

MINUTES OF THE SENATE NATURAL RESOURCES COMMITTEE.

The meeting was called to order by Chairperson Robert Tyson at 8:30 a.m. on March 2, 2001 in Room 423-S of the Capitol.

All members were present except: Senator Christine Downey - excused

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

Conferees appearing before the committee:

Charles Benjamin, Sierra Club
John T. Barnes, Kansas Natural Resource Council
Ron Klataske, Executive Director, Audubon of Kansas
Mike Calwell, private citizen, Countryside Kansas
Clyde Graeber, Secretary, Kansas Department of Health and Environment

Others attending: See attached list

Senator Tyson began the committee meeting with the continuation of the hearing on **SB 204**.

The first conferee and opponent was John T. Barnes, Kansas Natural Resource Council (Attachment 1).

The second conferee and opponent was Ron Klataske, Audubon of Kansas (Attachment 2).

The third conferee and opponent was Mike Calwell from Countryside, Kansas (Attachment 3).

The fourth conferee and opponent of the bill was Clyde Graeber, Secretary, Kansas Department of Health and Environment (Attachment 4).

The fifth conferee was Charles Benjamin, Sierra Club, an opponent of the bill (Attachment 5).

Written testimony was submitted by the following people:

Opponent Laura Calwell, private citizen, Countryside, Kansas (Attachment 6)
Opponent Yvonne A. Cather, private citizen, Wichita, Kansas (Attachment 7)
Opponent Randy Scholfield, Kansans for Clean Water (Attachment 8)
Opponent Karol Schlicher, Commission on Church and Society for the Kansas West Conference, United Methodist Church (Attachment 9)
Opponent Larry Ross, private citizen, Wichita, Kansas (Attachment 10)
Opponent Mary DeSena, private citizen, Wichita, Kansas (Attachment 11)
Proponent Chris Wilson, Kansas Building Industry Association (Attachment 12)

After questions and discussion, Senator Tyson declared the hearing on **SB 204** closed.

Senator Taddiken moved that the committee approve for consideration Proposed Substitute for SB 204, seconded by Senator Huelskamp. Motion carried.

Staff of Office of Revisor of Statutes explained the proposed amendments to **Substitute for SB 204** to the committee (Attachment 13).

Senator Lee moved that the amendments to Substitute for SB 204 be approved, seconded by Senator Huelskamp. Motion passed.

Senator Lee moved that Amended Substitute for SB 204 be passed out of committee, seconded by

Senator Huelskamp. Motion carried.

The meeting adjourned at 9:30.

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

SENATE NATURAL RESOURCES COMMITTEE

GUEST LIST

DATE: 3-2-01

NAME	REPRESENTING
Steve Montgomery	CAS Construction
Robert Reed	KDA
Saul Kemper	HNS
David Miller	DOB
Terry Smith	SCL
Tom Klataske	Auditor of Kansas
Leslie Kaufman	Kansas Farm Bureau
LINDSAY UNKSTIN	Governor's Office
Jim Allen	Sea board
Orville Cole	Sen. Tyson
Don Kegan	KCA
Bill Fuller	Kansas Farm Bureau
Chris Wilson	KS Building Industry Assoc.

Testimony of John T. (Jay) Barnes III

PO Box 21346
Wichita, Ks 67208-7346
316-686-6043

Good morning, Mr. Chairman and members of the committee, and thank you for this opportunity to testify before you today. I am Jay Barnes. I am a retired federal employee, and a long time Kansas resident. I am also the new Executive Director of the Kansas Natural Resource Council, which celebrates its 20th anniversary this year as a voice for the Kansas environment. I am here to record KNRC's opposition to SB 204 and to offer a personal observation about the nature of the debate we are engaged in on this issue.

I can be very brief this morning on SB 204 itself because our position is very simple. Our opposition does not focus on the content of this bill in any of its various forms, but on the concept that lies behind it. As you know, KNRC has partnered with the Kansas Sierra Club in suit against the US Environmental Protection Agency regarding failure to enforce Clean Water Act provisions in Kansas. That suit defines our position fully and guides our opposition to SB 204. The CWA is only as useful in protecting the nation's waters as the EPA's enforcement makes it. We believe that SB 204 would not conform to the standards we are committed to seeing enforced and we therefore urge your vote against it.

By letter to all committee members last week I asked you to consider that this bill would effectively abandon 30 years of effort to clean Kansas waters at a time when further measures to protect the water and the health and well-being of all Kansans are sorely needed. That brings me to the observation I want to share with you.

Mr. Chairman, the public debate over clean water appears to pit environmental interests against agricultural interests and testimony from both sides seems to ask you to choose between them. I want to be on the record refuting that point. Let me be very clear – KNRC is NOT against agriculture. We recognize agriculture's importance to the Kansas economy and maintenance of family farms is one of the core values in our commitments. On a personal basis, my own work for the last six years with the Kansas Rural Development Council should also be taken evidence of that recognition.

To KNRC clean water is a public health issue and it is a problem with resolution in basic economics. KNRC believes producers should pay all costs associated with production and pass them on to consumers. Strict enforcement nationally of CWA provisions will insure a level playing field for these costs among all competing producers. The alternatives to paying these costs in production stages are the much larger costs of cleaning the water for downstream consumption and re-use, and the huge social costs of all the known and suspected health problems that stem from the pollutants we do not keep out of our water system.

I do not ask you therefore to choose between Kansas' environmentalists and her farmers and ranchers. I urge you instead to reframe this debate in terms of how best to protect the health of all Kansans, rural and urban, farmer, rancher and environmentalist alike.

Thank You,
John T. (Jay) Barnes III
Executive Director
Kansas Natural Resource Council

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

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

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

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

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

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

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

There has been a great deal of apprehension in recent months about the impact of water quality regulations, particularly as they apply to classified stream segments and designated uses of classified stream segments. Unfortunately, this issue has divided folks and tended to obscure the common ground and values that we all share. One of the most troubling aspects of the controversy surrounding this bill is the potential for agricultural interests and their allies in the Legislature to be viewed by the public as wanting to undermine safeguards for surface water quality in our states's streams, the potential for environmental interests and legislators who do not support Senate Bill 204 to be viewed as insensitive to the concerns of farmers and ranchers. It also concerns of the Kansas Department of Health and Environment to fulfill its respo
maligned.

Senate Natural Resources Committee

Date 3-2-01

Attachment # 2

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

Your committee strived to substantially improve the bill with the Proposed Substitute for Senate Bill 204 released on Wednesday morning. We commend you for your continuing commitment to that objective and for all additional efforts to revise the bill so that protection of surface water quality throughout the state will not be compromised.

There doesn't appear to be many instances of financial or other hardship to landowners and operators caused by classification of streams that would qualify as exempt. Thus, there doesn't appear to be any compelling reason why this legislation should be rushed. However, there is a compelling need for the public to be better informed about the potential costs, intended merits and consequences of this legislation before it is approved.

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

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

Thank you for consideration of our views.

March 1, 2001

Testimony of Mike Calwell - President of the Kansas Canoe Assoc 1999-2000

RE: Opponent of Senate Bill 204

TO: Senate Committee on Natural Resources

I would like to focus on the many uses of the rivers in Kansas.

