

MINUTES OF THE HOUSE COMMITTEE ON ENVIRONMENT.

The meeting was called to order by Chairperson Joann Freeborn at 3:30 p.m. on March 15, 2001 in Room 231-N of the Capitol.

All members were present except:

Committee staff present: Emalene Correll, Kansas Legislative Research Department
Raney Gilliland, Kansas Legislative Research Department
Mary Ann Graham, Committee Secretary

Conferees appearing before the committee: Dr. Charles Perry, US Geological Survey, Water Resources Division, 4821 Quail Crest Place, Lawrence, KS 66049
Walt Aucott, District Chief, US Geological Survey, Water Resources Division, 4821 Quail Crest Place, Lawrence, KS 66049
Senator Janis Lee
Dr. Ron Hammerschmidt, Director, Division of Environment, KDHE, Forbes 740, Topeka, KS 66620-0001
Leslie Kaufman, Kansas for Common Sense Water Policy, 2627 KFB Plaza, Manhattan, KS 66505-8508
Terry Leatherman, KS Chamber of Commerce & Industry, 835 SW Topeka Blvd., Topeka, KS 66612-1671
Charles Benjamin, Sierra Club, KS Chapter, PO Box 1642, Lawrence, KS 66044-8642
Laura Calwell, President, Friends of the Kaw, PO Box 1612, Lawrence, KS 66044
Dwight Metzler, 900 SW 31st Suite 325A, Topeka, KS 66611
Edward Rowe, League of Women Voters of KS, 919 ½ S. Kansas Avenue, Topeka, KS 66612
Mike Calwell, Kansas Canoe Association, PO Box 1612, Lawrence, KS 66044

Others attending: See Attached Sheet

Chairperson Joann Freeborn called the meeting to order at 3:30 p.m. in room 519-S. She welcomed Mr. Dan Kahl and a group of about 30 members of the Kansas Environmental Leadership Program (KELP) to the committee. They were attending and observing the meeting today as part of their program. She announced that **SB237** will not have discussion and possible action today as stated in the agenda. The Revisor of Statutes, Mary Torrence is unable to attend today's meeting.

The Chairperson welcomed Dr. Charles Perry and Walt Aucott, District Chief, US Geological Survey, to the committee, they gave a presentation on Stream Flow Analysis. Dr. Perry explained Kansas stream flow data and provided maps of streams which were color coded, red, green and blue. He explained stream flow, (volume of water passing a point on the stream), stream gaging at specific points on a stream and stream statistics. (See attachment 1)

The Chairperson thanked Dr. Perry and Mr. Aucott for their presentation and opened hearing on **Senate Substitute for SB204**.

Senate Substitute for SB204: **Classified stream segments and designated uses of classified stream segments.**

The Chairperson welcomed Senator Janis Lee to the committee. She testified in support of the bill and believes we need a process to reevaluate stream segments to be certain we are regulating where necessary; a system that uses stream flow data and good science to identify stream segments in need of protection and assure that those are protected; and, as a state, need to put our resources where they will make the biggest contribution to improve the water quality. (See attachment 2)

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON ENVIRONMENT, Room 231-N of the Capitol
at 3:30 p.m. on March 15, 2001.

Dr. Ron Hammerschmidt, Director, Division of Environment, KDHE, was welcomed. He testified in opposition to the bill and addressed a number of concerns the department has with the bill. He believes there are problems with establishing or determining the designation for primary or secondary contact recreation use using public access as a criteria. There is an additional concern of impact on downstream property owners and users. The designation of secondary contact based upon property access may create a checkerboard effect with alternating designations or perhaps a uniform adoption of the lesser secondary contact designation. There appears to be conflicts with the current requirements of KSA 82a-702 which mandates the waters of the state belong to all citizens of the state. The devolution of the authority to set a recreational use based upon access appears to conflict with this long established state law. In addition to these concerns the department remains concerned with potential negative impacts on the NPDES program and other water protection programs. (See attachment 3)

Leslie Kaufman, Kansas For Common Sense Water Policy, was welcomed to the committee. She testified in support of the bill and believes the bill is a reasonable, balanced compromise that works for all Kansans and targets the state's resources to improve water quality. She believes this bill does two things: (1) defines what is considered a classified stream segment based upon stream flow data and sets forth a schedule for KDHE to review the current classifications; (2) outlines what designated uses of classified stream segments should apply in Kansas and sets forth a schedule for KDHE to conduct the work. All current classifications and designations remain in effect until KDHE conducts its reviews. Water quality will be protected while KDHE works. Further, KDHE has the resources to conduct the work. (See attachment 4)

Terry Leatherman, Kansas Chamber of Commerce and Industry, was welcomed. He testified in support of the bill. The Kansas Chamber has been very concerned about the actions of the federal Environmental Protection Agency this past summer and fall regarding water quality issues in Kansas. Overall, the EPA efforts are an example of Washington D.C. at its worst, imposing sweeping changes in water regulation, with little positive environmental impact, and without the direction of Congress. In September, the EPA action prompted the KCCI Board of Directors to support a policy statement opposing this federal takeover of the state's responsibility to regulate the water quality in Kansas. In light of the EPA actions, state legislation to clarify and direct the Kansas Department of Health and Environment in managing state water quality is needed. (See attachment 5) Questions and discussion followed.

Written only testimony in support of the bill was submitted by; Jamie Clover Adams, Secretary of Kansas Department of Agriculture (See attachment 6); Edward Moses, Kansas Aggregate Producers' Association (See attachment 7); Kerri Ebert, Kansas Agricultural Alliance (See attachment 8)

Written only testimony in a neutral position to the bill was submitted by Steve Williams, Secretary of Kansas Department of Wildlife and Parks. (See attachment 9)

The Chairperson welcomed Charles Benjamin, Sierra Club, Kansas Chapter, to the committee. He testified in opposition to the bill. He believes the intent of the bill is to exempt intermittent streams from the protections of the federal clean water act. That intent runs counter to the intent of Congress when they passed the Clean Water Act. Furthermore, federal judges in circuits throughout the United States have determined that intermittent streams are "navigable waters" and fall under the jurisdiction of the federal Clean Water Act. Also, he believes if the committee recommends the bill, as amended by the Kansas Senate on March 13, to the full Kansas House of Representatives, they will be asking their colleagues to violate the Clean Water Act. Before taking such an action he urges the committee to get a Kansas Attorney General's opinion as to the many legal questions raised on the floor of the Kansas Senate and before this committee about the bill. (See attachment 10)

Laura Calwell, President, Friends of the Kaw, was welcomed to the committee. She testified in opposition to the bill and believes it upholds Kansas's long standing tradition of allowing property owners to do what ever they want to their property and the publicly owned water that passes over their property regardless of public interest or health. The polluted condition of the Kansas River, it's tributaries, and all other waters in the state are a result of both rural and urban abuse. To pass a bill that will allow any one in the state of Kansas particularly agricultural feed lots to treat the rivers and streams as sewers is wrong. (See attachment 11)

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON ENVIRONMENT, Room 231-N of the Capitol
at 3:30 p.m. on March 15, 2001.

Dwight F. Metzler, P.E., was welcomed to the committee. He testified in opposition to the bill and believes the committee should allow this bill and related bills to die. He believes KDHE has developed a process for doing this which is satisfactory to the EPA and that reclassifying the 6,000 stream segments on a scientific basis requires much effort. This work should be completed in five years. He asked the committee to consider the alternative if some version of this bill becomes law, it will violate federal law and EPA will set Kansas stream standards. (See attachment 12)

Edward Rowe, League of Women Voters of Kansas, was welcomed. He testified in opposition to the bill and believes water is an unusual resource in that it gets used over and over. Each of us has a duty to use water in a way that doesn't make it unhealthy or unusable for downstream users. His own city has an obligation to treat the sewage produced by it's citizens before returning the water back into the river. The operator of a feedlot likewise has an obligation to minimize the impact of his operation on downstream users. As helpful as voluntary, incentive based programs are, regulations and a regulatory agency are also needed. It's not fair for some to pay for pollution reduction while competitors are left free to cut corners. He believes this threatens to turn back the clock on water quality progress. (See attachment 13)

Mike Calwell, Kansas Canoe Association, was welcomed to the committee. He testified in opposition to the bill and believes this bill is against federal law, that it will backfire on Kansas and create the one thing that our agricultural community does not want, more federal control instead of less. That it is asking to open up our streams and rivers to increased levels of pollution, thus creating public health problems; to increase the cost of our water purification systems statewide; and to exempt the Ag Industries by allowing them to increase pollutants to streams while other industries must comply. (See attachment 14) Questions and discussion followed.

Written only testimony in opposition to the bill was submitted by John T. Barnes, Natural Resource Council (See attachment 15) and Ron Klataske, Executive Director, Audubon of Kansas. (See attachment 16)

The Chairperson reviewed the committee agenda for Tuesday, March 20, and thanked committee members and guests for their work and attention.

The meeting adjourned at 6:45 p.m. The next meeting is scheduled for Tuesday, March 20.

Definition of a stream—Flow of water along a depression on the surface of the earth

Depression—Water course Scale? See HANDOUT of example of stream maps

rf1- River File 1 Approximately 1200 stream segments in Ks RED

rf2- River File 2 Approximately 2100 stream segments in Ks GREEN
Presently used by KDHE to define a stream

rf3- River File 3 Approximately 60,000 stream segments in Ks BLUE

Flow--- Volume of water passing a point on the stream

1 Cubic Foot per Second= 7.5 gallons per second
449 gallons per minute
646,560 gallons per day

1/10 cubic foot per second= 0.75 gallons per second
44.9 gallons per minute
64,656 gallons per day

Streamgaging at specific points on a stream

Continuous record of gage height converts by stage-discharge relation to flow

Stream hydrograph- daily values for the period of gage operation

Stream Statistics—

Mean = Average flow for all days in period of record

Median= Sort all daily flows from lowest to highest and pick the flow that is
exactly halfway (50%) down the list (This value is also the Q50)

Q10= Sort all daily flows from lowest to highest and pick the flow that is
10% of the way down the list

7Q10= Lowest 7 day flow that would occur with a probability of 10%
(nearly all streams in Kansas this value is 0)

