

Kansas Moratorium Report on Regulation Changes 2013

In June and October 2013, Kansas adopted the following Kansas Administrative Regulation revisions:

K.A.R. 5-16-1. Definitions. The terms and definitions in this article shall apply to K.S.A. 82a-736, and amendments thereto, unless the context clearly requires otherwise. (a) “Subdivision or subdivisions of the place of use for the base water right” means one or more portions of the authorized place of use under the base water right that are identifiable and completely circumscribed by the boundaries of place of use for the base water right.

(b) “Water conservation” means conservation by means of actual physical changes in a water distribution system or management practices that improve water use efficiency, which shall include one or more of the following:

- (1) Conversion from flood irrigation to center pivot irrigation with a nozzle package designed to improve water use efficiency;
- (2) conversion to subsurface drip irrigation;
- (3) removal of an end gun, resulting in a significant reduction in the number of irrigated acres; or
- (4) enrollment of the base water right in the water right conservation program, the conservation reserve program, or any other multiyear water conservation program approved by the chief engineer. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 2012 Supp. 82a-736; effective Oct. 11, 2002; amended Jan. 6, 2006; amended, T-5-8-29-11, Aug. 29, 2011; amended Dec. 16, 2011; amended June 21, 2013.)

K.A.R. 5-16-2. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 2001 Supp. 82a-708a(d), as amended by L. 2002, Ch. 181, § 21; effective Oct. 11, 2002; revoked June 21, 2013.)

K.A.R. 5-16-3. Establishing a multiyear flex account. (a) A multiyear flex account shall be established by filing an application for a multiyear flex account and a term permit on a form prescribed by the chief engineer. Each application shall meet the following requirements:

- (1) Except as specified in subsection (e), a separate application shall be filed for each water right and each point of diversion for which the owner desires to establish a multiyear flex account. Each application shall be accompanied by the appropriate filing fee;
 - (2) be date-stamped showing the date the application was filed with the chief engineer;
 - (3) indicate the five consecutive calendar years that are to be designated as the multiyear flex account period; and
 - (4) indicate whether the multiyear flex account period will commence with the year in which the application is made if filed before October 1, or with the next calendar year after the calendar year in which the application is filed.
- (b) Before any application to establish a multiyear flex account and a term permit will be accepted for filing, the application shall be signed by at least one owner of the water right or an authorized agent of an owner of the water right.
- (c) Before the multiyear flex account can be established or the term permit approved, all of the water rights owners, or an authorized agent of the owners, shall verify upon oath or affirmation that the statements contained in the application are true and complete.

(d) If one or more owners refuse to sign the application or if a written request is filed by one or more of the owners to withdraw their signatures from the application before the application is approved, the application shall be dismissed.

(e) A single application to establish a multiyear flex account and apply for a term permit shall be filed in the following situations:

(1) Multiple water rights authorize the diversion of water from a single point of diversion that diverts water to an identical place of use.

(2) Multiple points of diversion are authorized by the chief engineer to divert water through a single water flowmeter before going to an identical place of use.

(f) The multiyear flex account shall not be established and the term permit to exercise the multiyear flex account shall not be valid until both have been approved by the chief engineer. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 2012 Supp. 82a-736; effective Oct. 11, 2002; amended, T-5-8-29-11, Aug. 29, 2011; amended Dec. 16, 2011; amended June 21, 2013.)

K.A.R. 5-16-4. Conditions on the term permit. (a) The place of use authorized by a term permit shall be identical to the place or places of use authorized by the base water right or rights or a subdivision or subdivisions of the place of use for the base water right.

(b) The types of use authorized by a term permit shall be limited to the types of use authorized by the base water right or rights.

(c) The rate of diversion authorized by a term permit shall not exceed the maximum instantaneous rate of diversion authorized by the base water right or rights. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 2012 Supp. 82a-736; effective Oct. 11, 2002; amended June 21, 2013.)

K.A.R. 5-16-5. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 2010 Supp. 82a-736, as amended by L. 2011, ch. 89, sec. 28; effective Oct. 11, 2002; amended Jan. 6, 2006; amended, T-5-8-29-11, Aug. 29, 2011; amended Dec. 16, 2011; revoked June 21, 2013.)

K.A.R. 5-16-6. Multiyear flex accounts and term permits. (a) The duration of the multiyear flex account and term permit shall be five consecutive calendar years.

(b) If water use records for a base water right are inadequate to accurately determine actual water use during any calendar year in the period used to determine the base average usage, then the actual water use for that calendar year shall be deemed to be zero.

