

HOUSE BILL No. 2051

By Committee on Agriculture and Natural Resources

1-23

1 AN ACT concerning water; relating to limited transfer permits; exempting
2 certain dams from jurisdiction; enacting penalties for lack of dam
3 inspection; creating an incentive for multi-year flex accounts;
4 administrative review of certain orders of the chief engineer; amending
5 K.S.A. 2012 Supp. 82a-301, 82a-302, 82a-303b, 82a-736 and 82a-1901
6 and repealing the existing sections; also repealing K.S.A. 24-105, 24-
7 107, 82a-312, 82a-313 and 82a-314 and K.S.A. 2012 Supp. 24-106, 74-
8 509 and 82a-735.

9
10 *Be it enacted by the Legislature of the State of Kansas:*

11 New Section 1. (a) Subject to existing water rights and the principle
12 of beneficial use, the chief engineer may grant, upon application made
13 therefor, limited transfer permits to authorize the use of up to 4,000,000
14 gallons from an existing water right. The term of such limited transfer
15 permit will be limited to a single calendar year. Each application submitted
16 for a limited transfer permit shall be on a form prescribed by the chief
17 engineer and accompanied by an application fee of \$200.

18 (b) If the base water right is groundwater, the use of water can be
19 transferred to another well within the same source of supply within two
20 miles.

21 (c) The chief engineer shall adopt rules and regulations to effectuate
22 and administer the provisions of this section. Such rules and regulations
23 shall require that there is no significant increase in consumptive use
24 enabled by the transfer permit, prescribe necessary recordkeeping and
25 reporting requirements, prevent impairment of existing rights and address
26 any other matter deemed necessary by the chief engineer to protect the
27 public interest.

28 (d) Nothing in this section shall be deemed to vest in the holder of
29 any permit granted pursuant to provisions of this section any permanent
30 right to appropriate water except as is provided by such permit.

31 (e) All fees collected by the chief engineer pursuant to this section
32 shall be remitted to the state treasurer as provided in K.S.A. 82a-731, and
33 amendments thereto.

34 (f) This section shall be part of and supplemental to the Kansas water
35 appropriation act.

36 Sec. 2. K.S.A. 2012 Supp. 82a-301 is hereby amended to read as

1 follows: 82a-301. (a) Except as provided in ~~subsection~~ *subsections (c) and*
2 *(d)*, without the prior written consent or permit of the chief engineer of the
3 division of water resources of the Kansas department of agriculture, it
4 shall be unlawful for any person, partnership, association, corporation or
5 agency or political subdivision of the state government to: (1) Construct
6 any dam or other water obstruction; (2) make, construct or permit to be
7 made or constructed any change in any dam or other water obstruction; (3)
8 make or permit to be made any change in or addition to any existing water
9 obstruction; or (4) change or diminish the course, current; or cross section
10 of any stream within this state. Any application for any permit or consent
11 shall be made in writing in such form as specified by the chief engineer.
12 ~~Jetties or revetments for the purpose of stabilizing a caving bank which are~~
13 ~~properly placed shall not be construed as obstructions for the purposes of~~
14 ~~this section.~~

15 (b) As used in K.S.A. 82a-301 et seq., and amendments thereto,
16 "dam" means any artificial barrier including appurtenant works with the
17 ability to impound water, waste water or other liquids that has a height of
18 25 feet or more; or has a height of six feet or greater and ~~also has the~~
19 ~~capacity to impound a storage volume at the top of the dam elevation of 50~~
20 ~~or more acre feet. The height of a dam or barrier shall be determined as~~
21 ~~follows: (1) A barrier or dam that extends across the natural bed of a~~
22 ~~stream or watercourse shall be measured from the down stream toe of the~~
23 ~~barrier or dam to the top of the barrier or dam; or (2) a barrier or dam that~~
24 ~~does not extend across a stream or watercourse shall be measured from the~~
25 ~~lowest elevation of the outside limit of the barrier or dam to the top of the~~
26 ~~barrier or dam~~ *The height of a dam shall be measured from the lowest*
27 *elevation of the streambed, downstream toe or outside limit of the dam to*
28 *the elevation of the top of the dam.*

29 (c) (1) The prior written consent or permit of the chief engineer shall
30 not apply to water obstructions that meet the following requirements:

31 (A) The water obstruction is not a dam as defined in subsection (b);
32 (B) the water obstruction is not located within an incorporated area;
33 (C) every part of the water obstruction is located more than 300 feet
34 from any property boundary; and

35 (D) the watershed area above the water obstruction is 640 acres or
36 less.

