

STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION

NEW MEXICO ENVIRONMENT DEPARTMENT
WATER PROTECTION DIVISION,
SURFACE WATER QUALITY BUREAU,

Complainant,

v.

No. WQCC 22 - 32 (CO)

EL PASO WATER,

Respondent.

REQUEST FOR HEARING AND ANSWER OF RESPONDENT EL PASO WATER

In accordance with 20.1.3.19.A(1)-(2) NMAC, Respondent The El Paso Water Utilities – Public Service Board (“EPWater”) submits this Request for Compliance Order Hearing and Answer to the Administrative Compliance Order Requiring Compliance (“Compliance Order”) issued by the New Mexico Environment Department’s (“NMED”) Surface Water Quality Bureau for alleged violations of the New Mexico Water Quality Act, NMSA 1978, Sections 74-6-1 to -17 (“NM WQA”), the Ground and Surface Water Protection Regulations, 20.6.2 NMAC (“WQCC Regulations”) and the Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC (“Surface Water Regulations”).

Denial of Jurisdiction

EPWater denies that the NMED has jurisdiction or authority over EPWater and denies that NMED has subject matter jurisdiction over the matters which are the subject of the Administrative Compliance Order Requiring Compliance (“Compliance Order”) issued by the NMED Surface Water Quality Bureau (“Bureau”). Under controlling law, the “only state law applicable to an interstate discharge is the law of the State in which the point source is located,” and the NMED’s

statutory claims are preempted by the federal Clean Water Act (“CWA”), 33 U.S.C. § 1251, et seq. *See In re Gold King Mine Release in San Juan Cnty., Colorado*, on Aug. 5, 2015, No. 1:18-MD-02824-WJ, 2019 WL 1369349, at **4-5 (D.N.M. Mar. 26, 2019) (emphasis in original) (dismissing the state of Utah’s claims for violations of Utah’s Water Quality Act because the discharge occurred in Colorado and, accordingly, the CWA preempted Utah’s statutory claims), citing *Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S. Ct. 1046, 1054 (1992); *International Paper v. Ouellette*, 479 U.S. 481, 493, 107 S.Ct. 805, 812.

I. Request for Compliance Order Hearing.

EPWater hereby requests a hearing on this matter pursuant to NMSA 1978, Section 74-6-10(G) and 20.1.3.19.A(1) NMAC. A copy of the Administrative Compliance Order Requiring Compliance and Assessing a Civil Penalty is attached hereto as Exhibit A.

II. Answer.

In accordance with 20.1.3.19.A(2), EPWater submits this answer to the Compliance Order as follows:

A. Response to Findings of Fact

1. Paragraphs 1 through 4 of the Compliance Order are statements of law which require no response.

2. Answering paragraph 5, EPWater affirmatively states that under a grant of authority from the City of El Paso, it is a municipal entity, a water, wastewater and stormwater utility for the City of El Paso, and a political subdivision of the State of Texas providing water services to the residents of El Paso County. EPWater further states that the correct name of the utility is El Paso Water Utilities – Public Service Board. EPWater denies any allegations contained in paragraph 5 that are inconsistent with EPWater’s affirmative statements.

3. Paragraph 6 is a conclusion of law which requires no response. To the extent that a response is required, EPWater denies paragraph 6.

4. Answering paragraph 7, EPWater admits that it maintains and operates the sewer collection system and wastewater treatment facilities for the City of El Paso, Texas. EPWater denies the remaining allegations contained in paragraph 7 and affirmatively states during July and August of 2021, the City of El Paso experienced a historically severe monsoon season that involved some of the highest amounts of rainfall in its recorded history that created flooding in the area. Starting on August 13, 2021 EPWater experienced multiple breaks to its Frontera Force Main wastewater pipelines. In response to this emergency, which threatened the health and safety of local residents, EPWater made the difficult decision to discharge wastewater into the Rio Grande to prevent wastewater from endangering homes, businesses and streets in the area. Beginning on August 27, 2021, wastewater was directed into the stormwater system via two (2) pump stations, and the flows were discharged via the Keystone Outlet (referred to as the Doniphan Outfall in the Compliance Order) near the intersection of Doniphan and Hillside Drive in El Paso, Texas. At the time, the Rio Grande River flows were at 500 cfs and the EPWater wastewater flows were estimated at 6-10 cfs.

5. Answering paragraph 8, EPWater admits that wastewater generally contains contaminants such as the ones listed in paragraph 8, but is without knowledge of the unidentified exceedances of 20.6.4 NMAC standards alleged in paragraph 8; accordingly, EPWater denies the remaining allegations contained in paragraph 8.

6. EPWater admits paragraph 9.

7. EPWater denies paragraph 10 and affirmatively states beginning on August 27, 2021, after a break occurred on the Frontera Force Main in an area that had experienced previous breaks, to minimize the impact to residents and businesses in the area, wastewater was directed into the stormwater system via two (2) pump stations and the flows were discharged via the Keystone Outlet (referred to as the Doniphan Outfall in the Compliance Order) near the intersection of Doniphan and Hillside Drive in El Paso, Texas. At the time, the Rio Grande River flows were at 500 cubic feet per second (“cfs”) and the EPWater wastewater flows were estimated at 6-10 cfs. EPWater further affirmatively states that on average the sewer lines carry about 10 million gallons of wastewater from West El Paso every day.

8. Answering paragraph 11, EPWater denies that a point source discharge occurred into a surface water of the State of New Mexico and affirmatively states that, after an emergency break in the Frontera main line, wastewater was discharged via the Keystone Outlet (referred to as the Doniphan Outfall in the Compliance Order) near the intersection of Doniphan and Hillside Drive in El Paso, Texas. EPWater has no knowledge of the truth of the remaining allegations contained in paragraph 11 and, accordingly, denies the same.

