

**Department of Agriculture
Notice of Hearing on Proposed
Administrative Regulations**

A public hearing will be conducted at 1:30 p.m. Wednesday, March 16, 2011, in the 4th floor training room of the Kansas Department of Agriculture, 109 S.W. 9th, Topeka, to consider the adoption of proposed regulations.

A summary of the proposed regulations and there economic impact follows:

K.A.R. 5-21-4 - The proposed amendments close the Western Kansas Groundwater Management District No. 1 (GMD 1) to new appropriations of water in the portions of the unconsolidated aquifers commonly known as the Ogallala formation and the Niobrara formation that are located within the district.

Economic Impact Statement:

The proposed amendments will not result in any significant fiscal impact to other governmental agencies, businesses or individuals. Legislation passed in the 2010 session resulted in the protection against the forfeiture of a water right from abandonment if the water right as a source that is groundwater, is located in an area closed by rule and regulation, and has a diversion works that can be used within a reasonable time. The regulation amendment closes the GMD 1 by rule. Therefore, water rights located in GMD 1 and have a groundwater sources are protected from forfeiture from abandonment as long as they maintain a diversion works that can be used within a reasonable time. While this is perceived as a benefit to existing water rights in GMD 1, we do not have a determination of the fiscal impact to the water right holders.

Environmental Impact:

No significant impact could be identified resulting from the proposed amendment.

K.A.R. 5-7-1 - The proposed amendment to the regulation adds a condition for due and sufficient cause for non-use under a water right if water use is temporarily discontinued because a contract between the water right owner (producer) and a Groundwater Management District (GMD) exists committing the producer to forego use of water authorized by a water right for a definite five to ten year period to conserve water. The non-use contract will provide additional ranking consideration for eligibility for the federal Environmental Quality Incentive Program (EQIP). The regulated community and the GMDs felt participation would not exist in the EQIP if their contract was not listed as a due and sufficient cause for non-use in K.A.R. 5-7-1.

The proposed amendment will result in a fiscal impact to the department that equates to two hours of environmental scientist II staff time at \$33.71 salary and fringe per hour and one hour of administrative assistant data entry staff time at \$20.43 salary and fringe per hour per contract processed. Therefore, each contract will have a total of an \$87.85 fiscal impact on average to the KDA. We cannot anticipate the number of contracts that will be filed; therefore a total fiscal impact cannot be calculated at this time.



Proposed

The proposed amendments will not result in any significant fiscal impact to other governmental agencies or businesses. There will be a fiscal impact to the GMDs. Based on similar programs, two hours of GMD staff time could be utilized on each contract completed and processed. The proposed amendment will allow a positive fiscal impact benefit to individual water right holders. If qualified, the EQIP will pay a producer \$150 per acre per year for 3 years of enrollment with 4 years of practice. In addition, GMD 5 is paying producers in their district \$125 per acre for the 4th year to the first 800 acres enrolled. Total enrollment program wide is not known.

Environmental Impact

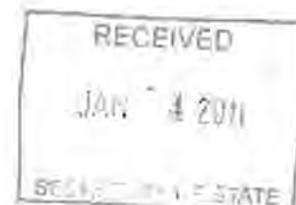
There will be an undetermined positive water conservation impact due to 5-10 years of not pumping water under participating water rights.

This 60-day notice of the public hearing shall constitute a public comment period for the purpose of receiving written public comments on the proposed rules and regulations. All interested parties may submit written comments prior to the hearing to the Chief Engineer, Department of Agriculture, Division of Water Resources, 109 S.W. 9th St., 2nd Floor, Topeka, 66612, or by e-mail at leslie.garner@kda.ks.gov. All interested parties will be given a reasonable opportunity to present their views orally on the adoption of the proposed regulations during the hearing. In order to give all parties an opportunity to present their views, it may be necessary to request that each participant limit any oral presentation to five minutes. These regulations are proposed for adoption on a permanent basis.

Any individual with a disability may request accommodation in order to participate in the public hearing and may request the proposed regulations and impact statements in an accessible format. Requests for accommodation should be made at least five working days in advance of the hearing by contacting Leslie Garner at (785) 296-4623 or fax (785) 368-6668. Handicapped parking is located at the southwest corner of 9th and Kansas Ave., and the north entrance to the building is accessible to individuals with disabilities.