37 (2) If the water obstruction does not meet the requirements of
38 subsection (c)(1)(C), but meets all other requirements of subsection (c)(1),
39 such water obstruction may be exempted from the permitting requirements
40 of subsection (a) if the chief engineer determines such water obstruction
41 has minimal impact upon safety and property based upon a review of the
42 information, to be provided by the owner, including:

43 (i) An aerial photo or topographic map depicting the location of the

1 proposed project, the location of the stream, the layout of the water
2 obstruction, the property lines and names and addresses of adjoining
3 property owners; and

4 (ii) the principal dimensions of the project including, but not limited
5 to, the height above streambed.

6 (3) Notwithstanding any other provision of this section, the chief
7 engineer may require a permit for any water obstruction described in this
8 subsection if the chief engineer determines such permit is necessary for the
9 protection of life or property.

10 (d) *The prior written consent or permit of the chief engineer shall not*
11 *be required for construction or modification of a dam that meets the*
12 *following provisions:*

13 (1) *The dam has a height of less than 25 feet and a storage volume at*
14 *the top of the dam elevation of less than 75 acre feet;*

15 (2) *the dam is a hazard class A dam as defined by rules and*
16 *regulations adopted by the chief engineer pursuant to K.S.A. 82a-303a,*
17 *and amendments thereto; and*

18 (3) *the dam location and dimensions have been registered with the*
19 *division of water resources in a written form prescribed by the chief*
20 *engineer.*

21 Sec. 3. K.S.A. 2012 Supp. 82a-302 is hereby amended to read as
22 follows: 82a-302. (a) Each application for the consent or permit required
23 by K.S.A. 82a-301, and amendments thereto, shall be accompanied by
24 complete maps, plans, profiles and specifications of such dam or other
25 water obstruction, or of the changes or additions proposed to be made in
26 such dam or other water obstruction, the required application fee as
27 provided in subsection (b) unless otherwise exempted, and such other data
28 and information as the chief engineer may require. ~~The chief engineer shall~~
29 ~~maintain a list of licensed professional engineers who may conduct the~~
30 ~~review of any application for the consent or permit required by K.S.A.~~
31 ~~82a-301, and amendments thereto. Such list may include licensed~~
32 ~~professional engineers employed by a local unit of government.~~
33 ~~Notwithstanding any law to the contrary, an applicant for the consent or~~
34 ~~permit required by K.S.A. 82a-301, and amendments thereto, may have the~~
35 ~~application reviewed by a licensed professional engineer approved by the~~
36 ~~chief engineer pursuant to this subsection provided such engineer is not an~~
37 ~~employee of the applicant. If such licensed professional engineer finds that~~
38 ~~such dam or other water obstruction meets established standards for the~~
39 ~~construction, modification, operation and maintenance of dams and other~~
40 ~~water obstructions, such findings shall be submitted in complete form to~~
41 ~~the chief engineer. Upon such submittance, the chief engineer shall grant~~
42 ~~such consent or permit within 45 days unless the chief engineer finds to~~
43 ~~the contrary that such dam or other water obstruction does not meet~~

1 established standards for the construction, modification, operation and
 2 maintenance of dams and other water obstructions. If the chief engineer
 3 declines to grant such consent or permit based upon a contrary finding, the
 4 chief engineer shall provide to the applicant within 15 days a written
 5 explanation setting forth the basis for the chief engineer's contrary finding.
 6 The chief engineer's action in declining to grant such consent or permit
 7 and any hearing related thereto shall be conducted in accordance with the
 8 provisions of the Kansas administrative procedure act. Any person
 9 aggrieved by any order or decision of the chief engineer shall be entitled to
 10 appellate review in accordance with the provisions of the Kansas judicial
 11 review act. Such applicant shall pay all costs associated with the review by
 12 the licensed professional engineer.