9. EPWater is without knowledge of the truth of the allegations contained in paragraph 12 and, accordingly, denies the same.

10. EPWater denies paragraph 13 and affirmatively states that on August 27, 2021, the day of the break necessitating the emergency diversion of wastewater, Denise Parra, EPWater Public Affairs Officer, e-mailed numerous people including New Mexico state employees informing them of the emergency diversion. *See* Exhibit B, 8/27/2021 e-mail from D. Parra to NMED employees including Susan Lucas Kamat, the NMED Program Manager, Point Source Regulation Section of the NMED Surface Water Quality Bureau. Following the initial notice on

August 27, EPWater voluntarily kept NMED apprised of the status of the discharge and EPWater's remediation and restoration efforts related to same. EPWater continued to voluntarily submit information to NMED, include NMED in a site visit and including NMED in a progress briefing that was provided to both the EPA and NMED on February 17, 2022. NMED representatives were also typically copied on (or otherwise provide) the communications involving EPWater, the EPA the U.S. Army Corps of Engineers and the TCEQ related to the discharge and EPWater's remediation efforts and plans.

11. EPWater admits paragraph 14.

12. Answering paragraph 15, EPWater admits that NMED Surface Water Quality Bureau representatives, including Susan Lucas Kamat, attended the El Paso Frontera Force Main Breaks and Mitigation Sites Tour on November 9, 2021. EPWater is without knowledge of the unidentified "reported findings" referenced in paragraph 15; accordingly, EPWater denies those allegations pertaining to the unidentified "reported findings" referenced in paragraph 15. Further answering paragraph 15, EPWater affirmatively states that the emergency discharge occurred at the Keystone Outlet (referred to as the Doniphan Outfall in the Compliance Order) in El Paso, Texas and that the wastewater travelled downstream from the discharge point. EPWater denies allegations contained in paragraph 15 that are inconsistent with the topography downstream from the Keystone Outlet.

13. Answering paragraph 16, EPWater admits that it was able to cease diversion of wastewater on January 11, 2022, and affirmatively states that on average the sewer lines carry about 10 million gallons of wastewater from West El Paso every day.

14. Answering paragraphs 17 and 18, EPWater admits that it sent NMED issued a Notice of Non-Compliance to EPWater on February 7, 2022 and affirmatively states that EPWater

contacted the United States Environmental Protection Agency (“U.S. EPA”) and NMED Surface Water Quality Bureau on January 21, 2022 informing the two agencies that EPWater was ready to begin remediation activities, the Texas Commission on Environmental Quality (“TCEQ”) did not require specific authorization to proceed with remediation activities, and inquiring whether either the U.S. EPA or the NMED required authorization to proceed with remediation activities. *See* Exhibit C, 1/21/22 e-mail from R. Rodriguez to S. Lucas Kamat and R. Matthews. Instead of receiving a response to this inquiry from NMED, EPWater received the Notice of Non-Compliance. Moreover, on April 27, 2022, EPWater’s Environmental Compliance Manager transmitted EPWater’s Pre-Construction Notification package request to NMED’s Watershed Protection Program Manager and others at NMED, which receipt was confirmed by the Watershed Program Manager.

15. Answering paragraph 19, EPWater denies that it discharged an estimated 1.1 billion gallons of untreated wastewater into “a surface water of the State of New Mexico.” EPWater admits the remaining allegations contained in paragraph 19.

16. EPWater denies the allegations contained in paragraph 20 and affirmatively states that on April 27, 2022, EPWater’s Environmental Compliance Manager transmitted EPWater’s Pre-Construction Notification package request to NMED’s Watershed Protection Program Manager and others at NMED, which receipt was confirmed by the Watershed Program Manager.

17. Answering paragraph 21, EPWater affirmatively states that it complied with the remediation plan submitted to, and approved by, the U.S. Army Corps of Engineers, the entity responsible for approving remediation plans for remediation of contamination identified by the U.S. EPA. EPWater further states that it followed the guidance and practices of the International Boundary and Water Commission (“IBWC”) in identifying appropriate sites for its remediation

activities. EPWater denies all allegations contained in paragraph 21 that are inconsistent with the remediation plan approved by the U.S. Army Corps of Engineers. EPWater is without knowledge of the truth of the remaining allegations contained in paragraph 21 and, accordingly, denies the same.

18. EPWater is without knowledge of the truth of the allegations contained in paragraph 22 and, accordingly, denies the same.

19. Answering paragraph 23, EPWater states the allegations are general statements of fact not specifically pertaining to EPWater or the practices of EPWater. EPWater admits that storage of soil saturated with wastewater should be accomplished through best practices.

20. Paragraph 24 is statement of law to which no response is required.

21. Answering paragraph 25, EPWater affirmatively states that it complied with the remediation plan submitted to, and approved by, the U.S. Army Corps of Engineers, the entity responsible for approving remediation plans for remediation of contamination identified by the U.S. EPA. EPWater further states that it followed the guidance and practices of the IBWC in identifying appropriate sites for its remediation activities. EP Water denies all allegations contained in paragraph 25 that are inconsistent with the remediation plan approved by the U.S. Army Corps of Engineers. The remaining allegations contained in paragraph 25 are conclusions of law to which no response is required.

