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August 9, 2018

ATTORNEY GENERAL OPINION NO. 2018- 9

Jackie McClaskey, Secretary  
Kansas Department of Agriculture  
1320 Research Park Drive  
Manhattan, KS 66502

Re: Waters and Watercourses—Groundwater Management Districts—Local Enhanced Management Areas; Establishment Procedures; Duties of Chief Engineer

Synopsis: Kansas law does not require any additional procedural steps to be taken when the Chief Engineer of the Division of Water Resources retires or resigns from that position during proceedings to designate a local enhanced management area. Cited herein: K.S.A. 2017 Supp. 82a-1021; 82a-1036; 82a-1041.

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Dear Secretary McClaskey:

As Secretary of the Kansas Department of Agriculture, you ask our opinion on what, if any, additional procedures would be required in the event the Chief Engineer of the Division of Water Resources retired or resigned during the following stages of proceedings to designate a local enhanced management area (LEMA):

- 1) After LEMA proceedings have been initiated, but prior to holding an initial public hearing;
- 2) After holding the initial public hearing but prior to issuing findings related to that hearing;
- 3) After issuing the initial findings but prior to holding the second hearing; and,

- 4) After holding the second public hearing but prior to issuing an order of decision.

For the reasons described below, we do not believe any additional steps or procedures are required in the event the Chief Engineer retires or resigns at any point during LEMA designation proceedings.

We begin our analysis by summarizing the procedure for designating a LEMA, as prescribed by K.S.A. 2017 Supp. 82a-1041. The proceedings begin when a groundwater management district<sup>1</sup> recommends the approval of a local enhanced management plan to address certain groundwater conditions.<sup>2</sup> The district submits its plan to the Chief Engineer, who conducts a review of the plan. K.S.A. 2017 Supp. 82a-1041(a) limits the chief engineer's review to whether the plan:

- (1) Proposes clear geographic boundaries;
- (2) pertains to an area wholly within the groundwater management district;
- (3) proposes goals and corrective control provisions as provided in [K.S.A. 2017 Supp. 82a-1041(a)] adequate to meet the stated goals;
- (4) gives due consideration to water users who already have implemented reductions in water use resulting in voluntary conservation measures;
- (5) includes a compliance monitoring and enforcement element; and
- (6) is consistent with state law.

If, based upon that limited review, the Chief Engineer determines that the plan is acceptable for consideration, "the chief engineer shall conduct an initial public hearing on the question of designating such an area as a local enhanced management area according to the local enhanced management plan."<sup>3</sup>

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<sup>1</sup> A ground water management district is "a contiguous area which overlies one or more aquifers, together with any area in between, which is organized for groundwater management purposes under [K.S.A. 82a-1020 *et seq.*]." K.S.A. 2017 Supp. 82a-1021(a)(4) (defining "district").

<sup>2</sup> These conditions are: "(a) Groundwater levels in the area in question are declining or have declined excessively; or (b) the rate of withdrawal of groundwater within the area in question equals or exceeds the rate of recharge in such area; or (c) preventable waste of water is occurring or may occur within the area in question; [or] (d) unreasonable deterioration of the quality of water is occurring or may occur within the area in question." K.S.A. 82a-1036(a) through (d). See *also* K.S.A. 2017 Supp. 82a-1041(a).

<sup>3</sup> K.S.A. 2017 Supp. 82a-1041(a).

The purpose of the initial public hearing is to resolve three factual issues described in K.S.A. 2017 Supp. 82a-1041(b).<sup>4</sup> “The chief engineer shall conduct a subsequent hearing or hearings only if the initial public hearing is favorable on all three issues of fact and the expansion of geographic boundaries is not recommended.”<sup>5</sup>

After all hearings are conducted, the Chief Engineer is required to issue an order of decision within 120 days of the conclusion of the final public hearing. If the Chief Engineer issues an order of decision accepting the LEMA plan, he or she must also issue an order designating the area in question as a LEMA.<sup>6</sup> K.S.A. 2017 Supp. 82a-1041(j) requires the Chief Engineer to conduct periodic reviews of the LEMA designation beginning seven years after the order of designation is final, unless otherwise specified in that order.

Turning to your question, we apply the Kansas Supreme Court’s guidance concerning statutory interpretation:

It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. Stated another way, when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute.<sup>7</sup>

In this case, neither K.S.A. 2017 Supp. 82a-1041 nor any other provision of K.S.A. 82a-1020 through 82a-1040 provides additional procedural requirements that must be observed in the event that the Chief Engineer retires or resigns during any of the phases of LEMA designation proceedings that you describe. Nor do we find any other Kansas statute that may impose additional procedural requirements. We therefore presume that the absence of such additional procedures reflects legislative intent. To read into those statutes a requirement that certain procedures must be followed in the event of a change in the office of Chief Engineer would run afoul of the Supreme Court’s guidance described above.

We therefore opine that Kansas law does not require any additional procedural steps to be taken when the Chief Engineer of the Division of Water Resources retires or resigns

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<sup>4</sup> “The initial public hearing shall resolve the following findings of fact: (1) Whether one or more of the circumstances specified in K.S.A. 82a-1036(a) through (d), and amendments thereto, exist; (2) whether the public interest of K.S.A. 82a-1020, and amendments thereto, requires that one or more corrective control provisions be adopted; and (3) whether the geographic boundaries are reasonable.” K.S.A. 2017 Supp. 82a-1041(b)(1) through (3).

<sup>5</sup> K.S.A. 2017 Supp. 82a-1041(b).

<sup>6</sup> K.S.A. 2017 Supp. 82a-1041(e).

<sup>7</sup> *Matter of Marriage of Killman*, 264 Kan. 33, 42-43 (1998) (internal citations omitted).

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from that position during LEMA designation proceedings. However, as a technical matter, we note that K.S.A. 2017 Supp. 82a-1041 includes certain deadlines that the Chief Engineer must meet, and we therefore caution the agency to be mindful of such deadlines in the event of a change in the office of Chief Engineer.

Sincerely,

Derek Schmidt  
Attorney General

Sarah Fertig  
Assistant Attorney General

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