

Approved: February 6, 2001
Date

MINUTES OF THE SENATE AGRICULTURE COMMITTEE.

The meeting was called to order by Chairperson Derek Schmidt at 8:30 a.m. on January 30, 2001 in Room 234-N of the Capitol.

All members were present except:

Committee staff present: Raney Gilliland, Legislative Research Department
 Jill Wolters, Revisor of Statutes
 Betty Bomar, Secretary

Conferees appearing before the committee:

Dirk Hanson, Executive Director, Board of Veterinary Examiners
Jamie Clover Adams, Secretary, Department of Agriculture
J. D. Rector, Chautauqua County, Kansas
Frances Kelsey, Shawnee County, Kansas
Larry Dahlsten, McPherson County, Kansas
Greg Krissek, Kansas Corn Growers Association
Doug Wareham, Kansas Grain & Feed Association and Kansas
 Fertilizer and Chemical Association
Terry Leatherman, Kansas Chamber of Commerce and Industry
Alan Hess, Kansas Livestock Association
Charles Benjamin, Sierra Club

Others attending: See attached list

Dirk Hanson, Executive Director, Board of Veterinary Examiners, appeared before the Committee requesting that a bill be introduced amending KSA 47-816, KSA 47-822 and KSA 47-825. Mr. Hanson stated the proposed amendments are (1) technical, (2) will reduce the number of examinations required for licensure; and (3) will expand the time from 45 to 60 days between time of application and the taking of the examination.

Senator Tyson moved, seconded by Senator Downey, that a bill pursuant to Mr. Hanson's request be introduced as a committee bill and referred back to the Committee for consideration. The voice vote was in favor of the motion.

Upon a motion by Senator Corbin, seconded by Senator Umbarger, the Minutes of the January 23rd and January 24th meetings were unanimously approved.

SCR 1605 - Requesting President Bush to permanently withdraw certain EPA regulations

Jamie Clover Adams, Secretary, Department of Agriculture, testified in support of the intent of **SCR 1605**. Secretary Adams advised that the Confined Animal Feeding Operation (CAFO) regulation was proposed on January 12, 2001 in the *Federal Register*, and a draft document was released to the public around the middle of December 2000. The scope of this proposed rule not only impacts "large factory farms" but it would impact many small and mid-size family farm operations in Kansas with as few as 300 animal units; therefore, a 60-day moratorium and extension of the comment period is appropriate. (Attachment 1)

The Department of Agriculture also supports application of the 60-day moratorium to the EPA proposed water quality standards for Kansas published in the *Federal Register* on July 3, 2000. Inasmuch as there is an interpretation of whether or not Kansas Water Quality Standards promulgated under state law conflict with provisions of the Clean Water Act, it is reasonable to allow Administrator-nominee Whitman to determine if the interpretation coincides with her own.

CONTINUATION SHEET

Secretary Adams stated the proposed rules are contrary to the voluntary, incentive based approach Kansas has chosen to address nonpoint source pollution and has required the State to shift limited resources from activities to improve water quality to activities in administration, which does nothing to address the water quality in the state. Secretary Adams stated it is both appropriate and prudent for the Bush Administration management team to review all proposed regulations and to determine whether such regulations are in the best interest of the nation. It is also appropriate that Kansans be a part of the review process.

J. D. Rector, Chautauqua County, Kansas, testified in support of **SCR 1605**, stating Kansans react to persuasion rather than the "hammer". Mr. Rector cited an article in the January 24th Issue of *The 2001 Chautauqua County Soil Conservation* paper that reported on a "riparian" project undertaken that upgraded game bird habitat, improved stockwater quality, reduced fertilizer runoff from cool-season grasses and provided the ability to rotate pastures. This was accomplished by individual initiative and incentive programs through the Soil Conservation Commission. (Attachment 2)

Francis Kelsey, Silver Lake, Kansas, testified in support of **SCR 1605**, stating that the water regulations published in the *Federal Register* were major rules and have a cost: 1) to the taxpayers for upgrades to wastewater treatment facilities; 2) to individual landowners because of restricted use of their own private lands and private waters; and 3) to the state in having their water quality regulations developed by regulators in Washington. Mr. Kelsey stated the Kansas Attorney General and the US Supreme Court have both determined that farm ponds should not be considered navigable waters, and therefore, are not subject to the regulation. At the very least, this part of the regulation should be eliminated. The Supreme Court reinforced the rights of individual states to regulate water quality in its recent decision. (Attachment 3)

Larry Dahlsten, Lindsborg, Kansas, testified in support of **SCR 1605**, stating that since the publication of EPA's proposed water quality standard rules last July, there has been a great deal of discussion on the impact on Kansas farmers and ranchers. The common thread throughout the discussions is of the heavy handedness of the federal government. Federal mandates do not encourage producer participation, nor do they necessarily result in improved water quality. Mr. Dahlsten stated he applied for and signed six separate Environmental Quality Incentive Program (EQIP) contracts for a total of 672.7 acres. Each contract falls within the "statewide concerns" category and extends for a period of five years, with payments pro-rated over the first three years. These contracts have produced tangible results and are the antithesis to federal mandates. They more quickly and more sustainably meet water quality goals because producers embrace them, rather than run from them. Rescinding the water quality rule proposed by the EPA last summer and replacing them with incentive-based voluntary programs will have more positive results. (Attachment 4)

Greg Krissek, Director of Operations for the Kansas Corn Growers Association and the Kansas Grain Sorghum Producers Association, testified in support of **SCR 1605**, stating the Resolution would send an urgent and important message to the newly elected Bush Administration and the US Congress about Kansans' concern over the proposed EPA water quality regulations for the state. The Associations have analyzed, discussed and commented upon the proposed regulations, and it has become clear they will not provide true environmental benefits. The resources required to participate in the rulemaking process have seriously detracted from programs that agricultural organizations had in place to work with producers and others for water quality education and outreach. Mr. Krissek stated EPA grossly underestimated the potential cost of the proposed regulations to Kansans. The estimates developed by the State Conservation Commission reflect the true expected cost which amount to millions of dollars.

With new leadership in the federal government and the USEPA, it is hoped that the opportunity exists for Kansas leadership to begin new discussions concerning these proposed regulations with the goal of resolving issues that remain. It is the Associations' desire to resume the good progress that was made on the state's water quality issues prior to the issuance of the new regulations. (Attachment 5)

Doug Wareham, Kansas Fertilizer and Chemical Association (KFCA) and the Kansas Grain and Feed Association (KGFA), testified in support of **SCR 1605** urging the Bush Administration to withdraw environmental regulations proposed by the EPA. Mr. Wareham stated the new surface water quality standards proposed would supercede existing Kansas water quality laws and establishes unachievable affluent discharge standards for many rural Kansas communities, requires an additional 1,292 streams and

CONTINUATION SHEET

164 lakes in Kansas to fall under the most stringent recreational use designation and applies stringent water quality standards to privately owned ponds and lakes. (Attachment 6)

Even though the cost estimates association with EPA's proposed water regulations ranged from several million to hundreds of millions of dollars, the most disquieting part of EPA's attempt to impose new standards was the interruption of the voluntary education activities in the water quality arena undertaken by public and private sector alliances. These efforts came to a virtual standstill and have had an unintended impact on the Kansas farmer and rancher.

Terry Leatherman, Vice President-Legislative Affairs, Kansas Chamber of Commerce and Industry (KCCI), testified in support of **SCR 1605**, stating the KCCI membership is very concerned about the actions taken by the EPA this past summer regarding water quality issues in Kansas. The KCCI, at its Business Congress last fall listed Kansas water quality as its 5th item on this year's list of major legislative objectives. Passage of **SCR 1605** adds the collective voice of the Kansas Legislature to the effort of the state to manage its own water quality. (Attachment 7)

Alan Hess, Kansas Livestock Association (KLA), testified in support of **SCR 1605**, stating the proposed rules and regulations promulgated by EPA last summer place an unfair burden on the ranchers and farmers in Kansas. The CAFO guidelines, recently proposed by EPA, are stacked with cumbersome record keeping requirements that will impact small and moderate sized operations throughout the state. Mr. Hess stated the Kansas Water Quality Standards require waters subject to the Clean Water Act including ponds, be free from foam and algae. To meet such standards, it is necessary to fence each facility to assure no livestock contacts the water, and to build many miles of fence around ponds and drainage areas. The cost of compliance would be prohibitive. (Attachment 8)

The KLA is opposed to EPA designating certain streams for primary contact recreation as many streams on ranches are dry or have less than 6 inches of water. It is obvious that it is impossible for humans to immerse in these streams and ingest stream water.

Joe Lieber, Kansas Cooperative Council, submitted written testimony, supporting the passage of **SCR 1605**. (Attachment 9)

Charles Benjamin, Sierra Club, testified in opposition to **SCR 1605**, stating passage of the resolution would send a message to rescind a law enacted by Congress. Mr. Benjamin testified that there has been a lot of misinformation circulated by certain organizations who feel threatened by EPA's proposed water quality standards for Kansas. Mr. Benjamin distributed to the Committee a Sierra Club, Kansas Chapter press release dated September 7, 2000, (Attachment 10), Pages 41220 through 41223, *Federal Register/Vol. 65, No. 128, Monday July 3, 2000/Proposed Rules* (Attachment 11), and EPA Region 7, Fact Sheet (Attachment 12)

Due to time restraints, Mr. Benjamin's testimony will be continued.

The Committee adjourned at 9:35 a.m.

The next meeting is scheduled for January 31, 2001.

SENATE AGRICULTURE COMMITTEE GUEST LIST

DATE: January 30, 2001

NAME	REPRESENTING
Julie Jimison	KGFA
J. D. RECTOR	Fur Bureau
Ellie Dunning	KLA
Alan Hess	KLA - Almo, Ks
Mike Beem	KLA
ROBLAND PARR	..
Jane Kelsey	Kansas Farm Bureau
Francis Kelsey	Kansas Farm Bureau
LARRY DAHLSTEN	KFB
Karla Johnston	KFB
Glail Banget	Kansas Farm Bureau
Jamie McKinzie	Kansas Farm Bureau
JUDY MCKEE	Kansas Farm Bureau
Don Steen	Labette Co Farm Bureau
Heather Reeves	Kansas Farm Bureau
Kim Mattox	KFB
Lomas	KFB
Caleb Phillips	KFB
Tom Robison	HFB

STATE OF KANSAS

BILL GRAVES, GOVERNOR

Jamie Clover Adams, Secretary of Agriculture
109 SW 9th Street
Topeka, Kansas 66612-1280
(785) 296-3558
FAX: (785) 296-8389



KANSAS DEPARTMENT OF AGRICULTURE

Senate Agriculture Committee
Senate Concurrent Resolution 1605
January 30, 2001
Jamie Clover Adams, Secretary

Chairman Schmidt and members of the Senate Agriculture Committee, I am Jamie Clover Adams, Kansas Secretary of Agriculture. I appear today to support the intent of Senate Concurrent Resolution 1605. No one in Kansas opposes cleaner water. However, fundamental flaws in the two proposals addressed by the resolution will hinder water quality improvements in Kansas and warrant the attention of the new Environmental Protection Agency (EPA) Administrator.

Confined Animal Feeding Operation Proposed Rule

A 186 page, Confined Animal Feeding Operation (CAFO) regulation was proposed on January 12, 2001 in the *Federal Register*. Also, a draft document was released to the public on or around December 15, 2000. A 60-day moratorium and extension of the comment period is appropriate in this case for two reasons. First, the proposal outlines two options with multiple scenarios. Such a document is more appropriately published for public comment as an advance notice of proposed rulemaking (ANPR). If such a change were made, the public would have another opportunity to review a concrete proposal during comment on the proposed rule to offer more constructive and specific comments. Secondly, the scope of this proposed rule was misrepresented in the popular press. The public was lead to believe this rule only impacts "large factory farms" when in reality it could impact many small and mid-size family farm operations in Kansas with as few as 300 animal units.

EPA Proposed Water Quality Standards for Kansas

KDA also supports application of the 60-day moratorium to the EPA proposed water quality standards for Kansas published in the *Federal Register* on July 3, 2000. Since the EPA promulgation involves an interpretation of whether or not Kansas Water Quality Standards duly promulgated under state law conflict with provisions of the Clean Water Act, it is reasonable to allow Administrator-nominee Whittman to determine if prior interpretation – which took nearly four years to determine – coincides with her own.

Further, this proposal is a classic case of process over substance. It is contrary to the voluntary, incentive based approach Kansas has chosen to address nonpoint source pollution and will require the State, as well as Kansans to shift limited resources from activities to improve water quality to activities in paper pushing futility. I have attached f

Equal Opportunity in Employment and Services

Senate Agriculture Committee
Date 1-30-01

Attachment # 1-1 thru 1-13

of the major nonpoint source pollution prevention activities of the past eight years in Kansas to illustrate the depth and breadth of the Kansas commitment to addressing nonpoint source pollution.

In addition, the 60-day moratorium will address conflicting federal requirements coming down on the side of public participation and consideration of public comment. It could prevent the EPA from being pushed into following the provision of the Clean Water Act that requires them to promulgate such regulations within 90 days of promulgation in favor of the public participation provisions of both the Clean Water Act and the federal Administrative Procedures Act.

Finally, the overall quality of Kansas waters is a source of much debate. Some claim Kansas has the dirtiest water in the nation. Further, citing statistics comparing 305(b) reports, claims are made that the percentage of impaired stream miles has increased despite the untold millions of dollars spent by the state and private sector to address water quality concerns. These claims are not valid and are not a true reflection of the quality of water in Kansas.

Kansas has an extensive statewide monitoring system unmatched by the majority of the other states.¹ While Kansas ranks 8th nationally in the number of assessed stream miles impaired, we rank 22nd on percentage of impaired stream miles to total classified stream miles. On the other hand, Missouri ranks 22nd nationally in the number of assessed stream miles impaired, but ranks 10th on percentage of impaired miles to total classified stream miles. Looking for problems will point them out while, conversely, not looking for problems will not point them out.

There are several reasons why comparisons between biennial 305(b) reports are not valid. They include: (1) data for the reports are collected on a rotational basis. Data for each year do not come from the same locations and, therefore, do not represent the same stream miles; (2) KDHE included monitoring data from 2616 more stream miles in the 2000 report than was included in the 1998 report; and, (3) the 2000 report was based on two-years of data while the 1998 report was based on five-years of data. Random fluctuations in climatological conditions, specifically rainfall and/or the number of rainfall events, may intensify nonpoint source impacts on water quality.

Conclusion

It is both appropriate and prudent for the Bush Administration management team to review all proposed regulations and determine whether such regulations are in the best interest of the nation. It is also appropriate for regulations that will have a great impact Kansas natural resources and Kansans to be a part of that review.

