

**STATE OF KANSAS  
BEFORE THE DIVISION OF WATER RESOURCES  
KANSAS DEPARTMENT OF AGRICULTURE**

**In the Matter of the City of Wichita’s )  
Phase II Aquifer Storage and Recovery Project ) Case No. 18 WATER 14014  
in Harvey and Sedgwick Counties, Kansas. )  
\_\_\_\_\_ )**

Pursuant to K.S.A 82a-1901 and K.A.R. 5-14-3a.

**ORDER REGARDING MOTION FOR EXTENSION OF TIME  
AND TO CONTINUE HEARING**

COMES NOW, David W. Barfield, Chief Engineer, Division of Water Resources, Kansas Department of Agriculture (“Chief Engineer”), who hereby issues the following order regarding the Motion for Extension of Time to Request Discovery, Designate Expert Witnesses and Exhibits and Continue Hearing (“Motion”) regarding the public hearing to consider proposed changes to Phase II of the City of Wichita’s Aquifer Storage and Recovery Project (“Project”).

**MEMORANDUM OF DECISION**

On November 3, 2018 the Intervenors filed a Motion requesting that the deadline for the close of discovery and the deadline to submit final witness and exhibit lists each be extended an additional forty-five (45) days and that the hearing date be set for thirty (30) days following the new final witness and exhibit deadline. On November 5, 2018, Equus Beds Groundwater Management District No. 2 (“GMD2”) filed a response in support of the Intervenors, including a request to extend all remaining deadlines by an additional sixty (60) days. On November 6, 2018, both the City of Wichita (“City”) and the Division of Water Resources (“DWR”) filed separate responses in opposition to the Motion. On November 9, 2018, both the City and the Intervenors filed replies.

I. Arguments Presented by the Parties

In support of their Motion, the Intervenors argue that the issues involved in this matter require a full and complete analysis which consists of the ability to submit discovery requests and the opportunity to thoroughly review discovery responses in order to meaningfully participate as a formal party. The Intervenors did not initially address their reason for not seeking to participate in this process sooner. In order to accomplish these tasks, the Intervenors have apparently hired an expert that has been out of the country and needs additional time to perform this work. In their reply, the Intervenors further note that the City has not presented evidence of any additional burden, inconvenience, or prejudice in granting the extension. Regarding their reasoning for not seeking to intervene sooner, they state that it was a difficult decision that they were unable to make any sooner. Intervenors also downplay the public comments about their alleged legal strategy of intentional delay published in the *Newton Now* newspaper.

GMD2's response states their support for the reasons stated in the Motion and adds their own additional arguments for an extension and continuance. They argue that the recent departure of their staff hydrogeologist requires them to hire new staff or hire an additional expert. GMD2 further argues that the City and DWR have not provided adequate discovery responses, that more time is needed to review the City's modeling work, and that the additional attorney they hired has been unavailable to work on this matter and needs additional time to prepare.

In response, the City argues that it has been a consistent premise throughout this hearing process that any additional parties would become formal parties subject to existing deadlines. Further, GMD2 has already been granted an extension of deadlines and agreed to the existing schedule with the other parties. The City denies that their discovery has been inadequate and

argues that GMD2 has had the capability to review and access the model since the Fall of 2016, including various work conducted jointly between the City and GMD2 during that period. Finally, the City included information containing published quotes from some of the Intervenors stating that their legal strategy was to purposefully delay the hearing process. As to the various experts and attorneys requiring additional time, the City argues that it should not be held responsible when opposing parties hire attorneys or experts that do not have time to work on a case when the deadlines were known in advance. In their reply, the City further argues that the difficulties faced by the Intervenors have been created by waiting so long to take action and that the Intervenors have mischaracterized the City's proposal.

DWR argues that the public nature of this hearing makes it unique as compared to how a private adjudicatory hearing may be conducted. Specifically arguing that it would potentially create confusion and an undue burden on the public to continuously change the hearing date in light of the public notices that have been sent and published twice already. In addition to the concern for the public at large's ability to participate, DWR notes that information about the City's proposal and this hearing have been public knowledge in this area for some time. DWR also argues that the previous decisions made by the Chief Engineer in this case have been clear about existing deadlines and that the existing parties had already agreed to those deadlines.

## II. Discussion of the Issues Presented by the Parties

The initiation of these proceedings and the basic timeline regarding the conduct of these proceedings has been public knowledge at least since the Chief Engineer conducted a public information meeting in Halstead on June 28, 2018. This does not take into consideration the significant processes conducted by the City, DWR, and GMD2 prior to the public information meeting. Prior to the public meeting, DWR developed a Project website with a comprehensive

index of all available information related to the project. Specifically, this included copies of the City's full proposal and model backup data, posted in January 2018, and documents related to the initial review of the proposal between DWR and GMD2 during the Spring of 2018.

