, EPA offered suggested changes to the language or other specific remedies which would eliminate the need for EPA disapproval and promulgation. KDHE's letter of May 24, 1994, to EPA, as well as its "Response to Comments Concerning Proposed K.A.R.'s 28-16-28b through f" of June 23, 1994, acknowledged and discussed EPA's comments. However, KDHE adopted the standards, as proposed, on June 28, 1994.

Section 303(c)(4)(A) of the CWA requires EPA to promulgate water quality standards for a state where new or revised water quality standards are determined to be inconsistent with the CWA. The authority to approve or disapprove new or revised state water quality standards is

delegated from the Administrator to the Regional Administrators of EPA. This letter executes that authority regarding the provisions described below in **Section I**, which are new or revised and have been found to be inconsistent with the CWA. The State of Kansas has ninety days from receipt of this letter to adopt revised water quality standards consistent with the CWA. In the event the state does not, EPA will propose replacement water quality standards for Kansas pursuant to Section 303(c) of the CWA and its implementing regulations at 40 C.F.R. § 131.22(a).

Disapproval of any new or revised criteria for Kansas which were previously the subject of the 1992 federal promulgation of criteria for states and territories found to be out of compliance with provisions under Section 303(c)(2)(B) of the CWA (i.e., National Toxics Rule), will not require further federal action. Such provisions are included in **Section II** below. Federal water quality criteria currently applicable to Kansas waters will remain in effect until EPA takes federal action to withdraw these criteria. EPA will not take such action until Kansas has adopted and EPA has approved state criteria for the appropriate pollutants. Until such time, Kansas must continue to use the federally promulgated criteria as the basis for all water quality control activities such as NPDES permitting and Section 401 water quality certifications.

This letter, at **Section III**, also identifies existing water quality standards within the K.A.R., which were previously approved by EPA. The Region has concluded that the identified provisions are inconsistent with the CWA and federal water quality standards regulations, and will recommend that the Administrator initiate promulgation of federal standards pursuant to Section 303(c)(4)(B) of the CWA to supersede those sections. The authority to make a finding of inconsistency regarding previously approved standards provisions, and to propose and promulgate federal regulations correcting such state water quality standards, rests solely with the Administrator.

Section I.

The following new and revised provisions of K.A.R. 28-16-28 have been identified as being inconsistent with the CWA:

A. Antidegradation

The revised antidegradation provisions at K.A.R. 28-16-28c(a) are inconsistent with federal regulations at 40 C.F.R. § 131.12 in that they fail to include an appropriate level of protection for high quality waters constituting outstanding national resource waters (ONRW) commensurate with 40 C.F.R. § 131.12(a)(3). Specific revisions to mixing zone provisions at K.A.R. 28-16-28c(b)(2)(C)(i) provide for placement of mixing zones in what Kansas has identified as its Outstanding Natural Resource Waters, allowing a permanent lowering of water quality in at least a portion of such waters. This modification to the state regulations reduces the level of protection which was previously provided to the state's Outstanding Natural Resource

Water and is not consistent with federal regulations requiring that the water quality of federal ONRWs be maintained and protected. EPA's interpretation of the requirements for ONRWs emphasizes restriction of new or increased discharges to such waters. Although this interpretation of the regulation is not the only means of assuring that the water quality will be maintained and protected in ONRWs, the present structure of the state's water quality standards as revised deviates significantly from this level of protection and provides no commensurate level of protection.

Without providing a level of protection equivalent to that provided under 40 C.F.R. § 131.12(a)(3), the state antidegradation policy is not complete. Regardless of whether there are current or future state waters designated as ONRWs, the state's water quality standards must provide the opportunity for such designation and, thereby, the opportunity for the public to nominate waters for ONRW status and the highest level of water quality protection under state water quality standards. If the state does not correct this deficiency within 90 days with regard to the ONRW level of water quality protection, by either eliminating mixing zones in Kansas Outstanding Natural Resource Waters or creating a new tier of protected waters equivalent to 40 C.F.R. § 131.12(a)(3), EPA will propose replacement federal provisions that are consistent with 40 C.F.R. § 131.12(a)(3).

B. Assumed Flow

The Kansas water quality standards at K.A.R. 28-16-28c(b)(2) specify that the stream flow upon which the mixing zone cross-sectional area is based is the 7Q10 flow. Under the Kansas provisions numeric water quality criteria would be met at all flows above this 7Q10 flow. A revision to K.A.R. 28-16-28c(b) creates an exception to the specified 7Q10 flow, which provides for an assumed stream flow in the calculation of the mixing zone cross-sectional area where the actual stream 7Q10 flow is zero. In effect, this provision provides dilution which does not exist under the steam conditions specified in the Kansas water quality standards. Implementation of this exception to the standards would result in violations of state water quality criteria during actual stream 7Q10 flows.

Kansas' water quality criteria are derived from those criteria developed by EPA under specific assumptions of magnitude of exposure, duration of exposure and the frequency of these parameters being exceeded. These toxicological assumptions are linked to the actual stream 7Q10 flows to ensure that the probabilities of occurrence for both pollutant concentrations and stream flow are compatible. Simply, the water quality criteria relied upon to protect designated uses are inseparable from the actual 7Q10 flows through which they are implemented. EPA guidance in the 1994 Water Quality Standards Handbook and the 1991 Technical Support Document for Water Quality-based Toxics Control specify the stream flows which match the aquatic life criterion continuous concentration (CCC, or chronic criteria) and the criterion maximum concentration (CMC, or acute criteria) as the 7Q10 and 1Q10, respectively. States may select other flows based on a demonstration that alternative flows are protective of the

specified uses. Kansas' reliance on assumed flows in the implementation of its criteria appears to be less protective than EPA's criteria which rely on actual 7Q10 and 1Q10 flows for the protection of aquatic life. Kansas has not submitted information demonstrating that the use of assumed flows is protective of aquatic life in Kansas streams. EPA's regulations at 40 C.F.R. § 131.21(a)(2) require that new or revised standards be accompanied by supporting analysis. The assumed flow provision under K.A.R. 28-16-28c (b)(2)(D) is a revision to the Kansas standards. EPA cannot approve the use of assumed flows without a scientifically defensible analysis demonstrating that it is protective of all applicable uses.

A great many Kansas streams possess 7Q10 flows of zero, particularly western streams already stressed by excessive surface and ground water withdrawals. Small, low flow headwater streams which serve as critical habitat for many threatened and endangered aquatic species might maintain toxic concentrations of pollutants when implementing this provision. K.A.R. 28-16-28d (b)(1) currently specifies that classified streams include those with mean summer base flows exceeding 0.1 cfs and those with less flow but with adequate pooling which serves as refuges for aquatic life during intermittent flow. Base flow is specifically defined in state standards to include sources of flow other than precipitation or ground water (e.g., effluent discharge and irrigation return flow). Many streams classified for beneficial uses under this provision (i.e., streams with mean summer base flows greater than 0.1 cfs) have 7Q10 flows of zero and could serve as receiving waters for discharges that rely on dilution, which does not exist, to comply with state standards.

KDHE has not provided any scientific rationale for the use of assumed flows or any data which suggests that this provision will ensure compliance with numeric water quality criteria under critical low flow conditions. KDHE noted in its "Response to Comments Concerning Proposed K.A.R.'s 28-16-28b through f" (June 23, 1994) that default low flows are employed in other states, are necessary because of the paucity of flow data in small watersheds and that some form of this provision has been employed by Kansas for twenty years. Although these do represent issues with which EPA and states must deal with respect to consistency and program oversight, they are not compelling reasons to approve state provisions which do not ensure that standards are met during all conditions where they are applicable. EPA's 1993 Water Quality Standards Handbook specifically states "That many streams within a State have no flow at 7Q10 is not adequate justification for designating alternative flows." EPA disapproves the standards provisions under K.A.R. 28-16-28c(b)(2)(D) and (c)(1) that reference assumed flows. Unless the state takes action within ninety days of receipt of this letter to delete these provisions, or to provide information demonstrating that the use of the assured flows is protective of aquatic life in Kansas streams, EPA will propose replacement federal water quality standards.