Thank you for the opportunity to appear today to support SCR 1605. I would answer any questions you may have at the appropriate time.

¹Kansas has an extensive water quality monitoring network consisting of 265 ambient stream sites, 78 biological stations, 38 sites for fish tissue collection, and 291 lake and wetland monitoring sites. The Kansas surface water register designates beneficial uses for 31,243 stream miles, 175,260 acres of publicly owned lakes and 35,597 acres of publicly owned freshwater wetlands.

EPA-CAFO Regulation Issues

January 26, 2001

The following seven points address significant issues that may impact CAFO's in Kansas.

1. **Dropping the permit threshold from 1000 A.U.s to 500-300 and Significant Pollution Potential.**
Kansas has a strong program and is already addressing this issue. Technically, anything that currently has a KDHE permit could be subject to the proposed rule.
2. **Includes land application areas into the NPDES permit.**
Identifies nonpoint source pollution as point source within the permit.
3. **Co-Permitting - Addresses Vertical Integrators.**
However, will create a nightmare for commercial feed yards with hundreds of individuals who retain ownership of their cattle in commercial facility.
4. **25 year-24 hour storm design.**
Brings other states under NPDES requirements, clarifies definition. Removes possibility for alternative designs for cattle, dairy, equine, sheep, exotics which include:
 - Wetlands
 - Filter Strips
 - New Technology
5. **25 year-24 hour storm design defined as Zero Discharge for Swine and Poultry.**
Includes waste management structures (any event); as well as land application area*
*(Unless compliant with permit nutrient plan (PNP))
6. **Production areas - hydro logic connection.**
Includes feeding areas and requires groundwater monitoring (Up & down gradient)
Requires testing two times per year for Total Coliform, FCB, TDS, NO₃, NH₃, Cl (20.9% of Kansas could be subject via Corporation Commission designated Sensitive Groundwater areas.)
7. **Permit Nutrient Plan (PNP)**
 - Extensive record keeping requirements
 - Far-reaching inspection requirements
 - Soil testing data, crop yield data
 - Commercial fertilizer records and application Requirements on PNP lands
 - Phosphorus-based land application



Headquarters Press Release

Washington, DC

Date 12/15/2000

Published:

Title: EPA PROPOSES STRICT NEW CONTROLS TO REDUCE WATER POLLUTION FROM LARGE INDUSTRIAL FEEDLOT OPERATIONS

FOR RELEASE: FRIDAY, DEC. 15, 2000

EPA PROPOSES STRICT NEW CONTROLS TO REDUCE WATER POLLUTION FROM LARGE INDUSTRIAL FEEDLOT OPERATIONS

EPA today is proposing strict new controls to protect public health and the environment from one of the nation's leading causes of water pollution -- animal wastes from large, industrial feedlot operations.

EPA Assistant Administrator for Water, J. Charles Fox, said, "Wastes from large factory farms are among the greatest threats to our nation's waters and drinking water supplies. Today, EPA is taking action to protect public health and the environment by significantly controlling pollution from animal feeding operations."

The livestock industry has undergone dramatic changes in the past 20 years, consolidating scattered, smaller facilities into fewer but vastly larger feeding operations that result in greater and more concentrated generation of wastes. An estimated 376,000 large and small livestock operations that confine animals generate approximately 128 billion pounds of manure each year. Typically these facilities confine beef and dairy cattle, hogs, and chickens.

Nationwide, nearly 40 percent of surveyed waters are too polluted for fishing or swimming. Some 60 percent of river pollution comes from all kinds of agricultural runoff, including livestock operations. Pollution from livestock is associated with many types of waterborne disease, as well as problems like *pfisteria* outbreaks which have plagued the Chesapeake Bay, red tides, algae blooms, and the dead zone in the Gulf of Mexico.

The new requirements would apply to as many as 39,000 concentrated animal feeding operations (CAFOs) across the country. Today, only an estimated 2,500 large and small

<http://yosemite.epa.gov/opa/admp.../274ed4f48827bcce852569b6006bac31?OpenDocumen> 01/30/2001

livestock operations have enforceable permits under the Clean Water Act. A CAFO is currently defined as having 1,000 or more cattle or comparable "animal units" of other livestock. Smaller operations may also be CAFOs if they are a threat to water quality. EPA today is co-proposing two options for a new CAFO definition. One proposed definition could include livestock facilities with more than 500 cattle or other animal units. The other proposal would require operations with 300-1000 cattle to have a permit if meet certain risk-based conditions.

In addition to stricter permitting requirements, the proposal includes several new strict controls: 1) poultry, veal, and swine operations would be required to prevent all discharges from their waste storage pits and lagoons where wastes are collected; 2) the proposal eliminates potential exemptions from permits presently used in some states; as a result, EPA expects that all large livestock operations will now have to acquire permits; 3) under this proposal, EPA and the states will issue co-permits for corporations and contract growers to ensure financial resources exist to meet environmental requirements; 4) the spreading of manure on the land owned by livestock facilities would be limited to protect water ways.

In March 1999, EPA and the U.S. Department of Agriculture issued a Unified National Strategy for Animal Feeding Operations, in response to public concern about contamination of rivers, lakes, streams, coastal waters and ground water from livestock manure. Today's proposal is an important step in that strategy.

EPA will take public comment for 120 days and will hold public meetings around the country on today's proposal. Additional information is available on EPA's Office of Water web site at: <http://www.epa.gov/owm/afo.htm> .

R-192 ###



EPA
Home Page



Email A
Comment

due to lack of federal funding and shortages of NRCS technical resource personnel. However, between 1997 and 2000, the NRCS provided to Kansas farmers and ranchers nearly \$17 million in federal cost-share dollars under EQIP. Further, between FY 1987 and FY 1994, 81,437 miles of terraces and waterways were installed in Kansas.

Kansas water quality stewardship priorities and efforts are reflected in the Kansas Unified Watershed Assessment, which was facilitated in 1998 by the Kansas Department of Health and Environment and USDA-NRCS. The Unified Watershed Assessment is a key action item of the federal Clean Water Action Plan. This plan was designed to bring the variety of water quality and natural resource condition assessment tools now used by federal and state agencies into a single, unified assessment to establish watershed restoration priorities. The Clean Water Action plan anticipates that additional federal funds will be made available to the states by the US Congress for implementing watershed restoration.

Since 1990, the US Environmental Protection Agency has been developing an initiative designed to prevent pesticide contamination of the nation's groundwater resources. The strategy calls for states to develop management plans for the pesticides identified by EPA as posing a threat to groundwater, including alluvial aquifers. The first step in the program is state development of a generic plan, which provides the basic framework of the program that would be refined and put into place for future designated pesticides. The Kansas generic plan has been prepared and EPA concurrence received. EPA indicates publication of the federal rule is likely to occur prior to January 1, 2001. Plans implemented under this rule will offer additional protection to groundwater and reduce potential discharge of pesticide-laden waters from the alluvium into streams.

(Documentation supporting this analysis is found in attachments 13, 14, 16, 17 and 51.)

Kansas Successes

A. Delaware River Basin Pesticide Management Area

In 1992, the Kansas Department of Agriculture created a Pesticide Management Area (PMA) in the Delaware River Basin of Northeast Kansas to limit the input of atrazine and other soil-applied herbicides into area surface water. Authority for this designation is contained within the Kansas Pesticide Law (K.S.A. 2-2438a et seq.). To our knowledge, it was the nation's first such management area to control pesticides in surface water. Following sunset review in 1998, the Delaware PMA was continued. No other areas have been formally designated.

Many agencies and entities, including the Department of Agriculture, the State Conservation Commission, U.S. Geological Survey, Kansas State University and Kansas Department of Health and Environment are gathering data and educating area residents. The PMA consists of several components — mandatory and voluntary management and conservation practices, education, monitoring, research, enforcement and evaluation. One goal was to bring the amount of the chemical atrazine to below three parts per billion in surface water from the area.

Any pesticide management area designated by the department can contain a different mix of voluntary and/or mandatory management practices. The Delaware PMA prohibited any use of atrazine

within 500 feet of public surface water supplies; banned application, mixing and loading of the chemical within 100 feet of public drinking water supply wells or within 50 feet of all wells, unless an impervious mixing/loading pad was in place; and, prohibited its use on non-cropland lands, such as railroad and highway right-of-ways. Also contained in the plan were recommendations for education, monitoring, enforcement and evaluation.

Voluntary recommendations were developed for agricultural uses according to the tillage practice being used by the farmer. Recommended atrazine rates range from 2.25 pounds of active ingredient per acre per year for mechanical incorporation within 24 hours, surface application before April 15, or no-till, to 1.25 pounds maximum per acre for pre-emerge broadcast application after April 15 and post-emerge treatments. After the PMA's inception, atrazine makers amended the federal pesticide label to lower recommended application rates and adopted other water quality protection practices developed for the Delaware PMA program. The proposal also suggested application methods, and encouraged using alternative weed control practices, stream buffer zones and vegetative buffer strips.

The water quality monitoring program in the Delaware Basin shows conditions have improved significantly since initial designation of the pesticide management area. All waters of the Kansas Lower Republican have been removed from the atrazine-impaired waters list except Tuttle Creek (which receives 80 percent of its pesticide load from Nebraska) and the Mission Lake area.³ Atrazine levels have decreased and continue to decline. Perry Lake, for instance, carried levels of atrazine in the four parts per billion and above range at the time the PMA was instituted. Atrazine concentrations in the Perry Dam outflow show annual average concentrations between 1993 and 1997 below the drinking water standard of 3ppb except in 1995 when it was 3.43ppb. Good water quality data allow identification of areas where chemical loading occurs and targeting of educational and cost-share incentives, or other efforts, to tributaries where they are needed most. Educational efforts continue in areas identified as having the greatest chemical loading problem.

Success in this endeavor revolved around three key areas: (1) implementation of an effective water quality monitoring program; (2) research into effective on-farm management practices designed to prevent herbicide runoff; and, (3) information and outreach to farmers and other property owners. The monitoring program was key, not only because it allowed us to measure water improvements, but it also showed that three of the 11 tributaries in the basin were responsible for 85 percent of the total pesticide load moving into the river. Kansas State University published recommendations in an atrazine Best Management Practices (BMP) guide which had been developed through work at the Foster Farm research site. The Kansas State Conservation Commission offered a pilot incentive program (\$5/acre) to farmers in one critical watershed (Mission Lake) to encourage adoption of KSU-recommended BMPs. Further, farmers were contacted on more than one occasion by both the SCC and a KSU extension employee dedicated to the project. Participation was nearly 100 percent. (Only one farmer did not participate because he grew soybeans only and did not use atrazine.) Outreach to farmers and property owners was the biggest challenge. The key appears to be to increase general awareness with follow-up by personal contact from a non-threatening source. Kansas has worked hard to make cost-share incentives available

³Mission Lake is on the 1998 303d list because water chemistry data utilized in the development of the list included data generated during calendar years 1993-1997. Current monitoring data show the average concentration of atrazine in Mission Lake below 2 ppb for 1996, 1997 and 1998.

to producers but, in point of fact, personal contact has been equally, if not more, important to the success of the Delaware PMA.

(Documentation supporting this analysis is found in attachments 1, 18, 19, 20, 29 and 31.)

B. Foster Farm Water Quality Research and Demonstration Site

During preliminary consideration leading to implementation of the Delaware Basin Pesticide Management Area in 1992, an awareness developed as to the need to examine current agricultural and conservation practices and their effect on surface water quality. As a result, an experimental field site was developed and instrumented for the purpose of evaluating land management practices and agricultural techniques in relation to mitigating or promoting runoff and herbicide movement. This site, which came to be known as the Foster Farm Site, was the first of a group of on-farm research facilities designed to screen, or field test, area-wide farming practices and measure the effectiveness of water quality best management practices. Once in operation, the Foster Farm also became an excellent demonstration tool to educate area farmers, chemical dealers and extension personnel.

Because of the success of the original Foster Farm site, the concept is being carried to other parts of the state. Similar sites have been developed in north central and east central Kansas, and more are planned for southeast and southwest areas of the state. Different sites are necessary because of climatic differences across the state. Work also has expanded to include nutrient best management practices. Principal cooperators — Kansas State University, the Kansas Department of Agriculture, the Kansas Corn, Grain Sorghum and Soybean Commissions and local farm owners — provide funding and assistance for site development and operations. Start-up assistance with the original Foster Farm site was also provided by EPA, CIBA-Geigy Corporation and the US Geological Survey.

(Documentation supporting this analysis is found in attachment 20.)

C. Big Blue River Basin Program

During 1993, the Kansas delegation to the Kansas-Nebraska Big Blue River Compact Administration raised the issue of pesticides and water quality in the Big Blue River Basin. After discussion, the Compact Administration formed a six-member joint water quality committee to oversee and find funding for water quality stewardship activities in the basin. The committee is made up of representatives from the Kansas and Nebraska Departments of Agriculture, the two land grant universities and the environmental agencies in each state. The Compact provides the legal vehicle for joint water quality work between the two states.

The work group, which is overseeing design and implementation of water quality protection measures in the Big Blue River basin is nearly a mirror image of the group that came together originally for implementation of the Delaware PMA. The core members of the Blue River work group are: the Kansas and Nebraska Departments of Agriculture, the Kansas and Nebraska Corn Growers and Grain Sorghum Producers Associations, Kansas State University and the University of Nebraska at Lincoln. More recently, Farm Bureau associations from both states have become active partners.

Activities in the Blue River basin to date include: (1) Development of a basinwide water quality monitoring program. Novartis Corporation provided the automatic samplers. Novartis and EPA Region VII provided funding to support the effort. KSU is analyzing samples for both states. (2) Direct mailings on atrazine management and BMPs to 9000 row crop producers. (3) Grower informational meetings and BMP workshops. Nebraska also conducted four BMP workshops for crop consultants working in the basin. (4) Conducting a basinwide farm practices survey. EPA provided funding and NASS analyzed the data. (5) Collection of agricultural waste pesticides. (6) Development of Educational and Research programs. KSU and University of Nebraska-Lincoln now hold periodic joint meetings to plan and conduct research and educational programs. Demonstration fields sites also have been developed in a number of locations. KSU and UNL jointly hold annual Big Blue River Basin water quality tours for elected officials and others in leadership positions to educate, showcase, and build support for the many water quality protection activities underway in the basin. (7) Both Kansas and Nebraska now have riparian buffer strip programs in place. The buffer strip programs appear to be gaining popularity rapidly among farmers. The key to selling the program to property owners appears to be personal contact, so the challenge we now face is to put a sufficient number of trained personnel on the ground in the local areas.

