

FOULSTON SIEFKIN LLP  
1551 N. Waterfront Parkway, Suite 100  
Wichita, KS 67206-4466  
316-267-6371

**IN THE DISTRICT COURT OF STAFFORD COUNTY, KANSAS,  
TWENTETH JUDICIAL DISTRICT**

ALAN B. CRANE, LEAH R. CHADD, )  
and HELEN CARR WEWERS, )

Plaintiffs, )

vs. ) Case No. 2018-CV-000006

DAVID BARFIELD, P.E., THE CHIEF )  
ENGINEER OF THE STATE OF KANSAS, )  
DEPARTMENT OF AGRICULTURE, )  
DIVISION OF WATER RESOURCES, )  
in his official capacity, )

Defendant. )

\_\_\_\_\_  
PURSUANT TO K.S.A. CHAPTER 77

**PLAINTIFFS' RESPONSE TO  
DEFENDANT'S MOTION TO DISMISS**

**Table of Contents**

Nature of the Case ..... 3  
Argument and Authorities ..... 3  
I. The Chief Engineer's Motion to Dismiss must be denied because the Petition  
clearly demonstrates that the Plaintiffs have asserted a valid right to judicial  
review of the Chief Engineer's failure to adopt rules and regulations as  
mandated by the Legislature..... 3

A.	Motions to Dismiss based on the Petition alone are disfavored and the Defendant has not and cannot meet the burden to sustain a Motion to Dismiss.....	4
B.	The Chief Engineer’s Motion to Dismiss improperly asserts facts that are outside of the Petition, which facts must be ignored.....	5
II.	The LEMA statute mandates that the Chief Engineer publish the standards, policies, and procedures he will use to “effectuate and administer” its provisions.....	7
A.	The text of the statute requires that the Chief Engineer adopt rules and regulations establishing procedures and standards for LEMAs.....	7
B.	The Legislature has required the Chief Engineer to adopt standards, statements of policy, and general orders as rules and regulations in the past. ....	9
C.	The statute should be interpreted in light of general principles requiring that Agency decisions be based on known rules and standards. ....	10
D.	The cases cited by the Chief Engineer do not support his erroneous position that he is not required to adopt rules and regulations to “effectuate and administer” the LEMA statute. ....	11
E.	Rules and regulations are needed to provide guidance and protection from ad hoc and subjective imposition of corrective actions and the “attendant dangers of arbitrary and discriminatory application.” .....	16
III.	The Defendant’s Motion to Dismiss must be denied because the Petition states a valid KJRA claim and Plaintiffs are entitled to judicial review of the Chief Engineer’s failure to adopt rules and regulations. ....	18
A.	The Chief Engineer’s failure to adopt rules and regulations as required by the LEMA statute is “final agency action.” .....	20
B.	The Plaintiffs have standing to seek judicial review of the Chief Engineer’s failure to adopt appropriate rules and regulations. ....	22
1.	Plaintiffs have statutory standing to seek judicial review.....	23
2.	The Chief Engineer’s arguments would prohibit judicial review of the “failure to issue a rule and regulation” nullifying the KJRA definition of “agency action.” .....	25
3.	Plaintiffs have common law standing to seek judicial review.....	27
C.	The KJRA does not require exhaustion of administrative remedies in order to seek judicial review of the failure to adopt rules and regulations. ....	30
	<b>Conclusion</b> .....	30
	Appendix. K.S.A. 82a-1041, Local Enhanced Management Areas .....	33

## Nature of the Case

The Chief Engineer of the Division of Water Resources (“DWR” or the “Agency”) of the Kansas Department of Agriculture and the Big Bend Groundwater Management District No. 5, (“GMD5 or “the GMD”) are actively and aggressively involved in the development of a proposed Local Enhanced Management Area (“LEMA”) in the area shown on the map attached to the Petition. The Plaintiffs own land within the area and seek judicial review of the Chief Engineer’s failure to adopt rules and regulations, as required by the statute, to address critical substantive and procedural issues.

## Argument and Authorities

- I. The Chief Engineer’s Motion to Dismiss must be denied because the Petition clearly demonstrates that the Plaintiffs have asserted a valid right to judicial review of the Chief Engineer’s failure to adopt rules and regulations as mandated by the Legislature.**

The Plaintiffs agree that the Rules of Civil Procedure are often used to fill gaps in the Kansas Judicial Review Act (“KJRA”)<sup>1</sup> but the Code of Civil Procedure cannot alter or override it.<sup>2</sup>

---

<sup>1</sup> K.S.A. 77-601, *et seq.*

<sup>2</sup> Motion to Dismiss, p. 2.

**A. Motions to Dismiss based on the Petition alone are disfavored and the Defendant has not and cannot meet the burden to sustain a Motion to Dismiss.**

A Motion to Dismiss for failure to state a claim upon which relief can be granted must be decided from the allegations in the Petition.<sup>3</sup> Plaintiffs are entitled to have all of their allegations taken as true and all inferences drawn in their favor.<sup>4</sup> A Motion to Dismiss must be denied when the facts alleged, and any inferences that can be drawn from those facts, state a claim on the theories asserted in the Petition and on any possible theory that occurs to the Court.<sup>5</sup>

The question is whether, in the light most favorable to petitioners, and with every doubt resolved in their favor, the petition states any valid claim for relief. Dismissal is justified only when the allegations of the petition clearly demonstrate petitioners do not have a claim.<sup>6</sup>

In *Families Against Corporate Takeover v. Mitchell*,<sup>7</sup> Plaintiffs sought judicial review of a Kansas Department of Health and Environment (KDHE) permit authorizing a 14,300-head hog farm in Hodgeman County. The District Court granted KDHE's Motion to Dismiss for failure to state a claim holding that the

---

<sup>3</sup> *State ex rel. Slusher v. City of Leavenworth*, 279 Kan. 789 112 P.3d 131 (2005).

<sup>4</sup> *Goldbarth v. Kansas State Bd. of Regents*, 269 Kan. 881, 9 P.3d 1251 (2000); *Ling v. Jan's Liquors*, 237 Kan. 629, 703 P.2d 731 (1985) citing *Wirt v. Esrey*, 233 Kan. 300, 662 P.2d 1238 (1983).

