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Dale A. Rodman, Secretary

Department of Agriculture

Sam Brownback, Governor

September 2, 2011

C.U.R.B.

Rec'd SEP 06 2011

Consumer Counsel

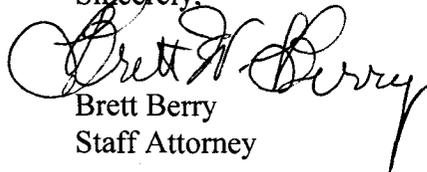
Citizens Regulatory Review Board (CURB)  
1500 SW Arrowhead Rd.  
Topeka, KS 66604

RE: Proposed Flex Account regulations by the Kansas Department of Agriculture, Division of Water Resources

Enclosed are proposed regulations, hearing notice and the economic impact statement for the Flex Account regulations pursuant to Executive Order 11-02.

If you have any questions concerning the proposed regulations and the economic impact statement, please feel free to contact me.

Sincerely,



Brett Berry  
Staff Attorney

Enc.

**Department of Agriculture, Division of Water Resources**  
**Notice of Hearing on Proposed**  
**Administrative Regulations**

A public hearing will be conducted at 10:00 a.m. Wednesday, November 9, 2011, in the 4th floor training room of the Kansas Department of Agriculture, 109 S.W. 9<sup>th</sup> St., Topeka, to consider the adoption proposed regulations on a permanent basis.

- K.A.R. 5-16-1 updates references to amended K.S.A. 82a-736.
- K.A.R. 5-16-3 removes language that is inconsistent with the provision in K.S.A. 82a-736 that now allows an application to be filed in the same year that the flex account begins or to start in the next year.
- K.A.R. 5-16-5 synchronizes the years considered to calculate the quantity of water available in the flex account with the years stated in the amended statute. It also includes an adjustment in the calculation for applications that request the flex account to begin in the same year the application is filed.

**Economic Impact:** There will be a slight cost to the agency due to an increase in work to process flex account applications, maintain records of the 5-year allocations, and ensure enforcement of the 5-year quantity authorized by the flex account. The increase is offset with a \$400 filing fee for each application. This change should not result in any significant fiscal impact to the agency, based on the past history of the flex accounts.

There should be no significant fiscal impact to other government agencies. If a flex account application is located within the boundaries of a groundwater management district (GMD), the GMD will be part of the review process. This would be like any other application, therefore, there should not be a significant fiscal impact to a GMD. There will be a fiscal impact of a \$400 filing fee to a private business or individual that makes an application for a flex account.

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 amendment to the rule and regulation. All interested parties may submit written comments prior to the hearing to the Chief Engineer, Division of Water Resources, Department of Agriculture, 109 S.W. 9<sup>th</sup> St., 2nd Floor, Topeka, 66612, or by e-mail at [leslie.garner@kda.ks.gov](mailto: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 amendment 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.

Any individual with a disability may request accommodation in order to participate in the public hearing and may request the proposed regulation and impact statement 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 in Topeka 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 regulation and its economic impact statement may be obtained by contacting the Department of Agriculture, Leslie Garner, 109 SW 9<sup>th</sup> St., 4<sup>th</sup> Floor, Topeka, Kansas 66612 or (785) 296-4623 or by accessing the department's website 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  
Permanent K.A.R. 5-16-1; 5-16-3; 5-16-5  
Flex Accounts**

**I. Summary of proposed regulation, including purpose.**

The proposed regulation amendment outlines the methods used to calculate the quantity of water authorized under a term permit for a flex account authorized by KSA 82a-736. KSA 82a-736 was amended last legislative session to add an option allowing the current year to be used as part of the flex account and to update the base use period.

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

This amendment is necessary to implement the 2011 statutory change in KSA 82a-736. This regulation is not mandated by federal law as water allocation is a function of state government.

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

Currently we have no water rights enrolled into a flex account. If it becomes more appealing due to the change in the statute and files become enrolled into the flex account, there will be a slight cost to the agency due to an increase in work to process flex account applications, maintain records of the 5-year allocations, and ensure enforcement of the 5-year quantity authorized by the flex account. The increase is offset with a \$400 filing fee for each application. Currently it is unknown how many flex account applications the agency might receive. This change should not result in any significant fiscal impact to the agency, based on the past history of the flex accounts.

