

Kansas Moratorium Report on Regulation Changes 2021

Kansas Water Appropriation Act

K.S.A. 82a-736. Multi-year flex accounts; term permits. (a) It is hereby recognized that an opportunity exists to improve water management by enabling multi-year flexibility in the use of water authorized to be diverted under a groundwater water right, provided, that such flexibility neither impairs existing water rights, nor increases the total amount of water diverted, so that such flexibility has no long-term negative effect on the source of supply. It is therefore declared necessary and advisable to permit the establishment of multiyear flex accounts for groundwater water rights, together with commensurate protections for existing water rights and their source of supply.

(b) As used in this section:

(1) "Alternative base average usage" means an allocation based on net irrigation requirements calculated pursuant to subsection (c)(1) (D)(ii) that may be used in place of the base average usage.

(2) "Base water right" means a water right under which an applicant applies to the chief engineer to establish a multi-year flex account and where all of the following conditions exist:

(A) The authorized source of supply is groundwater; and

(B) the water right is not currently the subject of a multiyear allocation due to a change approval that allows an expansion of the authorized place of use.

(3) "Multi-year flex account" means a term permit that suspends a base water right during its term, except when the term permit may be no longer exercised because of an order of the chief engineer, and is subject to the terms and conditions as provided in subsection (e).

(4) "Base average usage" means: (A) The average amount of water actually diverted for the authorized beneficial use under the base water right during calendar years 2000 through 2009, excluding:

(i) Any amount diverted in any such year that exceeded the amount authorized by the base water right;

(ii) any amount applied to an unauthorized place of use; and

(iii) diversions in calendar years when water was diverted under a multi-year allocation with an expansion of the authorized place of use due to a change approval;

(B) if water use records are inadequate to accurately determine actual water use or upon demonstration of good cause by the applicant, the chief engineer may calculate the base average usage with less than all 10 calendar years during 2000 and 2009. In no case shall the base average usage be calculated with less than five calendar years during 2000 and 2009; or

(C) if the holder of the base water right shows to the satisfaction of the chief engineer that water conservation reduced water use under the base water right during calendar years 2000 through 2009, then the base average usage shall be calculated with the five calendar years immediately before the calendar year when water conservation began.

(5) "Chief engineer" means the chief engineer of the division of water resources of the department of agriculture.

(6) "Flex account acreage" means the maximum number of acres lawfully irrigated during a calendar year, except for any acres irrigated under a multi-year allocation that allowed for an expansion of the authorized place of use due to a change approval and any of the following conditions are met:

(A) The calendar year is 2000 through 2009;

(B) if water conservation reduced water use under the base water right during calendar years 2000 through 2009, the calendar year is a year within the five calendar years immediately prior to the calendar year when water conservation began; or

(C) if an application to appropriate water was approved after December 31, 2004, the calendar year is any during the perfection period.

(7) "Net irrigation requirement" means the net irrigation requirement for 50% chance rainfall of the county that corresponds with the location of the authorized place of use of the base water right as provided in K.A.R. 5-5-12, on the effective date of this act.

(c)(1) Any holder of a base water right that has not been deposited or placed in a safe deposit account in a chartered water bank may establish a multi-year flex account where the holder may deposit, in advance, the authorized quantity of water from such water right for any five consecutive calendar years, except when the chief engineer determines a shorter period is necessary for compliance with a local enhanced management area or an intensive groundwater use control area and the corrective controls in the area do not prohibit the use of multi-year flex accounts, and subject to all of the following:

(A) The water right must be vested or shall have been issued a certificate of appropriation;

(B) the withdrawal of water pursuant to the water right shall be properly and adequately metered;

(C) the water right is not deemed abandoned and is in compliance with the terms and conditions of its certificate of appropriation, all applicable provisions of law and orders of the chief engineer;

(D) the amount of water deposited in the multi-year flex account shall not exceed the greatest of the following:

(i) 500% of the base average usage;

