Approved: February 15, 2001
Date

MINUTES OF THE SENATE NATURAL RESOURCES COMMITTEE.

The meeting was called to order by Chairperson Robert Tyson at 8:30 a.m. on February 8, 2001 in Room 241-N of the Capitol.

All members were present except: all present

Committee staff present: Raney Gilliland, Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Judy Krase, Committee Secretary

Conferees appearing before the committee:

Senator Janis Lee
Jere White, Kansans for Common Sense Water Policy
Dave Murphy, Friends of the KAW
Shelley King, Ks Society of Professional Engineers
Clyde Graeber, Secretary, KDHE

Others attending: See attached list

Senator Huelskamp moved that the minutes from the February 1 and February 2, 2001 meetings be approved, seconded by Senator Umbarger. The motion carried.

Senator Tyson noted that the committee would be hearing **SB 204**. He welcomed everyone and especially those from the Kansas Livestock Assn., who were here participating in KLA's Leadership Conference. He said originally EPA was scheduled to be here to explain the history concerning the water problem in Kansas and how they interpreted the recent Supreme Court case dealing with the farm ponds and small streams of Kansas, but they called and said with the new administration coming in they were told not to comment on anything. Senator Tyson said that seemed like a plus, because it means there may be changes coming.

The first conferee was Senator Lee. She commented that without this or similar legislation, the affect of the classification of streams by the Dept. of Health and Environment, coupled with the EPA proposed regulations, and coupled with the state's TMDL lawsuit agreement, there is the potential that the agricultural industry and the rural communities of our state could be devastated (Attachment 1).

The second conferee was Jere White, a proponent of the bill (Attachment 2). He also handed out *Comments and Requests of the Kansas Agriculture Coalition, October 16, 2000* (Attachment 3). Questions and discussion followed.

The third conferee, an opponent, was Dave Murphy who represented Friends of the KAW (Attachment 4).

The fourth conferee, an opponent, was Shelley King who represented the Kansas Society of Professional Engineers (Attachment 5). Questions and discussion followed.

The next conferee was Clyde Graeber, Secretary, KDHE, who was neutral (Attachment 6). Questions and discussion followed.

The written only testimony handed in was as follows:

Proponents:
Chris Wilson, KS Agricultural Aviation Assn. and KS Seed Industry Assn. (Attachment 7)
Kerri Ebert, KS Agricultural Alliance (Attachment 8)
Leslie Kaufman, KS Farm Bureau (Attachment 9)
Doug Wareham, KS Fertilizer and Chemical Assn. and KS Grain and Feed Assn. (Attachment 10)

Opponents:
Charles Benjamin, KS Chapter of the Sierra Club (Attachment 11)
John Metzler, Johnson County Wastewater (Attachment 12)

Senator Tyson appointed a subcommittee to work on this bill consisting of himself as chairman, and Senators Taddiken, Lee and Huelskamp as members. He stated there would be another hearing on **SB 204** at a future date. The meeting adjourned at 9:30 a.m.

The next meeting is scheduled for February 9 at 8:30 a.m.

SENATE NATURAL RESOURCES COMMITTEE
GUEST LIST
DATE: 2-8-01

NAME	REPRESENTING
Julie Jamison	KGFA
TOM TUNNELL	Kansas Fertilizer & Chem Assn
Doug Wareham	Ks Fert & Chem Assn / Ks. Grain Fed Assn.
Kerri Ebert	KS Dairy Association
Joe Fund	KDHE
Karl Mueldener	"
Mike Tate	Ks. Dep Hlth & Env
Theresa Hodges	" " " "
John Metzler	Johnson County
Eileen Hawk	" "
Shelley Kinser	KSPE
Kristen Wenrich, Volunteer	KS Sierra Club
Steve Swaffar	KS Farm Bureau
Bill Fuller	Kansas Farm Bureau
Leslie Kaufman	Kansas Farm Bureau
Diane Gruver	Kansas Coop Council
Greg Krissek	KS Corn Growers
Scott G. Burkdoll	KLA
Kendal Scheckel	KLA
Dwayne Rowe	KLA
BARB DOWNEY	KLA
David Miller	DOB

SENATE NATURAL RESOURCES COMMITTEE
GUEST LIST
DATE: 02.08.01

NAME	REPRESENTING
DAVE MURPHY	FRIENDS OF THE KAW
Kerry Wedel	State Conservation Commission
Jolene	WU
Cynthia Duijson	KLA
Ben F. Flagler	KLA
Steve Paisley	KLA
Rhonda L. Perry	KLA
Roy Tucker	K.L.A.
Dorie G. Tucker	K.L.A.
Stephen Kalb	KLA
Mark E. Huseman	KLA
Pat Caybell	KLA
James B. Borgerding	KLA
Galen E. Mitchell	KLA
[illegible]	KLA
Kelly Mettler	KLA
John Olee	KLA
Brett Myers	Kansas Assn. of Wheat Growers
DIXIE RUSSELL	KDOC&H
Jim B. Nuttle	KLA
Mike Collinge	KLA
Todd Schumacher	KLA

SENATE NATURAL RESOURCES COMMITTEE
GUEST LIST
DATE: 2-8-01

NAME	REPRESENTING
[illegible]	KLA
Jon Skelton	KLA
Chris Wilson	KAAA

STATE OF KANSAS

SENATOR JANIS K. LEE
ASSISTANT MINORITY LEADER
STATE SENATOR, 36TH DISTRICT
BARTON, ELLSWORTH, JEWELL,
LINCOLN, MITCHELL, OSBORNE,
PHILLIPS, REPUBLIC, RUSSELL
AND SMITH COUNTIES
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(785) 476-2294 HOME
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TOPEKA

SENATE CHAMBER

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

Chairman Tyson and Fellow Committee Members;

Thank you for holding a hearing on this very important issue and thank you for allowing me a few brief remarks.

This proposal is a result of testimony I and several other legislators gave and more importantly the testimony we heard given by many of our farmers and ranchers from across the state who simply cannot understand how water quality regulations can affect their property when there is no running water on that property or how streams on their property can be designated for recreational use when the land is not open for public access.

The proposed new definitions for classified streams in SB 204 are an attempt to correct the overextension of classified waters made by the Dept. of Health and Environment in the 1994 water quality standards. It is clear that the misclassification of both intermittent low flow streams and depressions where there are no waters as classified streams came about because of a convenient map and is not based on any through scientific study. Attempts to regulate dry stream beds, streams that only flow briefly at times of substantial rain, or streams that are not accessible to the public because of their location on private property will lead to a waste of our states' precious financial resources where common sense will show that regulation isn't needed.

It is abundantly clear in the Clean Water Act that it is the legitimate role for the state to define what uses should apply to our water resources. Congress recognized that it was the inherent prerogative of the individual states to decide whether a particular water body should be devoted to "agricultural and industrial uses," "navigation uses," "public water supplies," or the "propagation of fish and wildlife."

When Congress refers to the state it is referring to the legislature as the elected representatives of the people. It is time that this elected body become actively involved in the decision making process of determining the designations of the waters in our state. This is OUR responsibility and duty.

Please understand that our agricultural producers are very interested in clean water. We live, raise our children, and grow are crops in the areas we are discussing.

Senate Natural Resources Committee
Date 2-8-01

Attachment # 1

This proposal will protect streams that have endangered species, and provides for the designation of and stream which merits protection where scientific studies illustrate there is a legitimate need for protection.

Without this or similar legislation, the affect of the classification of streams by the Dept. of Health and Environment, coupled with the EPA proposed regulations, and coupled with the state's TMDL lawsuit agreement, there is the potential that the agricultural industry and the rural communities of our state could be devastated.

My constituents want change - they do not understand how their state government can agree (at least without any sound scientific basis) with something that will so directly affect their bottom line and potentially put them out of business.

Kansans for Common Sense Water Policy

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

Thank you Mr. Chairman and members of the committee for the opportunity to provide testimony today. I am Jere White, spokesperson for the Kansans for Common Sense Water Policy Coalition. Members of this coalition are the Kansas Association of Wheat Growers, Kansas Corn Growers Association, Kansas Dairy Association, Kansas Farm Bureau, Kansas Fertilizer and Chemical Association, Kansas Grain and Feed Association, Kansas Grain Sorghum Producers Association, Kansas Livestock Association, Farmland, Agriliance, and U.S. Premium Beef.

Executive Summary:

We are here today to provide testimony in support of Senate Bill 204 addressing waters of the state. The proposed bill provides a realistic approach to protecting the water quality in streams, lakes, and wetlands in Kansas and allows precious economic resources allocated for that protection to be targeted towards the highest priority watersheds and not towards dry and intermittent streams.

The proposed bill provides a new definition for classified streams that will correct a fundamental problem within the water quality standards. In 1994, at the recommendation of EPA, the state overextended the network of classified streams statewide to include numerous small headwaters and streams in the upper reaches of small and large watersheds. Many of those streams included in that assignment, and currently considered classified, are not streams at all and convey water intermittently or only during significant precipitation events. The new definition ensures only those streams that truly are perennial and are capable of supporting recreational uses, sustaining fully-developed, healthy aquatic communities, contain federal or

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Attachment # 2

state threatened or endangered species, or are used as drinking water supplies will be classified streams and subject to water quality standards. It is clearly the role of the state under the Clean Water Act to define which waters should be classified. Since its 1994 assignment, the state has not acted responsibly in this role; passage of this legislation is the first step toward correcting the problem and the state assuming that responsibility.

The proposed bill also repeals the existing Surface Water Register of classified streams and requires the Kansas Department of Health and Environment to justify the classification of any stream not meeting the new statutory definition. This ensures the existing; flawed registry of classified waters is not grandfathered into the revised definition, which would result in greater chaos and uncertainty than exists now.

Senate Bill 204 redefines two of the seven designated use categories found in the surface water quality standards: agricultural and recreational designated uses. These revised definitions provide a real-life perspective on the actual and historic uses of streams and rivers in Kansas. The new subcategories for recreational uses provide a more accurate characterization to place on many waters of the State, but in no way results in the degradation of the water quality in those streams. The revised definition and new use subcategories for recreation recognize that a stream cannot be used for fishing or swimming if the water depth is insufficient to support those activities. The new definition and subcategories also acknowledges streams where recreational activities are not available because access to the water is restricted by land ownership. The new definition and use subcategories still provide protection of human health in those waters used by the public for recreational activities but does not unnecessarily apply recreational uses to those streams where recreation is not possible because access is not available.

The revised definition for agricultural use appropriately distinguishes conveyances like grassed waterways and storm water ditches, used exclusively for transporting precipitation runoff around and through agriculture lands, should not have other inappropriate designated uses assigned to them like recreation and aquatic life.

Although the bill primarily addresses fundamental problems within Kansas' Surface Water Quality Standards, it also provides solutions to some of the federal water quality standards proposed by EPA last summer. With a new definition for classified waters and new recreational use subcategories, many of the 1292 streams designated for primary contact recreation in EPA's regulations will no longer need to be assessed, because they simply will not meet the new definition of a classified stream. The few streams that do meet the new definition will be assigned more appropriate recreational designated use categories. Additionally, the new definition for classified water also remedies EPA's proposal to remove Kansas' default low flow provision. Application and implementation of the new definition for classified streams will alleviate the large economic burden that could be placed on small Kansas communities should EPA's proposed regulations be finalized.

History of Coalition Involvement in Water Quality Protection:

In the summer of 1999 fourteen agricultural organizations joined together to form the TMDL Working Group. This group was the result of a series of meetings between industry representatives and the Kansas Department of Agriculture, Kansas State University Research and Extension, and State Conservation Commission. The purpose of the group was to educate and inform our respective memberships on the importance of water quality, the proposed total maximum daily loads (TMDLs) and what members could do to protect water quality on their farms and ranches.

The working group held meetings with industry leaders throughout the state, hired a technician to work with landowners, and sought additional funding for state programs to improve water quality. Our main focus was to educate and inform producers of all sizes about the benefits of protecting water quality and programs available to assist producers in meeting water quality standards. In addition, the groups made certain that agricultural interests attended and commented on proposed TMDLs for a number of basins

throughout the state. In short the agricultural organizations were actively engaged in efforts to meet water quality standards.

In the summer of 2000, the focus of the groups' efforts was greatly shifted from one of education and information to defense of individual rights and overly aggressive regulation. On July 3, 2000, EPA proposed water quality standards for Kansas that essentially called for the regulation of farm ponds that were totally surrounded by private property; designation of nearly 1,400 streams and lakes for primary contact recreation; and regulation of nonpoint pollution through an antidegradation policy. These regulations were considered overreaching. The agricultural community viewed the regulations as unnecessary and without authority under the law. The short period of time for response, forced the coalition to shift virtually all efforts to defeating or greatly modifying the regulations.

The coalition participated in informal meetings with EPA and made numerous suggestions as to how the regulations may be improved. During that meeting, it became clear that the coalition would need to file extensive comments. The coalition joined together to hire outside legal counsel to assist in the preparation of comments. The coalition then sought to inform and educate our members on the importance of the proposed regulations and the potential impacts on farms and ranches across the state. Our members were outraged and threatened by the proposed regulations. They demanded that we take all necessary actions to prepare comprehensive comments to EPA. In addition, nearly 1500 farmers and ranchers attended hearings in September expressing their grave concerns with the regulations. The coalition gathered affidavits and photographs of nearly 100 stream segments to illustrate to EPA and KDHE that many streams segments do not meet the definition of a classified stream and certainly would not support any type of recreation. Attached are copies of the comments the Coalition submitted to EPA (exhibits are excluded because of volume).

Since the filing of the comments, Coalition members have met with Governor Graves and appreciate his concerns with the issues. We have also met on several occasions with KDHE staff. We had requested that

KDHE bring forward ideas for improving the classifications and recreational use designations. KDHE did not respond to our requests. In fact we were told in the absence of a request from within the highest levels of the agency or administration, or the Kansas Legislature, such action would not likely take place. In the absence of action, the coalition sought the introduction of SB 204. We understand that the administration has concerns with the bill but stand ready to explain our positions and seek solutions to these problems. This bill primarily focuses on the issue of classification of streams and establishment of recreational uses. The bill does not address the private ponds issue because the Coalition believes current Kansas law and the recent ruling in the *Solid Waste Agency of Northern Cook County v. United States Corp of Engineers,* --S.Ct.—2001 Daily Journal, D.A.R. 267 (Jan. 9,2001) addressed these issues. The bill does not address the antidegradation issues because the Coalition is waiting for clarification of this issue by KDHE and EPA. It is our understanding that there is confusion among the regulators as to what was the intent of EPA.

Background of the Clean Water Act:

Generally, to understand the issue, it's necessary to take a step back and examine how the process began. In 1972, Congress enacted the Clean Water Act (CWA) with the objective of restoring and maintaining the nation's waters.

The act included several objectives designed to protect and improve water quality. A few key points in the document included eliminating discharge of pollutants into navigable waters, creating federal policy for financial assistance on waste treatment projects, developing a national policy for technology research needed to eliminate pollutant discharge and creating programs that reduce non-point pollution.

Water pollution was divided into two categories under CWA: point sources and non-point sources. A point source is any discernible, confined and discrete conveyance from which pollutants are, or may be, discharged. A non-point source is runoff from agriculture, forestry or construction activities.

CWA outlined specific ways the federal government should assist states in improving water quality. This included establishing grant and research programs and prohibiting the discharge of any pollutant except as provided by law. Congress was careful to maintain the states' lead role and primary right to oversee issues involving land and water.

To carry out goals of the act, states were required to establish water quality standards. These standards consisted of designated uses for the navigable waters involved and water quality criteria based upon specific uses. Designated use categories may include public water supplies, propagation of fish and wildlife, recreational, and agricultural.

Specifically, in writing the Clean Water Act, the Congress outlined specific goals and policies for improving the nation's waters. There are several sections of the Clean Water Act (CWA) that are relevant to the discussions of SB 204.

Congress provided in the Congressional declaration of goals and policy section of the CWA, 33 U.S.C. section 1251(b) that

> "*It is the policy of the congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter*. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution. (emphasis added)."

Clearly, Congress intended for the states to have the primary role in planning the development and use of land and water resources within its jurisdiction. Congress also intended for widespread public participation in the process. In subsection (d) of this section Congress wrote:

> "*Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the*

administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes. (emphasis added)"

Kansas, through regulations promulgated by the Kansas Department of Health and Environment, has determined what waters will be classified. The regulation states that "surface waters shall be classified as follows: (1) Classified streams shall include all streams with mean summer base flows exceeding 0.003 cubic meters per second. Regardless of flow, a stream shall be classified if studies conducted or accepted by the department show that pooling of water during periods of zero flow provides important refuges for aquatic life and permits biological recolonization of intermittently flowing segments." The regulation, K.A.R. 28-16-28d(b)(1) defines what lakes and wetlands will be classified.

K.A.R. 28-16-28d(c)(1) provides for assignment of uses to surface waters. The section states:

"At a minimum, all classified surface waters shall be designated for the noncontact recreational use and one of the three categories of aquatic life support use described in K.A.R. 28-16-28d(a)(2). Classified surface water shall be designated for uses based upon the results of use attainability analyses conducted or accepted by the department. The provisions of the federal water quality standards regulation, 40 C.F.R. 131.10 as in effect on July 1, 1993, shall be followed and are hereby adopted by reference."

SB 204 is only intended to address the definition of "classified streams". The coalition does not seek to alter the definitions of "classified wetlands" or "classified lakes." Section 1(a)(7)(i-iii) of SB 204 sets the perimeters to protect streams with actual flows, threatened or endangered species, and streams that KDHE determines need protection after review of scientific data, social and economic impacts. The flow requirements are similar to those used in Nebraska since 1969. The coalition contacted engineers familiar with water quality standards in many states. When asked whether the current Kansas regulations were overprotective, they responded by saying that they knew of no other state that had such a restrictive standard and that they knew of no scientific reason for using the current .003 cubic meters per second level. The coalition strongly supports the language in SB 204 because it will classify streams that actually have water and target state resources to those areas that are truly in need of protection.

Further, during our investigations and reviews of Kansas water quality standards in preparation for comment to EPA this fall, coalition members spent a number of hours visiting with KDHE personnel inquiring why so many stream segments were "classified" and how this classification was done. The department acknowledged that the United States Geological Survey River Reach 2 map was used to determine what streams would be classified. There was little or no field review to determine whether the stream would meet the definition of a classified stream. SB 204 provides that stream segments should not be classified where the department has no evidence that the stream meets the new definition of a classified stream. This only makes sense. The state should not be directing its resources to areas that are not true flowing streams.

Establishment of additional classes of recreational use.

The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Consistent with the provisions of the Act, one of the goals of the CWA is that "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." *Id.* § 1251(a)(2). Congress explicitly stated in the CWA its policy to "recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution. . ." *Id.* § 1251(b).

Pursuant to CWA section 303(c), states are required to develop water quality standards for navigable waters within their jurisdiction. *See id.* § 1313(c). Water quality standards must include designated uses for all water bodies within the state and the water quality criteria to protect the designated uses. *See id.* § 1313(c)(2)(A). The states must ensure that water quality standards "protect the public health or welfare, enhance the quality of water and serve the purposes of" the Act. *Id.* The CWA requires states to establish water quality standards taking into consideration a water body's use and value for "public water supplies,

propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." *Id.* Thus, the CWA provides for the consideration of numerous potential uses and allows for the designation of several compatible uses for the same water body.

Congress deliberately left it to the individual states to "designate" the appropriate uses applicable to each of its water bodies. Congress recognized that it could not possibly determine the appropriate uses for all water bodies throughout the United States and therefore determined that it was the inherent prerogative of the individual states to decide whether a particular water body should be devoted to "agricultural and industrial uses," "navigation uses," "public water supplies," or the "propagation of fish and wildlife." 33 U.S.C. § 1313(c)(2)(A).

Kansas establishes its designated uses of classified waters in K.A.R. 28-16-28d. Uses outlined include food procurement, groundwater recharge use, industrial water supply use, aquatic life support use, special aquatic life use waters, expected aquatic life use, restricted aquatic life use, agricultural, and recreational uses. SB 204 broadens the agricultural use category and creates subcategories of recreational use. The coalition strongly supports these changes.

During the public hearings on EPA's proposed regulations it became apparent that not only did the state classify some stream segments that did not have actual flows, but that the state also designated all classified waters for noncontact recreational use and one of the three categories of aquatic life support use. (K.A.R. 28-16-28d(c.)(1)).

The EPA, in turn stated that these waters should be designated for primary contact recreation. EPA asserts that the CWA contains a "rebuttable presumption" that in the absence of a Use Attainability Analysis ("UAA"), primary contact recreation uses are attainable. However, this "rebuttable presumption" does not exist in the CWA. The language of the Act and Congress' intent do not suggest that such a rebuttable presumption could be consistent with the Act, and nowhere does the Act authorize EPA to create such a

presumption. Moreover, by relying on this asserted "rebuttable presumption," EPA absolves itself of its legal duty to provide clear basis and support for a proposed rule. Finally, to make matters even worse, EPA shifts this legal duty to the citizens of Kansas by asking numerous times in the proposed rule for information, data, and support to rebut EPA's presumption.

EPA attempts to find support for this asserted "rebuttable presumption" in the CWA goal uses of section 101(a)(2). However, the goal language of the CWA does not create a statutory mandate. The language EPA relies upon is simply an "interim goal" that "wherever attainable" water quality should protect and support the propagation of fish, shellfish, and wildlife and provide for recreation in and on the water by July 1, 1983. 33 U.S.C. § 1251(a)(2) (emphasis added). Moreover, even if CWA section 101(a)(2) could create a "rebuttable presumption," it would not create an exclusive presumption for primary contact recreation uses, such as swimming. The goal language speaks to recreation "in and on" the waters of the United States. Most importantly, a "rebuttable presumption" runs contrary to the plain language of CWA section 303(c)(2)(A). CWA section 303(c)(2)(A) does not create a "rebuttable presumption" for primary contact recreation uses for waters of the United States. Instead, CWA section 303(c)(2)(A) requires states to consider many different uses when making use designations for navigable waters within its boundaries.

During the public hearings, and through written comments, the coalition presented evidence that many streams classified by KDHE would not support either secondary or primary contact recreation. The coalition collected pictures and affidavits from nearly 100 landowners whose property contains stream segments classified by KDHE, listed for secondary contact recreation, and whose streams would be designated for primary contact recreation. This process is absurd. Clearly, these pictures and affidavits rebut the presumption of use for primary contact recreation. The coalition also asserts that many of these stream segments would not support secondary contact recreation. In short, recreational use is not appropriate on these streams as there is not enough water to support recreation and/or that these lands are privately held and no public access is allowed therefore no recreational use can be achieved without permission.

SB 204 would put in law what is reality in Kansas. First, by changing the definition of a classified stream, the bill would classify only those streams with flow, threatened or endangered species, or those needing protection based upon scientific reviews. Second, by breaking the recreational use provisions into subcategories, there is recognition of private property rights and an affirmation of state law that nonnavigable waters are not open to the public. The Clean Water Act applies to navigable waters. (See 33U.S.C. 1313(c) (2)(A) and *Solid Waste Agency of Northern Cook County v. United States Army Corp of Engineers, --S.Ct. ---, 2001 Daily Journal D.A.R. 267, (Jan. 9, 2001)*) State law states that nonnavigable waters are not open to the public. This bill combines these realities and states that recreational uses are not attainable on lands that are not open to the public or where there is insufficient flow to support recreational uses. It is not the intent of the coalition that these streams not be listed for other uses. The coalition simply does not support listing of such streams for recreational uses.

Mr. Chairman, members of the committee, we understand that there might be additional work beyond the current provisions of SB 204. Our coalition stands ready to work with the Legislature, Administration, and other stakeholders. But we must remind the committee, that until this bill was introduced, our requests to work for a positive resolution went largely unheeded. On behalf of my colleagues, and the tens of thousands of Kansas citizens and landowners we represent, I ask for the committee's favorable passage of SB 204. Thank you.

U.S. Environmental Protection Agency
Kansas Water Quality Standards
Proposed Rule
40 C.F.R. Part 131
65 Federal Register 41215-41263
July 3, 2000

Comments and Requests
of the
Kansas Agriculture Coalition
October 16, 2000

Kansas Farm Bureau
Kansas Corn Growers Association
Kansas Grain Sorghum Producers Association
Kansas Livestock Association
Kansas Association of Wheat Growers
Kansas Dairy Association
U.S. Premium Beef
Farmland Industries, Inc.
Agriliance, L.L.C.
Kansas Grain and Feed Association
Kansas Fertilizer and Chemical Association
Kansas Agriculture Aviation Association
And Their Individual Members

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I. STATEMENT OF INTEREST

A. Introduction

These Comments and Requests are filed by the Kansas Agriculture Coalition (as defined below) and their individual members in response to Kansas Water Quality Standards ("WQS") proposed by the United States Environmental Protection Agency ("EPA") in the July 3, 2000 Federal Register (65 Fed. Reg. 41215-41263 (July 3, 2000)) (the "proposed rules"). The Kansas Agriculture Coalition has an intense interest in this rulemaking. The impact and injury that the proposed rules, if promulgated, will have on their members is of a magnitude that could threaten the livelihood of members and cause widespread economic harm. The proposed rules represent the first steps in attempts by EPA to impose controls, even enforceable controls, upon the agriculture community and nonpoint source activities through a regulatory regime far beyond what Congress authorized or envisioned under the federal Clean Water Act (33 U.S.C. §§ 1251 et seq.) ("CWA"). The unauthorized and far-reaching fists of the proposed rules are apparent when the implementation of the proposed rules is mapped out. EPA asserts that the proposed rules do not have a direct impact on any entity, but readily admits that the rules will have future impacts and indirect impacts (65 Fed. Reg. at 41228). In fact, the impacts that EPA refers to as "indirect" are "direct" and the impacts that EPA refers to as occurring in the "future" will begin to occur upon promulgation.

The proposed rules, if finalized, will set in place the regulatory basis to grant EPA control over private waters and over land management practices, effectively transforming EPA into a land management agency. EPA's proposed rules are clearly beyond its CWA authority, and are in conflict with other federal and state programs and with the United States Constitution.

These Comments and Requests raise the numerous aspects of the proposed rules that are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, thus making the proposed rules in their entirety an unlawful exercise of agency power.

B. The Interested Associations

The Kansas Farm Bureau, the Kansas Corn Growers Association, the Kansas Grain Sorghum Producers Association, the Kansas Livestock Association, the Kansas Wheat Growers Association, the Kansas Dairy Association, the Kansas Grain and Feed Association, the Kansas Fertilizer and Chemical Association, the Kansas Agricultural Aviation Association, Farmland

Industries, Inc., Agriliance, and US Premium Beef have joined together to make comments on behalf of their individual members and others likely situated and their entire associations. This group is informally called Kansans for Common Sense Water Policy. These groups and their members will be referred to in these Comments and Requests as the Kansas Agriculture Coalition or the Coalition. In addition to these Comments and Requests, many members of the Coalition associations have submitted individual comments in this rulemaking.

1. Kansas Farm Bureau

The Kansas Farm Bureau ("KFB") is a voluntary general farm organization under the Kansas Cooperative Marketing Act, K.S.A. ∋ 17-1601. The purpose of the KFB is to strengthen, develop, and correlate the work of the 105 affiliated county farm bureaus in their efforts to promote: the development of the most profitable and permanent system of agriculture; the most wholesome and satisfactory living conditions; the highest ideals in home and community life; a general interest in the business of farming and in rural life; any activity in connection with the manufacturing, buying, selling, or supplying to or for its members or members of county farm bureaus affiliated with the Kansas Farm Bureau of machinery, equipment, or supplies; and any activity connected with the marketing or selling of the agricultural products of its members and the members of the county farm bureaus. KFB members produce a variety of agricultural products including, but not limited to, livestock, dairy and poultry products, grains, and fruits. The KFB is also interested in the financing of agricultural production entities. KFB is a voluntary organization and has nearly 44,000 members through its affiliated organizations.

2. Kansas Corn Growers Association

The Kansas Corn Growers Association ("KCGA") is a not for profit corporation incorporated under Kansas law. The KCGA is a voluntary trade association whose purpose includes activities such as bringing together all persons interested in the production, marketing, distribution and utilization of corn and corn products; collecting and disseminating information related to the practical and scientific phases of corn production; promoting the development of better varieties and cultural and management practices; encouraging the interests of the federal and state governments, universities, and industry throughout the state in the educational and scientific projects and cooperating in conducting educational campaigns; and rendering all possible service to the general public through wide dissemination of scientific research. KCGA has approximately 1,200 members throughout Kansas.

3. Kansas Grain Sorghum Producers Association

The Kansas Grain Sorghum Producers Association ("KGSPA") is a not for profit corporation incorporated under Kansas law. This voluntary trade association focuses on promoting the interests of grain sorghum producers; promoting the exchange of education and ideas regarding the production and use of grain sorghum; promoting the development of scientific and sound methods of producing and processing grain sorghum; and, promoting the dissemination of knowledge pertaining to the advancement of grain sorghum production. The KGSPA has approximately 550 members throughout Kansas.

4. Kansas Livestock Association

The Kansas Livestock Association ("KLA") is a not for profit corporation incorporated under Kansas law and established in 1894. The KLA is a trade association composed of members representing all segments of livestock production. The mission of the association is to: promote the common business interests of its members; assemble and distribute information; establish and carry out educational programs; and cooperate with other organizations for the advancement of livestock and agricultural interests. The KLA has approximately 7,000 members.

5. Kansas Association of Wheat Growers

The Kansas Association of Wheat Growers ("KAWG") is a not for profit corporation incorporated under Kansas law. KAWG is a voluntary trade association composed of wheat producers, marketers, and processors. The mission of the association is to help Kansas wheat growers maximize their profitability and enhance their lives. The association's purposes include promoting, educating, and researching wheat and wheat products; publicizing reliable information regarding the value of wheat and wheat products for any purposes for which they may be found useful and profitable; participating in studies of the problems common to the producers of wheat in Kansas; and, taking actions necessary to promote the wheat industry of the state. The KAWG has approximately 3,000 members.

6. Kansas Dairy Association

The Kansas Dairy Association ("KDA") is a not for profit corporation incorporated under Kansas law. Its primary purpose is to represent the interests of dairy farmers in regulatory matters, cooperate with other organizations and agencies toward common goals, provide information and educational materials, and perform selected public relations activities. The

KDA is a voluntary trade association with approximately 650 dairy producers located throughout Kansas.

7. U.S. Premium Beef

US Premium Beef is a voluntary agricultural marketing cooperative incorporated under the laws of Kansas. The mission of US Premium Beef is to increase the quality of beef and long-term profitability of cattle producers by creating a fully integrated producer-owned beef processing system that is a global supplier of high quality value-added beef products. US Premium Beef has more than 1,400 cattle producer members.