<sup>5</sup> *Noel v. Pizza Hut, Inc.*, 15 Kan.App.2d 225, 231, 805 P.2d 1244, rev. denied 248 Kan. 996 (1991).

<sup>6</sup> *Bruggeman v. Schimke*, 239 Kan. 245, 247, 718 P.2d 635 (1986).

<sup>7</sup> 268 Kan. 803, 1 P.3d 884 (2000).

plaintiff did not have standing to sue. The Supreme Court reversed because the Rules of Civil Procedure only require notice pleading. Dismissal for failure to state a claim before any discovery has been conducted is seldom warranted. The Court said:

Under K.S.A.1999 Supp. 60–208, pleadings are to be given a liberal construction. We note that at the time the K.S.A. 60–212(b)(6) motion to dismiss was granted there had been no discovery. The record suggests that no factual matters outside the pleadings were presented to or considered by the district court. We have previously set out the scope of review for a motion to dismiss. The concept of notice pleading relies on its companion, discovery, to fill in the gaps. We have held that it is not necessary to plead a statute under which relief may be granted if the facts bring the case within the statute. Our discussion of notice pleading in *Oller*<sup>8</sup> applies here. Dismissal of a petition on a K.S.A. 60–212(b)(6) motion before utilization of discovery is seldom warranted. Following the teaching of *Bruggeman*<sup>9</sup> we have a duty to determine if the pleaded facts and inferences state a claim on any possible theory.<sup>10</sup>

**B. The Chief Engineer’s Motion to Dismiss improperly asserts facts that are outside of the Petition, which facts must be ignored.**

The Motion to Dismiss raises issues that are outside of the pleadings.

“[F]actual disputes cannot be resolved in ruling on a motion to dismiss; instead,

---

<sup>8</sup> *Oller v. Kincheloe’s, Inc.*, 235 Kan. 440, 446–49, 681 P.2d 630 (1984).

<sup>9</sup> *Bruggeman v. Schimke*, 239 Kan. 245, 247–48, 718 P.2d 635 (1986).

<sup>10</sup> 268 Kan. at 809.

the well-pleaded facts of the petition must be read in the light most favorable to the plaintiff.”<sup>11</sup>

The Petition makes the following assertions of fact regarding the LEMA plan being proposed by the Chief Engineer and the GMD. For purposes of this motion, these are the only relevant facts, they must be taken as true, and all inferences must be drawn in the Plaintiff’s favor. Statements in the Motion to Dismiss that attempt to contradict, minimize, or explain away these facts are improper argument that must be ignored.

18. Moreover, DWR is actively and aggressively involved in the development of the proposed LEMA.<sup>12</sup>

21. At the GMD5’s Annual Meeting held in St. John, Kansas on February 15, 2018, the GMD presented a draft LEMA plan.

22. The Chief Engineer and several of his staff were present at the meeting and the Chief Engineer followed the GMD’s presentation with a presentation of his own.

23. The essence of the presentation was that the GMD is working on the text of a proposed LEMA that is being driven by the Chief Engineer’s finding that a senior water appropriation right has been impaired. The GMD has proposed implementing an augmentation program that would address all or most of the impairment concerns.

24. Nevertheless, the Chief Engineer has insisted on reductions in water use with GMD5 even though GMD5’s augmentation plan

---

<sup>11</sup> *Cohen v. Battaglia*, 296 Kan. 542, 545-546; 293 P.3d 752, citing *Seaboard Corporation v. Marsh Inc.*, 295 Kan. 384, 392, 284 P.3d 314 (2012).

<sup>12</sup> Petition, ¶ 18.

would likely resolve the alleged impairment of a senior water appropriation right.<sup>13</sup>

32. In direct violation of the prior appropriation doctrine, the proposed LEMA Plan treats irrigation, stockwatering, and other users differently in violation of K.S.A. 82a-707(b), which specifically states that the “date of priority of every water right of every kind, and not the purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights.”<sup>14</sup>

As more fully discussed in the remainder of this Memorandum, the Petition establishes facts that entitle the Plaintiffs to relief as provided in the KJRA and the Motion to Dismiss should be denied.

**II. The LEMA statute mandates that the Chief Engineer publish the standards, policies, and procedures he will use to “effectuate and administer” its provisions.**

**A. The text of the statute requires that the Chief Engineer adopt rules and regulations establishing procedures and standards for LEMAs.**

The 2012 Kansas Legislature enacted the Local Enhanced Management Area (“LEMA”) statute,<sup>15</sup> including subsection (k), which reads:

The chief engineer *shall* adopt rules and regulations to *effectuate* and *administer* the provisions of this section.<sup>16</sup>

---

<sup>13</sup> *Id.*, ¶¶ 21-24.

<sup>14</sup> *Id.*, ¶ 32.

<sup>15</sup> K.S.A. 82a-1041. The text of the statute is attached as an Appendix.

<sup>16</sup> K.S.A. 82a-1041(k) (emphasis added).

The LEMA statute was effective as of April 12, 2012, just over six years ago. The Chief Engineer issued an order establishing a LEMA in the Northwest Kansas Groundwater Management District No. 4 (“NW KS GMD4”)<sup>17</sup> but he has not adopted the rules and regulations as directed by the Legislature.<sup>18</sup> Moreover, the Motion to Dismiss makes it clear that he does not believe that he has an obligation to do so.<sup>19</sup>

The Legislature directed the Chief Engineer to adopt regulations to “effectuate and administer” the LEMA provisions. “Effectuate” means to “put into force or operation,”<sup>20</sup> to “do something or make something happen,”<sup>21</sup> “to bring about; cause to happen; effect.”<sup>22</sup>

Thus, the Legislature directed the Chief Engineer to adopt rules and regulations to put the “provisions of this section” into force or operation; to make

---

<sup>17</sup> Petition, ¶ 13.

<sup>18</sup> Motion to Dismiss, p. 2-3, “As of the date this memorandum was filed, the Chief Engineer has not promulgated any rules and regulations under the authority of K.S.A. 82a-1041.”