22. Answering the allegation contained in paragraph 26 that it stockpiled and stored contaminated sediment in New Mexico, EPWater affirmatively states that it complied with the remediation plan submitted to, and approved by, the U.S. Army Corps of Engineers, the entity responsible for approving remediation plans for remediation of contamination identified by the U.S. EPA. EPWater further states that it followed the guidance and practices of the IBWC in

identifying appropriate sites for its remediation activities. EP Water denies all allegations contained in paragraph 26 that are inconsistent with the remediation plan approved by the U.S. Army Corps of Engineers. EPWater denies the remaining allegations contained in paragraph 26.

23. EPWater denies paragraph 27 and affirmatively states that on April 27, 2022, EPWater's Environmental Compliance Manager transmitted EPWater's Pre-Construction Notification package request to NMED's Watershed Protection Program Manager and others at NMED, which receipt was confirmed by the Watershed Program Manager.

B. Response to Violations

24. EPWater denies the allegations contained in paragraphs 28 through 34 and requests a hearing to contest both the allegations of the Compliance Order and the penalties set forth in the Compliance Order and accompanying exhibit.

25. Paragraph 35 is a statement of law to which no response is required.

C. Response to Compliance Order

26. Paragraphs 36 through 41 do not contain factual allegations and therefore require no answer. EPWater denies that NMED has the authority and jurisdiction to impose the requirements set forth in these paragraphs. EPWater further affirmatively states that on April 27, 2022, EPWater provided the NMED with a copy of the Pre-Construction Notification for Nationwide Permit 28 Verification and Section 10 Authorization – Frontera Force Main Project that was submitted by EPWater's remediation consultant to the United States Army Corps of Engineers, and the Corps of Engineers' written approval of the same.

27. Paragraph 42 is a statement of law to which no response is required.

D. Response to Civil Penalty

28. EPWater denies that NMED has the authority and jurisdiction to impose the civil penalties identified in paragraphs 42-45, and denies that civil penalties under the WQA for purported violations of the WQCC Regulations and Surface Water Regulations are legal, warranted or appropriate under these circumstances.

E. Response to Notice, Notice of Opportunity to Answer and Request a Hearing, Finality of Order, Settlement, Compliance with Other Laws, Termination

29. The allegations contained in paragraphs 46-60 are administrative notices regarding Respondents' rights and duties in appealing the Compliance Order and require no answer.

30. In accordance with 20.1.3.19.A(2)(c), the Affirmation of EPWater is attached hereto.

Affirmative Defenses

First Defense

EPWater's Answer and each denial contained therein constitute EPWater's first defense.

Second Defense

NMED lacks jurisdiction to enforce requirements and impose penalties under the NM WQA because it is undisputed that the discharge occurred in Texas and NMED lacks the authority or jurisdiction to regulate activities outside the boundaries of the State of New Mexico or which are otherwise preempted by federal law. NMED cannot regulate activities that occur within the sovereign State of Texas, and which are subject to the jurisdiction of Texas. *See In re Gold King Mine Release in San Juan Cnty., Colorado, on Aug. 5, 2015*, No. 1:18-MD-02824-WJ, 2019 WL 1369349; *Arkansas v. Oklahoma*, 503 U.S. 91; *International Paper v. Ouellette*, 479 U.S. 481.

Third Defense

NMED lacks jurisdiction to enforce requirements and impose penalties under the NM WQA because the discharge occurred into the Rio Grande, a navigable waterway governed by the federal Clean Water Act, 33 U.S.C. § 1251, *et seq.*

Fourth Defense

NMED lacks authority and jurisdiction to enforce requirements and impose penalties on EPWater because the NM WQA and the WQCC Regulations are preempted by federal law pursuant to the Supremacy Clause of the U.S. Constitution. U.S. Const. art. VI, sec. 2. The NM WQA and WQCC Regulations are preempted by the federal Clean Water Act “CWA”), including without limitation 33 U.S.C. §§ 1341, 1342, 1344 and 1319, among others. The Texas Commission on Environmental Quality (“TCEQ”) has jurisdiction over the matters made the basis of the Compliance Order, as delegated by the Environmental Protection Agency (“EPA”) pursuant to 33 U.S.C. § 1342. The State of New Mexico has not been delegated such authority under the CWA.

Fifth Defense

EPWater is exempt from the requirements of the WQCC Regulations, including but not limited to Section 20.6.2.1203, because the activities complained of were made in conformance with rules, regulations or orders of a federal agency – the U.S. Army Corps of Engineers – pursuant to the authority delegated to it under the Clean Water Act, 33 U.S.C. 1344.

Sixth Defense

NMED lacks authority and jurisdiction to enforce requirements and impose penalties on EPWater because the NM WQA and the WQCC Regulations are preempted by federal law pursuant to the Dormant Commerce Clause of the U.S. Constitution. U.S. Const. art. VI, sec. 2.

Seventh Defense

NMED lacks authority and jurisdiction to enforce requirements and impose penalties on EPWater because of the presumption that prohibits the extraterritorial application of state statutes or regulations outside the borders of the enacting state – the extraterritoriality doctrine, pursuant to the Dormant Commerce Clause of the U.S. Constitution. U.S. Const. art. VI, sec. 2.