(Documentation supporting this analysis is found in attachments 11, 12, 20, 21 and 23.)

D. Governor's Water Quality Initiative

On October 19, 1995, Kansas Governor Bill Graves announced a statewide initiative to protect and restore the quality of Kansas surface waters. Governor Graves believes "[t]he quality of the state's water can be improved. By educating everyone from farmers, ranchers and business owners, to children, parents and outdoor enthusiasts, we're hopeful of achieving voluntary participation rather than more regulatory compliance." The basic framework around which the Governor wanted the effort to be developed included: (1) target prevention efforts to concentrate state resources on the three priority pollutants within a basin; (2) be incentive based, relying on local voluntary efforts, public awareness, appropriate water quality monitoring and periodic re-evaluation of programs, practices, participation and pollutants; (3) related industries, associations and property owners be made full partners in both planning and conducting programs; and, (4) the five state agricultural, environmental, water and wildlife agencies, and the land grant university, function as a team and pursue a common set of goals. The USDA's Natural Resources Conservation Service (NRCS) came on board as a partner and is not part of the agency leadership team.

The Kansas-Lower Republican Basin (KLR) of northeast Kansas was chosen to serve as the pilot basin for the initiative. It was selected because waters of the basin serve the needs of more than one-third of the state's population. Also, the KLR provides a diverse group of water quality challenges ranging from agricultural to urban to industrial sectors. The Delaware PMA and the Big Blue River Basin prevention programs were included as key components of the larger KLR Initiative.

To date, nearly \$15.6 million has been spent in the pilot basin to improve water quality. Activities include: cropland nonpoint source reduction; erosion and sediment control; pasture and rangeland management; construction of livestock waste systems; construction of on-site wastewater systems; environmental education; and, wellhead protection and abandoned well plugging. Further, the

KDA has invested \$200,000 in BMP research to give farmers and ranchers the tools they need to improve water quality. One particular noteworthy activity was the joint effort of KSU Research and Extension, KDA and KDHE to improve animal waste management by designing and implementing nutrient management planning for livestock producers, and educational programs on land application of animal manure.

(Documentation supporting this analysis is found in attachments 10, 18, 19, 20, 21, 22 and 23.)

E. Kansas Buffer Initiative

In 1998, Governor Bill Graves proposed the Kansas Buffer Initiative, which was passed and funded by the Kansas Legislature. It is a state incentive for landowners and operators who enroll in the continuous sign-up portion of the federal Conservation Reserve Program (CRP). To be eligible for incentives, landowners agree to establish either grass filter strips or riparian forest and maintain them for a period of 10 to 15 years in return for annual rental payments from the federal government. The state enhancement is based on a percentage of the federal payment.

Riparian forest buffers and grass filter strips play an important role in maintaining the natural resources on farms and improve water quality as well. Preliminary research conducted by KSU Research and Extension shows that buffers can reduce sediment load in runoff by up to 80 percent, pesticides and nutrients by up to ninety percent, and certain pathogens by up to 60 percent. Kansas has enrolled approximately 160 stream miles in target areas of the Kansas Lower Republican basin. Another 50 miles have been tentatively approved and are awaiting CRP contract approval. Of the 195 approved contracts, 10 landowners have established riparian forest buffers which protect approximately 20 stream miles.

(Documentation supporting this analysis is found in attachments 23, 30 and 31.)

F. Herington Reservoir Watershed Project

In 1991, a demonstration project of livestock pollution control practices was developed for the Herington watershed in east central Kansas. The primary objective of the project was to improve the water quality of the reservoir which supplies water to the town of Herington, Kansas. This project was developed and implemented because small-scale livestock feeding operations were identified as contributing to nutrient enrichment and algae blooms occurring in the reservoir.

Resources for the project came from EPA Section 319 funds and State Water Plan funds through a cooperative agreement with Kansas State University and the Kansas Department of Health and Environment. The State Conservation Commission also provided funding support to the County Conservation District and cost sharing to participating land owners.

Measures implemented were site-specific, livestock number-dependent, and ranged from construction of non-discharging (total containment holding ponds) systems to development of retention settling basins and discharging grass filter systems. The project also was designed to demonstrate to managers of operations the effectiveness of innovative livestock pollution control practices such as constructed wetlands. In five instances, producers also relocated their feeding operations away from

environmentally sensitive areas. The project not only reduced nutrient enrichment of the reservoir, but has served as a demonstration site for livestock educational meetings and field days.

(Documentation supporting this analysis is found in attachment 24.)

G. Hillsdale Reservoir Watershed Protection Project

In 1992, a project began to improve the water quality of the Hillsdale Reservoir Watershed located in a four-county area of east central Kansas. The reservoir is a major area water supply and recreation facility in the south urban Kansas City region with two public water supply treatment plants drawing water from the reservoir. In all, the reservoir impounds water from a watershed of 144 square miles in size. Principal water quality concerns were nutrient enrichment by phosphorus and sediments. Low levels of soil-applied herbicides were also detected in the reservoir. The overall objective of the watershed protection project was to implement NPS pollution control measures to improve or maintain lake water quality. Specific objectives were to implement minimum recommended NPS pollution control measures on every identified NPS pollution source in the watershed.

Project cooperators included the Kansas Department of Health and Environment, Lake Region RC&D, county conservation districts and property owners. Resources for the project came from an EPA Section 319 grant and State Water Plan funds. The State Conservation Commission also provided funding for county conservation districts and cost-share to property owners.

Significant progress has been made toward installing pollution control practices in the watershed. A comprehensive water quality monitoring program has been instituted and is continuing. Public relations, through information and education efforts, appears to be very effective in generating public awareness and support for the project.

(Documentation supporting this analysis is found in attachment 25.)

H. Cheney Reservoir Watershed Protection Project

Cheney Reservoir was constructed during the 1960s by the Bureau of Reclamation to serve as flood control and a water supply in south central Kansas. The reservoir has a contributing drainage area of about 933 square miles in five south central Kansas counties, and currently supplies water to the city of Wichita. Principal water quality concerns revolved around algal blooms, which occurred during the summer months and caused taste and odor problems in water withdrawn from the reservoir for use as a public supply. It is believed that excessive nutrient concentrations are principally responsible for the blooms. In addition, state water quality monitoring indicated that sedimentation was reducing lake volume and revealed low levels of herbicides present in the waters.

As a step toward maintaining suitable surface water quality, the Cheney Reservoir Task Force was formed in 1992 to prepare and implement a plan to manage documented and potential contamination within the watershed. Prevention was to be done through implementing watershed management practices. The task force was comprised of members from the City of Wichita, Reno and Sedgwick Counties, Kansas Department of Health and Environment, EPA, the US Department of Agriculture and a committee of landowners from within the watersheds. Recommendations from this partnership of private

and governmental entities included implementing watershed best management practices and establishing long-term water quality monitoring within the watershed. The effort is led by the committee of private landowners called the Cheney Reservoir Citizens Management Committee.

Most funding to support cost sharing and implementation of water quality protection measures has been provided by the City of Wichita, USDA, State Water Plan funds and EPA 319 program funds. The State Conservation Commission also has provided financial assistance to county conservation districts and USDA-NRCS has provided much technical assistance.

As with the Hillsdale Reservoir and other large-scale, long-term projects, the Cheney Watershed effort is still in its implementation phase. The voluntary Citizens Management Committee has played an extremely active role in both leadership and recruitment of participatory property owners.

(Documentation supporting this analysis is found in attachment 26.)

I. TMDL Watershed Specialist Initiative

An integral part of Kansas' voluntary efforts to improve water quality involves hiring a half dozen watershed specialists to serve as "ambassadors" to rural and urban stakeholders. Under the structure and financing of the Kansas State University Research and Extension system, the overall goal of these hands-on specialists is the abatement of nonpoint sources of fecal coliform contamination and improved water quality through adoption of best management practices by farmers, homeowners and other landowners in targeted watersheds in Kansas. This team of watershed specialists will have improved water quality as their specific charge and will develop education and awareness strategies, and work one-on-one with livestock producers and others to show them the value of best management practices and other techniques designed to protect and improve water.

Kansas learned through these activities that the only way to effectively tackle nonpoint source pollution is to obtain cooperation and buy-in, and change people's habits. These six watershed specialists will provide an enormous boost to our voluntary water quality improvement efforts.

(Documentation supporting this analysis is found in attachments 19, 22 and 27.)

J. Kansas Agriculture TMDL Working Group

The TMDL Agriculture Working Group, formed in July 1999, is a coalition of 14 agricultural organizations. The group's goal is to inform and assist farmers and ranchers in implementing the TMDLs that are being established to enhance water quality in Kansas. The working group membership represents a broad spectrum of both the livestock and field crop production segments of agriculture. One of the first challenges the state has to confront in implementing Total Daily Maximum Load programs is public education. Few farmers, ranchers or members of the general public really know what a TMDL is or what it is all about. The working group sought cooperation and assistance from the Kansas Department of Agriculture, Kansas State University and the State Conservation Commission, and we are seeking their help in education and implementation of TMDLs and various other state water quality improvement programs.

One of the first things that the associations involved are attempting to do is to educate their membership. The group prepared some core educational articles that can be personalized and these were included in newsletters published by the various associations. In addition, the group held a series of meetings with local leaders of their organizations at locations throughout the state to provide them with an overview of the TMDL program. In addition, the working group wanted to get area members thinking about strategies which could be used to inform and assist landowners in their area. Area conservation district, cooperative extension service and NRCS personnel were also invited. At this point, a number of meetings have been held and the working group plans to have more meetings, and is essentially following KDHE as that agency works its way around the state with TMDL development.

(Documentation supporting this analysis is found in attachments 27 and 28.)

K. Conservation Tillage

Adoption of conservation tillage practices by Kansas farmers has played an important role in improving water quality in Kansas. Conservation tillage is any tillage and planting system with 30 percent or more residue remaining on the soil surface after planting to reduce soil erosion by water. Residue protects the soil surface from erosion by absorbing the impact energy of raindrops, thus reducing soil particle detachment. Residue also reduces surface crusting and sealing, thereby enhancing infiltration and crop emergence. By creating small dams and obstructions along the flow path, residue slows the velocity of runoff water, reduces the amount of soil transported and reduces the amount of additional soil particles detached by flowing water. Also, when flow velocity is reduced, some of the soil particles and aggregates already in the runoff water are redeposited. Put simply, residue intercepts that small raindrop, absorbs its energy and reduces soil particle detachment and runoff.

Since 1980, Kansas farmers have increased substantially their use of conservation tillage. Today, nearly 61 percent of corn acres are under some type of conservation tillage. Further, approximately 37 percent of soybean acres, 25 percent of wheat acres and 44 percent of grain sorghum acres are under some type of conservation tillage. Wheat producers face the biggest challenge in trying to shift to conservation tillage because of weed and disease problems compounded by lack of alternative crops for semi-arid areas. Researchers at KSU are working on low-moisture corn and sorghum varieties to address this issue.

(Documentation supporting this analysis is found in attachments 29.)

What Has Been Learned From Nearly a Decade of Work on Nonpoint Source Challenges

Over the past decade, Kansas has devised and perfected the elements for successful voluntary, incentive-based nonpoint source programs to improve water quality. These include: (1) establishing intensive water quality monitoring programs to gain baseline data to locate specific areas where loading is occurring; (2) developing a range of Best Management Practices that are cognizant of producer financial considerations, cognizant of producer status as commercial or part time, and tested in a real-world environment before they are recommended to farmers and ranchers; (3) delivering water quality



The 2001 Chautauqua County Soil Conservation Issue

Wednesday, January 24, 2001

Clark & Heidi Hill Receive Recognition For Riparian Project

The Farm Bureau and Conservation District Boards of Chautauqua County will recognize the efforts of Clark & Heidi Hill at this year's Conservation District Annual Meeting, for the installation of a riparian project.

A "riparian" area refers to the wooded or vegetated area alongside a creek, stream or river.

Two years ago, the Hill's developed a conservation plan with the District's assistance. They sought to upgrade gamebird habitat, improve stockwater quality, reduce fertilizer runoff from cool-season grasses and have the ability to rotate pastures.

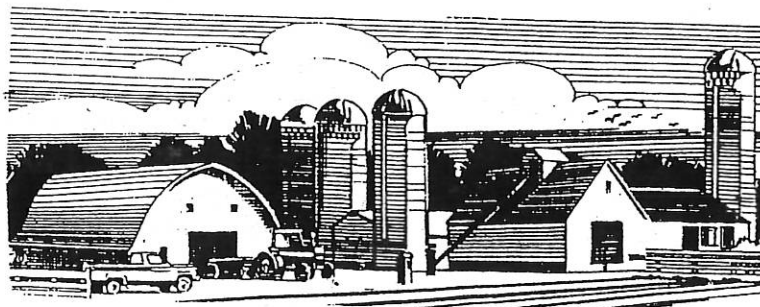
As part of the plan, they fenced out the wide and flat creek channel to prevent the livestock from "loafing" among the trees and

brush. This would free up the area for use by upland game birds. While fenced out, the area can be "flash" grazed.

To provide stockwater, a pond was installed. Two pipelines to two separate tanks, on either side of the draw below the dam, were installed as well. The area above the pond was fenced out, too.

All of these improvements resulted in six new units that can be grazed in a rotational manner, providing the grass in each unit some rest during the growing season.

The Hill's project can be viewed off of Highway 166, 1 3/4 miles west of the Hewins turnoff. It serves as a good example of how people in Kansas are addressing water quality issues for the benefit of Kansans.



Conservation Pays!

Senate Agriculture Committee

Date 1-30-01

Attachment # 2

Northwood Farms, Inc.

PO Box 127, Silver Lake, Ks. 66539

Senator Schmidt and members of the Senate Agriculture Committee:

My name is Francis Kelsey and I am a farmer in the Kansas River Valley west of Topeka. I am here this morning to testify in support of the proposed resolution requesting withdrawal of some of the environmental regulations proposed by the Environmental Protection Agency during this past year. I wish to outline the reasons why I support this resolution:

1. The water quality regulations that were published in the Federal Register in July of 2000 were major rules in several ways:
 - The cost to the taxpayers for upgrades to wastewater treatment facilities
 - The cost to individual landowners because of restricted use of their own private lands and private waters
 - The cost to the state in having our own proposed water quality regulations developed by those who know our state best being trashed by regulators in Washington
2. The idea of publishing these regulations over a holiday weekend with an initial public response period of only 25-26 days and only one public hearing was offensive to me. It took me a few days to even discover that one of the

Senate Agriculture Committee

Date 1-30-01

Attachment # 3-1 thru 3-3

streams that was listed as being designated for primary contact ran through some property I farm. A proposal of this magnitude deserves a lot of thought and consideration by all of the stakeholders involved and it was obvious that EPA's original intent was to minimize public input.

