

Kansas Steps Back from the Clean Water Act:
The National Implications of Substitute for Senate Bill 20

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What Substitute For Senate Bill 204 Does

Substitute for Senate Bill 204, passed by the Kansas legislature and signed by the Kansas Governor in 2001, basically does two things.

First it sets up a regime to "declassify" streams in Kansas. At a minimum a stream in Kansas would not be a stream unless it had a ten-year median stream flow equal to or in excess of 1 cubic foot per second. For those streams that DO NOT meet this minimum stream flow requirement the Kansas Department of Health and Environment (KDHE) must determine, by December 31, 2005, if threatened and endangered aquatic species actually exist and/or that pooling of water during periods of zero flow provide important refuges for aquatic life and permits biological recolonization in intermittently flowing segments.

KDHE must conduct cost/benefit analyses taking into account the economic and social impact of classifying stream segments. These analyses must indicate that the benefits of classifying these stream segments outweigh the costs of classifying these stream segments. The exception to these requirements would be at a point of discharge on a stream segment and downstream from where KDHE has issued an NPDES permit - however, this would NOT include NPDES permits for confined animal feeding operations.

Ephemeral streams, grass, vegetative or other waterways, culverts, or ditches, unless they had an NPDES point source discharger, would NOT be classified as stream segments. This is in spite of the fact that Federal courts have consistently said that even "dry arroyos" are "waters of the United States for purposes of the Clean Water Act."

KDHE must conduct Use Attainability Analyses (UAAs) on almost every stream in Kansas by Oct. 31, 2005. The purpose of these UAAs is to determine if the stream segments CAN support a contact recreation designation, unlike EPA's interpretation of the Clean Water Act that requires the state to show that stream segments CANNOT support primary contact recreation criteria.

The second part of SB 204 would establish two subcategories for recreational uses of the state's waters - primary and secondary contact recreation. Primary contact recreation use would be use of a classified stream segment for recreation during the period from April 1 through Oct. 31 - PROVIDED that the segment is open to and accessible by the public, is capable of supporting the recreational activities where the body is intended to be immersed in surface water to the extent that some inadvertent ingestion of water is probable. Secondary contact recreation use would be use of a classified stream segment for recreation if the segment by law or written permission of the landowner is open to and accessible by the public and is capable of supporting the recreational activities of wading or fishing where the body is not intended to be immersed and where ingestion is not probable.

Why Substitute for Senate Bill 204 violates state law and the Clean Water Act

The Kansas legislature has mandated that the waters of the state belong to the people of the state (K.S.A. 82a-702) rather than to specific property owners. Substitute for S.B. 204 appears to allow individual property owners to dictate the quality of the water that flows adjacent to their property.

Substitute for S.B. 204 declassifies stream segments and provides property owners the sole authority to dictate, without public input and in apparent violation of 40 C.F.R. 131.10(e) and 131.20(b), the restriction of contact recreational uses of the waters of the state and the corresponding public protection of public health through denial of public access.

Establishing or determining the designation for primary or secondary contact recreation using public access as a criteria, as is done in Substitute for S.B. 204, is inconsistent with federal regulations under 40 C.F.R. 131.10(g) which does not explicitly identify public access as a reason for changing a designated use of a stream.

The establishment of recreational uses is the minimum base standard and the only process available to KDHE to oversee biological contamination including fecal coliform and thus protect public health. The declassification of stream segments in Kansas, under Substitute for Senate Bill 204, will result in no protection for human exposure in Kansas stream segments and no applicable limits or goals for exposure to biological contaminants for all streams removed from the stream register.

Federal regulation on designated uses for streams, found at 40 C.F.R. 131.10(b), requires a consideration of downstream uses and provision for the maintenance of those uses. The language of Substitute for S.B. 204 appears to run counter to this provision in federal law.

The substantive requirement in Substitute for S.B. 204 of weighing the economic, social and regulatory cost of proposed classification of a stream segment against the benefit of protecting the quality of surface water in a stream segment for the general public and environment is very difficult if not impossible to determine. This provision of Substitute for S.B. 204 regarding cost benefit analysis is inconsistent with federal regulations on use designations found at 40 C.F.R. 131.10(g)(6).