1. Last year we paddled our boats the entire 170 Miles on our Kansas River Both myself and 30+ other Kansans saw our namesake river at eye level.
2. Friends of the Kaw has escorted nearly 3000 people on float trips on the Kansas River for the purpose of pointing out what a treasure of natural resources it is for our citizens.
3. The pollution is so high on that river as a result of the fecal coliform, that now all these canoeists must first sterilize their hands with alcohol after having even the most casual contact with the water. Eating lunch without a thorough cleaning Results in a bout of diarrhea. And swimming is obviously a real hazard.
4. The KU Rowing team worked with us last year and we listened as they told us this and I quote ... "We almost always get open blisters from rowing. We know that the water is polluted and we get staff infections. We try not to touch the water but when you are rowing on the river you always get wet.
5. According to KDHE statistics, the fecal coliform exists on nearly all streams in Kansas and is greatly compounded when these tributaries carry the toxic bacteria downstream to major rivers like the Kaw. In turn, our river contributes its pollutants to the Missouri river. This great and historic river is now ranked as the #1 most endangered river in the United States.
6. Those who depend on our rivers for their water supply, those who fish these streams, those who boat these stretches, and kids who will be kids in steams are all victims of this ever present pollution. So, please do not ask me to compromise. I will not compromise the water I drink or recreate on! Neither should you.
7. You as the leaders of our great state are charged with the well being of all Kansas citizens,.... not just the large cattle and hog interests. You have all claimed that your constituents are "real environmentalists and practicing custodians of the lands." If that is the case, then why is fecal coliform still in our water? I realize that the cities have their problems but remember that they are not sending fecal coliform upstream to the farm community.
8. I believe that those of you sitting here have a moral obligation to step forward and do absolutely everything in your power to **IMPROVE, NOT DEGRADE** the quality of our Kansas water. If you should manage to get Senate Bill 204 passed in it's present form, the inevitable result will be to halt the progress that caring Kansans have worked many years to develop.
9. Please form a more impartial committee to restructure this b

embroiled in unnecessary lawsuits. Senate Bill 204 as amen

Senate Natural Resources Committee

Date 3-2-01

Attachment # 3



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

Testimony for Substitute for SB 204
for the Senate Natural Resources Committee
by Clyde Graeber, Secretary
March 2, 2001

The original of SB 204, as described by the proponents, was designed to address the changes that KDHE made to the Surface Water Register in 1994, when streams were added for protection, some of which are dry. However the current form of this bill goes well beyond those 1994 additions and rather than addressing the removal of those "dry" streams through our current existing processes, oversteps the original intent of the bill. It now mandates that KDHE re-evaluate all of the stream segments, not merely those added in 1994, as well as eliminating protection for some streams that are not normally dry.

There has been a lot of discussion about the recreational use designation(s). Little emphasis has been placed on its public health purpose. The current standard for recreational use addresses only a baseline sanitary condition. This bill eliminates even that baseline condition for many streams.

KDHE has been delegated through the Clean Water Act the role of protecting the waters of the state for the citizens of the state. That role of protection for all occasionally puts us at odds with specific interests. Perhaps errors were made in 1994 by KDHE's attempt to provide at least a minimum level of protection for stream segments; however KDHE currently has a process to address those dry stream segments and is ready and willing to do so.

Therefore KDHE cannot support SB 204. We think it is unnecessary since it establishes an entirely new statutory framework instead of working through the existing regulatory processes to establish the proper listings. This new framework represents an environmental step backward and conflicts with federal regulations.

Since 1945, the legislature has consistently mandated that the waters of the state belong to the people of the state (K.S.A. 82a-702) rather than to a specific property owner. This is because water, unlike the land it flows through, does not stay put, but moves across property lines, state lines, and even international borders. We all own the waters of the state, even if located on private property and must all work together to protect them.

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March 2, 2001

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

Mr. Chairman, members of the Committee, thank you for giving me the opportunity to testify in opposition to SUBSTITUTE FOR S.B. 204. I am an attorney who lives in Lawrence and I serve as the legislative coordinator for the Kansas Chapter of Sierra Club. I also litigate on behalf of the Sierra Club in Kansas. In addition, I teach in the Environmental Studies Program at the University of Kansas, including a course in Environmental Law.

I want to focus my remarks on the legal underpinnings of the state's role in setting water quality standards. I will not discuss the specifics of stream flows, and use classifications that are in the bill. That is because the fundamental premise of Substitute for S.B. 204, that the state legislature can substitute a legislative/statutory process for an administrative process to set water quality standards, runs counter to the intent of Congress as specified in the Clean Water Act. Therefore, for me to comment or suggest changes to the substance of this legislation is to lend my legal expertise to facilitating what I believe to be an illegal act by the Kansas Legislature. My professional and personal ethics prevent me from engaging in such an exercise.

The Clean Water Act Provides for a Process for Reviewing Water Quality Standards by the Governor or KDHE, not the State Legislature

The Clean Water Act, at Section 303(c)(1), requires that "the Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with the date of enactment of the Federal Water Pollution Control Act Amendments of 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator (of EPA)."

In plain language, the Clean Water Act provides a procedure for reviewing the state's water quality standards that is binding on this state, and all other states. It is called a triennial review of water quality and, according to the intent of Congress as expressed in the Clean Water Act; it is to be initiated by the Governor or the "water pollution control agency" of Kansas, i.e., KDHE. Nowhere

in the Clean Water Act does it mention that state legislatures should set water quality standards. If Congress had intended for state legislatures to set water quality standards they would have said so in the Clean Water Act. Clearly, Congress intended that the setting of water quality standards should be a state administrative process, not a legislative process.

Proponents of this bill apparently believe that if the Governor signs a piece of legislation changing the state's water quality standards, it is the same as the process envisioned by Congress in the Clean Water Act. However, that is a very distorted view of the language in the Clean Water Act. When courts engage in "statutory construction" they look first to the "plain meaning" of the statute. It is clear that Congress intended for the Governor or the water pollution control agency to initiate the review of water quality standards. Substitute for S.B. 204 is a legislative initiative. In fact, Governor Graves' public statements indicate that does not support the actions of this committee initiating changes in Kansas' water quality standards. By passing this legislation you are putting the state of Kansas into direct conflict with federal law and defying the authority of the administrative branch of state government to carry out reviews and changes in the state's water quality standards. Furthermore, if this bill becomes law, and EPA challenges the standards, than the taxpayers of the state will pay the legal fees to try to uphold a law that on its face is of questionable validity.

In the past, the triennial review process in Kansas has been conducted by KDHE over many months while allowing 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 proposals contained in this legislation were considered in an open public process over several months rather than in a legislative hearing where a bill is released a day before a hearing is held? Many Kansans will be impacted by the dramatic change in water quality standards proposed in this bill. All who are affected should have an opportunity for input and good science should be applied to this process rather than politics.