Eighth Defense

EPWater is immune from enforcement of NM WQA requirements and imposition of NM WQA penalties because it is a political subdivision of the State of Texas. EPWater is a department and component unit of the City of El Paso. As a unit of Texas local government, EPWater is immune from suit, claims and liability pursuant to the common law doctrines of sovereign and governmental immunity. The state and its political subdivisions are protected by the common law doctrines of sovereign and governmental immunity, respectively. *Ben Bolt-Palito Blanco Consol. ISD v. Texas Political Subdivs. Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323-24 (Tex. 2006). Political subdivisions of the state, including counties, cities and school districts, are entitled to such immunity -- referred to as governmental immunity -- unless it has been waived clearly and unambiguously. TEX. GOV'T CODE § 311.034; *Travis Cent. Appr. Dist. V. Norman*, 342 S.W.3d 54, 57-58 (Tex. 2011); *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n. 3 (Tex. 2003). The Texas Legislature is the only entity with authority to waive that immunity, and the Legislature has expressed its desire to preserve its interest in managing fiscal matters through the appropriations process by maintaining sovereign immunity unless it has clearly and unambiguously stated otherwise. TEX. GOV'T CODE § 311.034. NMED's Compliance Order does not fall within any of the Texas Legislature's waivers of immunity.

Ninth Defense

Complainant fails to allege facts that support a finding of a violation of a requirement, regulation or water quality standard adopted pursuant to the NM WQA.

Tenth Defense

EPWater denies that it is a “person” as defined within NMSA 1978, Section 74-6-2 or within 20.6.2.7(P)(2) NMAC.

Eleventh Defense

By attempting to regulate activities outside of the State of New Mexico through the New Mexico Water Quality Control Commission Regulations, NMED is seeking to act beyond its delegated authority. The NM WQA only empowered the New Mexico Water Quality Control Commission (the “Commission”) to adopt “water quality standards for surface and ground waters of the state” (the State of New Mexico, not the State of Texas). NMSA 1978, Section 74-6-4(D). Additionally, the Commission could only adopt regulations to “prevent or abate water pollution in the state or in any specific geographic area, aquifer of the watershed state or in any part thereof.” NMSA 1978, Section 74-6-4(E).

Twelfth Defense

Complainant fails to substantiate claims that EPWater violated 20.6.2.3103 standards. Vague and unsupported allegations that EPWater violated 20.6.2.3103 standards: (1) violate due process and are arbitrary, capricious, and an abuse of discretion; (2) are not supported by substantial evidence; and (3) are otherwise not in accordance with the law.

Thirteenth Defense

NMED failed to avail itself of the administrative remedies afforded by the WQA and TCEQ.

Fourteenth Defense

The corrective actions set forth in the Compliance Order are barred by the doctrine of estoppel.

Fifteenth Defense

The NMED lacks the jurisdiction and authority to impose any civil penalties.

AFFIRMATION

The information contained herein is to the best of the undersigned's knowledge believed to be true and correct and the undersigned is authorized to sign this Request for Hearing and Answer on behalf of EPWater.

WHEREFORE, EPWater respectfully requests the NMED grant the following relief:

1. Grant EPWater a Compliance Order Hearing pursuant to the NM WQA and WQCC Regulations;
2. Dismiss the Compliance Order; and
3. Provide such other relief as may be just and reasonable.

Respectfully submitted this 11th day of July 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2022, a copy of the foregoing *Request for Hearing and Answer of Respondent EPWater* was e-mailed to the following:

Andrew Knight
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/s/ Thomas M. Hnasko
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**NEW MEXICO ENVIRONMENT DEPARTMENT
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No. WQCC 22-__ (CO)

EL PASO WATER,

Respondent.

**ADMINISTRATIVE COMPLIANCE ORDER
REQUIRING COMPLIANCE**

Pursuant to the New Mexico Water Quality Act ("Act"), NMSA 1978, Sections 74-6-1 to -17, and the New Mexico Water Quality Control Commission Regulations ("Regulations"), 20.6.2 NMAC and 20.6.4 NMAC, the Director of the Water Protection Division of the New Mexico Environment Department ("NMED") issues this Administrative Compliance Order ("Order") on behalf of NMED's Surface Water Quality Bureau ("Bureau") to El Paso Water ("Respondent"). NMED is issuing this order to the Respondent for violations of the Act and Regulations.

I. FINDINGS OF FACT

1. Pursuant to NMSA 1978, Section 9-7A-4, NMED is an executive agency within the New Mexico state government. Pursuant to NMSA 1978 Section 74-6-2(K)(1), NMED is a constituent agency of the New Mexico Water Quality Control Commission.

2. The Bureau is an organizational unit of NMED within its Water Protection Division. The Bureau was created pursuant to authority granted under NMSA 1978, Section 9-



7A-6(B)(3).

3. Pursuant to NMSA 1978 Section 74-6-10(A)(1), when NMED determines that a person violated or is violating a regulation or permit created pursuant to the Act, NMED may issue a compliance order to require corrective actions and/or assess a civil penalty.

4. Pursuant to a delegation of authority from the Secretary of NMED, the Director of the Water Protection Division of NMED has authority to issue Administrative Compliance Orders on behalf of the Bureau. NMSA 1978, § 9-7A-6(B)(2).

5. Respondent owns and operates a wastewater utility doing business by the name of El Paso Water, which operates in El Paso, Texas.

6. Respondent is a “person” as defined in Section 74-6-2(I) of the Act and 20.6.2.7(P)(2) NMAC.

7. Respondent maintains and operates the sewer collection system and wastewater treatment facilities and is responsible for the discharge of treated domestic wastewater to multiple outfalls in the Rio Grande for the City of El Paso, including a temporary discharge site identified as the Doniphan Road Outfall that was used to divert untreated sewage from the failed Frontera Forced Main sewer collection infrastructure directly into the Rio Grande near Sunland Park, New Mexico, Doña Ana County.

8. The wastewater in the sewer collection system and wastewater treatment facilities contains water contaminants such as pathogens (including indicator *E. coli* bacteria), suspended or settleable solids, nutrients (i.e., nitrogen and phosphorus), and low dissolved oxygen concentrations that may exceed the surface water quality standards codified in 20.6.4 NMAC, which are intended to protect designated uses such as aquatic life, wildlife habitat, irrigation, livestock watering, and human health.