C. Effluent-created Habitat

Revised regulations at K.A.R. 28-16-28c(c)(3) addressing "effluent-created flow" will result in the state's failure to control point source discharges in a manner that protects designated

uses. Further, this reduced level of protection could be regarded as an implicit lowering of the designated use based on inadequate flow. This approach is clearly inconsistent with 40 C.F.R. § 131.10(g)(2), which addresses use removals where low flow conditions prevent the attainment of the use. The federal provision specifically prohibits such approaches where "...these conditions may be compensated for by the discharge of sufficient volume of effluent discharges ...to enable uses to be met."

EPA previously informed the state of the basis for our position in letters dated May 13, 1993, to Dr. Hammerschmidt, Deputy Director, Division of Environment, KDHE, and May 24, 1994, to Mark Bradbury, District Environmental Administrator, KDHE, which were entered into the public record during hearings held by KDHE in support of the standards adoption. This provision was significantly revised as part of the 1994 standards revisions and is hereby disapproved. The state can correct this deficiency by either deleting the provision or by revising K.A.R. 28-16-28c(c)(3) to require that, prior to a removal of a designated use, a showing be made as to whether attaining the designated use is not feasible consistent with the provisions at 40 C.F.R. § 131.10(g). Unless one of these corrections to the state standards is made within ninety days of receipt of this letter, EPA will propose federal replacement water quality standards consistent with 40 C.F.R. § 131.10(g)(2).

D. Waste Stabilization Ponds

A newly adopted provision at K.A.R. 28-16-28c(d)(3) waives NPDES permitting requirements for determining the reasonable potential of certain waste stabilization pond discharges to violate water quality standards for ammonia and fecal coliform bacteria. This provision circumvents the application of water quality standards and will not ensure that such discharges meet state standards, and is therefore disapproved.

EPA also disapproves new regulations at K.A.R. 28-16-28c(d)(4), which may be interpreted to allow dischargers to avoid disinfection requirements regardless of a water body's designation for primary contact recreation under the standards. K.A.R. 28-16-28c(d)(4) requires disinfection of wastewater only if the Department determines that such a discharge will result in a threat to public health. This provision relies on information indicating that the water body is known or likely to be used for either primary or secondary recreation or domestic water supply. The need for disinfection of wastewater effluent must be a function of the need to protect designated uses based on accompanying water quality criteria, regardless of any demonstration that the public actually utilizes that water body for the use or uses designated in the standards. As all waters of the state are designated for secondary contact recreation by default, this provision has no apparent application except to potentially undermine the protection of designated uses in specific instances.

EPA hereby disapproves K.A.R. 28-16-28c(d)(3) and (d)(4). The state can correct the problems identified here within ninety days of receipt of this letter by deleting both provisions. If not corrected, EPA will propose to promulgate federal replacement provisions consistent with the Clean Water Act.

E. Designated Beneficial Uses

The revised Kansas Surface Water Register (June 20, 1994), adopted by reference at K.A.R. 28-16-28d(c)(2), greatly expanded the number of stream designations, dividing each original stream segment into multiple parts, with independent designations for each newly identified segment. Enclosure D is a matrix of surface water segments and lakes listed in the June 20, 1994, Kansas Surface Water Register lacking primary contact recreation uses and/or aquatic life protection uses. Although the state has indicated that either one or both uses are not attainable, no supporting use attainability analysis (UAA) documentation was submitted to EPA, or the UAA submitted by the state was not approved by EPA. Section 101(a)(2) of the CWA calls for the designation of aquatic life and recreational uses for all waters of the U.S., where attainable. EPA's regulations require the state to perform and submit to EPA for approval a use attainability analysis whenever the state does not designate waters for aquatic life and recreational uses. Without an approvable use attainability analysis for each water not designated for CWA § 101(a) uses, i.e. aquatic life and contact recreation uses, these new or revised use designations must be disapproved.

Enclosure E is a matrix of surface water segments listed within the Kansas Surface Water Register which were not designated for primary contact recreation, because no information on use attainability was available at the time of the revisions to the standards. Such omissions from designation must be supported by approvable use attainability analyses, consistent with Section 101(a)(2) of the CWA and federal regulations at 40 C.F.R. §§ 131.6(a) and (f).

The EPA approval of the 1985 revisions to the Kansas water quality standards on June 19, 1986 was conditional based on "completion of the statewide use attainability analyses in accordance with the KDHE schedule submitted to EPA, dated May 2, 1986." These analyses were to address the state's failure to designate all surface waters for contact recreational use. The schedule of planned use attainability analyses submitted by KDHE and accepted by EPA in its conditional approval provided for completion of this task by 1991. The 1994 revisions to the Kansas water quality standards, however, did not include supporting use attainability analyses for all surface waters for which the state did not designate the contact recreation use. Given the history of this issue through two revisions to the state standards, EPA has little choice but to disapprove those waters not designated for contact recreation and for which KDHE has not provided supporting documentation.

Because the provisions of the Kansas Surface Water Register identified in Enclosures D and E of this letter are not consistent with Sections 101(a) and 303(c) of the CWA and EPA's regulations at 40 C.F.R. §§ 131.6 and 131.10, and there is no documentation justifying the lack of the appropriate use designations for these waters, they are hereby disapproved. The state may correct these deficiencies by completing the use designations or providing a use attainability analyses consistent with 40 C.F.R. § 131.10 for each missing use designation. If not corrected within 90 days, EPA will propose to promulgate federal replacement provisions consistent with 40 C.F.R. § 131.10.

During the public comment period accompanying EPA's proposed designation of these waters for contact recreation, the public and other governmental agencies will be given an opportunity to provide adequate information supporting either promulgation of the contact recreation use or removal from the proposal. In any case, this action is deemed necessary to ensure that all waters of the U.S. are designated in full compliance with the CWA in a timely manner.

F. Domestic Water Supply Criteria

K.A.R. 28-16-28e(c)(3)(C) limits the adoption of protective water quality criteria for domestic water supplies to levels equivalent to the federally adopted maximum contaminant levels (MCLs) under Section 1412 of the Safe Drinking Water Act, 42 U.S.C. § 300g-1. MCLs are not risk-based values, but are calculated as a function of toxicity, treatment capability and cost considerations. As a result of these calculations, some MCLs reflect much higher levels of risk than are represented in EPA criteria guidance issued under Section 304(a) of the CWA. This provision requiring the adoption of criteria equal to the MCLs has resulted, as part of these revisions, in the state failing to adopt criteria necessary to protect domestic water supplies for pollutants for which EPA has not published MCLs, but has published Section 304(a) criteria for this use.

Until 1994, the K.A.R. reflected a 1×10^{-6} level of risk for the protection for domestic water supplies. The current standards at K.A.R. 28-16-28e(c)(4) base criteria for the protection of the food procurement use on the same 1×10^{-6} level of risk as was previously required for the domestic water supply use. EPA continues to recommend that states adopt criteria developed to protect human health under Section 304(a) of the CWA rather than Safe Drinking Water Act MCLs; however, current EPA policy provides for state discretion in the adoption of criteria to protect domestic water supplies, including the adoption of MCLs where the state determines that these values protect the use.

K.A.R. 28-16-28e(c)(3)(C) requires that the state adopt only MCLs for the protection of its Domestic Water Supply use. There are a significant number of pollutants for which EPA has not published MCLs, but has published criteria under the CWA. Similarly, there are a number of pollutants for which EPA has not published guidance criteria under Section 304(a) of the CWA,

but has published MCLs and MCLGs under the Safe Drinking Water Act. Under existing EPA policy, states may choose to adopt MCLs. However, to restrict the state's authority to adopt criteria only for pollutants for which EPA has adopted MCLs is inconsistent with federal regulations at 40 CFR §131.11(a) which require that states adopt criteria necessary to protect the designated uses and "must contain sufficient parameters or constituents to protect the designated use." K.A.R. 28-16-28e(c)(3)(C) restricts the state from meeting this requirement and is, therefore, disapproved. Unless these deficiencies identified with regard to K.A.R. 28-16-28e(c)(3)(C) are corrected by the state within ninety days of receipt of this letter, EPA will take appropriate action to correct these deficiencies. EPA will propose to promulgate federal replacement regulations unless EPA determines that the federal criteria promulgated for Kansas in the National Toxics Rule make such a promulgation unnecessary at this time.