<sup>19</sup> Motion to Dismiss, p. 2 (“The statutory language and context provide no guidance, direction, or mandate as to the specific content of any potential rules and regulations.”) and p. 9 (“[T]he Chief Engineer does not possess a mandatory duty to adopt rules and regulations pursuant to K.S.A. 82a-1041.”).

<sup>20</sup> <https://en.oxforddictionaries.com/definition/effectuate>.

<sup>21</sup> <https://dictionary.cambridge.org/dictionary/english/effectuate>.

<sup>22</sup> <https://www.collinsdictionary.com/us/dictionary/english/effectuate>, citing *Webster’s New World College Dictionary*, 4th Edition, 2010, Houghton Mifflin Harcourt.



“the provisions of this section” happen. The Legislature clearly intended that the Chief Engineer adopt rules and regulations that flesh out the process and procedure used to establish a LEMA (“effectuate”) as well as the contours of the corrective actions that can be imposed (“administer”).

**B. The Legislature has required the Chief Engineer to adopt standards, statements of policy, and general orders as rules and regulations in the past.**

It should be noted that this is not the first time that the Legislature has directed the Chief Engineer to adopt rules and regulations so that his internal “standards, statements of policy and general orders” see the light of day.<sup>23</sup> The 1999 Legislature directed the Chief Engineer to propose new rules and regulations, following the procedures in the Rules and Regulations Filing Act,<sup>24</sup> for the following:

[A]ll current standards, statements of policy and general orders that:  
(A) Have been issued or adopted by the chief engineer; (B) are of general application and have the effect of law; and (C) are not contained in current rules and regulations adopted by the chief engineer.<sup>25</sup>

---

<sup>23</sup> K.S.A. 82a-1903.

<sup>24</sup> K.S.A. 77-415, *et seq.*

<sup>25</sup> K.S.A. 82a-1903(a)(1).

The Legislature went on to declare that policies that were not adopted as regulations by November 15, 1999, were void and of no effect until adopted as rules and regulations.<sup>26</sup>

**C. The statute should be interpreted in light of general principles requiring that Agency decisions be based on known rules and standards.**

Due Process<sup>27</sup> and Equal Protection<sup>28</sup> require that agency actions be based on known standards. In *City of Wichita v. Wallace*,<sup>29</sup> the Kanas Supreme Court quoted from the U.S. Supreme Court's statement in *Grayned v. City of Rockford*, as follows:

[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application . . . The law must give the person of ordinary intelligence a reasonable

---

<sup>26</sup> K.S.A. 82a-1903(a)(2).

<sup>27</sup> U.S. Const. amend. XIV, § 1.

<sup>28</sup> *Id.*

<sup>29</sup> 246 Kan. 253, 258-59,788 P.2d 270 (1990) quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (internal quotations deleted).

opportunity to know what is prohibited, so that he may act accordingly.

Likewise, in *Schneider v. Kansas Securities Commissioner*,<sup>30</sup> the Court explained the critical role that rules and regulations play in the administration of an agency's mission.

As a general principle of administrative law, agency decisions must be based on known rules and standards applicable under the facts presented. "The requirement for filing and publishing rules and regulations is primarily one of dissemination of information. Members of the public, and others affected thereby, should not be subjected to agency rules and regulations whose existence is known only by agency personnel." *Clark v. Ivy*, 240 Kan. 195, 206, 727 P.2d 493 (1986). When an administrative agency arbitrarily applies a rule that is not embodied in the statutes or published as a rule or regulation, a respondent to an agency action is deprived of fair notice and due process. *See Bruns [v. Kansas State Bd. of Technical Professions]*, 255 Kan. 728, 737, 877 P.2d 391 (1994).

The Chief Engineer is required to adopt rules and regulations to "effectuate and administer" the provisions of the LEMA statute even if the Legislature had not included subsection (k) in the LEMA statute.

**D. The cases cited by the Chief Engineer do not support his erroneous position that he is not required to adopt rules and regulations to "effectuate and administer" the LEMA statute.**

The Chief Engineer argues that the Plaintiffs lack standing citing *Hallmark Cards, Inc. v. Kansas Dept. of Commerce And Housing*,<sup>31</sup> and *State v. Raschke*.<sup>32</sup> Both

---

<sup>30</sup> 54 Kan.App.2d 122, 139-40, 397 P.3d 1227 (2017) rev. denied February 26, 2018.

cases support the Plaintiff's argument that the Legislative directive imposes a mandatory duty to promulgate rules and regulations.

In *Hallmark*, the plaintiff applied for statutory income tax credits based on investments in its facilities. The statute stated that the agency "shall publish rules and regulations for the implementation of this act."<sup>33</sup> The Kansas Department of Commerce & Housing did not publish rules and denied the requested credits for several tax years. The District Court affirmed the agency's refusal to award the credits. The Court of Appeals reversed and the Supreme Court denied review.

*Hallmark* requires that the Agency promulgate rules and regulations, stating:

10. Where a statute contains a clear command that an agency proceed by rulemaking, failure to promulgate comprehensive and complete regulations to determine eligibility, coupled with an application of informal standards on a case-by-case basis, may lead to the agency action being stricken as arbitrary, capricious, and otherwise not in accordance with law.<sup>34</sup>

11. Where the legislature has explicitly directed that an agency "shall publish" rules and regulations to implement a statute, we must hold the agency to an even higher level of scrutiny in

---

<sup>31</sup> 32 Kan.App.2d 715; 88 P.3d 250 (2004).

<sup>32</sup> 289 Kan. 911; 219 P.3d 481 (2009).

<sup>33</sup> 32 Kan.App.2d at 720.

<sup>34</sup> 32 Kan.App.2d, syl. 10.

determining whether its internal and unwritten standards have been consistently and uniformly applied.<sup>35</sup>

The LEMA statute includes that explicit “shall publish” direction imposing the “even higher level of scrutiny” on DWR’s unwritten standards.

The *Hallmark* Court also stated that rules and regulations are required when the subject matter of the statute involves licensing or certification.

6. When an agency is charged with implementing or interpreting legislation, especially when the agency is administering a *licensing or certification statute*, fundamental fairness and due process dictate that any “standard” or “statement of policy” be expressed in a rule or regulation filed and published pursuant to law. Members of the public, and others affected thereby, should not be subjected to agency rules and regulations that are known only by agency personnel.<sup>36</sup>

Kansas water rights are property<sup>37</sup> and owners are entitled to the same, or even greater, “fundamental fairness and due process” as licensees and certificate holders.

