

MINUTES OF THE SENATE NATURAL RESOURCES COMMITTEE.

The meeting was called to order by Chairman Senator Robert Tyson at 8:34 a.m. on March 24, 2003 in Room 423-S of the Capitol.

Members present: Senator Lee, Senator Tyson, Senator Taddiken, Senator Umbarger, Senator Huelskamp, Senator Corbin, Senator Adkins, Senator Schmidt

Committee staff present: Raney Gilliland, Legislative Research
Lisa Montgomery, Revisor of Statutes
Shannon Stone, Secretary

Conferees appearing before the committee:

Jere White, Kansas Corn Growers, Kansas Grain Sorghum Producers, Kansas Grain and Feed Association, Kansas Agribusiness Retailers Association
Karl Muldener, Kansas Department of Health and Environment (KDHE)
Steve Swaffar, Kansas Farm Bureau (KFB)
Secretary Mike Hayden, Kansas Department of Wildlife and Parks
Charles Benjamin, Sierra Club

Others attending: See attached list

House Bill 2219

Staff, Raney Gilliland reviewed the bill with the Committee and answered questions. (Attachment 1)

Jere White, representative of several agricultural business associations, provided testimony in support of the bill. He stated that the bill was a realistic approach to protecting water quality in Kansas, and that standards defined in the bill were consistent with those already endorsed by the Environmental Protection Agency. (Attachment 2)

Speaking on behalf of KDHE, Karl Muldener gave oral testimony addressing the anomalies the Department has run into enacting **HB 2219**. Mr. Muldener also requested that the Committee consider placing certain small streams into subcategories. KDHE Secretary Robert Bremby submitted written testimony at a later time. (Attachment 3)

Steve Swaffar of Kansas Farm Bureau shared his organization's support for the bill. He praised the action taken to create **HB 2219** to correct deficiencies identified by EPA. Mr. Swaffar encouraged the Committee to begin the primary recreational use season on May 1 and end it on September 30 of each year. They also suggested that the definition of "kayaking" retain the classification of a "primary recreational use activity" and all other forms of boating, fall under the heading of "secondary recreational use activities". (Attachment 4)

At the invitation of the Committee, Secretary Hayden spoke about how the change of dates might affect the Department. In response to a question from the Committee, Secretary Hayden responded that he did not believe reclassification of streams would affect walk-in-hunting-areas (WIHA).

At the invitation of the Committee, Charles Benjamin of the Sierra Club shared his concerns with a change in the dates for recreation. He asserted that EPA was in violation of the Clean Water Act due to their failure to notify the state within the prescribed ninety days following the filing of the state's report.

Senator Tyson closed the hearing on the bill and announced that it would be worked on the 25th of March.

Senator Umbarger shared two letters from Fish and Wildlife Service regarding Federal statutes concerning prairie dogs. (Attachments 5 and 6).

The meeting was adjourned at 9:30 a.m.

SENATE NATURAL RESOURCES COMMITTEE

GUEST LIST

DATE: March 24

NAME	REPRESENTING
Adrian Polansky	KDA
Rebecca Reed	KS Dept of Agriculture
John Peterson	Ks Governmental Consulting
Mark Tomb	League of Kansas Municipalities
Stebdam	KDWP
Chris Tymeson	KDWP
Mike Hayden	KDWP
Ken Bostward	KWO
Tom Tunnell	KGFA/KARA
Steve Swaffar	Ks Farm Bureau
Greg Krissch	KS Corn / KS Grain Dry Lg
Mike Beam	KS. LUSTK. AGGN.
Jed Johnson	KLA
Charles Benjamin	KS Sierra Club
JOHN C. BOTTEMBERG	WESTAR ENERGY
HEBER GONZALEZ	
EDWARD ROWE	LEAGUE OF WOMAN VOTERS/KS
Jere White	KCGA - KGSP

"Sec. 1 K.S.A. 2002 Supp. 82a-2001. is hereby amended to read as follows: 82a-2001. As used in this act:

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

(A) Are indicated on the federal environmental protection agency's reach file 1 (RF1) (1982) and have the most recent 10-year median flow of equal to or in excess of 4 one cubic foot per second based on data collected and evaluated by the United States geological survey or in the absence of stream segment flow data, calculations of flow conducted by extrapolation methods provided by the United States geological survey;

(B) have the most recent 10-year median flow of equal to or in excess of 4 one cubic foot per second based on data collected and evaluated by the United States geological survey or in the absence of stream segment flow data, calculations of flow conducted by extrapolation methods provided by the United States geological survey;

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

(D) (i) scientific studies conducted by the department show that ~~pooling of water~~ during periods of ~~zero flow~~ less than one cubic foot per second stream segments ~~provides provide~~ important refuges for aquatic life and ~~permits permit~~ biological recolonization of intermittently flowing segments; and

(ii) a cost/benefit analysis conducted by the department and taking into account the economic and social impact of classifying the stream segment indicates that the benefits of classifying the stream segment outweigh the costs of classifying the stream segment, as consistent with the federal clean water act and federal regulations; or

(E) are at the point of discharge on the stream segment and downstream from such point where the department has issued a national pollutant discharge elimination system permit other than a permit for a confined feeding facility, as defined in K.S.A. 65-171d, and amendments thereto.