Why EPA is Proposing to Designate 1400 Water Bodies in Kansas for "primary contact recreation"

Section 101(a)(2) of the Clean Water Act establishes the national goal of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and ...recreation in and on the water, wherever attainable". This national goal is commonly referred to as the "fishable/swimmable" goal of the Clean Water Act. Section 303(c)(2)(A) requires State water quality standards to "protect the public health and welfare, enhance the quality of water, and serve the purposes of this Act."

EPA's regulations, found at 40 C.F.R. Part 131, interpret and implement these CWA provisions by requiring that water quality standards provide for Clean Water Act section 101(a) goals unless those uses have been shown to be unattainable. These EPA regulations are legally binding upon states because

they have been adopted pursuant to the federal Administrative Procedures Act, have the force of law and override any state law to the contrary. These regulations create a “rebuttable presumption” that all the waters of a state that are regulated under the Clean Water Act are to be designated “fishable/swimmable” unless the state proves otherwise.

The mechanism in EPA’s regulations used to rebut this presumption is a “use attainability analysis.” Under 40 C.F.R. 131.10(j) states are required to conduct a “use attainability analysis” (UAA) whenever the state designates or has designated uses that do not include the CWA Section 101(a) goal uses, or when the state wishes to remove CWA section 101(a) goal uses, or when the state adopts subcategories of uses that require less stringent criteria.

A UAA is defined in 40 C.F.R. 131.3(g) as a “structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors.” In a UAA, the physical, chemical and biological factors affecting the attainment of a use are evaluated through a water body survey and assessment.

This rebuttable presumption approach is designed to preserve the state’s paramount role in establishing water quality standards in weighing any available evidence regarding the attainable uses of a particular water body. The rebuttable presumption approach does not restrict the discretion that states have to determine that CWA section 101(a) goal uses are not, in fact, attainable in a particular case. Rather, if the water quality goals articulated by Congress are not to be met in a particular water body, the regulations simply require that such a determination be based upon a credible “structured scientific assessment” of use attainability.

Since the early 1980’s EPA has identified the State’s lack of justification for waters not designated with Section 101(a) goal uses, particularly primary contact recreation, as a significant issue that the State has failed to address. This is not an issue that goes back only to 1994 as some have alleged. Nevertheless, as part of its 1998 approval action, EPA approved over 300 revised use designations as a result of use attainability analyses that were submitted by KDHE. However, Kansas did not include supporting use attainability analyses for all the surface waters that the State did not designate for primary contact recreation. EPA therefore disapproved those use designations as being inconsistent with 40 CFR 131.10(g).

In plain language, Congress intended for all “waters of the United States” to be “fishable/swimmable.” The reason is to prevent states from conducting exactly the kind of wholesale categorization of waters in the state that is proposed in SUBSTITUTE FOR S.B. 204. This presumption can be rebutted by a state for any given water body by carrying out a use attainability analysis (UAA). Since, 1980 Kansas has been out of compliance with this section of the Clean Water Act. KDHE has been aware of this fact for twenty years and has finally developed a protocol for conducting these UAAs.

Kansas' Non-Compliance With the Clean Water Act Puts At Risk the Authority
and Federal Monies Delegated by EPA for Kansas To Carry Out the Clean Water
Act

Kansas signed a memorandum of understanding with EPA in 1973 whereby the federal government allowed Kansas to issue National Pollution Discharge Elimination System (NPDES) permits in Kansas, required under the Clean Water Act, on behalf of the federal government. Since 1973 the state has received millions of dollars of federal funds every year to carry out the mandates of the Clean Water Act. Currently over 80% of KHDE's budget comes from transfers from the federal government of grants to enable the state to carry out a variety of federal environmental and health mandates including the Clean Water Act, the Clean Air Act (CAA), the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

On March 31, 2000 the Kearney County Alliance filed suit requesting that the federal court order EPA to withdraw Kansas' authority to issue NPDES permits under the Clean Water Act, as stipulated at 33 U.S.C. § 1342(c)(2), because of the state's failure to comply with federal requirements of the Clean Water Act. Specifically, the Kansas Supreme Court in the case Families Against Corporate Takeover v. Gary Mitchell and The Kansas Department of Health and Environment (No. 82,962) noted Kansas' failure to comply with 40 C.F.R. § 123.30 requiring all states to provide for an opportunity for judicial review in state court of the final approval or denial of NPDES permits. The KDHE Secretary proposed S.B. 670 during the 2000 legislative session in order to remedy that situation but the legislature failed to act. EPA is currently reviewing the state's compliance with the Clean Water Act. Last week, the attorney for the Kearney County Alliance contacted me about having Sierra Club join in a lawsuit against EPA for failure to withdraw the Clean Water Act program, and NPDES permitting authority, from Kansas for failure to comply with this federal regulation

Similarly, the EPA expected the state legislature, in 1991, to remedy the lack of compliance with the Clean Water Act found at K.S.A. 65-171d(d) whereby individuals whose private ponds are polluted by others have no remedy in state law and must pursue private tort actions. The legislature again failed to act and Kansas is out of compliance with the federal Clean Water Act.

For twenty years, Kansas has failed to carry out Use Attainability Analyses in order to justify setting less than a primary contact recreation designation for some 1400 water bodies and EPA failed to act.

Now you have a bill before you that would reclassify hundreds of water bodies in this state in clear violation of the Clean Water Act. How many times must Kansas defy the mandates of the federal Clean Water Act before EPA withdraws the authority of this state to carry out the Act? Ask yourselves, as state legislators, whether you would tolerate a county defying state law set by the legislature while that county still receives state funds.

Citizens Rights to Seek Judicial Remedies to Carry out the Will of Congress

Some of you may hope the new presidential administration will not act to sanction the state if the legislature passes SUBSTITUTE FOR S.B. 204, that so clearly violates the Clean Water Act. Fortunately, Congress provided citizens of the United States the authority to seek a judicial remedy when the Administrator of the EPA fails to carry out her non-discretionary authority under the Clean Water Act. Section 505(a)(2) of the Clean Water Act states that "any citizen may commence a civil action on his own behalf against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator." That authority is the basis of the lawsuit Sierra Club, KNRC and citizen groups and individuals have filed throughout the country to carry out the will of Congress.

My clients take no pleasure in filing lawsuits. They simply want the Clean Water Act fully implemented in Kansas, as required by law. And if you think I am getting rich from these lawsuits, think again. I made a little over \$2600 from the settlement of the last lawsuit with EPA. That won't make many mortgage payments.

Congress gave the citizens of the United States the opportunity, and the duty, to bring a civil suit in U.S. District court when the EPA Administrator fails to carry out the Clean Water Act. My clients in the Kansas Sierra Club have filed these lawsuits only as a last resort. In every case the EPA was out of compliance with the Clean Water Act for many years. The members of the Kansas Sierra Club believe that the Clean Water Act and all environmental laws of the United States shall be fully implemented in Kansas. They intend to fully utilize the judicial branch of government when the administrative branches of federal and state government fail to carry out environmental laws in Kansas. Similarly, when the Kansas legislature passes laws that are contrary to federal environmental laws, the members of the Kansas Sierra Club will seek a judicial remedy.

Hoisted With One's Own Petard (*Hamlet*, III, iv)

A. Passage of this legislation will increase the likelihood of EPA intervening in the setting of Kansas' water quality standards.