G. Procedures Implementing the State's Antidegradation Policy

In compliance with federal regulations at 40 C.F.R. §131.12(a), KDHE identified its methods for implementing the state's antidegradation policy and submitted these methods to EPA as part of the Kansas Surface Water Quality Implementation Procedures (October 18, 1994). Federal regulations require that states identify the methods for implementing the state antidegradation policy and that these methods be consistent with the tiered levels of protection afforded surface waters under federal regulations at 40 C.F.R. § 131.12(a)(1), (2), (3) and (4). EPA has reviewed the portion of the state's implementation procedures addressing antidegradation, section 3, and has found that these procedures will not implement the state's antidegradation policy in a manner consistent with federal regulation.

The submitted procedures require the protection of existing water quality within the state's Outstanding Natural Resource Waters, but do not describe the mechanisms or methods by which this level of protection is to be implemented. Specifically, the procedures fail to identify how existing water quality in the state's Outstanding Natural Resource Waters will be maintained under the mixing zone provisions at K.A.R. 28-16-28c(b)(2). The use of mixing zones and zones-of-initial dilution in the state's Outstanding Natural Resource Waters allows for the permanent lowering of existing water quality in portions of those waters. These procedures do not clarify this apparent inconsistency and further support our action to disapprove the state antidegradation policy, in part, for the omission of a level of protection consistent with federal regulations at 40 C.F.R. § 131.12(a)(3).

Further, the provision for "compensatory actions" under these methods would allow for a localized lowering of water quality in these high quality waters and would not ensure that existing water quality is maintained without exception. This same provision would allow for discharges equal in quality to the receiving water, but fails to address the potential impacts to the aquatic community from alterations in the existing hydrologic regime resulting from the addition of flow

from new or expanded existing discharges, regardless of the quality of the water in that discharge. Additions to or reductions in existing flow may result in changes in the aquatic community and the hydrologic character of the stream. Even moderate changes in stream flow could have significant impact on the existing uses and existing water quality in many Kansas streams, particularly ephemeral, intermittent and headwater streams. Some states have adopted language under antidegradation policies and implementation procedures that requires maintenance of the stream's natural flow regime as part of the protection of existing water quality. EPA believes the addition of such procedures would address this issue in the state of Kansas as well.

The state's methods also do not ensure the maintenance of existing water quality in high quality waters as required under federal regulations at 40 C.F.R. §131.12(a)(2) (referred to as "Tier 2") and the state policy at K.A.R. 28-16-28c(a)(2). This Tier 2 level of protection under the federal antidegradation regulations and the state antidegradation policy requires protection of existing water quality. However, the state methods only provide for the maintenance of existing and designated uses in regulating point sources of pollution. This is not consistent with either the state policy or 40 C.F.R. §131.12(a)(2) which require that existing water quality must be maintained unless a lowering of water quality is necessary to accommodate important social or economic development. This portion of the methods also suggests, under subsection 3.b. of the methods, that violations of water quality-based permit limits could be allowed if KDHE determines that existing or designated uses are not jeopardized. This is clearly inconsistent with Section 301(b)(1)(C) of the CWA, federal regulation at 40 C.F.R. § 122.44(d) and state regulation.

The state's antidegradation implementation methods do not identify the means by which the state intends to implement its antidegradation policy under any of the three levels of protection with regard to non-point sources of pollution. As the antidegradation policy addresses all sources of pollution, specifically addressing the implementation of all cost-effective and reasonable best management practices for nonpoint source control under its second tier of protection, the implementation procedures should address the approach by which the state will ensure existing uses, high quality waters and Outstanding Natural Resource Waters are to be protected against nonpoint as well as point sources of pollution. On page 32 of KDHE's "Response to Comments Concerning Proposed K.A.R.'s 28-16-28b through f" (June 23, 1994) the Department states that it has authority to control nonpoint sources of pollution where those sources cause water quality problems. These implementation procedures should detail how that existing authority is to be implemented under the state's antidegradation policy. The state's methods fail, in general, to identify how nonpoint sources of pollution are to be addressed under the state's antidegradation policy, but, more specifically, they do not implement the state policy's second tier of protection in allowing a lowering of existing water quality. As currently written, the state's methods do not ensure that the highest statutory and regulatory requirements for all point sources of pollution and all cost effective and reasonable best management practices for nonpoint sources of pollution are achieved. Therefore, these methods are not consistent with federal regulation at 40 C.F.R. § 131.12(a).

The procedures implementing the state's antidegradation policy under section 3 of the Kansas Surface Water Quality Implementation Procedures (October 18, 1994) submitted with the revised standards do not implement that policy in a manner consistent with federal regulation and are disapproved. Unless corrected within ninety days of receipt of this letter, EPA will identify appropriate implementation methods consistent with 40 C.F.R. §131.12(a) for use in implementing Kansas' antidegradation policy.

H. Procedures Implementing State Water Quality Standards

Federal regulations at 40 C.F.R. § 131.13 address policies generally affecting the application and implementation of standards which states may, at their discretion, include in their state standards. If adopted, the regulation directs that such policies be subject to EPA review and approval.

Provisions within the Kansas Surface Water Quality Implementation Procedures (October 18, 1994) addressing mixing zones fail to clearly identify how mixing zones are to be limited in either application or in dimension in those instances when mixing zones are allowed. Authority to prohibit the use of mixing zones in certain instances when "the presence of a mixing zone would unduly jeopardize human health or any of the existing or designated uses of the receiving surface water" is specifically provided at K.A.R. 28-16-28c(b)(5). The implementation procedures do not identify the circumstances under which the state will prohibit mixing zones either by specific example or by evaluation. Provisions such as those found at K.A.R. 28-16-28c(b)(5) are of little value to the state if the means by which they are to be implemented during permit development are not clearly identified.

In those instances when mixing zones are allowed, provisions at K.A.R. 28-16-28c(b)(1), (b)(2)(A) and (b)(3) describe limitations to the placement and dimensions of mixing zones in surface waters. The implementation procedures are vague and do not describe how these limitations are to be incorporated into permit conditions and limitations. Without clear methods of implementing these provisions, routine and consistent implementation is not likely to occur and compliance with these provisions will be difficult to measure.

The implementation procedures addressing the use of whole effluent toxicity testing allow for the use of less sensitive test organisms and is not likely to result in the appropriate protection of surface waters against toxicity from point source discharges. EPA specifically recommends use of Ceriodaphnia dubia in testing waters for toxicity. Other Cladocerans may be used, but they are significantly less sensitive species. Further, procedures to be used by the state to determine the need for monitoring for or limiting toxicity in individually permitted discharges do not include the possibility of placing limitations in permits. The reasonable potential for violations of state water quality standards as implemented through whole effluent toxicity testing should be determined in

the same manner as chemical-specific testing and, where there is a reasonable potential to violate narrative provisions against toxicity, limitations must be placed in permits.

The reasonable potential procedure referenced in the implementation procedures contains a number of provisions which rely on best professional judgement and other similar determinations for implementation. Particularly with regard to limited data sets, the state should limit pollutants if data are not conclusive. The burden of proof should rest largely with the discharger who is seeking to discharge pollutants into waters of the U.S. Such discharges are not consistent with the Clean Water Act unless they occur within the limitations established under a National Pollutant Discharge Elimination System (NPDES) permit. Placement of limits in permits is more likely to encourage the collection of adequate monitoring data by dischargers prior to the permit application period. In addition, provisions within these procedures which describe determinations of "reasonable potential" for water quality-based limits for metals suggest that a lesser level of evaluation will be performed for minor permits. This approach is inconsistent with federal permit regulations at 40 C.F.R. § 122.44(d). All permits must be evaluated for the reasonable potential of a discharge to violate state water quality standards, regardless of the size of the discharge. As EPA does not routinely provide oversight of state issuance of NPDES permits for minor dischargers, consistent with the Memorandum of Agreement between EPA and KDHE on the NPDES permit program, review and approval of these procedures constitutes the only opportunity for EPA to ensure that all permits are issued consistent with the CWA and federal regulation. Since these provisions do not ensure that NPDES permits will be issued consistent with the CWA and federal regulation, they cannot be approved.