3. No one has demonstrated that these regulations will make any significant improvement in water quality. If it will not improve the situation, why implement the rule? On our farm, we do not make changes strictly for the sake of change. We make them based on the information available that shows a quantifiable improvement.
4. I attended the EPA hearing in Topeka this past September along with several hundred other Kansans. During the hearing, the officials from the Environmental Protection Agency said they really didn't intend to enforce this rule. I understand that these comments are on videotape and that they were submitted to the Agency as a part of the formal comment process. If they don't intend to enforce the rule, why even promulgate it? We have enough regulations now.
5. The Kansas Attorney General and the US Supreme Court have both determined that farm ponds should not be considered navigable waters and therefore are not subject to the regulation. At the very least, this part of the rule should be eliminated. The Supreme Court has also reinforced the rights

of individual states to regulate water quality. These rules should be rescinded based on that decision alone.

I am encouraged that a more common sense approach is being shown toward the Regulation process in Washington and would encourage the federal government to incorporate a sound scientific approach when writing environmental regulations. I thank the Committee for allowing me to appear here today and would stand for any questions that they might have.

Dahlsten Farms

Larry and Edie Dahlsten

922 Shawnee Road, Lindsborg, Ks. 67456

785-227-3192

Good morning my name is Larry Dahlsten. I am a farmer from McPherson County and a member of McPherson County Farm Bureau. Chairman Schmidt, I appreciate the opportunity to speak to your committee this morning.

Since the publication of EPA's proposed water quality standard rule in the Federal Register in July of last year we have heard a great deal of discussion concerning its impact on Kansas farmers and ranchers. One common thread throughout those discussions was the heavy handedness of the federal government this rule would impose on producers.

Many individuals and organizations testified that federal mandates such as these do not encourage producer participation, nor do they necessarily result in improved water quality.

Voluntary, incentive based programs, however, do both and our farm is a classic example of improved management practices and quantifiably improved water quality.

We farm in the Smoky Hill River Valley and our farm is a mix of river bottom ground and highly erodible land. We applied for and signed six separate Environmental Quality Incentive Program (EQIP) contracts for a total of 672.7 acres. Each of those contracts falls within the Statewide Concerns category and extends for a period of five years, with the payment pro-rated over the first three years.

Senate Agriculture Committee

Date 1-30-01

Attachment # 41 thru 4-3

As an example, one contract covers 140 acres, which has 25,529 feet of terraces and a 4%-5% slope. Calculations before EQIP implementation indicate a potential for 5.7 tons of soil erosion per acre. Calculations after EQIP no-till practices are implemented indicate the erosion potential reduced to .8 tons of soil per acre.

Producer accountability is strong when participating in EQIP contracts. Contract holders must conduct soil tests each year, must provide proof of fertilizing as indicated by soil tests and must allow for on-site field review by the District Conservationists.

The EQIP contracts are the antithesis to federal mandates. They more quickly and more sustainably meet water quality goals because producers embrace them, rather than run from them. Rescinding the water quality rule proposed by the EPA last summer and replacing it with incentive-based voluntary programs will have more long-lasting positive results than allowing the rule to move forward.



**Testimony Regarding Senate Concurrent Resolution No. 1605
Before the Senate Agriculture Committee
January 30, 2001**

Good morning Chairman Schmidt and members of the Senate Agriculture Committee, my name is Greg Krissek. I am Director of Operations for the Kansas Corn Growers Association. I appreciate the opportunity to make brief comments in support of SCR 1605. My comments also reflect the position of the Kansas Grain Sorghum Producers Association. I am here on behalf of these associations' farmer members and their Executive Director, Jere White, who is in Washington, DC today where he is attending meetings concerning other USEPA proposed activities.

SCR 1605 would send an urgent and important message to the newly elected Bush Administration and the U.S. Congress about Kansans' concerns over the proposed U.S. Environmental Protection Agency water quality regulations for our state. These proposed regulations have been highly visible these last six months due to their far-reaching potential impacts and expected effects upon every citizen of our state.

As we have analyzed, discussed, and commented upon these proposed regulations, it has become very clear that they will not provide true environmental benefits. Rather, these events and the resources required to participate in this rulemaking process have seriously detracted from the programs that agricultural organizations like ours have in place to work with producers and others for water quality education and outreach. Staff within the two organizations I work with have not been able to accomplish true progress on the state's water quality issues such as TMDL implementation while working to respond to these proposed regulations.

Further, the incredible miscalculation and gross underestimate by USEPA concerning the potential cost of the proposed regulations to Kansas is a travesty. The cost estimates being developed by the State Conservation Commission reflect the true expected cost which amount to the millions of dollars that must be taken into account for a realistic discussion of the impact expected to occur from the new requirements.

The importance of states' rights, long a bedrock belief among our social fabric, also should be a major factor in how Kansas approaches this situation. Fortunately, recent decisions by the U.S. Supreme Court concerning the Clean Water Act bolsters our belief that the message contained in SCR 1605 is most appropriate and legally valid.

With new leadership in the federal government and USEPA, our organizations hope that the opportunity exists for Kansas leadership to begin new discussions concerning these proposed regulation with the goal of resolving issues that remain. We want to be able to resume the good progress that was made on the state's water quality issues prior to the debacle that began with the proposal of these regulations.

Thank you for this opportunity to testify. I will certainly try to answer any questions.

P.O. BOX 446, GARNETT, KS 66032-0446 • PHONE (785) 448-6922

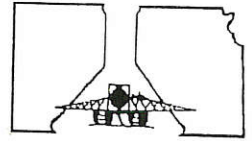
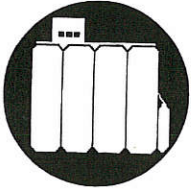
www.ksgrains.com/corn • jwhite@kanza.net

Senate Agriculture Committee

Date 1-30-01

PRINTED ON RECYCLED PAPER • PRINTED WITH CORN

Attachment # 5



STATEMENT OF THE
KANSAS GRAIN & FEED ASSOCIATION
AND THE
KANSAS FERTILIZER & CHEMICAL ASSOCIATION

PRESENTED TO
SENATE AGRICULTURE COMMITTEE
REGARDING S.C.R. 1605

SENATOR DEREK SCHMIDT, CHAIR

January 30, 2001

KGFA & KFCA MEMBERS ADVOCATE PUBLIC POLICIES THAT ADVANCE A SOUND ECONOMIC CLIMATE FOR AGRIBUSINESS TO GROW AND PROSPER SO THEY MAY CONTINUE THEIR INTEGRAL ROLE IN PROVIDING KANSANS AND THE WORLD THE SAFEST, MOST ABUNDANT FOOD SUPPLY

Senate Agriculture Committee

Date *1-30-01*

816 SW Tyler, Topeka KS 66612 - 785-234-0461 - Fax

Attachment # *6-1 thru 6-3*

Chairman Schmidt and members of the committee, I am Doug Wareham appearing today on behalf of both the Kansas Fertilizer and Chemical Association (KFCA) and the Kansas Grain and Feed Association (KGFA). KFCA's over 550 members are primarily plant nutrient and crop protection retail dealers with a proven record of supporting Kansas producers by providing the latest crop protection products and services. KGFA is comprised of more than 1100 member firms including country elevators -- both independent and cooperative -- terminal elevators, grain merchandisers, feed manufacturers and associated businesses. KGFA's membership represents 99% of the over 860 million bushels of commercially licensed grain storage space in the state of Kansas.

I want to express our support for Senate Concurrent Resolution 1605, which urges the Bush Administration to withdraw environmental regulations being proposed by the Environmental Protection Agency (EPA).

KGFA and KFCA have been very concerned by the U.S. Environmental Protection Agency's willingness to promulgate environmental rules and regulations with little or no regard for the significant financial burden their proposals will have on the Kansas crop and livestock production industries. This concern reached a new level this past summer as EPA proposed new surface water quality standards that would supercede existing Kansas water quality laws and establish the following:

- Unachievable affluent discharge standards for many rural Kansas communities.
- A federal mandate that would require an additional 1,292 streams and 164 lakes in Kansas fall under the most stringent recreational use designation.
- Stringent water quality standards that would apply to privately owned ponds and lakes.

While cost estimates associated with EPA's proposed water quality regulations for the state of Kansas range from several millions to literally hundreds of millions of dollars, the most disheartening part of EPA's latest attempt to impose new standards is that their action caused the majority of voluntary educational activities in the Kansas water quality arena by public and private sector alliances to come to an abrupt standstill. Significant efforts to educate both agricultural and urban stakeholders of the need to work together and voluntarily address non-point source pollution were being implemented when EPA's proposed water quality mandate was unveiled. It is unfortunate that so many resources, which were being dedicated to training and education, have been redirected to defend against proposed regulations that clearly lack merit from an environmental or economical standpoint.

While EPA's proposed water quality standards come with a tremendous price-tag, the agency's latest proposal regarding confined animal feeding operations raises a new challenge to Kansas agriculture that can not be ignored by agriculture stakeholders if we hope to remain competitive in today's world market. As reported to the Kansas Senate's Natural Resources Committee last week, EPA's proposed regulations that would govern confined animal feeding operations will touch nearly every level of the livestock industry in Kansas and place a tremendous amount of new record-keeping requirements on the Kansas producer.

Both KGFA and KFCA believe it is vitally important that the new administration in Washington and in particular the members of the Kansas Congressional Delegation receive support and encouragement from the Kansas Legislature to protect and defend against the promulgation of unreasonable and unattainable regulations. We commend this committee for consideration of this resolution and once again appreciate the opportunity to appear in support of S.C.R. 1605. I would be happy to answer any questions at this time.

PA

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

SCR 1605

January 30, 2001

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Committee on Agriculture

by

Terry Leatherman
Vice President – Legislative Affairs
Kansas Chamber of Commerce and Industry

Mr. Chairman and members of the Committee:

My name is Terry Leatherman. I am the Vice President of Legislative Affairs for the Kansas Chamber of Commerce and Industry. On behalf of our 2,000 plus members in Kansas, KCCI applauds the authors of the Resolution before you today and urges this Committee to approve SCR 1605.

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.

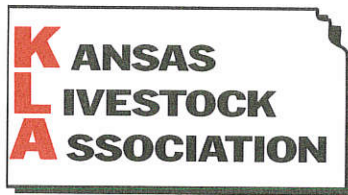
The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

The Kansas Chamber has been very concerned about the actions of the federal Environmental Protection Agency this past summer and fall regarding water quality

Senate Agriculture Committee

Date 1-30-01

Attachment # 7.1 thru 7.2



Since 1894

Testimony

Presented by

Alan Hess

Immediate Past President – Kansas Livestock Association

Regarding

Senate Concurrent Resolution No. 1605

Before the

SENATE COMMITTEE ON AGRICULTURE

January 30, 2001

Thank you Mr. Chairman, and Committee members, for introducing SCR 1605. As a rancher near Alma, Kansas and as the Immediate Past President of the Kansas Livestock Association (KLA) I'd like to make a few comments in support of this resolution and your efforts on two important pending environmental issues.

KLA members voiced strong opposition to the July 3, 2000 proposed EPA regulations for several reasons. First, the proposal called for the regulation of private waters. Secondly, the plan would designate nearly 1,300 small creeks and waterways for primary contact recreation. The regulations would lead to the regulation of nonpoint sources because of the antidegradation provision and finally we object to EPA's low estimate of costs these regulations will impose on Kansans.

I ranch in Wabaunsee and Riley counties. This property has been used for grazing cattle since the area was settled in the 1850s. Simply put, this property is being used exactly the way it was more than 140 years ago.

Senate Agriculture Committee

Date *1-30-01*

Attachment # *8-1 thru 8-7*

More than 60 farm ponds exist on our ranch. All of the ponds are entirely surrounded by property held in common private ownership. Access to these ponds is by permission only. It is my understanding the proposed EPA regulations would subject these ponds to water quality standards regardless of size or use for which it was built.

I understand that Kansas Water Quality Standards require waters subject to the Clean Water Act including ponds, be free from foam and algae. What steps does EPA expect me to take to meet Water Quality Standards and other requirements?

To meet water quality standards, I believe I would need to fence each facility to assure no livestock contacts the water. We would need to build many miles of fence around the ponds and drainage areas. Fencing costs a \$1.00 per foot. This would cost thousands of dollars.

Fencing ponds would also make much of the ranch unusable. Most of the drainage area to the ponds is covered with lush grass and the hillsides are historically some of the best grazing areas. Besides the cost, we would have no water for cattle. The expense of drilling wells or laying pipeline in the rocky Flint Hills would be terrific. Pastures would be divided, making poor grazing patterns, leading to overgrazing of some areas. Erosion would also be a problem, as cattle tend to walk along fences. Their paths would channel water.

The entire scenario is impractical and cost prohibitive. Even small costs cause great economic impact with the small profit margins we have.

We are opposed to EPA designating certain streams for primary contact recreation. Under normal conditions, many streams on our ranch are dry or have less than 6 inches of water. Under the proposed regulations, the upper reaches of Emmons Creek and Hendricks Creek, which are located on our ranch, would be designated for "primary contact recreation." I showed EPA photographs of these stream segments at the September 13, 2000 hearing in Topeka. It is quite obvious to many of us that it is not possible for humans to immerse in these streams and ingest stream water.

Attached to my statement is a copy of the formal comments I sent to EPA following the hearing in Topeka. You'll find more specific information about the proposed regulations and our objections in this letter.

I'd like to make a few comments regarding EPA's proposed "guidelines" for confined animal feeding operations (CAFO's) that were published in the Federal Register on January 12, 2001. We are still analyzing the 400-page proposal, but it is obviously stacked with cumbersome record keeping requirements that will impact small and moderate sized operations throughout this state. For example, CAFO's, perhaps as small as 300 animal units, must maintain a Permit Nutrient Plan that documents the amount of manure generated annually, the nitrogen-phosphorus-potassium content of the waste, amount of other nutrients applied to

fields, identify the crop rotation and expected crop yields on fields where the manure is applied, records of the calibration of manure application equipment, and numerous other documentations.

This will be a tremendous burden on small operations with limited labor resources and for larger confined feeding operations that provide animal waste to neighboring farmers as fertilizer.

It's our understanding these regulations are not included in the administration's moratorium because they were published prior to the January 20, 2001 memo to federal agency heads. EPA must take the initiative to include the CAFO regulations in the moratorium. We suggest this committee make this request in SCR 1605.