Many of you, along with the proponents of this bill, have complained about EPA's actions to promulgate water quality standards for Kansas. The irony of Substitute for S.B. 204 is that passage of this legislation may actually lead to more EPA promulgations. To understand why look at the language in the Clean Water Act found at § 303(c)(3):

"If the (EPA) Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of the State. If the Administrator determines

that any such revised or new standard is not consistent with the applicable requirements of this chapter, 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. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.”

In the scenario proposed in Substitute for S.B. 204, this water quality standards proposed would become law upon publication in the statute books. The Clean Water Act requires the EPA Administrator to determine within sixty days after that publication whether or not the water quality standards in Substitute for S.B. 204 meet the requirements of the Clean Water Act. If the EPA Administrator determines that they are not, then the EPA Administrator has ninety days after the publication of these standards in the statute book to notify the State. The State has ninety days after that notification to adopt the proposed changes by the EPA Administrator, otherwise EPA shall promulgate the new standard. If you put the state’s water quality standards into statutes, and EPA disapproves them, only the state legislature must change those statutes otherwise EPA will promulgate a new standard. What if the legislature is not in session when the deadlines set by federal law must be met? Will the legislature have to meet in special session? What will your constituents think of spending their tax money in order to have 165 legislators paid to convene in special session to change water quality standards to meet EPA objections? And if the legislature does not make those changes EPA must promulgate. So you see that passage of this legislation runs the very real possibility of even more EPA intervention.

B. Passage of this legislation will weaken Kansas’ ability to cooperate with EPA to find a settlement to the current litigation brought by Sierra Club and KNRC.

Proponents of the legislation, as well as some legislators, claim that this bill will somehow strengthen Kansas’ bargaining position in negotiations between EPA and Kansas to find a reasonable settlement offer to present to Sierra Club and KNRC in the current round of litigation. But a careful look at the law will reveal that this legislation basically erases any bargaining position that Kansas has. The Clean Water Act at § 303(c)(4) clearly spells out what the EPA Administrator must do once she has published the revised or new water quality standards for Kansas.

“The Administrator (of EPA) shall promulgate any revised or new standard under this paragraph not later than ninety days after (s)he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.” (parentheses added)

Basically there are only two outcomes to the current lawsuit under this section of the statute. Either the state adopts the EPA proposed water quality standards for the state within 90 days after it is published in the July 3, 2000

Federal Register or EPA promulgates the water quality standards they published in the July 3, 2000 Federal Register. Promulgation means "An administrative order that is given to cause an agency law or regulation to become known and obligatory." (Black's Law Dictionary, 6th Edition at 1214).

My colleague John Simpson, who represents KNRC, and I, representing Sierra Club, are willing to suggest to our clients any reasonable settlement of the current litigation that meets the requirements of the law. However, it has now been five months since the October 3, 2000 statutory time limit for EPA to promulgate the water quality standards for Kansas that they published in the July 3, 2000 Federal Register. With no reasonable settlement offer in hand and none anticipated, I feel compelled to advise my client - the Sierra Club, to ask the federal court to compel EPA to promulgate the water quality standards for Kansas that EPA published in the July 3, 2000 Federal Register.

So you see, that by passing this legislation you have effectively excluded the state from participating in a settlement to the current litigation.

Conclusion

In summary, I respectfully submit to you that you should not pass this legislation because:

The state legislature setting water quality standards runs counter to Congress' express grant of authority to the administrative branch of state government to review and change water quality regulations in a state.

Citizen suits are likely to continue to seek judicial remedies if EPA fails to compel Kansas to comply with the Clean Water Act.

The ultimate impact of this legislation may be to invite even more EPA intervention because of the inability of the legislature to respond to changes in legislation in a manner consistent with the time constraints contained in the Clean Water Act for statutes the EPA Administrator deems inconsistent with the Clean Water Act.

Additional legal ammunition is provided to those who seek to have the EPA revoke Kansas' authority to carry out the Clean Water Act and cease the transfer of millions of dollars in federal funds to Kansas to carry out the Act.

This legislation weakens the ability of Kansas to have any effect on a settlement to the current litigation between Sierra Club/KNRC and EPA.

This committee should therefore recommend this legislation unfavorably for passage to the full Senate. The legislature of Kansas should follow the dictates of the Clean Water Act, which is legally binding upon the state of Kansas. Allow the triennial review of water quality standards to be initiated by KDHE, in compliance with the Clean Water Act, to take place in 2002.

Thank you for your time and attention. I would be happy to respond to your questions.

Caution

Be careful about redefining state's waterways

Balance is needed in environmental regulations. But a legislative push to define many of the state's streams and lakes as "agriculture use" threatens to go too far.

The change was prompted by action taken last year by the federal Environmental Protection Agency. The EPA, as part of a settlement of a lawsuit by two Kansas environmental groups, is pressuring the state to classify more of its waterways as "primary" — meaning that they must meet the swimmable and fishable standards of the Clean Water Act.

To prevent that, some rural lawmakers and agriculture groups proposed that the higher standards only apply to streams that flow year-round and can support recreational uses, or that provide important refuge for threatened or endangered species. They also want there to be "clear and convincing evidence" that the benefits of requiring that waterways be swimmable and fishable "outweigh the social, economic and regulatory costs."

The lawmakers' concerns are understandable. It hardly seems worth the effort and considerable expense to impose swimmable standards on streams that carry only a trickle of water.

But as critics correctly note, small streams

often feed into larger streams and rivers. And creeks that are dry most of the year can wash dangerous pollutants into those larger streams and rivers after heavy rain.

There is also some question about whether the Legislature even has the authority to redefine standards for pollution control.

As a result, lawmakers on the Senate Natural Resources Council — which is scheduled to receive a compromise proposal today — should be cautious about sidestepping the EPA and exempting too many waterways from higher pollution standards.

While it is important to avoid placing unnecessary hardships on agriculture, the state needs to be strict about safeguarding its most valuable natural resource: its water.

— For the board, Phillip Brownlee

How to learn more

The full text of SB 204 is available on-line at <http://www.ink.org/public/legislative/fulltext.cgi>. Local lawmakers serving on the Senate Natural Resources Committee are Christine Downey of Newton — (785) 296-7377, downey@senate.state.ks.us — and Dave Corbin of Towanda — (785) 296-7388, corbin@senate.state.ks.us.

March 1, 2001

Testimony on proposed substitute for Senate Bill 204 from:

Laura Calwell, 5610 W. 61st Terr., Countryside, Kansas 66202
W/ 913 677 5854 H/ 913 677 2088 Email:

Honorable Senator Tyson and Committee:

First, I would like to thank you for taking so much of your valuable time to research and write the substitute for Senate Bill 204. As it was discussed in your committee meeting yesterday it is every citizen's responsibility regardless of whether they reside and work in rural or urban Kansas to strive for the best possible water quality. I believe that you are earnest in your attempt to draft a workable, fair bill but I will only judge the merit of this bill by its contents not how many hours it took to craft.

