

Bed, Bank & Beyond: *Streambed Regulation in Kansas*

By Tom Adrian and Dave Stucky





I. Introduction

A Kansas farmer wishes to modify a streambed to enhance his ability to farm his land. He desires to widen the banks to improve drainage and to construct a retention pond within the stream to water livestock and to irrigate crops. The question arises regarding what types of permits the farmer may need to conduct his activities. Does he need federal, state, or local permits? Any attempt to expand federal regulation of our nation's waters has always served as a galvanizing topic met with momentous resistance. Although there is significant attention given to federal regulation in this area, the majority of oversight of waterways in Kansas actually occurs at the state and local level.

To explain Kansas laws germane to streams, this article will first briefly provide a summary of the basic classifications of watercourses for the purpose of determining which types of regulations apply. Next, it will offer a detailed discussion of the definition of a stream in Kansas. The final section will present an overview of Kansas regulations applicable to alterations of streams.

II. Classifications of Rivers and Streams in Kansas

There are three major categories of watercourses: navigable streams, non-navigable streams, and diffused surface water. The focus of this article will be on non-navigable streams. However, a brief overview of each classification is warranted.

A. Navigable streams

The first category of consequence is navigable streams.¹ The state owns the beds of navigable streams. The public can freely access the water in navigable streams and the beds up to the high water mark.² To determine the navigability of a stream, Kansas courts have adopted a "navigable in fact" test.³ Currently, in Kansas, three rivers have been deemed navigable under this test: the Kansas, the Arkansas, and the Missouri.⁴

Distinct from the state test for navigability is the question of whether major watercourses are subject to federal regulation under the Commerce Clause of the U.S. Constitution.⁵ Extensive jurisprudence exists in this area. Currently, the test for navigability for federal pur-

poses is the significant nexus test.⁶ A variety of federal laws apply to navigable waterways.⁷ A meaningful discussion of federal regulation in this area is beyond the scope of this article.⁸

B. Nonnavigable streams

The next major classification of waterways deals with nonnavigable streams. The definition of streams in Kansas will be discussed in detail later in this article. As a general rule, a landowner who owns the property through which a nonnavigable stream flows has the exclusive right to access the water.⁹ The landowner also owns the bed and thus may alter, obstruct, or dam the stream.¹⁰

The riparian¹¹ landowner's rights to access to the water and ownership of the bed are far from unfettered property rights and are subject to expansive state regulation.¹² In Kansas, rules governing nonnavigable streams are primarily administered by the Kansas Department of Agriculture, Division of Water Resources (DWR).¹³ Additionally, because the rules governing federal and state regulation are often blurred in application, many stream situations should be viewed as subject to both state and federal regulation.

C. Diffused surface water

The final category is diffused surface water. Diffused surface water deals with unwanted water and is commonly thought of as runoff.¹⁴ It encompasses all water flowing in depressions not otherwise classified as streams or rivers.¹⁵ Since that is water not generally thought to be subject to state¹⁶ or federal regulation, Kansas courts have adopted distinct rules to deal with situations where a landowner alters his land in a fashion that increases the volume and velocity of water that flows onto his neighbor's property.¹⁷ A discussion of this topic is also beyond the focus of this article.¹⁸

III. The Definition of a Stream in Kansas

It is important first to examine the definition of a stream. Common dictionary definitions of "stream" include "a body of running water (as a river or brook) flowing on the earth"¹⁹ or "a small, narrow river."²⁰ The term "watercourse" seems to be broader and is defined variously in dictionaries as "a natural or artificial channel through which water

flows” or “a stream of water (as a river, brook, or underground stream)”²¹ or “a brook, stream, or artificially constructed water channel” or “the bed along which a watercourse flows.”²²

Interestingly, while Kansas has regulated stream obstructions since 1929,²³ the statutes contained no definition of stream until 2013, as discussed below. The chief engineer of DWR, however, first defined “stream” in regulations in the year 1987.²⁴ At the heart of this discussion on definitions is the recent pivotal case of *Frank v. Kansas Department of Agriculture*.²⁵ This section will conclude with a look at post-Frank statutory changes to the definition of a stream.