9. The temporary discharge site is located near the intersection of Doniphan Drive and Hillside Drive in El Paso, Texas, El Paso County.

10. Due to multiple collection system infrastructure failures and ongoing failed repair attempts, on August 27, 2021 Respondent began diverting approximately ten million gallons per day of raw, untreated sewage from the inoperative El Paso Frontera Force Main into the Rio Grande just upstream of Corchesne Bridge in Sunland Park, New Mexico at the Doniphan Outfall.

11. The reach of the Rio Grande where the untreated sewage was discharged is a surface water of the State of New Mexico protected under 20.6.4.101 NMAC and has designated uses of irrigation, marginal warmwater aquatic life, livestock watering, wildlife habitat, and primary contact.

12. The reach of the Rio Grande in New Mexico that was impacted by the unauthorized discharge of untreated sewage is approximately 1.7 miles long.

13. Respondent did not notify or report the unauthorized discharge to NMED as required by New Mexico Regulations at 20.6.2.1203 NMAC for discharges that may affect surface water.

14. Respondent reported the unauthorized discharge to the Texas Commission on Environmental Quality (TCEQ), United States Environmental Protection Agency (USEPA), and International Boundary and Water Commission (IBWC).

15. On November 9, 2021, Surface Water Quality Bureau representatives (Susan Lucas Kamat and Davena Crosley) attended the El Paso Frontera Force Main Breaks and Mitigation Sites Tour. The reported findings focused on the reach of the Rio Grande between the Rio Grande Discharge Point and the recently installed American Dam. The raw wastewater

traveled downstream along the New Mexico – Texas border for approximately 1.7 miles.

16. Respondent diverted an estimated ten million gallons per day of untreated wastewater through the temporary discharge “Doniphan Outfall” location for 156 days, completely ceasing the discharge on January 11, 2022.

17. In an email on January 21, 2022, Respondent noted that they would be working with their contractor over the next few months to complete clean-up of the Rio Grande River before the start of the 2022 irrigation season, which is expected to begin in late May to early June. Respondent also noted that they would follow-up with more details on the remediation and restoration plan when it becomes available.

18. NMED issued a Notice of Non-Compliance to Respondent on February 7, 2022, notifying Respondent of the violations of the Act and Regulations.

19. After discharging an estimated 1.1 billion gallons of untreated wastewater to the Rio Grande near Sunland Park, New Mexico, Doña Ana County, which is a surface water of the State of New Mexico, Respondent provided USEPA and NMED with a briefing and presentation on the discharge and on-going remediation efforts on February 17, 2022.

20. Respondent initiated remediation of the Rio Grande and other impacted areas in Texas, but never provided the remediation and restoration plan to NMED nor did Respondent follow-up with more details on the plan.

21. On April 20, 2022, NMED learned from an El Paso Times article that the Respondent had scraped contaminated soil from the riverbed of the Rio Grande and deposited the soil on the banks of the river in New Mexico near Sunland Park, New Mexico, Doña Ana County.

22. NMED inspector Davena Crosley inspected the sediment removal activities on

April 20, 2022, and photographed heavy equipment moving and stockpiling soil in New Mexico, as reported by El Paso Times earlier that day.

23. Stockpiling and storage of soil saturated with untreated domestic wastewater poses risks to human health and surface water if appropriate best management practices are not implemented to prevent or mitigate contaminated soils from being transported back to the river either through air or water.

24. As stated in the Regulations at 20.6.2.2201 NMAC, no person shall dispose of any refuse in a natural watercourse or in a location and manner where there is a reasonable probability that the refuse will be moved into a natural watercourse by leaching or otherwise.

25. The contaminated sediment stockpiled and stored along the banks of the Rio Grande in New Mexico is considered an unwholesome material that meets the definition of “refuse” at 20.6.2.7 NMAC.

26. The Respondent stockpiled and stored contaminated sediment in a location and manner where there is a reasonable probability that the refuse will be moved into a natural watercourse (i.e., the Rio Grande) by leaching or otherwise.

27. As of the date of the issuance of this Administrative Compliance Order, Respondent has not submitted a proposed remediation and restoration plan, nor any discharge permit application to NMED.

II. VIOLATIONS

28. The Respondent violated 20.6.2.1203 NMAC by failing to notify NMED of a discharge of water contaminants in such quantity as may with reasonable probability injure or be detrimental to human health, animal or plant life, or property, or unreasonably interfere with the public welfare or the use of property.

29. The Respondent violated 20.6.2.1203(A)(1) NMAC by failing to orally notify the Bureau of the unauthorized discharge of sewage and water contaminants to a surface water of the State of New Mexico no later than 24 hours after the discharge event.

30. The Respondent violated 20.6.2.1203(A)(3) NMAC by failing to send written notification to the Bureau within one week verifying prior oral notification.

31. The Respondent violated 20.6.2.1203(A)(6) NMAC by failing to consult with the Bureau and for failure to send the Bureau a written report within fifteen (15) days after learning of the discharge describing the proposed corrective actions or actions already taken relative to the discharge.

32. The Respondent violated 20.6.2.2201 NMAC by disposing (stockpiling and storing) refuse (contaminated sediment) in a location and manner where there is a reasonable probability that the refuse will be moved into a natural watercourse by leaching or otherwise.

