



City Council Work Session

Monday, August 8, 2016, 5:30 p.m.

Council Chambers, 317 S. Washington

Mayor Shelley Hansel

Council Member Kip Etter

Council Member Bill Butts

Council Member Kelly Hawley

Council Member Jim Valentine

Council Member Jan Korte

Council Member Vince Wetta

Agenda Items

- ❖ Pledge of Allegiance

- ❖ Raw Water
 - Consent Order Negotiation

Miscellaneous

**STATE OF KANSAS
DEPARTMENT OF HEALTH AND ENVIRONMENT**

In the Matter of:)
)
)
City of Wellington, Public Water Supply)
System) Case No. **XXXXXX**
)
Federal Water Supply ID No.: KS2019119)
Proceeding Under K.S.A. 65-161, *et seq.*)
Concerning Compliance with)
K.A.R. 28-15-19)
)

CONSENT ORDER

Now on this _____ day of _____, 2016, the Kansas Department of Health and Environment (“KDHE”) and the (“PWS”) (collectively, the “Parties”), having agreed that settlement of this matter is in the best interests of the Parties and conducive to protection of public health and the environment, hereby represent and state as follows:

The Parties acknowledge that this Consent Order (“CO”), upon execution by the Secretary of KDHE (“Secretary”), shall be a final agency order. The PWS shall not contest the authority of the Secretary to issue this CO or any action by KDHE to enforce this CO. The PWS voluntarily and knowingly waives the right to an appeal or review of matters leading up to the execution of the CO and execution of the CO under the Kansas Administrative Procedure Act, K.S.A. 77-501, *et seq.* (“KAPA”), and the Kansas Judicial Review Act, K.S.A. 77-601, *et seq.* KAPA authorizes KDHE to enter into an informal settlement of this matter without the necessity of proceeding to a formal hearing. K.S.A. 77-505.

The Secretary and the PWS deems that the Findings of Fact and Conclusions of Law in this CO are true and correct.

Findings of Fact

1. The PWS operates a community public water supply system located in Sumner County. The PWS serves a population of 7,942 individuals, and has 3,885 service connections.
2. On June 20, 2005, KDHE was sent a letter documenting 13 water customers which were receiving raw (untreated) water from the transmission line which carries raw water from the PWS’s wells to the treatment plant.

3. KDHE conducted an onsite evaluation of the PWS's well field on May 23, 2006 and confirmed that raw water was being provided to 13 service connections.
4. The PWS was sent a letter from KDHE on June 28, 2006, documenting the violation. The letter provided a deadline of September 5, 2006 to respond to KDHE documenting how this violation would be addressed.
5. KDHE received a letter dated August 31, 2006 requesting an extension to develop a procedure for addressing the affected customers.
6. On December 19, 2006, the 13 affected customers were mailed a letter notifying them the water being supplied to them was not disinfected and in violation of KAR 28-15-19. The letter stated the PWS would try to resolve the problem by April 1, 2007.
7. On January 17, 2008, KDHE sent the PWS a letter providing notification of, and requesting information regarding the ongoing violation of KAR 28-15-19.
8. A letter dated February 5, 2008 from Mike Brown, City Attorney, provided documentation that the violation had not been resolved and provided a date of July 1, 2008 to correct the violation.
9. The PWS received a Directive August 4, 2008 regarding 13 customer connections in violation of KAR 28-15-19. The Directive required the PWS to develop a final action plan that would result in compliance no later than March 1, 2009.
10. On August 30, 2008, affected customers were sent a letter from Mike Brown, City Attorney, asking to discuss options that would resolve the violation.
11. On October 1, 2008, KDHE received a response from Mike Brown, City Attorney summarizing the City's options for complying with KAR 28-15-19. The response also requested a deadline for compliance extension of June 1, 2009.
12. A sanitary survey inspection conducted on September 24, 2015 confirmed the city is still in violation of KAR 28-15-19. In addition, a direct cross connection to a finished water distribution line within the treatment plant was identified. A letter dated November 12, 2015, identified the sanitary survey inspection report findings.
13. A response letter to KDHE from Mike Brown, City Attorney, dated December 15, 2015, referenced an October 31, 2015 letter where the 23 still affected raw water customers were contacted in an effort to resolve the problem.