I would also like to clear the air about a comment made after my testimony that I had participated in the 1999 Use Attainability Analysis (UAA) Forums and hearing on proposed revisions to the Kansas Surface Water Quality Standards. One of you commented that because of the distance, citizens from western Kansas were rarely able to testify on these matters. I would like to point out that UAA forums were held in Hays on March 10, 1999; Topeka on March 15, 1999; Wichita on March 17, 1999 and Lawrence on April 7, 1999. The hearings on the Surface Water Quality Standards were held in Hays on May 11, 1999; Wichita on May 12, 1999 and Topeka on May 13, 1999. All Kansas citizens had an opportunity to testify on these important issues in their area. As I stated Kansas Department of Health and Environment changed boating from secondary contact recreation to primary contact recreation as a result of testimony from those hearings. Whether this is in the existing regulations or the proposed regulations waiting on approval from EPA, I strongly urge you to change boating from secondary contact to primary contact on page 3. I also have some concern about (iii) and (iv) on that same page. Just because streams run through private property that the land owner may or may not give permission for recreational use, many of these waters run into public streams or rivers that are classified primary or secondary contact recreation and should be protected as such. Even in Kansas, private landowners DO NOT own the water that runs across their land.

My last point, which I believe is shared by many Kansans, is that I do not want to see any bill passed which would make it easier for corporate agricultural industries like hog farms to establish in Kansas and run family farms and ranches out of business like Smithfield Farms did in North Carolina. Smithfield Farms not only devastated the local agricultural community but outrageously polluted North Carolina's water and air. I am a small business owner and I have first hand experience in how time consuming dealing with state regulations can be. I would much prefer to be in business and deal with state regulations than allow the chance for a large corporation to pollute my environment and leave me with no job or at best a minimum wage job under conditions hazardous to my health. Senators, be very careful with our precious resource, WATER.

Senate Natural Resources Committee

Date 3-2-01

Attachment # 6

CHAIRMAN and COMMITTEE MEMBERS of the SENATE NATURAL RESOURCE COMMITTEE:

I am Yvonne Cather, a resident of Wichita, Kansas, a mother of six children and grandmother of seven grandchildren. I would like to express my concern with the Substitute Bill of Senate Bill 204 in front of this Committee today. This bill will eventually **ABORT FUTURE** plans of municipal development in Western Kansas. Towns and Cities have to have "drinking water." **CLEAN "drinking water!"** How can we have clean aquifers that are fed by dirty streams? This generation has the ability to make its legacy to future generations - either **CLEAN** or **DIRTY** water. **YOU** will have to choose what is more important to you with respect to our future generation, however, do not impose your **DIRTY WATER** policy on **KANSAS!**

EITHER CLEAN WATER or SB 204!

EITHER THE "CLEAN WATER ACT" or THE "DIRTY WATER BILL"/SB204!

I own a canoe. I like to do water sports and the Arkansas River is **FILTHY**. How can it be clean if all the other streams that feed into it have **MANURE** flowing down them? The drinkable water not only pertains to humans but our animals as well. I would not eat the fish that could be caught in the Arkansas River. I would not wade in the Arkansas River. I cannot enjoy recreational water sports with my children or grandchildren in the Arkansas River. To have any piece of mind and to enjoy water sports, I have to go out of the state when I involve my children or grandchildren. This is a shame! Our fair City of Wichita has developed along the Arkansas River for beauty and tourist reasons. Our biggest event

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in the Spring is our River Festival which attracts tens of thousands of residents along the river. Our River Festival, in particular our water contact events, have been canceled on at least one occasion due to pollution. We DO NOT NEED the added efforts of Senate Bill 204 to push the pollution on down to us! Wichita does not need the expense that it takes to clean up after irresponsible citizens from other counties nor does its residents want to be restricted from contact use!

I strongly URGE you to OPPOSE the Substitute Bill or the original bill of SB 204!!!

Thank you for your consideration.

**Yvonne A. Cather
1110 W. 29th St. South
Wichita, Kansas 67217
Email: wolfalo@juno.com
(H) Tele: 316-554-7704
(W)Tele: 316-265-7841**

Testimony on S.B. 204
Randy Scholfield
Kansans for Clean Water

My name is Randy Scholfield of Kansans for Clean Water, a citizens group in south central Kansas working for better water quality in the state. We are deeply concerned about S.B. 204 and the devastating effects it would have on the already dismal water quality standards in the state. I'm here to say folks, we're heading in the wrong direction.

People who care about water quality in Kansas should be outraged by this legislation, which appears to be nothing more than an attempt by special interests (working under the radar of public attention and input) to torpedo water quality standards for the state. S.B. 204 would rewrite water classification standards in Kansas to create a two-tiered classification of streams and lakes--one for agriculture and one for recreation. Why? To protect big agribusiness interests who want to keep polluting our water with atrazine and other dangerous chemicals for short-term profits. Agribusiness-as-usual isn't good enough if we want to meet our state obligations under the Clean Water Act.

It is crucial to note that S.B. 204 violates the Clean Water Act by getting the Legislature involved in setting water quality standards--an authority reserved for the executive branch of the state. By flouting these Clean Water Act rules, Kansas is setting itself up for a costly lawsuit that will waste taxpayer dollars defending a bill that actually works to lower water quality in the state! This is definitely NOT how we want to see our tax dollars at work.

Moreover, I would like to strongly object to the rushed timetable under which this bill has been whisked through committees with no real public input or participation. The lack of openness in the process suggests either a contempt for public input on such a weighty issue or a desire to shield the bill from full scrutiny. And yesterday--only hours before this hearing--a substitute bill was introduced, which we have not had time to adequately study or understand. All of this casts doubt on the fairness and integrity of this hearing and this process.

S.B. 204 ignores the fact that a very well-defined process--the triennial review--already exists for reviewing state water standards. It is next scheduled for 2002 and will give all stakeholders a chance to comment on what standards are practical and commonsensical. Kansans for Clean Water strongly opposes S.B. 204 and urges legislators to uphold the law and the interests of the state, not special interests.

Randy Scholfield
Kansans for Clean Water



United Methodist Church Kansas West Conference

March 1, 2001

I am Karol Schlicher from Wichita, Kansas. I am here as an advocate for environmental justice on behalf of the Commission on Church and Society for the Kansas West Conference of the United Methodist Church.

The 2000 Book of Resolutions, which states the policy for of the United Methodist Church, affirms the right to abundant and clean water as a sacred gift from God.

"We believe that water is a gift from God that needs to be kept clean."

We advocate:

- measures that will address polluted run off that is threatening to public health,
- protection of waters for future generations,
- wetland preservation to clean water and sustain wildlife,
- the public's right to know that their water is safe for drinking, swimming and fishing, and
- effective enforcement against illegal pollution."

pp. 92, 93

As advocates for clean water, we strongly oppose Senate Bill 204 (House Bill 2373) in any form. Kansas Department of Health and Environment Secretary Clyde Graeber told the House Environmental Committee (February 15, 2001) that over 90% of water bodies in Kansas would be delisted and would no longer have the protections of the Clean Water Act if this bill were passed. Secretary Graeber also believes that this bill is in violation of the federal Clean Water Act, as does his legal counsel.