33. The Respondent violated 20.6.4.101 NMAC and 20.6.4.900 NMAC by discharging raw, untreated sewage containing *E. coli* bacteria in quantities that exceeded the surface water quality standards intended to protect primary contact recreation and human health. The water quality criteria for *primary contact* recreation are expressed as colony forming units per 100 milliliters ("cfu/100 mL") or most probable number per 100 milliliters ("MPN/100 mL"). The results for *E. coli* may be reported as either "cfu" or "MPN" depending on the analytical method used. The monthly geometric mean criterion and the single sample criterion for the impacted reach of the Rio Grande are 126 MPN/100 mL and 410 MPN/100 mL, respectively.

34. Water quality data provided by the Respondent indicates *E. coli* concentrations greater than 2,420 MPN/100 mL during the discharge, thus demonstrating the discharge caused

an exceedance of the water quality standards for this reach of the Rio Grande.

35. Section 74-6-10 of the Act authorizes the constituent agency to issue a compliance order requiring compliance immediately or within a specified time period or issue a compliance order assessing a civil penalty, or both.

III. COMPLIANCE ORDER

36. Based upon the foregoing findings and conclusions, Respondent is hereby ordered to immediately limit public access to the work area and stockpiled sediment (i.e., affected area) to protect human health and the environment.

37. Respondent shall immediately, but no later than three calendar days after the date of service of this Order, provide NMED with a copy of the remediation and restoration plan for consultation purposes and to ensure protection of the Rio Grande in New Mexico pursuant to the Act and Regulations. NMED may require further action, such as revegetation or other erosion control measures, upon review of the plan. Respondent shall provide the remediation and restoration plan to the NMED Watershed Protection Section program manager at wpsprogram.manager@state.nm.us.

38. As part of the remediation and restoration plan, the Respondent shall select and implement best management practices ("BMPs") to prevent or mitigate the potential for additional contamination during mitigation and restoration activities on and adjacent to the Rio Grande. Practicable and reasonable BMPs for New Mexico surface waters include but are not limited to:

a. Crossings – limit stream and wetland crossings to a single, narrow location that is perpendicular to the stream (or along a contour of a wetland).

b. Heavy equipment – pressure wash and/or steam clean before the start of

the project and inspect daily for leaks (to remove contaminants and to avoid introducing invasive species); do not use leaking equipment in or near surface water(s); do not park or leave equipment stored within the stream channel or wetland; operate from the bank or work platforms and avoid heavy equipment operation in flowing water.

c. Erosion control – avoid disturbance to vegetation; establish and maintain upland buffers; silt fences, biodegradable straw wattles, erosion control fabrics, and other techniques must be employed as appropriate to protect waters from sedimentation and other pollutants; and, avoid using jute netting or placing woven wire in contact with the river.

d. Wetlands – avoid working in wetlands whenever possible and flag or otherwise mark wetland boundaries so construction crews can avoid them.

e. Post-construction stabilization – minimize channel and bank erosion during and after construction; reseed or plant native vegetation in the disturbed areas so that species growth is equivalent to pre-disturbed site or reference site; and, native woody riparian and/or wetland species must be used in areas that support such vegetation.

f. Spills – appropriate spill clean-up materials such as absorbent pads must be available on-site at all times during construction. Respondent must report all spills immediately to NMED. For non-emergencies during normal business hours, call 505-428-2500. For non-emergencies after hours, call 866-428-6535. For emergencies only, call 505-827-9329 twenty-four hours a day (New Mexico Department of Public Safety).

39. Provided that river flow is occurring at USGS gage 08364000 (Rio Grande at El Paso, TX), Respondent shall conduct monitoring for *E. coli* at two locations described below, following the Standard Operating Procedure for bacteriological sampling available at <https://www.env.nm.gov/surface-water-quality/sop> or other EPA-approved methods. Respondent

shall monitor *E. coli* monthly, as streamflow allows, for one year after completion of the remediation and restoration project.

a. Upstream – Select a station upstream of the discharge point near the intersection of Doniphan Road and Hillside Drive, and within one half mile of the discharge point. An existing historical monitoring station on Bureau of Land Management land leased by El Paso Electric, at approximately 31.803611° N, 106.546389° W, is recommended for this purpose.

b. Downstream – Establish a station at the American Eagle Bridge approximately 0.22 miles upstream of American Dam.

40. Respondent shall provide monitoring data collected as described above to the NMED Watershed Protection Section program manager at wpsprogram.manager@state.nm.us within thirty days after the end of each standard quarter, October 31, 2022, December 31, 2022, March 31, 2023, and June 30, 2023. Respondents shall include with the data submittal a brief narrative describing observations or details useful for interpreting the results, including but not limited to whether precipitation had occurred in the area within twenty-four hours before sampling, and the corresponding flow recorded at USGS gage 08364000 (Rio Grande at El Paso, TX).

41. Within 30 days of completion of the 12-month monitoring period, Respondent shall provide an electronic data submittal package in either MS Excel or compatible format, which shall include (at a minimum) all the fields in the NMED-SWQB Data Template (attached as Exhibit A). Please note that analytical laboratory and El Paso Water qualifier codes (i.e., data flags) and “field notes” as well as “analytical comments” are included in the data template and shall be reported, as applicable. Respondent shall also include the analytical lab reports,

including case narrative, and any other relevant quality management actions and measures with the dataset.

42. Failure to comply with the Order may subject Respondent to additional civil penalties. Section 74-6-10(F) of the Act authorizes an additional civil penalty assessment of up to \$25,000 for each day of continued noncompliance with the actions required in this Order.

IV. CIVIL PENALTY

43. Sections 74-6-10(C)(2) and 74-6-10.1(B) of the Act authorizes civil penalties up to the amount of ten thousand dollars (\$10,000) per day for each violation of a regulation, water quality standard, or compliance order adopted pursuant to the Act.