8. Farmland Industries, Inc.

Farmland Industries, Inc. ("Farmland") is an agricultural marketing and supply cooperative incorporated under Kansas law. Farmland is committed to its member-owners and the consumers who buy their products. Farmland's mission is to be a global, consumer-driven, producer-owned "farm-to-table" cooperative system. Farmland is composed of nearly 50,000 farm families and has 130 local cooperatives across Kansas.

9. Agriliance, L.L.C.

Agriliance, L.L.C., is a retail and distribution partnership owned by three agricultural cooperatives operating in Kansas; Farmland Industries, Inc., Cenex Harvest States Cooperatives, and Land O'Lakes Cooperatives. Its primary activities include distribution and sale of plant food and crop protection products.

10. Kansas Grain and Feed Association

The Kansas Grain and Feed Association ("KGFA") is a not for profit corporation incorporated under Kansas law. The voluntary association was formed for the purpose of the advancement and protection of the common interests of the members who are engaged in the grain, feed or seed business or in businesses incidental, allied or associated with the grain, feed or seed business. The KGFA has over 1,100 members.

11. Kansas Fertilizer and Chemical Association

The Kansas Fertilizer and Chemical Association ("KFCA") is a not for profit corporation incorporated under Kansas law. The KFCA is a voluntary association composed of plant nutrient and crop protection industry representatives. It has over 600 members representing retailers, distribution firms, manufacturers and others serving the agricultural industry. The purposes of KFCA include providing educational programs; promoting research, development,

and use of fertilizers, agricultural chemicals and limestone in Kansas; working for and promoting a fair legislative climate for manufacturers, producers, distributors, dealers and consumers in the fertilizer, agricultural chemical and limestone industries in Kansas; and, doing any and all acts or things proper or incidental to the operation or conduct of any of its businesses or any of the purposes and powers of the association.

12. Kansas Agricultural Aviation Association

The Kansas Agricultural Aviation Association ("KAAA") is a not for profit organization incorporated under the laws of Kansas. KAAA is a professional and trade association composed of members representing all segments of the industry of aerial application of agricultural chemicals. The mission of the association is to foster and promote good trade practices; to promote the common business interests of its members; to assemble and distribute information regarding the industry; and to cooperate with other organizations for the advancement of agricultural interests. The KAAA has approximately 300 members.

C. General Statement of Impact to Coalition Members

The proposed rules, if finalized, will significantly impact the Coalition associations and their members. Members of the Coalition associations hold property interests in thousands of acres of crop and rangeland throughout Kansas. These lands have ponds or water bodies that are generally completely surrounded by private land and are not available for public access. Under Kansas law and the regulations of the Kansas Department of Health and Environment ("KDHE"), these water bodies are not subject to water quality standards. Under the proposed rules, these water bodies would be subject to water quality standards. If a water body does not meet water quality standards, it may be subject to further regulatory action. If land managers[1] must assure that these water bodies meet water quality standards, practices would have to be implemented to protect the waters from interference from precipitation runoff or livestock and to assure that the waters are free from conditions prohibited in the Kansas WQS general criteria at K.A.R. ∋ 28-16-28e(b)(1-9), such as foam and algae. Land managers likely would need to take preventive measures such as fencing the perimeters of these water bodies, ensuring that no livestock enters the water, and removing naturally occurring foam or algae. These measures are

[1] "Land managers" is a term used in these Comments and Requests to refer to landowners, to lessees, and to managers.

cost prohibitive and in some instances not achievable. In effect, the proposed rules would remove the primary purposes for which the water bodies were developed: Livestock watering or sediment control. Thus, the proposed regulations place an unattainable and unfeasible burden on land managers.

The proposed rule would designate 1,456 water bodies (1,292 stream segments and 164 lakes) throughout the state for primary contact recreation. Most of these water bodies are now designated for secondary contact recreation under KDHE regulations and KDHE has performed use attainability analyses for many of these water bodies and have concluded that primary recreational use is not attainable. Members of the Coalition associations hold property interests in the land that these stream segments traverse and within which these lakes are located. By definition, a primary contact recreation designation results in the application of more stringent water quality criteria to these water bodies. Application of more stringent criteria would potentially subject Coalition members to additional regulatory requirements and enforcement. The proposed rules, if promulgated, could require land managers to fence streams to prevent impact from livestock or to change land management practices, which may include taking land out of crop production or planting grass filter strips. It costs approximately $1.00 per foot to build wire fences. Switching cropping practices may reduce the overall productivity and profitability of a property. These are just two examples of the costs the proposed rules would have on land managers. If promulgated, the proposed rules will cause significant economic harm to land managers. Furthermore, the proposed rules are unreasonable in that EPA seeks to designate many dry stream segments for primary contact recreation when the stream is dry, except during infrequent heavy storm events, or where the water levels normally would not sustain such recreation. The proposed rules would impose a burden on owners of interests in land to somehow protect water quality in times when nature dictates the parameters and rules of the flow of water. The proposed regulation also seeks to appropriate these waters for a nonconsumptive use, a prerogative left to the State of Kansas by Constitution and law and a result that is directly contrary to the Kansas Water Appropriation Act.

The proposed rules require the State of Kansas to assure that nonpoint sources of pollution are considered when calculating effluent limitations and conditions of certain point source discharge permits. If a point source wishes to initiate or increase a discharge into a stream segment that meets or exceeds applicable water quality criteria, the proposed rule would

require the State to determine that nonpoint sources of pollution on that stream segment "will implement" mandatory additional best management practices. Best management practices ("BMPs") are encouraged and promoted by the Coalition and the Coalition association members, but their application and results are difficult to quantify and BMPs are not designed to attain numeric requirements. Topography, weather, acts of God and the nature of the environment cause wide variability in the effectiveness of BMPs. Under the proposed rules, land managers may be required to apply additional and mandatory BMPs when, in fact, their operations may not be contributing to stream degradation. This places a costly, unnecessary and burdensome obligation on land managers. EPA is without authority to place restrictions on nonpoint source discharges or to require the states to implement mandatory restrictions. Under the CWA, Congress makes it clear that the states are to facilitate voluntary programs to manage nonpoint source pollution. The proposed rules potentially make these voluntary programs mandatory and provides no additional financial assistance or any evidence that these actions will improve water quality. This is contrary to the CWA.

The proposed rules would also impact entities within the Coalition who provide goals and services to land managers. The proposed rule, in the antidegradation provisions, establishes a method for EPA (*via* the state) to regulate nonpoint sources. Members of the associations in the Coalition may have to change their land management practices to comply with such regulation. For example, in response to nonpoint source regulation, the agronomicly correct and environmentally safe application rate for pesticides and herbicides could be changed. A change in application rate would have a financial impact on the seller of the product as well as on the land manager. As another example, if land managers must take some land out of grazing or crop production in response to nonpoint source control, overall productivity of the land will be reduced and there will be a significant financial impact on the land manager. Mandatory and enforceable regulation to require additional BMPs thus would affect rural economics and, ultimately, the economy of the State of Kansas.

D. Profiles of Representative Coalition Association Members Who Will Be Impacted by the Proposed Rules

The proposed rules affect virtually every type of agricultural operation in Kansas. Throughout the comments filed by the Coalition, specific examples are given of the impact that the proposed rules will have on Kansans. Below is a short summary of some typical agricultural

operations of members of the Coalition associations and how the operations would be impacted by the proposed rules.

Consider the testimony of Alan Hess, current president of the Kansas Livestock Association. Mr. Hess testified at the public hearing on the proposed rules. Mr. Hess' testimony is attached at Exhibit A. Mr. Hess operates a ranch in Northeast Kansas. His family has owned or managed the property for nearly 140 years and little has changed in that period. The property is used for cattle grazing. Grazing is on open range according to grazing management practices that conserve the grazing resource, protect against erosion, and insure a sustained resource. On his Kansas ranch he has nearly 60 ponds. If the ponds were subject to Kansas water quality standards, Mr. Hess would need to check each pond daily, a time-consuming exercise not capable of justification. Mr. Hess likely would have to fence livestock away from the ponds and build additional livestock watering facilities. Fencing costs approximately $1.00 per foot. Fencing would cost Mr. Hess thousands of dollars and make the ponds unusable for the purpose they were developed: Livestock watering. Mr. Hess also has stream segments on his property that would be designated for primary contact recreation under the proposed rules. These streams are not suitable for primary contact recreation as the photographs attached to Mr. Hess' testimony clearly depict. Mr. Hess' land is not open to the public. If the stream segments transversing his land must meet primary contact recreation water quality criteria, significant questions arise regarding the appropriateness of the criteria and whether such criteria can be met under normal rural activities.

Stan Ahlerich's fourth generation farming operation in south central Kansas includes dryland and irrigated crop rotations. Mr. Ahlerich currently serves as president of the Kansas Farm Bureau. He is a member of Cowley County Farm Bureau, a county affiliate of the Kansas Farm Bureau. Sound environmental stewardship practices have been a part of the family's farm management for decades. At the public hearing on the proposed rules, Mr. Ahlerich voiced general concerns on behalf of himself, Farm Bureau and other agriculture producers in Kansas. EPA's attempts to establish authority to regulate farm ponds and nonpoint sources of pollution through the proposed rules and through the implementation of the proposed rules will, immediately and in the future, have a significant impact on operations such as those of the Ahlerich family and on agriculture producers across Kansas. On a broader scale, Mr. Ahlerich voiced concern that the proposed rules attempt to usurp private property rights and rights of the

State of Kansas through regulation of private waters and through designation of water bodies for primary contact recreation. He also addressed the lack of economic and impact analyses in the proposed rules. He referenced that failure to evaluate and consider the impact of increased mandatory nonpoint source controls is put in perspective when one considers the State Conservation Commission projection that nearly $80,000,000 will be needed to implement controls to meet total maximum daily load requirements in just one of the 12 river basins in the State of Kansas. These are concerns important to individual producers, the Coalition associations, and the State of Kansas.

Chuck Magathan's farming operation includes a dairy, rotational cropping and pastureland in central Kansas. Mr. Magathan testified at the public hearing on the proposed rules. Mr. Magathan is a member of the Chase County Farm Bureau, a county affiliate of the Kansas Farm Bureau. Mr. Magathan has incorporated soil and water conservation components into his farming operation. In particular, three large ponds were constructed to collect run-off and provide water for livestock and limited irrigation. According to the proposed rules, these water bodies would be subject to water quality standards. To assure the ponds meet narrative water quality criteria, Mr. Magathan, like Mr. Hess, would likely need to fence the ponds to eliminate stock watering. Mr. Magathan is also concerned that the proposed rules would place serious restrictions on the use of cropland for the manure application of manure because the proposed rules seek to regulate nonpoint sources of pollution. Mr. Magathan and other Kansans rely on manure application to fields as a means of controlling waste from dairy and livestock operations. Further regulation may limit the amount of application allowed and result in a need to purchase additional land for manure application. Magathan may be forced to find alternative means to handle the manure. In either case, this would mean additional costs.

Sid Warner is managing general partner of his family's limited partnership that operates a commercial feedyard as well as irrigated and dryland farming. Mr. Warner is a member of both the Kansas Livestock Association and Kansas Association of Wheat Growers. Mr. Warner incorporates soil, nutrient, and water conservation and management practices into the operation. Tail water pits are located on the family's land. The tail water pits are no longer used due to the cessation of flood irrigation in favor of the more efficient water use system known as center-pivot irrigation. The Kansas legislature has determined that private bodies of water, such as these, are exempt from water quality standards. However, EPA is seeking, through its proposed

rules, to bring tail water pits under its jurisdiction. What is the family partnership's required response to the tail water pits falling under regulation? The tail water pits were designed to retain runoff from fields and for return flow to the fields. It seems illogical that these tail water pits that are designed to protect water quality by capture and return of sediment and irrigation runoffs could be subject to water quality criteria that are unattainable. In addition, the family partnership property has watershed ponds. These ponds were designed for flood control and water retention. There is no public access to these facilities and the ponds discharge only during prolonged wet seasons, which seldom occur in arid western Kansas. What is the purpose of EPA's proposal to make these ponds subject to water quality standards? If the tail water pits and the sediment control ponds are subject to water quality standards, what is Mr. Warner required to do?

Jere White is a member of most of the organizations represented in the Coalition. His family operates a crop and livestock operation in eastern Kansas. Mr. White testified at the public hearings on the proposed rules. His written testimony was previously submitted to the administrative record and is attached at Exhibit A. The family operation grazes cattle downstream from Garnett, Kansas. Garnett's sewage treatment plant is located on the family's property. If the city of Garnett wishes to increase it's discharge into the stream, the family could be required to implement costly BMPs that may or may not be quantifiable. By definition, nonpoint source pollution is difficult to trace to a particular source. EPA has openly admitted during the hearing process that it does not intend to regulate nonpoint pollution. Yet the antidegradation regulation proposed by EPA appears to apply enforceable nonpoint source controls to operations such as that of the White family. The White farming and livestock operation has private ponds that would be regulated under the proposed rules and has stream segments transversing their land that EPA proposes to designate for primary contact recreation in the proposed rules. The White family requests an explanation of the short-term and long-term implications, requirements, and costs associated with these proposed rules.

Dean Stoskopf is the president of the Kansas Association of Wheat Growers and resides in Barton County in central Kansas. Mr. Stoskopf testified at the public hearing on the proposed rules. His written testimony was previously submitted into the administrative record. Mr. Stoskopf has the concerns raised by others above. Mr. Stoskopf, like many others, owns land transversed by streams that would be designated for primary contact recreation. However,

photographic evidence and historical conditions show that these streams are not suitable for such recreation. Mr. Stoskopf, like others, also owns property with ponds. His concern is in understanding the actions that would be necessary to meet water quality standards and in knowing who will pay the additional costs.

At the public hearing in Topeka on the proposed rules, State Senator Janis Lee reiterated the concerns of agricultural producers and stated the concerns of rural communities that would be burdened by the costs of compliance with the proposed rules. Senator Lee's written comments are attached at Exhibit A.

Comments similar to all of these above were made by agricultural producers across the state including, but not limited to, Chris Bloom, Tom Perrier, Don Hineman, Roger Pine, Jeff Casten, Keith Miller, and Brent Demmitt at the public hearings on the proposed regulations. The written comments of these concerned land managers have previously been submitted into the administrative record. These are only a few of the people who were able to testify during the public hearing given the limited time and space allotted. Numerous others have submitted written comments and/or have signed a petition attached at Exhibit J opposing the proposed rules.

E. Opportunities to Discuss the Proposed Rules with EPA Have Been Too Few and Have Been Inadequate

The Coalition is deeply disappointed with the level of public participation provided by EPA. After the regulations were announced and several Kansas public officials openly opposed the far-reaching effects of the proposed regulations, EPA agreed to meet with the Kansas Congressional delegation and members of the Kansas Governor's Cabinet. Some correspondence, press releases, and comments from elected public officials are gathered at Exhibit FF. No one representing private agricultural interests was invited. It is the Coalition's understanding that the meeting was cordial, but no resolution was proposed.

In an effort to assure public input, Kansas Senator Roberts requested that EPA officials travel to Kansas and meet with Kansas legislators and agricultural representatives. Those meetings occurred August 29, 2000. Videotape of the meetings is attached at Exhibit C and further information regarding the meeting is attached at Exhibit B. During those meetings, representatives of EPA articulated that it is not their intent to regulate private farm ponds. Later, in a meeting with Coalition members, EPA stated that farm ponds are waters of the United States

subject to regulation. This continuous statement and retraction process took place throughout these meetings.

During the meetings, officials also discussed EPA's presumption that 1,456 water bodies must be designated for primary contact recreation. EPA representatives acknowledged problems with the presumption and acknowledged that additional information is needed to make determinations of designated uses. EPA offered to consider some "streamlined system of evaluation" for the 1,456 water bodies. This statement is confusing in that the state has the authority to designate stream segments, not EPA, and in light of EPA's stated position that use attainability analyses must be performed by Kansas to overcome its presumption.

The meetings involved an exchange of concerns, and often an exchange of conflicting opinions and positions on the part of EPA. While the Kansas Agricultural Coalition appreciated that opportunity to interact, it became clear that it is unlikely EPA will modify the proposed rules before promulgation. EPA's conflicting, undefined, and unreasonable positions continued to be asserted after the meeting. *See* October 2, 2000 letter from Geoffrey H. Grubbs, Director of Office of Science and Technology at USEPA, to Jamie Clover Adams, Secretary of Kansas Department of Agriculture, provided at Exhibit D.

F. Opportunities to be Heard and to Hear at the Public Hearings on the Proposed Rules Were Inadequate and Violate EPA Regulations at 40 C.F.R. Section 25.5(c)

1. Public Hearing Locations and Facilities Were Inadequate

Opportunity for public participation at the hearings and the question and answer session before the hearings did not meet EPA's public participation requirements at 40 C.F.R. Part 25. First, EPA's selection of time was very inconvenient for the people most likely to be affected by the proposed rules. September is the start of fall harvest. Consequently, many producers were not able to attend the public hearings because they were harvesting their crops – their source of revenue. Others who were able to attend had to drive many hours each way to the hearings during this demanding harvest period.

Second, EPA held only two hearings. Kansas is a large state and the proposed rules impact the entire state. Many people traveled over 50 miles to attend the hearings. At both hearings, members of the agriculture community signed a petition opposing the proposed rules. The petition and photographs of the agriculture community signing the petition are attached at Exhibit J. Members of the agriculture community placed a green dot on a map of the State to

indicate the location of their land. The map is provided at Exhibit K. In some cases, the members rented buses and traveled hundreds of miles only to find no seats available. Despite the discouraging factors offered by EPA, many farmers and ranchers left their operations early in the workday and traveled many miles to attend these meetings.

Third, the hearing accommodations were grossly inadequate. As discussed below, in Topeka alone over 800 people withstood heat, humidity, and uncomfortable crowd conditions to listen to the hearings. This further emphasizes the strong interest and opposition to the proposed rules. Because the public participation opportunities provided were inadequate, EPA's public participation regulations are violated and the due process rights of the Coalition and its members under the United States Constitution are violated.

Public hearings on the proposed rules were held in Topeka, Kansas on September 13, 2000 and in Dodge City, Kansas on September 14, 2000. The facilities for both hearings were wholly inadequate and clearly did not meet the requirements of 40 CFR ∋ 25.5(c). Hearings are to be held at times and places which to the maximum extent feasible, facilitate attendance by the public. 40 CFR ∋ 25.5(c).

In Topeka, the hearing room accommodated approximately only 300 of the more than 1,100 people attending the hearings. Eight hundred farmers and ranchers, many of whom had driven as much as three hours to Topeka, had to sit outdoors in the dark, in the bugs, and in the heat and listen to the proceedings on a loudspeaker. Most had to park in fields one-half mile away from the hearing building and walk to the hearing along a roadway with no shoulder or sidewalk. This not only violates EPA's public participation regulations and rights of due process, but also is indicative of the lack of sensitivity that EPA has to the citizens of Kansas and to the impact that these proposed rules would have. EPA was given information regarding the expected attendance at the Topeka hearing and given suggestions as to alternate space. By 4:00 p.m. on the day of the hearing, during the prehearing question and answer session, the hearing room was full, confirming the expectations communicated to EPA. Photographs and videotape depicting the crowded and insufficient accommodations at the Topeka hearing are provided at Exhibits F and G.

In the Topeka public hearing State Representative Bill Fuerborn, and others, articulated the hearing accommodation inadequacies in their testimonies. Photographs (at Exhibit F) and video tape footage of the public hearing (at Exhibit G) depict the sincere interest of the farmers

and ranchers and the treatment that was afforded them in the accommodations for the Topeka public hearing.

In Dodge City, the hearing facilities accommodated only approximately 450 of the 600 people who attended to participate in the hearings. Many farmers and ranchers had to drive up to as much as five hours each way to attend the Dodge City hearings. The opportunity to participate was limited as depicted in the photographs at Exhibit H. An audiotape of the question and answer period before the Dodge City hearing is provided at Exhibit I.

2. The Question and Answer Sessions Prior to Both Hearings Failed to Meet the Requirements of 40 C.F.R. Sections 25.3, 25.4, and 25.5

While the question and answer periods offered before each hearing were viewed as an opportunity to understand the proposed rules, EPA's responses were less than informative. The participants were confused and/or frustrated by the legalistic and often evasive answers given to their legitimate questions. An audiotape of the Topeka question and answer session is provided at Exhibit E and for the Dodge City question and answer session at Exhibit I. In the sessions, EPA contradicted its positions regarding the impact and intent of the proposed rules. Perhaps the most alarming outcome of the question and answer period was EPA's attempt to shift the burden of providing data to support primary contact recreation designation of 1,456 water bodies to the public as part of the public participation process. *See* Exhibits E and I. This is discussed in further detail in these Comments and Requests.

G. EPA Has Not Provided Adequate Opportunity to Comment to the Proposed Rulemaking and Has Violated 40 C.F.R. ∋ 25.4

EPA's proposed rules reach to some of the most complex, controversial, and difficult aspects of water quality standards. The scope of the concept of "navigable waters" under the CWA, the foundational function of use designations, addressing nonpoint source activities, and establishing low flow and effluent dominated flow regulations are each, in and of themselves, rulemaking areas that require in-depth evaluation and explanation, especially where valid actions of a state are being contravened.

1. Adequate Information Has Not Been Provided to the Public

EPA's public participation regulations at 40 C.F.R. Part 25 clearly require that the maximum amount of information possible be provided to the public in connection with a rulemaking, particularly rulemakings that are significant and controversial. This rulemaking is significant and controversial. In fact, EPA's proposed rules represent wholesale changes in water

quality regulation in Kansas and would provide a stepping stone for making such wholesale changes in other states.

EPA's regulations require that EPA provide information to the public because it is a necessary prerequisite to meaningful, active public involvement. 40 C.F.R. ∋ 25.4(b). EPA is obligated to provide the public with continuing policy, program, and technical information and assistance beginning at the earliest practical time. *Id.* at 25.4(b)(2). In this rulemaking, EPA should have established contact with and provided information to the citizens of Kansas during the time that EPA was negotiating a consent decree in the lawsuit styled *Kansas Natural Resource Council, Inc. v. Browner*, Civ. Action No. 99-23 (D. Kan.), because at that time EPA was negotiating the substance of the proposed rulemaking, and doing so without any public participation. *See* court filings in *Kansas Natural Resource Council, Inv. v. Browner*, Civ. Action No. 99-23 (D. Kan.), are provided at Exhibit L. Furthermore, EPA's regulation at 40 C.F.R. ∋ 25.4(c) makes it apparent that the agency was obligated to notify the public of the decision that it would reach through settlement of the lawsuit and failed to do so. Finally, EPA, pursuant to 40 C.F.R. ∋ 25.4(e), was obligated to provide full and open information on the legal proceedings that lead to the proposal of these rules, particularly because the lawsuit involved promulgation of rules that would apply to all citizens and entities in the State of Kansas and the lawsuit did not involve issues of noncompliance or any private entity. In fact, EPA's preamble to the proposed rules does not even reference or acknowledge the lawsuit.

As noted above, EPA failed to provide the public with information at the earliest practicable time. Presumably, that time would have been sometime following the filing of the lawsuit on August 23, 1999 and settlement of the lawsuit on May 19, 2000. If EPA had acted within the scope of its authority and according to its mandate in the conduct of that lawsuit, EPA should have considered volumes of information prior to making the agreements that it did in the Consent Order settling the litigation. That information should have been provided to the public and the public should have been allowed to participate. EPA's failure to do so constitutes a clear violation of 40 C.F.R. ∋ 25.4(b)(2). In fact, as of October 10, 2000, EPA's administrative record for this rulemaking only contained the materials on the Administrative Record Kansas Promulgation at Exhibit EE and those materials are only a subset of the information EPA should have considered.

2. EPA Has Failed to Identify Impacted Segments of the Public

EPA has failed to identify the segments of the public likely to be affected by the proposed rule and has thereby violated its public participation regulation. *See* 40 C.F.R. ∋ 25.4(b)(2). EPA states in the proposed rule that the potentially affected entities are industries and municipalities discharging pollutants to waters of the United States and that those entities could be "indirectly" affected by the proposed rulemaking because water quality standards are used to determine discharge permit limits. 65 Fed. Reg. at 41216-41217. This is clearly insufficient under 40 C.F.R. ∋ 25.4(b)(2). First, EPA states that the rule may "indirectly" affect these entities. In fact, the rule will make wholesale changes in the application of water quality criteria to dischargers in the State of Kansas and that application will have the affect of making significant changes in discharge permit limits. Second, EPA completely fails to recognize the enormous number of entities who are implementing voluntary nonpoint source controls and who will be impacted by this rule as well as the thousands of landowners who have private waters that will be subject to water quality standards if EPA's proposed rules are made final. EPA clearly has breached its regulatory duty by failing to identify the segments of the public likely to be affected by the proposed rule, and further by failing to evaluate its proposal in light of those affected segments of the public.

3. EPA Has Failed to Conduct an Adequate Evaluation of Social, Economic, and Environmental Impacts

EPA's public participation regulations require that, wherever possible and consistent with applicable statutory requirements, the social, economic, and environmental consequences of the proposed rule be stated. *See* 40 C.F.R. ∋ 25.4(b)(2). EPA's economic analysis in the proposed rule preamble is wholly inadequate. EPA admits in the preamble to its proposed rule that its economic analysis is "in part" "preliminary" and that it did not evaluate the economic impact of its proposal to apply water quality standards to privately owned surface water or its proposal to apply the state's antidegradation policy to nonpoint sources. 65 Fed. Reg. at 41228-41229. The limited economic analysis fails to recognize the thousands of landowners and managers of nonpoint source activities that will be impacted by the proposed rules or to evaluate the economic impact of the proposed rules on these people. EPA states in its preamble that the proposed rules will not have a direct impact on any entity because the rules, once finalized, simply establish water quality standards, which by themselves do not impose any costs. *See* 65

Fed. Reg. at 41228. EPA says that until the state implements the standards, there will be no effect on any entity. *Id.* If water quality standards are simply a hollow exercise, not having any impact, as EPA attempts to characterize them, then EPA's rule is wholly unnecessary. However, EPA knows its statement is contrary to positions it has taken elsewhere that set forth EPA's belief that state water quality standards are self-implementing, and that even absent a permit based upon a specific water quality standard, a discharger can be held in violation of the CWA if its discharge causes a water quality standards violation.

EPA states in the preamble to the proposed rule that a "preliminary analysis" has been prepared to evaluate potential costs to dischargers in Kansas associated with the state's future implementation of the proposed rules. However, even this preliminary analysis of costs is based upon a very small subset of NPDES permit holders that will be impacted by the proposed rule and EPA grossly underestimates the potential costs to the permit holders. Interestingly, EPA states in its preamble that "EPA did not consider the potential costs for nonpoint sources, such as agriculture and forestry-related nonpoint sources, although EPA recognizes that controls on these sources may be necessary to achieve designated uses." 65 Fed. Reg. at 41228. The explicit recognition of impact and costs to nonpoint sources by EPA shows that EPA failed to target nonpoint source dischargers as potentially effected by the proposed rule and has failed to make any analysis of the economic impact of the proposed rule as to these dischargers, both clear violations of 40 C.F.R. ∋ 25.4(b)(2).

Moreover, EPA did not even evaluate the potential costs of this rule for the State of Kansas. The State of Kansas has numerous water quality programs in place and funds numerous activities associated with water quality improvements. The proposed rules will impact the State in its current and future activities. At a minimum, EPA should have evaluated the economic impact and the personnel impact that these proposed rules will have on the Kansas Department of Health and Environment and the Kansas Department of Agriculture.

Not only has EPA failed to adequately identify affected entities, but in its attempts to identify some affected entities, EPA has made erroneous assumptions and has attempted to shift the burden to the regulated community and to the citizens of Kansas to identify entities that may be affected by the proposal. *See* 65 Fed. Reg. at 41229. As discussed in these comments, EPA's attempt to shift its statutory burden to support its proposed rules to the citizens of Kansas is contrary to law. In fact, in view of the numerous times in the proposed rules that EPA requests

information and data, EPA makes it clear that it has failed to meet its statutory mandates to support these rules.

4. EPA Has Failed to Give an Adequate Amount of Time for Public Comment

EPA is required to give notice in time to permit public response to its proposed rules. *See* 40 C.F.R. ∋ 25.4(c). The complexity of the proposed rule, the wholesale changes that it will make to Kansas water quality standards and their implementation, and the number of water bodies, stream segments, entities, and landowners that will be impacted by the proposed rules without further description shows that a 105-day comment period is not adequate.

II. COMMENTS ON EPA'S PROPOSED RULE TO ELIMINATE K.S.A. ∋ 65-171d(d), WHICH EXEMPTS FROM WATER QUALITY STANDARDS PRIVATELY OWNED FARM PONDS THAT DO NOT DISCHARGE OR SEEP INTO SURFACE WATERS OR GROUND WATER OF THE STATE

A. EPA's Proposed Rule is Contrary to Law and Beyond EPA's Jurisdictional Authority Under the CWA

The CWA seeks to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Pursuant to this objective, the CWA prohibits "any person" from discharging "any pollutant," into "navigable waters," except as in compliance with specified sections of the CWA. Most important among these are the National Pollutant Discharge Elimination System ("NPDES") permit program provided in section 402 and the dredged and fill program provided in section 404. While the NPDES permitting program is implemented by EPA, the dredged and fill permit program is implemented by the United States Army Corps of Engineers ("the Corps"). *See* 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

In this rulemaking, EPA proposes to mandate that all waters of the United States, including non-navigable, private waters, are subject to the state's water quality standards. *See* 65 Fed. Reg. at 41236 (proposed 40 C.F.R. § 131.34(a))(emphasis added). The proposed regulation ignores the scope of Congressional intent and the scope of EPA's jurisdiction under the CWA. Moreover, the proposed regulation effectively eliminates a Kansas law that exempts from the application of state water quality standards those privately owned waters that are subject to the provisions of K.S.A. ∋ 65-171d(d). K.S.A. ∋ 65-171d(d) provides, in relevant part:

> If a freshwater reservoir or farm pond is privately owned, and where complete ownership of the land bordering the reservoir or farm pond is under common private ownership, such freshwater reservoir or farm pond shall be exempt from water quality standards in Kansas except as it relates to water discharges or seepage from the reservoir or pond to waters of the state, either surface water or ground water, or as it relates to the public health of persons using the reservoir or pond or waters therefrom.

EPA objects to this exemption because it states that the statute could "potentially" exempt from water quality standards surface water that "may be" "waters of the United States" under the CWA. 65 Fed. Reg. at 41228.

EPA's attempt to assert jurisdiction over privately owned, non-navigable isolated farm ponds that do not discharge or seep into waters of the state, including surface waters or ground water, is not authorized by the CWA. By using the legal terms "navigable waters" and "waters of the United States" in the CWA, Congress invoked their established meanings as waters that are navigable in fact, that could be made navigable with reasonable improvements, or that are connected to such waters and so could affect their quality. *See infra* section II.A.2. These statutory terms do not encompass waters with no connection to navigable waters, like the waters excluded under K.S.A. ə 65-171d(d). Because K.S.A. ə 65-171d(d) comports with the clear mandates of the CWA, EPA's proposed rule is a severe intrusion into areas of traditional state and local control. Not only is EPA's authority lacking under the CWA for its proposed actions, but Congress made explicit in the Act its intention to preserve state and local regulation of pollution and to reserve the State's plenary authority over water rights.[2] *See* 33 U.S.C. § 1251(b) and (d).