In addition to the issues identified as being inadequately addressed in these procedures, the submitted implementation procedures did not include provisions describing how site-specific criteria are to be developed and submitted to the state, how variances from standards are to be evaluated, and how socio-economic impacts are to be measured under either the use assessment process or the award of variances.

EPA disapproves the Kansas Surface Water Quality Implementation Procedures (October 18, 1994) submitted for EPA review and approval pursuant to 40 C.F.R. § 131.13. This disapproval applies to the entirety of the Kansas Surface Water Quality Implementation Procedures with the exception of section 3 of those procedures, Antidegradation, which was addressed separately in this letter. Antidegradation implementation methods are addressed separately at 40 C.F.R. § 131.12 and their development is not discretionary. Federal regulation at 40 C.F.R. § 131.13 specifies that the adoption by states of "policies generally affecting (standards) application and implementation" is discretionary. Since the adoption of these kinds of implementation procedures, specifically sections 4 through 6 of the Kansas procedures, is discretionary, EPA does not intend to propose such implementation procedures for Kansas. The state should implement state water quality standards in a manner consistent with federal regulation and in such a way that state water quality standards are not violated. EPA will review state

actions implementing its water quality standards in the course of its normal oversight responsibilities under Sections 402 and 404 of the CWA on a case-by-case basis until state procedures provide for implementation consistent with the Clean Water Act, federal regulations and available guidance.

Section II.

The following new and revised provisions of K.A.R. 28-16-28 have been identified as being inconsistent with the CWA and water quality standards previously promulgated under the National Toxics Rule:

A. Water Quality Criteria

On December 22, 1992, EPA published the National Toxics Rule (NTR) (57 F.R. 60848), which promulgated chemical-specific, numeric criteria for priority toxic pollutants necessary to bring fourteen states, including Kansas, into compliance with Section 303(c)(2)(B) of the CWA. Federal regulations at 40 C.F.R. § 131.11 describe how states are to develop and adopt criteria so as to be consistent with the CWA. Federal regulations at 40 C.F.R. § 131.6(c) require states to adopt criteria "sufficient to protect designated uses." Where EPA must promulgate criteria to protect uses when states fail to do so, EPA will utilize Section 304(a) criteria which represent EPA's best information regarding levels protective of aquatic life and human health. Should states adopt criteria less stringent than those published by EPA under Section 304(a), adequate scientific justification must be provided. In written and oral testimony provided during the May 27, 1994, public hearing on the proposed standards revisions, EPA specifically requested supporting justification for state-proposed criteria which were less stringent than EPA's published criteria. That justification is necessary for EPA to ensure that alternative criteria are protective of designated uses. No justification supporting Kansas' alternative criteria as being protective of designated uses was submitted to EPA.

Several water quality criteria within Table 1a of K.A.R. 28-16-28e(d) are less stringent than federal water quality criteria already in place for Kansas under the NTR. The state did not provide any information which would indicate that these less stringent criteria are protective of designated uses. Federal regulations at 40 C.F.R. § 131.11 specify that states must adopt criteria that protect the designated use and are based on sound scientific rationale. Further, these regulations identify the forms of criteria which states should adopt, including numeric values based on Section 304(a) guidance, modified Section 304(a) guidance or other scientifically defensible methods. Criteria adopted by the state which are less stringent than those promulgated by EPA for Kansas under the NTR and which have not been shown to protect designated uses are not approvable. These criteria are included in Enclosure A, Table A.1. to this letter and are disapproved.

Specifically, the criteria adopted by the state for cadmium, chromium (3+), copper, lead, nickel, silver and zinc found in K.A.R. 28-16-28e(d), Table 1a are derived from formulas included in Table 1b which inappropriately apply conversion factors for expressing metals criteria as dissolved metals. This error was recognized by KDHE prior to the standards adoption, but was not corrected. The hardness-based equations for metals criteria in Table 1b are approvable without the multiplication factor placed at the end of each equation. Until that correction is made, existing federal criteria promulgated for Kansas under the NTR for cadmium, chromium (3+), copper and lead found in Tables 1a and b will not be withdrawn and remain effective. The state criteria identified in Enclosure A, Table A.1 to this letter are disapproved.

Revised state criteria for nickel, silver and zinc are also derived from formulas included in Table 1b of K.A.R. 28-16-28e(d). These formulas are also mathematically flawed and are disapproved. However, EPA did not promulgate criteria for these three pollutants for Kansas under the NTR. At the time of the 1992 federal promulgation, Kansas' water quality criteria for these three pollutants were determined by EPA to be adequately protective. As a result of the 1994 revisions of state standards, EPA has determined that the revised criteria are not protective of uses. Select criteria for thallium, endrin, alpha endosulfan and beta endosulfan are also disapproved as not protecting designated uses. These values also were not promulgated for Kansas under the NTR. Thallium was inadvertently omitted from the national promulgation for Kansas while the revised criteria for endrin, alpha endosulfan and beta endosulfan adopted by the state are not protective. Since these seven pollutants were not included under the NTR for Kansas in 1992, EPA will propose promulgation of federal criteria for these values which the Region has disapproved. These pollutants and their respective state and federal criteria are included in Enclosure A, Table A.2 to this letter.

In addition, the state failed to adopt criteria for specific designated uses for some pollutants where EPA previously promulgated criteria under the NTR. In this instance, the state did not provide any documentation indicating that these pollutants were not present in state waters or discharges to state waters or could not reasonably be expected to interfere with designated uses as directed by Section 303(c)(2)(B) of the CWA. EPA will retain those federal criteria promulgated by EPA under the NTR for which the state failed to adopt criteria for the uses specified in Enclosure A, Table A.1.

Where EPA has previously promulgated federal water quality criteria and now disapproves state-adopted criteria for specific pollutants, those federally promulgated criteria are retained. Further, where the state has failed to adopt criteria for pollutants for which EPA has previously promulgated criteria, those federally promulgated criteria are also retained. Enclosure A, Table A.1. to this letter includes the listing of the priority pollutants for which Kansas has proposed no water quality criteria or less stringent criteria without accompanying justification than are presently in-place under the federal NTR promulgation and disapproved by EPA. EPA will retain the federally promulgated criteria for those pollutants included within Enclosure A, Table A.1. which also identifies state criteria which EPA is disapproving or pollutants for which

the state adopted no criteria for the specified use or uses. Those federal criteria and the stream design flows specified under that action at 40 C.F.R. § 131.36(c)(2)(ii) are to be implemented for all purposes under the CWA.

Table A.2. of Enclosure A identifies those pollutants for which either the state has failed to adopt criteria or for which the state has adopted criteria, but EPA has determined that the criteria do not protect uses. These pollutants were addressed under the NTR, but criteria were not promulgated for Kansas. Where the state has now adopted criteria less protective than the NTR value, the state criteria are disapproved. For these criteria, and where the state has no criteria, EPA will propose federal replacement water quality standards consistent with 40 C.F.R. §131.12(a).

Enclosure B to this letter includes a listing of state-adopted water quality criteria which are approved by EPA and for which EPA intends to proceed with a federal rule making to withdraw existing federal criteria as promulgated under the NTR. These criteria are determined by EPA to be fully protective of the applicable designated uses. The adoption by Kansas of these criteria is commendable and represents a great improvement in the State's ability to protect the designated uses for its surface waters consistent with the purposes of the CWA.

Enclosure C lists additional pollutants with criteria published by EPA under Section 304(a) of the CWA, but which were not included in the NTR. The state did not adopt criteria for the specified uses for these pollutants. EPA is taking no action regarding these criteria at this time; however, the adoption of these criteria or alternate criteria which the state can show are protective of its designated uses for pollutants which the state determines may be adversely affecting water quality are a priority for the state's next review of its standards.

Within 90 days of receipt of this letter, the state can take action to avoid federal promulgation by correcting the deficiencies identified herein with regard to Tables 1a and 1b of K.A.R. 28-16-28e(d) to make them consistent with the CWA and 40 C.F.R. § 131.11.

Section III.