44. Respondent is in violation of 20.6.2.1203 NMAC, 20.6.2.2201 NMAC, and 20.6.4.101 and 900 NMAC.

45. Although NMED has elected not to assess a civil penalty for these violations, Section 74-6-10(F) of the Act authorizes the assessment of \$25,000 for each day of continued noncompliance if Respondent fails to complete the actions required in Section III of this Order.

V. NOTICE OF OPPORTUNITY TO ANSWER AND REQUEST A HEARING

46. Pursuant to Section 74-6-10(G) of the Act, Respondent has the right to answer this Order and to request a public hearing.

47. If Respondent: (a) contests any material or legal matter upon which the Order is based; (b) contends that the amount of the penalties proposed in the Order is inappropriate; (c) contends that Respondent is entitled to prevail as a matter of law; or (d) otherwise contests the appropriateness of the Order, Respondent may mail or deliver a written Request for Hearing and Answer to the Order to the New Mexico Water Quality Control Commission, at the following address:

Commission Administrator
Water Quality Control Commission
P.O. Box 5469
Santa Fe, NM 87502
Telephone: (505) 827-2425

48. Respondent must file the Request for Hearing and Answer to the Order within 30 days after Respondent's receipt of the Order.

49. Respondent must attach a copy of this Order to its Request for Hearing and Answer to the Order.

50. A copy of the Answer and Request for Hearing must also be served on counsel for NMED at the following address:

Andrew Knight
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Avenue NE, Suite 1000
Albuquerque, New Mexico 87102
Email: Andrew.knight@state.nm.us

51. Respondent's Answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Order of which Respondent has any knowledge. Where Respondent has no knowledge of a particular factual allegation, Respondent should so state, and Respondent may deny the allegation on that basis. Any allegation of the Order not specifically denied shall be deemed admitted. Respondent's Answer shall also include any affirmative defenses upon which Respondent intends to rely. Any affirmative defense not asserted in the Answer, except a defense asserting lack of subject matter jurisdiction, shall be deemed waived.

52. The New Mexico Water Quality Control Commission's Adjudicatory Procedures, 20.1.3 NMAC, shall govern the hearing if Respondent requests a hearing.

VI. FINALITY OF ORDER

53. This Order shall become final upon Respondent's receipt of the Order unless

Respondent files a Request for Hearing and Answer to the Order as set forth above.

54. The failure to file an Answer to the Order and Request for Hearing constitutes an admission of all facts alleged in the Order and a waiver of the right to a hearing under Section 74-6-10(G) of the Act concerning this Order.

VII. SETTLEMENT

55. Whether or not Respondent requests a hearing and files an Answer, Respondent may confer with NMED concerning settlement. NMED encourages settlement consistent with the provisions and objectives of the Act and Regulations. To explore the possibility of settlement in this matter, Respondent may contact the attorney assigned to this case at the following address:

Andrew Knight
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Avenue NE, Ste. 1000
Albuquerque, New Mexico 87102
Phone: (505) 470-8215
Email: Andrew.knight@state.nm.us

56. Settlement discussions do not extend the 30-day deadline for filing of Respondent's Request for Hearing and Answer to the Order, nor alter the deadlines for compliance with this Order. Settlement discussions may be pursued as an alternative to and simultaneously with the hearing proceedings.

57. Respondent may appear at the settlement conference alone or represented by legal counsel.

58. Any settlement reached by the parties shall be finalized by written settlement agreement and a stipulated final order. A settlement agreement and stipulated final order must resolve all issues raised in the Order, must be final and binding all parties to the Order, and may

not be appealed.

VIII. COMPLIANCE WITH OTHER LAWS AND WAIVER

59. Compliance with the requirements of this Order does not relieve Respondent of the obligation to comply with all other applicable laws and regulations, including compliance orders or enforcement actions.

IX. TERMINATION

60. This Order shall terminate when Respondent certifies that all requirements of this Order have been met, and NMED has approved such certification, or when the Director of the Division approves a stipulated final order.

John Rhoderick

John Rhoderick, Acting Director
Water Protection Division,
New Mexico Environment Department

Digitally signed by John Rhoderick
Date: 2022.06.09 10:06:48 -06'00'

Date

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2022 a true and accurate copy of the Administrative Compliance Order Requiring Compliance was served by certified mail and email on Respondent at the following address:

John E. Balliew, President and CEO
El Paso Water
6400 Boeing Dr
El Paso, Texas 79925
Email: jeballiew@epwater.org

/s/ Andrew Knight
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Avenue NE, Suite 1000
Albuquerque, New Mexico 87102
Email: Andrew.knight@state.nm.us

From: [Denise Parra](#)
To: [Stephen Lopez](#); [Becker, Kathryn](#), NMENV; [Gilbert, anaya](#); [Wayne Belzer](#); [Rosalba Montes](#); [Rincon, Carlos](#); [Tellez, Gilbert](#); [Maria Sisneros](#); [Paz, Armando](#), NMENV; [Javier Guerra](#); [michael.martinez@cityofsunlandpark-nm.gov](#); [hector.rangel@sunlandpark-nm.gov](#); [Brent Westmoreland](#); [GUERRERO-JR, SALVADOR](#); [GALVAN, GERARDO](#); [amorales@ciamexeva.gob.mx](#); [Cabello Ribota Blanca Selenis](#); [Ing. Ramiro Carlos Meza de Ochoa](#); [paomoreno@imasivarez.gob.mx](#); [Biologo Francisco J. Nuñez](#); [imherrera@imasivarez.gob.mx](#); ["emmanuel.slas@conagua.gob.mx"](#); [LucasKamat, Susan](#), NMENV; [Rodriguez, Jorge A.](#); [Ortiz-Wertheim, Blanca](#), DHSEM; [Cc: Rasón Mendoza Luis Antonio](#); [Ramon Macias](#); [Connolly, Stephen](#), NMENV; [Amanda Bowen](#); [Hamilton, Kelly](#), DHSEM; [Christina Montoya](#); [Lisa F. Rosendorf](#); [Gisela Daonino](#); [Alan Shubert](#); [Gilbert Trelo](#); [Leticia Augsburg](#); [John E. Ballieu](#)
Subject: Frontera Force Main break
Date: Friday, August 27, 2021 5:26:00 PM
Attachments: [Waste water release point.jpg](#)