Moreover, in this proposed rulemaking, EPA essentially admits that it does not have jurisdiction over private farm ponds that are exempt from the application of water quality standards under K.S.A. ə 65-171d(d). EPA has repeatedly stated, including in the proposed rule, that "it is not aware of any waters of the United States in Kansas that are currently exempted from state water quality standards because of [] the State's provision. . ." 65 Fed. Reg. at 41228. In an EPA press release issued on June 26, 2000 regarding this proposed rule, Gale Hutton, EPA's Region VII's Water, Wetlands, and Pesticides Division Director, stated that the CWA and

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[2] Section III. D discusses how the proposed regulations impermissibly interfere with the state's plenary authority over water rights.

implementing regulations do not apply to "artificial farm ponds created for watering livestock or to irrigate ditches dug out of dry land." *See* EPA Press Release at Exhibit M. Mr. Hutton explains that the 1986 preamble to a Corps regulation clarified that artificial ponds dug out of dry land for the purpose of watering livestock are not considered "waters of the United States." *See* EPA Press Release at Exhibit M; *see also* 51 Fed. Reg. at 41217 (Preamble for 33 C.F.R. Part 328.3 November 13, 1986) ("[a]rtificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing are not considered to be "waters of the United States."). Moreover, Mr. Hutton has repeatedly emphasized in press releases and at public hearings that EPA does not intend to "regulate the use of private farm ponds." *See* EPA Press Release provided at Exhibit M and Audio Tape of the Question and Answer period at the Public Hearing in Topeka, Kansas on September 13, 2000 provided at Exhibit E.[3] Why then is EPA proposing this regulation? Moreover, if EPA does not intend to regulate private farm ponds, why doesn't EPA, at the very least, specifically state this in its final regulation?

EPA provides no answers to these questions. In its proposed regulation, EPA focuses solely on the fact that K.S.A. ∋ 65-171d(d) makes a distinction between private and public waters. EPA provides absolutely no analysis of the Kansas statute as a whole or why EPA believes that the provisions of K.S.A. ∋ 65-171d(d) do not comport with the CWA. Nor does EPA address the fact that only those isolated farm ponds that do not discharge or seep into waters of the state, including surface waters or ground water, and those that do not adversely impact public health – waters already outside the jurisdiction of the CWA – are exempt from the application of Kansas water quality standards. EPA has provided no analysis of this provision because any analysis leads to the conclusion that K.S.A. ∋ 65-171d(d) is consistent with the CWA. Indeed, because the exclusion in K.S.A. ∋ 65-171d(d) is consistent with the terms of the

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[3] EPA apparently wants the regulated community to blindly accept EPA's promises that they do not intend to regulate private farm ponds. The fact is, however, that other EPA officials may take a different view and citizen action groups may still bring enforcement actions in the absence of EPA involvement. The regulated community should not be subjected to the threat of litigation over this issue. If EPA does not interpret the CWA to regulate private farm ponds, EPA should clearly state this in the final regulation or work with the State of Kansas to amend K.S.A. 65-171d(d) to provide an exclusion that EPA believes is consistent with the CWA.

CWA, the additional requirement that these waters must be private, as opposed to public, ensures a stricter application of water quality standards than is required under the CWA. Thus, EPA cannot promulgate its proposed new water quality standard because the standard is not "necessary to meet the requirements " of the CWA. *See* 33 U.S.C. § 1313(c)(4)(B). Simply put, EPA does not have jurisdiction to regulate isolated, privately owned and non-navigable farm ponds that are excluded from the application of water quality standards pursuant to K.S.A. ə 65-171d(d). Accordingly, EPA must withdraw its proposed regulation in the final rulemaking.

1. EPA's Proposed Rule Impermissibly Contravenes A Valid State Statute That Is Consistent With The CWA Because It Does Not Exempt "Navigable Waters" From The Application Of Water Quality Standards

K.S.A. ə 65-171d(d) clearly states that only those privately owned farm ponds that do not "discharge[] or seep[] from [the] pond to waters of the state, either surface water or ground waters," or that adversely impact "the public health of persons using the . . . pond or water therefrom" are exempt from the application of water quality standards. Because K.S.A. ə 65-171d(d) only exempts those privately owned farm ponds that do not seep or otherwise discharge into waters of the State, including ground and surface waters, it only excludes from the application of Kansas water quality standards those farm ponds with no pathways to navigable waters. Thus, K.S.A. ə 65-171d(d) is not in conflict with the CWA because the waters excluded pursuant to the statute are not "navigable waters" under the CWA. Moreover, the Kansas statute precludes the application of this exemption if there is any adverse impact to the public health of persons using these farm ponds. As discussed further in Section II.A.2 of this comment, EPA is impermissibly attempting to expand its jurisdiction under the CWA to regulate isolated non-navigable farm ponds that fall within the scope of K.S.A. ə 65-171d(d). Because K.S.A. ə 65-171d(d) only applies to waters that are outside the jurisdiction of the CWA, the regulation of such waters is a matter solely for the State of Kansas. Moreover, because K.S.A. ə 65-171d(d) is consistent with the CWA, no new EPA standard is "necessary to meet the requirements" of the CWA under section 303(c)(4)(B). Thus, EPA's proposed regulation impacting the effect of this statute is clearly beyond EPA's statutory authority under the CWA and must be withdrawn in the final rule.

2. EPA's Proposed Rule Is Inconsistent With The CWA Because It Attempts To Impermissibly Expand Congressional Intent And The CWA Definition Of "Navigable Waters"

EPA's assertion of jurisdiction over privately owned isolated farm ponds, as identified in K.S.A. ə 65-171d(d), is not authorized by the CWA. By using the legal terms "navigable waters" and "waters of the United States" in the CWA, Congress invoked their established meanings as waters that are navigable in fact, that could be made navigable with reasonable improvements, or that are connected to such waters and so could affect their quality. Case law has not suggested that those statutory terms encompass waters with no physical connection to navigable waters, like the waters excluded under K.S.A. ə 65-171d(d). Moreover, legislative history confirms that Congress did not intend the EPA to have authority over waters lacking any connection to navigable waters.

The CWA gives EPA jurisdiction over "navigable waters," defined as "waters of the United States, including the territorial seas." 33 U.S.C. §§ 1344, 1362(7). Apparently, EPA takes the position that this language has virtually no meaning and imposes no limits on EPA's ability to assert its jurisdiction. As discussed above, EPA provides no statutory analysis regarding why EPA believes that K.S.A. ə 65-171d(d) does not comport with CWA and provides no basis for its attempt to assert jurisdiction over isolated farm ponds. The Kansas Agriculture Coalition can only speculate that EPA interprets Congress' definition of "waters of the United States" to include privately owned isolated farm ponds. [4]

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[4] EPA may also interpret its definition of "waters of the United States" to extend its jurisdiction to all waters that are subject to Congressional commerce clause power. This position, however, cannot be squared with the principle that Congress is presumed to intend the established legal meaning of the terms it uses. Congress did not say "waters in the United States subject to the commerce power" but "waters of the United States," which have always been those waters that "affor[d] a channel for useful commerce" between the states. *Donnelly v. United States*, 228 U.S. 243, 262 (1913). The structure of the CWA also demonstrates the error of such an interpretation. The Act forbids discharge of pollutants into three categories of water: "navigable waters," "waters of the contiguous zone," and "the ocean." 33 U.S.C. §§ 1311, 1362(12). If the term "navigable waters" encompasses all waters subject to federal jurisdiction, there would have been no need to separately prohibit discharges into these or other waters. *See also* 33 U.S.C. § 1343. It is also important to note the Supreme Court's decision in *Federal Power Comm'n v. Union Elec. Co.*, 381 U.S. 90 (1965). The Federal Power Act imposes requirements on water projects on "navigable waters of the United States" and other waters "over which Congress has jurisdiction under its authority to regulate commerce." 16 U.S.C. § 817. Even the Court in *Union Electric* found

EPA defines the term "waters of the United States" to include not only waters that are or could be used for navigation, such as tidal waters, interstate waters, tributaries or jurisdictional waters, and wetlands adjacent to jurisdictional waters, but also:

> 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 could affect interstate commerce . . . .

40 C.F.R. § 122.2.[5] Any interpretation by EPA that 40 C.F.R. § 122.2 extends to waters excluded under K.S.A. ∋ 65-171d(d) is entitled to no deference in this matter. EPA cannot interpret 40 C.F.R. § 122.2 to extend its jurisdiction beyond the confines of the CWA. By asserting jurisdiction over waters defined in K.S.A. ∋ 65-171d(d), EPA has written the term "navigable waters" out of the CWA and changed Congress' definition of "navigable waters" as "waters of the United States" from the settled meanings of those terms. The CWA and its legislative history do not allow the almost limitless reach of authority that EPA is proposing in this rulemaking. EPA's interpretation violates the cardinal principle that statutes "must, if possible, be construed in such fashion that every word" – including "navigable" in the CWA – has "operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *see Jones v. United States*, 120 S. Ct. 1904, 1911 (2000) (rejecting reading under which the statute's "limiting language . . . would have no office").

The definition of "navigable waters" as "waters of the United States" does not sever, but rather strengthens, the link between EPA's jurisdiction and the concept of navigability. The phrase "navigable waters of the United States," as distinguished from "waters of the United States," has long been used to mean waters over which interstate commerce may pass. *See*

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that this language does not apply to "projects located on intrastate non-navigable waters which do not flow into any navigable streams." 381 U.S. at 86-97, n.9. The CWA's statutory language is more limited and so must at least exempt "intrastate nonnavigable waters," like those defined in K.S.A. ∋ 65-171d(d), that are neither connected nor closely related to navigable water. Moreover, EPA has not shown that isolated farm ponds with no impact on navigable waters are subject to Congressional commerce clause power pursuant to the test prescribed by the Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995).

[5] This definition is identical to, and was based on, a definition of "waters of the United States" promulgated by the Corps in 1977 to implement the CWA section 404 program. *See* 33 C.F.R. § 328.3.

Donnelly, 228 U.S. at 262 ("what are navigable waters of the United States" depends on whether the water "affords a channel for useful commerce"); *The Montello*, 78 U.S. (11 Wall.) 411, 415 (1870) (a river that "is not itself a highway for commerce with other states or foreign countries, or does not form such a highway by its connection with other waters . . . is not a navigable water of the United States"). Although the CWA uses the phrase "waters of the United States," that phrase is used to define the term "navigable waters." Thus, the term "waters of the United States" must be interpreted within the confines of the term "navigable waters."

It is unreasonable to suppose that a defined term and its defining term bear no relationship and that the former loses all meaning, totally subsumed in the latter. *See Western Union Tel. Co. v. Lenroot*, 323 U.S. 490, 503-504 (1945) (rejecting contention that a statutory definition of the term "produced" to mean "handled, or in any other manner worked on" encompassed "not only handling or working on in relations to producing," but also other "handling or working on"). It would be particularly surprising if the concept of navigability disappeared altogether when Congress defined "navigable waters" as "waters of the United States," given that navigability is a traditional jurisdictional concept with a settled meaning in Supreme Court jurisprudence. *See FDA v. Brown & Willamson Tobacco Corp.*, 120 S. Ct. 1291, 1301 (2000) ("Ambiguity is a creature not of definitional possibilities but of statutory context."). The Fourth Circuit explains that, "as a matter of statutory construction, one would expect that the phrase 'waters of the United States' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are at least interstate or closely related to navigable or interstate waters." *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997).

Congress' regulation of navigable waters has a long history. The Northwest Ordinance provided that "[t]he navigable waters leading into the Mississippi and Saint Lawrence . . . shall be common highways." Northwest Ordinance art. IV (1787); *see also Railroad Co. v. Maryland*, 88 U.S. (21 Wall.) 456, 470 (1874). Consistent with this understanding of navigable waters as "common highways" of commerce, the Supreme Court's early cases held that "navigable waters" are waters "which are navigable in fact," meaning "susceptible of being used, in their ordinary condition, as highways for commerce." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). Later (but prior to the passage of the CWA), decisions expanded the concept of "navigable waters" to include waters that had previously been used in navigation or that could be made

navigable in the future through reasonable improvements. *See United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940).

When legislation is passed and a statute uses a legal term of art, it is assumed that Congress' choice is not haphazard or insignificant; rather, "Congress intended [the term] to have its established meaning," *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991), and to "adopt the interpretation placed on that concept by the courts." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 813 (1989); *see also Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979). The jurisdictional terms Congress used in the CWA carry at their core the meaning established by the Supreme Court's decisions; waters that are navigable in fact, have been navigable, or could be made navigable with reasonable improvements.

The legislative history of the CWA also demonstrates that Congress understood that EPA's jurisdiction would be limited to waters bearing a significant relationship to navigable water and the carriage of interstate commerce. Senator Muskie, Senate floor manager for the conference bill, gave this explanation in terms like those used in prior Supreme Court cases:

> It is intended that the term "navigable waters" include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases, the commerce on such waters would have a substantial economic effect on interstate commerce.

1 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Committee on Public Works by the Library of Congress), Ser. No. 93-1, at 178 (1973) ("Leg. Hist."). Representative Dingell also explained that the definition is "in line with more recent judicial opinions which have expanded the limited view of navigability – derived from the Daniel Ball [navigable-in-fact test] – to include waterways which would be 'susceptible of being used . . . with reasonable improvement,' as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris." *Id.* "It is enough that the waterway serves as a link in the chain of commerce among the states as it flows in the various channels of transportation – highways, railroads, air traffic, radio and postal

communication, waterways." *Id.* (citing *Utah*, 403 U.S. at 11 ("the lake was used as a highway and that is the gist of the federal test")).

Senator Muskie and Representative Dingell explain that while "[n]avigable waters" means more than waters navigable in fact, it still requires that waters be part of or closely related to "waters of the United States," which are understood by the Supreme Court precedent to mean a link in the "highways" of interstate commerce. The Congressional understanding of this definition is wholly inconsistent with EPA's attempts to assert jurisdiction over isolated farm ponds that have no link in these "highways" of commerce.

Since the passage of the CWA, the Supreme Court has continued to tie EPA's jurisdiction to those waters that impact navigable waterways. In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985), the Court held that a "wetland that actually abuts on a navigable waterway" is within the scope of the CWA because its proximity and function "are inseparately bound up with the 'waters' of the United States" to which they are "adjacent." The Court expressly declined to hold that the Corps in that case could exercise jurisdiction over "wetlands that are not adjacent to bodies of open water." *Id.* at 131, n.8, 135. Similarly, the Tenth Circuit has recognized EPA's jurisdiction under the CWA where waters have a connection to waters that are navigable in fact. *See Chemical Weapons Working Group, Inc. v. United States Dept. of the Army*, 111 F.3d 1485, 1490 n.3 (10th Cir. 1997); *Quivira Mining Co. v. United States Envtl. Protection Agency*, 765 F.2d 126, 130 (10th Cir. 1985).

Even the court in *Hoffman Homes, Inc. v. Administrator, EPA*, 999 F.2d 256, 260-61 (7th Cir. 1993), while upholding EPA's definition of "water of United States," found that "even a rule with such broad scope did not cover a one-acre wetland 750 feet from a small creek." *See also Village of Oconomoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994) (mining company's tailing ponds are not "navigable waters" under the CWA); *Washington Wilderness Coalition v. Hercla Mining Co.*, 870 F. Supp. 983 (E.D. Wash. 1994) (a six-acre retention pond that does not affect navigable waters is not subject to the CWA).

Because the statute excludes from the application of water quality standards only those farm ponds with no pathways to navigable waters, K.S.A. ∋ 65-171d(d) is not in conflict with the CWA. Accordingly, no new water quality standard is necessary to meet the requirements of the CWA and thus EPA's proposed new standard at 40 C.F.R. § 131.34(a) is contrary to CWA section 303(c)(4)(B). Moreover, because the statute does not exempt "navigable waters" under

the CWA, EPA lacks jurisdiction to effect the application and affect of K.S.A. ə 65-171d(d). For these reasons, EPA's proposed regulation impacting the affect of this statute must be withdrawn in the final rule.

3. The Private Waters Over Which EPA Seeks Jurisdiction Clearly Are Not Within the Scope of the CWA

An examination of the types of water bodies that the Kansas statute exempts from WQS, but that EPA would subject to WQS, makes it abundantly clear that not only is EPA's action contrary to the CWA, EPA's action is contrary to programs of other federal departments and contrary to state conservation programs. In simplest terms, Black's Law Dictionary defines "pond" as "[a] body of stagnant water without an outlet, larger than a puddle and smaller than a lake; or a like body of water with a small outlet." Black's Law Dictionary, 804 (6th ed.) The dictionary further defines "private pond" as "[a] body of water wholly on the lands of a single owner, or of a single group of joint owners or tenants in common, which did not have any such connection with any public waters that fish could pass from one to the other. At common law, if a pond was so connected with public waters that at time of high water, fish could go in and out, it was not 'private pond' from which defendants could seine fish whether fish might go out same day or next season." *Id.*

Throughout the public hearings, several representatives of the Coalition offered descriptions and pictures of ponds. The individuals testifying referred to these water bodies as "livestock ponds" or "stock ponds." The water bodies are so named because the primary purpose for establishing these ponds is to provide water for livestock. Other representatives referred to "sediment ponds," "erosion control ponds," or "tailwater pits." These are all terms given to water bodies created for a specific purpose such as retention of runoff water, or to prevent erosion. These are examples of private water bodies created for a specific purpose and completely surrounded by privately held land. Variations may exist in the description of the pond or its primary purpose, but clearly these are the waters currently exempted from water quality standards pursuant to K.S.A. ə 65-171d(d). These also are the waters that will be subject to water quality standards under the proposed rules even though these ponds are exactly the types

of artificial ponds that are excluded from the definition "waters of the United States" under both the CWA and EPA regulations.[6]

Throughout the years, the State of Kansas, and the United States Department of Agriculture, Natural Resources Conservation Service (USDA-NRCS) has promoted the use of ponds for various purposes. The state and federal government have funded cost-share programs to assist in the development of these ponds. Governmental entities have described ponds in a variety ways, but typically the descriptions match those provided by the representatives of the Coalition. For example, the USDA-NRCS Kansas Field Office Technical Guide ("USDA-NRCS Guide") (attached as Exhibit P) defines the Kansas Standards for Pond (No. Code 378) as:

> A water impoundment made by constructing a dam or an embankment or by excavating a pit or dugout. In this standard, ponds constructed by the first method are referred to as embankment ponds and those constructed by second method as excavated ponds. Ponds constructed by both the excavation and embankment methods are classified as embankment ponds if the depth of water impoundment against the embankment at spillway elevation is 3 feet or more.

The USDA-NRCS Guide continues to define the purpose of the pond "to provide water for livestock, fish and wildlife, recreation, fire control, ground water recharge, crop and orchard spraying, and other related uses and to maintain or improve water quality. This standard does not apply to commercial fishponds." *See* USDA-NRCS Guide at Exhibit P. The document then provides guidance for the spacing of ponds:

> Ponds shall provide storage capacity for the planned consumptive uses and the sediment yield estimated for the life of the structure. The volume of this capacity shall not exceed the mean annual runoff from the drainage area. Spacing of stockwater facilities within a pasture should not exceed 1 mile apart on gentle relief or ½ mile on rough relief for adequate distribution of grazing. Except where there is a significant difference in water quality, the required distribution of water may be provided by springs, wells, flowing streams, or ponds.

See USDA-NRCS Guide at Exhibit P.

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[6] Clearly, even EPA's definition of "waters of the United States" at 40 C.F.R. § 122.2 does not extend to the types of artificial ponds that are described herein. As stated earlier, EPA has repeatedly stated that "artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing" are not "waters of the United States." *See* EPA Press Release at Exhibit M; *see also* 64 Fed. Reg. 39252, 39354.

Here, the federal government is advising range managers on the proper size and location of ponds for stock watering. This clearly was the intended purpose of these ponds. EPA now proposes that these ponds must meet water quality standards. However, the only method of assuring that the ponds meet water quality standards is to construct a fence around them, which eliminates the ability of land managers to use them as intended and is contrary to the advice offered by the United States Department of Agriculture. A photograph of a typical Kansas stock pond is provided at Exhibit Q.

The USDA-NRCS Guide also defines a "water and sediment control basin" as "a short earth embankment or a combination ridge and channel generally constructed across the slope and minor watercourses to for a sediment trap and a water detention basin." *See* USDA-NRCS Guide at Exhibit P. The purpose of the water and sediment control basin is "to trap and collect sediment, reduce onsite erosion, reduce the content of sediment in water, reduce the peak rate of flow at down slope locations reduce flooding, reduce gully erosion, reform the land surface, improve the potential of areas for farming, and promote wildlife habitat by the creation of wetlands." *See* USDA-NRCS Guide at Exhibit P. This practice applies to sites where: (1) the topography precludes installing and farming terraces with reasonable effort; (2) runoff and sediment from upstream areas can damage downstream land or improvements; (3) water erosion is a problem; (4) site conditions are suitable for installation; (5) adequate outlets can be provided; and, (6) basins are installed in conjunction with the establishment of a workable terrace system to stabilize outlets and/or odd areas or where land treatment practices reduce soil loss to tolerable limits for the soil involved. *See* USDA-NRCS Guide at Exhibit P. Here, the USDA recommends the installation of this type of structure to retain sediment to improve water quality. It is absurd then for EPA to subject these waters to water quality standards. These retention ponds are specifically designed to retain potential pollutants, such as sediment, or other materials present in runoff to prevent these pollutants from degrading the water quality of those "navigable waters" subject to the CWA.

The USDA-NRCS Guide also defines a "sediment basin" as "a basin constructed to collect and store debris or sediment." *See* USDA-NRCS Guide at Exhibit P. The purpose of the sediment basin is "to preserve the capacity of reservoirs, ditches, canals, diversions, waterways, tailwater pits, streams, and waste storage facilities; to prevent undesirable deposition on bottom lands and developed areas; to trap sediment originating from construction sites; and to reduce or

abate pollution by providing basins for deposition and storage of silt, sand, gravel, stone, agricultural wastes, and other detritus." *See* USDA-NRCS Guide at Exhibit P. Again, EPA seeks to place water quality standards on these structures that have as their primary purpose to collect debris to protect water quality. By the federal government's own standards, these facilities cannot meet water quality criteria. Photographs of typical Kansas "water and sediment control basins" and "sediment basins," i.e., sediment ponds or erosion control ponds, are provided at Exhibit Q.

Kansas also has a standard for irrigation pits or regulating reservoirs. These facilities are defined as "small storage reservoir(s) constructed to regulate or store a supply of water for irrigation." *See* USDA-NRCS Guide at Exhibit P. This standard applies to reservoirs created by impounding structures and pits excavated below the ground surface for the short-period storage of either diverted surface water, water from pumped or flowing wells, or water from an irrigation delivery system." *See* USDA-NRCS Guide at Exhibit P. The purposes of these facilities are to store water for relatively short periods to:

1. provide for the regulation of fluctuating flows in streams or canals,
2. provide suitable (usually larger) irrigation streams,
3. provide for improved management of irrigation water,
4. permit more efficient use of available labor,
5. avoid nighttime operation, and
6. provide storage for reuse irrigation systems.

See USDA-NRCS Guide at Exhibit P. The USDA-NRCS Guide further provides guidance regarding the construction of tailwater recovery for irrigation systems. EPA is proposing to apply water quality standards to facilities that by definition and design cannot meet water quality standards because they contain runoff. Furthermore, EPA's proposed regulation would run contrary to best management practices of irrigators, as recommended by USDA. *See* USDA-NRCS Guide at Exhibit P. A photograph of a typical tailwater pit is provided at Exhibit Q.

Over the years, the federal government has not only encouraged the construction of the above-described ponds, it has provided substantial federal monies for their construction. The federal government has provided monetary incentives for these and other best management practices (described further in Section IV.C) to improve water quality. On the state level alone,

Kansas has invested $23.7 million in pond programs since 1990 to improve water quality in the State.

There are approximately 250,000 farm ponds in the State of Kansas. Virtually all of these farm ponds are manmade ponds as described above and are exempt from water quality standards pursuant to K.S.A. § 65-171d(d). These manmade ponds clearly are not regulated under the CWA. Even EPA's definition of "waters of the United States" at 40 C.F.R. § 122.2 includes only "natural ponds" that have an "affect on interstate commerce."[7] 40 C.F.R. § 122.2. As stated above, EPA recognizes that "[a]rtificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, [or] settling basins" are not considered to be "waters of the United States." 51 Fed. Req. at 41217; see also 64 Fed. Req. at 39354. Courts have also held that the above-described ponds are not subject to the jurisdiction of the CWA. See, e.g., Village of Oconomoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994) (mining company's tailing ponds are not navigable waters" under the CWA); Washington Wilderness Coalition v. Hercla Mining Co., 870 F. Supp. 983 (E.D. Wash. 1994) (six-acre retention pond is not subject to the CWA). If EPA does not intend to regulate the above-described ponds, as they have repeatedly stated, EPA should clearly state so in the final regulation. Given the concerns of the citizens of this state and the vast number of ponds that meet the above definitions, EPA's clarification in the final regulation of those ponds that fall outside the scope of the CWA is necessary to avoid future litigation on this issue.

B. EPA's Proposed Regulation to Eliminate K.S.A. ə 65-171d is an Impermissible Infringement Upon the Rights of the State of Kansas to Regulate Water Quality

Because K.S.A. ə 65-171d(d) is consistent with the CWA, EPA does not have authority to pass a regulation that would eliminate the effect of this statute. An explicit statement of Congressional intent is required before a statute will be interpreted to affect such a drastic intrusion on traditional state powers. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

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[7] "The maxim, *inclusio unis est exclusio alteris*, refers to the principle of interpretation that the inclusion of one is the exclusion of another. Where the law expressly describes a particular situation to which all shall apply, an irrefutable inference must be drawn that what was excluded was intended to be excluded." *American Wildlands v. Browner*, 94 F.Supp.2d 1150, 1160 (D. Colo. 2000).

Here, far from making such an assertion, Congress expressed its intention to "protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b).

A fundamental rule of statutory construction is that "unless Congress conveys its purpose clearly it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971); *see Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("the historic police powers of the states were not superceded by the Federal Act unless that was the clear and manifest purpose of Congress"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (a statute will not be read to "displace traditional state regulation" unless "the federal statutory purpose [is] 'clear and manifest'"). That principle precludes reading the CWA to displace state and local authority over isolated non-navigable ponds that are not subject to the jurisdiction of the federal government through the CWA.

The CWA reflects traditional views of the division of regulatory authority over waters. "Navigable" "waters of the United States," which are part of or connected to water highways of interstate commerce, are regulated by the federal government. At the same time, Congress sought to preserve the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution. *See* 33 U.S.C. § 1251(b). By asserting jurisdiction over wholly isolated non-navigable farm ponds, EPA readjusts this balance between state and federal authority without support in the text or history of the CWA – let alone the "clear and manifest" statement that is required – and in plain contradiction of 33 U.S.C. § 1251(b).

It is recognized that "[s]tate officials . . . have better knowledge of local environmental concerns than federal officials ever could." *Adler, "Wetlands, Waterflow, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetlands Regulation*," 29 Envtl. L. 1, 52 (1999). Because Kansas, like other states, has in place a comprehensive scheme for protecting local water resources, EPA's assertion of jurisdiction over isolated and privately owned, non-navigable farm ponds is an unlawful intrusion into a well-functioning state regulatory scheme and must be withdrawn in the final rulemaking.

C. EPA's Attempt to Exert Jurisdiction Over Privately Owned, Non-Navigable Isolated Farm Ponds Violates the Tenth Amendment of the United States Constitution

Because EPA is without authority to regulate privately owned isolated farm ponds, its attempts to require the states to subject such waters to water quality standards violates the Tenth Amendment of the United States Constitution.

The Tenth Amendment of the United States Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States . . ." The Supreme Court has interpreted the Tenth Amendment to preclude Congress from commandeering the states' legislative function. *See New York v. United States*, 505 U.S. 144, 175-76 (1992). The Court has emphasized that this protection is decreed no matter how strong the federal interest in the legislation (or regulation) may be. *Id.* at 178.

In *New York*, the Supreme Court considered the constitutionality of a provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which provided that if states could not dispose low-level radioactive waste within a certain deadline, then the state was required to take title to the waste and would be liable for all damages incurred. *See New York*, 505 U.S. at 153 (citing 42 U.S.C. § 2021e(d)(2)(C)). The Court stated that the "take title" provision offered states a choice between two unconstitutionally coercive regulatory techniques. *Id.* at 175-76. States therefore had a choice between accepting ownership of radioactive waste or regulating according to Congress' direction. *Id.* at 175. The Court concluded that either choice would "commandeer" the state to regulate by federal standards. *Id.* On one hand, the take title provision held state liable for radioactive waste. *Id.* On the other hand, the state could enact legislation suggested by Congress which the Constitution does not permit. *Id.* at 176. Thus, the take title provision violated the federal principles demanded under the Tenth Amendment. *Id.*

Protections over state sovereignty were again recognized in *Pritz v. United States*, 117 S. Ct. 2365 (1997), when the Supreme Court invalidated certain provisions of the Brady Act. Again, the Court held that the federal government cannot force the state's executive branches to enact federal regulatory programs regardless of the federal interest involved. *Id.* at 2383-84. Thus, the Supreme Court has clearly spoken and has held that the Tenth Amendment forbids Congress from commandeering the states to take a course of action that it cannot undertake directly. *Id.* Because EPA does not have the authority to regulate waters identified in K.S.A.

ɜ 65-171d(d), the Tenth Amendment does not allow EPA to force the State of Kansas to regulate such waters.

Moreover, EPA's proposed rule also violates the Tenth Amendment because, even if Congress had intended to regulate non-navigable private waters under the CWA, it is without authority to do so under the commerce clause. In *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court struck down the Gun-Free School Zones Act of 1990.[8] In *Lopez*, Chief Justice Rehnquist identified three valid types of commerce clause regulation: (1) regulation over channels of commerce; (2) regulation over instrumentalities of commerce; and (3) regulation over economic activities that substantially affect interstate commerce. *See id.* at 558-59. The Gun-Free School Zones Act failed constitutional scrutiny because it was not an economic activity that might, "substantially affect any sort of interstate commerce." *Id.* at 567. In order to find a substantial effect, the Court's precedent since 1937 has asked whether Congress's determination that an activity affects interstate commerce is rational. *See Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 277 (1981). In *Lopez*, Congress did not make concrete findings with respect to the substantial effect that guns in schools may have on interstate commerce. *See Lopez*, 514 U.S. at 562. Instead, Congress presupposed that interstate commerce was impacted through a theory of decreased "national productivity." *Id.* at 564. The Court reasoned that allowing Congress to act under this tenuous auspices would give the legislative branch overreaching powers. *Id.* at 565. Again, because non-navigable, privately owned isolated farm ponds have no connection with the "highways" of commerce, they are not subject to the Constitutional authority granted to Congress pursuant to the commerce clause. Therefore, any attempt by EPA to regulate these ponds violates the Tenth Amendment of the United States Constitution.