The following existing provisions of K.A.R. 28-16-28 have been identified as being inconsistent with the CWA and will be forwarded to the Administrator for further action:

A. Waters of the U.S.

The distinction between public and "private" lakes and wetlands for purposes of classification under K.A.R. 28-16-28d(b)(2) and (3) is inconsistent with the CWA. The regulations at K.A.R. 28-16-28c(f) and 28-16-28d(b)(2) and (b)(3) exempt some privately owned lakes and wetlands from protection under the state's water quality standards. The CWA does not recognize ownership in the application of water quality standards to waters of the United States.

Rather, the CWA requires that water quality standards apply to all waters of the United States, making no distinction between publicly and privately owned waters.

I understand that this regulatory provision is based directly on statutory language, and that KDHE's ability to revise such a provision is limited. The issue of exclusion of private waters from protections under the CWA has also been identified as a significant problem in the state's National Pollutant Discharge Elimination System (NPDES) program. The issue of lack of application of state's water quality standards to private waters was specifically identified as a program deficiency by EPA in an October 1, 1990, letter from Martha Steincamp, EPA Regional Counsel, to David Traster, General Counsel for KDHE. This statutory deficiency was to be addressed by legislative action in the 1991 legislative session, but no such correction was completed. Since KDHE has stated that the Department is unable to revise its regulations to comply with the CWA until the legislative correction is made, I will be requesting that the EPA Administrator make a finding that the provisions at K.A.R. 28-16-28c(f) and 28-16-28d(b)(2) and (b)(3) excluding private waters from application of state standards are inconsistent with the CWA, and that a promulgation action to correct this deficiency be initiated.

There is much more work to be done by both of our agencies regarding the development of water quality standards which will fully protect the citizens and resources of the state of Kansas. The approved state standards, however, represent significant progress in that continuing effort and I congratulate your staff in its efforts to date. I look forward to working with you to bring the state into full compliance with the CWA and full withdrawal of all federal water quality criteria in Kansas.

If you have any questions regarding these comments or the actions taken by EPA, please contact Cheryl Crisler, Water Resource Protection Branch Chief, at (913) 551-7820.

Sincerely,



U. Gale Hutton, Director
Water, Wetlands and Pesticides Division

Enclosures

cc:	Ronald Hammerschmidt	KDHE
	Karl Muedener	KDHE
	Theresa Hodges	KDHE
	William Gill	U.S. Fish and Wildlife Service, Manhattan, Kansas



KANSAS
DEPARTMENT OF HEALTH & ENVIRONMENT
BILL GRAVES, GOVERNOR
Gary R. Mitchell, Secretary

Testimony presented to

Senate Energy and Natural Resources Committee

March 5, 1998

by

Gary R. Mitchell
Secretary of Health and Environment

Briefing on
EPA's Response to the Surface Water Quality Standards 1994 Submission

Background:

KDHE submitted October 31, 1994, the Kansas Surface Water Quality Standards to Region VII EPA. (Commonly referred to as the Triennial Review list)

The Clean Water Act gives EPA 90 days to disapprove.
39 months later EPA responds on February 19, 1998.

Between 1994 and 1998 two high profile issues arose--Ammonia and Atrazine

The EPA February 19, 1998 letter comments on these two specific issues::

Ammonia

While the state's standards for ammonia is less stringent than the 1984 EPA criteria, EPA believes our standards are protective of designated aquatic life uses in Kansas.

EPA also strongly supports and concurs with Kansas' expansion of the number of waters classified for primary contact recreation and special aquatic life uses, especially the Kansas and Missouri Rivers.

Atrazine

As a result of HB 2368, Kansas established the level of Atrazine at 3 ppb.

NOTE: The 1994 list put the Atrazine level at 1 ppb.

EPA's comment on the 3 parts per billion is that it is more stringent than is currently contained in EPA's draft guidance. Until EPA publishes the new standard for Atrazine they have approved the 3 parts per billion standard adopted by the legislature last year in HB 2368.

Note: It appears EPA may allow Kansas to adopt a higher standard should they adopt one in their guidance document. Some speculations have been made that the standard should be 10 ppb or even higher.

As part of a national priority, Region VII strongly encourages Kansas to move to adopt EPA's 1986 bacteriological ambient water quality criteria supporting primary contact recreation use during the next triennial review.

Note: One of the issues still unresolved by the Commission is stream use designation streams for human contact. The Commission may address this issue in its report in July.

The February 19, 1998 letter also comments on how the State of Kansas handles:

Outstanding National Resource Waters

EPA requires that certain Outstanding National Resource Waters should not be subjected to any further degradation and that these "waters" should be protected from any new or increased discharges. EPA gives Kansas 90 days to either eliminate mixing zone in Kansas Outstanding National Resource Waters or create a new tier of protected waters equivalent to EPA regulations. In addition, EPA says that Kansas should establish a procedure whereby the public could nominate waters for ONRW status and the highest level of protection.

KDHE makes allowances for some dischargers who already discharge to ONRWs and were discharging to ONRWs at the time of designation. KDHE standards apply a minimal mixing zone to these facilities, providing for stringent permit limits. Our regulations also allow for either denying permits or prohibiting the use of mixing zones and further states that "**existing water quality shall not be lowered by artificial sources of pollution in any outstanding natural resource water.**" KAR 23-16-28c (a)(3)

Note: Kansas has 18 communities that could be impacted by a change in the way KDHE allows discharges into a ONRWs.

Minimum or Assumed Stream Flows

Kansas has many "streams" which receive municipal waste water that are dry part of the year and

have no flow. KDHE uses a calculation of base flow in a stream to include sources of flow other than precipitation or ground water, e.g., effluent discharge or irrigation return flow. In essence, what KDHE does is allow communities situated on a stream that may go dry to count the flow created by the wastewater discharge as stream flow. EPA charges that relying on these base stream flow assumptions does not create any dilution and should not be allowed.

Note: Nearly 250 Kansas communities rely on minimum or assumed stream flow assumptions in order to have a discharging waste facility. The option for these communities if EPA's directive is met is to either, not discharge into the "stream" or redesign their facility and spend millions of dollars so that any discharge is pure and doesn't need dilution.

Effluent-created Habitat

In some streams in Kansas with minimum stream flow, the only water there is effluent water. KDHE requires these streams to meet only technical standards of cleanliness. However, because it is only effluent flowing in the stream, EPA is proposing in the letter that KDHE should list the stream as degraded and go through a formal process of removing the designated use of human contact via public notice and comment.

Waste Stabilization Ponds

KDHE regulations require that a waste stabilization pond or lagoon for a discharging systems must have the capacity to hold the waste for 120 days. KDHE assumes, based on valid sampling and data, that during this holding period ammonia and fecal coliform is removed to levels that meet the water quality standards. Disinfection occurs through a natural process not through the addition chemicals. EPA wants to require each pond discharge to be evaluated independently and limits placed on those ponds.

Note: 245 communities have discharging lagoons which would be impacted by this requirement. KDHE believes that our existing policy is consistent with the Clean Water Act and that the continual evaluation of waster water discharged by these 245 communities would be expensive and is not necessary.

Designated Beneficial Uses

In the 1994 Triennial review, KDHE expanded the number of stream designations, dividing each original stream segment into multiple parts and then designated each stream segment for a specific use. Section 101 (a)(2) of the Clean Water Act calls for a designation of aquatic life and recreational uses for all waters of the United States, where attainable. EPA requires the states to submit to them a Use Attainability Analysis for each water segment not designated as aquatic life and contact recreation uses. KDHE plans on looking at the issue of use attainability and redesignating streams where necessary but this is an impossible task to accomplish in 90 days!

Domestic Water Supply

KDHE uses the Maximum Contaminant Level (MCL) from the Safe Drinking Water Act as the criteria for streams designated as public water supply use. However, EPA recommends that states adopt criteria developed to protect human health under Section 304 of the Clean Water Act rather than the Safe Drinking Water Act. In essence, KDHE rules apply the Safe Drinking Water Act requirements to streams designated as a source of domestic water supply.

Procedures Implementing the State's Anti-degradation Policy

EPA seems to believe that the state implementation plan does not state how the state will protect ONRW. EPA suggests that the State of Kansas should follow other states in adopting regulations addressing Anti-degradation policies and implementation of procedures that requires maintenance of the streams natural flow regime in ONRWS as part of the protection of existing water quality.