14. A January 6, 2016 letter from KDHE required the PWS to stop delivering untreated raw water and to remove the direct cross-connection to the finished water distribution line no later than May 1, 2016.
15. A May 3, 2016 Directive required three items. One, the PWS is to provide quarterly notification to the thirteen affected water customers along with Certificates of Delivery to KDHE beginning May 1, 2016. Two, the PWS must supply bottled water to the thirteen affected water customers until the customers are disconnected from the raw water line beginning no later than May 1, 2016. Three, the PWS is to remove the raw water line or install an approved backflow prevention device and provide proof no later than June 1, 2016.

Conclusions of Law

16. The KDHE is a duly authorized agency of the state of Kansas, created by an act of the legislature. KDHE has general jurisdiction over matters involving public water supply and protection of public health under the authority of K.S.A. 65-161 *et seq.*
17. The PWS operates a public water supply system as defined by K.S.A. 65-162a. A public water supply system is defined as “a system for the provision to the public of piped water for human consumption, which has at least ten (10) service connections or regularly serves an average of at least twenty-five (25) individuals daily at least sixty (60) days out of the year. Such term includes any source, treatment, storage or distribution facilities under control of the operator of the system and used primarily in connection with the system, and any source, treatment, storage or distribution facilities not under such control but which are used in connection with such system.”
18. K.S.A. 65-163 states in part:

“(b)(2) Whenever an investigation of any public water supply system is undertaken by the Secretary, it shall be the duty of the supplier of water under investigation to furnish to the Secretary information to determine the sanitary quality of the water supplied to the public and to determine compliance with applicable state laws and rules and regulations. The Secretary may issue an order requiring changes in the source or sources of the public water supply system or in the manner of storage, purification or treatment utilized by the public water supply system before delivery to consumers, or distribution facilities, collectively or individually, as may in the Secretary’s judgment be necessary to safeguard the sanitary quality of the water and bring about compliance with applicable state law and rules and regulations. The supplier of water shall comply with the order of the Secretary.”
19. K.S.A. 65-171m states in part:

“The Secretary of Health and Environment shall adopt rules and regulations for the implementation of this act. In addition to procedural rules and regulations, the Secretary may adopt rules and regulations providing for but not limited to: (a) primary drinking water standards applicable to all public water supply systems in the state. The primary drinking water standards may (1) identify contaminants which may have an adverse effect on the health of persons; (2) specify for each contaminant either a maximum contaminant level that is acceptable in water for human consumption... (b) establish the requirements for adequate monitoring, maintenance of records and submission of reports, sampling and analysis of water...”

20. K.A.R 28-15-19 dictates “All drinking water supplied to the public from a public water supply system shall be disinfected.” The results of onsite inspections indicate drinking water being supplied to customers is not being properly disinfected, resulting in violations of K.A.R. 28-15-19.

21. K.S.A. 65-171r prohibits the following acts:

“(e) the failure of a supplier of water to comply with a primary drinking water standard established under K.S.A. 65-171m, and amendments thereto, and rules and regulations adopted pursuant thereto unless a variance or exception has been granted;

22. K.S.A. 65-171s states in part:

“(a) Any person who violates any provision of K.S.A. 65-171r... shall incur, in addition to any other penalty provided by law, a civil penalty in an amount not more than \$5,000 per day for each day in which such violation occurs or failure to comply continues.”

23. The PWS is in violation of K.A.R. 28-15-19 for providing drinking water to the public that is not disinfected.

ORDER

24. Based upon the above-referenced Findings of Fact and Conclusions of Law and pursuant to the authority granted under K.S.A. 65-163, the Secretary hereby orders and the PWS consents to comply with the following Compliance Schedule.

25. The following required actions are necessary to protect public health during periods of non-compliance and shall be fulfilled as outlined below until full compliance is achieved.