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[8] The Act prohibited the carrying of firearms within 1000 feet of a school zone. *See* 18 U.S.C. § 922(q)(2)(A).

III. COMMENTS TO EPA's PROPOSED DESIGNATION OF 1,456 WATER BODIES IN THE STATE OF KANSAS FOR PRIMARY CONTACT RECREATION USES

A. EPA's Proposed Primary Contact Recreation Use Designation for 1,456 Water Bodies in the State of Kansas is Contrary to Law

The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Consistent with the provisions of the Act, one of the goals of the CWA is that "wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." *Id.* § 1251(a)(2). Congress explicitly stated in the CWA its policy to "recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution. . ." *Id.* § 1251(b).

Pursuant to CWA section 303(c), states are required to develop water quality standards for navigable waters within their jurisdiction. *See id.* § 1313(c). Water quality standards must include designated uses for all water bodies within the state and the water quality criteria to protect the designated uses. *See id.* § 1313(c)(2)(A). The states must ensure that water quality standards "protect the public health or welfare, enhance the quality of water and serve the purposes of" the Act. *Id.* The CWA requires states to establish water quality standards taking into consideration a water body's use and value for "public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." *Id.* Thus, the CWA provides for the consideration of numerous potential uses and allows for the designation of several compatible uses for the same water body.

Congress deliberately left it to the individual states to "designate" the appropriate uses applicable to each of its water bodies. Congress recognized that it could not possibly determine the appropriate uses for all water bodies throughout the United States and therefore determined that it was the inherent prerogative of the individual states to decide whether a particular water body should be devoted to "agricultural and industrial uses," "navigation uses," "public water supplies," or the "propagation of fish and wildlife." 33 U.S.C. § 1313(c)(2)(A).

EPA proposes to designate 1,456 water bodies for primary contact recreation. Although Kansas has designated these 1,456 water bodies for secondary contact recreation uses, EPA is attempting to usurp the State's primary authority to designate uses. To justify its proposed use

designation, EPA asserts that the CWA contains a "rebuttable presumption" that in the absence of a Use Attainability Analysis ("UAA"), primary contact recreation uses are attainable. However, this "rebuttable presumption" does not exist in the CWA. The language of the Act and Congress' intent do not suggest that such a rebuttable presumption could be consistent with the Act, and nowhere does the Act authorize EPA to create such a presumption. Moreover, by relying on this asserted "rebuttable presumption," EPA absolves itself of its legal duty to provide clear basis and support for a proposed rule. Finally, to make matters even worse, EPA shifts this legal duty to the citizens of Kansas by asking numerous times in the proposed rule for information, data, and support to rebut EPA's presumption.

EPA attempts to find support for this asserted "rebuttable presumption" in the CWA goal uses of section 101(a)(2). However, the goal language of the CWA does not create a statutory mandate. The language EPA relies upon is simply an "interim goal" that "wherever attainable" water quality should protect and support the propagation of fish, shellfish, and wildlife and provide for recreation in and on the water by July 1, 1983. 33 U.S.C. ə 1251(a)(2) (emphasis added). Moreover, even if CWA section 101(a)(2) could create a "rebuttable presumption," it would not create an exclusive presumption for primary contact recreation uses, such as swimming. The goal language speaks to recreation "in and on" the waters of the United States. If the CWA contains a presumption for recreational uses "in and on" the water, Kansas has clearly acted accordingly by designating these 1,456 water bodies for secondary contact recreation uses, such as wading, fishing and hunting. Most importantly, a "rebuttable presumption" runs contrary to the plain language of CWA section 303(c)(2)(A). CWA section 303(c)(2)(A) does not create a "rebuttable presumption" for primary contact recreation uses for waters of the United States. Instead, CWA section 303(c)(2)(A) requires states to consider many different uses when making use designations for navigable waters within its boundaries. Thus, EPA's proposed rulemaking to designate 1,456 water bodies for primary contact recreation uses based upon an asserted presumption is contrary to law.

1. EPA's Reliance on a "Rebuttable Presumption" That All Water Bodies Must Be Designated For Primary Contact Recreation Uses is Contrary to the CWA

EPA acknowledges in its proposed rulemaking that its own regulations, and not the CWA, effectively establish a "rebuttable presumption" that all navigable waters must be designated for primary contact recreation uses unless it is affirmatively demonstrated by a UAA

that those uses cannot be attained. *See* 65 Fed. Reg. at 41221. Yet no provision of the CWA remotely authorizes EPA to promulgate such a regulation, to interpret any regulation in this fashion, or to otherwise establish such a presumption.

The analysis of whether the CWA contains a presumption for primary contact recreation uses must begin with the plain language of the statute. *See United States v. James*, 478 U.S. 597, 604 (1986). When Congressional intent is clear through its legislation, a contrary interpretation by the agency is entitled to no deference and is contrary to law. *See Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994). As the following analysis will show, the goal language contained in CWA section 101(a)(2) does not provide for the presumption EPA is attempting to craft and impose through this proposed rulemaking. Furthermore, EPA's interpretation is contrary to the language contained in CWA section 303(c)(2)(A). Because EPA's proposed rule is contrary to the plain language of the CWA, it must be withdrawn in the final rulemaking.

a. The Goal Language Contained in CWA Section 101(A)(2) Does Not Contain A Presumption for Primary Contact Recreation Uses

EPA attempts to support its "presumptive use" position by resorting to CWA section 101(a)(2). Section 101(a)(2), however, merely sets forth legislative goals and does not mandate that all waters of the United States be designated for primary contact recreation uses. Nor can this goal language work to rewrite the plain language of the applicable statutory requirements set forth under CWA section 303(c)(2)(A).

At the outset, the Agriculture Coalition notes that the section 101(a)(2) goal is only one of many goals identified in CWA section 101(a). For example, CWA section 101(a)(1) provides that "it is the national goal that the discharge of pollutants into the navigable water be eliminated by 1985." 33 U.S.C. § 1251(a)(1). If this goal language was interpreted as a mandate, as EPA now interprets section 101(a)(2), all discharges of pollutants into navigable waters would have to cease (i.e., all municipalities, businesses, and industries would have to stop discharging even wastewater treated to comply with federal and state discharge requirements) and the National Pollution Discharge Elimination System in CWA section 402 would be rendered a nullity. This example speaks to the obvious: Goal language is not an enforceable statutory mandate.

Turning to an analysis of CWA section 101(a)(2), that provision states:

> The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter –
>
> (2) It is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.

33 U.S.C. § 1251(a)(2) (emphasis added). EPA asserts that these CWA sections contain a presumption for primary contact recreation uses. EPA's assertion is not correct.

First, CWA section 101(a)(2) provides that "wherever attainable, an interim goal of water quality which provides for . . . recreation in and on the water be achieved." 33 U.S.C. ∋ 1251(a)(2) (emphasis added). The CWA, including the goal language contained in section 101(a)(2), contains no preference for primary contact (in the water), as opposed to secondary contact (on the water) recreation uses. Moreover, EPA is reading into the CWA a presumption specifically for primary contact recreation uses that does not exist.[9]

Second, Congress stated that the CWA section 101(a)(2) goal should be achieved "wherever attainable." 33 U.S.C. ∋ 1251(a)(2). In other words, Congress recognized that recreation "in and on" the waters may not be attainable for every water body. This statement belies EPA's assertion that section 101(a)(2) contains a presumption that primary contact recreation uses are attainable. By inserting the phrase "wherever attainable," Congress expressed its desire to harmonize its stated goals with the broad discretion vested in the individual states under CWA section 303(c)(2)(A) to designate the uses appropriate for its water bodies. Indeed, Congress expressly recognizes the states primary authority in CWA section 101(b), which specifically provides: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . ." 33 U.S.C. § 1251(b) (emphasis added).

Finally, the plain language of this "Congressional declaration of goals and policy" clarifies that EPA must attain these goals "consistent with the provisions of [the Act]." *Id.* Accordingly, EPA must pursue the goals of the CWA by complying with the express mandates

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[9] As discussed further in section III.A.4, even if the CWA contains a presumption for recreational uses, it is clear that the designation of these water bodies for secondary contact recreation uses by the State of Kansas is consistent with the goal language in CWA section 101(a)(2).

of CWA section 303(c)(2)(A) and not by impermissibly eliminating the State's "primary responsibilit[y]" to designate waters as appropriate considering a range of uses. *See* 33 U.S.C. §§ 1251(b), 1313(c)(2)(A).

EPA's absurd interpretation reveals the agency's true "goal" in this proposed rulemaking – to do an end run around Congress, usurp the clear authority of the states to implement and enforce the CWA, and rewrite the statutory requirements of the CWA. Because EPA's presumption in this proposed rule is contrary to the clear language of CWA section 101(a)(2), it must be withdrawn in the final rulemaking.

b. EPA Cannot Create an Enforceable Mandate From General Congressional Policy Language

EPA cannot create or support its "rebuttable presumption" by resorting to the goal language in CWA section 101(a)(2). Courts have consistently held that it is improper to interpret a general Congressional statement of policy in a manner that transforms it into a statutory directive or requirement. *See, e.g., National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 177 (D.C. Cir. 1982) (admonishing that "caution is always advisable in relying on a general declaration of purpose to alter the apparent meaning of a specific provision" and finding that a goal of eliminating discharge of pollutants cannot be used to expansively construe the terms "pollutant" otherwise specifically defined under the CWA); *Association of Am. R.Rs. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977) (where operative parts of Noise Control Act are unambiguous, its meaning cannot be enlarged by recitation to Congressional statement of policy); *Samuel's v. District of Columbia*, 650 F. Supp. 482, 483 (D.D.C. 1986) (the Court admonished that Congressional statements of policy cannot mitigate nor override specific requirements laid out in body of statute). And the Supreme Court has rejected the notion that "whatever furthers the statute's primary objective must be the law." *Rodriquez v. United States*, 480 U.S. 522, 526 (1987). To the contrary, deduction from the broad purpose of a statute begs the question if it is used to decide by what means (and hence to what length) Congress pursued that purpose. In interpreting statutory meaning, the text of the statute must be read as a whole.

Accordingly, as discussed below, CWA section 101(a)(2) must be read together with CWA section 303(c)(2)(A) so that neither section is rendered a nullity and so that both sections are given full effect. 2A *Sutherland Statutory Construction* § 46.05 at 103 (5th ed. 1991); *Boise Cascade Corp. v. U.S.E.P.A.*, 942 F.2d 1427 (9th Cir. 1991). EPA's insistence that the general goal enunciated in CWA section 101(a)(2) somehow circumscribes the plenary authority

Congress vests in the states to designate appropriate uses for its water bodies is not supported by CWA section 101(a) and is contrary to the plain language of CWA section 303(c)(2)(A). Therefore, EPA's proposed primary contact use designations that are based on this unlawful presumption must be withdrawn in the final rule.

c. EPA's Presumptive Use Interpretation is Contrary to CWA Section 303(c)(2)(A)

As discussed above, Congress mandated that the goals of the CWA be achieved in accordance with the provisions of the CWA. Because EPA's presumptive use interpretation is in direct contravention of CWA section 303(c)(2)(A), it is ultra virus and must be withdrawn in the final rulemaking.

Section 303(c)(2)(A) is perfectly clear. It provides:

> Whenever a State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

33 U.S.C. ə 1313(c)(2)(A) (emphasis added).

As the highlighted language demonstrates, Congress did not establish certain limited presumptive uses for navigable waters as EPA contends. Instead, Congress requires states to affirmatively "designate"[10] appropriate uses for water bodies within their state and to do so "while taking into consideration their use and value" for a host of purposes, some potentially conflicting. *Id.*

By asserting that CWA section 303(c)(2)(A) supports an interpretation that requires all water bodies to satisfy primary contact recreation uses, EPA essentially deletes from the CWA

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[10] The definition of the word "designate" means:

> [t]o indicate, select, appoint, nominate, or set apart for a purpose or duty . . . To mark out and make known; to point out; to name; indicate.

Black's Law Dictionary, (5th ed. 1979).

the selection authority that Congress vested exclusively in the states under this section. By insisting that EPA has the power to require states to designate all waters for primary contact recreation uses, EPA deletes Congress's express requirement that states select the appropriate uses for navigable waters, taking into consideration "their use and value" for the uses listed in section 303(c)(2)(A). *Id.* EPA's presumption only for its interpretation of the uses identified in CWA section 101(a)(2) (protection of fish and wildlife and providing for recreation in and on the waters) essentially modifies section 303(c)(2)(A) to provide a list of use attainability priorities that do not exist and that will result in use designations that, in reality, conflict with the actual uses of the water bodies. EPA's "edits" to the CWA are not only contrary to the Act, they are contrary to EPA's own regulations and guidance. *See infra* section III.A.2 and 3. EPA emphasizes that "among the uses listed in the Clean Water Act, there is no hierarchy." *See Water Quality Standards Handbook: Second Edition*, section 2.1 (August 1994).

Had Congress intended that all waters of the United States be designated for primary contact recreation uses in the absence of a UAA, as EPA now asserts, Congress would have expressly said so rather than requiring the states to make that and other determinations on the basis of site-specific information concerning the water body's ability to be so designated. If Congress intended the result EPA now advocates, it would have written CWA section 303(c)(2)(A) as follows:

> Such standards shall be such as to protect the public health or welfare, enhance the quality of water, and serve the purposes of this chapter. **[Such standards shall be established to support primary contact recreation uses unless a Use Attainability Analysis shows that such a use cannot be attained.]** ~~Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.~~

The CWA would then go on to define "primary contact recreation uses."

It is an elementary canon of statutory construction that affect must be given to every word, clause, and sentence of a statute so that affect is given to all its provisions and no part will be inoperative or superfluous, void or insignificant. *See* 2A *Sutherland Statutory Construction*, § 46.06 at 119 (5th ed. 1991); *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825 (9th Cir. 1996); *Boise Cascade Corp. v. U.S. EPA*, 942 F.2d 1427 (9th Cir. 1991). Because EPA's

presumptive use interpretation is contrary to the clear meaning of CWA section 303(c)(2)(A), it must be removed from the final regulation.

2. EPA's "Presumptive Use" Interpretation is Contrary to Its Own Regulations

According to EPA, the regulations promulgated at 40 C.F.R. Part 131 support its "rebuttable presumption" that all waters must be designated for primary contact recreation uses unless a UAA has been conducted to show that those uses are unattainable. EPA cannot sidestep the CWA by using its own regulation to support a presumption it claims is in the CWA. Moreover, the clear language of 40 C.F.R. Part 131 demonstrates that no such "presumption" has ever been promulgated by EPA and no reading of Part 131 can support such a presumption. Indeed, where EPA desired to establish a "presumption" in the water quality standards regulations, it did so directly and explicitly. For example, 40 C.F.R. § 131.10(d) establishes a "presumption" of use attainability for waters in circumstances not applicable here. This section provides as follows:

> At a minimum, uses are deemed attainable if they can be achieved by the imposition of effluent limits required under sections 301(b) and 306 of the Act and cost effective and reasonable best management practices for nonpoint source control.

40 C.F.R. § 131.10(d) (emphasis added).

Pursuant to this regulation, EPA only can "deem" recreational uses as "attainable" after first concluding that the imposition of effluent limits required under CWA sections 301(b) and 306 and cost-effective and reasonable best management practices for nonpoint source controls on these waters would achieve the applicable water quality standards supported by those designations. The administrative record establishes that EPA has failed to make the required determinations. In fact, EPA does not even claim in the proposed rule that it has made such a determination under 40 C.F.R. § 131.10(d). Indeed, EPA states in the preamble to the proposed rules that there is an absence of information and data and solicits information and data from the public. In light of the existence of the explicit presumption found at 40 C.F.R. § 131.10(d), it is clear that when EPA desired to establish a presumption, it knew how to do so. Accordingly, the regulatory absence of a broader "presumption" "deeming" all waters of the United States suitable for "primary contact recreation" shows that EPA never intended that result.

Regardless, the operative regulation governing state-designated use determinations is 40 C.F.R. ∋ 131.10(a), which directs each state to "take into consideration" a variety of uses, but neither mandates a particular use designation nor creates a "presumption" that primary contact recreation uses are inherently attainable. Specifically, 40 C.F.R. ∋ 131.10(a) directs the states to:

> Specify appropriate water uses to be achieved and protected. The classification of the water of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation.

The language contained in 40 C.F.R. §∋ 131.10(a) and (d) simply leave EPA no room to argue the existence of a specific presumed use for primary contact recreation; the plain reading of its own regulation prohibits the very post hoc interpretation it now seeks to advance in this proposed rulemaking.

Because there is no statutory or regulatory provision that establishes the "presumption" that forms the basis for EPA's proposed rulemaking, EPA asserts that a comparison of 40 C.F.R. § 131.10(j) and (k) implicitly evidences its existence.[11] *See* 65 Fed. Reg. at 41221. Nowhere in either regulatory provision cited by EPA, however, is the word "presumption" (whether rebuttable or otherwise), the phrase "deemed attainable," or the phrase "primary contact recreation" found. EPA relies on 40 C.F.R. § 131.10(j), which requires a state to conduct a UAA whenever a state designates uses that do not include the uses specified in CWA section 101(a)(2). EPA contrasts that provision with 40 C.F.R. § 131.10(k), which provides that a state is not required to conduct a UAA "whenever designating uses which include those specified in CWA section 101(a)(2) of the Act." EPA asserts that because its regulations do not require a state to conduct a UAA if uses are designated consistent with section 101(a)(2), it somehow has the authority to presumptively designate all waters for primary contact recreation uses.[12]

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[11] Of course, because EPA has previously demonstrated an ability to promulgate a presumption when it desired to do so, its explicit failure to do so here must be interpreted as deliberate. *See, e.g., Oregon Natural Resources Council, Inc. v. Kantor*, 99 F.3d 334 (9th Cir. 1996) (government is presumed to act intentionally and purposely when it includes language in one section but omits it in another).

[12] As discussed above, this entire scenario completely ignores the plain language of CWA section 303(c)(2)(A) that lists the considerations and uses that form the basis for use designations.

However, a fair reading of subsections (j) and (k) of 40 C.F.R. § 131.10 does not support EPA's interpretation. Subsections (j) and (k) merely specify the type of scientific assessment that must accompany certain use designations. These regulations in no way explicitly or implicitly mandate that the states designate water bodies within their jurisdiction for CWA section 101(a)(2) uses. In fact, as discussed above, such an interpretation is contrary to EPA's regulations at 40 C.F.R. §§ 131(a) and (d). Additionally, as discussed further in section III.B of this comment, section 131.10(k) does not relieve a state (or EPA) from the obligation to independently justify designated use decisions. *See* 40 C.F.R. § 131.6(b) (state must demonstrate to EPA all methods used and analyses conducted to support water standard revisions). The fact that states (or EPA) must independently justify use designations completely contradicts any notion of a presumption for a particular use. Moreover, because the meaning of the CWA is clear, EPA's erroneous interpretation is entitled no deference pursuant to the Supreme Court's analysis in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984).

Speaking specifically to the State's compliance with 40 C.F.R. § 131.10(j), Kansas is not required to conduct a UAA for the water bodies at issue because they have been designated for recreational uses consistent with the goals contained in CWA section 101(a)(2). Additional discussion regarding the State's designation of uses consistent with the goals of the Act is provided *infra* in Section III.A.4.

In sum, nothing in 40 C.F.R. Part 131 supports EPA's attempts to justify its presumption and complete failure to establish an administrative record in support of its proposed administrative rulemaking to designate 1,456 water bodies in Kansas for primary contact recreation uses. Moreover, EPA's attempt to interpret its own regulations otherwise is inconsistent with the clear statutory directives of the CWA, and thus entitled to no deference.

3. EPA's "Presumptive Use" Interpretation is Contrary to EPA Guidance

EPA's position that the CWA contains a presumption of attainability and that such a presumption requires a primary contact use designation unless a UAA establishes otherwise, is contrary to EPA's own guidance document. As an initial matter, EPA's *Water Quality Standards Handbook – Second Edition* (EPA 823-B-94-005, August 1994) ("WQS Handbook"), contains no mention of a "rebuttable presumption of attainability." The WQS Handbook recognizes that

the states must take into consideration all uses provided in CWA section 303(c)(2)(A) and that states "are free to develop any use classification system they see as appropriate." *See WQS Handbook*, at 2.1. EPA clearly states that "[a]mong the uses listed in the Clean Water Act there is no hierarchy." *Id.*

Moreover, EPA specifically recognizes that recreation in and on the water "may not be attainable in certain waters, such as wetlands, that do not have sufficient water, at least seasonally." *Id.* at 2.1.3. EPA even notes that the shorthand expression "fishable/swimmable" that EPA relies on for its "rebuttable presumption" does not accurately reflect the "actual objective" of the CWA, which is to "restore and maintain the chemical, physical, and biological integrity of our Nation's waters." *Id.* at 4.4.2 (citing CWA § 101(a)). Thus, EPA's own guidance runs contrary to its assertions in this rulemaking that the CWA contains a "rebuttable presumption" and reveals EPA's clear attempts to twist the CWA to further its own new policy agenda.

4. Assuming That EPA Can Use the Goal Language of CWA Section 101(a)(2) to Create Presumptive Uses, the Designation of Kansas Waters for Secondary Contact Recreational Uses is Consistent With the Goals of the CWA

Even if the goal language provided in CWA section 101(a)(2) could create or support a "rebuttable presumption" that all navigable waters must be designated for those uses, the State of Kansas has designated all classified water bodies for secondary contact recreation uses, where such waters are not suitable for primary contact uses. CWA section 101(a)(2) provides that "wherever attainable, an interim goal of water quality which provides for . . . recreation in and on the water be achieved." 33 U.S.C. ə 1251(a)(2). This language does not differentiate between secondary or primary recreational contact uses; it states that recreation "in and on" the water be achieved.

EPA's proposed rule appears to assume that the goal language in CWA section 101(a)(2) mandates a "swimmable" goal. Again, EPA attempts to rewrite the CWA to achieve its own ends. The language "in and on" was clearly meant to encompass a wide variety of recreational activities that are not limited to swimming. The focus must remain with the language of the Act and not catch phrases like "fishable/swimmable" that are developed by the agency. As discussed above, even EPA admits that its phrase "fishable/swimmable" does not accurately reflect the "actual objective" of the CWA. *See WQS Handbook*, at 4.4.2.

The State of Kansas has acted in furtherance of the goals contained in CWA section 101(a)(2) by designating all 1,456 water bodies at issue for secondary contact recreation uses. EPA, however, has chosen to completely gloss over this fact in its proposed rulemaking. In the proposed rule, EPA explains that the State of Kansas greatly expanded its Surface Water Register in 1994, which contains the listing of all streams, lakes and wetlands classified under the State's water quality standards. *See* 65 Fed. Reg. at 41221. EPA also states that Kansas determined that some waters did not support primary contact uses and went on to say that Kansas completely failed to designate uses for another 1,475 waters. *Id.* EPA also states that Kansas has provided a lack of justification for failing to protect waters in the State for CWA section 101(a)(2) goal uses since the early 1980's. EPA, however, conveniently fails to mention in this discussion that <u>every</u> classified water body in Kansas has been designated, at a minimum, for secondary contact uses. Thus, every classified water body in Kansas is subject to the corresponding water quality standards and criteria to provide for those uses. Thus, EPA's statement that Kansas has failed to designate uses for waters within its state or that it has not designated uses that comport with the goals of the CWA is simply not true.

Clearly, the goal of the CWA to achieve recreational uses "in and on" the water is not limited to primary contact recreation uses. Even EPA's WQS Handbook expressly refutes any notion that the recreation goal in section 101(a)(2) only applies to <u>primary</u> contact recreation uses. *See WQS Handbook*, at 2.1.3. "Option 2" and "Other Options." Indeed, EPA's Handbook recognizes that the CWA goal of providing for "recreation <u>in and on</u> the water" supports both primary and secondary contact use designations. *See id.* at 4.4.1.

In its WQS Handbook, EPA explains that a primary contact recreation classification is primarily to protect persons from ingestion of, or immersion in, water. *See id.* at 2.1.3. Primary contact uses may include swimming, water-skiing, skin-diving, surfing and other activities likely to result in immersion. Secondary contact classification is protective when immersion is unlikely such as boating, wading and rowing. *See id.* EPA also recognizes the limitless subcategories of secondary contact uses that are unlikely to result in immersion, like rafting, sailing, and fishing and other recreational uses that do not involve contact with the water, such as hiking, camping, and bird watching. *See id.* Consistent with EPA guidance, Kansas differentiates between primary and secondary contact uses based on whether or not ingestion of surface water is probable. *See* K.A.R. ɔ 28-16-28d(l)(7)(A) and (B). Primary contact uses include activities such

as swimming, skin diving and water-skiing, whereas secondary contact uses include activities such as wading, fishing and trapping. *See id.*

It is clear from EPA guidance that EPA believes recreational use designations other than primary contact are consistent with the goals of the CWA. *See also id.* at 2.1.3. Thus, even if the CWA goals in section 101(a)(2) mandate particular use designations, Kansas has complied by designating classified waters for secondary contact uses.

5. Assuming That the State is Required to Conduct UAAs Pursuant to Section 131.10(j), EPA's Proposed Primary Contact Use Designation For These 1,456 Water Bodies is Contrary to the CWA and EPA Guidance

In the event a state has not complied with 40 C.F.R. ∋ 131.10(j), EPA's course of action should be to require Kansas to conduct UAAs for these water bodies. Section 131.10(j) requires a state to conduct a UAA if a designated use is not consistent with the goals contained in CWA section 101(a)(2). *See* 40 C.F.R. ∋ 131.10(j). Thus, even if EPA is correct that a secondary contact use designation is not consistent with the goals of CWA section 101(a)(2), 40 C.F.R. § 131.10(j) only requires the state to conduct a UAA; it does not allow EPA to automatically designate the water body for that use.[13] The EPA WQS Handbook allows for the conditional approval of water designations that do not comply with section 131.10(j) upon an agreement that the state will conduct UAAs within a limited time frame. *See* WQS *Handbook*, at 2.1.3.

In fact, EPA has acted consistent with 40 C.F.R. 131.10(j) and its guidance in the past. EPA conditionally approved the 1987 triennial review submitted by the State of Kansas upon an agreement by the state to conduct UAAs on an agreed upon schedule. Despite the clear language of its own regulations and guidance and its past practices with the State of Kansas, EPA is attempting to designate these streams for primary contact uses with no supporting data. The Coalition urges the EPA to act in accordance with its own mandates and past practices, and

[13] In fact, the presumptive primary contact designation could be detrimental to public health where the quality of water in the water body does not meet primary recreation contact criteria. *See* Section III.B.1.

conditionally approve the secondary contact use designations for the 1,456 water bodies and establish a schedule for the State of Kansas to conduct UAAs for these water bodies.[14]

B. In the Absence of Supporting Data, EPA's Primary Contact Recreation Use Designation for 1,456 Kansas Water Bodies is Arbitrary and Capricious and Must Be Withdrawn

EPA rules specify that when EPA steps in to promulgate federal water quality standards, EPA is subject to "the same policies, procedures, analysis, and public participation requirements established for states in these regulations." 40 C.F.R. § 131.22(c). Thus, prior to designating 1,456 Kansas water bodies for primary contact recreation uses, EPA must take the same steps Kansas would be required to take to re-designate these water bodies from secondary contact to primary contact recreation.

The minimum requirements for state development and submission of new and revised water quality standards are set forth at 40 C.F.R. Part 131. The CWA and supporting regulations require states to adopt water quality standards:

> to protect the public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act. Serve the purposes of the Act (as defined in sections 101(a)(2) and 303(c) of the Act) means that water quality standards, should wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water and take into consideration their use and value of public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial and other purposes including navigation.

See 40 C.F.R. § 131.2. Thus, at the outset, a host of competing interests must be considered prior to the development or revision of water quality standards. Moreover, these same competing interests must be considered by the state when designating "appropriate water uses to be achieved and protected." 40 C.F.R. § 131.10(a).

In addition to these initial considerations, "any new or revised water quality standard must be accompanied by some type of supporting analysis" and the "[m]ethods used and analyses conducted to support water quality standards revisions." 40 C.F.R. §§ 131.21(a)(2) and 131.6(b). In addition, the "supporting analyses shall be made available to the public prior to the

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[14] There is no indication in the proposed rules that EPA considered a conditional approval of the use designations submitted by the State of Kansas or any of the other "Options" articulated in EPA's WQS Handbook.

hearing."[15] *Id.* 131.20(b); *see also* Proposed Rule Preamble for Part 131, 47 Fed. Reg. at 49234 (Oct. 29, 1982) ("analyses are to be available at the public hearing so that during the public hearing, interested groups can debate, support and/or challenge the analyses. . .used as a basis for any possible revisions to their standards.").

The type of information that must be provided for any new or revised use designations, even those that include CWA section 101(a)(2) uses, is clarified in the discussion regarding designated uses in EPA's publication of the Final Rule for Part 131, 48 Fed. Reg. 51400, at 51409 (Nov. 8, 1983), where EPA states that it "will not approve standards unless they are based on sound scientific and technical analysis" (emphasis added). Because EPA requires states to support water quality standards revisions with sound scientific and technical analysis, EPA is required to provide the same level of support for its federally promulgated water quality standards revisions. *See* 40 C.F.R. ∋ 131.22. Such "sound scientific and technical analysis" likely includes "necessary data and information to: (1) adequately analyze the attainability of the uses; (2) perform benefit-cost assessments on attaining the uses; and (3) set site-specific criteria." *See* 47 Fed. Reg. at 49234.

In the instant rulemaking, EPA is proposing to revise Kansas water quality standards by changing the designated use of 1,456 Kansas water bodies from secondary contact to primary contact recreation. As set forth above, EPA, like any state revising water quality standards, is required to consider public health and welfare, balance the competing use interests of the water body and to provide "sound scientific and technical analysis" for its revision of the designated uses for these water bodies. *See* 40 C.F.R. ∋∋ 131.2, 131.6(b), 131.10(a), 131.21(a)(2). EPA is also required to provide "supporting analyses" for any water quality standards to the public prior to the hearing. *See* 40 C.F.R. ∋ 131.20(b).

EPA has completely ignored these statutory and regulatory requirements. EPA, in the proposed rule, provides no evidence that it has considered the public health or welfare of the citizens of Kansas or that it considered the competing interests of water body uses identified in the statute and regulations. Moreover, the administrative record is completely void of any

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[15] Although 40 C.F.R. ∋∋ 131.6(b), 131.20(b) and 131.21(a)(2) apply where states submit revised water quality standards to EPA for review and approval, these requirements must apply equally to EPA, pursuant to 40 C.F.R. ∋ 131.22, when EPA submits its proposed water quality standards to the public for review and comment.

scientific or technical analysis supporting the primary contact use designation. Indeed, EPA recognizes this total lack of supporting data by erroneously requesting the public to provide EPA the very type of scientific and technical analysis EPA was required to consider and provide to the public prior to proposing the revised use designations for these streams. *See* 40 C.F.R. ə 131.20(b).