(2) Classified stream segments other than those described in subsection (a)(1)(E) shall not include ephemeral streams; grass, vegetative or other waterways; culverts; or ditches.

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

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

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Attachment 1-1

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

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

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

(B) "livestock watering" means the provision of water from a classified stream segment to livestock for consumption.

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

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

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

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

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

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

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

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

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

(i) Primary contact recreational use is use of a classified stream segment for recreation during the period from ~~April 1 through October 31~~ ^{May 1 through September 30} of each year, provided such classified stream segment (a) ~~by law or written permission of the landowner is open to and accessible by the public and~~ (b) is capable of supporting the recreational activities of swimming, skin diving, water-skiing ~~waterskiing~~, wind surfing, boating ~~kayaking~~ or mussel harvesting where the body is intended to be immersed in surface water to the extent that some inadvertent ingestion of water is probable;

(a) Primary contact recreational use-Class A: use of a classified stream segment for recreation during the period from April 1 through October 31 **May 1 through September 30** of each year, and the classified stream segment is a designated public swimming area. Water quality criterion for bacterial indicator organisms applied to Class A waters shall be the geometric mean of at least 5 samples collected in separate 24-hour periods over a 30-day period and set at a minimum *an illness rate of 8, or more*, per 1000 swimmers. *If through routine monitoring, a sample collected exceeds the primary recreation use-Class A single-sample criterion, then at least five more samples shall be collected in separate 24 hour periods over a thirty day period to calculate a geometric mean. The classified stream segment shall only be considered impaired for primary recreation use-Class A if the geometric mean of the 5 samples exceeds the corresponding water quality criterion.* The water quality criterion for primary contact recreation use-Class A waters during the period ~~November 1 through March 31~~ **October 1 through April 30** of each year shall be equal to the criterion applied to secondary contact recreation use-Class A waters.

(b) Primary contact recreational use-Class B: use of a classified stream segment for recreation, where moderate full body contact recreation is expected, during the period from April 1 through October 31 **May 1 through September 30** of each year, and the classified stream segment is by law or written permission of the landowner is open to and accessible by the public. Water quality criterion for bacterial indicator organisms applied to Class B waters shall be the geometric mean of at least 5 samples collected in separate 24-hour periods over a 30-day period and set at a minimum *an illness rate of 10 or more* per 1000 swimmers. *If through routine monitoring, a sample collected exceeds the primary recreation use-Class B single-sample criterion, then at least five more samples shall be collected in separate 24 hour periods over a thirty day period to calculate a geometric mean. The classified stream segment shall only be considered impaired for primary recreation use-Class B if the geometric mean of the 5 samples exceeds the corresponding water quality criterion.* The water quality criterion for primary contact recreation use-Class B waters during the period ~~November 1 through March 31~~ **October 1 through April 30** of each year shall be equal to the criterion applied to secondary contact recreation use-Class A waters.

(c) Primary contact recreational use-Class C: use of a classified stream segment for recreation, where full body contact recreation is infrequent, during the period from April 1 through October 31 **May 1 through September 30** of each year, and is not open to and accessible by the public under Kansas law and is capable of supporting the recreational activities of swimming, skin diving, water-skiing, wind surfing, ~~or boating,~~ mussel harvesting, ~~wading or fishing.~~ Water quality criterion for bacterial indicator organisms applied to Class C waters shall be the geometric mean of at least 5 samples collected in separate 24-hour periods over a 30-day period and set at a minimum *an illness rate of 12, or more*, per 1000 swimmers. *If through routine monitoring, a*

sample collected exceeds the primary recreation use-Class C single-sample criterion, then at least five more samples shall be collected in separate 24 hour periods over a thirty day period to calculate a geometric mean. The classified stream segment shall only be considered impaired for primary recreation use-Class C if the geometric mean of the 5 samples exceeds the corresponding water quality criterion. The water quality criterion for primary contact recreation use-Class C waters during the period November 1 through March 31 **October 1 through April 30** of each year shall be equal to the criterion applied to secondary contact recreation use-Class B waters.

(ii) Secondary contact recreational use:—(a) is use of a classified stream segment for recreation, provided such classified stream segment (1) by law or by written permission of the landowner is open to and accessible by the public and (2) is capable of supporting the recreational activities of wading, or fishing **canoeing, motor boating, rafting or other types of boating** where the body is not intended to be immersed and where ingestion of surface water is not probable.;

(a) Secondary contact recreational use-Class A: use of a classified stream segment for recreation capable of supporting the recreational activities of wading or fishing and the classified stream segment is by law or written permission of the landowner is open to and accessible by the public. Water quality criterion for bacterial indicator organisms applied to secondary contact recreational use-Class A waters shall be the geometric mean of at least 5 samples collected in separate 24-hour periods over a 30-day period and shall be 9 times the criterion applied to primary contact recreational use-Class B waters. **If through routine monitoring, a sample collected exceeds the secondary recreation use-Class A single-sample criterion, then at least five more samples shall be collected in separate 24 hour periods over a thirty day period to calculate a geometric mean. The classified stream segment shall only be considered impaired for secondary recreation use-Class A if the geometric mean of the 5 samples exceeds the corresponding water quality criterion.**