13 (b) (1) The application shall be based upon the stage of construction
 14 at the time that a complete application has been submitted. The
 15 construction in progress fee shall be applicable for construction begun
 16 prior to approval by the chief engineer. Such fee shall be in addition to any
 17 other penalty for an unpermitted structure. Such fees shall be as follows:

Fees for new dam or dam modification applications

Pre-Construction	Construction In Progress
\$200	\$500

20
 21 (2) Permit fees for stream obstructions/channel changes application
 22 fee is based upon two criteria and are as follows:

- 23 (A) The drainage area category; and
- 24 (B) the stage of construction when the application is submitted.

	Pre- Construction	Construction In Progress
25 Drainage Area Category		
26 Major (Drainage area greater		
27 than 50 square miles)	\$500	\$1000
28 Moderate (Drainage area 5 to 50		
29 square miles)	\$200	\$400
30 Minor (Drainage area less than		
31 5 square miles)	\$100	\$200
32 General Permit	\$100	\$200

34
 35 (c) All fees collected by the chief engineer pursuant to this section
 36 shall be remitted to the state treasurer as provided in K.S.A. 2012 Supp.
 37 82a-328, and amendments thereto.

38 Sec. 4. K.S.A. 2012 Supp. 82a-303b is hereby amended to read as
 39 follows: 82a-303b. (a) (1) In order to secure conformity with adopted rules
 40 and regulations and to assure compliance with the terms, conditions or
 41 restrictions of any consent or permit granted pursuant to the provisions of
 42 K.S.A. 82a-301 through 82a-303, and amendments thereto, the chief
 43 engineer or an authorized representative of the chief engineer shall have

1 the power and the duty to inspect any dam or other water obstruction.
 2 Upon a finding pursuant to subsection (a) of K.S.A. 82a-303c, and
 3 amendments thereto, by the chief engineer that a dam is unsafe, the chief
 4 engineer shall order an annual inspection of the dam until it is either in
 5 compliance with all applicable provisions of this act, any rules and
 6 regulations promulgated pursuant to this act, permit conditions and orders
 7 of the chief engineer; or the dam is removed. The safety inspection shall be
 8 conducted by the chief engineer or authorized representative and the cost
 9 *of the inspection, as determined by the chief engineer*, shall be paid by the
 10 dam owner. The ~~hazard class and size~~ of a dam ~~provided for by the~~
 11 ~~provisions of this act~~ shall be defined by rules and regulations adopted by
 12 the chief engineer pursuant to K.S.A. 82a-303a, and amendments thereto.
 13 ~~Inspection fees are as follows:~~

Size of Dam	Inspection fee
Class 1	\$1,500
Class 2	\$1,500
Class 3	\$2,500
Class 4	\$4,000.

19 (2) Each hazard class C dam shall be required to have a safety
 20 inspection conducted by a licensed professional engineer qualified in
 21 design, construction, maintenance and operation of dams once every three
 22 years, unless otherwise ordered by the chief engineer.

23 (3) Each hazard class B dam shall be required to have a safety
 24 inspection conducted by a licensed professional engineer qualified in
 25 design, construction, maintenance and operation of dams once every five
 26 years unless otherwise ordered by the chief engineer.

27 (4) Within 60 days of the date of inspection, a report of the inspection
 28 shall be provided to the chief engineer by the licensed professional
 29 engineer who conducted the inspection. The report shall document the
 30 physical condition of the dam, describing any deficiencies observed, an
 31 analysis of the capacity of the dam and its spillway works, compliance of
 32 the dam with approved plans and permit conditions, changes observed in
 33 the condition of the dam since the previous inspection, an assessment of
 34 the hazard classification of the dam including a statement that the engineer
 35 either agrees or disagrees with the current classification, and any other
 36 information relevant to the safety of the dam or specifically requested by
 37 the chief engineer.