The Chief Engineer admits that in previous LEMA proceedings, “the Chief Engineer has not created any standards absent those set forth in the statute.”<sup>38</sup> As discussed in the following section, there are critical issues that require standards.

---

<sup>35</sup> 32 Kan.App.2d, syl. 11.

<sup>36</sup> 32 Kan.App.2d, syl. 6 (emphasis added).

<sup>37</sup> K.S.A. 82a-701(g).

<sup>38</sup> Motion to Dismiss, p. 9.

The Court in *Hallmark* held that an agency “must always proceed by rulemaking if it seeks to . . . establish rules of widespread application.”<sup>39</sup> The Court went on to state that:

In the absence of rules, however, due process requires the agency to demonstrate that its internal and written standards of eligibility for statutory benefits are objective and ascertainable and that they are applied consistently and uniformly.<sup>40</sup>

The admission that the Chief Engineer has no standards is clear evidence that he cannot meet the burden to show that orders imposing corrective control measures will be “objective” and be based on “ascertainable” criteria that will be “applied consistently and uniformly.”

In *State v. Raschke*,<sup>41</sup> the Court stated that because the word “shall” is used in both directory and mandatory statutes, statutory construction is required.<sup>42</sup> The Court made it abundantly clear that there are no firm rules and a case-by-case analysis is required.<sup>43</sup>

---

<sup>39</sup> 32 Kan.App.2d at 725 citing K.S.A. 77–415 *et seq.* and *Bruns v. Kansas State Bd. of Technical Professions*, 255 Kan. 728, 733–37, 877 P.2d 391 (1994).

<sup>40</sup> *Id.* citing *White v. Roughton*, 530 F.2d 750, 753–54 (7th Cir. 1976); *Holmes v. New York City Housing Authority*, 398 F.2d 262, 265 (2nd Cir. 1968); and *Baker–Chaput v. Cammett*, 406 F.Supp. 1134, 1139–40 (D.N.H.1976).

<sup>41</sup> 289 Kan. 911; 219 P.3d 481 (2009).

<sup>42</sup> *Id.*, at 914.

<sup>43</sup> *Id.*, 917, 920, and 921.

The Court stated that “shall” is generally mandatory where, as here, the rights of parties can be “injuriously affected”<sup>44</sup> and where the provision affects a party’s rights.<sup>45</sup>

[I]t is a general rule that where strict compliance with the provision is essential to the preservation of the rights of parties affected and to the validity of the proceeding, the provision is mandatory, but where the provision fixes a mode of proceeding and a time within which an official act is to be done and is intended to secure order, system and dispatch of the public business, the provision is directory.<sup>46</sup>

The Court when on to state:

It has been said that whether a statute is directory or mandatory depends on whether the thing directed to be done is of the essence of the thing required, or is a mere matter of form. Accordingly, when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or where the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory ... where no substantial rights depend on it, no injury can result from ignoring it, and the purpose of the legislature can be accomplished in a manner other than prescribed, with substantially the same results. On the other hand, a provision relating to the essence of the thing to be done, that is, to matters of substance, is mandatory, and when a fair interpretation of a statute, which directs \*918 acts or proceedings to be done in a certain way, shows that the legislature

---

<sup>44</sup> 289 Kan. at 916.

<sup>45</sup> *Id.*, 920.

<sup>46</sup> *Id.*, 916 quoting from *City of Hutchinson v. Ryan*, 154 Kan. 751, Syl. ¶ 1, 121 P.2d 179 (1942).

intended a compliance with such provision to be essential to the validity of the act or proceeding, or when some antecedent and prerequisite conditions must exist prior to the exercise of power or must be performed before certain powers can be exercised the statute must be regarded as mandatory.<sup>47</sup>

In a 2006 DWR case the Court said that “shall” is directory only when it involves “matters of mere form, not substance.”<sup>48</sup>

**E. Rules and regulations are needed to provide guidance and protection from ad hoc and subjective imposition of corrective actions and the “attendant dangers of arbitrary and discriminatory application.”**

The LEMA statute requires the Chief Engineer to hold a hearing to determine whether the public interest, as provided in K.S.A. 82a-1020,<sup>49</sup> requires adoption of one or more corrective control provisions because one or more of the following is occurring in the area.

- ◆ groundwater levels are declining;
- ◆ groundwater levels have declined excessively;
- ◆ the rate of withdrawal of groundwater equals or exceeds the rate of recharge;
- ◆ preventable waste of water is occurring;
- ◆ preventable waste of water may occur;
- ◆ unreasonable deterioration of the quality of water is occurring; or
- ◆ unreasonable deterioration of the quality of water may occur.<sup>50</sup>

---

<sup>47</sup> *Id.*, 917-18 quoting from *Wilcox v. Billings*, 200 Kan. 654, 657, 438 P.2d 108 (1968).

<sup>48</sup> *Hawley v. Kansas Dept. of Agriculture*, 281 Kan. 603, 132 P.3d 870 (2006).

<sup>49</sup> K.S.A. 82a-1041(b)(2).

<sup>50</sup> K.S.A. 82a-1041(b)(1).



Rules and regulations are needed to establish standards so that the regulated public is aware of the circumstances that will result in the imposition of corrective controls.

In addition, the statute raises numerous questions for which the Chief Engineer has provided no answers. For example:

- ◆ Under what circumstances will corrective controls be imposed because groundwater levels are declining but the decline is not “excessive”?
- ◆ How much decline is “excessive” in light of Kansas public policy that permits groundwater mining?<sup>51</sup>
- ◆ What is “preventable” waste?
- ◆ How much quality deterioration is “unreasonable”?
- ◆ Under what circumstances will potential waste of water or potential deterioration of groundwater quality result in corrective controls?

Rules and regulations are also needed to answer questions about the corrective control provisions. The statute authorizes the Chief Engineer to adopt any of the following controls:

- ◆ close the area to new appropriations of groundwater.
- ◆ determining total quantity of groundwater and insofar as may be reasonably done, apportion that quantity among the valid groundwater right holders in accordance with the relative dates of priority of such rights;

---

<sup>51</sup> See K.S.A. 82a-711 and 82a-711a; *Report on the Laws of Kansas Pertaining to the Beneficial Use of Water, Bulletin No. 3*, November 1956, pp. 51, 85-91.