(c) There shall be no carryover of unused quantities of water from one multiyear flex account or term permit to another multiyear flex account or term permit.

(d) No multiyear flex account shall be allowed if the multiyear flex account is inconsistent with the provisions of any intensive groundwater use control area created pursuant to K.S.A. 82a-1036 through K.S.A. 82a-1040, and amendments thereto, or any local enhanced management area created pursuant to K.S.A. 82a-1041, and amendments thereto.

(e) Water flowmeters shall be required under all multiyear flex account term permits and shall meet all of the following requirements:

(1) A water flowmeter meeting the requirements of the chief engineer shall be installed on each point of diversion authorized by the base water right.

(2) Each water flowmeter and the measuring chamber shall be sealed to the diversion works in a manner to ensure that the flowmeter and the measuring chamber can not be removed and reinstalled without breaking the seal.

- (3) Each water flowmeter register shall be sealed in a manner to ensure that the register can not be manipulated without breaking the seal.
- (4) Each replacement of a water flowmeter during the duration of a multiyear flex account shall be equipped with an anti-reverse-flow mechanism.
- (f) Only an entire water right, or a portion of a water right that has been formally divided, may be deposited in a multiyear flex account. Nothing in this subsection shall prevent a multi-year flex account term permit from authorizing a subdivision of the place of use for the base water right as the place of use for the multiyear flex account.
- (g) All water diverted pursuant to a term permit and the base water rights associated with the term permit shall be counted against the quantity of water deposited in the multiyear flex account.
- (Authorized by K.S.A. 82a-706a; implementing K.S.A. 2012 Supp. 82a-736; effective Oct. 11, 2002; amended June 21, 2013.)

K.A.R. 5-16-7. Conditions under which a base water right may be exercised. Each term permit approved by the chief engineer pursuant to K.S.A. 82a-736, and amendments thereto, shall include the condition that if the term permit can no longer be exercised because of an order issued by the chief engineer, including an intensive groundwater use control area order, a minimum desirable streamflow order, or an order to administer water rights to prevent impairment, then any base water right may be exercised to the extent that all of the following conditions are met: (a) The base water right is in priority, including priority with respect to any established minimum desirable streamflow. (b) The annual quantity of water authorized by the base water right has not been diverted during that calendar year. (c) The five-year quantity authorized by the term permit has not been completely used. (d) The use of water under the base water right does not impair water rights senior to the base water right. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 2012 Supp. 82a-736; effective Oct. 11, 2002; amended June 21, 2013.)

K.S.A. 82a-734. Sand and gravel pits; beneficial use of water, when; permit; perfection of appropriation; reports to chief engineer. (a) An operator shall notify the chief engineer of the location and area extent of any existing or proposed sand and gravel pit to be excavated, expanded or operated by the operator. (b) The net evaporation of water exposed as the result of the opening or operation of sand and gravel pits shall be construed to be a beneficial use or diversion of water for the purposes of the Kansas water appropriation act, K.S.A. 82a-701 *et seq.*, and amendments thereto, if the sand and gravel pit is opened or operated in a township where the average annual potential net evaporation is greater than 18 inches per year, as determined by the chief engineer. (c) If the chief engineer determines that an existing or proposed sand and gravel pit operation is a beneficial use of water, the operator shall apply to the chief engineer for a permit to appropriate water in accordance with the Kansas water appropriation act or otherwise acquire ownership or control of sufficient water rights, or by other methods pursuant to rules and regulations adopted by the chief engineer, or both, to offset net evaporation for the operation. The chief engineer may reduce this required offset based on the estimated use of groundwater by the existing vegetation. (d) (1) The permit shall authorize net evaporation as the primary use, and hydraulic dredging and sand washing as secondary uses of water if such secondary uses are located within the same source of supply and are associated with the operation. Any secondary uses shall use water in a manner in which there is no significant net consumptive use. The permit shall not be subject to the installation

of a water flow meter or administration of minimum desirable stream flow. Where the average potential net evaporation is less than 18 inches per year as determined by the chief engineer, the chief engineer shall issue a single term permit for the life of the project, not to exceed 80 years, for such secondary uses.

(2) The secondary uses shall be granted for the proposed life of the project or until the exhaustion of sand and gravel reserves. At the end of the industrial project, the owner shall file an application authorized by K.S.A. 82a-708b, and amendments thereto, to change the primary use made of water to recreational use to authorize the net evaporation use caused by the exposed groundwater.

(3) If a permit is denied, the chief engineer shall set forth all reasons for such denial.