38 (5) Upon failure of a dam owner to comply with the applicable
 39 inspection interval, the chief engineer or such chief engineer's authorized
 40 representative shall conduct a mandatory inspection of the dam and the
 41 costs ~~as established by this act for~~ *of the inspection, as determined by the*
 42 *chief engineer, plus the penalties established by this act*, shall be paid by
 43 the owner, in addition to any other remedies provided for violations of this

1 act. *Penalties are as follows:*

2	<i>Hazard Class</i>	<i>Penalty</i>
3	<i>B</i>	<i>\$2,500</i>
4	<i>C</i>	<i>\$4,000</i>

5 (6) The failure to file a complete and timely report as required by the
 6 provisions of this act, or the failure to submit the fees *and penalties*
 7 assessed for inspections conducted by the chief engineer or such chief
 8 engineer's authorized representative shall be deemed a violation of this act
 9 and subject to the penalties provided by K.S.A. 82a-305a, and
 10 amendments thereto.

11 (b) For the purpose of inspecting any dam or other water obstruction,
 12 the chief engineer or an authorized representative of the chief engineer
 13 shall have the right of access to private property. Costs for any work which
 14 may be required by the chief engineer or the authorized representative
 15 prior to or as a result of the inspection of a dam or other water obstruction
 16 shall be paid by the owner, governmental agency or operator of such dam
 17 or other water obstruction.

18 (c) All fees *and penalties* collected by the chief engineer pursuant to
 19 this section shall be remitted to the state treasurer as provided in K.S.A.
 20 2012 Supp. 82a-328, and amendments thereto.

21 Sec. 5. K.S.A. 2012 Supp. 82a-736 is hereby amended to read as
 22 follows: 82a-736. (a) It is hereby recognized that an opportunity exists to
 23 improve water management by enabling multi-year flexibility in the use of
 24 water authorized to be diverted under a groundwater water right, provided,
 25 that such flexibility neither impairs existing water rights, nor increases the
 26 total amount of water diverted, so that such flexibility has no long-term
 27 negative effect on the source of supply. It is therefore declared necessary
 28 and advisable to permit the establishment of multi-year flex accounts for
 29 groundwater water rights, together with commensurate protections for
 30 existing water rights and their source of supply.

31 (b) As used in this section:

32 (1) "Base water right" means a water right under which an applicant
 33 applies to the chief engineer to establish a multi-year flex account and
 34 where all of the following conditions exist:

35 (A) The authorized source of supply is groundwater; and

36 (B) the water right has not been the subject of a change approval to
 37 implement the provisions of K.A.R. 5-5-9(a)(2), K.A.R. 5-5-11(b)(2) or
 38 K.A.R. 5-5-11(b)(3), in effect upon the effective date of this act.

39 (2) "Multi-year flex account" means a term permit which suspends a
 40 base water right during its term, except when the term permit may be no
 41 longer exercised because of an order of the chief engineer, and is subject to
 42 the terms and conditions as provided in subsection (e).

43 (3) "Base average usage" means: (A) The average amount of water

1 actually diverted for a beneficial use under the base water right during
2 calendar years 2000 through 2009, excluding any amount diverted in any
3 such year that exceeded the maximum annual quantity of water authorized
4 by the base water right; or (B) if the holder of the base water right shows
5 to the satisfaction of the chief engineer that water conservation reduced
6 water use under the base water right during calendar years 2000 through
7 2009, then the average amount of water actually diverted for a beneficial
8 use under the base water right during the five calendar years immediately
9 before the calendar year when water conservation began, excluding any
10 amount used in any such year that exceeded the amount authorized by the
11 base water right.

12 (4) "Chief engineer" means the chief engineer of the division of water
13 resources of the department of agriculture.

14 (5) "Flex account acreage" means the maximum number of acres
15 lawfully irrigated during a calendar year when no term, condition or
16 limitation of the base water right has been violated and either of the
17 following conditions is met:

18 (A) The calendar year is 2000 through 2009; or

19 (B) if water conservation reduced water use under the base water
20 right during calendar years 2000 through 2009, the calendar year is a year
21 within the five calendar years immediately prior to the calendar year when
22 water conservation began.

23 (6) "Net irrigation requirement" means the net irrigation requirement
24 for 50% chance rainfall of the county that corresponds with the location of
25 the authorized place of use of the base water right as provided in K.A.R. 5-
26 5-12, on the effective date of this act.