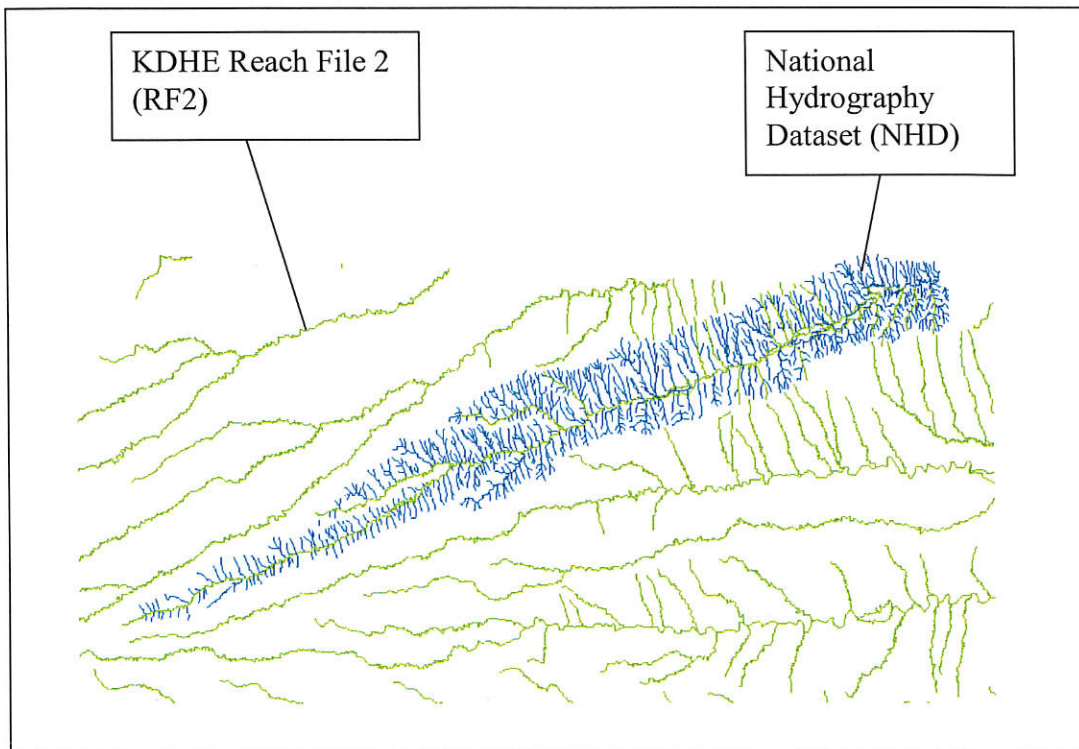
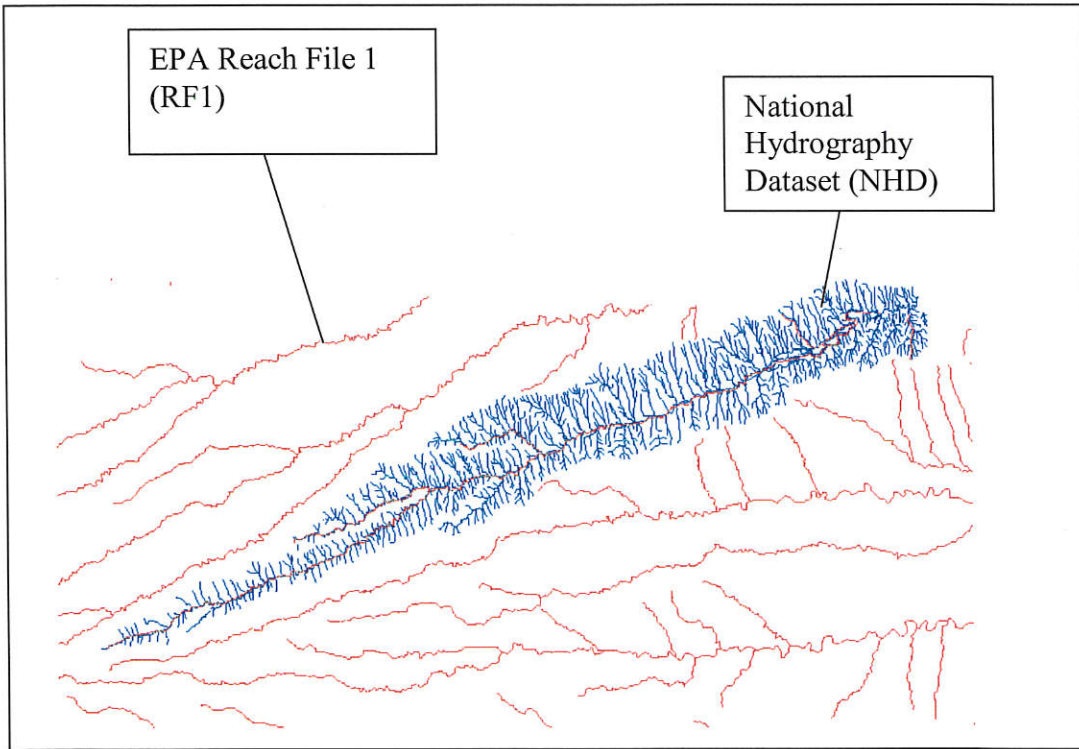
*House Environment
3-15-01
Attachment 1*

Approximate number of stream reaches (segments) in Kansas

Reach File 1: 1,200

Reach File 2: 2,100

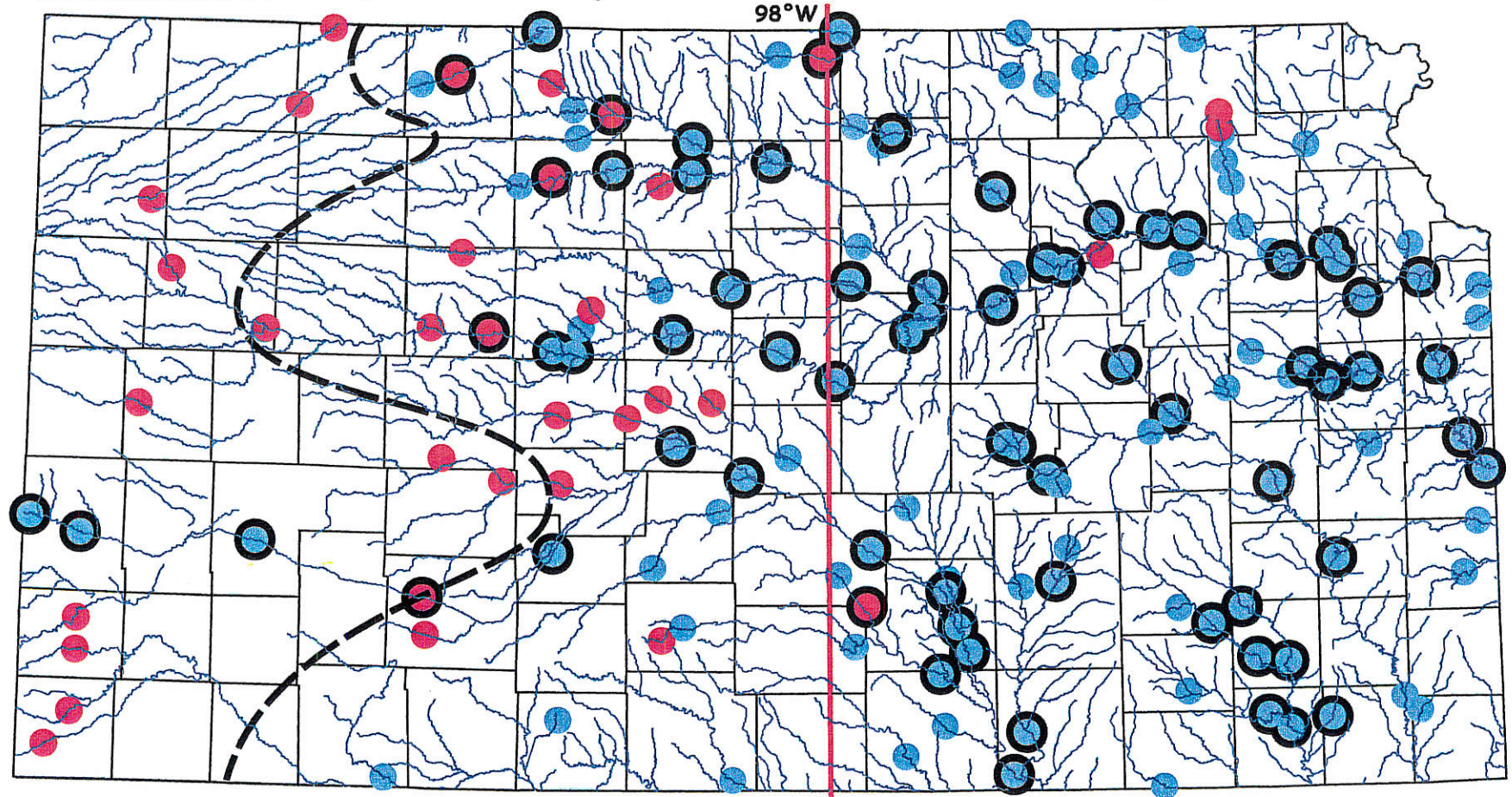
National Hydrography Dataset: 60,000





Kansas Streamflow Data

(at least 10 years of daily data since 1967)



EXPLANATION

Median streamflow at USGS gaging stations, in cubic feet per second (cfs)

- Less than 1 cfs
- Greater than 1 cfs

- Stream from EPA Reach File 1
- Streamflow affected by reservoir
- Median streamflow of 500-square-mile basin is 0.1 cfs

SENATOR JANIS K. LEE
ASSISTANT MINORITY LEADER
STATE SENATOR, 36TH DISTRICT
BARTON, ELLSWORTH, JEWELL,
LINCOLN, MITCHELL, OSBORNE,
PHILLIPS, REPUBLIC, RUSSELL
AND SMITH COUNTIES
RR. 2, BOX 145
KENSINGTON, KANSAS 66951
(785) 476-2294 HOME
(785) 296-7366 TOPEKA
jlee@ink.org



TOPEKA
SENATE CHAMBER

COMMITTEE ASSIGNMENTS

RANKING MINORITY MEMBER: ASSESSMENT & TAXATION
RANKING MINORITY MEMBER: NATURAL RESOURCES
MEMBER: EDUCATION
AGRICULTURE
UTILITIES
LEGISLATIVE EDUCATIONAL
PLANNING
REAPPORTIONMENT
VICE-CHAIR: HEALTH CARE REFORM
LEGISLATIVE OVERSIGHT
LONG TERM CARE TASK FORCE

Chairman Freeborn and Committee Members;

**History - why substitute for SB 204 came about
no fieldwork was done by KDHE for current classifications
very little if any scientific data was used to make decisions
action led to over regulation on some areas and under regulation on others**

We need a process to reevaluate stream segments to be certain we are regulating where necessary.

We need a system that uses stream flow data and good science to identify stream segments in need of protection and assure that those are protected.

We, as a state, need to put our resources where they will make the biggest contribution to improve the water quality.

preface to all discussions

#1. In SB 204 all current stream classifications and designated uses listed on the Kansas Surface Water Register 1999 shall remain in effect until Dec. 31, 2005 or until deleted or changed through the procedures set forth in the bill. (p. 5 lines 10 to 12 and lines 37 TO 40)

THE BILL DOES NOT TAKE ANY STREAM OFF THE REGISTER UNTIL SCIENTIFIC ANALYSIS HAS BEEN DONE - WORK WHICH SHOULD HAVE BEEN DONE BY KDHE BEFORE THEY WERE PLACED ON THE REGISTER IN THE FIRST PLACE.

#2. The bill does not in any way dilute KDHE's ability to deal with point source pollution nor change their authority from current law in dealing with non-point source pollution. p. 2 section (E) lines 4 through 8

*House Environment
3-15-01
Attachment 2*

Substitute for SB 204 establishes a framework for reevaluating stream segments in Kansas to determine which streams are classified streams. This is the first building block of establishing water quality standards.

- 1. Reach file 1 and KDH&E's recommended median 1cfs flow**
Uses EPA's Reach File ! as a foundation for evaluating current classifies stream segments listed on the 1999 Kansas Surface Water Register excluding those streams, after evaluation, that do not have a 10 year median flow of 1 cfs.
1 cfs standard was KDH&E suggestion
- 2. and stream segment with a median stream flow of 1 cfs**
Our reviews with USGS indicates this is a logical measurement for protection of streams.
- 3. presence of threatened and endangered species**
This bill protects through classification those stream segments that are actually inhabited by threatened and endangered species REGARDLESS of the flow. KDWP conducts biological studies.
- 4. KDH&E can classify a steam segment if scientific, cost benefit analysis indicate that protection of the stream is warranted and necessary.**
The bill allows KDH&E the flexibility to classify stream segments that may not be protected under the flow evaluation process. I these cases the bill requires KDH&E to conduct an analysis of the costs of regulation be fore classification.
This is the balancing of various societal interests of protection of water quality as allowed in the federal Clean Water Act.
- 5. all streams (regardless of flow) will be classified at the point of discharge and downstream from such point for point source polution**
- 6. Classified streams shall not include ephemeral streams - those that flow only as a result of a precipitin event and whose channel is at all times above the water table.**
This definition is agreed to by KDH&E.

SB 204 establishes a process in statute for KDH&E to use USGS data to reevaluate those streams segments listed on the 1999 Kansas Surface Water Register.
timeline KDH&E said they could handle

This work needs to be completed to establish a sound defensible framework for water quality programs. This is the foundation for the TMDL work that the state must do.

At a meeting with legislators in July, 2000 EPA offered to consider an "expedited" process to review stream segments. KDH&E has not responded to that offer to date. This bill provides that expedited process.

The state can no longer waste efforts on areas that do not need regulation - areas where regulation do not enhance the quality of the waters of the state - while critical areas are drained of resources.

As stated earlier - no scientific stream flow data was used to make the current classifications. This lack of use of scientific data has led to over regulation on some areas and under regulation on others. The state of Kansas needs a process to reevaluate stream segments to be certain we are regulating where necessary.

We need a system that uses stream flow data and good science to identify stream segments in need of protection and assure that those are protected.

Designated uses are the second building block in establishing water quality standards. The state has the authority under the Clean Water Act to define the uses.