Agency action resting on inadequate evidentiary basis is "arbitrary and capricious" and is invalid. *See Tex Tin Corp. v. U.S. EPA*, 992 F.2d 353, 354 (D.C. Cir. 1993). A rulemaking must be overturned where an agency failed to consider an important aspect of the problem or offered an explanation for its decision that runs counter to the evidence before the agency. *See Motor Vehicle MSS. Ass'n of U.S. Inc. v. State Farm Mut. Auto On. Co.*, 465 U.S. 29, 43 (1983). It is clear that under the rule of law, EPA's proposed primary contact use designations are arbitrary and capricious and must be withdrawn.

1. EPA Failed to Consider the Public Health and Welfare of the Citizens of Kansas before Designating These Water Bodies for Primary Contact Recreation Uses

EPA, like Kansas, is required to consider the public health and welfare of the state when establishing water quality standards. *See* 33 U.S.C. ə 1313(c)(2)(A); 40 C.F.R. ə§ 131.2 and 131.22(c). EPA, however, by failing to consider whether primary contact recreation uses are attainable with available pollution controls for the 1,456 Kansas water bodies at issue is not only abrogating its statutory duty but is also putting the public health of the citizens of Kansas at risk. Many of the streams proposed for primary contact uses exceed the in-stream criteria for primary contact recreation uses under normal urban, rural or industrial conditions. EPA provides no data regarding whether these in-stream criteria can be met through the imposition of pollution controls. Yet, EPA is proposing a standard that would have the citizens of Kansas presume that they may safely have full body contact with these water bodies. EPA is focusing blindly on its attempts to improve water quality (assuming the quality of the streams can be improved through pollution controls) to the detriment of public health and safety. Designating these 1,456 Kansas water bodies for primary contact recreation uses without even determining whether it is actually safe or will ever be safe for people to swim in these waters runs contrary to the purposes and

mandates of the CWA. Thus, the use designations are arbitrary and capricious and must be withdrawn. [16]

2. EPA Failed to Balance the Competing Stream Use Interests Before Designating These Water Bodies for Primary Contact Recreation Uses

When designating stream uses, EPA, like Kansas, is required to "take into consideration their use and value of water for public water supplies, propagation of fish, shellfish, and wildlife, recreation in and on the water, and agricultural, industrial and other purposes including navigation." 40 C.F.R. §§ 131.10(a) and 131.22(a). EPA has performed no such analysis in the proposed rule. Indeed, EPA admits that it "did not consider the potential costs for nonpoint sources, such as agricultural and forestry-related nonpoint sources." 65 Fed. Reg. at 41228. Nor did EPA consider "non-discharging animal feedlots." *Id.*

EPA failed to consider the impact of the proposed rule on agricultural and other nonpoint sources despite its recognition that "controls on these sources may be necessary to achieve designated uses." *Id.* at 41228. Rather, EPA states that "the evaluation of nonpoint sources and their effects on the environment is highly site specific and data sensitive." *Id.* Apparently, EPA chose to ignore its statutory and regulatory duty to consider competing stream uses when adopting these primary contact use designations because such an evaluation may be difficult to achieve. EPA's failure to consider these required factors is arbitrary and capricious. *See, e.g., Tex Tin Corp.*, 922 F.2d at 354 (agency action resting on inadequate evidentiary basis is "arbitrary and capricious" and is invalid); *Motor Vehicle MSS. Ass'n.*, 465 U.S. at 43 (a rulemaking must be overturned where an agency failed to consider an important aspect of the problem or offered an explanation for its decision that runs counter to the evidence before the agency). Accordingly, EPA's proposed primary contact recreation use designations must be withdrawn.[17]

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[16] EPA has taken the position that "[i]n order to protect public health, States must set criteria to reflect recreational uses if it appears that recreation will in fact occur in the stream," *see* Final Rule, 40 C.F.R. Part 131, 48 Fed. Reg. 51400, 51401(Nov. 8, 1983). EPA, however, provided no evidence of recreational activity in the 1,456 water bodies at issue in this proposed rulemaking.

[17] EPA's failure to consider the impact of the proposed rule on agricultural and other nonpoint sources also renders EPA's economic impact analysis concluding a total cost of $1.9 million for its use designation proposal wholly inadequate. *See* 65 Fed. Reg. at 41232.

3. EPA Failed to Provide Scientific and Technical Support for the Proposed Revision of the Recreational Use Designation for 1,456 Water Bodies

Although EPA regulations do not indicate the type or level of scientific and technical data that must be considered in establishing water quality standard use designations, logically such analyses must include data regarding the attainability of the proposed use. *See, e.g.*, 47 Fed. Reg. at 49234 (encouraging states to obtain "necessary data and information to: (1) adequately analyze the attainability of the uses; (2) perform benefit-cost assessments on attaining the uses; and (3) set site-specific criteria."). Obviously, EPA considers attainability data relevant because it requests such information from the public in the proposed rule. *See* 65 Fed. Reg. at 41223. [18]

A use is "deemed attainable" if it can be "achieved by the imposition of effluent limits required under sections 301(b) and 306 of the Act and cost-effective and reasonable best management practices for nonpoint source control." 40 C.F.R. ∋ 131.10(d). EPA completely failed to consider whether the imposition of point and nonpoint pollution controls on the waters at issue could ever achieve the applicable criteria in the water quality standards. EPA's failure to consider existing data or collect data of its own prior to proposing a primary contact use designation for these water bodies is arbitrary and capricious. *See, e.g., Tex Tin Corp.*, 922 F.2d at 354; *Motor Vehicle MSS. Ass'n.*, 465 U.S. at 43. Thus, the proposed primary contact use designation for these water bodies must be withdrawn.[19]

4. EPA Has Impermissibly Shifted the Burden to the Regulated Community to Support the Appropriate Use Designations for Kansas Water Bodies

Not only has EPA abrogated its duty to provide supporting analysis and to consider the potential uses for these water bodies, EPA impermissibly shifts the burden to the people of

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[18] As discussed more fully below in Section III.B.4, EPA's request that the public provide the very information EPA is required to provide to the public in support of its proposed water quality standard revisions is an improper attempt to shift EPA's burden of proof and a flagrant disregard of its own regulatory requirements.

[19] Even if EPA was correct in its position that the CWA contains a "presumption of attainability," EPA's failure to consider existing data that rebuts such a presumption is also an abuse of discretion. *See Idaho Mining Ass'n, Inc. v. Browner*, 90 F. Supp. 2d 1018, 1106-1107 (D. Idaho 2000). Thus, even under EPA's erroneous interpretation of the CWA, its primary contact use designations for these water bodies must be withdrawn.

Kansas to determine whether primary contact uses are attainable. EPA essentially is asking Kansas citizens to do EPA's job that they, as taxpayers, pay EPA to do.

EPA sidesteps its duties under the CWA and implementing regulations and asks the citizens to supply EPA with information "on the attainability of the proposed Federal uses for the water bodies listed" in the proposed rulemaking. 65 Fed. Reg. at 41222-41223 ("EPA is seeking information...[on] whether the proposed designated uses are currently being attained...; whether natural conditions or features or human-caused conditions prevent the attainment of these uses...; and whether controls more stringent than those required by section 301(b) and 306 of the CWA would be needed to attain the uses..."). However, the type of information "requested" by the agency cannot possibly be acquired within the commenting timeframe and can only be obtained through great cost to the regulated community. EPA requests ambient monitoring information, current and historical effluent data, water quality modeling information and economic data. Thus, the regulated community is put in an impossible situation. EPA gives lists of what it considers to be "most important"[20] to disprove EPA's presumption, however, EPA sets the bar so high that it cannot be achieved. Moreover, EPA's creation of a double standard is apparent because EPA does not have any supporting data for its designations, yet expects the citizens and the State of Kansas to provide extensive supporting data.

EPA's attempt to shift its burden to the citizens of Kansas is contrary to Supreme Court precedent. As held by the Supreme Court in *Industrial Union Dep't AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 653 (1980), an agency cannot shift its burden of establishing the necessity of more stringent standards to the regulated community. In that case, the Court invalidated a benzene worker safety standard under OSHA because the agency illegally "imposed the burden on industry of proving the existence of a safe level of exposure, thereby avoiding the Secretary's threshold responsibility of establishing the need for more stringent standards." *Id.* at 658. Similarly, EPA cannot simply designate all waters in Kansas for primary contact recreation and shift its burden onto the owners of land around those waters and the

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[20] In fact, EPA cites no authority for the information it requests from the citizens of Kansas. Neither the CWA nor its implementing regulations ask for the specific information that EPA now seeks from the people of Kansas in this proposed rule. Additionally, no EPA guidance can be located that asks for such information.

citizens of Kansas generally to disprove a presumption.[21] Even Gale Hutton recognized in a question and answer session at the September 14, 2000 public hearing at Dodge City, Kansas that EPA is without authority to shift the burden to the regulated community to support this rulemaking. *See* Audiotape of the Questions and Answers Session at the September 14, 2000 Public Hearing in Dodge City, Kansas provided at Exhibit I.

5. EPA's Proposed Use Designations are Based on An Underlying Stream Classification by the Kansas Department of Health and Environment That is Arbitrary and Capricious and Contrary to Law

The arbitrary nature of this primary contact use designation is further compounded by the fact that KDHE's classification of these water bodies was contrary to law.

In Kansas, streams are classified if mean summer base flows exceed 0.003 cubic meters per second (0.1 CFS or 45 GPM) and, regardless of flow are classified if studies conducted or accepted by the department show that pooling of water during periods of zero flow provides important refuges for aquatic life and permits biological recolonization of intermittently flowing segments. *See* K.A.R. ∋ 28-16-28d(b)(1). "Nonclassified streams" are any surface drainage which cannot be considered either classified or effluent created.[22] If a water body meets the criteria for classification set forth in K.A.R. ∋ 28-16-28d(b), it is then automatically designated for secondary contact recreation uses. *See* K.A.R. ∋ 28-16-28(c)(1), thus providing protection according to Congressional goals.

When Kansas submitted its revised water quality standards to EPA in October of 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. This 1994 Register, adopted by reference at K.A.R. ∋ 28-16-28d(c)(2), greatly expanded those streams classified in the State of Kansas. Consequently, these water bodies were designated for secondary contact recreation uses.

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[21] Moreover, EPA's attempt to shift its burden to provide information and support for the proposed rule violates EPA's own public participation regulations at 40 C.F.R. ∋ 25.4.

[22] "Effluent-created flow" means any classified stream segment in which continuous flow is sustained primarily through the discharge of treated effluent, and which all designated uses are otherwise unattainable due to low or nonexisting flow. K.A.R. ∋ 28-16-28c(c)(3).

However, the shocking truth is that no determination was conducted by KDHE to determine whether these water bodies meet the criteria to be "classified" in the first instance. KDHE simply looked at USGS topographical maps and classified all River Reach 2 streams. KDHE admits that they have no actual data or information about these streams. In classifying these stream segments, KDHE officials did not visit the streams to determine whether they had water flow or supported aquatic life. The only thing KDHE based its classification on was that these streams appeared on a topographical map. However, evidence gathered by the commenting organizations and provided at Exhibit R show that many of these steams do not meet the requirements of a "classified" stream provided in K.A.R. ∋ 28-16-28d(b). Thus, KDHE abrogated its duties and acted contrary to law by not making the classification determination consistent with K.A.R. ∋ 28-16-28d(b).

These stream segments are now being proposed for primary contact recreation uses even though they were improperly classified. Thus, not only is EPA's use designation completely void of data indicating that primary contact uses can be obtained, there is also no data establishing that these streams should have been classified in the first place. The commenting organizations ask EPA to seriously consider the fact that these streams were improperly classified when issuing its final rule. In light of this lack of information, it would be arbitrary and capricious for EPA to designate these streams for primary contact uses. As stated above, the appropriate course of action is to require the State of Kansas to conduct scientific assessments for these improperly classified stream segments to determine whether the classification and use designations are appropriate.

C. EPA's Proposed Regulation to Designate 1,456 Kansas Water Bodies For Primary Contact Recreation Use is an Impermissible Infringement Upon the Rights of the State of Kansas to Implement and Enforce the CWA

The CWA provides that each state will have primary responsibility for the adoption and revision of water quality standards for water bodies within their boundaries. *See* 33 U.S.C. ∋∋ 1251(b), 1313(c). The CWA does not require a state to establish any particular uses, but rather provides that each state "shall take into consideration" the waters' "use" for "public water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes." 33 U.S.C. § 303(c)(2)(A). States are required to periodically review (at least every three years) applicable water quality standards, and "as appropriate," after public hearing,

"adopt revised or new water quality standards" which are submitted to EPA for review and approval. 33 U.S.C. § 1313(c)(3)(A).

Moreover, it is the "policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution ..." 33 U.S.C. § 1251(b). Consistent with the policies of the CWA, EPA's role in reviewing state water quality standard submissions is limited to determining whether the standards meet the "requirements" of the CWA. *See* 33 U.S.C. § 1313(c)(4); *see also City of Albuquerque v. Browner*, 97 F.3d 415, 425 (10th Cir. 1996) (Congress intended for States and Tribes to have the primary role in establishing designated uses and Congress intended for EPA to "have a very limited role" in reviewing water quality standards); *Natural Resources Defense Council v. EPA*, 16 F.3d 1395, 1401, 1404 (4th Cir. 1993) (EPA's role in reviewing water quality standards is limited to whether state's decisions are "scientifically defensible and protective of designated uses..." Noting that "[s]tates have exclusive responsibility to designate water uses.").

EPA had no authority to step in and designate these water bodies for primary contact recreation uses because the designation of these water bodies for secondary contact recreation uses is consistent with the CWA. As discussed above, the statute and the regulations do not support EPA's ad hoc designation of all water bodies for primary contact recreation uses. Moreover, even if the statute contains a rebuttable presumption for the classification of water bodies consistent with the goals of CWA section 101(a)(2), KDHE has acted in accordance with those goals by designating all classified water bodies for secondary contact recreation uses.

By mandating that all waters in Kansas must be designated for primary contract recreation uses, EPA is proposing to circumscribe the authority vested in Kansas to make appropriate use "designations" under CWA section 303(c)(2)(A). If this use designation is finalized it will contravene the delicate balance of power Congressionally arbitrated between the federal government and the states under the CWA. *See, e.g., District of Columbia v. Schramm*, 631 F.2d 854 (D.C. Cir. 1980) (Congress carefully constructed legislative scheme that imposed major responsibility for control of water pollution on states); *Mississippi Comm'n on Natural Resources v. Costle*, 625 F.2d 1269 (5th Cir. 1979) (varied topographies and climates in country called for varied water quality solutions, and Congress placed primary authority for establishing water quality standards with states).

Additionally, EPA's regulations recognize the states' authority to select specific water bodies for an in-depth review of the appropriateness of the water quality standard. *See, e.g.*, 40 C.F.R. ∋ 131.20(a); Preamble to Final Rule for Part 131, 48 Fed. Reg. 51400, 51403 (Nov. 8, 1983); and WQS Handbook, 6.1.4 and 6.1.5. The purpose of this concept is:

> to make maximum use of limited resources and ensure that the most critical environmental problems are addressed. . . Factors which may cause a State to select a water body for review include areas where advanced treatment and combined sewer overflow funding decisions are pending, major water quality-based permits are scheduled for issuance or renewal, toxic pollutants have been identified or are suspected of precluding the attainment of water quality standards. This list is not meant to be all inclusive, and a State may have other reasons for examining a particular standard.

48 Fed. Reg. at 51403.

Kansas has long recognized that it is counterproductive to automatically designate streams for primary contact uses where it cannot be achieved or where there are no public health concerns. There are many areas of the State where no true "contact" recreation exists and where the public health and safety therefore may not be in jeopardy. The State of Kansas is also fully aware that other water uses such as agriculture (i.e., livestock watering) are <u>not</u> compatible with contact uses. This approach recognizes the legitimate uses identified in CWA section 303(c)(2)(A) where they occur and the fact that contact recreation does not exist in many places in the State for reasons unrelated to water quality. Thus, the State of Kansas made a determination that primary contact uses would not be designated unless KDHE found that such uses actually exist or are attainable for the area taking into consideration other potential uses. *See* attachment to a May 24, 1985 letter from KDHE to USEPA regarding "Contact Recreation in Kansas Rivers and Streams" provided at Exhibit O.

By redesignating 1,456 water bodies in Kansas for primary contact recreation uses, EPA, impermissibly interferes with the State's right to do so and has implicitly removed the express mandate for state flexibility. Thus, the purpose and goals of the Act, regulations and guidance, will be thwarted. Moreover, forcing these designations upon the State with the corresponding obligation to enforce water quality criteria to attain such uses violates the Tenth Amendment of the United States Constitution.

D. EPA's Proposed Rule Impermissibly Intrudes Into the Sovereign Authority of The State of Kansas to Allocate and Determine Water Rights

In the United States, states have plenary authority to determine who is eligible to receive water rights and the circumstances under which such individuals qualify. *See Kansas v. Colorado*, 206 U.S. 46, (1907). This power is implicit in the states' sovereignty and emanated from the fact that they hold title to all the water within their boundaries. Title to the water is recognized as clearly vested in the states, not in the federal government. *See United States v. Willow River Power Co.*, 324 U.S. 499 (1945). States have sovereign authority to grant water rights whether on private land or public domain lands. *See Desert Lands Act of 1877*, 43 U.S.C. §§ 321-339. State created water rights have a unique status as real property rights. Because the state owns the water, water rights represent a right of access to the water for specific authorized purposes. *See Thompson on Real Property* §50.03(c). They are therefore described in law as *usufructary* in nature. *See Williams v. City of Wichita*, 374 P. 2d 578 (Kan. 1962); *Stone v. Gibson*, 630 P. 2d 1164 (Kan. 1981). The water right itself does not convey to the water right holder any ownership interest in the water itself until the right is exercised and the water is reduced to possession. *See* K.S.A. § 82a-707(a). The concept is an ancient one, borrowed from roman law. *See* J. Cribbet, *Water as a Species of Private Property*, 5 Ill. Bar. J. 449 at 465 (Jan. 1959).

State created water rights are recognized as being both consumptive and nonconsumptive in nature. *See Montana Coalition for Stream Access v. Curran* 682 P.2d 163 (Mont. 1984); *State ex rel Meek v. Hays*, 785 P. 2d 1356 (Kan. 1990). The authority of states to grant and recognize both kinds of water rights is well established and is recognized as a power that was assumed directly by the states from the King of England. *See Martin v. Waddell*, 41 U.S. 234, 16 Pet. 367 (1842). It is shared by all states that are deemed to enter the Union on equal footing with all other states. This power to create and recognize water rights is not a power that has been delegated to the states by the federal government and it has been held that the federal government has no authority to require that any state adopt any particular regime for allocation water rights. *See Kansas v. Colorado*, 206 U.S. 46, 94 (1907) (the Court affirms that not only is the matter of water right allocation the province of the states, "Congress cannot enforce either rule upon any state."). This position was clarified in *California-Oregon Power Company v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), where the Supreme Court held that a state

has the power to legislate with respect to waters and water rights "as they deem[] wise in the public interest. . . with the right to determine for itself whether the common law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state'. . . the full power of choice must remain with the state." Furthermore, "[e]very state is free to change its laws regarding riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise." *Connecticut v. Massachusetts*, 228 U.S. 660 (1932). Although these cases deal with consumptive use rights, courts have never distinguished between state powers over such consumptive use rights and nonconsumptive use rights. It is clear from the language of the CWA, that EPA does not have the power to alter the state's power to allocate water rights.

The CWA provides that nothing in the Act is to be construed "as impairing or in any manner affecting any right or jurisdiction of the States with respect to waters (including boundary waters) of such states." 33 U.S.C. § 1370. Additionally, Congress provides that "[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superceded, abrogated or otherwise impaired" by the CWA. 33 U.S.C. § 1251(g). It is the further policy of Congress that "[f]ederal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." *Id.* It is notable that these provisions do not distinguish between consumptive and nonconsumptive use rights nor do they permit any abrogation of the state's inherent sovereignty to determine to whom and under what circumstances water rights may be granted. The CWA does not in any way abrogate the state's ownership interest in the waters within the state or the control that states may have as a result of that ownership. It has been held that the federal government can regulate water only if it is within the stream of interstate commerce. *See Sporhase v. Nebraska*, 458 U.S. 941 (1982). The regulatory power over water with respect to state created water rights presupposes the valid exercise of a water right, the result of which is to reduce the water to possession, which, in turn, qualifies the water as an article of commerce. *See id.* Nothing suggests that the federal government can regulate water in derogation of the state's right to create the water right. *See id.* Further, where federal commerce clause authority has been found to prevail over state created water rights, *see United States v. Glenn-Colusa Irrig. Dist.*, 778 F. Supp. 1126 (E.D. Cal. 1992), the federal power was directed at proscribing adverse consequences that could emanate from the

exercise of an already created water right, rather than being directed at the state's authority to create and recognize water rights. It is clear that the commerce clause does not allow the federal government to remove from the state its fundamental constitutional power as a sovereign to determine the circumstances under which a water right is deemed to exist. EPA seeks to take that power from the states by forcing them to designate non-navigable water bodies with certain nonconsumptive water rights of the type that can only be claimed by the public in navigable water-bodies. In other words, EPA forces the state to treat both non-navigable and navigable water-bodies as if they were all navigable for purposes of nonconsumptive use water rights without regard to whether those water bodies satisfy the test under which a state may have chosen to recognize public nonconsumptive use water rights.

Nonconsumptive use water rights have long been held to include boating, bathing, fishing, wharfing, ingress, egress and passage along the foreshore. *See* Dunscombe, *Riparian and Littoral Rights* 7 (1970). The public is deemed to enjoy these rights only in waters that are considered navigable for purposes of vesting title to the beds thereof in the state. *See United States v. Holt State Bank*, 270 U.S. 49 (1926). If the water is not considered navigable, the availability of such rights is entirely a question of state law. *See State ex rel Meek v. Hays*, 735 P. 2d 1356 (Kan. 1990). It is for the state legislature, not the courts, to make changes in rules regarding the allocation of those rights. *See id.* By forcing the state to open to public water bodies that are non-navigable under *Holt State Bank* for specific nonconsumptive uses, such as fishing and swimming, EPA is requiring the state to select a water right allocation scheme. This directly defies the inherent, constitutionally protected sovereignty of the state to make that choice. *See Kansas v .Colorado*, 206 U.S. 46 (1907). By mandating that private ponds and streams are available to the public for fishing and swimming and by forcing the state to insure that water quality meets those uses, EPA supercedes the states authority to chose which waters within its ownership are eligible for public nonconsumptive use water rights.

Where water bodies are non-navigable, state law recognizes that riparians enjoy nonconsumptive water rights in such waters. If non-navigable waters are opened to public use, there is a corresponding intrusion into private nonconsumptive use water rights that exist for those waters by State law. That corresponding destruction of private nonconsumptive use rights in such waters has specifically been considered a compensable taking under the Fifth Amendment to the United States Constitution where it was accomplished by the federal

government under the guise of the CWA section 404. *See Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Thus, EPA's proposed rule designation of 1,456 water bodies for primary contact uses impermissibly intrudes upon the State's sovereign authority to allocate water rights.

E. EPA's Proposed Primary Contact Use Designation Creates the Impermissible Inference That These Waters are Appropriate For Such Uses and That Public Access May Be Obtained Through Private Property

By designating 1,456 water bodies for primary contact recreation uses, the citizens of the State will assume that those water bodies are currently appropriate for such uses when, in reality, such uses are actually unattainable. Kansas citizens will assume that they may swim, water-ski and windsurf on these waters. EPA, however, has provided no information that such uses exist for the water bodies to be designated or that these uses are attainable. Moreover, as shown by the evidence referenced in Section III.G, the public does not and cannot recreate on these waters.

The commenting organizations are also concerned that a primary contact recreation designation will create the impermissible inference that individuals may have access through private property to recreate on these waters. Citizens, however, may not trespass onto private property to gain access to these water bodies and EPA clearly does not have authority to grant the public access in this rulemaking. It is not unreasonable for the general public to presume that access is available because access is an important issue in determining whether primary contact uses are attainable. KDHE guidance documents for conducting UAAs direct the State to look at whether there is roadside access, access through public parks, or other pathways leading to water bodies when determining if primary contact uses are appropriate. *See A Procedure For Conducting Recreation Use Attainability Assessment, Users Manual*, (April 1987) and *Use Attainability Protocols*, (April 7, 2000) provided at Exhibit BB. As shown in evidence referenced in Section III.G of this comment, however, many of the stream segments designated for primary contact recreation uses have no public access.

If EPA proceeds to designate these water bodies for primary contact recreation uses, the commenting organizations request that EPA clearly explain that this designation does not mean that these waters are actually suitable or safe for primary contact recreation uses. The commenting organizations request that EPA clearly state that the public may not access these waters through private property. It is also important for EPA to explain in the final rulemaking that private property extends to stream banks and stream beds unless otherwise indicated. Therefore, a person would be trespassing onto private property if he or she chose to wade up a

stream through private property. Moreover, roads that may cross over streams only provide an easement for travel and do not allow the public to use the road area to access streams on private property.

F. EPA's Proposed Rule to Designate 1,456 Water Bodies for Primary Contact Recreation Uses is an Unlawful Attempt to Facilitate Additional and Enforceable Controls Against Nonpoint Sources

EPA has proposed to designate 1,456 water bodies in the State of Kansas for primary contact recreation and override the State's secondary contact designation for those water bodies. The difference between treatment under the Water Quality Standards between primary contact recreation and secondary contact recreation is the water quality criteria for fecal coliform bacteria. The primary contact recreation fecal coliform criteria is a geometric mean of 200 organisms per 100 milliliters beyond the mixing zone and for secondary contact recreation 2000 organisms per 100 milliliters beyond the mixing zone April 1 through October 31 of each year. Numerous studies show the background level of fecal coliform in various settings. *See* Report of Wright Water Engineers, Inc. provided at Exhibit W. Because most of the 1,456 water bodies EPA proposes to designate for primary contact recreation are in agricultural areas of the State, these agricultural nonpoint sources are, in essence, determining whether the fecal coliform criteria are met. As discussed below in Section IV, it is clear that EPA does not have authority under the CWA to regulate nonpoint source discharges. Why then would EPA propose in agricultural areas to impose a water quality criteria that is impacted primarily by nonpoint source activities not subject to regulation under the CWA? The reason is clear: EPA is attempting to unlawfully regulate nonpoint source activities through designation of these water bodies for primary contact recreation.

Prior to publishing the proposed rule, EPA amended its Draft Implementation Guidance for Ambient Water Quality Criteria for Bacteria - 1986 (USEPA Office of Water, January 2000) (provided at Exhibit CC), that specifically addresses how EPA's recommended water quality criteria will be applied by EPA to non-human sources of fecal contamination. EPA states that it is changing its policy regarding non-human sources of fecal contamination from what was previously contained in EPA's WQS Handbook on this issue. Yet, EPA only submitted the WQS

Handbook into the administrative record and conveniently failed to submit its guidance establishing its new policy in this area.[23]

In this new policy, EPA recognizes that ambient water quality criterion is routinely exceeded due to anthropogenic sources of pollution related to man's activities, such as animal production agriculture, which EPA asserts may be controlled by effluent limitations or BMPs. EPA asserts that a state may obtain site-specific fecal water quality criteria or change a primary use designation only if the state demonstrates that the source of fecal contamination is from a natural source (i.e., non-anthropogenic sources of contamination, such as wildlife) and uncontrollable by either effluent limitations or best management practices. EPA states in its new policy that "anthropogenic sources would be subject to BMPs prior to determining the water quality criteria were not attainable." When reading EPA's proposed rule in conjunction with EPA's new policy, it is clear that EPA intends to mandate controls on nonpoint sources of pollution, a course of action that is beyond EPA's authority under the CWA. *See infra* at Section IV. Even in published "Frequently Asked Questions" in conjunction with this rulemaking EPA states that "EPA does have the authority to regulate nonpoint sources of pollution under the CWA." *See* EPA Press Release provided at Exhibit DD. Because EPA knows that it cannot expressly adopt regulations that force controls or practices to regulate nonpoint sources of pollution, it is attempting to sneak through the back door and indirectly regulate nonpoint sources. EPA's attempts to regulate nonpoint sources have not gone unnoticed by the Coalition. Whether indirect or direct, EPA does not have the authority to regulate nonpoint sources of pollution under the CWA. *See infra* Section IV.

Moreover, any attempt to mandate controls or certain practices upon anthropogenic sources, such as livestock grazing operations, to meet numerical fecal coliform limits is totally unworkable, unfeasible and contrary to good science. *See* Report by Wright Water Engineers, Inc. provided at Exhibit W and September 18, 2000 letter from Oren Long to Ann Jacobs at

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[23] Further evidence of EPA's intent is apparent through its requests in the preamble to the proposed rules for information related to releases of pollutants from agriculture and silvaculture activities, both clearly nonpoint sources. Finally, EPA explicitly states in the preamble that it "did not consider the potential cost for nonpoint sources, such as agriculture and forestry-related nonpoint sources, although EPA recognizes that controls on these sources may be necessary to achieve designated uses." 65 Fed. Reg. at 41228. This is clear statement that EPA intends to subject nonpoint sources to controls in order to achieve the fecal coliform criteria for primary contact recreation water bodies.

USEPA provided at Exhibit V. First, there is much debate regarding whether or not the type of bacteria typically found in nonpoint source runoff even presents a significant health hazard. *See* Exhibit W. Second, total fecal coliform bacteria is widespread in nature, occurring in both plant material and soil. Thus, the presence of total fecal coliform in water does not necessarily indicate fecal contamination. Finally, and most importantly, conventional nonpoint BMPs were not developed to meet numeric standards for fecal coliform. *See* Exhibit W. It is also extremely difficult to determine what affect a particular BMP will have upon nonpoint source fecal coliform contamination. *See* Exhibit W. To date there is little reliable scientific data for BMP performance, even for urban stormwater. Thus, not only does EPA lack authority to force controls or practices for nonpoint pollution, BMPs were not established to meet these numeric fecal coliform limits. It is important for EPA to realize, as discussed *infra* in Section IV, that the members of the Coalition have and will continue to work with the State to implement voluntary BMPs. However, the members of the Coalition object to EPA acting outside its authority under the CWA to require the implementation of additional and enforceable BMPs that are unfeasible or unworkable and are not proven to be effective to meet numeric water quality criterion for fecal coliform.