(ii) 500% of the product of the annual net irrigation requirement multiplied by the flex account acreage, multiplied by 110%, but not greater than five times the maximum annual quantity authorized by the base water right;

(iii) if the authorized place of use is located wholly within the boundaries of a groundwater management district, an amount that shall not increase the long-term average use of the groundwater right as specified by rule or regulation promulgated pursuant to K.S.A. 82a1028(o), and amendments thereto; or

(iv) pursuant to subparagraph (F), the amount computed in (i), (ii) or (iii) plus any deposited water remaining in a multi-year flex account up to 100% of the base average usage or alternative base average usage;

(E) if the multi-year flex account is approved for less than five calendar years, the amount of water deposited in the multi-year flex account shall be prorated based on the number of calendar years approved and otherwise calculated as required by subsection (c)(1)(D) (i), (ii) or (iii); and

(F) any deposited water remaining in a multi-year flex account up to 100% of the base average usage or alternative base average usage may be added to the deposit amount calculated in subparagraph (D) if the base water right is enrolled in another multi-year flex account during the calendar year in which the existing multi-year flex account expires. The total amount of water deposited in any multi-year flex account shall not exceed 500% of the authorized quantity of the base water right;

(2) The provisions of K.A.R. 5-5-11 are limited to changes in annual authorized quantity and shall not apply to this subsection.

(d) The chief engineer shall implement a program providing for the issuance of term permits to holders of groundwater water rights who have established flex accounts in accordance with this section. Such term permits shall authorize the use of water in a flex account at any time during the consecutive calendar years for which the application for the term permit authorizing a multi-year flex account is made, without annual limits on such use.

(e) Term permits provided for by this section shall be subject to the following:

(1) A separate term permit shall be required for each point of diversion authorized by the base water right.

(2) The quantity of water authorized for diversion shall be limited to the amount deposited pursuant to subsection (c)(1)(D).

(3) The rate of diversion for each point of diversion authorized under the term permit shall not exceed the rate of diversion for each point of diversion authorized under the base water right.

(4) The authorized place of use shall be the place of use or a subdivision of the place of use for the base water right. Any approval of an application to change the place of use of the base water right shall automatically result in a change to the place of use for the term permit.

(5) The point of diversion authorized by the term permit shall be specified by referencing one point of diversion authorized by the base water right at the time the multi-year flex account term permit application is filed with the chief engineer or at the time any approvals changing such referenced point of diversion of the base water right are approved during the multi-year flex account period. For a base water right with multiple points of diversion, each point of diversion authorized by a term permit shall receive a specific assignment of a maximum authorized quantity of water, assigned proportionately to the authorized annual quantities of the respective points of diversion under the base water right.

(6) The chief engineer may establish, by rules and regulations, criteria for such term permits.

(7) Except as explicitly provided for by this section, such term permits shall be subject to all provisions of the Kansas water appropriation act, and rules and regulations adopted under such act, and nothing in this section shall authorize impairment of any vested right or prior appropriation right by the exercise of such term permit.

(f) An application for a multi-year flex account shall be filed with the chief engineer on or before December 31 of the first year of the multi-year flex account term for which the application is being made.

(g) All costs of administration of this section shall be paid from fees for term permits provided for by this section. Any appropriation or transfer from any fund other than the water appropriation certification fund for the purpose of paying such costs shall be repaid to the fund from where such appropriation or transfer is made. At the time of repayment, the secretary of agriculture shall certify to the director of accounts and reports the amount to be repaid and the fund to be repaid. Upon receipt of such certification, the director of accounts and reports shall promptly transfer the amount certified to the specified fund.

(h) The fee for a multi-year flex account term permit shall be the same as specified for other term permits in K.S.A. 82a-708c, and amendments thereto.

(i) The chief engineer shall have full authority pursuant to K.S.A. 82a-706c, and amendments thereto, to require any additional measuring devices and any additional reporting of water use for term permits issued pursuant to this section. Failure to comply with any measuring or reporting requirement may result in a penalty, up to and including the revocation of the term permit and the suspension of the base water right for the duration of the term permit period.