(b) Secondary contact recreational use-Class B: use of a classified stream segment for recreation capable of supporting the recreational activities of wading or fishing and the classified stream segment and is not open to and accessible by the public under Kansas law. Water quality criterion for bacterial indicator organisms applied to secondary contact recreational use Class B waters shall be the geometric mean of at least 5 samples collected in separate 24-hour periods over a 30-day period and shall be 9 times the criterion applied to primary contact recreational-Class C use waters. **If through routine monitoring, a sample collected exceeds the secondary recreation use-Class B single-sample criterion, then at least five more samples shall be collected in separate 24 hour periods over a thirty day period to calculate a geometric mean. The classified stream segment shall only be considered impaired for secondary recreation use-Class B if the geometric mean of the 5 samples exceeds the corresponding water quality criterion.**

~~(b) is use of a classified stream segment for recreation, provided such classified stream segment (1) is not open to and accessible by the public under Kansas~~

~~law and (2) is capable of supporting the recreational activities of swimming, skin diving, water skiing, wind surfing, boating, mussel harvesting, wading or fishing.~~

(B) If opposite sides of a classified stream segment would have different designated recreational uses due to differences in public access, the designated use of the entire classified stream segment may be the higher attainable use, notwithstanding that such designation does not grant the public access to both sides of such segment.

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

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

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

Sec. 2 K.S.A. 2002 Supp. 82a-2001 is hereby repealed.

Sec. 3 This act shall take effect and be in force from and after its publication in the statute book.

Sec. 4 The Secretary of the Kansas Department of Health and Environment shall develop and publish proposed rules and regulations to incorporate the provisions of House Bill 2219, in accordance with the rules and regulations filing act, on or before July 1, 2003.



Thank you Mr. Chairman and members of the committee for the opportunity to provide testimony today. I am Jere White, Executive Director for the Kansas Corn Growers and Kansas Grain Sorghum Producers Associations. I am providing testimony today on behalf of my two associations, the Kansas Livestock Association, Kansas Grain and Feed Association and Kansas Agribusiness Retailers Association.

We are here today to provide testimony in support of Substitute for HB 2219, a bill addressing waters of the state. The proposed bill refines a realistic approach to protecting water quality in Kansas streams and allows precious economic resources allocated for that protection to be targeted towards the highest priority uses for our streams. The proposed bill provides for new sub-classifications relative to recreational uses for streams that will correct a recently identified problem within the water quality standards adopted under SB 204 during the 2001 Session. Most importantly, it embraces a method of risk mitigation already endorsed by the US EPA.

In a meeting with EPA Region 7 over a month ago, we were informed of the EPA's concerns with a few issues that have surfaced during the implementation of SB 204. In as much as there had to be some legislative action to make corrections, we had requested that KDHE bring forward ideas to this committee for improving the recreational use designations and corresponding standards, as well as the issue relative to providing protection in waters with flows less than 1 cfs. We believe Chairman Tyson has responded appropriately in realizing that time was running out and work needed to be done on this issue, and we support this effort. Mr. Chairman, members of the committee, we always understood that there might be additional work to do beyond the adopted provisions of SB 204. With the draft publication of the Implementation Guidance for Ambient Water Quality Criteria for Bacteria in May 2002, EPA



has provided the necessary guidance to further complete this work.

We do wish to offer a friendly amendment to the proposed amendment document distributed to the committee last Thursday. On pages 4 and 5, regarding Primary contact recreational uses-Class A, B. & C and Secondary contact recreational uses Class A and B, we suggest the following additions under each class: Water criterion for bacterial indicator organisms applied to Class A (B&C) waters shall be a single-sample maximum, serving as a trigger for the geometric mean...

On Page 54, Table 5-1, the EPA guidance document provides the option to use a *"single-sample maximum, serving as a trigger for collecting five samples within a 30-day period. If routine monitoring finds an exceedance of a single-sample maximum, then the state or tribe collects additional samples to calculate the geometric mean. The state or tribe then uses the geometric mean to make an attainment/nonattainment decision (i.e., both the geometric mean and the single-sample maximum need to exceed the state or tribal standards for the waterbody to be identified as impaired."* (Example #2) We believe this approach would place less demand for KDHE resources, unless determined to be appropriate by exceeding the single sample trigger. It is clearly an acceptable methodology to EPA and in line with the single sample concept that has been discussed with stakeholders by KDHE for several months.

Many of the agricultural stakeholders that participated in SB 204 have worked to review the few concerns of Region 7 with proposed standards based on SB 204. There will be other suggestions this morning that are based on our work. We urge this committee's consideration and the passage of Substitute for HB 2219.



K A N S A S

RODERICK L. BREMBY, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

DEPARTMENT OF HEALTH AND ENVIRONMENT

March 24, 2003

The Honorable Robert Tyson
The State Senate
State Capitol – Room 128-S
Topeka, Kansas 66612

Dear Senator Tyson:

During the hearing this morning several items were discussed which require a response from this agency.