26. The PWS shall distribute notice of the violation(s) to the public as required by K.A.R. 28-15a-201. Copies of the notice shall be furnished to all affected customers; area health care providers including medical doctors, clinics and hospitals; the county health department; and the KDHE. Notice of the violation(s) shall also be included in the annual Consumer Confidence Report (CCR) as required by K.A.R. 28-15a-153.
27. Beginning May 1, 2016, bottled water shall be provided to all customers being served by the raw untreated water line. Bottled water will be provided until delivery of the raw untreated water has ceased.
28. In order to rectify the violations referenced in this CO, the PWS shall comply with the following compliance schedule:
 - A. A backflow prevention device shall be installed, as a temporary solution, for the direct cross connection between the raw untreated water line coming into the plant and the finished water distribution line within the treatment plant no later than June 1, 2016.
 - B. The PWS shall provide KDHE a final plan of action including milestone dates to rectify violations associated with the direct cross connection and customers being served from the raw untreated water line by July 1, 2016.
 - C. The PWS shall remove the direct cross connection between the raw untreated water line coming into the plant and the finished water distribution line within the treatment plant no later than December 31, 2016.
 - D. The PWS shall disconnect all customers being served by the raw untreated water line no later than December 31, 2016. If a new transmission line is the PWS systems solution, standard KDHE review and approval will be required.
29. The PWS shall submit semi-annual status reports to the KDHE by January 1st and July 1st of every year while the PWS is in non-compliance with K.A.R 28-15-19. The status reports shall summarize the PWS progress toward achieving compliance and shall include but not be limited to:
 - A. Progress on any projects or improvements being made to the water system;
 - B. A summary of efforts being made to develop an annual budget, capital improvement plan, and an operation and maintenance plan;
 - C. Efforts made to comply with this CO; and
 - D. Any changes to the deadline for which the PWS anticipates to achieve full compliance.

30. All documentation required pursuant to this CO shall reference the case number (Case No. [REDACTED] BOW) and be mailed to:

Kansas Department of Health and Environment
Public Water Supply Section
1000 SW Jackson, Suite 420
Topeka, KS 66612-1367

Terms of Settlement

31. All actions required to be undertaken pursuant to this CO shall be undertaken in accordance with the requirements of all applicable local, state and federal laws and regulations.
32. This CO shall apply to and be binding upon the KDHE and the PWS, its agents, successors and assigns. No change in the ownership or corporate status of the PWS shall alter its responsibilities under this CO.
33. The PWS shall provide a copy of this CO to any subsequent owners or successors before ownership rights are transferred. The PWS shall provide a copy of this CO to all contractors, sub-contractors and consultants who are retained to conduct any work performed under this CO, within 14 days after the effective date of this CO or the date of retaining their services. Notwithstanding the terms of any contract, the PWS is responsible for compliance with, and for insuring that its contractors and agents comply with this CO.
34. The activities conducted under this CO are subject to approval by the KDHE, and the PWS shall provide all necessary information consistent with this CO requested by the KDHE.
35. The PWS agrees to meet every term and condition of this CO. Failure to meet the terms of the Compliance Schedule or any term or condition of, or scheduled date of performance in this CO or any report, work plan or other writing prepared pursuant to and incorporated into this CO, shall constitute a violation of this CO and may subject the PWS to further enforcement action including, but not limited to, the assessment of civil penalties not to exceed \$5,000 per day for each day in which such violation occurs or failure to comply continues. KDHE reserves the right to unilaterally withdraw this CO for substantial non-compliance.
36. This CO shall be terminated upon the PWS's receipt of written notice from KDHE that the PWS has demonstrated the terms of this CO to have been satisfactorily completed, including any additional tasks the KDHE has deemed necessary.