27 (c) (1) Any holder of a base water right that has not been deposited or
28 placed in a safe deposit account in a chartered water bank may establish a
29 multi-year flex account where the holder may deposit, in advance, the
30 authorized quantity of water from such water right for any five consecutive
31 calendar years, subject to all of the following:

32 (A) The water right must be vested or shall have been issued a
33 certificate of appropriation;

34 (B) the withdrawal of water pursuant to the water right shall be
35 properly and adequately metered;

36 (C) the water right is not deemed abandoned and is in compliance
37 with the terms and conditions of its certificate of appropriation, all
38 applicable provisions of law and orders of the chief engineer;

39 (D) the amount of water deposited in the multi-year flex account shall
40 not exceed the greatest of the following:

41 (i) 500% of the base average usage;

42 (ii) 500% of the product of the annual net irrigation requirement
43 multiplied by the flex account acreage, multiplied by 110%, but not greater

1 than five times the maximum annual quantity authorized by the base water
2 right; or

3 (iii) if the authorized place of use is located wholly within the
4 boundaries of a groundwater management district, an amount that shall not
5 increase the long-term average use of the groundwater right as specified by
6 rule or regulation promulgated pursuant to subsection (o) of K.S.A. 82a-
7 1028, and amendments thereto; and

8 (E) notwithstanding any other provisions of this subsection, except
9 when the base water right is suspended due to the issuance of a two-year
10 term permit in a designated drought emergency area for 2011 and 2012,
11 the quantity of water deposited into a multi-year flex account shall be
12 reduced by the quantity of water used in excess of the maximum annual
13 quantity of the base water right during 2011 if the application for a multi-
14 year flex account is filed with the chief engineer on or before July 15,
15 2012.

16 (2) The provisions of K.A.R. 5-5-11 are limited to changes in annual
17 authorized quantity and shall not apply to this subsection.

18 (d) The chief engineer shall implement a program providing for the
19 issuance of term permits to holders of groundwater water rights who have
20 established flex accounts in accordance with this section. Such term
21 permits shall authorize the use of water in a flex account at any time
22 during the five consecutive calendar years for which the application for the
23 term permit authorizing a multi-year flex account is made, without annual
24 limits on such use.

25 (e) Term permits provided for by this section shall be subject to the
26 following:

27 (1) A separate term permit shall be required for each point of
28 diversion authorized by the base water right.

29 (2) The quantity of water authorized for diversion shall be limited to
30 the amount deposited pursuant to subsection (c)(1)(D).

31 (3) The rate of diversion for each point of diversion authorized under
32 the term permit shall not exceed the rate of diversion for each point of
33 diversion authorized under the base water right.

34 (4) The authorized place of use shall be the place of use or a
35 subdivision of the place of use for the base water right.

36 (5) The point of diversion authorized by the term permit shall be
37 specified by referencing one point of diversion authorized by the base
38 water right at the time the multi-year flex account term permit application
39 is filed with the chief engineer or at the time any approvals changing such
40 referenced point of diversion of the base water right are approved during
41 the multi-year flex account period. For a base water right with multiple
42 points of diversion, each point of diversion authorized by a term permit
43 shall receive a specific assignment of a maximum authorized quantity of

1 water, assigned proportionately to the authorized annual quantities of the
2 respective points of diversion under the base water right.

3 (6) The chief engineer may establish, by rules and regulations, criteria
4 for such term permits.

5 (7) Except as explicitly provided for by this section, such term
6 permits shall be subject to all provisions of the Kansas water appropriation
7 act, and rules and regulations adopted under such act, and nothing in this
8 section shall authorize impairment of any vested right or prior
9 appropriation right by the exercise of such term permit.

10 (f) An application for a multi-year flex account shall be filed with the
11 chief engineer on or before October 1 of the first year of the multi-year
12 flex account term for which the application is being made.

13 (g) All costs of administration of this section shall be paid from fees
14 for term permits provided for by this section. Any appropriation or transfer
15 from any fund other than the water appropriation certification fund for the
16 purpose of paying such costs shall be repaid to the fund from which such
17 appropriation or transfer is made. At the time of repayment, the secretary
18 of agriculture shall certify to the director of accounts and reports the
19 amount to be repaid and the fund to be repaid. Upon receipt of such
20 certification, the director of accounts and reports shall promptly transfer
21 the amount certified to the specified fund.