(j) The chief engineer shall submit a written report on the implementation of this section to the house standing committee on agriculture and natural resources and the senate standing committee on natural resources on or before February 1 of each year.

(k) This section shall be part of and supplemental to the Kansas water appropriation act.

History: L. 2001, ch. 160, § 16; L. 2005, ch. 142, § 3; L. 2011, ch. 89, § 28; L. 2012, ch. 7, § 1; L. 2015, ch. 60, § 3; L. 2016, ch. 23 § 2; L. 2018, ch. 21, § 1; July 1; as amended by 2021 HB 2172, sec. 1; **effective July 1, 2021.**

Article 19 – Local Enhanced Management Areas

K.A.R. 5-19-1. Definitions. Each of the following terms, as used in this article of the division's regulations, shall have the meaning specified in this regulation: (a) "GMD" means a groundwater management district established pursuant to K.S.A. 82a-1020 et seq., and amendments thereto. (b) "LEMA" means a local enhanced management area pursuant to K.S.A. 82a-1041, and amendments thereto. (c) "LEMA plan" means the document adopted by a groundwater management district that specifies the basis for the designation and operation of a local enhanced management area. (d) "Presiding officer" means either the chief engineer or a hearing officer appointed for the purpose of conducting public hearings regarding a local enhanced management area pursuant to K.S.A. 82a-1041, and amendments thereto. (Authorized by K.S.A. 82a-1041; implementing K.S.A. 74-510a and K.S.A. 82a-1041; **effective Dec. 27, 2021.**)

K.A.R. 5-19-2. LEMA plans. (a) Before a GMD's board of directors recommends formal approval of a LEMA plan and submission to the chief engineer for review, the GMD's board of directors or staff may request the division to assist in the development of the LEMA plan or to informally review the LEMA plan. (b) In addition to the requirements for LEMA plans specified in K.S.A. 82a-1041 and amendments thereto, each GMD that recommends approval of a LEMA plan and formally submits the LEMA plan to the chief engineer shall ensure that the LEMA plan includes the following:

(1) Each condition specified in K.S.A. 82a-1036(a) through (d), and amendments thereto, that the LEMA plan is intended to address; (2) a statement of each goal that the LEMA plan is intended to achieve; (3) documentation that quantifies how any corrective controls that establish allocations, cuts, or limitations to water use would affect each individual water right within the proposed boundaries; (4) an appropriate appeals procedure for water right owners based on the corrective controls implemented; (5) an executive summary of the proposed goals and corrective controls; (6) documentation, evidence, or other information indicating that the proposed corrective controls will meet each stated goal of the proposed LEMA plan; (7) a description of how the boundary of the proposed LEMA was determined; (8) a description of how due consideration was given to water users who already have implemented reductions in water use resulting in voluntary conservation measures if the corrective controls result in any allocations, reductions, or limitations of water rights that are based on past use. If applicable, the description shall include the following: (A) An explanation of the criteria or methods used to address voluntary water management or conservation that reduced water usage; and (B) a requirement that any owner or holder of a water right provide documentation of any voluntary conservation that resulted in the use of less water; (9) if applicable to the LEMA plan, specification of how past reductions in water use resulting in voluntary conservation will be considered in any appeal process provided; and (10) if a stated goal of the LEMA plan is to address an impairment or there are known cases of direct impairment within the LEMA, an explanation of how each impairment is legally addressed. (c) A separate memorandum containing a summary of the public outreach conducted by the GMD before recommending the LEMA plan for approval shall be submitted simultaneously with the LEMA plan and shall include a description of any changes made to the LEMA plan due to any public comments. (d) If the stated goal of a LEMA plan is to improve water quality, the GMD's board of directors or staff may consult with the chief engineer before formal submission of the proposed LEMA plan to determine which requirements in subsections (b) and (c) are applicable and to determine any other information necessary in order for the chief engineer to perform a review of the LEMA plan. (Authorized by and implementing K.S.A. 82a-1041; effective Dec. 27, 2021.)