Information and petitions about protecting Kansas waters were distributed this week throughout the Kansas West Conference. The petition reads as follows

"All creation is the Lord's and we are responsible for the ways in which we use and abuse it."

United Methodist Social Principles

As people of faith we, United Methodist members and friends, support the protection of Kansas waters from pollution.

We oppose any action to exempt Kansas waters from the protection of the Clean Water Act.

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The signed petitions will be collected and delivered to Governor Graves along with the declaration of our United Methodist belief:

Water is a sacred gift from God that needs to be kept clean.

Karol Schlicher

Karol Schlicher
139 Brendonwood
Wichita, KS 67206
(316) 684-5953

February 28, 2001

We understand as of today there is a substitute bill for SB204. We oppose all attempts to legislate the water quality standards.

The fundamental point is that we now have a process in law that requires the governor and KDHE, with its resources and expertise, to set water quality standards.

The standards must be re-evaluated at least every three years with the next review scheduled for 2002. This review process has involved open hearings around the state with input possible from all stakeholders.

I had intended to testify in person, but regret I was unable to attend the hearing because of treacherous road conditions.

Karol Schlicher

TESTIMONY ON SB 204 - 01 MARCH 2001.
 KANSAS SENATE NATURAL RESOURCES COMMITTEE
 PRESENTED BY LARRY ROSS, 346 NO. BLUFF, WICHITA, KANSAS

Good morning, honorable members of the Kansas Senate Natural Resources Committee, staff and others attending this public hearing of pending Senate Bill 204. Today, I appear before you as an interested private citizen, deeply concerned about the potential dire consequences of your approval of this special interest 'dirty water' legislative initiative. My concern is that this fine state could well become the butt of national scorn following on last year's Kansas Board of Education evolutionary debacle. Why must we so often strive for the lowest bar and not the highest? Are we forever and inexorably captive to denial? Why not strive for being a national leader in state water policy, rather than indulging in regressive 'all water is not created equal' denial-based legislation. Mediocrity is not a laudable goal - at least some of your constituents expect more of you. Please don't let us down by endorsing this 'by guess and by gosh' legislative proposal.

Governor Graves appeared at an Arkansas River Symposium held in Wichita last fall and shared kind remarks and endorsed clean waters for all Kansans. He was introduced to the approximately 300 attendees, by Mayor Bob Knight of Wichita, who also encouraged the Symposium participants to strive for cleaning up rivers and streams within our state. Immediately following the introduction of Governor Graves and their remarks, they left for the day. Where does Governor Graves and Kansas Department of Health and Environment Secretary Graeber stand on this particular piece of proposed legislation? Surely, we all could benefit from their respective positions on SB 204. Likewise, Wichita Mayor Knight and Mayor Carl Koster, current chair of the Regional Economic Area Partnership consisting of 32 city and county governments from a seven county area of southcentral Kansas have not indicated their respective positions. The entire state of Kansas could benefit from these and other public officials relating to Senate Bill 204.

Water is our most valuable natural resource, we cannot afford the luxury of squandering this finite asset. Water knows no boundaries - artificial and contrived designations such as "recreational" and "agricultural" only serve to circumvent ownership and use of the most precious heritage of every Kansan, past present and future. Everyone is downstream from someone else, we are inter-related when speaking of water quality and water quantity. Our over-use, mis-use and abuse of water is historic and our common shame. We cannot afford the luxury of continuing denial of our shared responsibility in preserving this most basic resource.

By ^{defining} ~~defining~~ certain waters to be "agricultural" and to be reserved exclusively for agricultural use is wrong-headed and short-sighted and would prevent suburban development and would further isolate and detach rural areas from our increasingly urbanized state population. By defining certain streams and rivers to be exclusively "agricultural" would segregate large portions of our state to a limited and self-serving indigenous workforce and lifestyle. While agriculture is a fine and time-honored occupation, it would most certainly be self-defeating to restrict its potential for growth and continuing prosperity. Further complications might result from designation of other streams and rivers to be "recreational". Would access and use of these waterways for recreational use require a change in the Kansas Constitution which seems to prevent that access and use of all Kansas streams and rivers, other than the Kaw, Arkansas and Missouri Rivers. Maybe it is indeed time to revisit the access and use issue.

Ladies and Gentleman, please deliberate long and hard before you decide to either approve or disapprove this legislative proposal. I am concerned that your vote may well help decide on telling more about ourselves, individually and collectively than we may really want to now. Thank you for your time and concern.

Senator Tyson, Chairman
Natural Resource Committee
Kansas State Legislature

I would like to voice my opposition to Senate Bill 204. Unfortunately, I was told by Senator Tyson's office that I would not be allowed to testify at the committee hearing for this bill. I am resident of Wichita, living only a few blocks from both the Arkansas River and the Little Arkansas River in Riverside. I am also a journalist — formerly the editor of *U.S. Water News* — and have considerable experience covering water issues from both a local and national perspective.

Senate Bill 204 — both in its original form and the recently released substitute bill — would substitute for the triennial review process now in place water quality standards so low that they would certainly be in violation of the Clean Water Act. This bill — along with H.B. 2373 — would, without question:

- eliminate all protection from many important Kansas streams
- eliminate protection of surface waters and aquifers for drinking water
- eliminate protection of lakes and wetlands
- eliminate any protection of aquatic life.

The proponents of these bills argue that private property rights take all precedence over any of these concerns, that it will cost too much to set high water quality standards and then work to meet them. I am here today to remind you that hydrology and the hydraulic cycle that we all depend upon for life does not conform to the preconceived notions of any individual. The “fishable swimmable” standard set forth in the Clean Water Act has less to do with recreation than with healthy ecosystems. And if we want clean water to drink —

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an essential for all of us — we must face the fact that we must reverse the historical practice of treating every river and stream as a sewer for our waste. Let us not kid ourselves. Our rivers and streams are degraded because the human population has not managed its waste properly, and I mean all kinds of waste. Outdated sewer and septic systems are an obvious problem. But so is the considerable waste generated by animal feedlots and miles of streams where cattle freely roam, trampling riverbanks (a major cause of erosion and water degradation) and contaminating water with fecal coliform from their waste. To remove limits on fecal coliform in most waters of the state — as this bill would do — would compound health problems that already exist in regard to contaminated water. The same goes for the already unacceptably high levels of the herbicide atrazine in our water supplies.

These sources of water pollution cannot be dealt with in isolation. Water that flows across one piece of property inevitably flows downstream. Even the contents of small ponds and lakes can seep into underground water supplies. Riverbeds that are dry for several months of the year are not immune to absorbing and transmitting pollutants to groundwater supplies, or to seeping temporarily into other surface water supplies. And once a pristine aquifer has been contaminated future generations will be condemned to clean it up every time they use it.