A. *Frank v. Kansas Department of Agriculture*, 40 Kan. App. 2d 1024 (2008)

1. Facts

Acting on a permit obtained from DWR, Frank dug a groundwater pit on his land.²⁶ As a condition to approval of the permit, DWR required Frank to construct an embankment around the pit to avoid untreated surface-water runoff from entering into the pit and contaminating the groundwater supply.²⁷ Frank built the pit in compliance with his permit along a depression in his land that intermittently drained water from the surrounding watershed.²⁸

The location of the pit, and surrounding berm, caused water to back up onto his neighbor’s property.²⁹ Upon receiving complaints from Frank’s neighbor, the chief engineer of DWR concluded that Frank had obstructed a stream and needed an additional permit.³⁰ Frank appealed that decision, arguing that no stream existed.³¹

2. Statutes and regulations at issue in *Frank*

Central to the *Frank* case was the stream obstruction statute. Contained in K.S.A. 82a-301, the language in effect at the time broadly prohibited the building of any obstruction within a stream or changing the course of a stream.³² When *Frank* was decided in 2008, this statute contained no definition of a stream.³³ The stream obstruction statute will be discussed in much greater detail later in this article.

Despite the fact that K.S.A. 82a-301 failed to define a stream, DWR had adopted a regulation defining a stream.³⁴ At the time of the decision, the relevant regulation was K.A.R. 5-40-1(k), which defined a stream as “any watercourse that has a well-defined bed and banks” that exists within a watershed meeting the requisite acreage requirement above the geographic point in question.³⁵ Under that regulation, the acreage threshold for the watershed depended on the county in Kansas where the alleged stream was located, with the state

being divided into three geographic zones with the following acreage requirements: 240 acres in eastern Kansas, 320 acres in central Kansas and 640 acres (a full square mile) in western Kansas.³⁶

The definition further stated that the “stream need not flow continuously and may flow only briefly after a rain in the watershed.”³⁷ Finally, the definition provided that even if no discernible bed and banks existed, yet the requisite watershed size was met, then a presumption existed in favor of the existence of a stream.³⁸ That presumption could only be overcome by the landowner providing “conclusive” evidence to the contrary.³⁹

3. Holding in *Frank*

Frank argued that the location in question did not contain a stream because there was no evidence of a bed or banks in the immediate years prior to his construction efforts.⁴⁰ DWR, on the other hand, reasoned that Frank must show that no stream existed at any time since 1929, the year the stream obstruction statute was adopted.⁴¹ To support its conclusion that a stream existed, DWR produced a 1955 U.S. Geological Survey (USGS) map showing a stream and proof that the Kansas Department of Transportation (KDOT) had built a large culvert under a bridge near Frank’s property.⁴²

The court upheld the agency’s interpretation of the definition of a stream.⁴³ It adopted the approach that the landowner has the burden of proving that since 1929 no stream existed and that a stream can exist even when water only flows occasionally.⁴⁴ Underlying the court’s decision was the law affording deference to agency interpretations of statutes.⁴⁵ The court noted, “Deference to an administrative agency is of course greatest when the agency must apply special training or expertise in administering a statute.”⁴⁶

4. Implications of *Frank*

Because of the sweeping definition adopted in *Frank*, a heavy burden is placed on a landowner who attempts to avoid state regulation when a potential watercourse exists. Because that burden is difficult to overcome, even when a landowner escapes the tentacles of federal oversight, state regulations will likely apply.⁴⁷ Thus, a thorough discussion of state statutes and agency rules will be presented later in this article.

The court attached significance to the fact that Frank’s actions flooded his neighbor’s property.⁴⁸ Although perhaps not attempting to limit its opinion to the narrow facts of the case, the court wrote, “When the construction of a barrier to waterflow causes changes to the amount of water flowing onto other properties, application of the chief engineer’s presumption is quite rational.”⁴⁹ The court left the door open to the possibility that a case may arise in which “applying the chief engineer’s presumption would be so unreasonable that a court would reverse the administrative decision.”⁵⁰

B. The new definition of a stream in Kansas

In the 2013 legislative session, undoubtedly in response to the *Frank* case, the Kansas legislature adopted a new definition of a stream that is now a part of revised K.S.A. 82a-301.⁵¹ The statute defines a “designated stream” as “a natural or man-made channel that conveys drainage or runoff from a watershed” meeting the requisite acreage requirements.⁵² Significantly, the definition incorporates watershed thresholds different from DWR’s definition.⁵³

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In addition to different acreage requirements, other facets of the definition are noteworthy. Unlike the agency definition, the statutory definition encompasses “man-made channels.”⁵⁴ The definition is also conceivably broader than the regulation because it abandons the concept of “a well-defined bed and banks.”⁵⁵ The definition contained in K.S.A. 82a-301 also appears limited only to situations where a potential dam or stream obstruction exists. The DWR definition, which has remained unaltered since the *Frank* case, arguably applies under all other circumstances.⁵⁶