The first is the timing for the modifications to the Kansas Surface Water Quality Regulations. Staff are in the midst of a review of the Kansas Surface Water Quality Regulations, KSA 28-16-28, et. seq, as required by the Clean Water Act. This review started before I joined the agency in January, 2003. The bacteria standards have been discussed as part of this process. Staff anticipated these draft regulations would be proposed in the early summer with formal public comment in the late summer or early fall of 2003, with a targeted adoption date in November or early December, 2003. I anticipate we could include any language from amendments to K.S.A. 82a-2001 with this package hence the date for a public release by July 1, 2003 could be met. Since KDHE cannot control EPA's actions, we can only assert a willingness to move the regulation changes through as quickly as possible to have an approval decision at the earliest possible date. We cannot obviously guarantee Region VII US EPA will have a response prior to January 2004.

The second issue for discussion is the time period during which the primary contact recreation criteria are in effect. The current language is from April 1 through October 31 of each year. We believe this is an appropriate time and would request that it not be changed. It may be worth noting that Missouri uses the April 1 through October 31 timeframe for the recreational season. The continuation of the period will allow for the protection of spring and early fall activities as well as continuing the broader time period for assessment of our streams.

Finally, we have discussed alteration or amendment of K.S.A. 82a-2001 with the Secretary of Agriculture, Secretary of Wildlife and Parks, and Director of the Kansas Water Office, and representatives of the State Conservation Commission. The draft language developed was direct in giving the Secretary of Health and Environment the ability to establish a risk based approach for bacteria criteria using the guidance document prepared by US EPA and published in May 2002. While I recognize your desire to include more prescriptive language in the amendment of this statute, we may have to return to this draft in the event of a US EPA disapproval.

Senate Natural Resources
Date: March 24, 2003
Attachment 3-1

OFFICE OF THE SECRETARY

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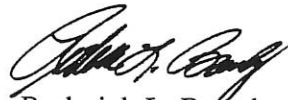
<http://www.kdhe.state.ks.us>

The Honorable Robert Tyson
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For your reference I have enclosed a copy of the draft language earlier prepared by the department; the bullet outline of points presented by Karl Mueldener; and the table of statistics requested by Senator Huelskamp.

If you have any questions, please contact Karl Mueldener (296-5500), Ron Hammerschmidt (296-1535), or me (296-0461).

Sincerely yours,



Roderick L. Bremby
Secretary

RLB:RFH:cah

Attachments

Copies: Senator Mark Taddiken

Senator Janis Lee

Representative Joann Freeborn

Jeremy Anderson

New Language:

Recreational Use Issue:

K.S.A. 82a-2001 (c)(7)(A)(iii) or in lieu of (i) or (ii) above, the department, through a risk based methodology, and in consultation with other state agencies including the Department of Agriculture, Department of Wildlife and Parks, Kansas Water Authority and State Conservation Commission, may establish subcategories of primary and secondary recreational uses reflecting the public accessibility to the stream. These subcategories of recreational use can have different criteria reflecting the potential risk to the public. The department in establishing recreational uses through a risk based methodology shall be consistent with the procedures in Implementation Guidance for Ambient Water Quality Criteria for Bacteria, May 2002 Draft, published by the Environmental Protection Agency, or subsequent final document. In establishing risk based methodologies for recreational uses, the department shall assure the public is provided ample opportunity for participation during development of regulations.

Flow Gap:

82a-2001 (a)(1)(D)(i) scientific studies conducted by the department on streams with a 10-years median flow of median less than 1 cfs, including periods of zero flow with pooling, provides important refuges of aquatic life and permits biological colonization of intermittently flowing segments; and

KDHE COMMENTS HB 2219 AMENDMENTS
TO: SENATE NATURAL RESOURCES COMMITTEE
MARCH 24, 2003

- Recreational use concept proposed is very similar to concept put forward by KDHE for comments
- Fixes the oversight of omitting < 1 cfs streams being classifiable
- Multiplier of 9 not in conformance w/ EPA draft guidance, 5 is the primary to secondary multiplier from guidance, However, the resulting e-coli #'s would be w/in EPA draft limits, with the exception of Secondary C – if a single sample EPA Guidance allows single sample multipliers for secondary, by negotiation
- Amendment speaks only to geometric mean of 5 sample days in 30 Consider use of single value – statistically equivalent to geo mean
- Small stream in a park - ? - shallow but readily accessible to public, Under amendment it would be Secondary A Suggest Primary B or C more appropriate – could be added to Pri B or C definition
- Amendment states illness rate “no less than” 8, 10, 12 swimmers sick/1000. Should this be worded differently to avoid interpretation that 8, 10, or 12 illnesses must occur (wording issue)?

kwm 3-22-03

Water Quality Criteria for Bacteria for Fresh Recreational Waters

Enterococci Criteria

Illness Rate (per 1000)	Geometric Mean Density	Single Sample Maximum Allowable Density			
		Designated Beach Area 75% C.L.	Moderate Full Body Contact Recreation 82% C.L.	Lightly Used Full Body Contact 90% C.L.	Infrequently Used Full Body Contact 95% C.L.
8	33	62	78	107	151
9	42	79	100	137	193
10	54	100	128	175	246
11	69	128	163	224	315
12	88	164	208	286	402
13	112	209	266	365	514
14	144	267	340	467	656