Designated uses on page 2 lines 17 through line 13 on page 3 are the same as current language is KDH&E rules and regulations.

Recreational use designation - as amended designates at least secondary contact as current KDH&E regs did

Amendment on last page recognizes the interests of private property rights because any state policy should be consistent with property law. When private lands are listed as recreational designated use, when no permission is granted, it encourages trespass.

This bill establishes uses only for classified stream segments. The current designated uses in regulations for classified lakes and wetlands are not changed.

To determine or change the designated uses of a stream the CWA requires that a state must do Use Attainability Analysis (UAA). Substitute for SB 204 establishes a framework for the UAA process.

**It is the role of the state to do the UAA's
KDH&E should do the work and do it correctly based upon a scientific process**

The UAA process outlined in the bill is taken from current KDH&E protocol and EPA handbooks and the CWA (changed concepts to list)

(e) page 6 is an important safety valve for anyone or any entity who believes that any classification or designated use as determined by KDHE is inappropriate. This provision specifically affords them the right to a review in accordance with the provisions of the Kansas administrative procedures act.

The time frames for completion of designated use reviews established in the bill were initially offered by KDHE. KDHE has stated on numerous occasions that they have the funding to do the work.

The CWA anticipates a continuous review process - the triennial review. Timing is critical because KDHE is at the beginning of its triennial review process. The parameters established in the bill fit within that review process. KDHE has not done the work in the past and this bill directs them to act to keep the system current and reflective of the uses of waters in Kansas and the needs of the people of the state.

Opponents argue that only the Governor of a state or the state water pollution control agency may review or change water quality standards. While the CWA mentions the Governor once, there are hundreds of references to the State in the CWA. The one place where the Governor is referenced is so stated because the Governor is the executive responsible for carrying out the laws of the state. The legislature is the body who make the laws. The legislature legislates laws - the Governor executes the laws.

SB 204 provides a system that uses stream flow data and good science to identify stream segments in need of protection and assure that those are protected.

We, as a state, need to target our resources where they will make the biggest contribution to improving the water quality.



KANSAS
DEPARTMENT OF HEALTH & ENVIRONMENT
BILL GRAVES, GOVERNOR
Clyde D. Graeber, Secretary

Testimony on Substitute for Senate Bill 204
to
House Environment Committee
Presented by
Ronald F. Hammerschmidt, Ph.D.
Director, Division of Environment
March 15, 2001

Good afternoon to the Chair, Vice Chair and members of the committee. For the record, I am Ron Hammerschmidt, Director, Division of Environment in the Department of Health and Environment. I am here today to express concerns the department has with the substitute for Senate Bill 204. We have expressed a number of these concerns in previous discussions on the original SB 204 and the substitute. For the sake of time I will briefly describe each.

There are problems with establishing or determining the designation for primary or secondary contact recreation use using public access as a criteria. The language is inconsistent with federal regulation under 40 CFR 131.10(g) which does not explicitly identify public access as a reason for changing a designated use. This links with our concern that the change of streams currently designated for primary contact recreation to secondary contact recreation allows a lessening of public health protection with a lowering of the level of bacterial criterion by a factor of ten through the determination of an individual property owner(s). In addition, this criteria also creates an inherent conflict between adjacent property owners. What designation applies when owners of opposite banks do not agree or only one allows access?

There is an additional concern of impact on downstream property owners and users. The designation of secondary contact based upon property access may create a checkerboard effect with alternating designations or perhaps a uniform adoption of the lesser secondary contact designation. In addition, does this provision require the review and perhaps revision of the designated use upon transfer of property. It should be noted the federal regulation on designated uses requires a consideration of downstream uses and provision for maintenance of these uses in 40 CFR 131.10(b).

In addition, there appear to be conflicts with the current requirements of K.S.A. 82a-702 which mandates the waters of the state belong to all citizens of the state. The devolution of the authority to set a recreational use based upon access appears to conflict with this long established state law.

While there are provisions for the challenge of the agency decision on approval or disapproval of a use attainability analysis by an aggrieved party, the requirement for such decision within 60 days does not allow for significant public participation. The requirement for publication in the Kansas Register and ultimate rule and regulation adoption process does allow for some participation. However the approval requirement finalizes the determination of the designated use long before either publication or the public process associated with the rule and regulation process begins. Is the department given the latitude to change a designation months after the use attainability analysis has been approved and adopt a use designation in the final rules and regulations?

As the department has stated on a number of occasions, we believe the proposed language regarding cost benefit analysis is inconsistent with federal regulations on use designations. The provisions of 40 CFR 131.10(g)(6) for example read as follows:

“(6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.”

It should be noted that sections 301(b) and 306 of the Clean Water Act deal with effluent limits for point source discharges..

Further, 40 CFR 131.10(h) specifies states **may not remove** designated uses if:

“(2) Such uses will be attained by implementing effluent limits required under sections 301(b) and 306 of the Act and by implementing cost-effective and reasonable best management practices for nonpoint source control.”

While we appreciate the effort of the Senate to set a delayed effective date for SB 204, there is still a concern over the timing of EPA review and approval/disapproval and subsequent state response to the disapproved items. The language of the “Alaska rule” codified in 40 CFR 131.21 which requires approval by EPA before changes in a state’s water quality standards can be applied, puts wastewater discharge permits and other aspects of the NPDES program affected by the changes in a state of suspense pending resolution of the disapproval. I should note the current Kansas water quality regulations were either adopted prior to this federal regulation or were approved by EPA upon review as required with a few limited exceptions, thus the current Kansas rules and regulations have passed this “Alaska rule” process.

In addition to these concerns the department remains concerned with potential negative impacts on the NPDES program and other water protection programs. In addition, we again bring to the committee’s attention this bill will create an entirely new statutory framework to replace an existing regulatory process. Therefor the department must remain opposed to the Substitute SB 204. Thank you for your attention. I and the KDHE staff present are prepared to answer any questions.

Kansans for **Common Sense** *Water Policy*



*Kansas Farm Bureau • Kansas Livestock Association • Kansas Corn Growers Association • Kansas Grain Sorghum Producers Association •
Kansas Association of Wheat Growers • Kansas Fertilizer and Chemical Association • Kansas Grain and Feed Association •
Kansas Dairy Association • Farmland • Agriliance • U.S. Premium Beef*

Testimony

regarding

Substitute Senate Bill 204

before the

HOUSE ENVIRONMENT COMMITTEE

Chairman: Joan Freeborn

March 15, 2001

*House Environment
3-15-01
Attachment 4.*

Substitute SB 204 is a reasonable, balanced compromise that works for all Kansans and targets the state's resources to improve water quality.

In simplest terms, water quality standards are composed of four parts: 1) classified stream segments; 2) designated uses; 3) criteria; and 4) total maximum daily loads. States define what waters should be protected by "classifying" stream segments. Once a stream segment is classified, then the state attaches one or more designated uses to that classified stream segment. (For a list of uses, see pages 2 and 3 of Substitute SB 204.) Once designated uses are set for a classified stream segment, then criteria, or levels of contaminants, are applied. The state monitors stream segments and makes a determination of whether a particular stream segment is meeting the assigned designated use. If the designated use is not met, then a plan, or total maximum daily load allocation, is applied to activities along the stream segment to reach the designated use.

In 1994, KDHE listed virtually every draw or small ravine located on a topography map as a classified stream segment. KDHE did little or no fieldwork to verify that the topography map illustrated places that could be described as streams with flowing water. KDHE selected this approach because it was easy and quick. KDHE further designated many of these same stream segments suitable for secondary contact recreation such as wading. The United States Environmental Protection Agency, as a result of litigation by the Sierra Club, proposed that all of those "classified stream segments" listed in 1994 be designated for the recreational use of primary contact recreation, which includes swimming and boating.

Farmers and ranchers were outraged by the thought that streams on their properties were being designated for swimming and boating when many of those streams did not have any flow. Nearly 1,500 farmers and ranchers attended public hearings to protest such classifications and designations. The flaws in the system became obvious. KDHE had misclassified many stream segments. EPA used this misclassification as a tool to propose regulations that will impact thousands of acres of property and many small communities. Substitute SB 204 establishes a scientific and technical process to correct these problems.

Agricultural representatives met with KDHE officials on several occasions prior to the session and asked them to take the lead in correcting the misclassifications. Because KDHE did not respond, the agricultural coalition eventually sought the introduction of the original SB 204. As you know, it was met with opposition. Substitute SB 204 is a genuine effort to meet the concerns of the opposition and address the concerns of thousands of Kansans who believe the current regulatory framework is not founded on flow data, that it over regulates and wastes state resources.

Substitute SB 204 essentially does two things: (1) defines what is considered a classified stream segment based upon stream flow data and sets forth a schedule for KDHE to review the current classifications; (2) outlines what designated uses of classified stream segments should apply in Kansas and sets forth a schedule for KDHE to conduct the work. All current classifications and designations remain in effect until KDHE conducts its reviews. Water quality will be protected while KDHE works. Further, KDHE has the resources to conduct the work.

There have been numerous attempts to confuse the public and the legislature about what Substitute SB 204 does and what effect it will have. Some organizations have even failed to acknowledge that a substitute bill exists. Attached is an outline of objections raised to Substitute SB 204 and our responses to those objections. We believe this will provide you with a complete, factual picture of the issues.

Passage of Substitute SB 204 will put Kansas' resources where they are most needed to improve water quality. Water quality is important to the agricultural coalition and we believe passage of Substitute SB 204 is the first step towards real improvements in water quality.

It is up to the elected legislators to protect Kansans – agricultural producers, industries and municipalities – from these types of mistakes by the bureaucracy. Citizens need to know they will be fairly protected by those they have elected to oversee the government agencies.

Again, please read and support Substitute SB 204. Thank you for your time.

Kansas Farm Bureau	Kansas Fertilizer and Chemical Association
Kansas Livestock Association	Kansas Grain and Feed Association
Kansas Corn Growers Association	Kansas Dairy Association
Kansas Grain Sorghum Producers Association	Farmland
Kansas Association of Wheat Growers	Agrilience
U.S. Premium Beef	

If you have any questions, please contact:

Allie Devine – 785-273-5115

Jere White – 785-448-6922

Patty Clark – 785-587-6106

Agricultural Coalition Responses to Arguments against Substitute SB 204

Property Access:

Opponents claim Substitute SB 204 would prohibit KDHE from using the only regulatory tool available, the designation of recreational use, to control biological contamination.

Coalition Response:

1. Substitute SB 204 provides for the designation, where attainable, of any of the other uses, including protection for aquatic life support, agricultural, special aquatic life use, expected aquatic life use, restricted aquatic life use, domestic water supply, food procurement use, groundwater recharge use, industrial water supply use, and recreational use. These uses each have criteria - limitations on contaminants - that may still apply.

2. The amendments made to the recreational use section (page 3, lines 15- 43 and page 4, lines 1- 23) provide that secondary contact recreation uses, where attainable, may apply to waters flowing through private lands. This amendment gives KDHE the same authority and designations they use today on classified stream segments to protect public health. While the coalition is not completely comfortable with the amendment, we support efforts to protect public health.

3. Nothing in the substitute bill precludes KDHE from using their authorities to prohibit point source discharges. Discharges into waters of the state are regulated under K.S.A 65-161 through 65-171d et seq. The substitute bill does not affect those existing powers.

Threatened and Endangered Species:

Opponents claim it will be difficult to prove that a species "actually" inhabits a stream segment. Opponents also contend that smaller streams that may be inhabited by endangered species are not protected under Substitute SB 204.

Coalition Response:

1. The Kansas Department of Wildlife and Parks conducts biological studies. They know and identify which stream segments are inhabited by a particular species as part of the "listing" of a threatened or endangered species. KDHE can use this data to conduct the evaluation as to whether a particular stream should be classified.

2. The state claims it is "too difficult" to demonstrate a species inhabits an area. Such an argument should be balanced against the potential costs to the public for the protection of a species that MAY or MAY NOT exist. The public, including cities, landowners, and industry, should not be forced, through regulation, to protect something that may not exist. The burden of justification of regulation, in a free society, is on the state, not on individuals. Difficulty of a task is not justification for regulation of private property, cities, or industry.

3. Smaller streams can be classified and endangered species protected if KDHE conducts the research and ‘balancing’ of interests. See Page 1, lines 33-43 and page 2, lines 1-3 of Substitute SB 204.