Copies of the regulations and their economic impact statements may be obtained by contacting the Department of Agriculture, Leslie Garner, 109 SW 9th St., 4th Floor, Topeka, KS 66612 or (785) 296-4623 or by accessing the department's Web site at <http://www.ksda.gov>. Comments may also be made through our website under the proposed regulation.

David W. Barfield
Chief Engineer
Division of Water Resources
Department of Agriculture



**KANSAS DEPARTMENT OF AGRICULTURE
ECONOMIC IMPACT STATEMENT
K.A.R. 5-21-4 amended**

I. Summary of proposed regulation, including its purpose.

The proposed amendments close the Western Kansas Groundwater Management District No. 1 (GMD 1) to new appropriations of water in the portions of the unconsolidated aquifers commonly known as the Ogallala formation and the Niobrara formation that are located within the district.

II. Reason or reasons the proposed regulation is required, including whether or not the regulation is mandated by federal law.

This regulation is not mandated by federal law.

III. Anticipated economic impact upon the Kansas Department of Agriculture.

The proposed amendment will not result in a fiscal impact to the department.

IV. Anticipated financial impact upon other governmental agencies and upon private business or individuals.

The proposed amendments will not result in any significant fiscal impact to other governmental agencies, businesses or individuals. The last application for a new appropriation of water in GMD 1 located in the Ogallala and Niobrara was filed on February 13, 1998.

Legislation passed in the 2010 session resulted in the protection against the forfeiture of a water right from abandonment if the water right as a source that is groundwater, is located in an area closed by rule and regulation, and has a diversion works that can be used within a reasonable time. The regulation amendment closes the GMD 1 by rule. Therefore, water rights located in GMD 1 and have a groundwater sources are protected from forfeiture from abandonment as long as they maintain a diversion works that can be used within a reasonable time. While a positive impact, we do not have a determination of the fiscal impact to the water right holders.

V. Less costly or intrusive methods that were considered, but rejected, and the reason for rejection.

No other methods were considered by the state.

VI. Environmental Impact.

No significant impact could be identified resulting from the proposed amendment.



Proposed

K.A.R. 5-21-4. Safe yield. (a) Except as ~~set forth~~ specified in subsection (c), the district shall be closed to ~~further~~ new appropriations of water in ~~all areas where the total saturated thickness of the unconsolidated aquifer, commonly known as the Ogallala, meets either of these criteria: the~~ portions of the unconsolidated aquifers commonly known as the Ogallala formation and the Niobrara formation that are located within the district.

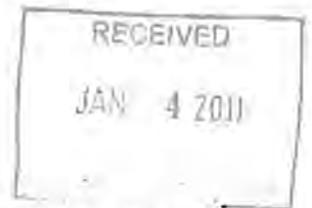
(1) ~~Has been depleted by 15 percent or more since 1950, as determined according to K.A.R. 5-21-8; or~~

~~(2) is less than 40 feet thick, as determined according to K.A.R. 5-21-9.~~

(b) ~~In the rest of the district, the approval of each application for a permit to appropriate water for a beneficial use, except as set forth in subsection (c), from the Ogallala aquifer, and~~ The approval of each application for a change in the point of diversion shall be subject to the following requirements, if the diversion works have not been completed under the original approved application, ~~shall be subject to the following criteria:~~

(1) The proposed appropriation, when added to the vested rights, prior appropriation rights, and earlier priority applications, shall not exceed the allowable safe yield amount for the area included within a two-mile-radius circle, which is approximately 8,042 acres, of the proposed well.

(2) For the purpose of analysis, all vested rights, certificates, permits, and prior unapproved applications shall be considered to be fully exercised, and all limitation clauses listed on permits to appropriate water and certificates shall be considered to be in force.



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(3) In the case of an application for change in the point of diversion referred to in subsection (b), each application and water right with a priority earlier than the priority established by the filing of the application for change shall be included in the analysis.