IV. Overview and Recent Changes to Dam and Stream Obstruction Regulations in Kansas

A. Brief overview and background

As mentioned above, K.S.A. 82a-301 mandates that before constructing, modifying, or adding to any dam or stream obstruction, or altering the course of a designated stream, a landowner must first obtain approval from the chief engineer of DWR.⁵⁷ K.S.A. 82a-301a empowers DWR to oversee “exclusive regulation” of the “construction, operation and maintenance of all dams or other water obstructions” in the state of Kansas to ensure the “protection of public safety.”⁵⁸ The chief engineer may adopt rules and regulations to enforce and administer any rules relating to dams and other water obstructions.⁵⁹ Consequently, both statutes and agency regulations will be discussed below. Unlike other areas of law governing surface water,⁶⁰ the following requirements have roughly equal application in both rural and urban areas, with only a few exceptions.⁶¹

A number of enforcement mechanisms exist to ensure compliance with the statutes and regulations regarding dams and stream obstructions. If the chief engineer finds a dam or water obstruction has been constructed in violation of the applicable rules, the chief engineer may order the landowner to correct the violation or even may order the removal of the dam or stream obstruction.⁶² If the landowner still fails to comply, the chief engineer may then file a civil lawsuit and seek a mandatory injunction.⁶³ A landowner can also face criminal prosecution for ignoring an order of the chief engineer.⁶⁴

B. Rules governing dams

With House Bill 2363 in the 2013 session, the Kansas legislature revised the rules governing dams.⁶⁵ A “dam” is defined as any “artificial barrier” with the ability to impound water with a structure height⁶⁶ of at least 25 feet or a height of 6 feet where the structure impounds more than 50 acre feet of water.⁶⁷ Any landowner desiring to construct, modify, or repair a dam must first obtain a permit.⁶⁸ An owner of a dam is further responsible for periodic inspections, repairs, and liability concerns associated with the dam.⁶⁹

According to K.S.A. 82a-302, when applying for a permit, a landowner must provide maps, plans, a design report, and specifications along with the completed application form.⁷⁰ A fee of \$200 must also accompany the application.⁷¹ The legislature revised K.S.A. 82a-302 to eliminate the presumption in favor of approval by the chief engineer in cases in which the application has first been reviewed by an approved licensed engineer.⁷² Depending on the project, exceptions to the dam permitting process may exist.⁷³

C. Rules regarding stream obstructions

K.A.R. 5-40-1(aaa) defines a “stream obstruction” as “any project or structure that is wholly or partially placed or constructed in a stream and that does not meet the definition of a dam.”⁷⁴ Pursuant to that broad definition, virtually any activity impacting a stream could constitute a stream obstruction. In situations similar to those involving dam regulations, before constructing, modifying, or adding to a stream obstruction, a landowner must first submit an application along with a fee. The fee depends on the size of the watershed impacted by the project.⁷⁵ As with a dam, an application to obstruct a stream must include a variety of plans, maps, and specifications.⁷⁶

House Bill 2363 carved out a number of exceptions to the above permitting rules. The first is the minor project exemption. That exemption applies when the activity (1) impacts less than 25 feet of the stream length, (2) obstructs less than five percent of the channel cross section, and (3) the floodplain fill outside the channel does not exceed one foot in depth.⁷⁷ Another exemption of great significance to farmers and other landowners living in unincorporated areas is the rural stream obstruction exemption. That exemption applies if the obstruction (1) is not a dam, (2) is located in a rural area, (3) has a watershed of five square miles or less, and (4) every part of the obstruction, including impounded water, exists at least 300 feet from neighboring property boundaries.⁷⁸ Two other new exemptions of lesser applicability are the low hazard dam exemption and the feedlot structure exemption.⁷⁹ A final exception, adopted by DWR in a regulation, exists in cases in which the landowner can show that the structure is temporary in nature.⁸⁰

D. Changes to fee section

House Bill 2363 changed virtually the entire fee structure for dams, stream obstructions, and alterations of streams.⁸¹ Overall, the new fee requirements are greatly simplified.⁸² One significant change in the fee requirements is the elimination of the “after-the-fact” permit fees that applied in the event a landowner had already begun construction on the dam, stream obstruction, channel change, or aggregate removal project.⁸³

E. Other permit requirements

In addition to the permits outlined above, a host of other federal, state, and local permits may be required for any given project impacting waterways. Virtually the same require-

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ments that exist for stream obstructions apply when a landowner wishes “to change or diminish the course, current, or cross section of a stream.”⁸⁴ Additionally, when the legislature amended K.S.A. 82a-302, it added the concept of a general permit.⁸⁵ Neither the legislature nor DWR has yet fully defined the applicability of a general permit.⁸⁶

Regulated in a wholly different statutory section, a separate type of permit is required to construct, modify, or repair a levee or place fill within a floodplain of a designated stream.⁸⁷ The nature of the operations on the stream may necessitate a landowner to obtain a separate permit for the appropriation of water.⁸⁸ When water quality is potentially impacted, KDHE may require its own series of permits.⁸⁹ Finally, a given project may involve the need to seek federal⁹⁰ or local permits.⁹¹