E. coli Criteria

Illness Rate (per 1000)	Geometric Mean Density	Single Sample Maximum Allowable Density			
		Designated Beach Area 75% C.L.	Moderate Full Body Contact Recreation 82% C.L.	Lightly Used Full Body Contact 90% C.L.	Infrequently Used Full Body Contact 95% C.L.
8	126	235	487	669	576
9	206	300	381	524	736
10	206	383	487	669	941
11	263	490	622	855	1202
12	336	626	795	1092	1536
13	429	799	1016	1396	1962
14	548	1021	1298	1783	2507



Kansas Farm Bureau

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PUBLIC POLICY STATEMENT

Senate Natural Resources Committee

RE: House Bill 2219

**March 24, 2003
Topeka, Kansas**

**Presented by:
Steve M. Swaffar, Director
Natural Resources**

Chairman Tyson and members of the committee, thank you for this opportunity to provide comments on House Bill 2219 addressing classified streams in Kansas. I am Steve Swaffar, Director of Natural Resources for the Kansas Farm Bureau. Kansas Farm Bureau is a grassroots organization that develops policy through the input of our 105 county organizations and the more than 41,000 farmer and rancher members across the State.

I am here today to provide testimony in support of HB 2219, addressing classified streams in Kansas. HB 2219 seeks to refine changes made to the State's law during the 2001 legislative session by Senate Bill 204. SB 204 was a great step towards making the State's water quality program pragmatic and focusing the limited resources of the State on those streams that are the most important to protect. HB 2219 is an extension of this focus and practicality. The proposed bill clarifies legislative intent regarding KDHE's ability to conduct studies on streams with median flows less than 1 cubic foot per second for classification and proposes a risk-based recreational designated use scheme that embraces U.S. EPA's most up-to-date guidance for recreational uses and their associated criteria.

Our meetings and discussions with EPA, KDHE, and agricultural stakeholder groups lead us to believe that EPA Region VII has concerns about portions of the water quality standards submitted by KDHE last year. Those concerns center on the recreational uses and the definition of classified streams. We fully expected

*Senate Natural Resources Committee
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Attachment 4-1*

KDHE would bring forward to the 2003 legislature suggestions to amend SB 204 to alleviate EPA's concerns and ensure the approval of the regulations that embody SB 204. However, to this point, KDHE has not brought proposed language to this committee or the Environment Committee in the House. Therefore it is fortunate and appropriate that Chairman Tyson has acted to create HB 2219 to correct the deficiencies identified by EPA. HB 2219 follows the direction provided in EPA's document Guidance for Ambient Water Quality Criteria for Bacteria and provides the necessary statutory changes for KDHE to revise its regulations and satisfy EPA Region VII concerns.

It does however, seem some structural changes should be made to HB 2219 to further refine the legislation and regulations. As you have heard from previous proponents, EPA's document references using a single-sample as a triggering mechanism for collecting additional samples sufficient to calculate a geometric mean and subsequently make a use impairment decision. Given the limited resources KDHE has to collect water quality monitoring samples, this is an appropriate amendment to the language currently in the bill. We support the use of this monitoring scheme for recreational use waters.

We believe there is sufficient evidence in EPA's guidance to change the dates when the criteria for primary contact recreational uses apply. On pages 25 and 26 of the document, EPA describes how seasonal recreational uses can be applied based on the expected actual use of a particular waterbody for primary recreational activities, like swimming or skin diving. The guidance states that "seasonal recreational use for a waterbody need not be burdensome" and does not "require a formal use attainability analysis." We suggest the primary recreational use season begin on May 1 and end on September 30 each year. Since Kansas already has a seasonally based primary recreation use season, KDHE should be able to provide ambient air and water temperatures to justify the adjustment to our primary season. Already, EPA region VI has approved Oklahoma's primary season with those dates; it only makes sense that Kansas should be able to adopt them as well.

We believe a revision to the description of activities for primary and secondary recreational uses is also supported by EPA's document. Current law lists all forms of "boating" as a primary recreation use. However, on page 39 of EPA's document, canoeing and motor boating are listed as examples of secondary contact recreation activities. The guidance does list kayaking as a primary use activity on page 24, as this activity has a high likelihood of water ingestion. We suggest kayaking be broken out from boating and remain as a primary recreational use activity, but canoeing, motor boating, rafting and other forms of boating be listed as secondary recreational use activities.

KDHE submitted the most recent version of the adopted water quality standards in December of 2002. In the *Code of Federal Regulations* at 40.131.21, EPA has sixty days to approve the State's submittal or ninety days to disapprove. Since

the sixty-day limit has passed, we can only assume EPA has concerns about those portions of the standards identified above and that EPA's reaction to the State's submittal will be forthcoming very soon. If EPA chooses to disapprove portions of the standards, then KDHE will have ninety days to respond with a plan to correct the identified deficiencies. In light of the looming timeframe for response, we suggest language be added to the bill that makes the statute effective upon publication. We also suggest language be added to require KDHE to propose the revised regulations by July 1, 2003. This should be sufficient enough time for the Department to revise the regulations and send them to the Attorney General's office and the Department of Administration for review. By proposing the regulations by July 1, the State will demonstrate to EPA that it is making every effort to address the concerns as quickly as is administratively possible.