(4) The allowable annual safe yield amount shall be calculated using the following formula:

$$Q = \frac{AR}{12}$$

Q = the allowable annual safe yield amount in acre-feet per year

A = area of consideration, within a two-mile-radius circle, approximately 8,042 acres

R = average annual recharge of 0.5 inches per year

(5) If part of the radial area is located outside the district boundary, that part shall be included in the depletion analysis only if the chief engineer determines that hydraulically connected groundwater exists in that portion of the area outside the district. A part of the area of consideration lying outside the state of Kansas shall not be included in the analysis.

(6) If wells authorized under a vested right, a certified water right, or a permit to appropriate water are divided by the circumference of the radial area, the authorized quantity of water shall be assigned to each well. If specific quantities are not authorized for each well, a proportional amount shall be assigned to each well.

(c) This regulation shall not apply to the following:

- (1) Domestic use;
- (2) temporary permits and term permits; and



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(3) a new application filed to appropriate groundwater in any area of the district not ~~closed by regulation or~~ within an intensive groundwater use control area ~~order by the chief engineer to new nondomestic, nontemporary permits and term permits for five or fewer years,~~ meeting all of the following criteria:

(A) The sum of the annual quantity requested by the proposed appropriation and the total annual quantities authorized by prior permits allowed because of an exemption pursuant to this subsection does not exceed 15 acre-feet in a ~~1/2-mile-radius~~ two-mile-radius circle surrounding the proposed point of diversion.

(B) Well spacing criteria in the area have been met.

(C) The approval of the application does not authorize an additional quantity of water out of an existing authorized well with a nondomestic permit or water right that would result in a total combined annual quantity of water authorized from that well in excess of 15 acre-feet.

(D) All other criteria for approving a new application to appropriate water at that location have been met.

(d) Exceptions to this regulation may be granted on an individual basis by recommendation by the board in conjunction with the approval of the chief engineer. The applicant may be required by the board to submit information necessary in order to make the determination. (Authorized by K.S.A. 82a-706a and K.S.A. 2009 Supp. 82a-1028(e); implementing K.S.A. 82a-706, K.S.A. 82a-708b, and K.S.A. 2009 Supp. 82a-1028(e); effective May 23, 1994; amended Sept. 22, 2000; amended P-_____.)



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**KANSAS DEPARTMENT OF AGRICULTURE
ECONOMIC IMPACT STATEMENT
K.A.R. 5-7-1 Amended**

I. Summary of proposed regulation, including its purpose.

The proposed amendment to the regulation adds a condition for due and sufficient cause for non-use under a water right if water use is temporarily discontinued because a contract between the water right owner (producer) and a Groundwater Management District (GMD) exists committing the producer to forego use of water authorized by a water right for a definite five to ten year period to conserve water. The non-use contract will provide additional ranking consideration for eligibility for the federal Environmental Quality Incentive Program (EQIP). The regulated community and the GMDs felt participation would not exist in the EQIP if their contract was not listed as a due and sufficient cause for non-use in K.A.R. 5-7-1.

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This regulation is not mandated by federal law.

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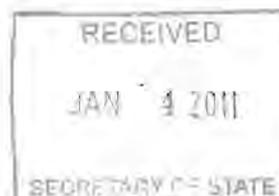
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VI. Environmental Impact.

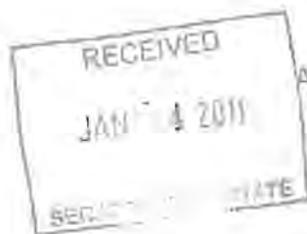
There will be an undetermined positive water conservation impact due to 5-10 years of not pumping water under participating water rights.



Proposed

K.A.R. 5-7-1. Due and sufficient cause for nonuse. (a) Each of the following circumstances shall be considered "due and sufficient cause," as used in K.S.A. 82a-718, and amendments thereto:

- (1) Adequate moisture from natural precipitation exists for the production of grain, forage, or specialty crops, as determined by the moisture requirements of the specific crop.
- (2) A right has been established or is in the process of being perfected for use of water from one or more preferred sources in which a supply is available currently but is likely to be depleted during periods of drought.
- (3) Water is not available from the source of water supply for the authorized use at times needed.
- (4) Water use is temporarily discontinued by the owner for a definite period of time to permit soil, moisture, and water conservation, as documented by any of the following:
 - (A) Furnishing to the chief engineer a copy of a contract showing that land that has been lawfully irrigated with a water right that has not been abandoned is enrolled in a multiyear federal or state conservation program that has been approved by the chief engineer;
 - (B) enrolling the water right in the water right conservation program in accordance with K.A.R. 5-7-4; or
 - (C) furnishing the chief engineer with a copy of a contract showing that the water right is subject to a Kansas groundwater management district groundwater conservation agreement for a five-year to 10-year period that results in an additional ranking consideration for an application under the federal environmental quality incentive program (EQIP) for the land constituting the authorized place of use for the water right; or