G. Assuming EPA's Presumption of Primary Contact Recreation Could Stand, EPA's Presumption Is Rebutted

Even if EPA's rebuttable presumption of primary contact recreation could stand under the law, there is ample evidence provided in these comments to rebut that presumption. EPA has repeatedly represented that "if the State or public provides information demonstrating that primary contact recreation is not the appropriate use classification for any of the listed water bodies, EPA will remove those water bodies from the final rule." *See* Testimony of Gale Hutton, Director of the Water, Wetlands and Pesticides Division of the USEPA Regions VII for the joint hearing before the Joint Health Reform Oversight Committee (September 20, 2000) provided at Exhibit N. Of course, a UAA is not necessary to rebut this presumption. *See Idaho Mining Association, Inc. v. Browner*, 90 F.Supp.2d 1078, 1106-7 (D. Idaho 2000). EPA has stated that "any information" will be considered. *See* Exhibits E and I.

Although shifting the burden to the public to support this rulemaking is contrary to law, land owners and land managers across the State of Kansas who are members of the Coalition associations have provided declarations that for at least approximately 120 stream segments that

are proposed for primary contact recreation uses by EPA are not capable of attaining that use. And despite the fact that EPA only gave the public approximately one hundred and five days to provide information on 1,456 water bodies, this comment provides information for stream segments within the Kansas-Lower Republican, Walnut River, Smokey Hill/Saline, Cimarron River, Verdisgris River, Solomon River, Lower Arkansas, Neosho, Missouri, and Marais des Cygne basins.

The information attached at Exhibit R for each stream segment is provided by an individual that is familiar with the stream segment. The information presented demonstrates that primary contact uses do not exist and that they are not attainable. In fact, these streams do not even contain water except in times of runoff in significant rain or snow events. Moreover, all of these stream segments are contained on private property and are not accessible to the public. It is not surprising that many of the stream segments to be designated for primary contact uses by EPA are actually dry beds because these streams were classified by the KDHE in 1994 without any determination that they meet the classification criteria under Kansas law. The reality is that many of these streams do not even meet the requirements for classification. *See* Exhibit R.

Also attached at Exhibit T are UAAs prepared by, or on behalf of, KDHE that conclude that many of the stream segments EPA now proposes to designate for primary contact uses are not suitable for these uses. A review of the UAAs for the Kansas Lower Republican Basin alone, KDHE reveals approximately 40 stream segments proposed in this rulemaking for primary contact uses that KDHE has concluded are not attainable for such uses. *See* Exhibit GG.[24] Any UAA conducted by or on behalf of the State is conclusive evidence that these stream segments cannot be designated for primary contact uses.

In the absence of any evidence that primary contact uses are attainable for these streams segments, the information provided is sufficient to rebut EPA's presumption that such uses are attainable. In *Idaho Mining Association, Inc. v. Browner*, 90 F.Supp.2d 1078, 1106-7 (D. Idaho 2000), the court stuck down a use designation for cold water biota for Shields Gulch. In that case, EPA also relied on a rebuttable presumption to support the use designation. However, the only evidence in the record established that Shields Gulch was dry on the day that the state agency attempted to sample it. *See id.* at 1106. The EPA had no other biological, chemical or

[24] Exhibit GG only contains a portion of the UAAs in Exhibit T that conclude that primary contact uses are not attainable for stream segments proposed in this rulemaking.

physical data concerning the suitability of Shields Gulch for cold water biota uses. *See id.* The court held that in the absence of evidence to the contrary, the evidence contained in the record indicated that cold water biota uses are not attainable in Shields Gulch. *See id.* at 1107. Because EPA was unable to point to a single citation in the administrative record to support its assertion that water flows in Shields Gulch for even part of the year, the court struck down EPA's use designation finding that the plaintiffs had rebutted the presumption relied upon by EPA. *See id.*

In the present case, the evidence provided in these comments is more substantial than the evidence that rebutted the presumption for Shields Gulch. While the evidence for Shields Gulch represented only one day, the declarations submitted herein are from persons who are familiar with these stream segments and who testify that they are dry year round except for times of runoff from significant snow and rain events. These individuals also testify that people do not use these streams for primary contact recreation activities. Additionally, UAAs provided at Exhibit T and Exhibit GG that were prepared by, or on behalf of, KDHE conclusively establish that primary contact uses are not attainable for many stream segments that EPA proposes for primary contact designations in this rulemaking. Add the fact that the majority of these stream segments were improperly classified by KDHE in the first place, and the evidence presented more than rebuts EPA's presumption in this case. Thus, all of the streams segments for which information has been provided to rebut EPA's presumption must be withdrawn in the final rulemaking.

Moreover, EPA allows for a basin wide approach to determining whether primary contact uses are appropriate. *See* WQS Handbook. Because the declarations and UAAs submitted are a representation of the basins in which they are located and because the vast majority of these streams are River Reach 2 streams that were improperly classified, all stream segments within these basins should also be withdrawn in the final rulemaking.

H. EPA Has Violated Procedures Mandated By the Clean Water Act in This Proposed Rulemaking to Designate 1,456 Water Bodies in the State of Kansas For Primary Contact Recreation Uses

At least once every three years, states are required to review their water quality standards and, as appropriate, modify and adopt new standards. *See* 33 U.S.C. § 1313(c)(1). Whenever a state revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. *See* 33 U.S.C. § 1313(c)(2)(A). If the Administrator determines that any such revised or new standard "is not consistent with the applicable requirements of [the CWA], he

shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements." *See* 33 U.S.C. § 1313(c)(3) (emphasis added). However, EPA violated the clear mandates of the CWA by failing to notify the State of Kansas of its alleged deficiencies within ninety days of its 1994 triennial review submittal.

On October 31, 1994, Kansas submitted to EPA a complete set of water quality standards to EPA for review and approval. However, EPA did not indicate its approval in part and disapproval in part of these new and revised water quality standards until February 19, 1998, three-and-a-half years after Kansas submitted its triennial review. Thus, EPA has waived its right to object to the designation of these waters for secondary contact recreation uses. Because EPA did not comply with CWA section 303(c)(3) it is improper for it to propose these use designations pursuant to CWA section 303(c)(3)(4)(A). Similarly, any classified water body that was designated for secondary contact uses and was approved for that use by EPA cannot now be designated for primary contact uses pursuant to 33 U.S.C. § 1313(c)(3)(4)(A).

IV. COMMENTS TO EPA's PROPOSED RULE SETTING FORTH IMPLEMENTATION PROCEDURES FOR ANTIDEGRADATION REVIEW OF NONPOINT SOURCE ACTIVITIES

A. EPA's Proposed Rule Setting Forth Implementation Procedures for the Kansas Antidegradation Regulation Set Forth At K.A.R. ∋ 29-16-28c(a)(1)(B) is Contrary to Law

The Coalition opposes EPA's proposed rule setting forth implementation procedures for the Kansas high quality water antidegradation regulation set forth at K.A.R. ∋ 29-16-28c(a)(1)(B).[25] K.A.R. ∋ 29-16-28c(a)(1)(B) requires that, before allowing point source degradation of water quality in waters where existing water quality is better than applicable criteria, the highest statutory and regulatory requirements for all point sources and all cost effective and reasonable BMPs for controlling nonpoint sources, shall be achieved. Although EPA approves Kansas antidegradation regulation, EPA disapproves of a portion of the antidegradation implementation procedures because the procedures are silent on how Kansas "would implement the requirement in K.A.R. ∋ 28-16-28c(a)(1)(B) that all cost-effective and

[25] The Kansas regulation substantially mirrors the federal antidegradation policy set forth in 40 C.F.R. ∋ 131.12(a)(2).

reasonable best management practices for nonpoint sources of pollution shall be achieved in instances when the KDHE allows a lowering of water quality by point sources." EPA proposes to promulgate the following rule:

> (f) What procedures apply to implement the provisions of Kansas' antidegradation requirements that would allow the lowering of surface water quality by point sources where nonpoint sources also contribute the pollutant of concern to that body of water? The following implementation procedures are for use when applying K.A.R. 28-16-28c(a)(1)(B) 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:
> (1) Identification of significant sources (or categories) of nonpoint pollution that may impact a high quality water body by releasing the pollutants of concern;
> (2) Identification of reasonable and cost-effective best management practices (BMPs) for each of these significant nonpoint sources or source categories; and
> (3) Determination that significant nonpoint sources in those nonpoint source categories will implement appropriate BMPs.

65 Fed. Reg. at 41236 (proposed 40 C.F.R. § 131.34(f)). EPA uses the term "high quality water body" in (f)(1). This term does not appear in the Kansas WQS. The Coalition requests a definition and clarification of this term and an explanation of what "high quality waters" are in light of Kansas WQS definitions of levels of water quality.

EPA's proposed antidegradation implementation procedure is another impermissible, backdoor attempt by EPA to regulate nonpoint sources, to require additional BMPs, and make BMPs for nonpoint source pollution mandatory and enforceable. EPA, however, has no authority to create such a mandatory and enforceable nonpoint source regulatory scheme and any attempt by EPA to do so is in excess of EPA's statutory and jurisdictional authority under the CWA and is contrary to the United States Constitution. Moreover, the proposed rule is arbitrary and capricious and an abuse of agency discretion and the vague language in the proposed rule violates the Due Process Clause of the United States Constitution. Finally, the proposed antidegradation rule is procedurally deficient. Accordingly, the proposed antidegradation implementation procedure must be withdrawn in the final rulemaking.

1. EPA Lacks Statutory and Jurisdictional Authority to Regulate Nonpoint Sources through the Kansas Antidegradation Implementation Procedures.

The CWA does not require, nor does it allow for, EPA's regulation and control of nonpoint sources – especially not through EPA's antidegradation policy and especially not

through a state's antidegradation implementation procedures. As an initial matter, serious questions exist as to whether EPA's antidegradation policy is authorized by the CWA at all. For example, the antidegradation policy is not delineated in the text of the Act. Rather, the first antidegradation policy statement was developed by the Secretary of the Interior in 1968 and was incorporated into EPA's first Water Quality Standards Regulations in 1975. *See* 40 Fed. Reg. 55340-41, Nov. 28, 1975; *see also* WQS Handbook at 4-1. EPA's current antidegradation regulation is a refinement of the 1975 regulation and was promulgated in 1983. *See* WQS Handbook at 4-1; *see also* 48 Fed. Reg. 51400, 51402 (Nov. 8, 1983). The first statutory reference regarding antidegradation did not occur until the 1987 CWA Amendment to section 303(d)(4)(B) which requires that certain changes in NPDES permits be consistent with antidegradation policies. *See* WQS Handbook at 4-1; *see also* 33 U.S.C. ∋ 1313(d)(4)(B).

EPA states that its original antidegradation policy was based on goal language in CWA section 101(a) and the provision of 303(a) "that made water quality standards under prior law the 'starting point' for the CWA water quality requirements." *See* WQS Handbook at 4-1. EPA's reliance on these sections to support its antidegradation policy, however, is misplaced. CWA section 101(a) is merely a statement of Congressional goals and policy. Statements of policy cannot be relied upon to establish enforceable directives or requirements. *See, e.g., National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 177 (D.C. Cir. 1982); *Association of Am. R.R.s v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *Samuel's v. District of Columbia*, 650 F. Supp. 482, 483 (D.C. Cir. 1986). Likewise, CWA section 303(a) is an administrative section setting forth the details of how the CWA is to come into effect and the manner in which the numerous state standards in place at the time of section enactment would fall under the umbrella of the Act. Nothing in CWA section 303(a) even contemplates EPA's antidegradation policy, much less one that is mandatory and enforceable against nonpoint sources of pollution. Moreover, while Congress' reference to antidegradation policy in the 1987 amendment to CWA section 303(d)(4)(B) arguably could be construed as a post hoc approval of EPA's antidegradation policy, CWA section 303(d)(4)(B) applies only as a limit on the revision of certain effluent limitations in NPDES permits. Thus, if Congress has approved EPA's antidegradation regulation, it has done so only to the extent that it applies to point sources of pollution regulated by the Act's NPDES program.

Moreover, EPA's authority under the CWA to require states to establish any regulatory programs for nonpoint source pollution is dubious. Based on analysis of statutory provisions, legislative history, regulations, policy guidance, and case law, it is clear that EPA has no authority to directly regulate nonpoint sources by imposing enforceable standards or by mandating a state's regulation of nonpoint sources of pollutants. In a case that squares with the present situation, the court specifically held that "Congress has left the regulation of nonpoint sources up to the states and that Congress has not required states to establish federally enforceable nonpoint source controls." *American Wildlands v. Browner*, 94 F. Supp. 2d 1150, 1158 (D. Colo. 2000).

a. Direct Regulation of Nonpoint Sources

The distinction between a "point source" and a "nonpoint source" is of central importance to EPA's authority. CWA section 302 defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis supplied). "Point source" is defined as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. ə 1362(14). The CWA explicitly provides that a point source "does not include agricultural stormwater discharges and return flows from irrigated agriculture." *Id.*

"The concept of a point source was designed to further the scheme to eliminate pollution of the nation's waters by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." *American Wildlands*, 94 F. Supp. 2d at 1157 (citing *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979)). While the definition of point source is extremely broad, it inherently excludes nonpoint sources. *Id.* at 1160 ("the inclusion of law regarding point source pollution and the lack of law specifically regulating nonpoint source pollution implies Congress did not intend the CWA to regulate nonpoint source pollution"). [26]

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[26] "The maxium, *inclusio unis est exclusio alterius*, refers to the principle of interpretation that the inclusion of one is the exclusion of another. Where the law expressly describes a particular situation to which it shall apply, an irrefutable inference must be drawn that what was excluded was intended to be excluded." *Id.* at 1160.

b. Broad "National Policy" Lacks Legal Implementation Authority

While the ultimate objective of the CWA is to improve the quality of the waters of the United States, Congress intentionally created the distinction between point and nonpoint sources and consciously decided to regulate the former and not the latter.[27] Despite the broad Congressional declaration that: "it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution," 33 U.S.C. § 1251(a)(7), it is clear that Congress' statement is an aspiration, devoid of any authority for the EPA to directly regulate and control nonpoint sources. The foregoing policy may suggest that nonpoint source programs be developed, but, as analyzed in this section, the CWA does not in any way authorize the direct regulation of nonpoint sources. *See, e.g., American Wildlands*, 94 F. Supp. 2d 1150; *Earth Sciences*, 559 F.2d 368; *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232 (10th Cir. 1979); *Natural Resources Defense Council, Inc. ("NRDC") v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

c. Legislative History: Technical and Administrative Unfeasibility

The courts cite legislative history and confirm the reasons for Congress' decision not to establish regulatory authority over nonpoint source pollution. The Tenth Circuit cited the virtual impossibility of isolating one polluter as Congress' reason for limiting such regulatory authority. *See Earth Sciences*, 599 F.2d at 371. Another court has stated that "[t]here is no way to measure the pollutants contributed by each source to enable enforcement of an effluent limitation." *National Wildlife Federation v. Gorsuch*, 530 F. Supp. 1291, 1305 (D.D.C. 1982), *rev'd on other grounds*, 694 F.2d 156 (D.C. Cir. 1982). The unavailability of technology-based controls and

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[27] Congress emphasized that the CWA "was a tough law that relied on explicit mandates to a degree uncommon in legislation of this type." A statement of Senator Jennings Randolph of West Virginia, Chairman of the Senate Committee responsible for the Act, is illustrative. "I stress very strongly that Congress has become very specific on the steps it wants taken with regard to environmental protection. We have written into law precise standards and definite guidelines on how the environment should be protected. We have done more than just provide broad directives for administrators to follow. . . . In the past, too many of our environmental laws have contained vague generalities. What we are attempting to do now is provide laws that can be administered with certainty and precision." *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1375 (D.C. Cir. 1977) (*citing* 117 CONG. REC. 38805 (1971)).

general administrative unfeasibility also have been identified as limiting factors. *See Costle*, 568 F.2d at 1376.

The extraordinary administrative burden on EPA that would have resulted from attempting to respond to millions of permit applications from all of the contributors to nonpoint source pollution would have been incapacitating and financially unjustifiable. And even if Congress had created nonpoint source regulatory authority for EPA, and EPA attempted to use its discretion to exempt the class of sources or delay implementation, it would certainly have been faced with litigation to mandate EPA's compliance with such legislative authorization. Consequently, Congress intentionally distinguished point and nonpoint sources and left the regulation of nonpoint sources either to the control of the states or to be regulated by the federal government at some uncertain future date. EPA's authority to regulate nonpoint sources in the future would have to be established pursuant to a legislative amendment. "Courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute. . . . It is not the Court's role . . . to overturn Congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process." *NRDC v. Costle*, 568 F.2d at 1377 (citing *FPC v. Texaco, Inc.*, 417 U.S. 380, 400 (1974)).

In *National Wildlife Federation v. Gorsuch*, the court examined the distinction between point and nonpoint sources, and articulated the rationale supporting the distinction.

> The NPDES System is the preferred method of control, and it appears that Congress would have put all pollution sources under that program had it been feasible. The Act generally divides pollution sources into two categories, point source and nonpoint source . . . Point sources fall under the NPDES program, while the regulation of nonpoint sources is left to states and localities under Section 208 area wide waste treatment management plans. EPA issues guidelines for identifying and controlling pollution from nonpoint sources, but has no direct authority over nonpoint source control.

530 F. Supp. at 1304-5 (emphasis supplied).

The court then uncovered the reasons why Congress omitted nonpoint sources from coverage under the CWA:

> The only logical reason for exempting major sources of pollution from the regulatory program considered to be the most effective tool for pollution control in the CWA solely on the basis of the means of conveyance to the water is the

> unfeasibility of subjecting such sources to a permit program based upon effluent limitations . . . there is no way to measure the pollutants contributed by each source to enable enforcement of an effluent limitation . . . Also, the kinds of controls applicable to point source pollution, such as treatment of the wastes to remove pollutants or render them less harmful before they are returned to the water, changes in operational processes to reduce pollutant production, and collection of the pollutants for disposal on land, generally depend upon having the pollutants collected in one place which is under the source owner's control before they are discharged into water. These methods therefore generally cannot be applied to nonpoint sources.

Id. (emphasis supplied).

"It is clear from the legislative history that Congress would have regulated so-called nonpoint sources if a workable method could have been derived; it instructed the EPA to study the problem and come up with a solution." *Id.* at 1305. Thus, Congress made a well-informed decision not to establish authority to regulate nonpoint sources under the CWA.

The lack of a workable method to regulate nonpoint sources is demonstrated by the comments of Mr. Oren Long, attached as Exhibit V. Mr. Long was involved in the creation of EPA's nonpoint source program. His team of researchers quickly concluded that an enforceable nonpoint source regulatory program could not be achieved. The team concluded that a combination of best management practices and soil and water conservation measures was the only practical, cost-effective, workable nonpoint pollution control strategy. *See also* Report of Wright Water Engineers, Inc. at Exhibit W.

In *American Wildlands v. Browner*, the United States District Court for the District of Colorado[28] held that EPA could not force the Montana Department of Environmental Quality to regulate nonpoint sources for antidegradation policies. *See American Wildlands*, 94 F. Supp. at 1158. In its analysis, the court stated: "Whether a discharge is made through a point source is crucial for application of enforcement provisions of [the CWA] because pollutants discharged through point sources are regulated by effluent limitations and require a permit. Because nonpoint sources of pollution, such as oil and gas runoffs caused by rainfall on the highways, are virtually impossible to isolate to one polluter, no permit or regulatory system was established as to them." *Id.* The court also confirmed Congress' intent not to regulate nonpoint sources stating

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[28] *American Wildlands* is directly on point to the present situation and provides persuasive precedent regarding the limitations on EPA's authority over nonpoint sources. Colorado, along with Kansas, sits in the Tenth Circuit.

that "Congress has left the regulation of nonpoint sources up to the states." *Id.* The court specifically added that "Congress has not required states to establish federally enforceable nonpoint source controls." *Id.*

The fact that Congress reserved authority over nonpoint sources to the states and did not instruct the states as to how to regulate nonpoint sources is evidence that Congress did not consider a system such as the National Pollutant Discharge Elimination System, based upon permits, based upon effluent limitations, and subject to enforcement, to be an appropriate paradigm for addressing issues of nonpoint source pollution. Such a paradigm is equally unworkable for the states and Congress did not authorize EPA to create this burden for the states.

d. EPA Acknowledges Lack of Authority Over Nonpoint Sources

EPA clearly recognizes the distinctions between point and nonpoint sources. EPA guidance provides that "[n]onpoint source (NPS) pollution, unlike pollution from industrial and sewage treatment plants, comes from many diffuse sources." *See* "Polluted," USEPA, Office of Water, EPA-841-F-94-005, 1994. It is recognized that "[n]onpoint source pollution generally results from land runoff, precipitation, atmospheric deposition, drainage, seepage, or hydrologic modification. Technically, the term 'nonpoint source' is defined to mean any source of water pollution that does not meet the legal definition of 'point source' in Section 502(14) of the Clean Water Act." ENFORCEABLE STATE MECHANISMS FOR THE CONTROL OF NONPOINT SOURCE WATER POLLUTION, 1997 (a report by the Environmental Law Institute supported by EPA Assistance Agreement No. X-825472-01). Indeed, EPA, expressly recognizes that there is no "Federal regulatory process for nonpoint sources." *See* WQS Handbook at 4.6. Moreover, EPA, recognizing its lack of authority to regulate nonpoint sources, previously provided only guidance for states on how to consider nonpoint sources in the implementation of its antidegradation policy. *See* Proposed Rule, 65 Fed. Reg. at 41226 ("the proposed procedures are based on guidance issued by EPA in 1994 entitled Interpretation of Federal Antidegradation Regulatory Requirement, from Tudor T. Davies"); Exhibit V. Even in the context of this rulemaking, EPA acknowledges that it "does not have the authority to regulate nonpoint sources of pollution under the CWA. *See* EPA Press Release at Exhibit DD. EPA has no reason, nor authority, to suddenly attempt to turn policy guidance into a regulation for the State of Kansas.

EPA has specifically acknowledged its lack of authority to regulate nonpoint sources of pollution in numerous federal cases. In *Kennecott Copper Corporation v. EPA*, Kennecott

challenged EPA's storm runoff provisions on the basis that they included "nonpoint" as well as "point sources." *Kennecott Copper Corp.*, 612 F.2d 1232 (10th Cir. 1979). Although the Tenth Circuit sidestepped the challenge, it did highlight EPA's clarification that its storm runoff provisions specifically applied to "point source" discharges. *Id.* at 1242-43 (citing 44 Fed. Reg. 7,953-54) ("those (storm runoff) provisions do not apply to diffuse storm water and runoff, but apply only to point source discharges").

The court noted further that EPA's position "is in complete harmony with our holding that notwithstanding its lack of authority to regulate 'nonpoint sources,' EPA has full authority to regulate any 'point source' discharge." *Id.* at 1243 (citing *Earth Sciences*, 599 F.2d at 368); *see also American Wildlands*, 94 F. Supp. 2d at 1160) ("[u]nder the CWA, the only recognized means for enforcing water quality standards is through National Pollution [sic] Discharge Elimination Permits ("NPDES") for point source discharges.") *Id.* Courts have also noted that even "EPA . . . does not believe that the CWA, as interpreted by EPA regulations at 40 C.F.R. Part 131, creates a federal requirement for states to regulate nonpoint sources such that water quality standards and antidegradation requirements are satisfied." *American Wildlands*, 94 F. Supp. 2d at 1161. Thus, similar to the situation presented in *American Wildlands*, EPA clearly lacks the authority to regulate nonpoint sources of pollution in this matter.

Again, that EPA would force the states to do what it is not authorized to do and what the states are not equipped to do is unconscionable and EPA's proposed rule cannot stand.

e. CWA Incentives for Nonpoint Source Control

There is a significant difference between the legal authority to regulate and encouraging activities through the creation of incentives. This distinction emphasizes yet another reason that EPA has exceeded its authority under the CWA. EPA was authorized to create management incentives, but not to directly regulate nonpoint sources, *per se*. Congress enacted the CWA and established express authority for EPA to regulate point sources. However, Congress deliberately chose not to create authority to regulate nonpoint sources. Instead, it established authority to encourage compliance and to create incentives associated with the control of nonpoint source pollution. CWA sections 208 and 319 are primary examples of the "incentive" approach to controlling nonpoint sources. CWA section 201 ("Area-Wide Waste Treatment Management") authorizes grants for "waste treatment management" on an "area-wide" basis to "provide control or treatment of all point and nonpoint sources of pollution . . ." 33 U.S.C. § 201(c). In turn,

CWA section 208 calls for "area-wide waste treatment management" planning by the states, expressly including plans for "nonpoint source" pollution. 33 U.S.C. § 208(a)(1). CWA section 319 ("Nonpoint Source Management Programs") does not require states to penalize nonpoint source polluters who fail to adopt best management practices, "rather it provides for grants to encourage the adoption of such practices." *National Defense Council v. EPA*, 915 F.2d 1314, 1318 (9th Cir. 1990). In other words, through the foregoing statutory provisions Congress has encouraged the control of nonpoint sources, but "has not required states to establish federally enforceable nonpoint source controls." *American Wildlands*, 94 F. Supp. 2d at 1158 (citing *Earth Sciences*, 599 F.2d at 371). Furthermore, with regard to antidegradation, EPA's position is that "the federal statutory and regulatory antidegradation requirements have not, in our view, created any additional regulatory authority over otherwise unregulated activities. Therefore, although we expect states to apply antidegradation requirements to regulated activities, we encourage, but do not require, them to do so for non-regulated activities." *Id.* at 1161 (emphasis supplied). Thus, the reference to nonpoint sources in the EPA's and KDHE's antidegradation implementation procedures does not, and cannot, create any new regulatory requirement or authority over nonpoint sources.

The "incentive" concept also applies to "total maximum daily load" ("TMDL") regulations. "Congress and EPA have already determined that establishing TMDLs is an effective tool for achieving water quality standards impacted by nonpoint source pollution." *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1348 (D.N. Cal. 2000). While the court in *Pronsolino v. Marcus* ultimately held that TMDL criterion were clearly authorized for nonpoint sources and that states must "incorporate" the TMDL in its planning, it was also very careful to emphasize that under the CWA, "[n]othing . . . requires that the TMDL be uncritically and mechanically passed through to every relevant parcel of land." *Id.* at 1355. Furthermore, a state is "free to select whatever, if any, land management practices it feels will achieve the load reductions called for by the TMDL . . . [and] is also free to moderate or to modify the TMDL reductions, or even refuse to implement them, in light of countervailing state interests. Although such steps might provoke EPA to withhold federal environmental grant money, [a state] is free to run the risk." *Id.* at 1355.

In addressing the "incentive" aspect, the court noted:

> A practical reality, of course, is that once federal environmental grant money begins to flow, state regulatory agencies become dependent on it. They become sensitive to threats to terminate it – terminations that would entail job and programmatic cuts. This influences behavior. A state may knuckle under to coercive threats by EPA. A state may uncritically apply TMDL-loading reductions, like the ones at issue, without regard to other legitimate state interests or to the unique circumstances of an applicant. Even so, this is not direct federal regulation. The regulation is by [the state] -- though influenced by incentives established by Congress and the agency charged with protecting the environment.

Id. (emphasis supplied).

While Congress delegated to EPA the authority to establish incentives for state regulation of nonpoint sources, it did not provide the authority to directly regulate nonpoint sources, especially under an enforceable program. Therefore, EPA's proposed rule establishing antidegradation implementation procedures to regulate nonpoint sources is contrary to law, in excess of its authority and invalid. Accordingly, the proposed rule must be withdrawn.

2. EPA's Interpretation of the CWA Involves an Unconstitutional Delegation of Power

The proposed rules require regulation of nonpoint sources. As discussed above, Congress initially did not even speak to the notion of an antidegradation policy. Moreover, the CWA does not require or authorize the regulation of nonpoint sources. Article 1, section 1 of the United States Constitution requires that all legislative powers granted shall be vested in a Congress of the United States. EPA has articulated no intelligible principle connecting its proposed antidegradation implementation regulation to any section of the CWA. Indeed, to construe CWA sections 101(a), 303(a) and (d)(4)(B) as allowing the EPA to extend its antidegradation policy to include mandatory and enforceable controls over nonpoint sources is to construe those sections so loosely as to render them unconstitutional delegations of legislative power. *See American Trucking Assoc. Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), *modified on other grounds* (D.C. Cir. 1999), *cert. granted*, 195 F.3d 4 (D.C. Cir. 2000). Accordingly, the proposed rule establishing antidegradation implementation requirements for nonpoint sources must be withdrawn.

3. EPA's Proposed Nonpoint Source Antidegradation Regulation is Arbitrary, Capricious, an Abuse of Discretion, or Otherwise not in Accordance with Law and thus is an Unlawful Exercise of Agency Power

Section 706 of the Administrative Procedure Act ("APA") allows a reviewing court to hold unlawful and set aside agency action that is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. ∋ 706(2)(A). EPA's application of antidegradation requirements to all sources of pollution, regardless of whether they are nonpoint sources over which neither the EPA nor the State of Kansas have authority, is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and thus must be withdrawn. *C.f. American Wildlands*, 94 F. Supp. 2d at 1161-62 (holding that EPA did not abuse its discretion when *exempting* nonpoint source pollution from high quality water antidegradation review).

4. EPA's Proposed Nonpoint Source Antidegradation Regulation is Vague and Ambiguous on its Face and Therefore Violates the Due Process Clause of the Constitution

The due process clause of the United States Constitution requires that agency action must be based upon clearly articulated standards. EPA's proposed antidegradation rule contains vague terms and phrases including, but not limited to, "significant sources," "may impact," and "reasonable and cost-effective." Thus, the "identification" and "determination" requirements contained in the proposed antidegradation rule are uncertain. When people of common intelligence must necessarily guess at its meaning and differ as to its applications, a regulation is void for vagueness. *See Franklin v. Shields*, 569 F.2d 784, 792-93 (4th Cir. 1977) *cert. denied*, 435 U.S. 1003 (1978). The proposed antidegradation rule is vague and ambiguous on its face, violates the due process clause and is therefore unlawful and must be withdrawn.

5. EPA Has Violated Procedures Mandated by the CWA

In addition to the arguments set forth above, the Coalition objects to the proposed antidegradation regulation on procedural grounds.

In its January 19, 2000 approval/disapproval letter, EPA proposed to promulgate "this or similar language:" "Where the state has established, pursuant to state law, authorities over nonpoint sources of pollution requiring compliance with water quality standards, compliance with the antidegradation requirements at K.A.R. § 28-16-28c is required." January 19, 2000 approval/disapproval letter from EPA to KDHE at 12. The language in the proposed rules with

respect to nonpoint source antidegradation requirements, however, applies to all nonpoint sources, not just to those nonpoint sources over which the State of Kansas has established authority. *See* 65 Fed. Reg. at 41236 (proposed 40 C.F.R. s. 131.34(f)).[29] EPA has failed to CWA section 303(c)(3) and (4) and therefore is unlawful and must be withdrawn.