V. Conclusion

Before interfering with a streambed, a landowner must consider many things, including the legal ramifications. The rules governing streams in Kansas have shifted and expanded dras-

tically in the last several years. With a growing Kansas population, water will increasingly become both a valuable commodity and a detriment, and, just as a watercourse changes, regulations governing streams will continue to evolve. ■

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ENDNOTES

1. See, e.g., *Wood v. Fowler*, 26 Kan. 682 (1882); *State ex rel. Peterson v. Kansas State Bd. of Agric.*, 158 Kan. 603, 606-07, 149 P.2d 604 (1944). Ownership is of significance since the thrust of this article deals with a landowner's ability to dam, obstruct, or alter a streambed.

2. Opinion to the Honorable Tim Tedder, State Representative, 101st District, Att'y Gen. No. 2000-51, 2000 Kan. AG LEXIS 64 (Oct. 4, 2000) (opining that “the bed and banks, up to the line to which water rises in time of ordinary high water, are public property that can be used by the public for lawful or non-destructive recreational purposes”).

3. Navigability in fact can be simply defined as whether a river had the capacity for commercial navigability at the time of statehood. See *Webb v. Neosho Cnty. Comm'rs*, 124 Kan. 38, 257 P. 966 (1927) (holding the Neosho River nonnavigable). The *Webb* Court adopted the following more detailed definition: “Navigability in fact is the test of navigability in law, and that whether a river is navigable in fact is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” 124 Kan. at 40 (quoting *Oklahoma v. Texas*, 258 U.S. 574, 586, 66 L. Ed. 771, 42 S. Ct. 406 (1922)). For a helpful overview of the state test of navigability see James B. Wadley, *Recreational Use of Nonnavigable Waterways*, 56 J. KAN. BAR ASS'N 9, 28-29 (1987).

4. *State ex rel. v. Akers*, 92 Kan. 169, 140 P. 637 (1914); *Dana v. Hurst*, 86 Kan. 947, 964, 122 P. 1041 (1912); *Wood*, 26 Kan. at 682; see also K.A.R. 5-40-1(kk).

5. See, e.g., *Gibbons v. Ogden*, 22 U.S. 1, 6 L. Ed. 23 (1824); *The Daniel Ball*, 77 U.S. 557, 19 L. Ed. 999 (1870); see also U.S. CONST. art. I, § 8, cl. 3.

6. See, e.g., *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (failing to garner majority for continuous surface connection test and thus leaving significant nexus test in place); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) (solidifying significant nexus test); *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L. Ed. 2d 419 (1985) (discussing significant nexus test). The Environmental Protection Agency and the U.S. Army Corps of Engineers are frequently seeking to expand their power to regulate the nation's waters. In fact, recently a new definition of “waters of the United States” has been proposed by the agencies for public comment that seeks ostensibly to increase the types of water subject to regulation. *Proposed Definition of Waters of the United States*, Docket No. EPA-HQ-OW-2011-0880 (Dec. 5, 2014), http://www2.epa.gov/sites/production/files/2014-06/documents/proposed_regulatory_wus_text_40cfr230_0.pdf.

7. Perhaps the most common federal statute applying to navigable waterways deals with section 404 permits under the Clean Water Act. See 40

C.F.R. 230.1 (2014) *et seq.* The purpose of those permits is to control the discharge of dredge or fill materials into waters of the United States. See *id.* Another federal law pertains to obstructions and structures in navigable waters under the Rivers & Harbors Act of 1899, which gives the Army Corps of Engineers authority to require Section 10 permits to place structures or conduct other operations below the ordinary high water elevation of navigable waters. See 33 U.S.C. 401 (2014) *et seq.*

8. For an excellent overview of jurisprudence involving navigability for purposes of federal regulatory power under the Commerce Clause, see Robert W. Adler, *The Ancient Mariner of Constitutional Law: The Historical, Yet Declining Role of Navigability*, 90 WASH. U. L. REV. 1643 (2013).

9. *State ex rel. Meek v. Hays*, 246 Kan. 99, 785 P.2d 1356 (1990). When the stream serves as the border between two properties, the riparian owner of the property on each respective side owns the bed up to the middle of the stream. See *id.* *Hays* was a case involving a canoeing business operating on the Shoal Creek in Cherokee County. *Id.* at 100, 108-09. Canoeists complained after a landowner constructed barbed wire across the stream, which prevented them from further canoeing downstream. *Id.* at 100. The court utilized the navigability-in-fact test and determined that the stream was nonnavigable. *Id.* at 101-03. Significantly, however, the court left open the possibility of the legislature adopting the public trust doctrine which could conceivably allow the legislature to designate nonnavigable streams for public recreational use. *Id.* at 111; accord Wadley, *supra* note 3, at 30 (noting that the state could open up nonnavigable waters to recreational use). In addition to the Neosho River and Shoal Creek, the Kansas Supreme Court has declared the Delaware and Smoky Hill Rivers to be nonnavigable. *Piazzek v. Drainage Dist.*, 119 Kan. 119, Syl. § 2, 237 P. 1059 (1925); *Kregar v. Fogarty*, 78 Kan. 541, Syl. § 3, 96 P. 845 (1908).