- ◆ reducing the permissible withdrawal of groundwater by any one or more appropriators thereof, or by wells in the local enhanced management area;
- ◆ requiring and specifying a system of rotation of groundwater use in the local enhanced management area; or
- ◆ any other provisions making such additional requirements as are necessary to protect the public interest.<sup>52</sup>

These provision raise a multitude of statutory and constitutional questions, most particularly reconciling the corrective control provisions with the prior appropriation doctrine mandated by the Kansas Water Appropriation Act.<sup>53</sup>

**III. The Defendant’s Motion to Dismiss must be denied because the Petition states a valid KJRA claim and Plaintiffs are entitled to judicial review of the Chief Engineer’s failure to adopt rules and regulations.**

The Chief Engineer argues, without citation to authority, that Plaintiffs have failed to state a cause of action and do not have standing because:

- ◆ no LEMA proceeding has been commenced;<sup>54</sup>
- ◆ Plaintiffs have not suffered any injury or damage,<sup>55</sup> which harm is uncertain,<sup>56</sup> hypothetical,<sup>57</sup> undescribed, and unknown;<sup>58</sup>
- ◆ the outcome of a LEMA proceeding is completely uncertain including,<sup>59</sup>

---

<sup>52</sup> K.S.A. 82a-1041(f)(1)-(5).

<sup>53</sup> K.S.A. 82a-701, *et seq.*

<sup>54</sup> Motion to Dismiss, pp. 3 and 11.

<sup>55</sup> *Id.*, pp. 3, 4, 6, 7, 8, and 11.

<sup>56</sup> *Id.*, p. 7.

<sup>57</sup> *Id.*, p. 4.

<sup>58</sup> *Id.*, p. 7 and 11.

<sup>59</sup> *Id.*, p.. 6. *See also* p 7.

- whether a LEMA hearing will ever take place;<sup>60</sup>
- what any proposed management plan might contain;<sup>61</sup>
- what property will be included within the boundaries;<sup>62</sup>
- the LEMA management plan may
  - change during the hearing process;<sup>63</sup>
  - be rejected by the Chief Engineer;<sup>64</sup> or
  - rejected by GMD5.<sup>65</sup>

Each of these factors support the need for rules and regulations to make sure that there are standards in place to protect water right owners.

Nevertheless, the Kansas Judicial Review Act (“KJRA”)<sup>66</sup> specifically recognizes the Plaintiffs’ right to seek judicial review of the Chief Engineer’s failure to issue a rule and regulation even if the duty is discretionary.<sup>67</sup>

The KJRA applies to all agencies and all proceedings for judicial review not specifically exempted by statute.<sup>68</sup> It provides the exclusive means of judicial review of agency action.<sup>69</sup> A person with standing who has exhausted any

---

<sup>60</sup> *Id.*, p. 6.

<sup>61</sup> *Id.*, p. 6 and 7.

<sup>62</sup> *Id.*, pp. 3, 7, and 11.

<sup>63</sup> *Id.*, pp. 3 and 6.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*, p. 6.

<sup>66</sup> K.S.A. 77-601, *et seq.*

<sup>67</sup> K.S.A. 77-602(b) quoted below.

<sup>68</sup> K.S.A. 77-603(a).

<sup>69</sup> K.S.A. 77-606.

available administrative remedies and files a timely Petition is entitled to judicial review of final agency action.<sup>70</sup>

**A. The Chief Engineer’s failure to adopt rules and regulations as required by the LEMA statute is “final agency action.”**

The Chief Engineer’s failure to promulgate regulations is “agency action” and “final agency action,” (i.e., not “nonfinal agency action”) because of the passage of time, the fact that he has established another LEMA without adopting regulations, and, as his Motion to Dismiss makes clear, he has no intention to adopt them.

The KJRA defines “agency action” to include:

- (1) The whole or a part of a rule and regulation . . . ;
- (2) the failure to issue a rule and regulation . . . ; or
- (3) an agency’s . . . failure to perform . . . any other duty, function or activity, discretionary or otherwise.<sup>71</sup>

The Act defines final and non-final agency action as follows:

- (1) “Final agency action” means the whole or a part of any agency action other than nonfinal agency action;
- (2) “Nonfinal agency action” means the whole or a part of an agency determination, investigation, proceeding, hearing, conference or other process that the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural or intermediate

---

<sup>70</sup> K.S.A. 77-607(a).

<sup>71</sup> K.S.A. 77-602(b).

with regard to subsequent agency action of that agency or another agency.<sup>72</sup>

The Chief Engineer's failure to adopt rules is "agency action" and "final agency action" because his failure is not "preliminary, preparatory, procedural or intermediate." The Petition alleges that it has been five and one-half years (actually six years) since the enactment of the LEMA statute<sup>73</sup> and he recently issued an order establishing a LEMA in the Northwest Kansas Groundwater Management District No. 4 ("NW KS GMD4")<sup>74</sup> without adopting rules and regulations as directed by the Legislature.<sup>75</sup>

Moreover, in the February 23, 2018, Order issued in the NW KS GMD4 LEMA proceeding, the Chief Engineer stated that the plain text of the statute does not require that he adopt rules and regulations to effectuate LEMA proceedings.<sup>76</sup>

---

<sup>72</sup> K.S.A. 77-607(b).

<sup>73</sup> Petition, ¶ 20.

<sup>74</sup> *Id.*, ¶ 13.

<sup>75</sup> *Id.*, ¶ 20.

<sup>76</sup> *Id.*, ¶ 13.

Finally, his Motion to Dismiss makes it clear that he does not believe that the LEMA statute requires him to do so.<sup>77</sup>

The Chief Engineer does not intend to comply with the mandate, making his failure to comply “final agency action” subject to judicial review.

**B. The Plaintiffs have standing to seek judicial review of the Chief Engineer’s failure to adopt appropriate rules and regulations.**

The Chief Engineer asserts that Plaintiffs lack standing for all of the reasons set out at the beginning of this Section III. The argument misses the mark.

