

BEFORE THE KANSAS DEPARTMENT OF AGRICULTURE

1320 Research Park Drive
Manhattan, Kansas 66502

In the Matter of the Designation of the)
Groundwater Management District No. 4 District Wide)
Local Enhanced Management Area in Cheyenne, Decatur,)
Rawlins, Gove, Graham, Logan Sheridan, Thomas, and)
Wallace Counties, Kansas.)
)
Pursuant to K.S.A. 82a-1041.)
)

002 – DWR-LEMA – 2017

ORDER DECLINING PETITION FOR ADMINISTRATIVE REVIEW

COMES NOW, Jackie McClaskey, Secretary, Kansas Department of Agriculture (“Secretary”) and finds as follows:

That on June 8, 2017, the Northwest Kansas Groundwater Management District No. 4 (“GMD 4”) submitted a revised request seeking review of the local enhanced management plan by the Chief Engineer of the Division of Water Resources (“Chief Engineer”).

That on June 27, 2017, the Chief Engineer, via letter, determined that the local enhanced management plan proposed by GMD 4 was acceptable for consideration pursuant to K.S.A. 82a-1041(a). Accordingly, the Chief Engineer initiated proceedings to consider the designation of the proposed local enhanced management area (“LEMA”).

That on August 23, 2017, the Chief Engineer’s designee, Constance C. Owen conducted the initial public hearing pursuant to K.S.A. 82a-1041(b). On September 23, 2017, Ms. Owen entered a summary of factual findings which resolved the three findings of fact set forth in K.S.A. 82a-1041(b)(1)-(3). Since the initial public hearing was favorable on all three findings of fact, the Chief Engineer scheduled the subsequent public hearing for November 14, 2017.

That on October 10, 2017, David M. Traster, attorney for Intervenor, filed with the Chief Engineer, a Motion for Continuance requesting the public hearing scheduled for November 14, 2017 be continued and that a Prehearing Conference be scheduled. On October 11, 2017, the Chief Engineer considered the Intervenor’s Motion for Continuance. The Chief Engineer denied the Intervenor’s request to continue the public hearing and scheduled a Prehearing conference call for October 31, 2017.

That on October 27, 2017, the Intervenor filed a Petition for Review by the Secretary of Agriculture (“Petition for Review”) requesting review of the findings of fact entered by Ms. Owen and the actions of the Chief Engineer regarding the Motion for Continuance.

That K.S.A. 82a-1041 sets forth the establishment procedures for local enhanced management areas. After a groundwater management district recommends the approval of a local enhanced management plan, the Chief Engineer is required to review the proposed local enhanced management plan pursuant to K.S.A. 82a-1041(a). If, based upon his review, the Chief Engineer determines that the local enhanced management plan is acceptable for consideration, then the Chief Engineer shall initiate proceedings to designate a LEMA. K.S.A. 82a-1041(a). The Chief Engineer is required to conduct an initial public hearing to resolve three findings of fact and is only permitted to conduct subsequent hearing(s) if the initial public hearing is favorable on all three findings of fact. K.S.A. 82a-1041(b). Within 120 days of the conclusion of the final public hearing, the Chief Engineer must issue an Order of Decision. K.S.A. 82a-1041(d). If the Chief Engineer issues an Order of Decision accepting the local enhanced management plan, then the Chief Engineer must issue an Order of Designation within a reasonable time. K.S.A. 82a-1041(e). Review of the Chief Engineer's Order of Designation is authorized pursuant to K.S.A. 82a-1901, and amendments thereto. K.S.A. 82a-1041(h).

That K.S.A. 82a-1901(c) authorizes the Secretary of the Kansas Department of Agriculture to review orders issued by the Chief Engineer pursuant to K.S.A. 82a-1041, and amendments thereto. Such review by the Secretary is pursuant to K.S.A. 77-527, and amendments thereto, and the Kansas Administrative Procedure Act.

That as of the date of this Order, a subsequent public hearing has not occurred. The Chief Engineer has not issued an Order of Decision or an Order of Designation. The only hearing that has occurred is the initial public hearing wherein the Chief Engineer's designee resolved the three findings of fact as required by K.S.A. 82a-1041(b). K.S.A. 82a-1901 authorizes review of orders issued by the Chief Engineer pursuant to K.S.A. 82a-1041 and that statute only authorizes the Secretary to review the Order of Designation issued by the Chief Engineer. K.S.A. 82a-1041 does not authorize the Secretary to review any and all actions and decisions occurring during the LEMA establishment procedures. Accordingly, the Intervenor's Petition for Review requesting that the Secretary review the findings of fact entered by Ms. Owen and the actions of the Chief Engineer regarding the Motion for Continuance is not in accordance with the provisions of K.S.A. 82a-1901 and K.S.A. 82a-1041 and is not ripe for review.