10. See *Meek*, 246 Kan. at 111.

11. For the purposes of this article, “riparian” shall refer to the interface between land and a stream. See *Dawson v. Akers*, 92 Kan. 169, 140 P. 637 (1914).

12. Kansas has authority to regulate streams under its “police power” conferred pursuant to the 10th Amendment of the U.S. Constitution. See *Williams v. City of Wichita*, 190 Kan. 317, 340, 374 P.2d 578 (1962).

13. K.S.A. 82a-301a.

14. See James B. Wadley, *Diffused Surface Water*, 6-50 THOMPSON ON REAL PROPERTY § 50.20 (Thomas ed., 2011).

15. See *Dougan v. Rossville Drainage Dist.*, 243 Kan. 315, 757 P.2d 272 (1988); *Clawson v. Garrison*, 3 Kan. App. 2d 188, 592 P.2d 117 (1979). The definition of diffused surface water is actually quite broad and may include “water from rain, melting snow, springs or seepage, or detached from subsiding floods, that lies or flows on the surface of the earth but does not form a part of a watercourse or lake.” RESTATEMENT (SECOND) OF TORTS § 846 (2011).

16. Cf. K.S.A. 82a-702 (“All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein provided.”).

17. Different rules apply depending on whether the watercourse is located in a rural or an urban area. In cities, the so-called “common enemy” rule applies where landowners can freely cast unwanted water onto their neighbor’s property so long as such actions do not alter the natural drainage pattern. *Williamson v. City of Hays*, 275 Kan. 300, 64 P.3d 364 (2003); *Baldwin v. The City of Overland Park*, 205 Kan. 1, 468 P.2d 168 (1970). For agricultural land and highways located outside of incorporated cities the so-called “civil law” rule has been adopted where landowners “may not divert their surface waters by artificial means onto the lands of lower proprietors nor accelerate by means of ditches or increase the drainage of their lands to the injury of lower owners.” *Clawson*, 3 Kan. App. 2d at 203; see also K.S.A. 24-105.

18. For further discussion of the Kansas approach to diffused surface water, see Robert W. Coykendall, *Too Much of a Good Thing: Kansas Law on Unwanted Water*, 66 J. KAN. BAR ASS’N 24, 25 (1997); Thomas A. Adrian & David J. Stucky, *Litigating the Myriad of Harms Caused by Diffused Surface Water*, 35 J. KAN. ASS’N JUSTICE 5, 6 (May 2012).

19. <http://www.merriam-webster.com/dictionary/stream>.

20. http://www.oxforddictionaries.com/us/definition/american_english/stream.

21. <http://www.merriam-webster.com/dictionary/watercourse>.

22. http://www.oxforddictionaries.com/us/definition/american_english/watercourse.

23. 1929 Kan. Sess. Laws, ch. 203, § 1, codified at K.S.A. 82a-301.

24. K.A.R. 5-40-1 (1987).

25. 40 Kan. App. 2d 1024 (Ct. App. 2008).

26. *Id.* at 1026.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* In addition to notifying the agency, a neighboring landowner harmed by the obstruction of a stream could potentially have filed a lawsuit under a number of common law theories including negligence, nuisance, trespass, inverse condemnation, and actions for injunctive relief. See Coykendall, *supra* note 18 (providing a discussion of those more common causes of action).

31. *Id.*

32. *Id.* at 1028.

33. See *id.*

34. *Id.* at 1029. The court indicated that because the statute did not define a stream, it could look to a regulation. *Id.* As noted by the court, the agency was free to adopt regulations to “administer and enforce” the stream obstruction statute, as provided in K.S.A. 82a-303a. *Id.* at 1028-29.

35. *Id.* at 1029. Note that this definition is now K.A.R. 5-40-1(zz). DWR defines a “watershed” as “the area draining toward a selected point on a stream.” K.A.R. 5-40-1(ddd).

36. K.A.R. 5-40-1(k) (2008). There was no dispute among the parties that the watershed requirement was clearly met in the case. 40 Kan. App. 2d at 1029.