Kansas water rights are property rights;<sup>78</sup> their owners are entitled to due process and equal protection.<sup>79</sup> A fundamental characteristic of each Kansas water appropriation right is priority in relationship to other water rights—first in time is first in right.<sup>80</sup> The LEMA statute is part of the Groundwater Management District Act<sup>81</sup> which is subject to the Water Appropriation Act including the prior

---

<sup>77</sup> Motion to Dismiss, p. 4. *See also* p. 10 (The Chief Engineer asserts that “it appears that the requirement to adopt rules and regulations pursuant to K.S.A. 82a-1041 was merely a directory, not a mandatory.”)

<sup>78</sup> K.S.A. 82a-701(g).

<sup>79</sup> Petition, ¶ 36.

<sup>80</sup> *See, e.g.*, K.S.A. 82a-703b(b); 82a-706; 82a-706b; 82a-706e; 82a-707(b), (c), and (d); 82a-708b; 82a-710, 82a-711(b)(3), 82a-711a, 82a-712, 82a-716; 82a-717a; 82a-742; and 82a-745.

<sup>81</sup> K.S.A. 82a-1020, *et. seq.*

appropriation doctrine.<sup>82</sup> The LEMA statute contains provisions that appear to be at odds with the provisions cited in the footnotes in this paragraph.<sup>83</sup>

Based on the Chief Engineer's rulings in the NW KS GMD4 LEMA proceeding, his active and aggressive involvement in the development of the proposed GMD5 LEMA, and the contents of the Motion to Dismiss, the Plaintiffs are virtually certain that discovery will demonstrate that he plans to follow the same basic ad hoc approach in the upcoming GMD5 LEMA.<sup>84</sup>

The imposition of a GMD5 LEMA is imminent and the LEMA statute, as the Chief Engineer has and is continuing to interpret and apply it, is in direct violation of Kansas law and will have a direct and negative impact on the Plaintiffs' property rights.

**1. Plaintiffs have statutory standing to seek judicial review.**

The KJRA confers standing to challenge a rule and regulation on persons subject to the rule and regulation.<sup>85</sup> The Plaintiffs meet this standard because the Petition asserts that DWR is "actively and aggressively"<sup>86</sup> involved in the

---

<sup>82</sup> See, e.g., K.S.A. 82a-1020, 82a-1028(n) and (o), 82a-1029, and 82a-1039.

<sup>83</sup> See K.S.A. 82a-1041(f)(2)-(5).

<sup>84</sup> Petition, ¶ 37.

<sup>85</sup> K.S.A. 77-611.

<sup>86</sup> Petition, ¶¶ 17-18 and 21-24.

development of the proposed LEMA by the Chief Engineer and GMD5. That LEMA, as proposed, will impact water rights in Edwards, Kiowa, Pawnee, Pratt, Reno, Rice, and Stafford Counties.

In addition, the Petition asserts that Plaintiffs are owners of agricultural land and water appropriation rights within the GMD5 boundaries and within the boundaries of the proposed LEMA. The map attached to the Petition shows the proposed boundaries of a LEMA in GMD5. Plaintiffs know where their lands are located and have relied on the Chief Engineer's public statements to determine that they own agricultural land and water rights within the boundaries of the proposed LEMA.<sup>87</sup>

Because the Plaintiffs own agricultural land within the area that is likely to be covered by a LEMA, they are entitled to know and understand the procedural contours of the proceeding in advance as well as the circumstances that could result in corrective control measures. The statute gives a cursory outline of the steps in the LEMA process but does not afford the Plaintiffs the protections found in either the Code of Civil Procedure or the Kansas Administrative Procedure Act ("KAPA").<sup>88</sup>

---

<sup>87</sup> *Id.*, ¶¶ 5 and 6.

<sup>88</sup> K.S.A. 77-501, *et seq.*



In the NW KS GMD4 LEMA proceeding, the Chief Engineer granted only portions of the Intervenor’s Motion to Provide Due Process Protections.<sup>89</sup> In his February 23, 2018, Order, the Chief Engineer explained that he did not rule on the Intervenor’s initial Motion for Continuance, stating that the LEMA statute “does not mandate that the public hearings be conducted as adversarial hearings.”<sup>90</sup>

Plaintiffs should not be required to wait until the LEMA proceeding has concluded to seek judicial review when the Chief Engineer has been directed to adopt rules and regulations to effectuate and administer the statute and he has ignored the directive for six years.

**2. The Chief Engineer’s arguments would prohibit judicial review of the “failure to issue a rule and regulation” nullifying the KJRA definition of “agency action.”**

The Chief Engineer hopes to entirely avoid judicial review of his failure to act. As noted above, he asserts that Plaintiffs do not have a cause of action and lack standing because no LEMA proceeding has been commenced, the outcome is uncertain, and Plaintiffs have not suffered injury or damage.<sup>91</sup> He goes on to

---

<sup>89</sup> Petition, ¶¶ 34-35.

<sup>90</sup> *Id.*, ¶ 35.

<sup>91</sup> Motion to Dismiss, p. 6.

argue that the Plaintiffs' claims are not ripe.<sup>92</sup> In fact, he argues that a "finalized management plan" is required before judicial review is available at all.<sup>93</sup>

Yet the Legislature has clearly said that the "failure to issue a rule and regulation" is agency action and is reviewable.<sup>94</sup> It goes on to provide that,

(b) The court may grant . . . appropriate relief, whether mandatory, injunctive or *declaratory*; preliminary or final; temporary or permanent; equitable or legal. In granting relief, the court *may order agency action* required by law, *order agency exercise of discretion* required by law, set aside or modify agency action, enjoin or stay the effectiveness of agency action, remand the matter for further proceedings, *render a declaratory judgment* or take any other action that is authorized and appropriate.

(c) The court may also grant necessary ancillary relief to redress the effects of *official action wrongfully taken or withheld* . . .

(d) If the court sets aside or modifies agency action or remands the matter to the agency for further proceedings, the court may make any interlocutory order it finds necessary to preserve the interests of the parties and the public pending further proceedings or agency action.<sup>95</sup>

While the Chief Engineer hasn't said so, it seems clear from the text of the Motion to Dismiss that he doesn't intend to write new rules and to promulgate

---

<sup>92</sup> *Id.*, p. 7.