That the Kansas Administrative Procedure Act ("Act"), K.S.A. 77-501 *et seq.*, and amendments thereto, creates certain procedural rights and duties with which an agency must comply. The Act sets forth the actions an agency head may review and the procedure by which an agency head may exercise review. With respect to the actions an agency head may review, K.S.A. 77-527 is applicable. The relevant provisions state as follows:

- (a) The agency head ...upon petition by any party ... shall, review an initial order....

The Act defines "order" at K.S.A. 77-502(d), which states:

- ... a state agency action of particular applicability that determines the legal rights, duties, privileges, immunities or other legal interest of one or more specific persons.

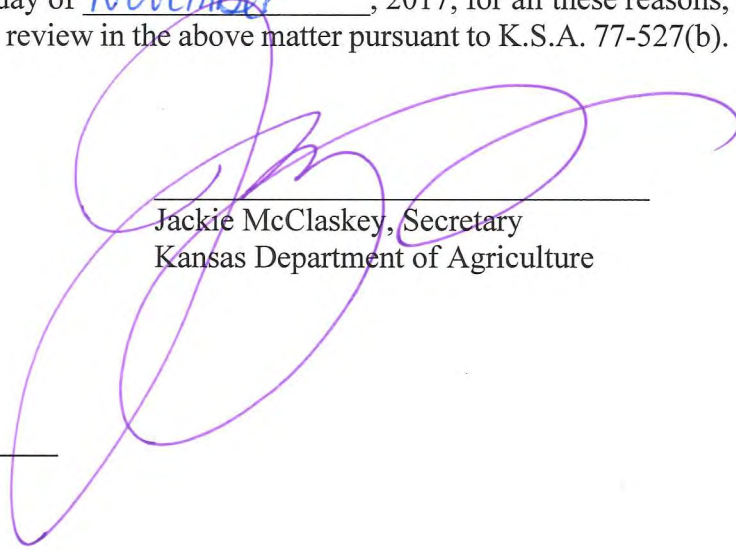
Additionally, the Act specifically identifies requirements of a final order or an initial order. The relevant provisions of K.S.A. 77-526(c), state as follows:

A final order or initial order shall include, separately stated, findings of fact, conclusions of law and policy reasons for the decision if it is an exercise of the state agency's discretion, for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness.... The order shall also include a statement of the available procedures and time limits for seeking reconsideration, administrative review or other administrative relief. An initial order shall include a statement of any circumstances under which the initial order, without further notice, may become a final order....

That as of the date of this Order, no initial order has been issued by the Chief Engineer or the Chief Engineer's designee. The findings of fact entered by Ms. Owen and the actions of the Chief Engineer do not meet the definition of "order" set forth in K.S.A. 77-502(d) and do not satisfy the requirements of a final or initial order pursuant to K.S.A. 77-526. Accordingly, the Intervenor's Petition for Review requesting that the Secretary review the findings of fact entered by Ms. Owen and the actions of the Chief Engineer regarding the Motion for Continuance does not meet the requirements established in the Kansas Administrative Procedure Act, K.S.A. 77-501 *et seq.*, and amendments thereto, and review by the Secretary is not appropriate or authorized pursuant to K.S.A. 77-527.

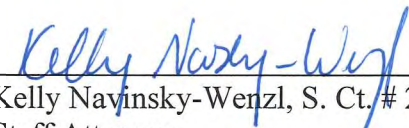
THEREFORE, on this 13th day of November, 2017, for all these reasons, the Secretary hereby declines to exercise review in the above matter pursuant to K.S.A. 77-527(b).

IT IS SO ORDERED.



Jackie McClaskey, Secretary
Kansas Department of Agriculture

Prepared by:



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CERTIFICATE OF SERVICE

On the 13th day of November, 2017, I hereby certify that a true and correct copy of the foregoing *Order* was deposited in the U.S. mail, first class postage prepaid, and a true and correct copy was sent by electronic mail, addressed to the following:

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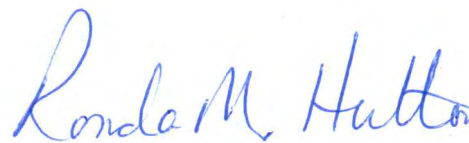
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