I want to reiterate Kansas Farm Bureau has worked with other agriculture stakeholders in making these suggestions and we ask the committee to act favorably and pass HB 2219. Thank you for this opportunity to speak with you today.

Kansas Farm Bureau represents grassroots agriculture. Established in 1919, this non-profit advocacy organization supports farm families who earn their living in a changing industry.



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Mountain-Prairie Region

IN REPLY REFER TO:

FWS/R6
ES

MAILING ADDRESS:
Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225-0486

STREET LOCATION:
134 Union Blvd
Lakewood, Colorado 80225-1807

DEC 13 2001

G. Jay Gogue, President
New Mexico State University
P.O. Box 30001
Las Cruces, New Mexico 88003

Dear Dr. Gogue:

The U.S. Fish and Wildlife Service is concerned that a person on staff at New Mexico State University is providing incorrect written interpretations of Federal statutes and cases to the public agricultural community. A four-page document by Mr. Ric Frost written on University letterhead was distributed to agricultural interest groups and individuals in Colorado, Nebraska, and South Dakota (copy enclosed). We have reviewed the document and believe that Mr. Frost has misinterpreted the Endangered Species Act (ESA) and other statutes and cases. This is unfortunate, because it has led some in the agricultural community to believe that should the black-tailed prairie dog be listed under the ESA and should it occur on lands they ranch, they will not be obligated by the ESA. The concept that species are listed to shut down industry or businesses is without merit. Man's ability to control mammalian species far outweighs the ability of that species to survive.

The Service is particularly concerned that this document has been distributed when the 11 States within the historic range of the black-tailed prairie dog are each developing management plans intended to conserve the species, with a goal to avoid listing the animals under the ESA. The incorrect interpretations in the document could influence those State plans to the extent that when implemented, they will be insufficient to prevent listing. If the black-tailed prairie dog were to be listed, landowners could incur greater burdens under the ESA than under a State developed plan.

We believe it would be in the best interest of potentially impacted landowners, the University, and ultimately, the black-tailed prairie dog species if the University would take immediate steps to correct the misinformation presented by Mr. Frost and provide factual information to the affected agricultural communities, particularly in Colorado, Nebraska, and South Dakota.

Senate Natural Resources Committee
Date: March 24, 2003
Attachment 5-1

G. Jay Gogus, President

The following comments address the issues raised in the document in the order in which they are raised.

ISSUE A

Section 12 of the Granger-Tove Act, 16 U.S.C. 5580h. This section authorizes the Secretary of Agriculture to issue regulations and to expend funds for control of range-destroying rodents, presumably including the black-tailed prairie dog. Assuming the black-tailed prairie dog becomes listed, any funding for its control (usually by poisoning) by the Department of Agriculture would be subject to the requirements of section 7(a)(2) of the ESA. Section 7(a)(2) and its implementing regulations require the Secretary of Agriculture to insure that his or her action is not likely to jeopardize the continued existence of the species or to adversely modify or destroy its critical habitat, which is to be designated at the time of any listing. The Secretary is required to formally consult with the Service on any control actions and to supply the information the Service needs to analyze the impacts on the species. The Service is required to give its biological opinion on whether the proposed action is likely to jeopardize the species or adversely modify or destroy critical habitat and to provide reasonable and prudent alternatives, if available, to avoid violation of the ESA. The Department of Agriculture has the discretion to not comply with these alternatives and choose a different alternative to get to the endpoint the Service prescribes.

In addition, if the black-tailed prairie dog were to be listed as a threatened species, which the Service has found to be warranted, the take prohibitions of section 9 and its implementing regulations prohibit the Department of Agriculture from taking black-tailed prairie dogs unless authorized by the Service. Take includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, and collect. Harass and harm are further defined to include harassment or habitat modification. These cover all activities that would result in take, including killing by poisoning. Thus the Department of Agriculture authorities to control prairie dogs would be constrained by the ESA's prohibitions on taking.

Finally, should the black-tailed prairie dog become listed the Department of Agriculture is required to carry out actions to conserve the species under section 7(a)(1) of the ESA. It would have discretion on which actions it chose to fulfill this mandate, but it is doubtful that control of prairie dogs at current levels would be supported.

ISSUE B

The Act of March 2, 1931, 48 Stat. 1468. This statute authorizes the Secretary of Agriculture to investigate the control of a number of animals, including prairie dogs, and to destroy such animals. The above discussion on section 7 consultation and the take

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G. Jay Goguz, President

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prohibitions also is applicable to this statute should the black-tailed prairie dog become listed.

Petition to the U.S. Fish and Wildlife Service. The organization that petitioned the Service to list the black-tailed prairie dog is the National Wildlife Federation, not Foundation. The information cited as being in the petition is not contained in it.