<sup>93</sup> *Id.*, p. 6.

<sup>94</sup> K.S.A. 77-602(b).

<sup>95</sup> K.S.A. 77-622 (emphasis added).

them as required by the Rules and Regulations Filing Act<sup>96</sup> before beginning the procedure to establish a LEMA in GMD5.

The practical result of the Chief Engineer's argument is that the Plaintiffs will never have a claim for judicial review of the Chief Engineer's failure to adopt rules. He seeks to nullify the Legislature's definition of "agency action" and asks the Court to ignore the fact that declaratory and other forms of relief are available to address his failure to act.

**3. Plaintiffs have common law standing to seek judicial review.**

The Chief Engineer asserts that Plaintiffs do not have common law standing. Citing *Sierra Club v. Moser*<sup>97</sup> and *Cochran v. State, Depart. Of Agr., Div. of Water Resources*,<sup>98</sup> he points out that Plaintiffs must meet the statutory and common law standing requirements.<sup>99</sup> He then points out that standing is an element of the "case-or-controversy requirement."<sup>100</sup>

---

<sup>96</sup> K.S.A. 77-415, *et seq.*

<sup>97</sup> 298 Kan. 22, 310 P.3d 360 (2013).

<sup>98</sup> 291 Kan. 898, 908-909; 249 P.3d 434 (2011).

<sup>99</sup> Motion to Dismiss, pp. 5-6.

<sup>100</sup> *Id.*, p. 6.

Instead of making a standing argument, he argues that the Plaintiffs have failed to present a case or controversy because their claims are not ripe.<sup>101</sup> In addition, he argues that the statute provides adequate protections so Plaintiffs have nothing to worry about.<sup>102</sup>

The *Cochran* Court stated that to establish traditional standing, “[a] party must have a sufficient stake in the outcome of an otherwise justiciable controversy in order to obtain judicial resolution of that controversy.”<sup>103</sup>

In *Sierra Club v. Moser*, the Court put it this way:

Generally, to demonstrate common-law or traditional standing, a person suing individually must show a cognizable injury and establish a causal connection between the injury and the challenged conduct. To establish a cognizable injury, a party must establish a personal interest in a court's decision and that he or she personally suffers some actual or *threatened injury* as a result of the challenged conduct.<sup>104</sup>

In *State ex rel. Morrison v. Sebelius*,<sup>105</sup> the Court stated:

As in federal court, less rigorous requirements have been imposed in declaratory judgment cases; yet, actual cases and controversies are still required. The one Kansas case stressed by the governor at oral arguments in this case is illustrative. In *State ex rel. Hopkins v.*

---

<sup>101</sup> Motion to Dismiss, pp. 6-7.

<sup>102</sup> *Id.*, p. 7.

<sup>103</sup> 291 Kan. at 909.

<sup>104</sup> 298 Kan. at 33 (emphasis added; citations omitted).

<sup>105</sup> 285 Kan. 875, 897, 179 P.3d 366 (2008)

*Grove*, 109 Kan. 619, 201 P. 82 (1921), the constitutionality of Kansas' declaratory judgment statute was challenged on the basis those actions did not present a case or controversy. Rejecting this argument, the court noted a declaratory action involves "two disputants, each of whom sincerely believes in the rightfulness of his own claim" and upon whom the judgment would be binding. 109 Kan. at 623, 201 P. 82. In contrast, the court noted advisory opinions are based upon abstract questions, are " 'inoperative and nugatory,' " and are " 'merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties.... Such is not the judicial power confided to this Court.'

The Petition asserts that in a similar proceeding, the Chief Engineer refused to provide adequate procedural protections, characterizing LEMA proceedings as non-adversarial.<sup>106</sup>

The Chief Engineer is threatening to use his considerable power to curtail Plaintiffs' property interests.<sup>107</sup> The "injury" is threatened, cognizable, personal, and imminent. The Plaintiffs take exception to characterizing a proceeding as "non-adversarial" when it is designed to curtail their valuable property rights and, indeed, their livelihood.

---

<sup>106</sup> Petition, ¶¶ 34-37.

<sup>107</sup> See discussion in subsection III.B., *supra*.

**C. The KJRA does not require exhaustion of administrative remedies in order to seek judicial review of the failure to adopt rules and regulations.**

While exhaustion of administrative remedies is normally a prerequisite for judicial review, it is not required for judicial review of a rule or regulation.

Plaintiffs are not required to have participated in a rulemaking proceeding or to petition for its amendment or repeal.<sup>108</sup>

**Conclusion**

The Chief Engineer alleges that Plaintiffs may not “ultimately be affected by a potential LEMA because the boundaries and corrective controls contained in any management plan may be altered or rejected outright during the LEMA proceedings.”<sup>109</sup>

Plaintiffs know where their lands are located and have relied on the Chief Engineer’s public statements to determine that they own agricultural land and water rights within the boundaries of the proposed LEMA.<sup>110</sup>

Plaintiffs would like nothing more than to be excluded from the LEMA area and they will be pleased to dismiss their Petition if the Chief Engineer will

---

<sup>108</sup> K.S.A. 77-612(a).

<sup>109</sup> Motion to Dismiss, p. 3.

<sup>110</sup> Petition, ¶¶ 5 and 6.

provide assurance that their water rights will not be included in the proposed LEMA.

So while it is possible that Plaintiffs' lands will be excluded, a result that would please them greatly, they are entitled to understand the process that will be used so they can navigate the process to achieve that very end. Without rules and regulations, the Plaintiffs will be left to vagaries of the Chief Engineer's ad hoc process.