I'll close with these personal thoughts and observations. Ranchers and farmers love and respect our land and water. It is our heritage, pride and joy. Our lives are defined by our land. We know we must protect it to assure its long-term viability and our way of life. Good environmental practices make good business sense. We have been here over 140 years and I hope future generations of our family will be on the ranch too. These EPA regulations do little to improve the environment. Instead, they cut deeply into our hopes of being able to operate our ranch in the future.

Thanks again for bringing attention to these issues. We appreciate your support and cooperation.



September 13, 2000

Ms. Ann Jacobs
EPA Region VII
Water Resources Protection Branch
901 North 5th Street
Kansas City, Kansas 66101

Dear Ms. Jacobs,

I am writing to express my opposition, and that of the Kansas Livestock Association, to the Kansas water quality standard regulations proposed by the United States Environmental Protection Agency (EPA) on July 3, 2000 (69 Fed. Reg. 41215). My opposition to the proposed regulations relates to three specific areas: 1) regulation of private waters, 2) designation of stream segments for primary contact recreation, and 3) the low estimate of costs these regulations will impose on Kansans.

I am a member and the current president of the Kansas Livestock Association. I also serve on the Mill Creek Watershed District board. I am also a member of the Kansas Farm Bureau. I support the legal analysis and arguments made by these agricultural organizations and incorporate their statements into mine. I would also like to take this opportunity to outline how this regulation would impact my operation and those similarly situated.

I am a rancher in Wabaunsee and Riley Counties, in Kansas. The ranch is mostly family owned with leased land that we have managed for many years. Some of the ranch property has been owned and operated by my family since 1858. This property has been used for grazing cattle since the area was settled in the 1850s. Simply put, this property is being used exactly the way it was over 140 years ago. We have made minor management changes over the years to include the recommendations of rangeland management specialists to assure the long-term viability of the land.

On this ranch we have over 60 farm ponds. Most of these ponds were built during the drought of the 1950's as sources for livestock watering. The sizes of these ponds vary greatly from very small covering about 800 square feet to the largest covering approximately 20,000 square feet. The depths of these ponds also vary greatly from 24 inches to 10 feet. I would like to direct your attention to photograph #1 which depicts the typical watershed on our ranch. All of the ponds are entirely surrounded by property held in common private ownership. Access to these ponds is by permission only. There is no public access to any of the ponds or land surrounding them. Our ponds do not receive wastewater from any point sources. There is no discharge from these ponds with the exception of extended periods of extreme heavy rains.

It is my understanding that the proposed regulations of EPA would subject these ponds to water quality standards. I would like additional information as to what affect this regulation will have on private landowners like me. Please provide answers to the following questions.

1. Does this regulation require these ponds, regardless of size, to meet water quality standards?
2. It is my understanding that Kansas Water Quality Standards require that waters subject to the Clean Water Act regulation, including ponds, be free from foam and algae. Is this true? What other substances must I assure are not present in these facilities and at what levels? I would like to direct your attention to photographs #2, #3 and #4 which represent typical ponds with algae and plant growth present.
3. What other requirements apply to my ponds?
4. What steps does EPA expect me to take to meet Water Quality Standards and other requirements?
5. What will these steps cost?
6. What public health risk are you seeking to avoid by regulating these facilities?
7. Will EPA have the right to enter my land to inspect my ponds?
8. What will these inspections cost the taxpayer?
9. What happens if a pond on my property is found not in compliance with these water quality standards? It is my understanding that I may be subject to fines up to \$27,500.00 per day per violation. Is this true?
10. I do not have point source discharges into my ponds. If the water quality in my ponds does not satisfy EPA are my nonpoint sources going to be controlled? I understand that EPA does not have the authority to control nonpoint sources.

I request a detailed answer to each of the above questions.

If in fact this regulation will require these ponds to meet water quality standards, I believe I would need to fence each facility. This would assure that no livestock water in the ponds and limit the chance for pollution natural or otherwise. However, this would have the practical effect of rendering the property useless and be cost prohibitive. Fencing costs approximately \$1.00 per foot. We would have of miles of fence around the ponds. Second, we would have to fence the drainage area into the ponds. Again, this would mean building many more miles of fence. Fencing alone would cost us thousands of dollars. In addition, it would render much of the grazing area unusable, as most of the drainage area to the pond is covered with lush grass and the hillsides are historically the best grazing areas of the pasture. Besides the expense of fencing the ponds and their drainage areas, the cattle on the remaining usable grass would now have no water to drink. The expense of drilling wells or laying pipeline in the extremely rocky ground would be terrific. Pastures would be chopped into pieces making poor grazing patterns and leading to overgrazing of some areas. Erosion would be an additional problem, as cattle tend to walk along fences making paths in which water tends to run. It takes an average of 4 or more acres to sustain a yearling animal for full summer grazing. Dividing the pastures in this manner makes the ranch unusable. Fencing would be very expensive. Even a small cost or expense causes great economic impact on my profitability because profit margins in leasing grass and grazing cattle are small.

These ponds were built as water supplies for livestock and a means to stop sedimentation into the streams. If I am unable to water livestock in these ponds, why would I need them? Perhaps I should drain them rather than run the risk of being fined or the expense and frustration of having to meet use restrictions imposed on my property.

This regulation flies in the face of the governmental policy promoted by conservation districts and the United States Department of Agriculture Natural Resource Conservation Service. For years programs such as the Watershed Dam Construction program, the non-point source pollution control program, and now EQUIP have been promoting the use of ponds as alternative water sites for livestock and a means to slow erosion. If we breach these ponds, in a heavy rain sedimentation and heavy erosion are likely to occur. The ponds were never intended to be pristine sources of water.

I contend that these waters are not "waters of the United States" or within the jurisdiction of the EPA. A simple reading of the Clean Water Act indicates that these were not the waters Congress intended to regulate. Finally, I support the legal arguments made by the Kansas Livestock Association and the agricultural organizations allied with the Kansas Livestock Association. I strongly support the Kansas law exempting ponds like these from the requirements of the water quality standards. Kansas's law provides a basis for public health protection, or protection of adjacent landowners, no other law or regulation is necessary (See K.S.A. 65-171d(d)). Please outline for me why the Kansas statute is contrary to the Clean Water Act. Specifically, K.S.A 65-171d(d) subjects to water quality standards private waters that discharge or seep to waters of the state and water for which public health considerations apply, how is this inconsistent with the Clean Water Act? The proposed rule would subject thousands of farm ponds to water quality standards and regulations and enforcement under the clean Water Act, yet the proposed rule discussion for this important topic does not even encompass an entire Federal Register page.

I am also opposed to EPA's designating certain streams for primary contact recreation when the state had previously classified these segments for secondary contact recreation. It is my understanding that in 1994 the state of Kansas classified all streams on the U.S. Geological Survey River Reach 2 maps as suitable for secondary contact recreation. It is my understanding that through this regulation, EPA is requiring that these same stream segments be designated for primary contact recreation until the state conducts a use attainability analysis illustrating why the streams are not suitable for primary contact. Kansas already has designated these stream segments for secondary contact recreation. If the people at the state level who know about these streams have made a valid determination why should they have to make it again, only at a much greater cost to the taxpayers of Kansas?

Although, I believe the state did not conduct enough fieldwork to justify the designation of secondary contact recreation, for many streams, a primary recreation designation, which assumes that there are opportunities for a human to fully immerse in the water and that ingestion of the water by a human is probable seems very far reaching and very far from reality. Proper evaluation of geography in Kansas would reveal the obvious, and what Kansans already know – most of the segments EPA is proposing for primary contact recreation will not support **any** type of recreation.

My ranch receives an average annual rainfall of approximately 34 inches. This year we have received less than half of that amount. Under normal conditions, many of the streams and tributaries on our property are dry except for a brief time after precipitation and few have over 6 inches of water in them. Under the proposed regulations Emmons Creek and Hendricks Creek, which are located on our ranch, would be designated for primary contact recreation. Attached are pictures of these streams taken September 2000. (See photographs #5, #6, and #7) Clearly, it is not possible for a human to immerse in these streams and ingest stream water. These pictures were taken

during the period of the year during which this primary contact recreation is assumed to take place. I request an explanation for why EPA believes these streams are ones in which people can swim.

As a property owner I have a number of concerns about my property rights under the law and a number of questions for which I request an answer:

1. Would designating the streams within my ranch for primary contact recreation create an expectation of access to my property for recreational purposes?
2. There is no public access allowed to my private property. Does the regulation require that I provide public access?
3. My insurance policies do not protect me from any claims that would relate to use of my property by others for recreation. I do not know whether such a policy even exists and do not know what the cost of such a policy would be. Can you provide information about my duty to the people that would expect to be able to recreate in the streams on my land because of this regulation?
4. Does the regulation authorize a trespass for purposes of recreation?
5. How can EPA preempt specific Kansas's laws regarding the ownership of streambeds and deem these privately owned streambeds available for recreation?
6. By asserting in public documents that these streams are suitable for swimming, the EPA is creating a public health and safety risk. How has EPA determined that these waters are suitable for primary contact recreation, both from a water quality perspective and from a physical hazards perspective?
7. Are landowners required to provide for the primary contact recreation use? There are not any point source discharges into the streams on our ranch that EPA is proposing for primary contact recreation. We already have in place and abide by voluntary best management practices developed by Kansas State University, the United States Department of Agriculture, and other federal and state agencies. If the streams on our ranch do not meet primary contact recreation water quality standards does that impose any obligation or liability on us as owners of the land?

Again, I agree with the statements of the Kansas Livestock Association and the other agricultural organizations that have joined together to comment. This clearly is an area where EPA is regulating contrary to the law. The Clean Water Act allows STATES not the EPA to establish uses. EPA should not be able to circumvent the Clean Water Act with a regulation. Finally, what is the purpose of designating stream segments for primary contact recreation, when there is no water in the stream, and no access to it?

I look forward to a response to all of the questions I have posed. Further, I encourage EPA to withdraw this regulation and negotiate rational solutions with all stakeholders in Kansas.

Respectfully submitted,

Alan Hess, Rancher
Hess Ranch
Rural Route 2, Box 149
Alma

Testimony on SCR 1605
Senate Agriculture Committee
January 30, 2001
Prepared by Joe Lieber, Kansas Cooperative Council

Mr. Chairman and members of the Committee, I'm Joe Lieber, President of the Kansas Cooperative Council. The Council has a membership of nearly 200 cooperative businesses who have a combined membership of nearly 200,000 Kansans. Approximately 120 of our members are farm supply cooperatives and most of them are involved in the grain storage business. The Council supports SCR 1605.

We support SCR 1605 because we feel the farmers and ranchers of Kansas are the first tier of environmentalists when it comes to protecting the soil and water. Not only do they use both in their work, they are concerned about protecting the health of their families. They are not opposed to environmental regulations, but they are concerned about regulations that are not based on sound scientific facts.

It appears that the Environmental Protection Agency (EPA) has gotten involved in the emotional aspect of a clean environment and has over reacted. Many, if not most, of their regulations are not based on sound scientific information and they have not considered how these unnecessary regulations affect the real world of agriculture.

We commend the committee for holding hearings on SCR 1605 and ask for your support.

Senate Agriculture Committee

Date 1-30-01

Attachment # 9



September 7, 2000

For Immediate Release

The Sierra Club's Position on EPA's Water Quality Standards for Kansas

This statement is intended to correct misinformation that has been presented by certain organizations who feel threatened by EPA's proposed Water Quality Standards for Kansas. It is also intended to express the Kansas Chapter's willingness to work with various stakeholders to implement the new rules in ways that minimize the economic impact but conform to the law.

The problem. Kansas surface waters are in bad shape and getting worse. A recent EPA report, based on 1998 state submissions, showed Kansas dead last in percentage of lakes supporting all designated uses (none do). We were 43rd in the nation for percentage of streams meeting the basic safety standards designed to protect human health and aquatic life. Also, Kansas ranked 35th in number of stream miles assessed, so we can't claim we are doing a better job of looking for pollution. KDHE's Year 2000 report showed that 81% of river and stream miles tested are too polluted for recreation and other uses at least part of the time. This is up from 69% in 1998. Some people may dispute the causes of this pollution, but no one should dispute that our rivers and streams need to be cleaned up. The applicable law for this clean up is the federal Clean Water Act.

The debate over Kansas water quality standards has persisted for many years without effective action. This debate has centered on high bacteria levels preventing the attainment of recreational uses and effluents toxic to aquatic life, frequently attributed to ammonia. However, coming soon will be another powerful reason for state authorities to act.

The appearance and growth of the "dead zone" in the Gulf of Mexico underscores the urgency of addressing the problem of excess nutrients washing and seeping into the lakes and streams of the Midwest. The dead zone is a national disgrace for which we share responsibility. The obvious places to look for remediation are the same sources that are degrading the designated uses of our streams. These are inadequately treated municipal and industrial effluent, agricultural runoff and atmospheric deposition.

The state will soon have to face up to these problems. The Kansas Chapter of the Sierra Club had every right and, in fact, the obligation as citizens of this state to precipitate, through legal action, the new standards that are the subject of the September 13 and 14 hearings. We are sad, but do not apologize for the angry reaction we have seen in recent weeks. We are, however, mindful of the

Senate Agriculture Committee

Date

1-30-01

Attachment #

10-1 thru 10-3

small municipalities that discharge into small streams.

Small streams. It is our understanding that municipal aerobic lagoon systems, constructed in accordance with KDHE standards, such as 3-cell systems with 120 day detention, do a reasonably good job. However compliance with the new water quality standards will be borderline in the winter months. We feel the best approach to resolve this uncertainty is for the state to sponsor extensive research on a range of simple, add-on options for these dischargers. For example constructed wetlands with translucent covers in the winter might provide the margin of additional treatment needed at low cost. Another approach would be a state construction grant program for low income rural communities perhaps in cooperation with the USDA.

We would oppose wholesale reclassification of streams by use attainability studies, financed by dischargers, that do not meet rigorous scientific protocols and receive adequate review and oversight.

The new rules may not affect as many dischargers in central and western Kansas as some people believe. If streams are almost always dry then it will not be possible to obtain stream samples that indicate non-compliance. If the numerous confined animal feeding facilities are not violating their "zero discharge" permits and are properly recycling effluent onto crops then no one should be concerned about non-compliance with water quality standards.

However some dry streams with sandy bottoms that have cut into underlying permeable formations are direct conduits to groundwater and are capable of recharging the aquifer with contaminants. Thus the quality of runoff and discharges must be judged accordingly. We would support new ideas that take into account the diverse geological and climatic settings in Kansas as long as compliance with water quality standards is achieved.