The letter also calls into question the state's effort to address non-point sources of pollution, such as the Republican River basin initiative and the Governor's Water Quality initiative.

Note: Does this mean that EPA is encouraging the state to adopt a policy that would prohibit any of the 18 communities that discharge into a ONRW from reducing their discharge because it would reduce stream flow?

It is further interesting to note that the EPA says the state implementation is not in line with their regulations not the Clean Water Act.

USC Section 1251 (g) states:

“(g.) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate the rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.”

Procedures Implementing State Water Quality Standards

EPA in the letter comments on the States process and procedures for implementing the standards. As an example of their concern they suggest Kansas should use a more sensitive water flea to test

waters for toxicity. They don't like our implementation of the use or non-use of mixing zone and they object to using Best Professional Judgement when evaluating reasonable potential.

Water Quality Criteria

The 1994 list contained submitted to EPA contained an calculation error in the formula used and plans were under way to correct in the next triennial review. The error largely impacting heavy metals, is not a health and was statistical in nature. The error does not impact KDHE's ability to regulate any potential heavy metal discharges by point sources of pollutant.

Waters of the U.S.

The Kansas Department of Health and Environment is prohibited by Kansas statute from regulating farm ponds that are on private property. EPA contends that these are "waters of the United States" and should be regulated because the Clean Water Act applies to all waters of the United States. Since the legislature has objected to giving EPA and KDHE authority over private ponds, EPA is proposing to promulgate rules to correct this "deficiency".

Summary

It is interesting to note that it took nearly 39 months for EPA to respond to the Surface Water Quality Standards. By this slowness, it is safe to assume that EPA saw no imminent threats to public health in the 1994 Standards.

One could characterize the 17 page document as an attempt to assert more Federal control over water quality issues with little regard for costs.

In the 250 communities that would be impacted by the EPA's proposed change in minimum stream flows, I wonder who will be paying for the upgrade of the communities wastewater treatment facility. Many of these communities are populated with the working poor and the elderly just getting by on Social Security. Can the city of Admire or the city of Ashland afford to spend another \$million or two to address the issues raised in this letter?

It is easy for Wichita, with its vibrant economy and powerful economic engine to spend the money necessary. But what about Dighton? What about Columbus? What about Axtell?

The Clean Water Act at 33 USC Section 1251 (g) states:

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States:

It is the policy of the Congress to recognize, preserve, and protect primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development

and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter..."

I would only suggest that the Congress and the Clean Water Act appears to retain the state's right to make judgement calls where there are gray areas This letter is an attempt by EPA to inject the heavy hand of the Federal government into an area best left to the state.

Kansas CleanWater Timeline

- | | |
|---------------|---|
| 1977 | U.S. Congres adopts Clean Water Act Adopted |
| 1985 | Kansas submits Surface Water Quality Standards |
| Oct. 1994 | Kansas Submits Triennial Surface Water Quality List |
| April 1997 | Legislature creates 2368 Commission |
| Decemer 1997 | KDHE notifies EPA of intent to skip 97 Review |
| February 1998 | EPA responds to KDHE list from 1994 |
| July, 1998 | 2368 Commission to file final report |
| By 2000 | KDHE will submit new Surface Water Quality List |

KANSAS WASTEWATER TREATMENT SYSTEMS

Total Municipal & Commercial Wastewater Treatment Permits = 946

Municipal Systems:	746
Commercial Systems:	200
Mechanical Systems:	202
Lagoon Systems:	744 (79%)

Total Municipal & Commercial Lagoons = 744

Discharging Lagoons:	284
Non-Overflow Lagoons:	460

Total Industrial/Federal Wastewater Treatment Permits = 482

Industrial:	475
Federal:	7

Discharging Systems = 344

Industrial:	338
Federal:	6

Non-Overflow Systems = 138

Industrial:	137
Federal:	1

MUNICIPAL AND COMMERCIAL DISCHARGING LAGOONS

NAME
ADMIRE
ALDEN MWTP
ALLEN CO. S.D. #1
ALLEN MWTP
ALMA MWTP
ALTA VISTA MWTP
ALTAMONT MWTP
ALTOONA
AMERICUS MWTP
ARCADIA MWTP
ARGONIA MWTP
ARLINGTON MWTP
ARMA MWTP
ASHLAND
ASSARIA
ATLANTA
ATTICA MWTP
AUBURN MWTP
AXTELL
BAILEYVILLE IMPROVEMENT DISTRICT
BARTLETT
BASEHOR (NORTH PLANT)
BASEHOR (SOUTH PLANT)
BAXTER SPRINGS MWTP
BEATTIE MWTP
BELVUE MWTP
BENTON MWTP
BERN MWTP
BETO INN, INC.
BISON MWTP
BLUE RAPIDS MWTP
BRONSON MWTP
BUCKLIN MWTP
BURDEN
BURLINGAME MWTP
BURLINGTON MWTP
BURRTON MWTP
BUTLER CO. S.D. #17 (BEAUMONT)
CARBONDALE MWTP
CEDAR VALE
CENTRALIA
CHASE MWTP
CHAUTAUQUA
CHEROKEE
CHETOPA MWTP
CHIHOWA RETREAT CAMPER
CLEARWATER MWTP
CLIFTON MWTP
CLYDE MWTP
COLUMBUS MWTP
CONESTOGA MOBILE HOME PARK
CONWAY SPRINGS MWTP
CORNING
COTTONWOOD FALLS
COUNCIL GROVE MWTP

COUNTRY PARK MOBILE HOME PARK
COURTLAND
CUBA MWTP
CUNNINGHAM MWTP
DEARING MWTP
DELIA MWTP
DELPHOS MWTP
DEXTER MWTP
DIAMOND SPUR MOBILE HOME PARK
DIGHTON
DOUGLASS
DWIGHT
EASTON MWTP
EDNA MWTP
EFFINGHAM MWTP
ELBING MWTP
ELK CITY MWTP
ELLSWORTH
ELWOOD MWTP
ENTERPRISE MWTP
ERIE MWTP
ESKRIDGE MWTP
EUDORA MWTP
EUREKA
EVEREST MWTP
FALL RIVER MWTP
FORT SCOTT MWTP (MAJ-
FOSTORIA
FRANKFORT MWTP
FRONTENAC MWTP
FULTON
FUN VALLEY
GALENA MWTP
GALVA MWTP
GEARY COUNTY SEWER DISTRICT #4
GEUDA SPRINGS MWTP
GIRARD MWTP
GLEN ELDER MWTP
GODDARD MWTP
GOESSEL
GOFF MWTP
GRANDVIEW PLAZA
GREELEY MWTP
GREENLEAF MWTP
GRIDLEY MWTP
HADDAM
HAMILTON MWTP
HARDTNER
HARPER MWTP
HARTFORD MWTP
HARVEYVILLE MWTP
HAVANA
HAVEN MWTP
HAVENSVILLE
HAVILAND MWTP
HENRY'S MOBILE HOME PARK

HEPLER MWTP
HERNDON MWTP
HIGHLAND MWTP
HILLSDALE IMPROVEMENT DISTRICT
HOISINGTON MWTP
HOLTON MWTP
HOLYROOD MWTP
HOWARD
HOYT MWTP
HURON MWTP
INDEPENDENCE MWTP
INMAN MWTP
IOLA MWTP (MAJ-
JO. CO. LITTLE BULL CR SUB. S.D. #1
JO. CO. MILL CREEK REGIONAL WTF
JO. CO. TIMBERWOLF ESTATES B.RIV
KANSAS TURNPIKE (EMPORIA SERVIC
KANSAS TURNPIKE (LAWRENCE SERV
KANSAS TURNPIKE (MATFIELD GREEN
KANSAS TURNPIKE (TOWANDA SERVI
KDOT. BROWN CO. REST AREA
KDOT. FRANKLIN CO. REST AREA
KDOT. GEARY CO. REST STOP (I-70 W
KDOT. MCPHERSON REST AREA
KDOT. WABAUNSEE CO. REST AREA I-
KDOT. WILSON CO. REST AREA
KECHI
KINCAID
LA CYGNE MWTP
LAKE WABAUNSEE IMP. DIST.
LANCASTER MWTP
LANE
LEAVENWORTH CO. S.D. #2
LEAVENWORTH COUNTY S.D. #1
LEBO MWTP
LECOMPTON MWTP
LEE, EUGENE TRAILER COURT
LEHIGH MWTP
LENEXA - HIRNING WOODS
LEONARDVILLE
LEROY MWTP
LIBERTY
LINWOOD MWTP
LITTLE RIVER
LONGTON MWTP
LOUISBURG - PLANT #2
LOUISBURG MWTP
MAPLE HILL
MAPLE RIDGE MOBILE HOME COURT
MARION MWTP
MARQUETTE
MAYETTA MWTP
MC CUNE MWTP
MC FARLAND MWTP
MC LOUTH MWTP
MELVERN MWTP