37. The PWS shall perform the requirements under this CO within the time limits set forth herein unless the performance is prevented or delayed solely by events which constitute a force majeure.
- A. For purposes of this CO a force majeure is defined as any event beyond the control of the PWS which could not be overcome by due diligence and which delays or prevents performance by a date required by this CO. Such events do not include increased costs of performance or changed economic circumstances. Any delay caused in whole or in part by action or inaction by federal or state authorities shall be considered a force majeure and shall not be deemed a violation of any obligations required by this CO.
 - B. The PWS shall have the burden of proving all claims of force majeure. Failure to comply by reason of force majeure shall not be construed as a violation of this CO.
 - C. The PWS shall notify the KDHE in writing within seven (7) days after becoming aware of an event which the PWS knew, or should have known, constituted force majeure. Such notice shall estimate the anticipated length of delay, its cause, measures to be taken to minimize the delay, and an estimated timetable for implementation of these measures. Failure to comply with the notice provision of this section shall constitute a waiver of the PWS's right to assert a force majeure claim and shall be grounds for the KDHE to deny the PWS an extension of time for performance.
 - D. Within seven (7) days of the receipt of written notice from the PWS of a force majeure event, the KDHE shall notify the PWS of the extent to which modifications to this CO are necessary. In the event the KDHE and the PWS cannot agree that a force majeure event has occurred, or if there is no agreement on the length of the extension, the dispute shall be resolved by the Director of the Division of Environment, KDHE, under the Dispute Resolution Procedure provided herein.
 - E. Any modifications to any provision of this CO shall not alter the Schedule of Actions or completion of other tasks required by this CO unless specifically agreed to by the parties in writing and incorporated into this CO.
38. This CO may be amended by mutual agreement of the KDHE and the PWS. Such amendments shall be in writing, shall have as their effective date the date on which they are signed by both parties, and shall be incorporated into this CO.
39. Dispute Resolution Procedure:

- A. The parties recognize that a dispute may arise between them regarding implementation of the action to be taken as herein set forth or other terms or provisions of this CO. If such dispute arises, the parties will endeavor to settle it by informal negotiations between themselves. If the parties cannot resolve the issue informally within a reasonable period of time, either of the parties may notify the other in writing stating specifically:
- i. that informal negotiations have failed,
 - ii. that formal dispute resolution under this paragraph has commenced, and
 - iii. the position with regard to the dispute and the reason therefore.
- B. A party receiving such a notice of dispute will respond in writing within ten (10) working days stating its position. The parties shall have an additional ten (10) working day period to prepare written arguments and evidence for submission to the other party. Any settlement shall be reduced to writing, signed by representatives of each party and incorporated into this CO. If the parties are unable to reach an agreement following this procedure, the matter shall be referred to the Director of the Division of Environment, KDHE, who shall decide the matter and provide a written statement of his decision which shall be incorporated into this CO.
- C. This dispute resolution procedure shall not preclude any party from having direct recourse to court if otherwise available by applicable law.
40. The requirements of this CO represent the best professional judgment of the KDHE at this time based on the available information. If circumstances change significantly so that data indicates an immediate threat of danger to the public health or safety, or the environment, or a significantly different threat other than the alleged deficiencies addressed herein, then the KDHE reserves the right to modify dates or requirements herein as is deemed reasonably necessary and the PWS reserves the right to appeal any such modifications or additional requirements.
41. Nothing contained in this CO shall affect any right, claim, interest, defense or cause of action of any party hereto with respect to any person or entity not a party to this CO. This CO does not constitute a waiver, suspension or modification of the requirements of applicable statutes or regulations which remain in full force and effect.
42. The parties hereto have affixed their signatures on the dates inserted below to acknowledge their agreement to this CO. The signatories to this CO certify that they are authorized to execute and legally bind the parties they represent to this CO.

IT IS SO ORDERED AND AGREED.
Please sign and date.

Susan Mosier, MD, Secretary
Kansas Department of Health & Environment

Shelley Hansel, Mayor
City of Wellington

Date: _____

Date: _____

DRAFT

CERTIFICATE OF MAILING

KDHE USE ONLY

The undersigned hereby certifies that on the ____ day of _____ 2016, true and correct copies of the above and foregoing CO were placed in the U.S. Mail, postage prepaid, first class and addressed to:

mayor

«AddressBlock»
«AddressBlock»
«AddressBlock»
«AddressBlock»

SDWIS AC

«AddressBlock»
«AddressBlock»
«AddressBlock»
«AddressBlock»

Any other contact mentioned above

«AddressBlock»
«AddressBlock»
«AddressBlock»
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KDHE Staff Member