A schedule (later delayed by 50 days at the request of GMD2) was formalized when the Pre-Hearing Order was issued on July 23, 2018 in which the City, GMD2, and DWR were designated as formal parties. All the parties designated at the time these deadlines were established agreed to them and there were no objections to making additional parties subject to the existing deadlines when the issue was raised.

Further, there does not appear to be a lack of knowledge on the part of the Intervenors as to this process. Their attorney participated as a non-party in phone hearings to set schedules on September 18, 2018 and September 24, 2018. Further, some of the original members of the intervening group were members of the GMD2 Board of Directors and had been exposed to a considerable amount of information about the Project. Regarding the Intervenors' 3 ½ month delay before deciding to seek intervention or to participate in a meaningful way, the Intervenors only state that they were unable to decide if it was worthwhile to intervene. The Intervenors' contention that an expert is needed, and that their expert needs additional time to provide meaningful testimony because he was hired at such a late stage in the process, may be correct, but it also appears that the time crunch of the Intervenors is self-imposed.

Despite the position the Intervenors have put themselves in by waiting to fully engage in the hearing process well after deadlines were set and months had passed since the initial notification of the proceedings, this alone does not justify a refusal to extend the existing deadlines in this particular case. However, DWR raises a compelling argument about the nature of this proceeding. This matter is not a private adjudication between two parties involving a local

issue or a single water right. This is intended to be a public hearing in which comments and participation from the public are expected to be important components of any decision on the proposed Project. Initial letters and notices have already been re-issued because of the previously granted extension and to re-notice the public hearing for a third time would likely create confusion and could decrease public participation.

Regarding the arguments presented by GMD2 about the loss of their hydrogeologist, more information would have been beneficial. GMD2 filed their motion in support on November 5, 2018 and stated that the hydrogeologist had already moved to Virginia. Considering the prejudice claimed by GMD2, it is unclear why they would wait until the hydrogeologist had already left the state to seek an extension or notify the other parties of a change in staff. In any event, as stated in the Pre-Hearing Order, the parties are allowed to amend their preliminary expert list, so there is no material issue if GMD2 needs to amend their expert list, as long as it is done by the proper deadline.

Procedurally, K.A.R. 5-14-3a(1) allows a continuance of proceedings, but only if notification is provided to all other parties before requesting a continuance. It does not appear that the proper procedure was followed in this instance. The presiding officer is not required to grant a continuance if any party has not been consulted or objects, both of which appear to justify a denial based on the available facts.

### III. Conclusion

One of the purposes of this hearing procedure is to provide the public with a reasonable opportunity to be heard. This includes providing a proper venue for individual public comments because their voices should not be minimized for lack of counsel. All parties must respect the public nature of this hearing, but each formal party also deserves a fair opportunity to present

their case and to likewise scrutinize the other formal parties' evidence as well. While the Chief Engineer has stated, both at the public information meeting in Halstead on June 28, 2018, in a letter to GMD2, dated June 1, 2018, and in other instances, that the proposed changes sought by the City could serve public interest by facilitating fuller aquifer conditions, he also has maintained that the purpose of holding these proceedings is to determine if the proposals should be approved, should not be approved, or approved with other changes. The basis for any decision on the City's proposals will be based on the evidence entered into the record in this matter.

Therefore, in order to balance these interests, the public hearing scheduled for December 11, 2018 shall still be held, but that hearing shall be only for public comments. This will serve the dual benefit of not changing an available date to present such comments and provide a much more efficient venue for public comments to be shared without the extensive delays that can occur when the public must wait for formal presentations to be concluded. In order to allow a reasonable opportunity for the parties to prepare, a second public hearing shall be held during the last week of January in order to conduct the formal phase of the hearing. Limited time will also be set aside to hear additional individual public comments following the formal phase of the hearing, in addition to the opportunity to submit written comments for at least 30 days after the second hearing. In the meantime, the deadline for the close of discovery will be extended until December 21, 2018. Once the date for the second public hearing is determined, then the various intermediate deadlines will be rescheduled in relation to the final hearing date.

**THEREFORE**, having considered the Motion for Extension of Time to Request Discovery, Designate Expert Witnesses and Exhibits and Continue Hearing, the Chief Engineer hereby orders the following:

- a. The Public Hearing scheduled for December 11, 2018 in Wichita shall still be held for the exclusive purpose of hearing individual public comments.
- b. A second public hearing date for the last week of January shall be set for the purpose of holding the formal phase of the hearing.
- c. The deadline for the close of discovery shall be extended to December 21, 2018.
- d. All other relevant intermediate deadlines shall be adjusted accordingly once a second public hearing date is selected.
- e. A scheduling conference via phone shall be held the morning of November 16, 2018 to set other necessary dates.

**IT IS SO ORDERED, THIS 12TH DAY OF NOVEMBER 2018.**

      /s/        
David W. Barfield, P.E.  
Chief Engineer, Division of Water Resources  
Kansas Department of Agriculture

Prepared by:

      /s/        
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