Thirty years ago, when the Clean Water Act was enacted, we were just beginning to understand these problems. But that is not the case today. Our knowledge base has expanded. Solutions exist. Implementing these solutions will not be without cost, but cost is really not the issue, since we are talking about a resource we absolutely depend on. The real question is: Who will pay? If we set

water standards to allow this contamination, who will pay to have the water cleaned when we finally ingest it? The taxpayers will. And pay we will. Water supplies in Kansas are being rapidly depleted through tapping our aquifers, and as they decline these aquifers are dangerously susceptible to polluted surface water. Governor Graves has begun to address the problem of supply through an initiative to ensure our state will not face severe water shortages in the future. Does it make sense to set our water quality standards so low that the very supplies we are trying to save will be contaminated?

I would like to close by saying that I am one of many citizens in our state engaged in “voluntary” efforts to clean up our rivers. In Riverside citizens have received a small grant and are working with city and county officials to test the efficacy of storm drain filters in improving water quality. We are also working on educating homeowners about best management practices for their homes and yards to reduce contaminants in urban runoff. We are embarking on this project because we believe that everyone must do his part to solve this problem. Those who would lower water quality standards in the face of those who are willing to work for better water quality in Kansas will only jeopardize genuine progress. No amount of “voluntary” effort to clean up our rivers will work unless every sector of our society becomes involved in protecting our water supplies. Water quality standards — as laid out in the Clean Water Act — are absolutely necessary if we are to attain this goal.

Mary DeSena
1003 Faulkner St.
Wichita, KS 67203

**STATEMENT OF THE KANSAS BUILDING INDUSTRY ASSOCIATION
TO THE SENATE NATURAL RESOURCES COMMITTEE
SENATOR ROBERT TYSON, CHAIR
REGARDING S.B. 204
MARCH 2, 2001**

Chairman Tyson and Members of the Committee, I am Chris Wilson, representing the Kansas Building Industry Association (KBIA). On behalf of KBIA's builders and developers throughout the State of Kansas, I am submitting this statement in support of S.B. 204, as recommended by the subcommittee.

KBIA members are affected by the classification of streams and designated uses. We believe it is the authority of the state, under the federal Clean Water Act, to classify streams and determine designated uses. We are pleased that this Committee is working to providing statutory direction for the Department of Health and Environment to use in making such determinations. It is imperative that there be a sound process for stream classification and use designation, which relies on credible data, evaluation of stream flow data, the availability of public access to the stream segment and the societal and economic impacts on the state and the regulated community.

KBIA members are committed to water quality protection in their work. We want decisions of the state which make sense, so that our activities as well as those of other Kansans, will truly protect water quality, while not being unnecessarily burdened where water quality will not be affected.

We urge your favorable consideration of the proposed substitute for S.B. 204.
Thank you for your consideration.

3
4 AN ACT concerning the waters of the state; relating to classified stream segments and designated
5 uses of classified stream segments.
6

7 *Be it enacted by the Legislature of the State of Kansas:*
8

9 Section 1. As used in this act:

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

13
14 (A) Are indicated on the federal environmental protection agency's reach file 1 (RF1)
15 (1982) and have ~~a 30-year~~ the most recent 10-year median flow of equal to or in excess of 1
16 cubic foot per second based on data collected and evaluated by the United States geological
17 survey or in the absence of stream segment flow data, calculations of flow conducted by
18 extrapolation methods provided by the United States geological survey;
19

20 (B) have ~~a 30-year~~ the most recent 10-year median flow of equal to or in excess of 1
21 cubic foot per second based on data collected and evaluated by the United States geological
22 survey or in the absence of stream segment flow data, calculations of flow conducted by
23 extrapolation methods provided by the United States geological survey;
24

25 (C) that are actually inhabited by threatened or endangered aquatic species listed in rules
26 and regulations promulgated by the Kansas department of wildlife and parks or the United States
27 fish and wildlife service; or
28

29 (D) (i) Scientific studies conducted by the department show that pooling of water
30 during periods of zero flow provides important refuges for aquatic life and permits biological
31 recolonization of intermittently flowing segments; and
32

33 (ii) social and economic studies by the department indicate, by clear and convincing
34 evidence, that the benefits of stream segment classification outweigh the social, economic or
35 regulatory costs to the state and the regulated community.
36

37 (2) Classified stream segments shall not include ephemeral streams; grass, vegetative or
38 other waterways; culverts; or ditches.
39

40 (3) Any definition of "classified stream" or "classified stream segment" in rules and
41 regulations or law that is inconsistent with this definition is hereby declared null and void.
42

43 (b) "Department" means the department of health and environment.

1 (c) "Designated uses of classified stream segments" shall be defined as follows:

2 (1) "Agricultural water supply use" means the use of a classified stream segment for
3 agricultural purposes, including the following:

4
5 (A) "Irrigation" means the withdrawal of water from a classified stream segment for
6 application onto land; or

7
8 (B) "livestock watering" means the provision of water from a classified stream segment
9 to livestock for consumption; ~~or~~

10 ~~(C) other agricultural use.~~

11
12
13 (2) "Aquatic life support use" means the use of a classified stream segment for the
14 maintenance of the ecological integrity of streams, lakes and wetlands, including the sustained
15 growth and propagation of native aquatic life; naturalized, important, recreational aquatic life;
16 and indigenous or migratory semi aquatic or terrestrial wildlife directly or indirectly dependent
17 on surface water for survival. Categories of aquatic life support use include:

18
19 (A) "Special aquatic life use" means classified stream segments that contain
20 combinations of habitat types and indigenous biota not found commonly in the state, or classified
21 stream segments that contain representative populations of threatened or endangered species, that
22 are listed in rules and regulations promulgated by the Kansas department of wildlife and parks or
23 the United States fish and wildlife service.

24
25 (B) "Expected aquatic life use" means classified stream segments containing habitat types
26 and indigenous biota commonly found or expected in the state.

27
28 (C) "Restricted aquatic life use waters" means classified stream segments containing
29 indigenous biota limited in abundance or diversity by the physical quality or availability of
30 habitat, due to natural deficiencies or artificial modifications, compared to more suitable habitats
31 in adjacent waters.

32
33 (3) "Domestic water supply" means the use of a classified stream segment, after
34 appropriate treatment, for the production of potable water.

35
36 (4) "Food procurement use" means the use of a classified stream segment for the
37 obtaining of edible forms of aquatic or semi aquatic life for human consumption.

38
39 (5) "Groundwater recharge use" means the use of a classified stream segment for the
40 replenishing of fresh or usable groundwater resources. This use may involve the infiltration and
41 percolation of surface water through sediments and soils or the direct injection of surface water
42 into underground aquifers.