K.A.R. 5-19-3. Public hearings. (a) If the chief engineer initiates proceedings to designate a LEMA, the chief engineer may preside over any public hearings or may designate a presiding officer. (b) If, following the initial hearing, the presiding officer determines that the proposed LEMA plan meets the initial requirements in K.S.A. 82a-1041 and amendments thereto, then a second hearing or hearings on the elements of the proposed LEMA plan shall be held. Each subsequent hearing shall include consideration of the LEMA plan's corrective controls, the likelihood that the LEMA plan will achieve the stated goals, and any other matters deemed necessary by the presiding officer. (c) If a presiding officer is appointed to conduct a subsequent hearing as described in subsection (b), the presiding officer for the subsequent hearing shall be authorized only to make

recommendations to the chief engineer and shall not have the authority to issue an order of decision or an order of designation. (d)(1) Before any public hearing, the presiding officer shall hold a prehearing conference, with at least 15 days of notice, to select a date for the public hearing, specify the procedures to be followed at the public hearing, set any deadlines, and consider any other matters necessary for conducting the public hearing. The presiding officer may establish any procedural rules that are deemed necessary or expedient for the conduct of the public hearing, including holding formal and informal phases of testimony, rules for discovery, and cross-examination of witnesses. (2) Following the prehearing conference, the presiding officer shall issue a prehearing order that specifies the formal parties designated pursuant to paragraph (d)(1) if requested, all procedures to be followed during the public hearing, all deadlines, and any other matters necessary for conducting the public hearing. (e) If formal and informal phases of testimony are held, the GMD that proposed the LEMA and the division shall be considered formal parties at the public hearing. Each other person or entity that wishes to be designated as a formal party shall file a timely request with the presiding officer. The presiding officer shall have discretion to approve or deny any request based upon the effect that the proposed LEMA would have on that person or entity or the timeliness of the person's or entity's request. (f) Each GMD proposing a LEMA plan shall be required to prove that the LEMA plan meets the requirements of K.S.A. 82a-1041, and amendments thereto, and that the corrective controls are sufficient to meet the stated goals. The GMD's representative shall call witnesses or testify first, followed by the division, and then by any other formal parties, unless the presiding officer determines that another order of testimony will better facilitate the proceedings. The division may proffer its record along with providing testimony or in lieu of providing testimony. (g) In all hearings, the presiding officer shall make any rulings regarding procedure and evidence that are necessary to provide all interested persons and entities with a reasonable opportunity to be heard and present evidence into the record, whether the persons or entities are admitted as formal parties or not. The presiding officer shall not be bound by the formal rules of evidence or by any rules of civil procedure. In each case, all testimony received during the hearing or admitted as evidence during the hearing shall be taken under oath or affirmation, and a reasonable opportunity after the hearing shall be provided for the submission of written testimony and comments. (h) During each hearing for the renewal of a LEMA plan that proposes adoption of a LEMA plan substantially similar to the LEMA plan that was previously adopted, the hearing schedule and requirements may be consolidated and simplified if notice of the consolidation or simplification is provided in the public notice required by K.S.A. 82a-1041 and amendments thereto, the proposing GMD does not object, and all parties are given a reasonable opportunity to be heard. (i) The GMD and other parties shall not be required to pay any costs related to the presiding officer, hearing location, court reporter, and published notice or any other costs related to hosting a public hearing that may be approved by the chief engineer, except that the GMD may assist in organizing the hearing and may contribute funds to cover part or all of any costs incurred by the division. (j) The presiding officer may conduct any public hearing by using a medium for interactive communication that meets the requirements of the Kansas open meetings act, K.S.A.

75-4317 et seq. and amendments thereto, if requested or approved by the GMD. The presiding officer may hold any prehearing, scheduling, or other conference by using a medium for interactive communication at the presiding officer's sole discretion. (Authorized by K.S.A. 82a-706a and K.S.A. 82a-1041; implementing K.S.A. 74-510a and K.S.A. 82a-1041; effective Dec. 27, 2021.)

