



Kansas Water Resources Consulting

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**Neutral Testimony on HB 2459  
House Committee on Water, February 1, 2024**

My name is David Barfield, and I am providing neutral testimony regarding HB 2459.

**Qualifications** - I am a professional civil engineer with over 40 years of water resources experience. I worked for the Kansas Dept. of Agriculture's Division of Water Resources (DWR) from 1984 until my retirement from the state during early 2020, which included 12 years as DWR's Chief Engineer. Since mid-2020, I have been a water resources consultant, assisting two GMDs in their LEMA development and implementation and a diverse set of cities, industry, and irrigators in water right matters. That said, **my comments provided herein are my own alone.**

**The Kansas Water Appropriation Act (Act) allows for water right changes** when, among other considerations, the Chief Engineer finds the proposed change is reasonable and will not impair existing rights. Current statewide regulations as well as regulations adopted by the Chief Engineer on behalf of the state's GMDs, further define requirements for such changes.

**Changes in points of diversion** are common under the Act and **are often necessitated** such as when a well fails, a well has outlived its useful life, or, in the case of municipal wells, when contaminants are found in the well's production. The later problem is an increasingly common challenge for municipalities with increases in nitrates, PFAS, and more.

**HB 2459** would add to the (Act) the definition of safe yield currently in the regulations of the Chief Engineer and a new required consideration of the Chief Engineer in approving a change a point of diversion. Specifically, such changes would not be allowed if the change in location would cause the safe yield of the source of water supply to be exceeded.

**The Legislature needs to be very cautious in amending the Act to prevent unforeseen consequences** as, while the Chief Engineer can waive regulations for good cause, the Chief Engineer cannot waive statutory provisions.

First, of concern is the proposed amendment's applicability to all changes in point of diversion and **the lack of discretion allowed to the Chief Engineer in its application.** For example, there is no exemption for wells drilled within 300 feet of the existing points of diversion, as is typically allowed under the Act and its regulations. There is also no exemption for changes that would fail to meet the stated criteria but might be in the public interest and proposed in a way that does not impair other water rights.

Second, **the language is unclear.** The vast majority of the Ogallala aquifer in western Kansas does not meet safe yield according to the Bill's definition. How would the Bill's language to be

applied by the Chief Engineer in such areas? Would the Bill prohibit all changes in points of diversion in areas not meeting safe yield? This would be problematic and in the case of short moves (less than 300 feet), provide little benefit to the public.

If the Bill's intent is to only restrict changes in points of diversion where safe yield is met prior to the move and but not met with the proposed move, then the Bill should be re-written to reflect that intent. It is certainly a valid, if narrow, concern.

As I stated before, the ability to make changes in points of diversion are necessary at times and the current statute and regulations provide significant and real protections to ensure changes are approved in a manner that does not injury other water rights.

That said, **there is room for additional improvements for the Act and its implementing regulations. The Chief Engineer is currently working** with a diverse set of stakeholders on **potential amendments to regulations** related to changes in points of diversion of more than 300 feet **to prevent multiple, consecutive changes in point of diversion (chasing water)** and to add definition to the complex question of when a proposed change in point of diversion is reasonable and will not impair other water rights. See attached discussion draft of the regulation. One part of those potential regulatory amendments of particular appeal is **the establishment of an "anchor point"** for each existing authorized point of diversion and all future ones, which will prevent water right holders from using multiple change applications to move into the water supply of their neighbors.

**I would recommend the Committee identify specific concerns** with the Act's and its implementation and **request the Chief Engineer's input** on whether these concerns are best addressed in regulations or require amendment of statute.

I would be happy to stand for questions.

**Attachment:** DWR discussion draft of K.A.R. 5-5-17

**K.A.R. 5-5-17. Application to change points of diversion of groundwater rights.**

(a) This regulation shall apply to groundwater rights and permits.

(b) As used in this regulation, the anchor point for a water right or permit:

(1) with an earlier priority date than the effective date of this regulation shall be the authorized point of diversion on the effective date of this regulation.

(2) with a later priority date than the effective date of this regulation shall be the original authorized point of diversion.

(c) As used in this regulation, “area of consideration” and “circle” have the same meanings as in K.A.R. 5-3-11 with the currently authorized point of diversion and the proposed point of diversion as the centers of the two-mile radius circles.

(d) An application for a change in point of diversion that is filed requesting to move a point of diversion more than 300 feet from the anchor point shall not be approved if a proposed point of diversion would move into a more appropriated area of consideration, and allow a vested right or prior appropriation right or permit to be added to an area of consideration, unless the water right or permit would meet the requirements of safe yield pursuant to K.A.R. 5-3-10, and amendments thereto, at the proposed point of diversion.

(e) A change in the point of diversion of a water right or permit shall not be greater than 2,640 feet from the water right or permit’s anchor point.

(f) This regulation shall apply to:

(1) changes in points of diversion that would only impact another water right or permit held by the owner of the water right or permit at issue; and

(2) applications for changes in points of diversion filed within a groundwater management district for which the chief engineer has previously adopted regulations specifying a

less restrictive standard for changes in the points of diversion of groundwater water rights and permits. (Authorized by K.S.A. 82a-706a; implementing K.S.A. 82a-706a and K.S.A. 82a-708b; effective P-\_\_\_\_\_).

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