ISSUE C

Section 6(a) of the Endangered Species Act. This section describes how the States and Service are to cooperate to conserve listed species and describes the agreements that must be entered into for States to be eligible for Federal funds for their work on conserving listed species. The Service is required to cooperate to the maximum extent practicable with the States. However, there is no requirement for the Service to cooperate when such cooperation will not conserve species. Section 6 does not say that the Service is "subject to the State's cooperation and direction" as is stated in the document by Mr. Frost. Section 6 directs the Service to consult with concerned States before acquiring real property for listed species and authorizes the Service to enter into an agreement with States to manage areas established to conserve listed species. Section 6 does not give the States authority to control the Service's actions.

Missouri v. Holland, 252 U.S. 418 (1920). The quote that Mr. Frost attributes to Missouri v. Holland is not contained in the text of the Supreme Court's Opinion in that case.

The case is not relevant to the issue presented in the document concerning the authority of States or the Department of Agriculture over prairie dogs. It upholds the power of Congress to pass a statute to protect migratory birds pursuant to a treaty with Great Britain. Under the authority of such protective legislation, the Migratory Bird Treaty Act, the Department of Agriculture, which prior to 1939 included the agency which was the predecessor of the Service, issued regulations restricting hunting of migratory birds. The State of Missouri filed a law suit which claimed the Migratory Bird Treaty Act was unconstitutional because it claimed that only States had authority over hunting migratory birds and the Federal Government had no such authority. The Supreme Court held that Congress had the authority to enact the legislation and that the Federal restrictions on hunting migratory birds were therefore valid. The regulations referred to in the quote are regulations controlling the take of migratory birds, and the authority to issue such regulations currently resides in the Migratory Bird Division of the Service, not the Department of Agriculture.

Section 6(g)(2) of the Endangered Species Act. The quote in the document from this section of the ESA is incomplete in that it does not acknowledge that it only applies to a State with a section 6 cooperative agreement. The Service can enter into such an

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G. Jay Gogue, President.

agreement only after making a finding that the State has an adequate and active program to conserve listed species, including the legal authority to carry out that program. The quoted language recognizes the existence of other Federal laws and treaties that cover listed species. However, it does not state that those laws supercede the requirements of the ESA, and neither does it state that other Federal laws are not "affected by the ESA" as claimed by Mr. Frost.

Section 11(h) of the Endangered Species Act. The first half of the quote from section 11(h) pertains to importation or possession of animals and is not relevant to Mr. Frost's arguments about the black-tailed prairie dog. The relevant language in the second half of the quote relates to "proceedings" of the Department of Agriculture. This section of the ESA says that any "proceeding or determination" under the ESA by the Service is not to be considered determinative of facts or law in a proceeding by the Secretary of Agriculture. For example, if there were an administrative appeal of a Regional Forester's approval of a Forest Management Plan that contained a proposed grazing plan and the Service made a determination in a biological opinion relating to the proposed grazing plan, the Department of Agriculture has a responsibility to make its own determinations on the ESA issues during the appeal process. However, this does not absolve the Department of Agriculture from its responsibilities under the ESA.

CANDIDATE CONSERVATION AGREEMENTS WITH ASSURANCES (CCAA)

The document discusses several features of CCAs that are described in greater detail in the published CCAA policy and implementing regulations, which are available on the Service's web site at <http://endangered.fws.gov/policies/index.html#candidate>. The CCAA is a voluntary conservation tool the Service has initiated to encourage private landowners, States and other non-Federal partners to work proactively to implement conservation measures to preclude listing under the ESA.

The Service does not enforce a CCAA through lawsuits and penalties, as Mr. Frost asserts in item 1 of the CCAA discussion, but simply by terminating the agreement and revoking the permit that provides assurances. However, before resorting to termination, the Service would attempt to work with the partner to seek ways to resolve any conflict and keep the CCAA intact.

In item 4 of the CCAA discussion, the sentence about section 7 consultation incorrectly implies that the landowner or other partner would enter into a consultation. We explained consultation under section 7 in addressing Issue A. Section 7(a)(2) requires all Federal agencies to consult with the Service before carrying out an action. Before entering into a CCAA, the Service, rather than the landowner, will conduct an internal consultation.

It is clear to the Service that Mr. Frost's interpretations, particularly of the obligations of the Secretary of Agriculture under the Endangered Species Act, are at best misleading. We trust that

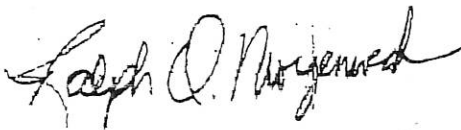
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G. Jay Gogue, President

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after reviewing our comments, you will agree to correct the situation. If you wish to discuss our comments or proposed actions further, please contact the Service's Grasslands Coordinator, Dr. Patricia Mehlich, at (303) 236-7400, extension 225 or Pat_Mehlich@fws.gov.