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(D) any other method acceptable to the chief engineer that can be adequately documented by the owner before the nonuse takes place.

(5) Management and conservation practices are being applied that require the use of less water than authorized. If a conservation plan has been required by the chief engineer, the management and conservation practices used shall be consistent with the conservation plan approved by the chief engineer to qualify under this subsection.

(6) The chief engineer has previously approved the placement of the point of diversion in a standby status in accordance with K.A.R. 5-1-2.

(7) Physical problems exist with the point of diversion, distribution system, place of use, or the operator. This circumstance shall constitute due and sufficient cause only for a period of time reasonable to correct the problem.

(8) Conditions exist beyond the control of the owner that prevent access to the authorized place of use or point of diversion, as long as the owner is taking reasonable affirmative action to gain access.

(9) An alternate source of water supply was not needed and was not used because the primary source of supply was adequate to supply the needs of the water right owner.

(10) The chief engineer determines that a manifest injustice would result if the water right were deemed abandoned under the circumstances of the case.

(11) The water right is located in an area of the state that is closed to new appropriations of water by regulation or order of the chief engineer but is not closed by a safe-yield analysis.

(b) In addition to circumstances considered due and sufficient cause pursuant to subsection (a), both of the following requirements shall also be met to constitute due and sufficient cause for nonuse of water:

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(1) Except as provided by paragraph (a)(11), the reason purporting to constitute due and sufficient cause shall have in fact prevented, or made unnecessary, the authorized beneficial use of water.

(2) Except for the temporarily discontinued use of water as provided by paragraph (a)(4) and for physical problems with the point of diversion or distribution system as provided by paragraph (a)(7), the owner shall maintain the diversion works in a functional condition.

(c) Each year of nonuse for which the chief engineer finds that due and sufficient cause exists shall be considered to interrupt the successive years of nonuse for which due and sufficient cause does not exist.

(d) When a verified report of the chief engineer, or the chief engineer's authorized representative, is made a matter of record at a hearing held pursuant to K.S.A. 82a-718, and amendments thereto, that establishes nonuse of a water right for five or more successive years, the water right owner shall have the burden of showing that there have not been five or more successive years of nonuse without due and sufficient cause. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-706a and K.S.A. 2009 Supp. 82a-718, as amended by L. 2010, ch. 59, sec. 1; modified, L. 1978, ch. 460, May 1, 1978; amended May 1, 1986; amended May 31, 1994; amended Oct. 24, 2003; amended May 21, 2010; amended P-_____.)



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STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

STEVE SIX
ATTORNEY GENERAL

120 SW 10TH AVE., 2ND FLOOR
TOPEKA, KS 66612-1597
(785) 296-2215 • FAX (785) 296-6296
WWW.KSAG.ORG

Propose

November 9, 2010

Leslie Garner
Legal Secretary
Department of Agriculture
109 SW 9th Street
Topeka, Kansas 66612

Re: **K.A.R. 5-7-1, Dues and sufficient cause for nonuse**

Dear Ms. Garner:

We have reviewed the above-referenced regulation for legality, and finding no issues of concern, have approved it.

Sincerely,

OFFICE OF THE ATTORNEY GENERAL
STEVE SIX

Camille Nohe
Assistant Attorney General

CN:cn

Enclosure: Original document

cc: Senator Vicki Schmidt, Chair, Joint Committee on Rules and Regulations
Representative Carl Holmes, Vice Chair, Joint Committee on Rules and Regulations
Representative Janis Pauls, Ranking Minority Member, Joint Committee on Rules and Regulations
Raney Gilliland, Legislative Research
Ken Wilke, Revisor of Statutes

Regulations/AgDept/5-7-1

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