Public Health Impacts:

Opponents claim the declassification of stream segments will result in no protection for human exposure in the stream segments.

Coalition Response:

1. Again, the amendment by Senator Derek Schmidt provides for secondary recreational use designations to apply to water flowing through private lands, which is the standard KDHE now applies to many of these same waters. This addresses the public health concerns raised. See page 4, lines 3-23.

2. The process to classify stream segments under Substitute SB 204 is based on an EPA topography map outlining major stream segments in Kansas and a median flow rate verified through data of the United States Geological Survey. To continue to use the current systems that are known to be flawed is irresponsible and unfair to the taxpayers of this state. Substitute SB 204 provides a means to target resources where the water is, not where environmental activists would have it be. (The agricultural coalition has numerous pictures depicting stream segments currently listed by KDHE that are dry.) The environmental community continues to claim Kansas has the “dirtiest waters”. It is time to reevaluate the system KDHE is using and base it on data and science, not a useless topography map.

3. These smaller stream segments that the opponents seek to protect are likely on private property where no public access is allowed. Where there is no public access, human access is limited and so is the risk of human exposure. If the area is open to the public by virtue of law, then it may be designated for a number of uses that will protect human health.

4. Nothing in Substitute SB 204 limits the existing authorities of KDHE to address public health concerns. There is ample authority in the laws pertaining to discharges into waters of the state to address pollution issues. (See K.S.A. 65-161 et seq.)

5. Any stream segment, regardless of flow, may be protected under the provisions of Substitute SB 204 for aquatic life if KDHE’s research proves it is warranted. (See page 1, lines 33-43 and page 2, lines 1-3.)

6. The amendments made to substitute SB 204 also provide for the classification of stream segments in which a point source may discharge. This amendment assures that KDHE retains all of its authorities to regulate point sources. The amendment excludes confined animal feeding operations because they do not discharge. Confined animal feeding operations are required to retain all of their effluent. Confined animal feeding operations may only discharge when their lagoons are full because of a sever storm event that causes large amounts of precipitation to accumulate rapidly.

Economic and Social Studies:

Opponents claim it would be “difficult” to weigh the economic, social, and regulatory costs of proposed classification against the benefits received.

Coalition Response:

1. Difficulty of work is not justification for imposition of regulation onto society. The legislature has a fiduciary responsibility to assure public resources are not wasted. Cost/benefit analysis should be done on every law or regulation passed by any governing body. Legislators must constantly weigh the costs of regulation against the costs of no regulation. It is clear that this fiduciary duty of protecting the public funds is not shared by KDHE; therefore this language is absolutely necessary to instill in KDHE this responsibility.

2. Throughout the Clean Water Act there is a “balancing” of interests. Section 303 (c) (1) of the Clean Water Act incorporates the idea of balancing and protecting the public health and welfare. The protection of the public health and welfare inherently includes the concept of balancing of economic and social interests. Nothing in the Clean Water Act requires regulation at all costs. Section 101 of the Clean Water Act addresses national policies and “goals”. The law specifies that certain uses “where attainable” should be a goal.

Open and Accessible Requirements for Class A designation and Requirements on Class B designation:

Coalition Response:

Both these issues are addressed in the response provided in the first section dealing with private access.

Impacts on Water Quality Programs:

Opponents of Substitute SB 204 claim it is inconsistent with the Clean Water Act.

Coalition Response:

What provisions of the Clean Water Act does Substitute SB 204 violate? Nothing in Substitute SB 204 conflicts with the Clean Water Act:

Reasons Why Substitute SB 204 does not violate the Clean Water Act:

Classification of stream segments:

1. Classification of water bodies, including stream segments, is within the jurisdiction of the states. The Clean Water Act never mentions “classified stream segments” or classified waters. The state defines these terms as the first step in setting water quality standards.
2. Substitute SB 204 provides for a review process and no stream segment that is currently classified will be removed without a review.

3. The current system is subject to challenge by persons regulated by this system because KDHE did not follow its own process when they selected Reach File 2 map as the basis of classifying streams.

Designation of uses:

1. Section 303 (c) (2) of the Clean Water Act calls for states to consider the use and value of waters for a variety of purposes. EPA's Water Quality Standards Handbook, 1995 notes that states are free to adopt any use classification system the state believes appropriate and keeping with the Clean Water Act. Here, the legislature is following and outlining the same uses listed within the Clean Water Act. It should be noted that EPA handbooks allow for subcategories to be created within the recreational use designation. Clearly, this does not violate the Clean Water Act.
2. The Clean Water Act provides for a process called a use attainability analysis to be done when a state seeks to remove a designated use. Substitute SB 204 outlines what things KDHE is to consider when conducting those reviews. Other states have issued similar directives to their administrative regulators.
3. The process set forth in Substitute SB 204 to review designated uses follows the Clean Water Act and EPA regulations. Substitute SB 204 simply directs KDHE to do the reviews.
4. No current designated use is removed without a review.

Opponents argue that only the Governor of a state or the state water pollution control agency may review or change water quality standards.

Coalition Response:

The opponents are reading one section of the Clean Water Act in total isolation of the remainder of the act. Throughout the Act, references are made to "the state". In section 303(c) (1) of the Clean Water Act dealing with water quality standards states:

"The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the **State** revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator...(emphasis added and remaining language deleted for purposes of brevity)"

There are hundreds of references to the State in the Clean Water Act. The opponents are using this one reference to the Governor to imply that state legislatures may not act. Here, the reference to the Governor is because the Governor is the executive responsible for carrying out the laws of a state. Please note the Clean Water Act references the Governor or the STATE water pollution control agency. State agencies only have the powers granted to them by the legislature. It is completely acceptable for the legislature to act in defining what waters to protect and what uses to designate. Further, KDHE will need to amend Kansas water quality standards to incorporate the provisions of Substitute SB 204.

Impacts on Regulatory Programs:

Opponents assert this bill may result in EPA withdrawing the NPDES program. Opponents also assert any changes to regulations must be done through the regulatory process.

Coalition Response:

Nothing in this bill affects the NPDES program or KDHE's ability to issue permits.

Litigation:

Opponents submit the Sierra Club may sue if the bill is passed.

Coalition Response:

1. The Sierra Club likely will continue to sue regardless of whether this bill passes or not. Representatives of the Sierra Club have continually made this threat without referencing what their cause of action will be. Their success is not certain.

2. The coalition of agricultural organizations, Kansans for Common Sense Water Policy, also has indicated they will consider litigation if the current system of stream classifications is allowed to continue without review.

EPA Review and Approval:

Opponents contend the time frames of Substitute SB 204 do not allow for correction of water quality standards if EPA denies approval.

Coalition Response:

Amendments were made on the Senate floor to allow the EPA approval process to work within the timeframes of the legislature where modifications may be made if necessary in a timely manner.(See page 7 line 29.)

Conflicts with the Clean Water Act:

Opponents claim the classification of stream segments violates the Clean Water Act.

Coalition Response:

See the earlier discussion regarding reasons why Substitute SB 204 does not violate the Clean Water Act.

Schedule Requirement:

Opponents claim the schedules set out in the substitute bill are optimistic and not likely workable.

Coalition Response:

The schedule set forth was discussed with KDHE. The dates for completion of the reviews of designated uses were given to the bill sponsors by KDHE.

Public Participation:

Opponents contend there is no public participation in the review of designated uses and that this bill violates the public participation requirements of the Clean Water Act.

Coalition Response:

1. The process outlined is the current process outlined in KDHE use attainability protocols. Changes to the designated uses must be published in the Kansas Register.

2. Substitute SB 204 allows for appeals from use attainability analysis decisions. This is a new section and actually allows for MORE, not less, public involvement.

3. Substitute SB 204 does nothing to remove the requirements that KDHE write regulations. Here, if Substitute 204 is passed, KDHE would amend their regulations to be consistent with the law, move those regulations through the public process, and send them to EPA for approval. This is the same public participation process used today for establishing water quality standards.

LEGISLATIVE TESTIMONY



The Unified Voice of Business

835 SW Topeka Blvd. • Topeka, KS 66612-1671 • 785-357-6321 • Fax: 785-357-4732 • E-mail: kcci@kansaschamber.org • www.kansaschamber.org

Sub for SB 204

March 15, 2001

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

House Committee on Environment

by

Terry Leatherman
Vice President – Legislative Affairs

Madam Chairperson and members of the Committee:

My name is Terry Leatherman. I represent the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to comment on Sub for SB 204, and to express KCCI's support for legislative action to address state management of water quality in Kansas.

The Kansas Chamber has been very concerned about the actions of the federal Environmental Protection Agency this past summer and fall regarding water quality issues in Kansas. Overall, the EPA efforts are an example of Washington D.C. at its worst, imposing sweeping changes in water

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 2,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 48% of KCCI's members having less than 25 employees, and 78% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

*House Environment
3-15-01
Attachment 5 5*

ulation, with little positive environmental impact, and without the direction of Congress.

In September, the EPA action prompted the KCCI Board of Directors to support a policy statement opposing this federal takeover of the state's responsibility to regulate the water quality in Kansas. The business community's concern about this EPA initiative was also evident at KCCI's Kansas Business Congress last fall in Wichita. At that annual Kansas Chamber event, our members develop a list of major state legislative objectives. Supporting state initiatives to address the federal effort involving Kansas water quality became the 5th item on this year's list of major legislative objectives developed at the Business Congress.

KCCI supported SCR 1605, which was approved by the Kansas Senate and is pending House action, which urges the EPA action be reversed. However, in light of the EPA actions, state legislation to clarify and direct the Kansas Department of Health and Environment in managing state water quality is needed. As a result, KCCI supports and urges this Committee to recommend Substitute for SB 204 for passage.

Thank you for the opportunity to comment on KCCI's concerns regarding water quality regulations. I would be happy to respond to any questions.

STATE OF KANSAS

BILL GRAVES, GOVERNOR

Jamie Clover Adams, Secretary of Agriculture

109 SW 9th Street

Topeka, Kansas 66612-1280

(785) 296-3556

FAX: (785) 296-8389



KANSAS DEPARTMENT OF AGRICULTURE

House Environment Committee

March 15, 2001

Written Testimony Regarding SB 204

Kansas Department of Agriculture

Good afternoon Chairman Freeborn and members of the committee. Thank you for accepting the Kansas Department of Agriculture's written testimony as you consider SB 204.

Attached is a copy of a memo dated March 13, 2001 which I sent to the members of the Kansas Senate. This memo outlines the Kansas Department of Agriculture's position on Senate Bill 204.

Thank you for the opportunity to provide information on this subject. Should any members of the committee have questions about the Department's position, please do not hesitate to contact me.

STATE OF KANSAS

BILL GRAVES, GOVERNOR


Jamie Clover Adams, Secretary of Agriculture
109 SW 9th Street
Topeka, Kansas 66612-1280
(785) 296-3556
FAX: (785) 296-8389



KANSAS DEPARTMENT OF AGRICULTURE

Memorandum

TO: Members of the Kansas Senate

FROM: Jamie Clover Adams, Secretary of Agriculture 

DATE: 13 March 2001

RE: Senate Substitute for S.B. 204

The Kansas Department of Agriculture (KDA) supports Senate Substitute for S.B. 204 with the amendments that will be offered by Senator Schmidt on the floor today. Governor Graves believes it is a major improvement over the bill as it was introduced. The substitute and the amendments raise his comfort level with the bill.

The KDA has a strong interest in water quality standards because they directly impact our regulatory mission specifically with regard to pesticides, fertilizers, chemigation, application of swine waste, dams, levees and channel changes, and the appropriation of water. Further, the KDA is a full partner in implementing the voluntary, incentive-based measures envisioned by the Clean Water Act to address nonpoint sources of pollution.

Need for Senate Sub. for S.B. 204

First, let me point out that no one in Kansas opposes cleaner water. However, the actions of the Environmental Protection Agency (EPA) in one day last summer undid a decade's worth of effort to address nonpoint source pollution in Kansas. I believe Senate Sub. for S.B. 204 is a good faith measure to bring Kansas farmers and ranchers back to the table so that we can resume our efforts to improve water quality in Kansas. The literature is clear – without landowner cooperation and collaboration progress will not occur.