B. EPA's Proposed Rule Setting Forth Implementation Procedures for Antidegradation Review of Nonpoint Sources is an Impermissible Infringement Upon the Rights of Kansas to Regulate Water Quality Within the State

Because EPA is acting outside of its authority under the CWA, EPA's proposed regulation is an impermissible infringement on the right of Kansas to regulate pollution. The CWA specifically provides that states retain the primary responsibility "to prevent, reduce and eliminate pollution and to plan the development and use of land and water resources." 33 U.S.C. ə 1251(b). Because EPA has no authority to require the states to regulate nonpoint sources of pollution, it has impermissibly infringed upon the State's right to regulate pollution for the reasons discussed above in Section II.B and violates the Tenth Amendment of the United States Constitution for the reasons discussed above in Section II.C.

C. EPA's Preamble to the Proposed Rules Makes It Clear That EPA Intends to Require Additional and Enforceable BMPs

The heart of EPA's proposed rule is a backdoor attempt by EPA to force Kansas to do what EPA is not authorized to do – impose enforceable nonpoint source BMPs.[30] For example, the preamble to the proposed rule states that "[w]ith respect to the third step, the state need only determine that the BMPs will be implemented. Such a determination can rely on Kansas regulations, local ordinances, performance bonds, contracts, cost share agreements and memorandums of understanding, as well as voluntary programs under certain circumstances, *e.g.*, an active nonpoint source program covering a watershed or area of concern." 65 Fed. Reg. at 41227. This first step by EPA in articulating what it expects pursuant to the phrase "will implement" in its proposed regulation is an obvious attempt to pave the way to BMPs that are

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[29] If EPA does not intend for the proposed antidegradation rule to apply to all nonpoint sources, the Coalition requests that EPA clarify the scope of the proposed rule.

[30] As set out more fully above, EPA cannot force states to establish federally enforceable nonpoint source controls. *See American Wildlands*, 94 F.Supp.2d at 1158.

enforceable in court, by the government and by others.[31] While EPA may argue that it will not regulate nonpoint sources under the rule, it is clear that EPA will force Kansas to do so based on the rationale that Kansas has an obligation to implement EPA's proposed rule when it allows new or increased discharges to waters already meeting or exceeding applicable water quality criteria. However, this course of action is not authorized under the CWA and is therefore beyond EPA's authority.

The Coalition objects to the proposed rule to the extent that it reaches beyond K.A.R. § 28-16-28c(a)(1)(B). EPA cannot promulgate an overarching and sweeping modification of the Kansas water quality standards and the development of BMPs and other nonpoint source pollution plans by the state and land managers through a proposed revision to the Kansas antidegradation implementation procedures. CWA section 303(c)(3) provides that EPA must notify the state of disapproved standards and allow the state a 90-day period within which to correct the standards before promulgating replacement standards. *See* 33 U.S.C. 1313(c)(3); *see also* 40 C.F.R. § 131.21(a) and 131.22. Consequently, the Coalition objects to any attempt by EPA to promulgate and change standards which were previously approved by EPA and which were not objected to by EPA following the procedures required by CWA section 303(c)(3).

D. EPA's Proposed Regulation Would Defeat Federal and State Agricultural Best Management Practices in Kansas

Voluntary incentive-based agricultural BMPs have been developed and have evolved significantly in Kansas in the past decade. This progress has occurred as a result of many public and private partnerships between agricultural producers, commodity organizations, state and federal agencies, and academic researchers and extension personnel. Agricultural BMPs are agronomic practices that decrease the potential for nonpoint source pollution runoff of nutrients, sediment, and animal wastes. Significant resources have been and are being expended to research and implement BMPs for a wide variety of agricultural variables that exist including topography, soil type, precipitation, cropping patterns, and tillage management.

Reducing nonpoint source runoff is a primary goal of BMPs. The primary difficulty, however, is that diverse conditions and variables make it virtually impossible to accurately quantify the beneficial affects that these BMPs have on water quality. *See* Report by Wright

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[31] As discussed above, this is a result that Congress clearly did not intend and would not tolerate.

Water Engineers, Inc. at Exhibit W. Unpredictable weather patterns, differing soil types and topography, and inconsistent human behavior are all impediment to obtaining scientific evidence on the affects of BMPs. The report attached at Exhibit W and prepared by Wright Water Engineers, Inc. demonstrates the lack of quantifiable scientific BMP performance data.

Despite these difficulties, the State of Kansas has directed significant resources to developing BMPs and voluntary incentive programs for their implementation. Selected highlights of current state programs and their funding include:

State of Kansas	**Funding Amount since 1990**	**Funding Source**
State Conservation Commission		
Nonpoint Source Pollution Control Program	$19,523,236	State Water Plan
Buffer Initiative Program	$ 240,000	State Water Plan
Riparian & Wetland Protection Program	$ 968,276	State Water Plan
Water Resources Cost-Share Program	$ 8,909,333	WaterPlan/GenFund
Kansas Dept. of Health & Environment		
Section 319 Grants/NPS/CWN/Stream	$14,287,632	USEPA

One of the state programs, the Governor's Water Quality Initiative, is a collaborative effort between state agencies, federal agencies, and private partners. A primary strategy in the initiative is to evaluate and promote BMPs for cropland, rangeland, confined animal feeding operations, home sites, construction sites, and other rural, suburban, and urban land uses, that will lead to improved water quality. In the past three to four years, state and federal funding for the Governor's Water Quality Initiative has exceeded $16 million. The Governor's Water Quality Initiative began in the Kansas-Lower Republican Basin and will be implemented in other river basins in the coming years. Attached at Exhibit X is information concerning the numerous state and federal voluntary incentive-based nonpoint source BMP programs available for agricultural producers. Also included in Exhibit X, is material specifically detailing the BMP incentive-based programs available through the Governor's Water Quality Initiative in the Kansas – Lower Republican Basin.

Extensive educational initiatives have also been implemented by state agencies and the private sector to educate landowners and land managers regarding these voluntary incentive-based BMP programs. The agricultural community has been a major force in the educational effort, holding over fifty meetings all over Kansas to educate the community regarding BMPs.

Examples of the educational programs sponsored by the agricultural community are provided at Exhibit Z. Techniques for information dissemination include field demonstrations and tours, electronic information, educational meetings, news releases, public service announcements, fact sheets/brochures/handbooks, magazine inserts, and on-site consultations. Beginning in the fall of 2000, six KSU Extension personnel were hired to work in the Kansas-Lower Republican Basin to provide outreach services for landowners, farmers, and ranchers regarding BMPs. The cost of this new effort is estimated at approximately $450,000 per year and will include the development of a model that will be transferable to other basins for the implementation of BMPs. Significant materials concerning BMPs are available to the public. Examples of available guidance for the implementation of BMPs are attached at Exhibit Y.

Several voluntary incentive-based federal programs have also been developed to support and promote BMPs. Through these and other programs farmers and ranchers across Kansas have been incorporating BMPs in their farm and ranch management practices for years. The federal assistance programs include incentives to protect and enhance soil and water. In large part, these programs are administered through the United States Department of Agriculture (USDA), particularly under the department's Natural Resources Conservation Service (NRCS). Among the programs that have fostered the construction of alternative water sources and the implementation of nonpoint pollution controls are the Conservation Reserve Program (CRP), Wildlife Habitat Incentive Program (WHIP), the Wetlands Reserve Program (WRP) and the Environmental Quality Incentive Program (EQIP). The EQIP, instituted in 1996, includes four former USDA programs: the Agricultural Conservation Program (ACP), Great Plains Conservation Program (GPCP), the Water Quality Incentive Program (WQIP) and the Colorado River Basin Salinity Control Program. Other historical conservation programs include Long-term Contracts (LTC) and PL 566 programs for watershed projects. A summary of USDA's conservation programs, an overview of conservation provisions in the 1996 Farm Bill (Federal Agriculture Improvement and Reform Act of 1996) and a fact sheet on USDA's natural resource programs are attached with these comments at Exhibit X. In short, EPA's proposed rules would impose mandatory and enforceable BMPs and directly undermine the millions of federal, state, and individual dollars and hours of time that have been invested in the voluntary nonpoint source programs developed in accordance with the CWA. A brief description of some of the numerous programs is illustrative of this point.

The Conservation Reserve Program is a voluntary program designed to provide incentives for producers to establish vegetative cover practices on highly erodible or environmentally sensitive acreage. The program is funded through the Commodity Credit Corporation. Landowners receive rental payments in exchange for retiring environmentally sensitive lands. USDA reported that 2,520,238 acres in Kansas are enrolled in the program as of September 2000. October 2000 rental payments alone for Kansas are estimated at $96,823,830. A brief description of the CRP program is included in the attached summary of USDA's 1996 Farm Bill Conservation Provisions and USDA's Farm Service Agency news release (No. 1613.00) at Exhibit X.

The Wildlife Habitat Incentives Program is a voluntary program providing technical and cost-share assistance to develop and improve wildlife habitat. WHIP funds are distributed to the states based on wildlife habitat priorities. In Kansas, $900,000 has been expended to improve habitats in 1998 and 1999. The WHIP was budgeted for a total of $50 million through year 2002. Landowners enter into five to ten year contracts and agree to install and maintain WHIP practices consistent with a wildlife habitat development plan. These wildlife habitat development plans are prepared in consultation with the United States Department of Agriculture's Natural Resource Conservation Service and local conservation districts. The landowner receives technical assistance from USDA and up to a 75 percent cost-share for installing these wildlife conservation practices. A USDA fact sheet regarding the WHIP is attached at Exhibit X.

The Wetlands Reserve Program is a voluntary program to protect and restore wetlands located on private property. The WRP, authorized under the Food Security Act of 1985, as amended by the 1990 and 1996 Farm Bills, is funded through the Commodity Credit Corporation. In Kansas, $6,750,000 has been invested in wetlands from 1995 to 2000. Under the WRP, landowners may choose to sell a conservation easement or enter into a cost-share agreement with USDA to protect and enhance wetlands. Depending on the type of agreement, the contracts may run from a minimum of ten years to a permanent conservation easement in perpetuity. A USDA fact sheet on the WRP is attached at Exhibit X.

The Environmental Quality Incentives Program is a voluntary conservation program providing technical, educational and financial resources to assist agricultural producers to address environmental concerns related to soil, water and other natural resources. The program,

established in the 1996 Farm Bill, is funded through the Commodity Credit Corporation. The program's budget was authorized at $1.3 billion, with that amount being prorated at $200 million annually through 2002. Producers enter into five to ten year conservation contracts and receive cost-share payments to implement structural and vegetative management practices. In Kansas, the State Conservation Commission reports that more than $16,700,000 has been allocated for EQIP projects for fiscal years 1997 through 2000. A USDA fact sheet on the Environmental Quality Incentives Program and a summary of EQIP projects in Kansas are attached at Exhibit X.

The description of the numerous programs and monies spent demonstrates that the State of Kansas has carried out Congressional intent that states create voluntary nonpoint source pollution control programs. The state and agricultural community have created a successful voluntary incentive-based cooperation to develop, evaluate, and implement BMPs. This effort has resulted in the implementation of BMPs by landowners and land managers across the state. Any interference by EPA through the imposition of additional and enforceable BMPs is not only unlawful under the CWA, but will disrupt the voluntary incentive based programs in place in the State of Kansas to encourage the development and implementation of BMPs.

Moreover, any attempt by EPA to mandate additional mandatory BMPs upon the agricultural community would be unworkable, unfeasible and would run contrary to good science. *See* Report prepared by Wright Water Engineers, Inc. at Exhibit W. Agricultural BMPs were never developed to meet specific numeric water quality criteria. Moreover, uncontrollable agricultural variables exist which ensure that the beneficial affect of a particular BMP cannot be quantified. As mentioned above, there is a <u>total</u> lack of scientific BMP performance quantification data. *See* Exhibit W. Thus, additional enforceable BMPs are <u>not</u> a workable solution. The State of Kansas has found a workable solution; working with the agricultural community to develop and implement voluntary incentive-based BMPs.

E. <u>Including Nonpoint Sources of Pollution in Antidegradation Review is Technically Infeasible and is Unreliable</u>

For many reasons emphasized above, significant technical constraints exist to integrating nonpoint sources into antidegradation reviews. *See* Report by Wright Water Engineers, Inc. at Exhibit W. It is not technically feasible to project pollution removal efficiencies of structural or nonstructural BMPs. As discussed above, reliable BMP performance data simply are not available for nonpoint sources. The antidegradation review process necessarily culminates with

a comparison of pre-discharge versus post-discharge instream constituent concentrations. However, there are not adequate hydrologic or water quality data to enable nonpoint sources to be reliably included in antidegradation review. *See* Report at Exhibit W.

V. THE PROPOSED RULES ARE ARBITRARY AND CAPRICIOUS, AN ABUSE OF DISCRETION, OTHERWISE NOT IN ACCORDANCE WITH LAW AND THUS ARE AN UNLAWFUL EXERCISE OF AGENCY POWER

The above sections of these Comments and Requests establish, in the context of discussion of the rules proposed and of the public participation offered, that in numerous respects the proposed rules are contrary to the CWA, contrary to the United States Constitution, contrary to the Constitutional rights of the State of Kansas and its citizens, and contrary to and in excess of the authority granted EPA by Congress in the CWA. There are additional statements, rationales, requests, and positions articulated by EPA in the preamble to the proposed rules that further demonstrate these flaws and that the rules are arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law and are an unlawful exercise of agency power. Examples of these statements, rationales, requests, and positions are discussed below.

A. EPA's Failure to Timely Respond to the Kansas October 31, 1994 WQS Submittal Has Prejudiced the Rights of the State of Kansas and its Citizens

As the preamble to the proposed rules sets forth, EPA responded to KDHE's October 31, 1994 WQS submittal three and one-half years later on February 19, 1998. CWA section 303(c) requires this response within 90 days after the state submission. Now an additional two and one-half years have passed. The result of the six years passage of time, and two intervening WQS submittals by KDHE, is to prejudice the rights of the State of Kansas and the rights of its citizens to full participation in the development of the 1994 Kansas WQS and the rights and expectations of the people of the state to full due process in this proceeding and in the numerous permit proceedings, nonpoint source program development, and water quality protection policies that have been developed or have been "on hold" while the October 31, 1994 WQS have been under EPA review. This EPA action is contrary to the mandates of CWA section 303(c) and violates due process rights under the United States Constitution.

B. Proposed Rules That are in Response to Kansas WQS That Were Not Before EPA for Review Must be Withdrawn on the Basis of Procedural Error

EPA has proposed to designate some Kansas water bodies for primary contact recreation that were not water bodies included in the secondary recreation contact designations submitted by Kansas on October 31, 1994. Some of the water bodies falling under EPA's proposal were designated prior to the 1994 standards and are not before EPA for review. EPA, therefore, has no authority to promulgate these use designations and its attempts to do so violate CWA section 303(c). EPA admits as much at 65 Fed. Reg. at 41221 when it sates that given the extensive restructuring of the citations for classified stream segments and the creation of the Kansas Register separate from the regulations somehow gives EPA authority to review the substance within the new form of Kansas' expression of use designations. This is clearly contrary to the CWA.

C. EPA's Proposed Rules When Taken Together Represent a Wholesale Revision to Kansas WQS for Which Complete Evaluation and Public Participation is Mandated by the CWA

EPA recognizes in the preamble that EPA's approval/disapproval authority is triggered only when a state submits new or revised WQS. 65 Fed. Reg. at 41219. The proposed rules represent wholesale changes to the Kansas WQS and a wholesale change was not before EPA for review. Thus, EPA's proposed rules are invalid. In addition, although the individual proposed rules are in response to individual provisions in the Kansas WQS, the effect of the individual proposed rules when taken together is to change significantly the premises, principles, policies, and practices for water pollution control in Kansas. This wholesale revision should have been addressed by EPA in the proposed rules, evaluated by EPA in determining impacted entities, economic analyses, and all other determinations required in order to properly promulgate a rule. EPA's failure to engage in this evaluation violates CWA section 303(c).

D. EPA Has No Authority to Review and Approve or Disapprove Kansas Implementation Procedures

EPA's regulations at 40 CFR ə 131.13 make it clear that states at their discretion, may include in their state WQS policies generally affecting their application and that such policies are subject to EPA review and approval. This regulation and its implementation are contrary to the federal CWA which clearly reserves to the states the delicate interest balancing process that is part of WQS development. 33 U.S.C. ə 303(c)(2)(A). EPA's action in reviewing the

implementation policies of Kansas and disapproving and promulgating federal rules that include such implementation policies is contrary to the CWA and the rights reserved to the states.

E. EPA Must Disapprove Secondary Contact Recreation as a Designated Use in Order to Support this Proposed Rule and EPA has Failed to do so

EPA states in the preamble to the proposed rule that its approach for proposing a primary contact designated use for 1,456 Kansas water bodies is to select uses from the Kansas system that correspond to CWA goal uses. *See* 65 Fed. Reg. at 41222. This is, in effect, a statement by EPA that it is choosing to ignore the clear words of Congress: "in and on" the waters. This is clearly contrary to the CWA. In order to make the use determination and the statutory interpretation that underlies the proposed designations EPA has to disapprove the Kansas secondary contact recreation use. EPA's failure to do so causes its proposed rules to be without any basis.

F. EPA's Failure to Cite Any Authority for its Antidegradation Implementation Provisions is Further Evidence that EPA Lacks Authority to Control, or Cause the State of Kansas to Control, Nonpoint Source Pollution

The preamble to the proposed antidegradation implementation provisions does not cite any authority for EPA's proposal. This when coupled with the analyses at Section IV shows that EPA is entirely without basis to promulgate an antidegradation implementation provision for the State of Kansas.

G. EPA Failed to Properly Consider Alternative Regulatory Approaches and Implementation Mechanisms

The Kansas Agriculture Coalition further objects to EPA's proposed rule because EPA's consideration of Alternative Regulatory Approaches and Implementation Mechanisms in Section VII of the preamble to the proposed rules is wholly inadequate, impractical, replete with unnecessarily time consuming procedures and otherwise arbitrary and capricious.

EPA recognizes, as it must, that "it is possible that data and information may become available after completion of this rulemaking that will be material to water quality standards for Kansas." 65 Fed. Reg. at 41232. EPA must make this statement because EPA has requested enormous amounts of information from the regulated community in the proposed rule – information EPA was required to provide to the public in the first place. The massive amount of information and data requested by EPA, although highly material to the rulemaking, cannot possibly be gathered and assimilated in the short period of time allowed for public comments.

Accordingly, EPA had to create mechanisms for this information to be considered after the close of the comment period. However, the comment period will be closed and the public will then be foreclosed from the opportunity to comment on a complete administrative record, thus violating due process rights.

EPA's proposed alternative regulatory approaches and implementation mechanisms include (1) changes in use designation, (2) development of site-specific criteria, (3) a federally promulgated variance procedure and (4) TMDLs.[32] *Id.* EPA's approach is wholly inadequate, impractical, replete with unnecessarily time consuming procedures and arbitrary and capricious because EPA completely fails to consider a more cost-effective and less intrusive alternative to the extreme alternative it chose – to federally promulgate water quality standards for Kansas.

As EPA recognizes, to undertake any of the implementation procedures it suggests in Section VII of the preamble, the state will be required to jump through all the hoops required for revisions to its water quality standards, including submission to EPA, public participation requirements and certification by the appropriate legal authority. *Id.* Kansas already has complied with these procedural requirements in this rulemaking. The unnecessary repetition of these time consuming and costly implementation procedures, however, can easily be avoided by use of a regulatory alternative better suited to this situation. As discussed above, with respect to the 1,456 primary contact use designations, EPA can grant a conditional approval of the Kansas use designations upon an agreement that the state will conduct UAAs within a specified time frame. *See supra* Section III.A.5 and *WQS Handbook* at 2.1.3 and 6.2. Such an approach is more cost-effective and less time consuming than EPA's approach because it would eliminate EPA's erroneous redesignation of the streams in the first place and instead allow the state time to gather additional information to support its existing use designations.[33] This, in turn, eliminates the delay involved in resubmitting unnecessarily revised recreation use designations for EPA

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[32] The Coalition notes that, with the exception of the federal variance procedure, EPA's proposed alternative regulatory approaches and implementation procedures provide no new or novel methods for the state to change EPA's proposed rules, once finalized. EPA's proposed mechanisms are nothing more than a reiteration of the revision procedures already in place in the CWA and implementing regulations.

[33] As discussed above, information from KDHE suggests that the stream segments at issue should not even be classified streams under the Kansas water quality program, much less designated for primary contact recreation. *See supra* Section III.B.5.

approval and public comment. This approach also eliminates the need for yet another regulatory program--in this instance federal variances (proposed 40 C.F.R. 131.44(i)) – as suggested by EPA in its preamble. *See* 65 Fed. Reg. at 41232.

In addition to this general objection to Section VII of the preamble and proposed 40 C.F.R. ə 131.44(i), the Coalition objects to or challenges the following specific statements in Section VII of the preamble:

- Although EPA would require Kansas to support any use designation change, site-specific criteria or variance with scientifically defensible data, *see* 65 Fed. Reg. at 41232, EPA proposes to change the use designation of 1,456 water bodies with absolutely no scientific or technical support. *See supra* Section III.B of these Comments and Requests.
- Although EPA specifically recognizes in Section VII.A of the preamble that "[s]tates have considerable discretion in designating uses," as set forth fully above, EPA has completely usurped this discretion and unnecessarily, and without authority, changed the use designation for 1,456 water bodies. *See supra* Section III of these Comments and Requests.
- In proposing the federal variance procedure, EPA states that such procedures are appropriate where "EPA adopts use designations which rely, at least in part, on a rebuttable presumption that fishable/swimmable uses are attainable or adopts more stringent criteria for the State's use designation."[34] This statement establishes just how arbitrary and capricious and contrary to the statute EPA's rebuttable presumption is. If EPA's rebuttable presumption was truly part of the present statutory or regulatory scheme, a federal variance procedure like the one proposed would already be in place. Moreover, the fact that implementation of EPA's "rebuttable presumption" requires a new federal variance procedure shows how unworkable and unattainable the rebuttable presumption method of use designations truly is.
- Through the proposed variance procedures, EPA has raised by at least one more notch the bar that the public must clear to challenge EPA's use designations. First, the

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[34] The Coalition notes that EPA has relied on nothing but its rebuttable presumption to support its redesignation of 1456 Kansas stream segments.

public must rebut the presumption by completing extensive studies and submitting substantial information all during the 105-day comment period (as explained *supra* in these Comments and Requests). If EPA does not accept the information submitted and promulgates the use designation, then the cumbersome, expensive, and time-consuming proposed variance process is the only recourse for interested parties.

For these reasons, the actions taken by EPA in Section VII of the proposed rule are arbitrary and capricious and must be withdrawn in the final rulemaking.

H. EPA Failed to Properly Consider Administrative Requirements and Related Government Acts

EPA's consideration of Administrative Requirements and Related Government Acts in Section VIII of the proposed rule preamble is also insufficient, arbitrary and capricious and not in accordance with the law and thus must be clarified, modified or withdrawn.

I. EPA Failed to Perform a Proper Evaluation Under Executive Order 12866: Regulatory Planning and Review

Section VIII.A of the proposed rule preamble sets forth EPA's consideration of Executive Order 12866: Regulatory Planning and Review. Although EPA correctly determined that the proposed rule is a "significant regulatory action," EPA provided no information regarding this determination. Nor did EPA indicate, other than OMB review, what a finding of "significant regulatory action" means with respect to EPA compliance with the Order. The Coalition requests clarification on this issue.

J. EPA Failed to Properly Evaluate the Proposed Rule in Light of the Regulatory Flexibility Act

EPA's certification in Section VIII.B of the preamble that the proposed rule will not have a significant economic impact on a substantial number of small entities as required by the Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), 5 U.S.C. 601 *et seq.* is arbitrary and capricious. As detailed above, many of the Coalition members are small business entities that will be affected by the regulation. *See supra* Section I of these Comments and Requests. Moreover, EPA's statement that the proposed rule "establishes no requirements applicable to small entities" because the "standards themselves do not apply to any discharger, including small entities" is simply incorrect. 65 Fed. Reg. at 41234.

EPA's proposed rule changes Kansas' water quality standards to make them directly applicable to all citizens of Kansas, including small entities. For example, the proposed use designations for the 1,456 water bodies could alter how all citizens are allowed to use the waters regardless of potential adverse health effects. *See supra* Section III.B.1 of these Comments and Requests. In addition, EPA's proposed rule regarding private waters directly applies to nearly all of the Coalition members as owners of private, isolated, non-navigable farm ponds. EPA's proposed rule subjects these small business entities to the CWA – a comprehensive statutory and regulatory scheme that is otherwise completely inapplicable to their private, isolate, non-navigable waters. *See supra* Section II of these Comments and Requests. Similarly, EPA's proposed antidegradation policy applies across the board to the Coalition members because the proposed regulation applies to all nonpoint source pollution without regard to whether the nonpoint sources are within the state's regulatory authority. *See supra* Section IV of these Comments and Requests. Accordingly, the proposed regulation directly applies to many small entities, including the small entity members of the Coalition. Thus, EPA must change its certification and prepare the regulatory flexibility analysis required by the RFA.

K. EPA's Analyses Under the Unfunded Mandates Act is Flawed

EPA is also wrong in its conclusion in Section VIII.D of the preamble that the proposed rules are not subject to the requirements of the Unfunded Mandates Reform Act of 1995. EPA erroneously states that the proposed rule contains "no Federal mandates for State, local, and Tribal governments or the private sector." In fact, EPA's proposed rule, at a minimum, contains numerous mandates that will require substantial expenditures by State and local governments and the private sector. For example:

- EPA's redesignation of 1,456 water bodies from secondary to primary contact recreation mandates that state and local governments and/or the private sector spend millions of dollars conducting UAAs to establish what is already obvious – EPA's primary contact use designations are unattainable. As set out above, the most troubling aspect of EPA's spending mandate is the fact that the majority of the water bodies should not be classified streams at all. *See supra* Section III.B.5.
- EPA's proposed antidegradation rule requires the State to determine that BMPs will be implemented for nonpoint source pollution previously. *See supra* Section IV of these Comments and Requests. EPA suggests that this "determination can rely on

Kansas regulations, local ordinances, performance bonds, contracts, cost share agreements and memorandums of understanding, as well as voluntary programs under certain circumstances; *e.g.*, an active nonpoint source program covering a watershed or area of concern." 65 Fed. Reg. at 41227. It's hard to imagine a federal mandate that has a greater affect on state and local governments and the private sector. At a minimum, the proposed antidegradation rule requires (1) the development of state and local nonpoint source regulation; (2) affects funding decisions at the Kansas Department of Agriculture ("KDA")—the funding source for nonpoint source programs; (3) creates enforceable BMPs on previously unregulated private sector nonpoint source pollution; and (4) requires KDHE to regulate previously unregulated nonpoint source activities at substantial additional costs to the state and thus to the Kansas taxpayers.

- The proposed regulation of private, isolated, non-navigable waters also contains federal mandates affecting state government and the private sector. The state will be required to amend its statute and incur the costs to regulate a previously unregulated activity. The private sector, on the other hand will be required to incur potentially substantial costs to comply with the CWA and the Kansas water quality program despite the fact that the private farm ponds are not within the jurisdictional authority of the Act. *See supra* Section II of these Comments and Requests.

Clearly, the proposed rule directly effects State and local governments and the private sector. Accordingly, EPA must perform the requirements of the Unfunded Mandates Reform Act of 1995.

L. EPA Improperly Concludes That the Proposed Rule Does Not Have Federalism Implications

Similarly, EPA's conclusion in Section VIII.E of the preamble that the proposed rule "does not have federalism implications" must be set aside. As set forth above, the proposed rule raises state authority issues under the CWA and the Tenth Amendment to the United States Constitution. *See supra* Section II.B, II.C, III.C and III.D of these Comments and Requests. Indeed, EPA essentially admits that federalism concerns are raised by the rule in its description of the minimal consultation between EPA and State and local government representatives in developing the proposed rule. *See* 65 Fed. Reg. at 412235. Accordingly, EPA's conclusion that

the proposed rule does not have federalism implication is erroneous. EPA must re-evaluate this issue and re-propose the rules.

Moreover, EPA's minimal consideration of state and local government concerns was wholly incomplete and inaccurate. The "concerns" EPA allegedly considered were that some of the proposed regulations "would result in substantial costs to small communities without significant environmental benefits." *Id.* EPA improperly discounted these concerns stating that economic impacts may not be considered by the State in adopting water quality standards for statewide implementation. *Id.* EPA is simply wrong in this conclusion. CWA section 303(c)(2)(A) requires states to consider a host of competing interests when developing water quality standards. Moreover, legislative history establishes that economic considerations are required in water quality standards development. *See* 48 Fed. Reg. 51400 (November 8, 1983) *citing* Senate Report No.10 on the Federal Water Pollution control Amendments of 1965, 89th Congress, 1st Session. Thus, EPA's minimal attempt to comply with the Executive Order on Federalism is wholly inadequate and the proposed rules should be remanded.

M. EPA Failed to Properly Implement Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

Finally, EPA's conclusion in Section VIII.I that the proposed rule is not subject to Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks is arbitrary and capricious. First, EPA states that the rule is not economically significant under Executive Order 12866. In EPA's discussion regarding Executive Order 12866 in Section VIII.A, however, EPA concluded that the regulation was significant. Next, EPA's redesignation of 1,456 water bodies from secondary to primary contact recreation is, indeed, likely to have a disproportionate effect on children. EPA's primary contact use designation suggests that the water bodies are safe for primary contact recreation when, in fact, they may not be. As discussed above, EPA's primary contact use designation puts the health and safety of Kansas citizens, children included, at risk. *See supra* Section III.B.1 of these Comments and Requests. Thus, EPA's conclusion that the proposed rule is not subject to Executive Order 13045 is arbitrary and capricious and must be withdrawn.

VI. CONCLUSION

The Coalition associations respectfully submit these Comments and Requests on behalf of the associations and their individual members. The Coalition requests that in accordance with 40 C.F.R. ∋ 25.8, EPA prepare a detailed responsiveness summary and that EPA withdraw the proposed rules for all the reasons set forth in these Comments and Requests.

CERTIFICATE OF SERVICE

I hereby certify that an original and two copies of the above was hand delivered this 16th day of October, 2000 to:

Ann Jacobs
Water Resources Protection Branch
U.S. Environmental Protection Agency
901 North 5th Street
Kansas City, KS 66101

_____
Attorney for the Coalition Associations

564847 v1

Kansans for Co[redacted]nse Water Policy

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

October 17, 2000

Attorney General Carla Stovall
Kansas Judicial Center
Topeka, Kansas 66612-1597

Dear Attorney General Stovall:

Enclosed please find a copy of the comments filed on behalf of the above listed organizations in opposition to EPA's proposed regulations. Included in these comments is an extensive discussion on the legitimacy of the K.S.A. 65-171(d). I hope this will provide you with important information needed as you develop a response to Secretary Clyde Graeber's request for an Attorney General's opinion.

