

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

A public hearing will be conducted at 10:00 a.m. Tuesday, March 4, 2014, in the 4th floor training room of the Kansas Department of Agriculture, 109 S.W. 9th, Topeka, to consider the adoption of proposed rule and regulations.

K.A.R. 5-7-1 establishes circumstances that are considered due and sufficient cause for non-use of a water right.

K.A.R. 5-7-4 establishes rules regarding the Water Rights Conservation Program (WRCP) prior to January 1, 2010.

K.A.R. 5-7-4b establishes rules regarding the Water Rights Conservation Program (WRCP) authorized by KSA 82a-741.

**Economic Impact:**

K.A.R. 5-7-1 and 5-7-4 – There will be no economic impact to the department of agriculture, government agencies, businesses or individuals.

K.A.R. 5-7-4b - KDA anticipates about 10 WRCP applications each year. KDA would see a \$3000 fiscal impact that would support the on-going processing and operating costs to the department of agriculture. There will be no economic impact to the government agencies, businesses or individuals.

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, 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 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 9<sup>th</sup> St., 4<sup>th</sup> Floor, Topeka, KS 66612 or (785) 296-4623 or by accessing the department's Web site at <http://agriculture.ks.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. 5-7-1; 5-7-4; 5-7-4b**

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

K.A.R. 5-7-1 establishes circumstances that are considered due and sufficient cause for non-use of a water right.

K.A.R. 5-7-4 establishes rules regarding the Water Rights Conservation Program (WRCP) prior to January 1, 2010.

K.A.R. 5-7-4b establishes rules regarding the Water Rights Conservation Program (WRCP) authorized by KSA 82a-741.

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

K.A.R. 5-7-1 - This amendment is necessary to implement a portion of K.S.A. 82a-718 and K.S.A. 82a-741. K.S.A. 82a-718 states (in part) that all water rights must be for a beneficial purpose. It goes on to state (in part), in areas of Kansas that are not closed to new appropriation, that water rights shall be deemed abandoned if there are five consecutive years of non-use unless there is due and sufficient cause for non-use. This regulation sets forth due and sufficient causes for non-use. We are adding water rights enrolled into a multi-year flex account and amending the water rights conservation program (K.S.A. 82a-741). This regulation is not mandated by federal law as water allocation is a function of state government.

K.A.R. 5-7-4 and 5-7-4b – K.S.A. 82a-741 has modified the WRCP program. The agency did not want to make modifications to the WRCP program for contracts enrolled prior to the change in statute. This rule applies to the contracts that were active prior to January 1, 2010. Many of these contracts are good until 2020. Therefore this rule needs to be in place. Changes to the program are covered by a new proposed rule. K.S.A. 82a-741 has established a \$300 filing fee to enroll into the WRCP. This rule establishes the requirements of the program. These regulations are not mandated by federal law as water allocation is a function of state government.

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

K.A.R. 5-7-1 and 5-7-4 – There will be no economic impact to the department of agriculture.

K.A.R. 5-7-4b - We anticipate about 10 WRCP applications each year. We would see a \$3000 fiscal impact that would support the on-going processing and operating costs to the department of agriculture.

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

There will be no economic impact to other state or federal government agencies. There will be no economic impact to businesses or individuals.

**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. 5-7-1. 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, K.A.R. 5-7-4b, and K.S.A. 2012 Supp. 82a-741 and amendments thereto; or

(C) 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.

(12) The water right has been donated to a water bank authorized by K.S.A. 2012 Supp. 82a-761 through K.S.A. 2012 Supp. 82a-773, and amendments thereto.

(13) Water use, as authorized by the water right, is suspended because the water right is enrolled in a multiyear flex account, pursuant to K.S.A. 2012 Supp. 82a-736 and amendments thereto.

(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:

(1) 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~~ 2012 Supp. 82a-718; 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-\_\_\_\_\_.)

**K.A.R. 5-7-4. Water rights conservation program; tier 1.** (a) Applications for enrollment in the water rights conservation program (WRCP) ~~shall not be accepted after December 31, 2009.~~ Applications received on or before December 31, 2009, shall be considered for enrollment in the program as tier 1 applications. Enrollment in tier 1 of the WRCP approved by the chief engineer and continued compliance with the WRCP shall constitute due and sufficient cause for nonuse pursuant to K.S.A. 82a-718, and amendments thereto, and K.A.R. 5-7-1.

(b) In order to qualify for enrollment in the WRCP as a tier 1 applicant, all of the following requirements and conditions shall be met:

(1) The point of diversion shall be located in either of the following locations:

(A) ~~in~~ An area that is closed to new appropriations of water, except for temporary permits, term permits, and domestic use; or

(B) ~~in~~ some other area designated by the chief engineer as an area where it would be in the public interest to allow water rights to be placed in the WRCP. In areas within the boundaries of a groundwater management district, the recommendations of the board of the district shall be taken into consideration by the chief engineer.

(2) Each of the owners of the water right shall agree to totally suspend all water use authorized by that water right for the duration of the contract.

(3) The owner or owners of the water right shall sign a contract with the chief engineer, or the chief engineer's authorized representative, before placing the water right into the WRCP. The contract shall be binding on all successors in interest to the water right owner.

(4) Only an entire water right may be placed into the WRCP. If a portion of a water right has been abandoned, the portion that is still in good standing may be enrolled in the WRCP. If a

water right is administratively divided by the chief engineer, each portion of a ~~formally~~ that divided water right shall be considered to be an entire water right for the purpose of this regulation.

(A) If at least five successive years of nonuse have occurred before application for enrollment in the WRCP, a determination of whether or not that water right is subject to abandonment before entry into the program, including an analysis of any reasons given that might constitute due and sufficient cause for nonuse, shall be made by the chief engineer.