Also, the EPA action last summer made it clear that the state must assert its rights under the Clean Water Act or the federal government will direct land use decisions in our state. Senate Sub. for S.B. 204 puts water quality decisions back into the hands of Kansans.

Elements of Senate Sub. for S.B. 204

Stream Classification. The bill, with the Schmidt amendment establishes which streams will be classified and thus covered by Kansas water quality standards. It also provides protection for streams important to threatened and endangered species and other aquatic life, no matter what the size of the stream. Current stream classifications remain until the scientific basis for change is determined.

Recreational Use Designations. The bill, with the Schmidt amendment reconciles two important tenants of Kansas law – the sanctity of private property rights and the recognition that the waters of the state belong to the people of the state. The bill creates a recreational category that recognizes private property rights and continues to provide public health protections.

Designation Decisions. Senate Sub. for S.B. 204 ensures that science will be the foundation for designation decisions in the future. It establishes a timetable to complete scientific assessments of Kansas streams to verify use designations and establishes broad parameters for those assessments.

Senate Sub. for S.B. 204 Within Parameters of the Clean Water Act

I believe Senate Sub. for S.B. 204 will comply with the requirements of the Clean Water Act. While states are required to submit water quality standard revisions to EPA for review and approval under 33 § 1313(c) and 40 C.F.R. 131.21, the bill should not be subject to EPA review until actual changes are made to the classification or use of a listed stream. The bill ensures that when changes are submitted to EPA they are based on scientific assessment. No present classification or use is changed until the scientific assessments are complete and this scientific assessment should pass EPA muster.

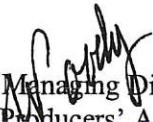
History shows that EPA is very unwilling to take over state programs. I believe this is highly unlikely given Governor Whittman's comments since the announcement of her appointment about returning flexibility and responsibility to the states. Further, EPA officials have stated on numerous occasions that the Kansas water quality standards program is far superior to other states – on the cusp. Will the parameters set-out in Senate Sub. for S.B. 204 which require scientific assessment before any changes are made be enough to move EPA to take back what they have described as a superior program? I doubt it.

KAPA

Kansas Aggregate
Producers' Association

Edward R. Moses
Managing Director

TESTIMONY

Date: March 15, 2001
By: Edward R. Moses,  Managing Director
Kansas Aggregate Producers' Association
Regarding: Senate Substitute for Senate Bill 204
Before: House Natural Resources Committee

Madam Chair and Members of the Committee:

My name is Edward R. "Woody" Moses appearing on behalf of the Kansas Aggregate Producers' Association. The Kansas Aggregate Producers' Association is an industry wide trade association comprised of over 250 members located in all 165 legislative districts in this state, providing basic building materials to all Kansans. We are happy to be here today to give our support for Senate Sub. For SB 204.

The Kansas Aggregate Producers' Association has long supported the need for effective conservation and environmental protection legislation. One of our primary guiding principles is to conduct our operations in such a manner as to utilize our natural resources in an environmentally friendly manner. In pursuit of this goal, we have supported legislation in the past, examples of which are the Surface-mining Land Conservation and Reclamation Act, the NPDES permitting process, and the establishment of the stormwater discharge program for the state of Kansas. While our industry always strives to maintain high environmental standards and play by the rules, it is sometimes difficult due to the fact that the rules are not always clear or practical.

We appear before you in support of SB 204, as we believe it, by clearly defining standards, will allow our industry to more effectively comply with the overall goals of the Clean Water Act. SB 204 would codify the manner in which use designations and stream classifications are established. Stream classification and use designations are important elements of the Clean Water Act and must be achieved by a sound and logical process in order for our industry to understand what it is that we are to comply with. The current classification and designation process has resulted in a hodge-podge of streams being listed on the surface water registry with little or no real data to support the classification or designation.

SB 204 would provide the Kansas Department of Health & Environment and related agencies with clear direction regarding the classification of streams and use designations. Having a reliable system in law will achieve many long term benefits. Most importantly, for our industry, it will allow us to continue providing natural resources to the public in an environmentally friendly and economical manner. We urge this committee to take positive action on SB 204. We thank you for your time and consideration.

*House Environment
3-15-01
Attachment 7*

Kansas Agricultural Alliance

Kansas Agricultural Aviation Association

Kansas Agri-Women

Kansas Association of Ag Educators

Kansas Association of Conservation Districts

Kansas Association of Wheat Growers

Kansas Cooperative Council

Kansas Corn Growers Association

Kansas Crop Consultant Association

Kansas Dairy Association

Kansas Ethanol Association

Kansas Farm Bureau

Kansas Fertilizer and Chemical Association

Kansas Grain and Feed Association

Kansas Grain Sorghum Producers Association

Kansas Nursery & Landscape Association

Kansas Livestock Association

Kansas Pork Association

Kansas Seed Industry Association

Kansas Soybean Association

Kansas Veterinary Medical Association

Western Retail Implement and Hardware Association

March 15, 2001

The Honorable Joann Freeborn
Chairman of the Senate Environment Committee
Statehouse
Topeka, KS 66612

Dear Chairman Freeborn,

The Kansas Agricultural Alliance, representing the 21 agricultural producer organizations and agribusiness organizations listed above, supports Substitute for SB 204. Alliance members voted unanimously to support this legislation. Our members have not taken a vote on the measure as amended by the Senate with the Schmidt Amendment; however we believe that significant compromises were made in the Senate to appease concerns expressed by KDHE. While our individual members are not as happy with the amended Sub for SB 204 as we were with the original bill, we understand and appreciate the spirit of compromise with which it was amended.

As you know, members of the Alliance and the producers we represent feel strongly about water quality in our state. We believe this bill, even as amended in the Senate, will help address fundamental flaws in the system currently used by KDHE to classify and designate uses for Kansas streams while allowing the appropriate channeling of precious state money to be used wisely to ensure water quality. Furthermore, we believe this legislation will help protect waters of Kansas without over-regulating Kansas citizens.

Thank you for taking our comments into consideration as you and your committee members deliberate on this issue.

Sincerely,



Kerri Ebert
KAA President

*House Environment
3-15-01
Attachment 8*



STATE OF KANSAS
DEPARTMENT OF WILDLIFE & PARKS

Office of the Secretary
900 SW Jackson, Suite 502
Topeka, KS 66612-1233
785/296-2281 FAX 785/296-6953



March 14, 2001

Representative Joann Freeborn, Chair
House Committee on Environment
State Capitol, Room 231-N
Topeka, Kansas 66612

Re: Substitute for Senate Bill No. 204

Dear Chair Freeborn:

Substitute for Senate Bill No. 204, as amended in the Senate, specifically refers to the Kansas Department of Wildlife and Parks and to threatened and endangered species. Consequently, we believe it appropriate to provide comments to your Committee concerning these provisions (contained on page 1, lines 30-33 and page 2, lines 32-35).

The department appreciates the recognition, expressed in Sub. for SB 204, that water quality in Kansas streams impacts Kansas threatened and endangered wildlife. We would also suggest, however, that the provisions as drafted create certain concerns. Primarily, they are:

- The Kansas Nongame and Endangered Species Act, and its implementing regulations, actually creates three classes of listed species. In addition to “endangered” and “threatened”, the law also provides for “species in need of conservation” or “SINC” species, which receives a lesser category of protection. We would suggest these species also be referenced.
- The department, through statute and regulation, designates critical habitat for listed species. Habitat is designated on a priority basis, by law, and therefore critical habitat for certain species might not have been designated to this point. We would suggest that the bill refer to streams within designated critical habitat or with a record of inhabitation by the species (as opposed to “actually inhabited”).
- No statute or regulation distinguishes “aquatic” species, whether endangered, threatened, or SINC, and there is no clear basis that would define such species. If the intention of this provision is to protect stream habitat necessary for survival of listed species, we suggest that it refer to species dependant upon stream quality for habitat, reproduction, or food source.

*House Environment
3-15-01
Attachment 9*

We would also observe that protection of stream quality, as contemplated by this legislation, may not successfully protect listed species. For listed species dependent upon water quality, but living in water bodies other than streams, tributaries feeding these water bodies could impact the species, even if those streams themselves are not within the designated critical habitat of the species.

We intend our comments to be restricted to these limited provisions of Sub. for SB 204 (referenced above). We hope they may be useful to the Committee's discussion of the bill.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Williams". The signature is fluid and cursive, with a prominent initial "S".

Steve Williams
Secretary

Charles M. Benjamin, Ph.D., J.D.
Attorney at Law
P.O. Box 1642
Lawrence, Kansas 66044-8642
(785) 841-5922
(785) 841-5922 fax

Testimony in Opposition to Substitute for S.B. 204
(As Amended by the Senate Committee of the Whole)

March 15, 2001

Prepared and presented on Behalf of the Kansas Chapter of the Sierra Club

One of the goals set by Congress when they passed the Clean Water Act in 1972 was "that the discharge of pollutants into the *navigable waters* be eliminated by 1985." (italics added)

Opponents to EPA's proposed July 3, 2000 rule that all streams be labeled for primary contact recreation, unless a use attainability analysis proves otherwise, claim that intermittent streams in Kansas are not "navigable waters." I looked up the word "navigable" in my 1966 version of Webster's New World Dictionary that my grandmother gave me as a high school graduation present. Webster says that navigable means "wide or deep enough, or free enough from obstructions, to be traveled on by ships." That is certainly a "common sense" definition of "navigable."

However, the law does not always match "common sense." The Clean Water Act has been the law of the United States for almost 30 years. During that time hundreds of cases have been filed in which federal judges, at various levels, have interpreted the words that Congress put into the Act. Judges have tried to figure out what Congress meant to include in the term "navigable waters." I want to tell you about the most recent federal case in which three federal judges interpreted "navigable waters" to include intermittent streams.

On March 12, 2001 the Ninth Circuit Court of Appeals released Opinion No. 99-35373 in a case called *Headwaters, Inc. v. Talent Irrigation District*. This opinion was released the day before the Kansas Senate debated Substitute for S.B. 204. The ruling in the case had to do with the irrigation district discharging herbicides into its canals without an NPDES permit. The question the judges were asked to consider was whether a user of a herbicide registered under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) needed to get an NPDES permit required under the Clean Water Act when the user of that herbicide discharged that herbicide in the "navigable waters" of the United States, in this case irrigation canals.

House Environment
3-15-01
Attachment 10

For the purposed of the debate on S.B. 204, I ask you to turn to page 5 of the opinion attached to this testimony. There the court reviews what constitutes waters of the United States:

The EPA has interpreted "waters of the United States" to include "intrastate lakes, rivers, streams (including intermittent streams) ... the use of which would affect or could affect interstate or foreign commerce," and "tributaries of [those] waters." 40 C.F.R. § 122.2(c), (e). The district court concluded that the irrigation canals were "waters of the United States" because they are tributaries to the natural streams with which they exchange water.

We agree with the district court...a "stream which contributes its flow to a larger stream or other body of water" is a tributary.

The court's opinion goes on to cite cases in the 11th, 2nd, and 10th federal circuit courts that interpret Congress' intention to make "non-navigable tributaries flowing into navigable streams" waters of the United States" and that an "unnamed tributary of a creek that is a tributary to a river is "water of the United States." This last quote is particularly significant because it comes from a 1979 10th Circuit Court of Appeals case. Tenth Circuit Court of Appeals decisions are binding on federal district court judges in Kansas, unless overturned by the U.S. Supreme Court.

Furthermore, the court says that its conclusion "is not affected by the Supreme Court's recent limitation on the meaning of "navigable waters" in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers.*"

The court's opinion goes on, at page 6, to state, "Even tributaries that flow intermittently are "waters of the United States." The court cites an 11th Circuit opinion that:

Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage....as long as the tributary would flow into the navigable body (under certain conditions), it is capable of spreading environmental damage and is thus a "water of the United States" under the Act.

The court's opinion goes on to cite a 1985 10th circuit case that found "creeks and arroyos connected to streams during intense rainfall are 'waters of the United States'." Again, 10th circuit decisions are binding on federal district court judges in Kansas, unless overturned by the U.S. Supreme Court.

The court concludes by saying "The Clean Water Act is concerned with the pollution of tributaries as well as with the pollution of navigable streams, and 'it is contestable that substantial pollution of one not only may but very probably will affect the other.'"