1 (6) "Industrial water supply use" means the use of a classified stream segment for
2 nonpotable purposes by industry, including withdrawals for cooling or process water.
3

4 (7) (A) "Recreational use" means:
5

6 (i) Class A primary contact recreation use is use of a classified stream segment for
7 recreation during the period from ~~May 1 through September 30~~ April 1 through October 31 of
8 each year; such classified stream segment is open to and accessible by the public; and capable of
9 supporting the recreational activities of swimming, skin diving, water-skiing ~~or~~, wind surfing,
10 boating or mussel harvesting where the body is intended to be immersed in surface water to the
11 extent that some inadvertent ingestion of water is probable;
12

13 (ii) Class A secondary contact recreation use is use of a classified stream segment for
14 recreation; such classified stream segment is open to and accessible by the public; and capable of
15 supporting the recreational activities of wading, ~~boating, and fishing and mussel harvesting~~
16 where the body is not intended to be immersed and where ingestion of surface water is not
17 probable;
18

19 (iii) Class B primary contact recreation use is use of a classified stream segment that is
20 used during the period from ~~May 1 through September 30~~ April 1 through October 31 of each
21 year; such classified stream segment is not open to and accessible by the public under Kansas
22 law, except with written permission of the land owner; and capable of supporting the recreational
23 activities of swimming, skin diving, water-skiing ~~or~~, wind surfing, boating or mussel harvesting
24 where the body is intended to be immersed in surface water to the extent that some inadvertent
25 ingestion of water is probable. If written permission of the landowner has not been granted no
26 recreational use shall be attainable and no recreational designation shall be assigned; or
27

28 (iv) Class B secondary contact recreation use is use of a classified stream segment used
29 during the period from ~~May 1 through September 30~~ April 1 through October 31 of each year;
30 such classified stream segment is not open to and accessible by the public under Kansas law,
31 except with written permission of the land owner; and capable of supporting the recreational
32 activities of wading, ~~boating, and fishing and mussel harvesting~~ where the body is not intended to
33 be immersed and where ingestion of surface water is not probable. If written permission of the
34 landowner has not been granted no recreational use shall be attainable and no recreational
35 designation shall be assigned.
36

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

40 (d) "Ephemeral stream" means streams that flow only in response to precipitation and
41 whose channel is at all times above the water table.
42

43 (e) "Secretary" means the secretary of health and environment.

1
2 Sec. 2. Notwithstanding any other provisions of law and in addition to the powers of the
3 secretary pursuant to K.S.A. 65-171d, and amendments thereto, the secretary shall establish
4 classified stream segments in Kansas and following such classification, designate use of such
5 classified stream segments pursuant to sections 3 and 4, and amendments thereto.
6

7 Sec. 3. (a) Prior to December 31, 2002, the department shall review all stream segments
8 listed on the 1999 Kansas surface water register and determine whether such stream segments
9 meet the definitions of classified stream segments pursuant to paragraph (a)(1)(A) or (a)(1)(B) of
10 section 1, and amendments thereto. The department shall begin the review with stream segments
11 listed on the 1999 Kansas surface water register west of the 98th longitude line and consider
12 stream flow data or methodologies of extrapolating flow from the United States geological
13 survey.
14

15 (b) Prior to December 31, 2005, the department shall review all stream segments listed on
16 the 1999 Kansas surface water register which do not meet the definitions of classified stream
17 segments pursuant to paragraph (a)(1)(A) or (a)(1)(B) of section 1, and amendments thereto, and
18 determine whether such stream segments meet the definitions of classified stream segments
19 pursuant to paragraph (a)(1)(C) or (a)(1)(D) of section 1, and amendments thereto. The
20 department shall establish a procedure, adopted in rules and regulations, requiring that all of the
21 reviews and findings have been met pursuant to paragraph (a)(1)(D) of section 1, and
22 amendments thereto.
23

24 (c) All current stream classifications shall remain in effect until December 31, 2005 or as
25 deleted or changed through the procedures set forth above.
26

27 Sec. 4. (a) Prior to July 15, 2001, the department shall make available a listing of all
28 currently classified stream segments for which designated use attainability analyses have been
29 completed, and such stream segments for which designated use attainability analyses have not
30 been completed.
31

32 (b) For classified stream segments identified in subsection (a) for which designated use
33 attainability analyses have not been completed, the department, at a minimum, shall complete a
34 designated use attainability analyses for aquatic life support and recreation use according to the
35 following schedule:
36

37 (1) An aggregate of at least 30% of such classified stream segments shall have a
38 designated use attainability analyses completed prior to October 31, 2002.
39

40 (2) An aggregate of at least 60% of such classified stream segments shall have a
41 designated use attainability analyses completed prior to October 31, 2003.
42

43 (3) An aggregate of at least 90% of such classified stream segments shall have a

1 designated use attainability analyses completed prior to October 31, 2004.
2

3 (4) All of such classified stream segments shall have designated use attainability analyses
4 completed prior to October 31, 2005.
5

6 (c) Barring flooding or acts of God, which would prevent the department from
7 completing designated use attainability analyses, the schedule outlined in subsection (b) shall be
8 accelerated to allow for completion of designated use attainability analyses prior to October 31,
9 2005.
10

11 (d) All current designated uses of classified stream segments listed on the Kansas surface
12 water register 1999 shall remain in effect until December 31, 2005 or until deleted or changed
13 through the procedures set forth above.
14

15 Sec. 5. (a) Prior to October 31, 2001, the secretary shall publish as guidance designated
16 use attainability analysis protocols for the revision and adoption of designated uses of classified
17 stream segments to protect the public health or welfare and to enhance the quality of classified
18 stream segments. The secretary shall take into consideration the uses and values of such waters
19 for public water supplies, propagation of fish and wildlife, navigation and recreational,
20 agricultural, industrial and other purposes.

21 (b) The designated use attainability analysis protocols shall include procedures for:

22 (1) Analysis of physical, chemical, biological and economic and social factors affecting
23 attainment of a use or uses;

24 (2) analysis of naturally-occurring pollutant concentrations and conditions affecting
25 attainment of a use or uses;

26 (3) analysis of natural, ephemeral, intermittent or low flow conditions or water levels
27 affecting attainment of a use or uses;

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

31 (5) analysis of hydro logic modifications such as dams and diversions affecting
32 attainment of a use or uses;

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

36 (7) analysis of economic and social factors, and for determining whether economic and
37 social impact would be caused that is not outweighed by the benefits of attainment of a use or

1 uses;

2 (8) analysis of whether there are cost-effective and reasonable best management practices
3 for non-point source pollutant control where such control would be needed to attain a use or uses;
4 and

5 (9) qualified persons outside the department to conduct designated use attainability
6 analyses.

7 (c) A use or uses shall not be designated unless it is demonstrated that such use or uses
8 are actually existing and attainable, or unless it is demonstrated that the social and economic
9 impact of designating a use or uses that are not actually existing are outweighed by the
10 attainment of such use or uses.

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

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

20 (f) At least once each calendar year, the department shall publish in the Kansas register
21 any changes in the designated uses of any classified stream segments.

22 Sec. 6. (a) Annually, on or before the first day of the legislative session, the secretary
23 shall prepare and submit a report to the governor and the chairperson, vice-chairperson and
24 ranking minority member of the standing committees of the House of Representatives and the
25 Senate on environment and natural resources regarding the status of completing the classification
26 of streams as required in section 3, and amendments thereto, and designated use attainability
27 analyses as required in section 4, and amendments thereto.

28 (b) On or before February 15, 2003 the secretary shall report to the governor and the
29 chairperson, vice-chairperson and ranking minority member of the standing committees of the
30 House of Representatives and the Senate on environment and natural resources regarding the
31 status of new methodologies of measuring stream flow, in particular that under development by
32 the United States geological survey.

33 Sec. 6. This act shall take effect and be in force from and after its publication in the
34 statute book.

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