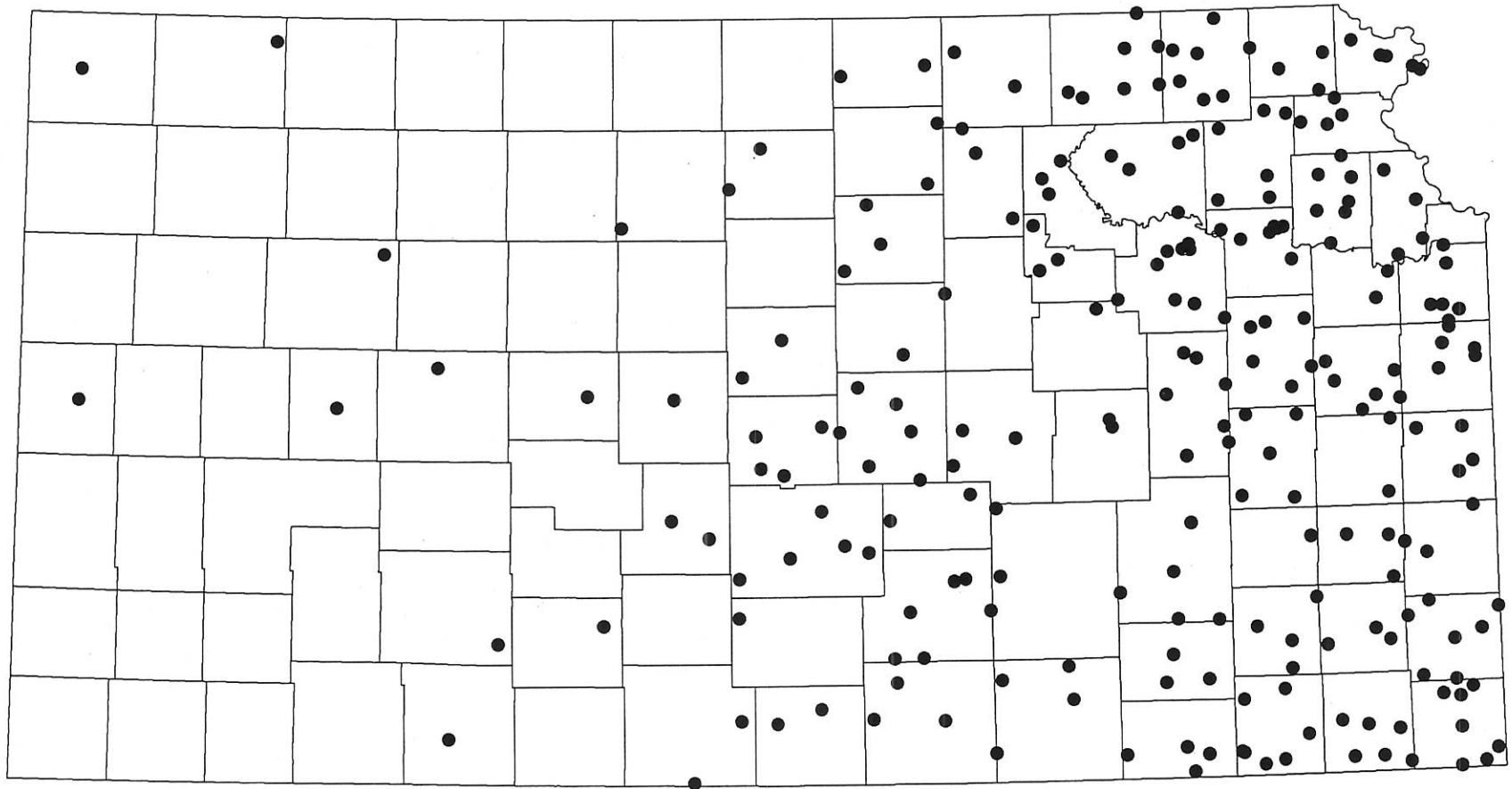
MEMORIAL HOME FOR THE AGED
MERIDEN MWTP
MILFORD
MILTONVALE MWTP
MINNEAPOLIS
MOLINE MWTP
MONTGOMERY CO. S.D. #4
MONTGOMERY CO. S.D. #5
MORAN MWTP
MORGANVILLE MWTP
MOUND CITY MWTP
MOUND VALLEY MWTP
MOUNDRIDGE MWTP
MUSCOTAH
NATIONAL MARKETING, INC-TRUCK S
NATOMA MWTP
NEODESHA (PLANT NO. 1)
NEOSHO RAPIDS
NETAWAKA MWTP
NEW STRAWN
NORTONVILLE MWTP
OAK HILL MOBILE HOME PARK
OLPE MWTP
ONAGA MWTP
OSAGE CITY
OSKALOOSA MWTP
OSWEGO MWTP
OVERBROOK MWTP
PAOLA MWTP
PARK CITY - NEW PLANT
PARKER
PAXICO MWTP
PERRY MWTP
PERU
PLEASANTON MWTP
POMONA MWTP
POWHATTAN
QUENEMO MWTP
QUINTER MWTP
RANDOLPH MWTP
RANSOM MWTP
RANTOUL MWTP
READING MWTP
REGENCY WICHITA
RENO CO. S.D. #202
RICHMOND MWTP
RILEY
ROBINSON MWTP
ROCKY FORD TRAILER COURT
ROSE HILL MWTP
ROSSVILLE MWTP
SAVONBURG MWTP
SCAMMON
SCRANTON MWTP
SEDAN
SEDGWICK CO. - FOUR MILE CREEK

SENECA MWTP
SEVERY MWTP
SHARON MWTP
SHAWNEE CO. M.S.D. #15
SHAWNEE CO. M.S.D. #17, L.S.D. #1
SHAWNEE CO. M.S.D. #2
SHAWNEE CO. M.S.D. #4
SHAWNEE CO. M.S.D. #8, L.S.D. #2
SHAWNEE CO. M.S.D. & S.S.D. #31
SHAWNEE CO. S.D. #33
SHAWNEE HILLS MOBILE HOMES
SILVER LAKE MWTP
SOLDIER
SOLOMON
SOUTHERN HILLS MOBILE HOME PAR
SOUTHVIEW HOUSING DEVELOPME
SPRING HILL
SPRING HILL MWTP
ST. FRANCIS MWTP
ST. JOHN MWTP
ST. PAUL
STAFFORD
STERLING MWTP
STRONG CITY MWTP
STUCKEY'S DAIRY QUEEN - PAXICO
SUMMERFIELD MWTP
TESCOTT MWTP
THAYER MWTP
TIPTON
TREECE MWTP
TRIBUNE
TRIPLE "D" MOBILE HOME PARK
TROY (MOSQUITO CREEK)
TROY MWTP
TURON MWTP
TYRO MWTP
UDALL MWTP
UNIONTOWN MWTP
USD #288 CENTRAL HEIGHTS
USD #345 SEAMAN SENIOR HIGH SCH
USD #348 VINLAND ELEM.
USD #437 JAY SHIDELER JR. HIGH SC
USD #450 SHAWNEE HEIGHTS JR-SR
VALLEY FALLS MWTP
VERMILLION
VIOLA MWTP
WAKEFIELD MWTP
WALNUT
WALTON MWTP
WATERVILLE MWTP
WATHENA MWTP
WAVERLY MWTP
WEIR MWTP
WELLINGTON
WEST MINERAL
WESTMORELAND