Sincerely,



Regional Director

Enclosure

cc: Regional Director
Fish and Wildlife Service
Albuquerque, New Mexico

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United States Department of the Interior

FISH AND WILDLIFE SERVICE

Mountain-Prairie Region

IN REPLY REFER TO:

FWS/R6
ES

MAILING ADDRESS:

Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225

STREET LOCATION:

134 Union Blvd.
Lakewood, Colorado 80228

JAN 23 2002

J. Michael Hayden, Secretary
Kansas Department of Wildlife and Parks
900 SW Jackson Street, Suite 502
Topeka, Kansas 66612

Dear Mr. Hayden:

The U.S. Fish and Wildlife Service is concerned that New Mexico State University is providing incorrect written interpretations of Federal statutes and cases to the public agricultural community. A document from the University was distributed to agricultural interest groups and individuals in Colorado, Nebraska, and South Dakota, and possibly other States. We have reviewed the document and believe that its author has misinterpreted the Endangered Species Act (ESA) and other statutes and cases. This is unfortunate, because it has led some in the agricultural community to believe that should the black-tailed prairie dog be listed under the ESA and should it occur on lands they ranch, they will not be obligated by the ESA.

Following legal review of the document, the Service wrote to the President of the University expressing concern that these incorrect interpretations have received broad distribution at a time when the States within the historic range of the species are developing management plans intended to conserve the species, with a goal to avoid listing under the ESA. The incorrect interpretations in the document could influence those State plans to the extent that when implemented, they will be insufficient to prevent listing. If the black-tailed prairie dog were to be listed, landowners could incur greater burdens under the ESA than under a State developed plan.

We have prepared the enclosed guest commentary, which we plan to distribute to the press in the 11-State black-tailed prairie dog region. It is our intention to reach the affected agricultural community in each State so ranchers can make a more informed decision about the role they wish

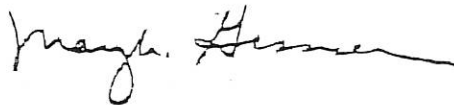
Senate Natural Resources Committee
Date: March 24, 2003
Attachment 6-1

J. Michael Hayden, Secretary

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to take in managing the species. Please feel free to use and distribute the guest commentary as you deem appropriate.

Sincerely,



ACTING Regional Director

Enclosure

See Enclosed Distribution List

cc: Regional Director, Region 2

GETTING THE FACTS ABOUT PRAIRIE DOG CONSERVATION

Guest Commentary by Ralph Morgenweck, Regional Director, U.S. Fish and Wildlife Service

Agricultural communities in 11 of our western states are facing a challenge today requiring more fortitude and will power than a cowboy saddle-breaking a wild mustang. This challenge, the conservation of the black-tailed prairie dog and its habitat, will also require a healthy dose of innovative thinking and hard facts about the consequences of inaction.

The black-tailed prairie dog, long considered to be a varmint by many in rural America, experienced large losses over the last 80 years mainly due to poisoning and changes in land use during the early 1900s. Plague, a disease not native to the United States and fatal to prairie dogs, continues to be a serious threat. As a result, an animal that was once thought to "blanket the earth" is in serious need of conservation before it and the wildlife that exist in association with it suffer irrevocable losses.

As a result of this significant decline and outside pressures to regulate this species under the Endangered Species Act (ESA), landowners, state agencies, private organizations and agricultural concerns are getting together and developing plans customized to each State's needs and specific to the goal of recovering black-tailed prairie dogs. This cooperative effort requires many of these groups to overcome substantial differences in order to work together toward the common goal of conserving black-tailed prairie dogs in their states. This achievement is important at this time in history to help avoid the need for ESA protection.

Several of the states where black-tailed prairie dogs live are working both separately and together on state-designed conservation strategies to help recover this species. Biologists believe the status of the black-tailed prairie dog will improve and the need to include the animal on the federal list of threatened and endangered species will disappear if state conservation plans are implemented and result in sufficient on-the-ground conservation.

These diverse groups have made great strides in their conservation planning. Unfortunately, inaccurate information has been circulated recently which threatens their work and could possibly cause these much needed collaborative working groups to disband.

This inaccurate information has led some in the agricultural community to believe that should the black-tailed prairie dog be listed under the ESA and should it occur on the lands they ranch, they will not be subject to ESA requirements. This is not true.

The U.S. Fish and Wildlife Service is particularly concerned that this inaccurate and misleading information has surfaced at the same time the 11 states within the historic range of the black-tailed prairie dog are developing their conservation plans intended to conserve the species and prevent its listing under the ESA, a goal the Service supports. This incorrect interpretation of the ESA could influence state plans to the extent that plans are abandoned or resources are wasted on plans which don't promote conservation and therefore would not prevent an ESA listing.

A common goal of all stakeholders in the prairie dog issue, including the U.S. Fish and Wildlife

Service, is to conserve the black-tailed prairie dog and to avoid listing the animal under the ESA and the restrictions such a listing might entail. If voluntary conservation efforts are not developed or implemented and the status and habitat of the prairie dog continues to decline, the ESA would most likely come into play.

The bottom line? We can and will work with landowners, ranchers, developers, state wildlife representatives and any others who may be impacted by a potential prairie dog listing action to recover the prairie dog through proactive voluntary conservation measures. We want to avoid the need for the black-tailed prairie dog to be listed.