FOULSTON SIEFKIN LLP  
1551 N. Waterfront Parkway, Suite 100  
Wichita, KS 67206-4466  
Tel (Direct): 316-291-9725  
Fax (Direct): (866) 347-3138  
[dtraster@foulston.com](mailto:dtraster@foulston.com)

By: s/David M. Traster  
David M. Traster, #11062  
*Attorneys for Plaintiffs*

## CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May, 2018, I presented the foregoing to the Clerk of the Court for filing and uploading to the Kansas Courts e-Filing system that will send notice of electronic filing to the following:

Kenneth B. Titus, Chief Counsel  
Kansas Department of Agriculture  
1320 Research Park Drive  
Manhattan, KS 66502  
[kenneth.titus@ks.gov](mailto:kenneth.titus@ks.gov)

Aaron Oleen, Staff Attorney  
Kansas Department of Agriculture  
1320 Research Drive  
Manhattan, KS 66502  
[Aaron.Oleen@ks.gov](mailto:Aaron.Oleen@ks.gov)

*s/David M. Traster*

---

David M. Traster, #11062



## Appendix.

### K.S.A. 82a-1041, Local Enhanced Management Areas

#### **K.S.A. 82a-1041. Local enhanced management areas; establishment procedures; duties of chief engineer; hearing; notice; orders; review.**

(a) Whenever a groundwater management district recommends the approval of a local enhanced management plan within the district to address any of the conditions set forth in K.S.A. 82a-1036(a) through (d), and amendments thereto, the chief engineer shall review the local enhanced management plan submitted by the groundwater management district. The chief engineer's review shall be limited 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 subsection (f) 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 on such review, the chief engineer finds that the local enhanced management plan is acceptable for consideration, the chief engineer shall initiate, as soon as practicable thereafter, proceedings to designate a local enhanced management area.

(b) In any case where proceedings to designate a local enhanced management area are initiated, 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. 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.

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. At least 30 days prior to the date set for any hearing, written notice of such hearing shall be given to every person holding a water right of record within the area in question and by one publication in any newspaper of general circulation within the area in question. The notice shall state the question and shall denote the time and place of the hearing. At every such hearing, documentary and oral evidence shall be taken and a complete record of the same shall be kept.

(c) The subject matter of the hearing or hearings set forth in subsection (b) shall be limited to the local enhanced management plan that the chief engineer previously reviewed pursuant to subsection (a) and set for hearing.

(d) Within 120 days of the conclusion of the final public hearing set forth in subsections (b) and (c), the chief engineer shall issue an order of decision:

(1) Accepting the local enhanced management plan as sufficient to address any of the conditions set forth in K.S.A. 82a-1036(a) through (d), and amendments thereto;

(2) rejecting the local enhanced management plan as insufficient to address any of the conditions set forth in K.S.A. 82a-1036(a) through (d), and amendments thereto;

(3) returning the local enhanced management plan to the groundwater management district, giving reasons for the return and providing the district with the opportunity to resubmit a revised plan for public hearing within 90 days of the return of the deficient plan; or

(4) returning the local enhanced management plan to the groundwater management district and proposing modifications to the plan, based on testimony at the hearing or hearings, that will improve the administration of the plan, but will not impose reductions in groundwater withdrawals that exceed those contained in the plan. If the groundwater management district approves of the modifications proposed by the chief engineer, the

district shall notify the chief engineer within 90 days of receipt of return of the plan. Upon receipt of the groundwater management district's approval of the modifications, the chief engineer shall accept the modified local management plan. If the groundwater management district does not approve of the modifications proposed by the chief engineer, the local management plan shall not be accepted.

(e) In any case where the chief engineer issues an order of decision accepting the local enhanced management plan pursuant to subsection (d), the chief engineer, within a reasonable time, shall issue an order of designation that designates the area in question as a local enhanced management area.

(f) The order of designation shall define the boundaries of the local enhanced management area and shall indicate the circumstances upon which the findings of the chief engineer are made. The order of designation may include any of the following corrective control provisions set forth in the local enhanced management plan:

- (1) Closing the local enhanced management area to any further appropriation of groundwater. In which event, the chief engineer shall thereafter refuse to accept any application for a permit to appropriate groundwater located within such area;
- (2) determining the permissible total withdrawal of groundwater in the local enhanced management area each day, month or year, and, insofar as may be reasonably done, the chief engineer shall apportion such permissible total withdrawal among the valid groundwater right holders in such area in accordance with the relative dates of priority of such rights;
- (3) reducing the permissible withdrawal of groundwater by any one or more appropriators thereof, or by wells in the local enhanced management area;
- (4) requiring and specifying a system of rotation of groundwater use in the local enhanced management area; or
- (5) any other provisions making such additional requirements as are necessary to protect the public interest.

The chief engineer is hereby authorized to delegate the enforcement of any corrective control provisions ordered for a local enhanced management area to

the groundwater management district in which that area is located, upon written request by the district.

(g) The order of designation shall follow, insofar as may be reasonably done, the geographical boundaries recommended by the local enhanced management plan.

(h) Except as provided in subsection (f), the order of designation of a local enhanced management area shall be in full force and effect from the date of its entry in the records of the chief engineer's office unless and until its operation shall be stayed by an appeal from an order entered on review of the chief engineer's order pursuant to K.S.A. 82a-1901, and amendments thereto, and in accordance with the provisions of the Kansas judicial review act. The chief engineer upon request shall deliver a copy of such order to any interested person who is affected by such order and shall file a copy of the same with the register of deeds of any county within which any part of the local enhanced management area lies.

(i) If the holder of a groundwater right within the local enhanced management area applies for review of the order of designation pursuant to K.S.A. 82a-1901, and amendments thereto, the provisions of the order with respect to the inclusion of the holder's water right within the area may be stayed in accordance with the Kansas administrative procedure act.

(j) Unless otherwise specified in the proposed enhanced management plan and included in the order of designation, a public hearing to review the designation of a local enhanced management area shall be conducted by the chief engineer within seven years after the order of designation is final. A subsequent review of the designation shall occur within 10 years after the previous public review hearing or more frequently as determined by the chief engineer. Upon the request of a petition signed by at least 10% of the affected water users in a local enhanced management area, a public review hearing to review the designation shall be conducted by the chief engineer. This requested public review hearing shall not be conducted more frequently than every four years.

(k) The chief engineer shall adopt rules and regulations to effectuate and administer the provisions of this section.

(l) The provisions of this section shall be part of and supplemental to the provisions of K.S.A. 82a-1020 through K.S.A. 82a-1040, and amendments thereto.

Laws 2012, ch. 62, § 1, eff. April 12, 2012; Laws 2015, ch. 60, § 4, eff. July 1, 2015.