Sincerely,

Allie Devine

AD/da
enclosures

3-102

State of Kansas
Office of the Attorney General
120 S.W. 10th Avenue, 2ND FLOOR, TOPEKA, KANSAS 66612-1597

CARLA J. STOVALL
ATTORNEY GENERAL

MAIN PHONE: (785) 296-2215
FAX: 296-6296

September 6, 2000

Allie Devine, Counsel
Kansas Livestock Association
6031 S.W. 37th
Topeka, Kansas 66610

RE: 48-00

Dear Ms. Devine:

Our office has received the enclosed request for an attorney general opinion.

The subject matter of the inquiry and our response thereto fall within areas in which I believe your association may deal. In order to consider the unique legal knowledge and perspective of the association in the matter, we invite you to provide us with any information relating to statutes, regulations, and court decisions that you deem relevant to the issue to be addressed. We ask that you contact us by September 13, 2000, because of the time sensitive nature of this issues to provide such information.

Thank you for your assistance in matters of mutual concern.

Very truly yours,

OFFICE OF THE ATTORNEY GENERAL
CARLA J. STOVALL

Camille Nohe
Assistant Attorney General

CN:jm
Enclosure

48-0d

for attack Nolan

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

August 24, 2000

Attorney General Carla Stovall
Memorial Building
120 SW 10th, 2nd Floor
Topeka, KS 66612-1597

Dear Attorney General Stovall:

I am requesting an opinion clarifying whether a Kansas statute relating to water quality standards is consistent with federal law.

Under section 303 of the Clean Water Act (CWA), 33 USC §1313, states and tribes are required to develop water quality standards for waters of the United States within their jurisdiction. Standards adopted by a state must be consistent with the CWA. If a state's standards are not consistent with the CWA, the Administrator of the federal Environmental Protection Agency (EPA) is then required to promulgate water quality standards for the state to correct any inconsistencies. *Id.*

Kansas has adopted statutes and regulations in compliance with the CWA. See KSA 65-161 *et seq.*, KAR 28-16-1 *et seq*. Under Kansas law, water quality standards apply to privately owned freshwater reservoirs and farm ponds as provided by KSA 171d(d), as follows:

> If a freshwater reservoir or farm pond is privately owned and where complete ownership of land bordering the reservoir or pond is under common private ownership, such freshwater reservoir or farm pond shall be exempt from water quality standards except as it relates to water discharge or seepage from the reservoir or pond to waters of the state, either surface or groundwater, or as it relates to the public health of persons using the reservoir or pond or waters therefrom.

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3-104

The EPA believes that the Kansas exemption for privately owned reservoirs and farm ponds would possibly exempt some "waters of the United States" from water quality standards, and that the Kansas law is therefore inconsistent with the CWA. 65 FR 41216, 41217 (July 3, 2000). As a result, the EPA has proposed new water quality standards for Kansas which would subject farm ponds and reservoirs to regulation. *Id.* The EPA has stated, however, that it is not currently aware of any "waters of the United States" which are exempted from state water quality standards by KSA 171d(d). 65 FR 41228.

After reviewing the relevant statutes and regulations, I am not convinced that the EPA's position is correct. I therefore request your opinion on the following questions:

1. Is the exemption of privately owned freshwater reservoirs and farm ponds from Kansas water quality standards, with the exceptions set out at KSA 65-171d(d), consistent with the federal Clean Water Act?

2. Is application of state water quality standards to non-discharging freshwater reservoirs and farm ponds required by the federal Clean Water Act?

The first question was briefly addressed in Attorney General Opinion 87-154. In that opinion, Attorney General Stephan stated his belief that "state law is not as broad as federal law in this area." I would appreciate your reexamining this question under current law, and I would appreciate more detailed guidance in this area than provided in Attorney General Opinion 87-154.

Please do not hesitate to contact me if you have any questions or if I can be of any other assistance.

Respectfully,

Clyde D. Graeber,
Secretary

GDG:DJH

SB 204
Committee on Natural Resources
Robert Tyson, Chairman
Thursday, February 7, 2001
Room 241 North, Capitol Building, 8:30 AM

Testimony of Dave Murphy
P. O. Box 328
Shawnee Mission, KS 66201-0328
913-406-2260

Good morning Mr. Chairman, my name is Dave Murphy. I am a businessman, a lifelong resident of Kansas and a landowner. I am here to speak on behalf of Friends of the Kaw, and organization that has a real-life, practical knowledge of rivers and water quality. We are opposed to SB 204.

This bill would reverse thirty years of water quality improvements in Kansas. It would put Kansas in clear violation of the Federal Clean Water Act, and it would threaten all uses of our rivers and streams.

Specifically:

Section 1(7)(A)(i) would remove all water quality controls from the entire state. A river system is just that, a "system". Without protection on the smaller creeks and streams there is no protection for any body of water in the state. By a preliminary count from KDHE and another independent count from USGS shows only 15 streams and rivers in the entire state would meet the cutoff criteria for a "classified stream" under SB 204's standards. This leaves not even one tributary of those major rivers with any water quality protection or standards. In effect, this will remove all water quality standards from our state. You cannot put polluted water in the streams then expect the water to clean itself at the confluence with the main river system.

Sections 1(7)(A)(ii) and (iii) would encourage extermination of aquatic life present in a stream then use it absence to justify continued pollution. It also makes a mockery of the concept of stream restoration.

Section 1(7)(B) would require a tremendously expensive study on every stream. KDHE does not have the resources for such undertakings.

Sections 1(7)(C) and (D) further clarifies that this bill would effectively remove all water quality standards from the state by the simple act of removing all feeder streams from regulation.

Section 1(8)(A) would reclassify almost all waters in the state as "agriculture use". A quote from Section 1(8)(B)(a) though (d) – Contact recreation "is classified streams that… are open to the public". Within the next few months my wife and I plan to buy a larger piece of ground along a stream somewhere in eastern Kansas. Even though my land is "private", I still want to be able to swim, boat and fish in the river. Under common law and under the laws of this nation all of us have the right to th

no person or group of people has the right to destroy or pollute those resources held in public trust. This bill flies in the face of common law and the Federal Clean Water Act and, if passed, it would guarantee intervention by EPA.

This section goes on to limit recreational uses to only five (5) months of the year on those few streams that could be classified at all.

What the proponents of this bill aren't telling you is more important than what they will tell you.

1. They will tell you that EPA is forcing Kansas to regulate dry streambeds, but that is not exactly true. EPA has given KDHE a painless and easy way to reclassify uses of dry streambeds. It is my understanding that all it takes to reclassify a dry streambed as "not attainable" is a good set of photos and a good description of the location of the pictures. This can and will be done quite economically. There is no need to jeopardize the water quality progress of the last 30 years for the sake of a few pictures.

2. The proponents of this bill will tell you what hardships they would have to go through under the proposed EPA regulations. But not one Kansas farmer or rancher has ever been cited, let alone prosecuted for agricultural or livestock contamination of a dry streambed or farm pond through normal agricultural or grazing practices. Normal and ordinary agricultural use of the land is guaranteed under the Freedom to Farm Act.

3. The proponents of SB 204 will tell you that EPA wants to regulate their farm ponds and dry creek beds. They won't tell you that EPA has publicly stated, over and over again, that the proposed regulations will not regulate farm ponds. Again, normal agricultural uses are guaranteed under the Freedom to Farm Act.

Every expert I have spoken to throughout the state has condemned this bill. This is a very complex issue. Many experts have made good judgements concerning the best ways to protect and preserve our water supplies. To date, no one is being harmed or threatened by the current regulations. But this bill puts at stake is the health and wellbeing of our precious and all too scarce water. Not one person has been threatened by current or proposed regulation. I suggest we all consider working carefully within the framework of what is best for the future our water, and abandon the notion that a quick reaction is needed to fix a problem that does not exist.

Stay the course of Kansas water quality based upon our greatest hopes, not our most selfish fears.

Thank you
Dave Murphy

Kansas Society of Professional Engineers

A state society of the National Society of Professional Engineers

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TESTIMONY BEFORE SENATE NATURAL RESOURCES COMMITTEE

Hearing on Senate Bill 204
AN ACT concerning the waters of the state; relating to classified streams.
8:30 a.m., February 8, 2001

Presented by: Shelley King
Kansas Society of Professional Engineers (KSPE)

Good morning Mr. Chairman, my name is Shelley King. I am associate director for the Kansas Society of Professional Engineers. KSPE is a professional organization made up of approximately 900 engineers practicing in Kansas. KSPE believes that Kansas should devote the necessary resources for the development, maintenance and implementation of water quality standards appropriate for Kansas that are protective of aquatic life and public health. Many of our members work with counties, cities, and several industrial and agricultural groups in regards to water issues. Although Senate Bill 204 addresses valid concerns about designated uses in the state Water Quality Standards, KSPE opposes Senate Bill 204 for the following reasons:

- The language in SB 204 removes designated uses from most streams in Kansas by changing the definition of what constitutes a classified stream. If passed into law SB 204 would permanently remove several designated uses from most streams in Kansas, including protection of aquatic life and public health concerns surrounding swimming, fishing and boating.

- Virtually all streams in Kansas would be left without water quality standards. For an example, visualize Shunga Creek here in Topeka being left without any protection from degradation. Shunga Creek flows along a popular, scenic trail, which is enjoyed by many children, joggers and bicyclists. Without any protection, one wonders how long Shunga creek would remain a safe public resource.

- KDHE does not have the labor force to conduct the thousands of studies necessary to determine whether or not these uses should be restored to the streams.

- The bill is clearly contrary to EPA regulations, which requires a Use Attainability Analysis, which is a structured scientific analysis, before a use is removed. Under Senate Bill 204, uses for thousands of streams will

Senate Natural Resources Committee
Date 2-8-01

Attachment # 5

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be removed without benefit of a Use Attainability Analysis. If judicial intervention were to occur, the possibility of a judge taking issue with the change in use is quite high.

- The classification and use designation of streams in Kansas and virtually all other states in the country have always been under the preview of regulation, not law. KSPE cannot rationalize any reason for such a drastic change in the regulatory scheme.

- The proposed change to the period when the primary recreational use criterion is in effect from April through October to a reduced period of May through September may have merit. However, such a change should only be made after scientific analysis of data on actual Kansas usage and the practices of nearby states has been conducted.

The issues raised here in this hearing relying heavily on scientific analysis and findings and should be treated as such. For this reason, KSPE would like to take this opportunity to state that we are supportive of SB 221 which would create a permanent Water Quality Commission. The issues that we have concerning SB 204 should be studied and evaluated by a permanent Water Quality Commission. As this committee is no doubt aware, the previous Water Quality Commission lead to significant reforms of KDHE Water Quality Standards. In developing the 1999 standards, KDHE relied heavily on the Commission's recommendations to use actual stream data rather than desktop analysis in making water quality decisions.

The Kansas Society of Professional Engineers would like to thank the committee for the opportunity to present these views. Thank you.

State of Kansas

Department of Health and Environment

CAPITOL TOWER
400 SW 8TH AVE., STE. 200
TOPEKA, KS 66603-3930

PHONE (785) 296-0461
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BILL GRAVES
GOVERNOR

CLYDE D. GRAEBER
SECRETARY

Testimony on Senate Bill 204
presented by
Secretary Clyde D. Graeber
to the
Senate Energy and Natural Resources Committee

February 8, 2001

Chairman Tyson and members of the Committee, I appear before you today to express concerns KDHE has regarding certain provisions included in Senate Bill 204 that we believe would hinder the adequate protection of the surface waters of our state. These provisions also place in jeopardy, Kansas' compliance with federal laws and regulations.

I have offered previously, and reiterate publicly today, an offer to meet and work with the proponents of this legislation to review the questioned provisions of SB 204. It is my sincere intent to work with this coalition and it is my hope to craft revised language that will be amenable to all parties involved, which I feel can be accomplished within the next 10 days.

I would ask the Committee to afford the latitude, not only to KDHE but also the proponents of this legislation, to immediately begin working towards the development of legislation that will accomplish the intended goals and still protect the waters of our state.

I again thank the Chairman and members of the Committee for this opportunity.

STATEMENT OF THE KANSAS AGRICULTURAL AVIATION ASSOCIATION

AND THE

KANSAS SEED INDUSTRY ASSOCIATION

TO THE SENATE NATURAL RESOURCES COMMITTEE

SENATOR ROBERT TYSON, CHAIR

CONCERNING S.B. 204

Thursday, February 8, 2001

chris wilson

Mr. Chairman and Members of the Committee, I am Chris Wilson, Executive Director of the Kansas Agricultural Aviation Association (KAAA) and Director of Member Services of the Kansas Seed Industry Association (KSIA). KAAA is the professional trade association of the aerial application of crop protection chemicals in the state. Our 300 members are involved in agricultural aviation. KSIA is the professional trade association of seed companies in the Kansas market, involved in the production, preparation, distribution, wholesale or retail of seed, with over 150 member companies.

KAAA and KSIA are in support of S.B. 204. We believe it is important for the state to define classified streams in order to prevent the classification of "streams" that do not or rarely carry water. We were shocked when we learned that hundreds of such streams had been classified, resulting in designations that made no sense for those areas, without any science or factual basis. What has been even more frustrating for us is that the streams could be classified without facts, but they couldn't be removed without significant documentation.

This kind of bureaucratic regulation is not about water quality. S.B. 204 would tie our water quality regulation in Kansas to factual data, to science, to sincere identification of quality problems and to enable the state to better address water quality concerns.

We commend those legislators who have worked on this bill. We join with other organizations representing Kansas farmers, ranchers and agribusiness in their comments and urge your favorable consideration of S.B. 204. Thank you for your consideration.

Kansas Agricultural Alliance

Kansas Agricultural Aviation Association
Kansas Association of Ag Educators
Kansas Association of Wheat Growers
Kansas Corn Growers Association
Kansas Dairy Association
Kansas Farm Bureau
Kansas Grain and Feed Association
Kansas Nursery & Landscape Association
Kansas Pork Association
Kansas Soybean Association
Western Retail Implement and Hardware Association
Kansas Agri-Women
Kansas Association of Conservation Districts
Kansas Cooperative Council
Kansas Crop Consultant Association
Kansas Ethanol Association
Kansas Fertilizer and Chemical Association
Kansas Grain Sorghum Producers Association
Kansas Livestock Association
Kansas Seed Industry Association
Kansas Veterinary Medical Association

February 8, 2001

The Honorable Robert Tyson
Chairman of the Senate Natural Resources Committee
Statehouse
Topeka, KS 66612

Dear Chairman Tyson,

The Kansas Agricultural Alliance, representing the 21 above-named agricultural associations, supports SB 204. Members of the Alliance feel strongly about water quality in our state. We believe this bill will help address fundamental flaws in the system currently used by KDHE to designate uses for Kansas streams that more accurately reflect actual stream use. Furthermore, we believe this legislation will help protect waters of Kansas without over-regulating Kansas citizens.

Members of the Ag Alliance have voted unanimously to support this legislation.

Thank you for your consideration.

Sincerely,

Kerri Ebert

Kerri Ebert
KAA President

Senate Natural Resources Committee
Date 2-8-01

Attachment # 8

PUBLIC POLICY STATEMENT

SENATE NATURAL RESOURCES COMMITTEE

RE: SB 204 regarding classification of streams and designated uses.

February 8, 2001
Topeka, Kansas

Presented by:
Leslie J. Kaufman, Associate Director
Public Policy Division
Kansas Farm Bureau

Chairman Tyson and members of the committee, thank you for the opportunity to present testimony on behalf of Kansas Farm Bureau's farmer and rancher members across the state and express our support for SB 204. I am Leslie Kaufman and I serve KFB as an Associate Director of Public Policy.

Kansas Farm Bureau is a member of the alliance, Kansans for Common Sense Water Policy. We fully support the testimony presented to this committee on behalf of the coalition. In addition, we feel it is important to supplement that presentation with a statement specific to KFB policy.

Farm Bureau members are aware of the important and vital role the state fulfills in determining how Kansas will meet the requirements of the federal Clean Water Act. Hundreds of farmers and ranchers from across the state filled meeting rooms in Topeka and Dodge City this past fall expressing concern with the U.S. Environmental Protection Agency's proposed water quality standards for Kansas and the way in which EPA was trying to interject itself into matters of the state.

These concerns were raised again when the voting delegates to the Kansas Farm Bureau Annual Meeting debated and adopted new language regarding the state's authority under the federal Clean Water Act:

"We support the authority of the state of Kansas to regulate water quality under the federal Clean Water Act. We also support the current state exemption for certain private waters from water quality standards."

SB 204 will provide the legislative guidance through statutory definition and direction that is needed to ensure Kansas' stream classifications and use designations are appropriate, reasonable and scientifically based. We urge this committee to act favorably on the concepts contained in SB 204. Thank you.

STATEMENT OF THE

KANSAS GRAIN & FEED ASSOCIATION

AND THE

KANSAS FERTILIZER & CHEMICAL ASSOCIATION

PRESENTED TO

SENATE NATURAL RESOURCES COMMITTEE REGARDING SB 204

SENATOR ROBERT TYSON, CHAIR

FEBRUARY 8, 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.

816 SW Tyler, Topeka KS 66612 – 785-234-0461 - Fax: 7

The following statement is submitted on behalf of 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 that 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.

KGFA and KFCA want to express support for Senate Bill 204, which accomplishes the following:

- S.B. 204 ensures the Kansas Department of Health and Environment considers the social, economic and regulatory costs associated with the classification of streams.
- S.B. 204 establishes a credible and practical definition for "classified streams" based on a one cubic foot per second low flow. (This is the current standard in place in Nebraska.)
- S.B. 204 provides special consideration in cases where streams are inhabited by threatened or endangered species.
- S.B. 204 provides special consideration in cases where pooling occurs in low flow streams and serves as a refuge for aquatic life.
- S.B. 204 more clearly defines the term "agriculture use" with regards to Kansas Surface Water Quality Standards.
- S.B. 204 establishes practical recreational use designations for classified streams in Kansas that account for seasonal climatic conditions and historical recreational use timeframes.
- S.B. 204 strengthens private property rights in Kansas by ensuring that primary contact recreational uses (swimming, etc.) do not apply to private lands where public access is not authorized.

With the advent of the Environmental Protection Agency's proposed water quality standards, which if adopted would force Kansas to apply the most stringent recreational use designation to all "classified streams", it is paramount that Kansas exercise its right and responsibility to only classify streams that have the ability to realistically support recreational activities. If left unchecked, the inappropriate classification of streams and the stringent EPA mandated standards that follow will

not only negatively impact Kansas agriculture but also the hundreds of small rural communities in Kansas whose livelihood depends on a strong agricultural economy.

It is our hope, that the Kansas Legislature will not sit idly by as streams are inappropriately classified and stream uses are inappropriately designated. The cost associated with unjustified classifications and designations is simply too great to ignore. The Kansas Legislature must ensure that the limited resources available for water quality improvement in Kansas are targeted to rivers and streams that have a realistic chance at meeting all of the uses designated for that specific stream. This can only be accomplished if our standards for stream classification and stream use designation are also realistic.

It is clearly time for reason rather than emotion, time for common sense rather than command and control regulations and time for practical solutions rather than unattainable standards. KGFA and KFCA believe its time for positive consideration of Senate Bill 204. Thank you for the opportunity to present this statement of support.

For information contact Doug Wareham, Vice President, Government Affairs at (785) 234-0461 (office) (785) 224-1848 (mobile).

Charles M. Benjamin, Ph.D., J.D.
Attorney at Law
P.O. Box 2642
Lawrence, Kansas 66044-8642
(785) 841-5902
(785 841-5922 fax

February 8, 2001

Testimony Before the Kansas Senate Natural Resources Committee
In Opposition to S.B. 204
On Behalf of the Kansas Chapter of Sierra Club

Mr. Chairman, members of the Committee, thank for giving me the opportunity to testify in opposition to S.B. 204. There are three great thinkers that I would like to quote in my testimony today. They are Yogi Berra, the great N.Y. Yankees catcher, Albert Einstein, Nobel Prize Winning Physicist, and my mother.

As Yogi Berra used to say "I have a feeling of Déjà vu all over again." That is because I testified before all but one of you on Tuesday morning, but in the Senate Agriculture Committee. But then, I get that same feeling before the House Environment Committee. It too has virtually the same membership as the House Agriculture Committee. I suppose it is not by accident that the membership of the two committees that deal with agriculture and the environment are virtually the same. And it is not by accident that we are dealing with a bill today that is strongly endorsed, and probably written by, the "Ag Alliance." As I recall, these are the same special interests that, in 1997, brought us H.B. 2368 to suspend water quality standards for ammonia and chlorides and lower the standards for atrazine.

It is not by accident that the leader of this group, "Kansans for Common Sense Water Policy," is none other than Jere White. Mr. White is paid by Novartis, a Swiss Corporation, to make sure that those Kansans who live in cities in the northeast part of Kansas get to spend hundreds of thousands of dollars every year to remove the weed killer atrazine, made by Novartis, from our drinking water. The parents and grandparents of babies living in cities in northeast Kansas, who drink baby formula mixed with tap water, should feel assured by Mr. White that just because those infants get their entire adult dose of atrazine before they are two years old, it is perfectly normal to have weed killer in their baby's formula. Soon those Kansans who live in southcentral Kansas, and who depend on the Equus Beds for their drinking water, will get to pay thousands of dollars every year to take Novartis' weed killer out of the Little Arkansas River before it is used to recharge the Equus Beds.

It is no accident that we see organizations strongly supporting this legislation whose members feel it is just okay for those Kansans who live downstream from their livestock operations to pay hundreds of thousands of dollars every year to take the bacteria from their cattle's poop out of our water before it is fit to drink. And it is okay to run the risk of getting sick if we do attempt to swim or canoe in one of the rivers in this state polluted with cow manure.

One of my first recommendations therefore is that you try to be less transparent about what you are about. The people of Kansas, who do not benefit and will be harmed by this legislation, might suspect that this committee is working hand in glove with the very interests who cause most of the water pollution in this state.

Albert Einstein said that you cannot really understand something until you can explain it to your grandmother. How many of you really understand what you are being asked to recommend to the entire state Senate? Can you assure your colleagues in the Senate that what is contained in this bill won't actually negatively affect their constituents? Can you assure your colleagues in the Senate that this bill is in conformity with the federal Clean Water Act? Are you prepared to fund the Kansas Attorney General's office to sue the EPA if the EPA rejects these water quality standards as inconsistent with the Clean Water Act? Can you explain to your grandmother or to your constituents the actual meaning of "An actual flow during the seven day 10 year low flow equal to or greater than one cubic foot per second as evidenced by flow data"?

Water quality standards are a complex mixture of science and law and not something that legislators normally deal with – like you do school finance and the state's budget. That is why there is a procedure already in place to deal with water quality issues. It is called a triennial review of water quality standards and it is required of all states under the federal Clean Water Act. Every state is required to completely review, and if necessary, update their water quality standards at least every three years. In the past, that process in Kansas has been an open process that takes many months and provides for input by all stakeholders, including the scientific and public health community. Kansas is due for another triennial review of its water quality standards in 2002. Wouldn't it be better for all Kansans if the special interests who are promoting this legislation allow the proposals contained in this legislation to be considered in an open public process over several months rather than in a one hour hearing on a bill whose content was released to the public less than a week ago, in a hearing that was changed yesterday from tomorrow to today? What is the rush? Many Kansans will be impacted by such a dramatic change in water quality standards. Why not make sure you have heard from all who might be affected so that you don't pass a law that will benefit a few Kansans and potentially harm many more?

My mother used to warn me that I should watch what I ask for, because I might get it. Given the hysteria about the proposed EPA rules on Kansas water quality standards whipped up by the groups promoting this legislation and the political and economic clout they have, this legislation will probably pass and be signed into law. Those of you who think that passing this legislation will take care of water quality issues might find that this change creates more problems than it solves.

I asked a scientist at KDHE, who has worked on water quality issues at KDHE for many years, to supply me with a list of streams in Kansas that would be affected by the changes in flow contained in the current language in S.B. 204. That list is attached to this testimony. Looking at this list, do you really think this legislation will take care of water quality issues in those streams? And will this legislation improve the water quality in the rivers and streams that lie downstream from the rivers and streams on this list? Or is this legislation just another way of avoiding the issue of what has really happened to the rivers and streams in Kansas, even in your lifetimes? If this legislation is as good as its proponent's claim, than let them convince other Kansans in a thoughtful, open process rather than a one-hour legislative hearing. Only then can we have laws all Kansans can live with.

Thank you for your time and attention.

The following 7Q10 values are based on USGS gaging data. They were last updated in 1996 and should be regarded as reasonable approximations.

Cimarron River Basin
(Only the lower Cimarron River would likely meet the proposed 1.00 cfs cutoff.)
Crooked Creek near Oklahoma border ..... 0.00 cfs

Kansas/Lower Republican River Basin
Soldier Creek near Delia ..... 0.19 cfs
Fancy Creek near Randolph ..... 0.21 cfs
Mill Creek near Alma ..... 0.90 cfs
Delaware River near Muscotah ..... 0.35 cfs
Vermillion Creek near Belvue ..... 0.77 cfs
Stranger Creek near Tonganoxie ..... 0.20 cfs
Wolf Creek near Concordia ..... 0.02 cfs
Buffalo Creek near Concordia ..... 0.07 cfs
White Rock Creek below Lovewell Reservoir ..... 0.02 cfs

Lower Arkansas River Basin
Rattlesnake Creek near Raymond ..... 0.72 cfs
Medicine Lodge River near Oklahoma border ..... 0.00 cfs
North Fork Ninnescah River below Cheney Reservoir ..... 0.03 cfs
Slate Creek near Wellington ..... 0.04 cfs
Cow Creek near Lyons ..... 0.72 cfs

Marais Des Cygnes River Basin
(Only the Marais des Cygnes River would likely meet the proposed cutoff.)
Little Osage River near Fulton ..... 0.04 cfs
Marmaton River near Fort Scott ..... 0.05 cfs
Pottawattomie Creek near Garnett ..... 0.13 cfs
Bull Creek above Hillsdale Reservoir ..... 0.08 cfs
Dragoon Creek near Burlingame ..... 0.04 cfs
Salt Creek near Lyndon ..... 0.05 cfs
Hundred-and-Ten Mile Creek below Pomona Reservoir ..... 0.65 cfs

Missouri River Basin
(Only the Missouri River and streams receiving discharges from large STPs would likely meet the proposed cutoff.)
Blue River at Stanley ..... 0.02 cfs
Independence Creek near Doniphan ..... 0.08 cfs
Wolf River near Robinson ..... 0.04 cfs

Neosho River Basin
(Only the Neosho, Cottonwood and Spring rivers and Shoal Creek would likely meet the proposed cutoff.)
Cottonwood River below Marion Reservoir ..... 0.06 cfs
Neosho River below Council Grove Reservoir ..... 0.28 cfs
Lightning Creek near McCune ..... 0.01 cfs
Cedar Creek near Clements ..... 0.75 cfs

Smoky Hill/Saline River Basin
(Only the lower Smoky Hill and Saline rivers would likely meet the proposed cutoff.)
Smoky Hill River near Elkader ..... 0.02 cfs
Smoky Hill River near Schoenchen ..... 0.18 cfs
Big Creek near Hays ..... 0.07 cfs
Saline River near Russell ..... 0.53 cfs

Solomon River Basin

(Only the Solomon River below Waconda Reservoir, and the North Fork Solomon River immediately above Waconda Reservoir, would likely meet the proposed cutoff.)

South Fork Solomon River near Osborne	0.68 cfs
North Fork Solomon River below Kirwin Reservoir	0.01 cfs
Bow Creek near Stockton	0.06 cfs
Salt Creek near Minneapolis	0.33 cfs

Upper Arkansas River Basin

(Only the Arkansas River at the Colorado border and near Great Bend would likely meet the proposed cutoff.)

Arkansas River near Syracuse	0.60 cfs
Arkansas River near Garden City	0.00 cfs
Arkansas River near Dodge City	0.00 cfs
Arkansas River near Kinsley	0.20 cfs
Walnut Creek near Albert	0.00 cfs

Upper Republican River Basin

(None of the streams in this basin would likely meet the proposed cutoff.)

Beaver Creek near Nebraska border	0.06 cfs
Prairie Dog Creek near Nebraska border	0.08 cfs

Verdigris River Basin

Caney River near Elgin	0.11 cfs
Elk River near Elk Falls	0.06 cfs
Elk River below Elk City Reservoir	0.15 cfs
Big Hill Creek below Big Hill Reservoir	0.01 cfs
Fall River below Fall River Reservoir	0.83 cfs
Otter Creek near Climax	0.05 cfs
Verdigris River below Toronto Reservoir	0.94 cfs

Walnut River Basin

(Only the Walnut River and its largest tributary, the Whitewater River, would likely meet the proposed cutoff. The Whitewater's 7Q10 is 1.22 cfs. No other stream in this basin is routinely monitored for flow.)

TO: The Honorable Robert Tyson, Chairman
Members, Senate Natural Resources Committee

FROM: John Metzler

DATE: February 8, 2001

RE: Opposition to SB 204 -- Classification of Lakes and Streams

I am a registered professional engineer and I am Chief Engineer with Johnson County Wastewater, a sewer utility that provides sanitary sewers to approximately 300,000 customers in Johnson County.

While Senate Bill 204 addresses valid concerns about designated uses in the state Water Quality Standards (WQS), we believe the bill should not be approved for the following reasons:

1. The bill proposes to remove designated uses from most streams in Kansas by redefining what a classified stream is. Because this part of the bill gives as a deadline the publication of the bill for reinstating these uses, as a practical matter, it will permanently remove many important designated uses from most streams in Kansas, including protection of aquatic life and public health.

2. The streams left without protection under the WQS include virtually all streams in Johnson County. Perhaps more familiar to this committee, the Shunganunga and Soldier Creeks here in Topeka will also lose this protection.

3. KDHE does not have the staffing to conduct the thousands of studies that would be required to evaluate whether these uses should be restored to the streams. KDHE does not have sufficient staffing for implementing the current WQS program, and cannot take on these additional studies.

4. The bill appears contrary to EPA regulations, which requires a Use Attainability Analysis (a structured scientific analysis), before a use is removed. Under the bill, uses for thousands of streams will be removed without benefit of a Use Attainability Analysis. It is difficult to conceive of a position a court could take in support of this concept should it be challenged in court.

5. The classification and use designation of streams in Kansas and virtually all other states in the country have always been under the purview of regulation, not law. There is no justification for this significant change to the regulatory scheme.

6. The proposed change to the period when the primary recreational use criterion is in effect from April through October to a reduced period of May through September may have merit. However, such a change should only be made after scientific analysis of data on usage and the practices of nearby states.

7. The issues raised by this bill are largely scientific, rather than legal. We strongly urge that the issues raised by proposed S.B. 204 be studied by a permanent Water Quality Commission as proposed in S.B. 221. As this committee is no doubt aware, the previous Water Quality Commission lead to significant reforms of KDHE's Water Quality Standards in 1999.

Thank you for this opportunity to provide comments on proposed Senate Bill 204.