I hope that you understand that the intent of Substitute for S.B. 204 is to exempt intermittent streams from the protections of the federal clean water act. That intent runs counter to the intent of Congress when they passed the Clean Water Act. Furthermore, federal judges in circuits throughout the United States have determined that intermittent streams are "navigable waters" and fall under the jurisdiction of the federal Clean Water Act.

If you recommend Substitute for S.B. 204, as amended by the Kansas Senate on March 13, to the full Kansas House of Representatives you will be asking your colleagues to violate the Clean Water Act. Before you take such an action I respectfully urge you to get a Kansas Attorney General's opinion as to the many legal questions raised on the floor of the Kansas Senate and before this committee about Substitute for S.B. 204.

Thanks you for your time and attention. I would be happy to stand for questions.

--- F.3d ---

(Cite as: 2000 WL 33224806 (9th Cir.(Or.))

Only the Westlaw citation is currently available.

United States Court of Appeals,
Ninth Circuit.

HEADWATERS, INC., an Oregon not for profit corporation; Oregon Natural Resources Council (ONRC) Action, an Oregon not for profit corporation,
Plaintiffs-Appellants,

v.

TALENT IRRIGATION DISTRICT, an Oregon municipal corporation, Defendant-Appellee.

No. 99-35373.

Argued and Submitted Aug. 8, 2000
Filed March 12, 2001

Charles M. Tebbutt, Western Environmental Law Center, Eugene, Oregon, for the plaintiffs-appellants.

Robert L. Cowling, Hornecker, Cowling, Hassen & Heysell, Medford, Oregon, for the defendant-appellee.

Appeal from the United States District Court for the District of Oregon; Ann L. Aiken, District Judge, Presiding. D.C. No. CV-98-06004-ALA.

Before: Robert Boochever, Stephen S. Trott, and Marsha S. Berzon, Circuit Judges.

BOOCHEVER, Circuit Judge:

*1 Headwaters, Inc. and Oregon National Resources Council Action filed a citizen lawsuit against the Talent Irrigation District. The suit alleged that the irrigation district had violated the Clean Water Act by applying the aquatic herbicide Magnacide H to its canals, without obtaining a National Pollution Discharge Elimination System permit. The district court granted summary judgment in favor of the irrigation district. The court held that the canals were waters of the United States covered by the Clean Water Act, and

that the active ingredient in Magnacide H was a pollutant. Nevertheless, the court concluded that no permit was required because the label on the herbicide, approved by the Environmental Protection Agency under the Federal Insecticide, Fungicide, and Rodenticide Act, did not require the user to acquire a permit. Because we conclude that the approved label did not obviate the need to obtain a permit, we reverse.

FACTS

The Talent Irrigation District ("TID") operates a system of irrigation canals in Jackson County, Oregon. The canals derive water from a variety of surface streams and other bodies of water, including Bear Creek, Emigrant Lake, Wagner Creek, and Anderson Creek. The canals also divert water to such streams as Bear Creek, Wagner Creek, Anderson Creek, Coleman Creek, Dark Hollow Creek, and Butler Creek. [ER pp. 53-56]

TID provides irrigation waters to its members from May to September or October. To control the growth of aquatic weeds and vegetation in its irrigation canals, TID uses an aquatic herbicide, Magnacide H, which it applies to the canals with a hose from a tank on top of a truck every two weeks from late spring to early fall. The active ingredient in Magnacide H is acrolein, an acutely toxic chemical that kills fish and other wildlife. TID does not have, and has never applied for, a National Pollution Discharge Elimination System permit ("NPDES permit" or "permit") issued under the Clean Water Act, 33 U.S.C. § 1342.

In May 1996, TID applied Magnacide H to the Talent Canal, and the next day the Oregon Department of Fish and Wildlife found many dead fish in nearby Bear Creek, around and downstream from a leaking waste gate from the canal. Over 92,000 juvenile steelhead were killed. An earlier fish kill in Bear Creek followed an application of Magnacide in 1983. [ER pp. 34-35]

On January 5, 1998, Headwaters, Inc. and

(Cite as: 2000 WL 33224806, *1 (9th Cir.(Or.)))

Oregon Natural Resources Council Action (hereafter referred to as "Headwaters" or "plaintiffs"), nonprofit environmental corporations whose members use the streams near TID's canals, brought a citizen suit under the Clean Water Act ("CWA"), 33 U.S.C. § 1365. The complaint alleged that TID is in violation of the CWA, 33 U.S.C. § 1311, when it discharges the toxic chemical into the irrigation canals, and through the canals into Bear Creek, without a permit under 33 U.S.C. § 1342. [ER pp. 8-10] The complaint asked for a declaratory judgment, an injunction prohibiting TID from discharging pollutants without a permit, and an injunction requiring TID to allow the plaintiffs to monitor further discharges. The complaint also asked for an injunction requiring TID to pay for environmental restoration, as well as civil penalties and the plaintiffs' costs and attorneys fees.

Headwaters filed a motion for partial summary judgment on liability, and TID filed a cross-motion. The district court granted TID's cross-motion. The court held that Headwaters had standing to bring a citizen's suit under the CWA; that the irrigation canals were "waters of the United States" subject to the Act; and that Magnacide H (with its active chemical ingredient acrolein) is a "pollutant" under 33 U.S.C. § 1362. But the court also concluded that no NPDES permit was necessary: "[T]he application of acrolein is adequately regulated and controlled by [the Federal Insecticide Fungicide and Rodenticide Act] and the EPA thus making further regulation by the [CWA] unnecessary." [ER p. 130] Because the EPA-approved label on Magnacide H did not require a permit, the court held that none was required. The court further concluded that the application by TID of Magnacide H complied with the FIFRA label and that acrolein had not "recently" leaked from the irrigation canals into "natural waterways." [ER p. 135] The court denied relief to the plaintiffs, but recommended they petition the EPA to amend the label to require a permit. This appeal followed.

ANALYSIS

*2 We review the district court's grant of summary judgment de novo. See *Botosan v. Paul McNally Realty*, 216 F.3d 827, 830 (9th Cir.2000).

I. Subject matter jurisdiction

TID argues on appeal that the district court had no jurisdiction because the suit was based on wholly past violations of the CWA. "The Clean Water Act does not permit citizen suits for wholly past violations." *Russian River Watershed Prot. Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1143 (9th Cir.1998) (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987)). Nevertheless, a citizen group has "standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 708, 145 L.Ed.2d 610 (2000); see *Russian River*, 142 F.3d at 1143 ("appellants must prove the existence of ongoing violations or the reasonable likelihood of continuing future violations").

The complaint alleges that TID's application of Magnacide H to its irrigation canals, without a permit, violates the CWA. **There is no factual dispute that TID continues to apply Magnacide H to its canals without a permit. The plaintiffs' claim is thus based on a continuing violation.**

The complaint also alleges that Magnacide H reaches Bear Creek. TID claims that it has implemented a new protocol, and that since the complaint was filed there have been no leaks into Bear Creek and "no releases are likely to occur." **But the claimed violation of the Clean Water Act is the continuing discharge of the herbicide into the canals without a permit, regardless of whether the herbicide continues to cause environmental damage to any of the numerous streams with which the canals exchange water.**

We conclude that we have subject matter jurisdiction.

(Cite as: 2000 WL 33224806, *2 (9th Cir.(Or.)))

II. EPA-approved label under FIFRA

*3 The Clean Water Act, as originated in the Federal Water Pollution Control Act Amendments of 1972, generally prohibits the discharge of pollutants into "navigable waters" or "waters of the United States." See 33 U.S.C. §§ 1311(a), 1362(7). There are statutory exceptions, however, the broadest of which is the National Pollution Discharge Elimination System ("NPDES") permit program, which allows a polluter who obtains a permit to discharge a specified amount of the pollutant. See *id.* at § 1342; *Russian River*, 142 F.3d at 1138. Under the NPDES program, 33 U.S.C. § 1342, the EPA may establish a uniform national limitation on the discharge of an identified pollutant from categories of sources, but the EPA may also issue permits on a case-by-case basis, taking into account local environmental conditions. See *American Mining Cong. v. United States Envtl. Prot. Agency*, 965 F.2d 759, 762 n. 3 (9th Cir.1992); *United States v. Pozsgai*, 999 F.2d 719, 725 (3d Cir.1993) ("The permit system translates [national effluent] standards into site-specific limitations to accommodate individual circumstances and ease enforcement."). TID does not have, and has never applied for, such a permit.

TID claims that it does not need a permit, because Magnacide H's label does not mention any permit requirement, and the label was approved by the EPA under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").

FIFRA, codified at 7 U.S.C. §§ 136-136(y), "is a comprehensive federal statute which regulates pesticide use, sales, and labeling, and grants enforcement authority to the EPA." *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 559 (9th Cir.1995); see also *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 601, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991). The statute creates a comprehensive regulatory scheme for the labeling of pesticides and herbicides, requiring that all herbicides sold in the United States be registered with the EPA. See *Andrus v. Agrevo USA Co.*, 178 F.3d 395, 398 (5th Cir.1999). After a complex

review process, the EPA may approve a label under which the product is to be marketed. See 7 U.S.C. § 136a.

The EPA then registers the herbicide if it determines that its composition is such as to warrant the proposed claims for it, that its labeling complies with FIFRA requirements, that it will perform its intended function without unreasonable adverse effects on the environment, and, when used in accordance with widespread practice, that it will not generally cause unreasonable adverse effects on the environment.

Andrus, 178 F.3d at 398 (citing 7 U.S.C. § 136a(c)(5)). The labels must be nationally uniform. See 7 U.S.C. § 136(v).

Magnacide H is registered under FIFRA and bears an EPA-approved label. [ER p. 40] The label states that the herbicide is toxic to fish and wildlife, should be kept out of lakes, streams, or ponds, and should not be applied to drainage areas where runoff or flooding will contaminate other bodies of water. The "Directions for Use" warn against release into potential sources of drinking water, and conclude, "Do not release treated water for 6 days after application into any fish bearing waters or where it will drain into them." The label does not state that a NPDES permit is required for the use of Magnacide-H. The district court construed the label's failure to mention a permit as an indication that none was required.

*4 To resolve whether a FIFRA label controls whether a permit is required under the CWA, we must interpret the two statutes "to give effect to each if we can do so while preserving their sense and purpose. When two statutes are capable of co-existence, it is the duty of the courts ... to regard each as effective." *Resource Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1165 (9th Cir.1998) (quotations and internal alteration omitted).

The CWA and FIFRA have different, although complementary, purposes. The CWA's objective "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and to that end the statute requires a NPDES

permit before any pollutant can be discharged into navigable waters from a point source. See 33 U.S.C. § 1342(1). FIFRA's objective is to protect human health and the environment from harm from pesticides, and to that end the statute establishes a nationally uniform pesticide labeling system requiring the registration of all pesticides and herbicides sold in the United States and requiring users to comply with the national label. See 7 U.S.C. § 136a, 136j(a)(2)(G).

Even this cursory review of the statutes reveals that a FIFRA label and a NPDES permit serve different purposes. FIFRA establishes a nationally uniform labeling system to regulate pesticide use, but does not establish a system for granting permits for individual applications of herbicides. The CWA establishes national effluent standards to regulate the discharge of all pollutants into the waters of the United States, but also establishes a permit program that allows, under certain circumstances, individual discharges. FIFRA's labels are the same nationwide, and so the statute does not and cannot consider local environmental conditions. By contrast, the NPDES program under the CWA does just that.

The facts in this case illustrate the way in which the statutes differ. When TID applies Magnacide H to its irrigation canals, it is required to follow the directions on a label that is the same across the United States no matter where Magnacide H is applied. The application of Magnacide H in the Talent Canal, however, even if done in compliance with the label, may have effects that depend on local environmental conditions and that will not be duplicated in other areas. The label's general rules for applying the herbicide must be observed under FIFRA, but where the herbicide will enter waters of the United States, FIFRA provides no method for analyzing the local impact and regulating the discharge from a particular point source. The NPDES permit requirement under the CWA thus provides the local monitoring that FIFRA does not. See *Wisconsin Pub. Intervenor*, 501 U.S. at 614 (FIFRA does not preempt entire field of pesticide regulation, but instead leaves room

for local ordinances requiring permit before pesticide use).