(4) Any applicant who is denied a project permit by a final order of the chief engineer under this section may appeal such order in the manner provided by the Kansas judicial review act.

(5) Any application for a project permit shall be accompanied by a filing fee of \$500 and any request for modification shall be accompanied by a fee of \$250. Applicants for a project permit under this section shall not be required to pay fees pursuant to K.S.A. 82a-708a and 82a-708c, and amendments thereto, as part of such application.

(e)(1) The initial period of time allowed to complete construction of diversion works pursuant to an approved application to appropriate water for the purpose of net evaporation from a sand and gravel pit operation shall be reasonable and consistent with the proposed use. The chief engineer may allow extension of such period by not to exceed two 10-year extensions if it can be shown that the operation requires the additional time for the operator to satisfy the operator's market demand in the area. The two 10-year extensions may be granted at the same time, to run consecutively, if the applicant submits to the chief engineer a written development plan.

(2) The period of time allowed to perfect an approved application to appropriate water for the purpose of net evaporation from a sand and gravel pit operation shall be not less than 20 years and, for good cause shown, the chief engineer may allow one or more 10-year extensions of such period. The chief engineer shall consider the time needed until exhaustion of proven reserves, closure in accordance with the surface land reclamation and mining act, K.S.A. 49-601 *et seq.*, and amendments thereto, and the availability of water for the proposed use, but in no case shall allow longer than 80 years for perfection.

(3) Nothing herein shall require an extension of time to construct diversion works or to perfect a water right if there is demonstrable impairment of a use under an existing water right from the same source of supply, as determined pursuant to K.S.A. 82a-711, and amendments thereto.

(4) Upon examination of the diversion works for sand and gravel operations, the chief engineer or the chief engineer's duly authorized representative shall, within 90 days of the examination, notify the applicant if there was a failure to construct the diversion works at the authorized location or any deficiency of the terms and conditions of the permit. This notice will provide steps necessary to gain compliance with state law. If the chief engineer fails to examine the diversion works within two years of the notice of completion for any sand and gravel operation diversion works, the applicant shall not be required to forfeit priority date as a result of failure to construct a diversion works at the authorized location or any deficiency of the terms and conditions of the permit.

(f) Net evaporation from sand and gravel pits, as calculated by the chief engineer, will be reported as an industrial use to the director of taxation for the purpose of assessing the water protection fee pursuant to K.S.A. 82a-954, and amendments thereto.

(g) This section shall be part of and supplemental to the Kansas water appropriations act. (**History:** L. 1995, ch. 72, § 1; L. 2004, ch. 100, § 1; July 1; L. 2012, ch. 133, § 2; July 1; L. 2013, ch. 111, § 3; July 1.)

K.S.A. 82a-743. New Section. (a) Subject to existing water rights and the principle of beneficial use, the chief engineer may grant, upon application made therefor, limited transfer permits to authorize the use of up to 4,000,000 gallons from an existing water right. The term of such limited transfer permit will be limited to a single calendar year. Each application submitted for a limited transfer permit shall be on a form prescribed by the chief engineer and accompanied by an application fee of \$200.

(b) (1) If the base water right is groundwater, the use of water can be transferred to another well within the same source of supply within two miles.

(2) If the base water right is surface water, the use can be transferred to another surface water use within the same surface water system.

(c) The chief engineer shall adopt rules and regulations to effectuate and administer the provisions of this section. Such rules and regulations shall require that there is no increase in consumptive use enabled by the transfer permit, prescribe necessary recordkeeping and reporting requirements, prevent impairment of existing rights and address any other matter deemed necessary by the chief engineer to protect the public interest.

(d) Nothing in this section shall be deemed to vest in the holder of any permit granted pursuant to provisions of this section any permanent right to appropriate water except as is provided by such permit.

(e) All fees collected by the chief engineer pursuant to this section shall be remitted to the state treasurer as provided in K.S.A. 82a-731, and amendments thereto.

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

(History: L. 2013, ch. 111, § 1, July 1.)

K.S.A. 82a-743a. New Sec. Any rules and regulations adopted by the secretary of health and environment pursuant to K.S.A. 65-171d, and amendments thereto, shall not apply to land-based sand and gravel pits or aggregate mining operations utilizing washwater ponds if the only water or wastewater directed to the dredge pit or washwater pond consists of the following: (a) Dredge return flows;

(b) flows generated from aggregate classification; or

(c) flows from washing aggregate, if water used in such flows is returned to the dredge pit or washwater pond. **(History:** L. 2013, ch. 111, § 2, July 1.)