37. K.A.R. 5-40-1(k) (2008).

38. *Id.*

39. *Id.*

40. 40 Kan. App. 2d at 1034. The DWR even conceded that “because of human activity . . . no distinct stream channel was visible” on Frank’s land or a mile upstream “since at least 1991.” *Id.* at 1030.

41. *Id.* at 1029. Frank contended that the caveat forcing a landowner to prove the absence of a stream “all the way back to 1929” was a “phantom requirement.” *Id.* The court countered that inserting a temporal limitation actually benefited a landowner. *Id.* at 1030.

42. *Id.* at 1033. The chief engineer also produced calculations that showed that the watercourse drained an area of 4,165 acres and that peak flow in a 100-year storm would be 1,600 cubic-feet-per-second, which was all consistent with the design capacity of the bridge constructed by Kansas Department of Transportation. *Id.* at 1030.

43. *Id.* at 1032.

44. *Id.* at 1032-33. The court noted that the chief engineer’s definition of a watercourse roughly paralleled the early Kansas case of *Wood v. Brown*,

98 Kan. 597, 599, 159 P. 396 (1916), which had indicated that a watercourse required “an eroded channel with clearly distinguishable bed and banks.” *Id.* at 1032. The court further concluded that the broad definition was consistent with the statutory purpose of protecting public safety. *Id.* at 1033. Finally, the court noted that the “legislature prohibited stream obstructions from 1929 forward” and that the presumption only applied to “watersheds of substantial acreage.” *Id.* at 1033.

45. *Id.* at 1033. Other recent cases involving the DWR, however, have created a reason to question the extent to which deference will be afforded to the agency’s decisions. See, e.g., *Clawson v. State*, 49 Kan. App. 2d 789, 315 P.3d 896 (2013); *Wheatland Elec. Coop. Inc. v. Polansky*, 46 Kan. App. 2d 746, 265 P.3d 1194 (2011).

46. *Id.* at 1031; see also K.S.A. 77-621. The court concluded that the agency employed special knowledge and training in reaching its conclusion and also noted that K.S.A. 74-506d cloaked the agency with the power to use its expertise in arriving at such decisions. *Id.*

47. It remains to be seen, for example, whether routine farming activities under the right circumstances could constitute a water obstruction.

48. See *id.* at 1033-34.

49. *Id.* at 1033 (emphasis added). The opinion at least invites the question of whether the presumption applies where no neighboring landowner is harmed. Indeed, a central tenet of water and property law is that “thou shall not anger thy neighbor.” See Tyler A. Darnell, *Attention Kansas Water Right Holders: Be Nice to Your Neighbors, They’re Policing Your Water Rights*, 46 WASHBURN L.J. 429 (Winter 2007).

50. *Frank*, 40 Kan. App. 2d at 1033.

51. K.S.A. 82a-301.

52. *Id.*

53. *Id.* The geographic requirements under the statute are three or more square miles in Western Kansas, two or more square miles in Central Kansas, and one or more square miles in Eastern Kansas. *Id.*

54. *Id.* This approach is likely in response to a Kansas Supreme Court case that held that a man-made structure can become part of the natural watercourse over time. See *Johnson v. Bd. of Cnty. Commr’s*, 21 Kan. App. 2d 76, 897 P.2d 169 (1995) (determining that after 62 years, configuration of a stream, as altered by construction of a bridge, would be considered a natural watercourse). Additionally, there is no definition of a “channel” contained either in the statute or in the agency regulations.

55. *Id.*

56. See K.A.R. 5-40-1(zz). The DWR definitions also define a “perennial stream” as “a stream, or part of a stream, that flows continuously during all the calendar year, except during an extreme drought.” *Id.* at 5-40-1(nn). The definition of a perennial stream has significance in regulations that deal with channel changes, stream obstructions, levees, and the disposal of waste. See K.A.R. 5-41-1, 5-42-1, 5-45-1, 5-45-2, 28-29-1602, 28-29-1604.

57. K.S.A. 82a-301.

58. *Id.* The statute goes on to indicate that its purpose serves to protect “life and property.” *Id.*

59. K.S.A. 82a-303a. The immense discretion of the chief engineer in administering and adopting regulations is exemplified by K.A.R. 5-40-6 which allows the chief engineer both to waive the requirements of the streambed regulations and to impose stricter requirements than the promulgated regulations. K.A.R. 5-40-6; accord K.S.A. 82a-303 (allowing the chief engineer to withhold consent or to attach conditions and restrictions to permit); but see *Clawson*, 49 Kan. App. 2d at 789 (limiting the restrictions the chief engineer can impose when approving a water right).