K.A.R. 5-19-4. Due consideration for past voluntary water conservation. (a) Each past reduction in water use that has resulted in voluntary water conservation implemented during any period upon which a LEMA plan's corrective controls are based shall be given due consideration by the GMD's board of directors or staff in determining allocations or eligible acres under a LEMA plan if the allocations or eligible acres are based on past use. (b) If the GMD's board of directors or staff determines that water use has already been voluntarily reduced through management or conservation practices, the allocation or eligible acres under the LEMA plan or the average used to determine individual allocations and eligible acres may be adjusted based on the amount of water conserved for each year that the conservation measure was in place. (c) The GMD's board of directors or staff, in consultation with the chief engineer, may develop or apply any other criteria or methods to determine reductions in water use that resulted in voluntary conservation that are suitable to local conditions under the LEMA plan. (Authorized by and implementing K.S.A. 82a-1041; effective Dec. 27, 2021.)

K.A.R. 5-19-5. Review and modification of a designated LEMA. (a) Once a LEMA has been designated by the chief engineer, the corrective controls in the LEMA plan shall remain in place until the LEMA expires pursuant to the terms of the LEMA plan or until the LEMA plan is changed. (1) A GMD's board of directors or staff may request assistance in developing changes or informally reviewing any proposed changes to a LEMA plan before recommending adoption of the changes and submitting the changes to the chief engineer for consideration. (2) In order to change an existing LEMA plan, each proposed change shall first be adopted by resolution of the GMD and then sent to the chief engineer for a public hearing. (3) If the chief engineer determines that the proposed changes should be made part of the LEMA plan based on the findings at a public hearing, an order amending the LEMA plan shall be issued. However, no amendments may be retroactively applied in a way that requires greater reductions in water use than were required by the existing LEMA plan. (b) If any proposed changes result from a formal review of the LEMA plan pursuant to K.S.A. 82a-1041 and amendments thereto or as required by the LEMA plan, the proposed changes with the chief engineer's findings shall be sent to the GMD's board of directors following the formal review hearing. The GMD's board of directors shall have 60 days to review the proposed changes and approve, reject, or amend the proposed changes. (1) If the proposed changes are approved by resolution of the GMD, the chief engineer shall issue a LEMA review order containing the chief engineer's findings and implementing the changes and amending the LEMA plan. (2) If the proposed changes are rejected by resolution of the GMD or the GMD fails to act within 60 days, the chief engineer shall issue a LEMA review order summarizing the chief engineer's findings and recommendations but without ordering any changes or amending the LEMA plan.

(3) If the proposed changes are amended by resolution of the GMD and sent back to the chief engineer, an additional public hearing to consider the amendments shall be held. The additional hearing shall allow for the submission of written comments and may be conducted by using a medium for interactive communication that meets the requirements of the Kansas open meetings act, K.S.A. 75-4317 et seq. and amendments thereto. The amendments to the proposed changes shall not be amended by the chief engineer but may only be adopted or rejected as received from the GMD. Following the public hearing on the amendment, the chief engineer shall issue an order with findings that either reject the changes or order the amendment of the LEMA plan. (c) Each hearing to consider changes in a designated LEMA and each formal review hearing shall be conducted pursuant to the hearing requirements in K.A.R. 5-19-3, unless the existing LEMA plan prescribes different or additional procedural requirements for a formal review. (d) In addition to any topics required by the LEMA plan to be reviewed, each LEMA plan formal review hearing shall, at a minimum, include review and consideration of the effectiveness of the current corrective controls to meet the LEMA plan's stated goal. This subsection shall not serve as a limitation on topics that the presiding officer may hear or that the public may present during a formal review. (Authorized by K.S.A. 82a-706a and K.S.A. 82a-1041; implementing K.S.A. 82a-1041; effective Dec. 27, 2021.)