Urban dischargers. On the other hand, impacts of the new rules on large urban areas, if any, would be long overdue. One major sanitary district, with a large tax base, is operating on a permit that expired nine years ago. When is the EPA going to act to enforce the Clean Water Act on the big dischargers? Many of these cities take advantage of rivers to dilute the toxicity of their effluent. With nutrient criteria on the horizon, this approach isn't going to work much longer, and it's clearly counterproductive for EPA to allow KDHE to loosen ammonia standards as proposed. It's time for the large communities that have garnered the lion's share of economic growth to invest some of their wealth in cleaning up their pollution. We commend cities, such as Wichita, for taking the long term view and upgrading their wastewater treatment plants.

Private ponds. The private ponds issue has been blown far out of proportion. The new rules merely state that water quality standards in Kansas apply to all privately owned surface waters in Kansas that *are waters of the United States*. Regardless of what Kansas law says, any water that can be shown to be connected to downstream has always been subject to the Clean Water Act. A 1987 Kansas AG opinion acknowledged this. If someone dams up a stream or stream bed, they should rightfully take responsibility for the rights of downstream users to receive clean water for their use.

On the other hand EPA has, on several occasions, clarified that the Act does not typically consider artificial farm ponds, dug out of dry land, to be Waters of the U.S. No

regulatory agency has staff to snoop around thousands of farm ponds anyway. If someone's activities do not affect the property rights of others they have nothing to worry about. Conversely, if their pond or stream is degraded by upstream users the new rules give them legal recourse. Apparently only two other states have found it necessary to exempt privately owned surface waters from the law. EPA has promulgated regulations for Idaho and intends to address a similar problem in Nebraska. The other 47 states have not had a problem, so why should Kansas?

Antidegradation. The Sierra Club is generally pleased with the new rules. However, the KDHE did slip one past the EPA. KDHE has downgraded all of the 68 stream segments listed as "outstanding natural resource waters" in the 1994 Surface Water Quality Register plus several lakes and wetlands. The new designation, "exceptional state waters," will allow new or expanded discharges. This is important because these elements are among the state's most pristine waters and have significant value to wildlife and for human recreation. Because the downgrades were done without the required justification and public participation, EPA should have disapproved them.

Summary. In general we support the new water quality standards that will be promulgated by USEPA. We remain ready to work with other stakeholders to minimize adverse economic impacts. However it's time to do the right thing for Kansas. Small streams are, and always will be, irresistably attractive to children. We ask folks to consider how they would feel if their children got sick playing in dirty streams... or if there were no living creatures for them to marvel at and learn from. We believe that all of us want the same thing for future generations, and we'll be able to work this out.

For further information or clarification of this statement, please contact Charles Benjamin, Attorney at Law and spokesperson for the Kansas Chapter of Sierra Club at (785) 841-5902 – office or (785) 550-4876 – cell phone.

standards through the development of NPDES permit limitations (*Kansas Surface Water Quality Implementation Procedures*; October, 18, 1994). These procedures contain two separate components: procedures for implementing the State's antidegradation policy at K.A.R. 28-16-28c(a), and procedures governing the implementation of water quality standards, e.g., through development of water quality-based effluent limitations for NPDES permits.

In its 1998 action, EPA addressed components of these procedures separately based on their distinctly different treatment under Federal regulations. Federal regulations at 40 CFR 131.12(a) require that States identify methods for implementing the State's antidegradation policy. Development of these implementation procedures is not discretionary. Section 3 of the State's procedures addressed implementation of the State's antidegradation policy. In its 1998 disapproval of Kansas' October 18, 1994, antidegradation implementation procedures, EPA identified three deficiencies with the procedures that would lead to the implementation of Kansas' antidegradation policy in a manner inconsistent with Federal regulations. These deficiencies were: (1) Failure to maintain existing *water quality* for Tier 3 waters; (2) Failure to maintain existing water quality for Tier 2 waters under the State's antidegradation provision; and (3) Failure to identify the means by which the State would implement its antidegradation policy in the context of determining whether to allow a lowering of surface water quality by point sources of pollution where nonpoint sources also contribute the pollutant of concern to that body of water. The State revised its antidegradation procedures and submitted them to EPA for review in 1999. These revised procedures addressed the first two disapproved items regarding existing water quality in Tier 3 and Tier 2 waters, but not the third disapproved item. This last item remains disapproved and is addressed in section IV.D.

The 1994 antidegradation procedures required the protection of existing water quality within the State's Outstanding Natural Resource Waters, but did not describe the mechanisms or methods by which that level of protection was to be implemented. Specifically, the Procedures failed to identify how existing water quality in the State's Outstanding Natural Resource Waters would be maintained under the mixing zone provisions at K.A.R. 28-16-

28c(b)(2). The use of mixing zones and zones of initial dilution in the State's Outstanding Natural Resource Waters allowed for the permanent lowering of existing water quality in portions of those waters.

The State's 1994 Procedures also did not adequately protect high quality waters as required under Federal regulations at 40 CFR 131.12(a)(2) (referred to as "Tier 2") and the State provision at K.A.R. 28-16-28c(a)(2). The Tier 2 level of protection under the Federal antidegradation regulations and the State antidegradation policy requires protection of existing *water quality* unless a lowering of water quality is necessary to accommodate important social or economic development in the area where the lowering of existing water quality occurs. However, the State procedure only addressed the protection of existing and designated *uses* in regulating point sources of pollution rather than existing water quality. This is contrary to the State provision at K.A.R. 28-16-28c(a)(2) and is also inconsistent with 40 CFR 131.12(a)(2).

As part of its June 29, 1999, revisions to its water quality standards, the State revised its antidegradation implementation procedures in a manner consistent with revisions to the State's antidegradation policy (see section III.A.) to maintain existing water quality in Tier 3 waters. Kansas' 1999 revision of its antidegradation implementation procedures also adequately addressed the manner in which the maintenance of existing water quality is ensured for high quality waters (Tier 2). EPA approved these revisions in its January 19, 2000, letter. These corrections to the State's Procedures made further Federal action to address these two disapproved provisions unnecessary.

The remaining provisions of the State's 1994 implementation procedures addressed implementation of water quality standards. Federal regulations at 40 CFR 131.13 address policies generally affecting the application and implementation of standards that States may adopt, at their discretion. If a State adopts such policies, the regulation provides that they are subject to EPA review and approval. In its 1998 action, EPA disapproved the State's implementation procedures for NPDES permits because the procedures did not ensure that permits would derive from and comply with the State's water quality standards. Specifically, EPA identified the following deficiencies. First, the procedures failed to clearly identify how mixing zones were to be limited or sized. Second, the procedures addressing whole effluent toxicity (WET) testing allowed the use of less

sensitive organisms than recommended in the testing methodology and did not identify any circumstances when WET limitations would be placed in NPDES permits when there was reasonable potential to violate the State's narrative water quality criteria. Third, the procedures specified a "lesser level of evaluation" for minor permits than is specified for major permits. Finally, the procedures did not include provisions addressing site-specific water quality criteria development, the issuance of variances or the manner by which the State would measure and evaluate socio-economic impacts.

In its 1999 revisions to its water quality standards, Kansas significantly revised its implementation procedures (*Kansas Implementation Procedures: Surface Water*, June 1, 1999) and corrected the deficiencies identified in EPA's 1998 disapproval letter. Additionally, the State incorporated its implementation procedures into the State's water quality regulations at K.A.R. 28-16-28b(cc). These revised implementation procedures, to the extent they addressed water quality standards implementation, were reviewed by EPA and approved on January 19, 2000.

IV. What Federal Water Quality Standards Is EPA Proposing in Response to Its 1998 Disapproval?

A. Designated Uses

1. Background

Section 101(a)(2) of the CWA establishes as a national goal "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and * * * recreation in and on the water," wherever attainable. This national goal is commonly referred to as the "fishable/swimmable" goal of the CWA. (Hereafter, the fishable/swimmable goals are referred to as CWA section 101(a) goal uses.) Section 303(c)(2)(A) requires State water quality standards to "protect the public health and welfare, enhance the quality of water, and serve the purposes of this Act." EPA's regulations at 40 CFR part 131 interpret and implement these CWA provisions by requiring that water quality standards provide for CWA section 101(a) goal uses unless those uses have been shown to be unattainable, effectively creating a rebuttable presumption of attainability, i.e., a default designation of CWA section 101(a) goal uses should apply. The me
reb Senate Agriculture Committee
att: Date / - 30 - 01

Under 40 CFR 131.10(j), States are required to conduct a use attainability analysis (UAA) whenever the State designates or has designated uses that do not include the CWA section 101(a) goal uses, or when the State wishes to remove CWA section 101(a) goal uses, or when it adopts subcategories of uses that require less stringent criteria. Uses are considered by EPA to be attainable, at a minimum, if the uses can be achieved (1) when effluent limitations under section 301(b)(1)(A) and (B) and section 306 are imposed on point source dischargers, and (2) when cost effective and reasonable best management practices are imposed on nonpoint source dischargers. See 40 CFR 131.10(d). EPA's regulations at 40 CFR 131.10 list grounds upon which to base a finding that attaining the designated use is not feasible, as long as the designated use is not an existing use. A UAA is defined in 40 CFR 131.3(g) as a "structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors." In a UAA, the physical, chemical and biological factors affecting the attainment of a use are evaluated through a water body survey and assessment. Guidance on water body survey and assessment techniques is contained in the Technical Support Manual, Volumes I-III: Water Body Surveys and Assessments for Conducting Use Attainability Analyses. Volume I provides information on water bodies in general, Volume II contains information on estuarine systems and Volume III contains information on lake systems. (Volumes I-II, November 1983; Volume III, November 1984). Additional guidance is provided in the Water Quality Standards Handbook: Second Edition (EPA-823-B-94-005, August 1994). Guidance on economic factors affecting the attainment of a use is contained in the Interim Economic Guidance for Water Quality Standards: Workbook (EPA-823-B-95-002, March 1995).

As discussed earlier, EPA regulations effectively establish a "rebuttable presumption" that CWA section 101(a) goal uses are attainable and therefore should apply to a water body unless it is affirmatively demonstrated that such uses are not attainable. EPA adopted this approach in order to help achieve the national goal articulated by Congress that, "wherever attainable," water quality should provide for the "protection and propagation of fish, shellfish and wildlife" and for "recreation in and on the water." CWA 101(a). While facilitating achievement of

Congress' goals, the "rebuttable presumption" approach preserves States' paramount role in establishing water quality standards in weighing any available evidence regarding the attainable uses of a particular water body. The rebuttable presumption approach does not restrict the discretion that States have to determine that CWA section 101(a) goal uses are not, in fact, attainable in a particular case. Rather, if the water quality goals articulated by Congress are not to be met in a particular water body, the regulations simply require that such a determination be based upon a credible, "structured scientific assessment" of use attainability. See 40 CFR 131.3(g) (defining use attainability analysis).

EPA believes that the rebuttable presumption policy reflected in these regulations is an essential foundation for effective implementation of the CWA as a whole. The "use" of a water body is the most fundamental articulation of its role in the aquatic and human environments, and all of the water quality protections established by the CWA follow from the water's designated use. If a use lower than a CWA section 101(a) goal use is designated based on inadequate information or superficial analysis, water quality-based protections that might have enabled the water to achieve the goals articulated by Congress in section 101(a) may not be put in place. As a result, the true potential of the water body may never be realized, and a resource highly valued by Congress and the public may be forever lost.

EPA seeks, through its oversight under section 303(c) of the Act, to ensure that any State's decision to forgo protection of a water body's potential to support CWA section 101(a) goal uses results from an appropriately "structured" analysis of use attainment. Where EPA concludes that the State failed to adequately justify a use designation lower than a CWA section 101(a) goal use designation, EPA disapproves the use designation. In some cases, the State may decide to revise its use classifications to protect CWA section 101(a) goal uses. In other cases, the State may decide to conduct a more thorough analysis of use attainability sufficient to rebut the rebuttable presumption reflected in the regulations. Where, however, a State does neither, federally promulgated CWA section 101(a) goal uses will ensure the water quality goals of the Act are effectively implemented.

2. EPA Review of Kansas' Use Designations

When Kansas submitted its revised standards to EPA on October 31, 1994, it also submitted the *Kansas Surface Water Register*, which contains the listing of all streams, lakes and wetlands classified under the State's water quality standards, individual water body locational data and all designated uses for each stream segment, wetland and lake. The *Register*, adopted by reference at K.A.R. 28-16-28d(c)(2), greatly expanded the number of streams previously designated under the 1985 Kansas standards, dividing each original stream segment into multiple parts, with independent designations for each newly identified segment. Given both the extensive restructuring of the citations for classified stream segments and the creation of the *Register* separate from the K.A.R., EPA treated all of the 1994 use designations as new or revised water quality standards subject to EPA approval under section 303(c)(3) of the CWA. In the 1994 revision to Kansas' water quality standards, the State listed a number of streams and lakes that it determined did not support a primary contact recreation use or aquatic life protection use, or that were simply undesignated because Kansas reported that it had limited or no field information to make a CWA section 101(a) goal use designation. In 1998, of these waters, EPA disapproved nine water body designations because it determined that the use attainability analyses submitted by Kansas were inadequate, and it disapproved one water body designation for which the State failed to submit a use attainability analysis to justify the omission of the CWA section 101(a) goal uses. EPA also disapproved Kansas' failure to designate any uses at all for another 1,475 waters.

Since the early 1980's, EPA has identified the State's lack of justification for waters not designated with section 101(a) goal uses, particularly primary contact recreation, as a significant issue that must be addressed. EPA approved the 1985 revisions to the Kansas water quality standards on June 19, 1986, based on "completion of the statewide use attainability analyses in accordance with the KDHE schedule submitted to EPA, dated May 2, 1986." These analyses were to address all surface waters that the State did not designate for primary contact recreational use. The schedule of planned use attainability analyses submitted by KDHE and accepted by EPA provided for completion of this task by 1991. Kansas has performed a number of use attainability analyses since the adoption

of the 1994 Water Quality Standards. As part of its 1998 approval action, EPA approved over 300 revised use designations as a result of those use attainability analyses that were submitted. However, Kansas did not include supporting use attainability analyses for all the surface waters that the State did not designate for primary contact recreation. EPA therefore disapproved those use designations as being inconsistent with 40 CFR 131.10(g).

3. EPA Proposal To Promulgate Federal Designated Uses for Specific Stream Segments and Lakes

Subsequently, in 1999, Kansas adopted, and submitted to EPA, use designations consistent with the CWA and EPA's implementing regulations for two streams and 14 lakes for which EPA had previously disapproved use designations. On January 19, 2000, EPA approved these revised use designations. Kansas also identified in its 1999 submittal, and EPA approved on January 19, 2000, the deletion of seven water bodies due to errors in their original identification. EPA also identified, in its January 2000 letter, one stream segment in Kansas that is located totally within Indian country, over which Kansas has not demonstrated jurisdiction for CWA purposes. In preparing today's proposed rulemaking, EPA also identified four waterbodies the Agency inadvertently counted twice in its 1998 disapproval action. Accordingly, in today's action, EPA is proposing to promulgate primary contact use designations for 1,456 stream segments and lakes and the State's expected aquatic life use designation for one stream segment.