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

There should be no significant fiscal impact to other government agencies. If a flex account application is located within the boundaries of a groundwater management district (GMD), the GMD will be part of the review process. This would be like any other application, therefore, there should not be a significant fiscal impact to a GMD. There will be a fiscal impact of a \$400 filing fee to a private business or individual that makes an application for a flex account. There could be a positive fiscal impact if the water pumped under a flex account produces a profit from the beneficial use. We do not have a method to measure the positive fiscal impacts.

**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.**

An environmental benefits statement is not required since the proposed regulation, while proposed for adoption by the Secretary of Agriculture, deals with groundwater appropriation and does not have as its primary purpose the protection of the environment.

**K.A.R. 5-16-1. Definitions.** As used in this article of regulations, in the Kansas water appropriation act, and by the chief engineer in the administration of the Kansas water appropriation act, unless the context clearly requires otherwise, the following words and phrases shall have the meanings ascribed to them specified in this regulation. (a) “Base amount” and “BA” mean the quantity of water deposited in a flex account.

(b) “Base average usage factor” and “BAUF” mean the percentage of the “base average usage,” as this term is defined in K.S.A. 82a-736 and amendments thereto, that is multiplied by five as a part of the calculations ~~set out by~~ specified in K.A.R. 5-16-5 to determine the quantity of water that may be deposited into a flex account. The BAUF shall not exceed the maximum of 90% established by K.S.A. 82a-736, and amendments thereto.

(c) “Base water right” means a vested or certified water right or rights for which the owner applies to the chief engineer to establish a flex account pursuant to K.S.A. 82a-736, and amendments thereto.

(d) “BAU” means the “base average usage” as defined in K.S.A. 82a-736, and amendments thereto.

(e) “Good standing,” only as that term is used in K.S.A. 82a-736, and amendments thereto, in reference to base water rights, means a base water right that meets the following conditions:

(1) Has been lawfully exercised within the ~~11-year time~~ period specified in K.A.R. 5-16-5;

(2) has had all required water use reports filed and any civil fines assessed for failure to timely file a complete and accurate water use report paid; and

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(3) has had no period of nonuse with a duration of five or more consecutive years since January 1, 1990, except for enrollment in the water right conservation program ~~according~~ pursuant to K.A.R. 5-7-4 or L. 2011, ch. 89, sec. 25 and amendments thereto, enrollment in the federal conservation reserve program, or enrollment in another multiyear federal or state conservation program.

(f) "Significant water conservation measures" means actual physical changes in a water distribution system or management practices that improve water use efficiency, including the following:

(1) Conversion from flood irrigation to center pivot irrigation with a nozzle package designed to improve water use efficiency;

(2) irrigation scheduling;

(3) conversion to subsurface drip irrigation; and

(4) removal of an end gun, resulting in a significant reduction in the number of irrigated acres. (Authorized by K.S.A. 82a-706a; implementing ~~K.S.A. 82a-706a~~ and K.S.A. 2004 2010 Supp. 82a-736, as amended by ~~L. 2005, ch. 142, sec. 3~~ L. 2011, ch. 89, sec. 28; effective Oct. 11, 2002; amended Jan. 6, 2006; amended, T-\_\_\_\_\_, \_\_\_\_\_; amended P-\_\_\_\_\_.)

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**K.A.R. 5-16-3. Establishing a flex account.** (a) A flex account shall be established by filing an application for a flex account and a term permit on a form prescribed by the chief engineer. ~~The five year period shall begin on January 1 of the next calendar year for which the application has been timely filed, unless expressly authorized by the chief engineer to begin the following~~ January 1. Each application shall meet the following requirements:

(1) ~~The application shall also~~ Show the location of all wells located within one-half mile of the proposed point of diversion, and the names, addresses, and telephone numbers of the owners of those wells. Except as ~~set forth~~ 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 flex account. Each application shall be accompanied by the filing fee specified in K.A.R. 5-16-2.;

(2) be date-stamped showing the date the application was filed with the chief engineer;

(3) indicate the five consecutive years that are to be designated as the flex account period;

and

(4) indicate whether the flex account period will commence with the year in which the application is filed or with the next year after the year in which the application is filed.

(b) Before any application to establish a 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 a duly authorized agent of an owner of the water right.

(c) Before the flex account can be established or the term permit approved, all of the water rights owners, or a duly authorized agent of the owners, shall verify upon oath or affirmation that the statements contained in the application are true and complete.