WHITING MWTP
WILSON CO. S.D. #1 (TULAKES)
WINCHESTER MWTP
WINDOM MWTP
WOODSON CO. IMP. DIST. #2

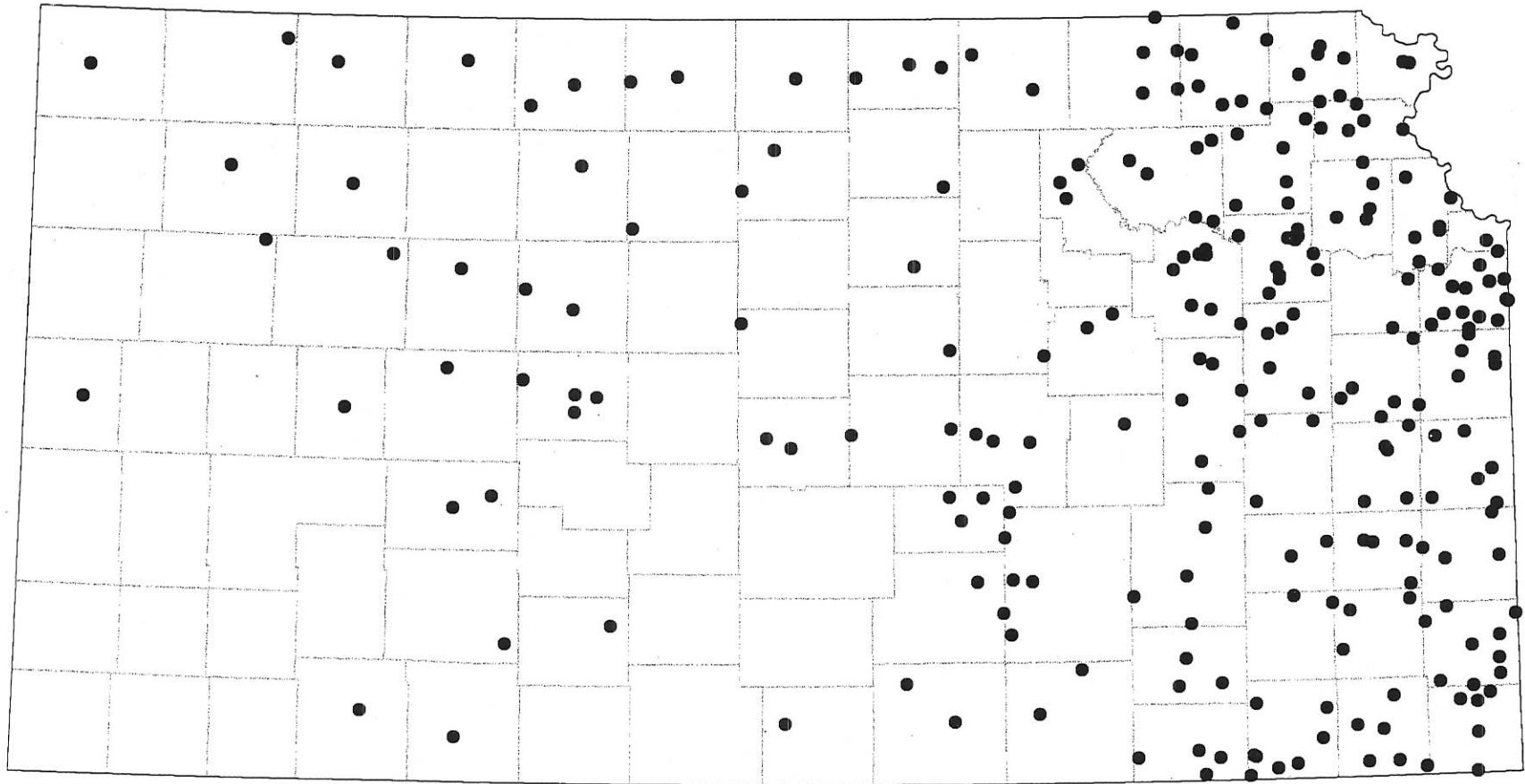
MUNICIPALITIES WITH DISCHARGING LAGOONS

1-32



MUNICIPALITIES THAT DISCHARGE INTO DEFAULT LOW FLOW STREAMS

1-33



Memorandum

TO: Senate Energy and Natural Resources Committee

FROM: Lila McClafin, Committee Secretary

DATE: February 25, 1998

RE: Minutes 2/24

Attached are the minutes of February 24, 1998. If there are corrections please notify me by noon on February 27, 1998, or they will stand approved as written.

Thanks,
Lila

MUNICIPALITIES DISCHARGING INTO ONRWS

FACILITY	COUNTY	PRIMARY_RE
ARGONIA MWWTP	SUMNER	CHIKASKIA RIVER
BAXTER SPRINGS MWWTP	CHEROKEE	SPRING RIVER
CHEROKEE CO.1&2 PROP.RIVERTON	CHEROKEE	SPRING RIVER
COFFEY CO. SD#1 JACOBS CR PLT.	COFFEE	NEOSHO RIVER
DEXTER MWWTP	COWLEY	GROUSE CREEK
DOUGLASS MWWTP	BUTLER	WALNUT RIVER
ELLSWORTH MWWTP	ELLSWORTH	SMOKY HILL RIVER
EUREKA MWWTP	GREENWOOD	FALL RIVER
FALL RIVER MWWTP	GREENWOOD	FALL RIVER
FREDONIA MWWTP	WILSON	FALL RIVER
GALENA MWWTP	CHEROKEE	SPRING RIVER
HOISINGTON MWWTP	BARTON	BLOOD CREEK
KDOT WABAUNSEE CO	WABAUNSEE	MILL CREEK
LACYGNE MWWTP	LINN	MARAIS DES CYGNES RIVER
PAXICO MWWTP	WABAUNSEE	MILL CREEK
PLEASANTON MWWTP	LINN	MUDDY CREEK
WABAUNSEE LAKE WWTP	WABAUNSEE	E. BRANCH MILL CREEK
WINFIELD MWWTP (PROPOSED)	COWLEY	WALNUT RIVER

OUTSTANDING NATURAL RESOURCE WATERS

STREAM NAME	BASIN
BEAVER CR	LOWER ARKANSAS
BIG SUGAR CR	MARAIS DES CYGNES
BLOOD CR	LOWER ARKANSAS
CANEY R	VERDIGRIS
CEDAR CR	NEOSHO
CHIKASKIA R	LOWER ARKANSAS
CIMARRON R	CIMARRON
CIMARRON R, N FK	CIMARRON
COTTONWOOD R, S FK	NEOSHO
DEEP CR	KANSAS LOWER REPUBLICAN
East Branch Fall River	VERDIGRIS
FALL R	VERDIGRIS
FALL R, W BRANCH	VERDIGRIS
GROUSE CR	LOWER ARKANSAS
LITTLE CHEYENNE CR	LOWER ARKANSAS
LYON CR	SMOKY HILL/SALINE
MARAIS DES CYGNES R	MARAIS DES CYGNES
MIDDLE CR	MARAIS DES CYGNES
MILL CR	KANSAS LOWER REPUBLICAN
MILL CR, E BRANCH	KANSAS LOWER REPUBLICAN
MILL CR, E BRANCH	KANSAS LOWER REPUBLICAN
MILL CR, W BRANCH	KANSAS LOWER REPUBLICAN
Muddy Creek	MARAIS DES CYGNES
N SUGAR CR	MARAIS DES CYGNES
NEOSHO R	NEOSHO
OTTER CR (CANEY R)	VERDIGRIS
OTTER CR (FALL R)	VERDIGRIS
SALINE R	SMOKY HILL/SALINE
SHOAL CR	NEOSHO
SMOKY HILL R	SMOKY HILL/SALINE
SPRING R	NEOSHO
Thompson Creek	LOWER ARKANSAS
UNNAMED TRIB TO CIMARRON R, N FK	CIMARRON
UNNAMED TRIB TO SHOAL CR	NEOSHO
WALNUT R	WALNUT

lower case streams are from reach file 2