In an amicus brief filed by the United States, the EPA describes the different analyses required by the statute:

*5 In approving the registration of th[e] pesticide, EPA concluded that the overall economic benefits of allowing the use of the product outweigh adverse environmental effects. EPA did not analyze, was not required to analyze, and could not feasibly have analyzed, whether, or under what conditions, the product could be discharged from a point source into particular public water bodies in compliance with the CWA. In approving the registration of Magnacide H, EPA did not warrant that a user's compliance with the pesticide label instructions would satisfy all other federal environmental laws. Indeed, EPA approves pesticides under FIFRA with the knowledge that pesticides containing pollutants may be discharged from point sources into the navigable waters only pursuant to a properly issued CWA permit.

[Amicus Curiae Brief of the United States p. 12]

This agency position is entitled to some deference. See *Resource Invs.*, 151 F.3d at 1165 (agency's construction of statute it is charged with enforcing is normally entitled to deference if reasonable and not in conflict with Congressional intent). Although "this deference does not extend to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice," *id.* (quotations omitted), the EPA's position is not without support. In 1995, the EPA issued a public notice that a label's failure to include the possible need for a NPDES permit "does not relieve a producer or user of such products from the requirements of the Clean Water Act." Pesticide Regulation (PR) Notice 95-1 (May 1, 1995).

This court has already held that registration under FIFRA is inadequate to address environmental concerns under the National Environmental Policy Act, 42 U.S.C. §§ 431-435. See *Northwest Coalition for Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 595 (9th

Cir.1988) (herbicide); *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1248 (9th Cir.1984) (herbicide); *Oregon Envtl. Council v. Kunzman*, 714 F.2d 901, 905 (9th Cir.1983) (pesticide). "FIFRA registration is a cost-benefit analysis that no unreasonable risk exists to man or the environment taking into account the economic, social and environmental costs and benefits of the use of any pesticide." *Save Our Ecosystems*, 747 F.2d at 1248 (quotation omitted). In contrast, the granting of a NPDES permit under the CWA is not based on a cost-benefit analysis, but rather on a determination that the discharge of a pollutant satisfies the EPA's effluent limitations, imposed to protect water quality. See 33 U.S.C. § 1342(a) (permit conditioned on discharge meeting CWA's effluent limitations).

We conclude that the registration and labeling of Magnacide H under FIFRA does not preclude the need for a permit under the CWA. The label's failure to specify that a permit is required does not mean that the CWA does not apply to the discharge of Magnacide-H.

III. "Discharge" of a "pollutant" into "waters of the United States"

*6 To establish a violation of the CWA's NPDES permit requirement, a plaintiff must show that defendants (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source. See *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir.1993). The CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). The district court held that Magnacide H is a pollutant (and by implication that it is discharged into the canals), and that the irrigation canals are "waters of the United States" under the CWA. The only element not disputed by TID is that the Magnacide H flowed from a "point source," the hose that delivered the herbicide to the canals.

A. Discharge

TID's direct application of acrolein into the

irrigation canals qualifies as a "discharge" because, as discussed below, we conclude that the canals themselves are "waters of the United States." Further, acrolein has at least once-and according to the allegations in the complaint, more than once-leaked from the canals into Bear Creek, constituting a "discharge" into those waters. See *Mokelumne River*, 13 F.3d at 308-09 (discharge of pollutant took place when contaminated water collected in reservoir from time to time passed over spillway or valve into river).

B. Pollutant

TID claims that Magnacide-H is not a pollutant, because it is a chemical applied to the canals for a beneficial purpose, the clearing of weeds. TID points to the CWA's definition of a "pollutant," which includes "chemical wastes" but not "chemicals." 33 U.S.C. § 1362(6).

The active ingredient in Magnacide H is acrolein, a toxic chemical that is lethal to fish at a concentration at and below the level required to kill weeds in the irrigation canals, and which takes at least several days to break down into a nontoxic state. Although it would seem absurd to conclude that a toxic chemical directly poured into water is not a pollutant, we need not decide that issue because we agree with the district court that the residual acrolein left in the water after its application qualifies as a chemical waste product and thus as a "pollutant" under the CWA. See *Hudson River Fishermen's Ass'n v. City of New York*, 751 F.Supp. 1088, 1101-02 (S.D.N.Y.1990), *aff'd*, 940 F.2d 649 (2d Cir.1991) (residual of chemical is "pollutant" even if its earlier use is beneficial).

C. Navigable waters/waters of the United States

The EPA has interpreted "waters of the United States" to include "intrastate lakes, rivers, streams (including intermittent streams) ... the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce," and "tributaries of [those] waters." 40 C.F.R. § 122.2(c), (e). The district court concluded that

Permit before
States, analyses
[e]
11
EPL -
Tifru
with

(Cite as: 2000 WL 33224806, *6 (9th Cir.(Or.)))

the irrigation canals were "waters of the United States" because they are tributaries to the natural streams with which they exchange water.

We agree with the district court. By TID's own admission the irrigation canals exchange water with a number of natural streams and at least one lake, which no one disputes are "waters of the United States." A "stream which contributes its flow to a larger stream or other body of water" is a tributary. *Random House College Dictionary* 1402 (rev. ed.1980). As tributaries, the canals are "waters of the United States," and are subject to the CWA and its permit requirement. See *United States v. Eidson*, 108 F.3d 1336, 1341-42 (11th Cir.1997) (tributaries are "waters of the United States," and manmade ditches and canals that flow intermittently into creek may be tributaries); *United States v. TGR Corp.*, 171 F.3d 762, 764 (2d Cir.1999) (non-navigable tributaries flowing into navigable streams are "waters of the United States"); *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir.1979) (unnamed tributary of creek that is tributary to river is "water of the United States").

*7 Our conclusion is not affected by the Supreme Court's recent limitation on the meaning of "navigable waters" in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, --- U.S. ---, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001). The Court invalidated a 1986 Army Corps of Engineers promulgation known as the "Migratory Bird Rule," which included in "waters of the United States" intrastate waters with no connection to any navigable waters, but which were or would be used as habitat by migratory birds. See 51 Fed.Reg. 41206, 41217 (1986) (setting out Corps' interpretation). The Court rejected the Corps' argument that "isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under [the] definition of 'navigable waters' because they serve as habitat for migratory birds," holding that such an interpretation exceeded the Corps' authority under the CWA and "imping[ed] the States' traditional and primary power over land and water use." --- U.S. at ---, ---, 121 S.Ct. at 682, 684.

The irrigation canals in this case are not "isolated waters" such as those that the Court concluded were outside the jurisdiction of the Clean Water Act. Because the canals receive water from natural streams and lakes, and divert water to streams and creeks, they are connected as tributaries to other waters of the United States. TID claims that the canals are not tributaries because, during the application of Magnacide H, the canals are a "closed system," isolated from natural streams by a system of closed waste gates. It is a disputed question of fact whether those waste gates are effective, and whether the system is ever entirely sealed off during application of the herbicide. Certainly when the leaks into local creeks killed fish in 1996 and 1983, the system failed to contain the treated water. TID points to a new "protocol" in place that it claims will result in no leakages during treatment. But even if TID succeeds, at certain times, in preventing the canals from exchanging any water with the local streams and lakes, that does not prevent the canals from being "waters of the United States" for which a permit is necessary. Even tributaries that flow intermittently are "waters of the United States." As the Eleventh Circuit stated:

Pollutants need not reach interstate bodies of water immediately or continuously in order to inflict serious environmental damage.... [I]t makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense. Rather, as long as the tributary would flow into the navigable body [under certain conditions], it is capable of spreading environmental damage and is thus a "water of the United States" under the Act.

*8 *Eidson*, 108 F.3d at 1342 (internal quotations and citations omitted) (holding that drainage ditch connected to sewer drain and running into canal eventually leading to Tampa Bay was "water of the United States"); see *Driscoll v. Adams*, 181 F.3d 1285, 1291 (11th Cir.1999) (small-volume stream running only intermittently is "navigable water"); *Quivira Mining Co. v. United States Envtl. Prot. Agency*, 765 F.2d 126, 130 (10th Cir.1985) (creeks and arroyos connected to streams during intense rainfall are "waters of the United States");

(Cite as: 2000 WL 33224806, *8 (9th Cir.(Or.)))

Texas Pipe Line Co., 611 F.3d at 347 (oil spill into tributary involved "waters of the United States," even though there was no evidence that streams that connected the tributary with navigable waters were running at time of spill); *United States v. Ashland Oil and Transp. Co.*, 504 F.2d 1317, 1329 (6th Cir.1974) (to establish violation of Clean Water Act it is enough to show that defendant discharged pollutants into tributary that is "water of United States;" there is no threshold requirement to prove "that, in fact, the [pollutant] reached and polluted the navigable river"). The Clean Water Act is concerned with the pollution of tributaries as well as with the pollution of navigable streams, and "it is incontestable that substantial pollution of one not only may but very probably will affect the other." *Id.*

CONCLUSION

The EPA-approved label under FIFRA did not eliminate TID's obligation to obtain a NPDES permit. We reverse the district court's grant of summary judgment in favor of TID and its dismissal of the case, and remand for entry of partial summary judgment in favor of Headwaters and for further proceedings on damages and injunctive relief.

END OF DOCUMENT



Friends of the Kaw inc.

P.O. Box 1612
Lawrence, KS.
66044

March 15, 2001

Representative Freeborn and Committee

I have been involved with Friends of the Kaw/Kansas Riverkeepers, a non profit, grassroots organization, as president for three terms and all together for over six years. Our mission statement is simply "to protect and preserve the Kansas River for future generations". I have attended and made public comment at the most recent Use Attainability Analysis (UAA) forums, Kansas Surface Water Quality Standards hearings, Total Maximum Daily Load for the lower Republican Basin hearings. Along with Dave Murphy, I attended and participated in the Johnson County Wastewater Site-Specific Ammonia Limits Study. I have made reference to the outdated, polluting Oakland Wastewater Treatment Plant in Topeka when ever possible to make Kansas Department of Health and Environment understand our organization is aware of the problems to the Kansas River. I'm sure you will agree with me that water quality is a complex and technical issue that cannot be mastered in two days, two weeks or two years for that matter. Friends of the Kaw/Kansas Riverkeepers advocates for the health of the Kansas River and the water quality of the state against BOTH urban and rural polluters.

I would like to share with you my impression of substitute SB 204, it upholds Kansas's long standing tradition of allowing property owners to do what ever they want to their property and the PUPUBLICLY OWNED water that passes over their property regardless of public interest or health. The polluted condition of the Kansas River, it's tributaries, and all other waters in the state are a result of both rural and urban abuse. To pass a bill that will allow any one in the state of Kansas particularly agricultural feed lots to treat the rivers and streams as a sewers is wrong.

Every one lives downstream.

Laura Calwell
President, Friends of the Kaw/ Kansas Riverkeepers

~Executive Committee~

Laura Calwell- President 5610 W. 61 st Terr. Countryside, KS 66202 913 677 5854 creativechoice@yahoo.com	Joanne Bergman- Treasurer 25253 Alexander Rd Lawrence, KS.66044 785 785-842-5941 jobob@grapevine.net	Patty Boyer- Secretary 1927 E. 1300 Rd. Lawrence, KS. 66044 785 843 9431 Lburr@aol.com	Lance Burr-Vice Pres 16 E. 13 th St Lawrence KS 66044 785 842 1133 Lburr@aol.com
---	--	--	---

*House Environment
3-15-01
Attachment 11*

From: "Dwight F. Metzler" <dfox@cjnetworks.com>
To: "Karl Mueldener" <kmuelde@kdhe.state.ks.us>, "John Metzler" <john.metzler@jcw.org>, "Doug Mays" <mays@house.state.ks.us>, "Clyde Graeber" <cgraeber@kdhe.state.ks.us>, <aurand@house.state.ks.us>, <freeborn@house.state.ks.us>, <myers@house.state.ks.us>, <mclure@house.state.ks.us>, <flora@house.state.ks.us>, <schwartz@house.state.ks.us>, <mckinney@house.state.ks.us>, <wells@house.state.ks.us>, <powers@house.state.ks.us>, <light@house.state.ks.us>, <peteronj@house.state.ks.us>
Date: Sun, Mar 18, 2001 8:33 PM
Subject: Testimony on Substitute S204

Testimony on Substitute S204
by Dwight F. Metzler, P. E.
To the House Committee on the Environment
March 18, 2001

This written testimony is to follow my oral statement proposing a solution to the difficult task given you by S204 and related bills. Madam Chair, I commend you and your committee members for your probing questions as you each sought to understand the complexities of stream classification. Now for a simple solution.