60. See, e.g., notes 14-17 and accompanying text, *supra*.

61. An example of a statute that may have unequal import in a rural versus an urban area is a county’s ability to clean out debris from a stream upon the petition of at least 50 taxpayers of the county. K.S.A. 82a-307 (2013). The legislature significantly revised that section to restrict a county from entering onto private land without written permission from the landowner. Compare K.S.A. 82a-307 (2013) with K.S.A. 2012 Supp. 82a-307.

62. K.S.A. 82a-303c.

63. K.S.A. 82a-305a(b).

64. This is a class C misdemeanor. *Id.* at 82a-305a(a).

65. The changes went into effect July 1, 2013.

66. This is measured as the “vertical distance . . . from the bed of the stream . . . to the lowest elevation on the top of the dam or barrier.” K.A.R. 5-40-5a.

67. K.S.A. 82a-301(b)(1); *see also* K.A.R. 5-40-5a (defining height of dam). Although there are subtle changes, overall the new definition of a dam is more concise and straightforward than the old definition. *Compare* K.S.A. 82a-301(b)(1)(2013) *with* K.S.A. 2012 Supp. 82a-301(b)(1).

68. K.S.A. 82a-301.

69. *See, e.g.*, K.S.A. 82a-303b; K.A.R. 5-40-76, 5-40-93. An exception to this rule exists in cases in which an easement authorizes another person or entity to construct or maintain the dam. K.A.R. 5-40-1(mm).

70. K.S.A. 82a-302(a). For a more detailed explanation of the maps and documentation that must accompany an application to construct a dam, *see* K.A.R. 5-40-2; 5-40-2a; 5-40-2b; 5-40-3; *see also* K.A.R. 5-40-8 (detailing the requirements of an acceptable application). The type of application form depends on the nature of the project; for example, Form 2-100 applies if the project relates solely to a dam or stream obstruction, and Form 6-102 is a joint application for a stream obstruction and the appropriation of water.

71. *Id.* at 82a-302(b)(1).

72. *See id.* at 82a-301(a). The old statute allowed the applicant to pick from a list of licensed engineers approved by the chief engineer. *Compare* K.S.A. 82a-301 (2013) *with* K.S.A. 2012 Supp. 82a-301. If an approved engineer determined that the application met established standards a presumption was created in favor of approval by the chief engineer. *Compare* K.S.A. 82a-301 (2013) *with* K.S.A. 2012 Supp. 82a-301. Despite that modification, “a licensed professional engineer who is competent in the design and construction of dams” must still design the dam. K.A.R. 5-40-4. Even if the regulations did not make the use of a licensed engineer a necessary condition for construction of a dam, the design requirements are highly technical and highlight the importance of involving a competent engineer in the project. *See, e.g.*, K.A.R. 5-40-22 (explaining the design requirements); 5-40-23 (involving detention storage); 5-40-24 (mandating a dam breach analysis); K.A.R. 5-40-40 (requiring a geotechnical investigation); 5-40-44 (specifications for embankment); 5-40-50 (rules governing pipes through an embankment); and 5-40-51 (requiring a trash rack for the primary spillway). The project engineer must also coordinate the construction closely with the chief engineer of DWR. *See* K.A.R. 5-40-70.

73. *See* notes 77-80 and accompanying text, *infra*. Another example of an exception concerns “prejurisdictional dams.” Prejurisdictional dams constructed before the adoption of the statutes or regulations are not retroactively subject to the design requirements; however, upon repair or modification, prejurisdictional dams may also be subject to those rules. *See* K.A.R. 5-40-1(rr) (defining a prejurisdictional dam); 5-40-76 (requiring compliance upon repair or modification unless “not feasible or . . . unduly burdensome” or chief engineer determines that the lack of compliance does not impact public safety). Another exception exists where the landowner obtains approval to comply with the requirements of the federal agricultural conservation program and not the provisions of K.S.A. 82a-301 through 305. *See* K.S.A. 82a-312.

74. K.A.R. 5-40-1(aaa).

75. K.S.A. 82a-302(b)(2). The applicable fees are as follows: \$100 for watersheds of less than 5 square miles, \$200 for watersheds between 5 and 50 square miles and \$500 for watersheds greater than 50 square miles. *Id.*

76. This requirement is spelled out in K.A.R. 5-42-1. The applicant must provide maps detailing the nature of the obstruction, a detailed plan, topographical information, an elevation view, a permanent benchmark, proposed easements, or right-of-ways if other land is impacted, and many other details.

77. 82a-301(c)(1)(A). Examples of obstructions that may fall under the exemption are a pipeline or a low water crossing.

78. 82a-301(c)(1)(B). Under the old rule, the watershed size exempted was a mere one square mile. *Compare* K.S.A. 82a-301 (2013) *with* K.S.A. 2012 Supp. 82a-301. Free of charge, a landowner can ask for a determination by the DWR regarding whether a sizable enough watershed exists to require a permit. Federal floodplain and other permits may also be required as discussed in notes 87-91 and accompanying text, *infra*.