(B) If, after review of the information, it appears that the right has been abandoned, the statutory procedures, including the right to a hearing, shall be followed to determine whether or not the right has been abandoned.

(5) Only the portion of a water right in good standing at the time of application for enrollment may be entered into the WRCP.

(c) Other requirements of enrollment in the WRCP program shall include the following:

(1) Water rights shall be placed into the WRCP for a definite period of calendar years of no fewer than five and no more than 10. Each WRCP contract shall terminate upon expiration of the time period specified in the contract.

(2) The water right owner or operator shall not be required to maintain the diversion works or delivery system during the period of the WRCP contract. If the pump is removed from a well, the well shall be properly capped or sealed during the contract. These requirements shall be in addition to those made by the Kansas department of health and environment pursuant to the groundwater exploration and protection act, K.S.A. 82a-1201 et seq., and amendments thereto.

(3) A certificate determining the extent to which a water right has been perfected shall be issued by the chief engineer before entering the water right into the WRCP if all of the following conditions are met:

(A) An applicant has a permit to appropriate water for beneficial use and has perfected all, or any portion, of the water right authorized by the permit.

(B) The time in which to perfect the water right has expired, including any authorized extensions of time.

(C) A field inspection has been completed.

(4) If the time to perfect the water right, or any authorized extension of that right, has not expired, enrollment in the WRCP shall be considered as suspending the time to perfect. Upon expiration of the WRCP contract pertaining to this water right, the time to perfect shall again commence, and the applicant shall be required to perfect the water right within the remainder of the time allowed to perfect, or any authorized extension of that time.

(5) Each year after authorized enrollment in the WRCP, the water use correspondent shall indicate on the water use report that no water was used because the water right was enrolled in the WRCP.

(6) If the owner breaches, or causes or allows a breach of, the WRCP contract with the chief engineer, each year of nonuse between the effective date of the contract and the date of the breach shall be counted as years of nonuse without due and sufficient cause for the purpose of determining whether or not the water right has been abandoned pursuant to K.S.A. 82a-718, and amendments thereto. Before this penalty is imposed, the owner shall be given an opportunity to show either of the following:

(A) A breach of contract did not occur.

(B) A breach occurred, but either was minor or has been cured, and should not constitute grounds for imposing the penalty. (Authorized by K.S.A. 82a-706a and K.S.A. 2012 Supp. 82a-741; implementing K.S.A. 82a-706, K.S.A. 82a-713, K.S.A. ~~2008~~ 2012 Supp. 82a-714, as amended by ~~L. 2009, Ch. 51, § 4, and K.S.A. 2008~~ 2012 Supp. 82a-718, and K.S.A. 2012 Supp. 82a-741; effective July 1, 1994; amended Sept. 22, 2000; amended Dec. 28, 2009; amended P-  
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**K.A.R. 5-7-4b. Water rights conservation program; tier 2.** (a) Each application for enrollment in the water rights conservation program (WRCP) received on or after July 1, 2011, shall be considered as a WRCP tier 2 application.

(b) Enrollment of a water right in tier 2 of the WRCP shall be by order of the chief engineer and compliance with the requirements of subsection (d).

(c) For a water right to be eligible to be enrolled in tier 2 of the WRCP, each of the following requirements shall be met:

(1) Except for domestic use, the point of diversion shall be located in either of the following locations:

(A) An area that is closed to new appropriations of water by regulation or order of the chief engineer or is effectively closed due to overappropriation determined by a safe-yield analysis; or

(B) some other area designated by the chief engineer as an area where it would be in the public interest to allow water rights to be placed in the WRCP. In areas within the boundaries of a groundwater management district, the recommendations of the board of the district shall be taken into consideration by the chief engineer.

(2) Each of the owners of the water right shall agree to totally suspend all water use authorized by the water right for the duration of the enrollment period.

(3) The owner or owners of the water right shall submit an application to the chief engineer, or the chief engineer's authorized representative, requesting that the water right be enrolled.

(4) Only an entire water right may be enrolled in the WRCP. If a water right is administratively divided by the chief engineer, each portion of the water right shall be considered to be an entire water right.

(5) The water right shall not be deemed abandoned pursuant to K.S.A. 82a-718, and amendments thereto.

(d) Requirements of any order enrolling a water right in the WRCP shall include the following:

(1) Water rights shall be placed into the WRCP for a definite period of calendar years of no fewer than five and no more than 10 as requested by the application.

(2) The water right owner or operator shall not be required to maintain the diversion works or delivery system during the period of enrollment. If the pump is removed from a well, the well shall be properly capped or sealed during the period of enrollment. These requirements shall be in addition to those requirements made by the Kansas department of health and environment pursuant to the groundwater exploration and protection act, K.S.A. 82a-1201 et seq. and amendments thereto.

(3) A certificate determining the extent to which a water right has been perfected shall be issued by the chief engineer before enrolling the water right in the WRCP.

(4) Each year after authorized enrollment in the WRCP, the water use correspondent shall indicate on the water use report that no water was used because the water right was enrolled in the WRCP.

(e) Each diversion of water for beneficial use, other than domestic use, under authority of a water right while enrolled in the WRCP shall result in revocation of the enrollment order

and the loss of due and sufficient cause for nonuse of water during the portion of the enrollment period occurring before the diversion.

(f) Each diversion of water for beneficial use, other than domestic use, during the enrollment period shall be considered a violation of the order enrolling the water right. Any such diversion of water may result in a civil penalty pursuant to K.S.A. 2012 Supp. 82a-737, and amendments thereto. (Authorized by and implementing K.S.A. 2012 Supp. 82a-741; effective P-  
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