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(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 flex account and apply for a term permit may be filed in either of 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 for a single type 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 flex account shall not be established, and the term permit to exercise the 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. 82a-706a~~ and K.S.A. ~~2001~~ 2010 Supp. 82a-736, as amended by L. 2011, ch. 89, sec. 28; effective Oct. 11, 2002; amended, T-  
\_\_\_\_\_, \_\_\_\_\_; amended P-\_\_\_\_\_.)

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**K.A.R. 5-16-5. Maximum annual quantity of water authorized by term permit.** (a) Except as set forth specified in subsections (b) through (e), the maximum quantity of water deposited in a flex account and authorized to be diverted in five consecutive calendar years under the authority of a term permit shall be determined in accordance with K.S.A. 82a-736, and amendments thereto, by means of these performing the following calculations:

(1) ~~Adding~~ Add the ~~total~~ actual, legal annual water use of the base water right or rights for the period of calendar years ~~1992~~ 2000 through ~~2002~~ 2009. This sum is the total quantity of water;

(2) ~~dividing~~ divide that total quantity of water by ~~11~~ 10;

(3) ~~multiplying~~ multiply that resulting quantity in paragraph (a)(2) by the BAUF; and

(4) ~~multiplying~~ multiply that resulting quantity in paragraph (a)(3) by five; and

(5) if the application required by K.A.R. 5-16-3 was filed after November 1 of the year designated as the first year of the flex account period, subtract the quantity of water used under the base water right during the year in which the application was filed from the resulting quantity in paragraph (a)(4).

(b) If significant water conservation measures were implemented under the base water rights at any time during the period of calendar years ~~1992~~ 2000 through ~~2002~~ 2009, the average annual quantity of water actually used may be calculated using the five consecutive calendar years immediately preceding the implementation of significant water conservation measures, but these five calendar years shall not begin before calendar year ~~1987~~ 1995. The five-year allocation under the term permit shall be determined by ~~means of these~~ performing the following calculations:

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- (1) ~~Adding~~ Add the ~~total~~ actual, legal annual water use of the base water right or rights for the five consecutive calendar years. This sum is the total quantity of water;
- (2) ~~dividing~~ divide that total quantity of water by five;
- (3) ~~multiplying~~ multiply that resulting quantity in paragraph (b)(2) by the BAUF; ~~and~~
- (4) ~~multiplying~~ multiply that resulting quantity in paragraph (b)(3) by five; ~~and~~
- (5) if the application required by K.A.R. 5-16-3 was filed after November 1 of the year designated as the first year of the flex account period, subtract the quantity of water used under the base water right during the year in which the application was filed from the resulting quantity in paragraph (b)(4).

(c) If water use records for a base water right are inadequate to accurately determine actual water use during any calendar year during the period used to determine the base average usage, then that year shall be counted as having no water use.

(d) No flex account shall be allowed if the 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.

(e)(1) If water was authorized to be diverted for less than the entire period used to determine the base average usage, the five-year allocation shall be determined by means of these calculations:

(1) (A) ~~Adding~~ Add the ~~total~~ actual, legal annual water use of the base water right or rights for the entire period used ~~to determine~~. This sum is the base average usage;

(2) (B) ~~dividing~~ divide the ~~total quantity~~ base average usage by the number of years, or parts thereof, that water was authorized to be diverted by the chief engineer;

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(3) ~~(C) multiplying multiply~~ that resulting quantity in paragraph (e)(2) by the BAUF; and  
(4) ~~(D) multiplying multiply~~ that resulting quantity in paragraph (e)(3) by five; and  
(E) if the application required by K.A.R. 5-16-3 was filed after November 1 of the year designated as the first year of the flex account period, subtract the quantity of water used under the base water right during the year in which the application was filed from the resulting quantity in paragraph (e)(4).

(2) Water rights that authorized use of water for less than two calendar years during the period used to determine the base average usage shall not be eligible for a flex account.

(Authorized by K.S.A. 82a-706a; implementing ~~K.S.A. 82a-706a~~ and K.S.A. 2004 2010 Supp. 82a-736, as amended by ~~L. 2005, ch. 142, sec. 3~~ L. 2011, ch. 89, sec. 28; effective Oct. 11, 2002; amended Jan. 6, 2006; amended, T-\_\_\_\_\_, \_\_\_\_\_; amended P-\_\_\_\_\_.)

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