79. The low hazard dam exemption applies to the construction or modification of a Hazard Class A dam that has a height of 30 feet or less and a storage volume of less than 125 acre-feet. K.S.A. 82a-301(d)(1). The feedlot structure exemption applies when a landowner modifies or constructs a Hazard Class A dam used for wastewater storage in a confined animal feeding operation approved by the Kansas Department of Health and En-

vironment (KDHE). K.S.A. 82a-301(d)(2). The hazard classification of a dam refers to the extent to which the failure of the dam would result in damage to property or pose a danger to people. K.A.R. 5-40-1(k). The failure of a Hazard Class C dam represents the highest level of hazard whereas the malfunction of a Hazard Class A dam would impact only uninhabited buildings and agricultural or undeveloped land. *See* K.A.R. 5-40-20; *see also* K.A.R. 5-40-1 (defining class sizes of dams).

80. K.A.R. 5-42-4. Among other requirements, to qualify as “temporary” the regulation dictates that the landowner must use “temporary materials” (such as straw or plywood) to construct the structure and must only perform minor and necessary alterations to the stream. *See id.* In addition, the water backed up by the obstruction must be contained upon the landowner’s property and must be for a temporary beneficial use. *See id.* Notably, the regulation does not define what constitutes a “temporary beneficial use.” *See id.*

81. K.S.A. 82a-301.

82. *Compare* K.S.A. 82a-301 *with* K.S.A. 2012 Supp. 82a-301.

83. *Id.* “After-the-fact” fees remain in place for levee and floodplain fill projects commenced prior to approval of a permit. *Id.*

84. *See* K.S.A. 82a-301. For a review of the regulations specifically applicable to channel changes, *see* K.A.R. 5-41-1 through 5-41-6. The permitting process under section 301 must also be followed if a landowner desires to remove sand or gravel from the bed or banks of a designated stream. K.S.A. 82a-301. For the regulations specific to sand dredging and removal *see* K.A.R. 5-43-1 through 5-43-5, and 5-46-3; *see also* K.S.A. 82a-309 (applicable if the activity concerns beds owned by the state).

85. *See* K.S.A. 82a-302(b)(3).

86. Although DWR currently offers general permits for bridge and culvert replacement projects and small aggregate removal operations, it promises to define general permit options through regulations in the future. *See* K.A.R. 5-46-1, 5-46-4; K.S.A. 82a-302(a).

87. K.S.A. 24-126. A floodplain may also be designated by a federal flood insurance rate map. *Id.* The appropriate permit is Form 3-100.

88. For example, Frank originally obtained an appropriation permit to construct a pond. *Frank*, 40 Kan. App. 2d at 1025. An appropriation permit is required if the water is being impounded for a consumptive or a nonconsumptive use such as for irrigation or recreational purposes. *See* K.S.A. 82a-707 (2013); K.S.A. 82a-705 (2013); K.S.A. 82a-708a (2013). A discussion of the prior appropriation doctrine is beyond the scope of this article. For an excellent overview of the prior appropriation doctrine in Kansas, *see* John C. Peck, *The Kansas Water Appropriation Act: A Fifty-Year Perspective*, 43 U. KAN. L. REV. 735 (1995).

89. *See* K.A.R. 28-16-28c (2014). The Kansas Department of Wildlife and Tourism may also require an Endangered Species Permit. *See* K.S.A. 82a-326. During the permitting process under K.S.A. 82a-301, a variety of additional agencies may be notified by the chief engineer to consider the “environmental effects” of the project. *See id.*; K.S.A. 82a-327. The chief engineer then “shall consider their comments in determining whether to approve or issue a permit for such project.” K.S.A. 82a-327.

90. As noted above, the rules governing what constitutes a navigable stream subject to federal regulation are difficult to apply conclusively. *See* notes 5-8 and accompanying text, *supra*. Consequently, a gray area exists between state and federal regulation. Where such jurisdiction potentially overlaps, a landowner may be wise to obtain both state and federal permits. Any landowner wishing to alter a stream should contact the local branch of the Natural Resources Conservation Service (NRCS). The NRCS can aid in determining the types of permits required for a given project. Additionally, the failure to involve the NRCS in a project could jeopardize payments stemming from federal crop insurance or federal farm subsidies. In certain instances there may even be subsidies available for the project—for example, if the landowner enhances a nature area. The NRCS can aid in that determination as well.

91. Examples of local permits include zoning and construction permits issued by county authorities. Although the NRCS has local county branches, as noted above, the NRCS makes broad initial determinations of the types of permits required, including whether Army Corps of Engineers jurisdiction may apply.