I suggest that you allow S204 and related bills to die. Take no action. If you do this, KDHE will reclassify Kansas streams. I believe that KDHE has developed a process for doing this which is satisfactory to the EPA. Reclassifying the 6,000 stream segments on a scientific basis requires much effort. The work should be completed in five years.

Now, please consider the alternative if some version of S204 becomes law: it will violate federal law. EPA will set Kansas stream standards, and will move people to Kansas to enforce them. The Sierra Club will file suit, pressing for higher stream standards. They will be successful. Their attorney is skillful in playing EPA and federal judges like a fine musical instrument.

In short, pass the bill and EPA takes over administration of Kansas water quality. Let it die and work with KDHE for reasonable standards.

Sincerely, Dwight F. Metzler, P. E.

*House Environment
3-15-01
Attachment 12*

LWVK LEAGUE OF WOMEN VOTERS OF KANSAS

919½ South Kansas Avenue

Topeka, KS 66612

(785) 234-5152

Testimony on Sub. SB 204 Before the House Environment Committee March 15, 2001

Chairman Freeborn and members of the committee, my name is Edward Rowe and I am one of eight volunteers who lobby for the League of Women Voters of Kansas.

I am here to defend a very general concept, that it's in everyone's interest to have water quality regulations and an effective agency to enforce those regulations.

Water is an unusual resource in that it gets used over and over. Each of us has a duty to use water in a way that doesn't make it unhealthy or unusable for downstream users. My own city, for example, has an obligation to treat the sewage produced by its citizens before returning the water back into the river. The operator of a feedlot likewise has an obligation to minimize the impact of his operation on downstream users. As helpful as voluntary, incentive-based programs are, regulations and a regulatory agency are also needed. It's not fair for some to pay for pollution-reduction while competitors are left free to cut corners.

During the 40 years I've lived in Kansas I've observed a lot of progress. I can remember when we tolerated slaughterhouses dumping blood directly into Kansas rivers and when we endured fish-kills caused by run-off from poorly-engineered feedlots. And on the national scene I've observed a lot of progress during my lifetime; it's no longer acceptable for cities to discharge raw or poorly-treated sewage into waterways.

It would be a sad mistake to turn back the clock on water quality progress, but SB 204 threatens to do just that by undermining our lead agency for maintaining water quality and water safety. Please vote against this bill.

*House Environment
3-15-01
Attachment 13*

TO HOUSE ENVIRONMENT COMMITTEE

RE: REVISED SB 204

3-15-2001

Testimony of Mike Calwell-Kansas Canoe Association

Subject: DIRTIER WATER FOR KANSAS.

Dear Chairman Freeborn and Committee Members,

I ask all of you to stop amid the hype and hoopla that is being staged for you beyond these doors, and for a moment consider the health and well being of future citizens of our state.

In short, what Substitute Senate Bill 204 is asking you to do is

1..... Against Federal Law - This will backfire on Kansas and create the one thing that our Agricultural Community does not want, MORE FEDERAL CONTROL INSTEAD OF LESS.

2.....It is asking you to open up our streams and rivers to increased levels of pollution, thus creating a PUBLIC HEALTH PROBLEMS.

3..... It is asking you to increase the cost of our water purification systems statewide....

4..... It is asking you to exempt the Ag Industries by allowing them to increase pollutants to streams while other industries must comply. What shall we change next? Shall we de-regulate our Air quality standards?

Why don't you and I and all of us here concentrate our energies into leaving our land and waters in better condition than when we received them.

With some serious effort and combined energy we can develop a workable system of stream protection with buffer zones and settling ponds. This is not out of our reach, it just takes work and commitment.

I am deeply concerned that we are about to make a major MORAL ERROR. At this point you have the rare opportunity, so seldom given to human beings. You can make Kansas a better place to live and work for all of us. If we don't take sides, but rather work hard together, we can all be proud of our Agricultural heritage.

I ask you here today to PLEASE, DO NOT PERPETUATE THIS WATER WAR which will only turn us against each other. Please stop and re-think this issue. Please say no to this bill and if necessary build a task force of citizens equally balanced between city and country. Get the lawyers and the lobbyists out of the way and let the people sit face to face and work this out.

*House Environment
3-15-01
Attachment 14*

Joann Freeborn - House Environment Committee Hearings, SB 204, 3/15/01 Page 1

From: "Jay &/or Shirley Barnes" <wolfsong7@prodigy.net>
To: "Joann, Dist 107 Freeborn" <freeborn@house.state.ks.us>
Date: Thu, Mar 15, 2001 2:50 PM
Subject: House Environment Committee hearings, SB 204, 3/15/01

Testimony from:

John T. (Jay) Barnes III
Executive Director
Kansas Natural Resource Council
PO Box 21346
Wichita, KS 67208

Representative Freeborn,

Thank you for the opportunity to submit written testimony to the House Environment Committee on SB 204 as passed by the Senate on 3/13/01.

The Kansas Natural Resource Council has consistently opposed this bill through it's various forms and amendments, always based expressly on concept as opposed to content. Our opposition on that basis has been categorized as extremist in the Senate floor debate, but the concept issues remain and they are being expressed in the form of questions that this committee is now asking. The bill, as presented to your committee, still would codify into Kansas law provisions for regulating our waters that KNRC believes properly belong to the regulatory role of the Kansas Department of Health and Environment.

KNRC, along with the Kansas Sierra Club, have taken legal action over KDHE's performance in their past administration of those regulations. We therefore can honestly say we share this bill's proponents' serious concerns in that regard - but we do not believe that turning regulation into law is an effective approach to resolution of the situation. That is the heart of our opposition to this bill and we do not believe that position to be extremist at all. In fact it seems to be the position taken by the Editorial Board of the Wichita Eagle newspaper, another group not normally known for their loud expressions of support of KDHE's work.

We believe this strategy of codifying water quality standards will politicize processes meant to be administrative in nature, and we believe this will only restrict individual access to due process in application of the standards to their own property and will severely limit the state's ability to respond effectively to changing circumstance or federal regulation.

We believe that this strategy will not meet CWA requirements for public participation in the process of setting the state's water quality standards and will therefore not serve in meeting EPA procedural requirements.

We believe this strategy will strip a state agency of it's proper role and authority to act in behalf of Kansas citizens rather than addressing the issues that lay behind its past shortcomings. This seems a measure in fact more like EPA's response to the state's deficiencies than this bill's proponents would like to consider. The proper role of the legislature in this situation is to hold the executive branch accountable for it's performance, not take over their function.

We believe this strategy contributes nothing to resolving the issues of KDHE's performance capacity, a capacity we all need for them to have to protect and enhance the environment that all Kansans share, farmer or rancher, rural or urban, environmental activist or not.

We stand on our opposition to SB 204 because of these conceptual issues and urge this committee to vote against the bill.

*House Environment
3-15-01
Attachment 15*

Thank you,

John T. (Jay) Barnes III
Executive Director
Kansas Natural Resource Council
PO Box 21346
Wichita, KS 67208

Phone or Fax 316-686-6043

email wolfsong7@prodigy.net

Statement of Ron Klataske
Executive Director, Audubon of Kansas, Inc.
 to the
Kansas House of Representatives,
Committee on Environment
Regarding Proposed Substitute for Senate Bill 204

My name is Ron Klataske. I live in Manhattan and serve as Executive Director of Audubon of Kansas, Inc. I am a native of Kansas and have been involved in wildlife conservation and farming/ranching most of my life. In partnership with my wife, sister and mother I manage approximately 1,170 acres of range and farm land in three counties.

This statement is on behalf of Audubon of Kansas. Audubon of Kansas represents 5,000 members of eleven community-based chapters and our statewide organization in Kansas. Audubon members reflect a diversity of backgrounds and interests and that is represented by our statewide Board of Trustees. Exactly half of our 28 trustees own rural land devoted to ranching, farming and/or conservation. Like most residents, our members want clean water and a healthy environment for their families and others. They also appreciate the natural resources of our state. Wildlife watching and nature appreciation, fishing and hunting, and other forms of outdoor recreation associated with streams, forests, grasslands and other landscapes--both rural and urban/suburban--contribute to the quality of life of Kansans.

We also believe that maintaining family farms and ranches is crucial to conservation as we know it in this state. It is vital that we seek ways to establish partnerships with landowners to enhance environmental qualities that benefit everyone, and the State of Kansas. Water quality is one of the most far reaching and fundamental of the environmental values that we all cherish.

Like many landowners, I have benefited directly from cost-share programs that have involved establishment of filter strips, waterways, riparian buffers, fencing designed to reduce livestock impacts on streams, and development of alternative water sources (spring development, a traditional pond and a dug-out pond). Everyone downstream has benefited, as well.

I do not believe there is much reason for a traditional farmer or rancher to be apprehensive about classification of streams for water quality purposes. Our property includes a segment of a stream (King Creek, Riley Co.) that is not classified although it should be, and would be under the proposed criteria. Another that is classified (Camp Creek, Washington Co.) has unfortunately become silted in during my lifetime and no longer has "pooling of water during periods of zero flow" to provide "important refuges for aquatic life...that permits biological recolonization of intermittently flowing segments." One of the most startling ecological changes that occurred in Kansas during the twentieth century was the loss of thousands of miles of perennial stream segments in central and western Kansas. They became intermittent, subject to ephemeral instream flow only during rain events or periods of substantial perception, and many have lost the pooling capacity due to excessive siltation.

It is appropriate for farmers and ranchers to help maintain and improve water quality, and equally appropriate for the public to help make it economically feasible. Additionally, all other segments of our communities need to demonstrate that they are equally committed--as reflected by the water quality enhancement measures employed by urban/suburban residents and commercial entities.

There has been a great deal of apprehension in recent months about the impact of water quality regulations, particularly as they apply to classified stream segments and designated uses of classified stream segments. Unfortunately, this issue has divided folks and tended to obscure the

House Environment
3-15-01
Attachment 16

common ground and values that we all share. One of the most troubling aspects of the controversy surrounding this bill is the potential for agricultural interests and their allies in the Legislature to be viewed by the public as wanting to undermine safeguards for surface water quality in our states' streams, the potential for environmental interests and legislators who do not support Senate Bill 204 to be viewed as insensitive to the concerns of farmers and ranchers. It also concerns us that the commendable work of the Kansas Department of Health and Environment to fulfill its responsibilities may be needlessly maligned.

There is an unfortunate distinction in this bill that is unique to Kansas and makes this legislation less protective of water quality than it would if enacted in adjacent states. Most stream segments in Kansas would be Class B streams because they are "not open to and accessible by the public" for boating, fishing and related recreational activities except at state highway crossings or other areas where the land is in public ownership. Only three rivers are generally accessible in this state, the Kansas (Kaw) River, Arkansas River and Missouri River because of their "navigable" designation. In Nebraska, Missouri, Colorado, Arkansas, Oklahoma and most other states virtually all streams that can carry a canoe or other boat are open to the public for this purpose.

There doesn't appear to be any compelling reason why this legislation should be rushed. However, there is a compelling need for the public to be better informed about the potential costs, intended merits and consequences of this legislation before it is approved.

We believe that it would be far better to defer action on this bill and allow the Kansas Department of Health and Environment a sufficient opportunity and time to address the issues that have been raised, and consider those concerns as they relate to both federal and state laws. We are confident that the agency has the professional, legal and technical talent to accomplish the desired balance of regulatory reform. We also believe that the Department can appropriately review the stream segments in question and eliminate segments of streams that are inappropriately classified. This administrative approach would be most cost-effective, and most adaptive to both the physical and legal landscape.

We believe the best investment is to build on the desire of everyone to maintain and enhance water quality by working within the regulatory and administrative structure already in place. Building on the partnership opportunities that have been evolving at both the state and national levels with buffer initiatives and farm bill conservation titles will also be helpful, and further establish the agricultural community's stewardship in a positive light.

Thank you for consideration of our views.