22 (h) The fee for a multi-year flex account term permit shall be the
23 same as specified for other term permits in K.S.A. 82a-708c, and
24 amendments thereto, except as follows:

25 (1) If the base water right is currently suspended due to the issuance
26 of a two-year term permit in a designated drought emergency area for 2011
27 and 2012, then a holder of such term permit shall be subject to a \$200
28 application fee for a multi-year flex account term permit if the application
29 is filed on or before July 15, 2012; or

30 (2) if water use under the authority of the base water right exceeded
31 the maximum annual quantity authorized by the base water right during
32 2011 and the holder of the base water right files an application for
33 approval of a multi-year flex account term permit on or before July 15,
34 2012, then the application fee shall be \$600.

35 (i) *Any holder of a groundwater base water right that has*
36 *participated for the full five years in the multi-year flex account program*
37 *that re-enrolls the same groundwater base water right in a succeeding,*
38 *contiguous multi-year flex account will be credited, as an incentive, with*
39 *water not used under the concluding multi-year flex account, during the*
40 *succeeding multi-year flex account. The amount of conserved water*
41 *credited shall not exceed $\frac{1}{5}$ of the amount of water calculated pursuant to*
42 *subsection (c)(1)(D).*

43 (†) (j) The chief engineer shall have full authority pursuant to K.S.A.

1 82a-706c, and amendments thereto, to require any additional measuring
2 devices and any additional reporting of water use for term permits issued
3 pursuant to this section. Failure to comply with any measuring or reporting
4 requirement may result in a penalty, up to and including the revocation of
5 the term permit and the suspension of the base water right for the duration
6 of the term permit period.

7 ~~(j)~~ (k) The chief engineer shall submit a written report on the
8 implementation of this section to the house standing committee on
9 agriculture and natural resources and the senate standing committee on
10 natural resources on or before February 1 of each year.

11 ~~(k)~~ (l) This section shall be part of and supplemental to the Kansas
12 water appropriation act.

13 Sec. 6. K.S.A. 2012 Supp. 82a-1901 is hereby amended to read as
14 follows: 82a-1901. (a) Orders of the chief engineer of the division of water
15 resources of the department of agriculture pursuant to K.S.A. 42-703, 42-
16 722, 42-722a, 82a-708b, 82a-711, 82a-718 ~~and~~, 82a-1038 *and* 82a-1041,
17 and amendments thereto, and failure of the chief engineer to act pursuant
18 to K.S.A. 82a-714, and amendments thereto, shall be subject to review in
19 accordance with the provisions of the Kansas administrative procedure act.

20 Such review shall be conducted by the secretary of agriculture or a
21 presiding officer from the office of administrative hearings within the
22 department of administration. The secretary of agriculture shall not have
23 the authority otherwise to designate a presiding officer to conduct such
24 review unless at the party's request pursuant to K.S.A. 75-37,121, and
25 amendments thereto.

26 (b) The order of the secretary of agriculture or the administrative law
27 judge or presiding officer upon review pursuant to subsection (a) shall be a
28 final order under the Kansas administrative procedure act. Such order shall
29 not be subject to reconsideration pursuant to K.S.A. 77-529, and
30 amendments thereto, and shall be subject to review in accordance with the
31 Kansas judicial review act.

32 (c) This act shall not affect any administrative proceeding pending
33 before the chief engineer of the division of water resources of the
34 department of agriculture, the secretary of agriculture or any
35 administrative hearing officer on July 1, 1999, and such matter shall
36 proceed as though no change in the law had been made with regard to such
37 proceeding.

38 Sec. 7. K.S.A. 24-105, 24-107, 82a-312, 82a-313 and 82a-314 and
39 K.S.A. 2012 Supp. 24-106, 74-509, 82a-301, 82a-302, 82a-303b, 82a-735,
40 82a-736 and 82a-1901 are hereby repealed.

41 Sec. 8. This act shall take effect and be in force from and after its
42 publication in the Kansas register.