When proposing replacement Federal water quality standards, EPA must follow the same rebuttable presumption approach that applies under the regulation to State decision-making (40 CFR 131.22). EPA does not believe it would be appropriate to alter the current approach to establishing use designations under 40 CFR part 131 merely because the forum for decision-making has changed from the State to the Federal level. Attaining the goals articulated by Congress is no less important when EPA, as opposed to a State, is making use designation determinations. Moreover, EPA believes that failure to apply the rebuttable presumption in the Federal context could undermine how that presumption currently applies to State decision-making under the Federal regulations. If the presumption did not apply equally in the State and Federal decision-making process, a State could effectively

shift the burden of demonstrating attainability simply by failing to adequately justify its use designation and thereby triggering a Federal rulemaking proceeding.

EPA's approach in this proposed rulemaking does not undermine the State's primary role in designating uses for waters in Kansas. If, prior to EPA finalizing this rule, the State undertakes a sound analysis of use attainability for the waters subject to this proposal that takes into account appropriate biological, chemical and physical factors, and concludes that the CWA section 101(a) goal uses are not attainable for these waters, EPA would approve the State's action and would not promulgate CWA section 101(a) goal use designations for those waters. EPA is soliciting public comment and information on the attainability of the proposed Federal uses for the water bodies listed in proposed 40 CFR 131.34 (g) and (h). EPA also encourages the State to continue evaluating the appropriate use designations for these waters. The State of Kansas has performed a number of use attainability analyses (UAAs) since the adoption of the 1994 Water Quality Standards. As part of the 1998 approval action, EPA approved over 300 revised use designations as a result of those UAAs submitted to EPA. As part of the State's commitment to review uses, Kansas is updating and standardizing the protocols for performing UAAs through a public process. Four public forums were held by the State to present the revised UAA protocols to the public. Improvements to the State's methods of performing use attainability analyses also implements recommendations made by the Kansas Special Commission of Water Quality Standards. Kansas expects to complete this process in the Summer of 2000. EPA will review any future UAAs submitted by the State with the same level of rigor as it has reviewed previous UAAs submitted by the State. EPA's proposal of designated uses based on the rebuttable presumption does not affect the substance of EPA's review of State UAAs. If further data indicates that this presumption is not appropriate for particular water bodies, EPA's final rule will be revised accordingly. In particular, if EPA determines, based on the record, that any of Kansas' designations are justified, there will be no need for Federally promulgated use designations for those particular water bodies. EPA believes that this approach is reasonable because it is consistent with the goals in section 101(a)(2) of the

CWA and the implementing regulations at 40 CFR part 131.

Kansas' use classification system includes a variety of designated uses for its waters, including "domestic water supply," "agricultural water supply," "special aquatic life," "expected aquatic life," "restricted aquatic life," "primary contact recreation," and "food procurement." Kansas water quality standards identify three subcategories of aquatic life uses for Kansas' surface waters: Special aquatic life use waters, expected aquatic life use waters, and restricted aquatic life use waters. The Kansas water quality standards define "expected aquatic life use waters" as "surface waters containing habitat types and indigenous biota commonly found or expected in the State." Further, the Kansas Surface Water Register includes the expected aquatic life use designation for the majority of surface waters in the State. EPA's approach in proposing designated uses for 1,457 of the water bodies is to select uses from Kansas' system that correspond to CWA section 101(a) goal uses. This approach meets the requirements of the CWA while deferring to the State's approach for defining 101(a) goal uses.

a. *Expected Aquatic Life*

EPA is proposing to promulgate an aquatic life use designation for one stream segment, Whiskey Creek, that the State designated for a restricted aquatic life use in 1994 without a supporting UAA. Subsequently, the State submitted a UAA documenting its designation decision for Whiskey Creek on December 23, 1997. The basis for this designation was the State's determination that poor water quality, associated with the discharge from a wastewater treatment facility, limited the attainment of an expected aquatic life use. The State's determination was not consistent with Federal regulations at 40 CFR 131.10, which require that at least one of six reasons be met to justify uses less than CWA section 101(a) uses or downgrades in designated uses. The reason supplied by Kansas was not one of the six possible bases specified in the regulation. Therefore, EPA disapproved Kansas' use designation for Whiskey Creek in 1998.

Because the State assigns the expected aquatic life use category to a majority of its surface waters, and there is no information to indicate that Whiskey Creek contains other than common habitat types and indigenous biota, EPA believes that an expected aquatic life use designation is appropriate for aquatic life in Whiskey Creek. Therefore, EPA proposes to designate Whiskey Creek for expected aquatic life.

This water is identified in proposed 131.34 (g).

b. Primary Contact Recreation

EPA is proposing to promulgate primary contact recreation use designations for 1,456 waters in Kansas. In its 1998 action, EPA disapproved the absence of a primary contact recreation use designation for 1,484 water bodies. Of these waters, EPA disapproved nine water bodies' use designations because of inadequate use attainability analyses. For the remainder, which under Kansas' water quality standards received default protection for secondary contact recreational use, see K.A.R. 28-16-28d(c)(1), the State provided no documentation regarding the absence of a primary contact recreation use. Therefore, EPA proposes to promulgate primary contact recreation use designations for 1,456 waters in Kansas. These waters are identified in proposed 40 CFR 131.34(h).

The designation of primary contact recreation uses in this proposed rule is not intended to apply to waters within Indian country. The 1999 *Kansas Surface Water Register* includes some stream segments that may be located wholly or partly in Indian country. EPA approval of designated uses for waters in Kansas has never been intended to apply to any waters located within Indian country because EPA has not analyzed or approved the State's authority to adopt water quality standards for waters in Indian country. In its January 19, 2000, letter, EPA recommended that the State clarify this matter by amending the Kansas Surface Water Register to specify that the State's water quality standards do not apply to any portions of waters located in Indian country. EPA is working with Tribes in Region VII to identify those Tribes that may consider seeking authorization to administer the water quality standards program under the CWA. That effort is part of a national effort to ensure there are water quality standards for Indian Country waters.

4. Request for Comment and Data

EPA believes the proposed designated uses in today's rule are appropriate considering the requirements of the CWA and EPA's implementing regulations and the absence of data and information supporting the State's designation of less stringent uses. EPA solicits any additional data and information that may further support or refute the attainability of today's proposed designated uses. The Agency will evaluate any data and information submitted to EPA by the close of the public comment period with regard to

designating uses for these 1,457 stream segments and lakes. After full consideration of such information, EPA will make a final decision whether the designated uses in today's proposal are appropriate. To assist commenters, the following paragraphs provide guidance on the type of information EPA considers to be most important.

EPA is seeking information that would assist in determining for each of the waters identified in proposed 40 CFR 131.34(g) and (h) whether the proposed designated uses are currently being attained or have been attained since November 28, 1975; whether natural conditions or features or human-caused conditions prevent the attainment of these uses and whether these conditions can or cannot be remedied or would cause more environmental damage to correct than to leave in place; and whether controls more stringent than those required by sections 301(b) and 306 of the CWA would be needed to attain the uses, and, if imposed, whether they would result in substantial and widespread social and economic impact to the community. A general discussion of the types of data/information requested by the Agency follows.

Ambient Monitoring Information: (1) Any in-stream data for any of the stream segments listed in 40 CFR 131.34 (g) and (h) reflecting either natural conditions (e.g., in-stream flow data or other data relating to stream hydrology) or irretrievable human-caused conditions that cannot be remedied and that prevent the uses or water quality criteria from being attained; (2) any available in-stream biological data; (3) any chemical and biological monitoring data that verify improvements to water quality as a result of treatment plant/facility upgrades and/or expansions; and (4) any in-stream data reflecting nonpoint sources of pollution or best management practices that have been implemented for nonpoint source control.

Current and Historical Effluent Data: (1) Any data and information relating to mass loadings from point source discharges of pollutants such as BOD, NH₃-N, chlorine, metals (e.g., arsenic, cadmium, chromium, copper, lead, mercury, nickel, silver, zinc), other toxics (e.g., volatile organic chemicals such as benzene or toluene, acid extractables such as pentachlorophenol, base neutrals such as anthracene, fluorine or pyrene, and pesticides such as aldrin, lindane, DDT, dieldrin, endrin and toxaphene); (2) data and information related to facility or treatment plant effluent quality; and (3) any information related to releases of pollutants from other sources such as

landfills, transportation facilities, construction sites, agriculture/silviculture, incinerators, and contaminated sediments.

Water Quality Modeling Information:

(1) Any data or information on analytical models that can be used to evaluate or predict stream quality, flow, morphology; (2) any physical, biological or chemical characteristics relating to designated uses; and (3) the results of any such models that can be used to evaluate the attainment of designated uses.

Economic Data: any information relating to costs and benefits associated with or incurred as a result of facility or treatment plant expansions or upgrades. This information includes: (1) Qualitative descriptions or quantitative estimates of any costs and benefits associated with facility or treatment plant expansions or upgrades, or associated with facilities or treatment plants meeting limits; (2) any information on costs to households in the community with facility or treatment plant expansions or upgrades, whether through an increase in user fees, an increase in taxes, or a combination of both; (3) descriptions of the geographical area affected; (4) any changes in median household income, employment, and overall net debt as a percent of full market value of taxable property; and (5) any effects of changes in tax revenues if the private-sector entity were to go out of business, including changes in income to the community if workers lose their jobs, and effects on other businesses both directly and indirectly influenced by the continued operation of the private sector entity.

B. Stream Design Flow

1. Background

The 1985 Kansas water quality standards at K.A.R. 28-16-28c(c)(1) specified conditions for the application of numeric water quality criteria to State waters, including stream flows below which numeric criteria did not apply (i.e., the 7Q10 or 1 cubic foot per second (cfs)). The 1985 provisions at K.A.R. 28-16-28c(b), describing the allocation of dilution for discharges to classified streams based on the use of mixing zones, did not specify a stream design flow. Revisions to the 1985 Kansas water quality standards at K.A.R. 28-16-28c(c)(1) in 1994 introduced a stream design flow of an "assumed 7Q10" in addition to a "measured 7Q10," defining the stream flow below which numeric criteria do not apply. Under the 1994 revisions, an "assumed 7Q10" of either 1 cfs or 0.1 cfs



FACT SHEET

Proposed Rule for Kansas Water Quality Standards—Rescheduling of Public Hearings and Extension of the Public Comment Period

Summary

In response to concerns raised by stakeholders, the Environmental Protection Agency (EPA) is rescheduling the public hearings originally scheduled for July 27, 2000, to September 13 and 14, and extending the public comment period from September 1, to October 16, 2000 for the proposed water quality standards for the State of Kansas. The original proposal was published in the Federal Register on Monday, July 3, 2000, and the proposed rules have not changed. If promulgated as final standards, they would supersede aspects of Kansas's water quality standards that EPA disapproved in 1998. EPA is taking this action because certain provisions of Kansas's water quality standards are inconsistent with the Clean Water Act (CWA) and EPA's implementing regulations.

Background

Under the CWA, States and Tribes have the primary responsibility for developing and implementing water quality standards. The CWA requires that States and Tribes review their standards at least once every three years and submit the results to EPA for its review. EPA is required to either approve or disapprove such standards, depending on whether they meet the requirements of the CWA. Where EPA disapproves a standard, and the State or Tribe does not revise the standard to meet EPA's objection, the CWA requires the Agency to promptly propose substitute federal standards and to promulgate final federal standards 90 days thereafter.

In October 1994, Kansas submitted water quality standards to EPA for review and approval. In February 1998, EPA approved most of the State's new or revised standards, and disapproved certain provisions which were inconsistent with the CWA and EPA's implementing regulations.

In June 1999, Kansas completed a triennial review of its water quality standards. As part of that review, Kansas adopted revised water quality standards. Kansas submitted these revised standards for EPA review and approval in August 1999. In its submission, Kansas changed several provisions previously disapproved by EPA in February 1998. On January 19, 2000, EPA approved most of these new or revised portions of the States' water quality standards. EPA's approval of these new or revised standards eliminated the need for a Federal promulgation to correct many of the previously disapproved provisions. The July 3, 2000 proposed rules address the remaining standards disapproved by EPA in its 1998 action by promulgate final federal standards for the State of Kansas.

Senate Agriculture Committee
Date 1-30-01

Attachment # 12-1 thru 2-13

Today's Action

EPA originally established a deadline of September 1, 2000, for the submission of comments on this proposed rule. In response to concerns raised by stakeholders, EPA is extending the comment period until Monday, October 16, 2000. It is EPA's intent to provide the public and all stakeholders an adequate period of time to fully analyze the issues, to prepare comprehensive comments and to assemble any available data. Furthermore, EPA is changing the date and locations of the public hearings from July 27, 2000 to September 13 and 14, 2000, to provide increased notice time to allow interested parties to accommodate the hearing times and locations into their schedules.

The first public hearing will be held on Wednesday, September 13, 2000, at 6:30-9:00 p.m. (CDT) in the Museum Classroom of the Kansas Center for Historical Research at 6425 S.W. 6th Avenue in Topeka, Kansas. The telephone number for the Kansas Center for Historical Research is 785-272-8681. The second public hearing will be held on Thursday, September 14, at 6:30 - 9:00 p.m. (CDT) in the Convention Center of the Best Western Silver Spur at 1510 West Wyatt Earp Boulevard in Dodge City, Kansas. The telephone number of the Best Western Silver Spur is 316-227-2125.

As indicated previously, Kansas remedied several of the water quality related issues that EPA disapproved in 1998. However, Kansas did not fix all of the disapproved items so EPA is proposing to promulgate federal standards. These standards would provide:

- that all discharges to stream segments for which continuous flow is sustained primarily through the discharge of treated effluent shall protect the States' designated uses;
- that scientifically defensible design flows approved by EPA shall be used to implement the State's chronic and acute aquatic life criteria;
- an aquatic life use for one stream segment and a primary contact recreation use for 1,292 stream segments and 164 lakes;
- implementation procedures for use when applying the States' antidegradation policy to determine whether to allow a lowering of surface water quality by point sources of pollution where nonpoint sources also contribute the pollutant of concern to that body of water.

In addition, the EPA Administrator, under her discretionary authority to address State standards that are determined inconsistent with the CWA, EPA is also proposing to promulgate federal standards that would provide:

- that water quality standards in Kansas apply to all privately owned surface waters in Kansas that are waters of the U.S.; and
- numeric human health criteria for alpha- and beta-endosulfan.

Costs and Benefits

This proposed rule would have no direct impact on any entity because the proposed rule, once finalized, will simply establish water quality standards (e.g., ambient water quality criteria) which by themselves do not impose any costs. These standards, however, may serve as a basis for development of NPDES permit limits. In Kansas, the State is the NPDES permitting authority and retains considerable discretion in implementing standards. Thus, until the State implements these water quality standards, there will be no effect on any entity. Nonetheless, EPA prepared a preliminary analysis to evaluate potential costs to NPDES dischargers in Kansas associated with future State implementation of EPA's Federal standards. The total estimated, annualized, statewide costs of the proposed rule are approximately \$2,000,000. The bulk of the costs are attributable to the need for dischargers to install disinfection to meet the State's bacteria criteria for the primary contact recreation use being proposed for 1,456 waters. The proposed rule will help ensure that discharges to streams and lakes in Kansas will meet the State's bacteria criteria for recreation in and on the water. The proposed rule will also help to ensure that aquatic life are adequately protected and safe to consume.

Additional Information

EPA is seeking input from the public regarding the proposed federal water quality standards for Kansas. These comments and any additional information relevant to EPA's proposal can be provided at the public hearings or in writing. For more information, please call Ann Jacobs at 913-551-7930 or the Region 7 toll-free Environmental Action line at 800-223-0425. Please submit your written comments to Ann Jacobs at: U.S. Environmental Protection Agency, Region 7, Water Resources Protection Branch, 901 North 5th Street, Kansas City, Kansas, 66101, or through e-mail at jacobs.ann@epa.gov.

You may view the *Federal Register* notices for this proposed rule, on the Internet at: <http://www.epa.gov/OST/standards/kansas>. The *Federal Register* notice gives complete information on how to obtain additional information and how to review the complete administrative record for this proposed rule.

FAQs



EPA Proposal Regarding Water Quality Standards for Kansas

September 2000

Following are frequently asked questions about water quality standards proposed for Kansas by the U.S. Environmental Protection Agency (EPA):

Q. Why is EPA proposing federal water quality standards in Kansas?

A. The federal Clean Water Act (CWA) requires EPA to approve or disapprove state water quality standards when the state revises its standards and submits them to EPA for review. EPA must then "promptly" prepare and publish proposed federal replacement standards if the agency finds that the revised standards are inconsistent with the CWA and its implementing regulations. The CWA also requires EPA to issue replacement standards as federal regulations if the state does not revise its standards. EPA must publish the proposed federal regulations and give due consideration to public comment before issuing the replacement standards.

The Kansas Department of Health and Environment (KDHE) has worked very hard to improve the quality of water for the citizens of Kansas. EPA's proposal to issue a handful of standards to ensure that all of the requirements of the CWA are met does not diminish the great strides Kansas has taken to improve its water quality standards. EPA has and will continue to work with Kansas to resolve these water quality issues.

(A number of federal water quality standards already exist in Kansas. EPA, under the National Toxics Rule, issued water quality criteria for toxic pollutants for Kansas and several other states where they lacked specific water quality criteria. EPA will remove Kansas and those other states from the National

Toxics Rule when they adopt water quality criteria for the pollutants in their state water quality standards.)

PRIVATE WATERS

Q. What does the Kansas regulation say about private waters, and why did EPA disapprove it?

A. The Kansas regulation excludes from the state's water quality standards any "freshwater reservoir and farm pond" that is privately owned, with all surrounding land under common ownership, unless such waters are open to the public for use. The Kansas regulation is based on state law. EPA disapproved this provision because of the possibility that some of these excluded waters could be "waters of the United States."

The CWA and water quality standards based on the CWA apply to "waters of the United States." Some waters of the United States may be excluded when a category of waters, such as reservoirs, are excluded. EPA has not identified any privately held waters of the United States in Kansas, but the provision conflicts with the CWA.

EPA alerted the state in 1987 that this provision was inconsistent with the CWA. EPA, in disapproving the Kansas regulations concerning private waters, performed its own review and considered an earlier opinion by the Kansas attorney general. The attorney general issued an opinion in October 1987 that stated:

"We believe that situations could arise in which a discharge would be prohibited by federal law, but not prohibited by state law. For example, if a pond or reservoir is so constructed as to preclude seepage or discharge from the body of water into waters of the state, and a water quality standard is not designed to protect the health of persons using the pond or reservoir, then such a water quality standard would not apply to the pond or reservoir. However that pond or reservoir could theoretically be a navigable water, into which the unpermitted discharge of pollutants is prohibited by federal law. Therefore, it is our opinion that the state law is not as broad as the federal law in this area."

Although KDHE proposed an amendment to Kansas law to correct this provision in the early 1990s, no revision to the state law or regulation was made.

Therefore, EPA is proposing a regulation to ensure that all waters of the United States are protected by the Kansas water quality standards.

Q. What is the definition of a "water of the United States?"

A. Waters of the United States are defined as:

(a) All waters which are currently used, were used in the past or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (b) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. [Note: This next sentence was suspended in 1980. "This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States."]

Wetlands means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(Source: Code of Federal Regulations 40 Part 122)

Q. Are any water bodies, such as farm ponds, specifically excluded from the definition of waters of the United States?

A. There are no regulatory definitions of excluded waters. The U.S. Corps of Engineers and EPA, however, included in preambles to their regulations a description of waters that would generally be excluded from consideration as water of the United States. Among the waters generally excluded are "artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing."

Q. Are there some examples of waters wholly on private properties that could also be "waters of the United States?"

A. Yes. Waters from which fish could be taken and sold for interstate purposes or are used by interstate travelers for recreational purposes, such as private recreational lakes used by tourists, or waters used by migratory birds, such as wetlands, are considered waters of the United States. In contrast, livestock and other farm ponds created by excavating dry land -- and waste treatment systems created in uplands -- generally are not considered "waters of the United States." Whether a water body is a water of the United States is determined on a case-by-case, as-needed basis.

Q. What is EPA proposing for private waters?

A. EPA is proposing to make state water quality standards applicable to all waters of the United States, whether on public or private land. This essentially narrows the state exclusion so that all waters of the United States are protected by water quality standards, should the need arise. This would allow privately

owned waters that are not waters of the United States to remain exempt from the state's water quality standards.

Q. What would be the likely effect of EPA's proposal for private waters?

A. In practical terms, the overall effect is likely to be small, if any, for a combination of reasons.

EPA has not identified any specific waters that would be affected by the proposal and has no plans to search for any.

If there are any waters on private land that have significant beneficial uses, the state is likely to classify the waters to protect their beneficial uses (and may have already done so).

If a landowner is using the water in question for interstate commerce (e.g., to raise fish), the owner is likely to want to maintain the beneficial uses to protect the business.

The reason for the proposed rule is this: A surface water in Kansas might become polluted at some time in the future. If, at that time, the water is determined to be a water of the United States, EPA and the state could work to improve the quality of that water.

Q. Has EPA taken similar actions in any other states? If so, what has been the outcome?

A. Yes. EPA developed similar language for Idaho. No special effort has been made to determine which private waters are waters of the United States in the three years that the federal rule has been in place.

Q. Would this federal regulation mean that the state or EPA would travel around the state to determine which private waters are waters of the United States?

A. No. The CWA establishes the basic limit of protection for waters of the United States. The Kansas standard, as it is written, excludes privately owned "freshwater reservoirs and farm ponds" from state water quality standards. The federal rule simply proposes that if those private waters, such as reservoirs, are

waters of the United States, then state water quality standards apply to them. EPA will not make a special effort to determine which surface waters in Kansas are (or are not) waters of the United States.

DESIGNATED BENEFICIAL USES: UPGRADE OF PRIMARY CONTACT RECREATION

Q. Why is EPA proposing primary contact recreation use designations for approximately 1,400 classified waters in Kansas?

A. The CWA assumes that waters of the United States will support primary contact recreation (swimming) unless information about that water body demonstrates that it will not. Approximately 1400 classified water bodies in Kansas are not designated as primary contact recreation, and Kansas has not provided information to EPA to demonstrate that they will not support this use. The designation of primary contact recreation for these water bodies has been an issue in Kansas since 1984.

Kansas has a program specifically set up to determine the appropriate uses for a water body, and, in 1986, Kansas did begin performing a large number of use attainability analyses (UAAs) for waters that were not designated for primary contact recreation. EPA has approved the vast majority of those use changes.

A UAA is used to determine the specific conditions of each water that may affect its use. Examples would be natural contamination, irreversible human made conditions, or too little flow to support aquatic life. A UAA may be a simple or complex review, depending on the circumstances of the water being reviewed. For example, if a stream is dry for most of the year, not much more information is needed.

However, Kansas has not performed the necessary UAAs to address approximately 1,400 classified water bodies. EPA is therefore proposing primary contact designations for those waters because no contrary information has been gathered about their quality or appropriate uses.

Recent revisions to the Kansas UAA protocol provide a detailed explanation of how a UAA should be conducted and what kinds of information are needed to conduct a UAA. This revised UAA protocol allows entities other than the state to conduct UAAs. This protocol will lead to consistency in analyses and will provide

predictability to the regulated community. As the UAAs provide new information about the appropriate use of these waters, Kansas may revise its water quality standards to adopt new designated uses and submit them for EPA review.

ECONOMIC ANALYSIS

Q. How did EPA determine the potential costs of this rule?

A. EPA asked KDHE for specific information to help to determine the potential economic impact of the proposed rule on the regulated community. EPA looked at past permitting information for facilities and municipalities and compared the past permit limits to the potential costs if the rule were to be finalized. EPA considered the use upgrades likely to result and how a potential upgrade would translate to more or different water quality treatment practices. EPA also made conservative assumptions where it had little information. EPA acknowledged in the proposed rule that it could not get all of the information it needed to perform the economic analyses and has asked the public for information during the public comment period. EPA is working with Kansas to gather more permitting information that will help in developing the final rule.

Q. What is the effect of these rules on farmers?

A. Normal farming practices are not regulated by EPA under the CWA. That is why EPA does not believe these rules will have a direct effect on farmers. Kansas has programs and legal authority to address point and non-point sources of pollution and has discretion to determine how to use these programs to ensure water quality standards are met.

Q. Will the potential costs of this rule play a role in any final federal regulations?

A. EPA provides an economic analysis to inform the public of potential costs associated with implementing a federal regulation. The cost analysis is for information purposes only. While economic factors may be considered in designating uses, scientific and technical factors must justify criteria to meet those uses. For example, actual facility-specific and community-specific cost data is taken into consideration by the state at the time a regulatory decision needs to be made, such as when issuing a pollutant discharge permit. The state may decide

at that time, based on the cost information, that certain standards are not appropriate for a particular water body and that regulatory relief is warranted. The state may choose to revise a designated use or develop site-specific water quality criteria. The state may also grant a variance until a facility is able to meet the water quality standard. The state may also develop an alternate stream design flow or authorize an alternate mixing zone. Kansas would retain significant flexibility to take costs into consideration when issuing permits or establishing total maximum daily pollutant loads a water can accept, even if the federal rule goes into effect.

EFFLUENT CREATED HABITAT PROVISION

Q. Why should water quality standards apply to effluent dominated streams?

A. The presumed fishable/swimmable use for a water may be changed with stream-specific data and information. EPA's concern is that streams not be used for waste transport and that full public participation be ensured before lowering a water body's level of protection.

The Kansas water quality standards included a mechanism to gather the necessary information. It appears, however, that the state did not intend to adopt the use change in its water quality standards before issuing a permit based on that information. EPA is proposing that Kansas adopt the results of the state's analysis in their water quality standards and provide the public and affected stakeholders an opportunity to comment on the information before the decision takes effect in a permit.

ANTI-DEGRADATION IMPLEMENTATION PROCEDURES

Q. Is EPA trying to regulate non-point source pollution in Kansas?

A. EPA is not trying to regulate non-point sources of pollution in Kansas. EPA does not have the authority to regulate non-point sources of pollution under the CWA. However, where states have non-point source authority, EPA may ensure that it is implemented. EPA's proposed anti-degradation implementation policy is intended to ensure that the state uses its own authorities and programs to control pollution, whether it is from a point source or a non-point source. This proposed rule does not create any new authority for either EPA or the state.

Q. What is anti-degradation, and what is EPA proposing?

A. The anti-degradation implementation procedures are very important for ensuring that existing water quality is protected, even where water quality is better than the minimum required. Kansas has its own authority to address non-point sources of pollution, including voluntary and incentive-based approaches. EPA, by proposing this rule, would ensure that the state uses its own programs, established under state authority, to address non-point source pollution before authorizing certain increases in point-source discharges of pollution.

The effect of this rule on landowners would be determined by the state's non-point source programs and its authorities established under state law.

WATER QUALITY CRITERIA

Q. What are alpha and beta endosulfans and why is EPA proposing to promulgate water quality criteria for these two pollutants?

A. Alpha and beta endosulfans are broad-spectrum insecticides in a group of compounds called polycyclic chlorinated hydrocarbons. Both compounds are restricted in their usage, but significant commercial use of the compounds for insect control on vegetables, fruits, and tobacco continues. EPA is proposing water quality criteria for these two toxic pollutants because Kansas does not have criteria to protect human health from these pollutants. Kansas is proposing criteria for these two pollutants, which may remove the need for these federal water quality criteria.

ASSUMED FLOW PROVISION

Q. What is the assumed flow provision, and why is EPA proposing to establish design flows for Kansas?

A. Kansas has a provision in its water quality standards that allows for the use of "assumed flows" rather than actual stream flows in the calculation of National Pollutant Discharge Elimination System permit limits. This provision results in an assumption that stream flow is available to dilute pollutants when, in actuality, the

stream may be dry. If the stream is dry, the higher concentrations of pollutants in the stream may endanger aquatic life. The calculation of permits based on stream flow that does not exist may fail to protect aquatic life and is not scientifically justified. Numeric water quality criteria are developed on the presumption that actual stream flow data will be the basis of a permit. The concern is that water quality criteria would be violated more often than they should be and that aquatic life would not be protected. The proposed rule allows the state the flexibility to use several stream design flows for acute and chronic aquatic life criteria to ensure that the water quality criteria are met and aquatic life is protected.

Q. What will be the economic impact of this rule on my community?

A. EPA is continuing to gather permitting data from Kansas regarding facilities that discharge to streams with very low flow. There is uncertainty about the economic effects on specific communities because the state has flexibility in determining how this provision would be implemented. The state may choose, for example, to revise a designated use or develop a site-specific water quality criterion. The state may also grant a variance until a facility is able to meet the water quality standard. The state may also develop an alternate stream design flow or authorize an alternate mixing zone.