Good evening,

In response to your questions, below are the latest developments:

On Friday morning, El Paso Water experienced another break in its Frontera Force Main at a point near the Frontera Lift station, located at Frontera Road and Doniphan Drive in West El Paso. This is the same line that has seen other breaks in recent weeks. To minimize the impact to residents and businesses in the area, crews worked to divert wastewater to El Paso Water property that is adjacent to the lift station.

From there the wastewater is being directed into the stormwater system, where it will eventually empty into the Rio Grande. River flows are currently at 500 cfs and EPWater wastewater flows are estimated at 6-10 cfs. Even with this dilution, EPWater advises the public to avoid contact with river water.

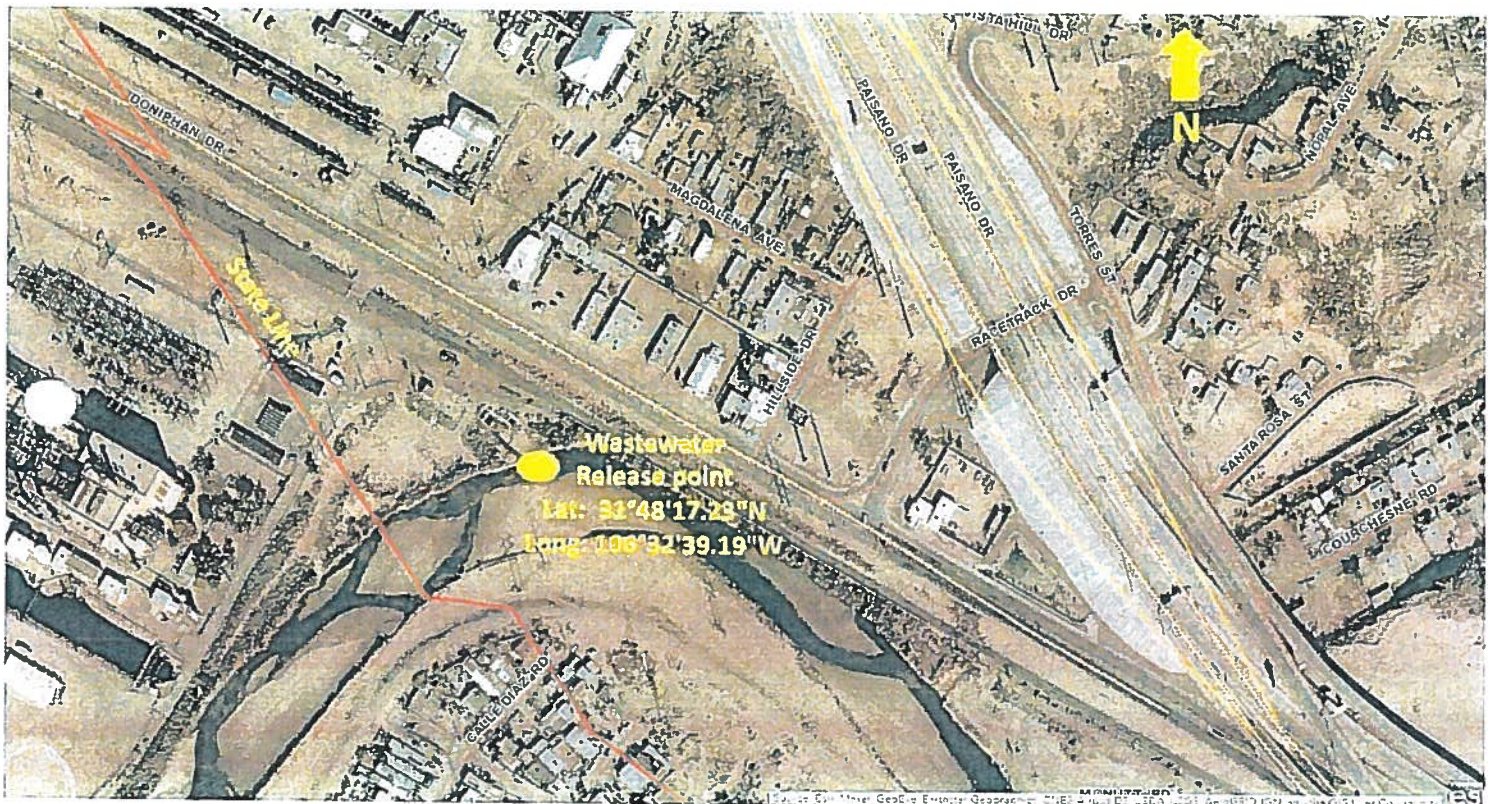
We estimate repairs may take several days, and we will keep you apprised of any new updates and developments. Within the last week, EPWater river water treatment plants stopped treating water for the season. EPWater is communicating with the Texas Commission on Environmental Quality on this incident.

Attached is a map showing where the wastewater is being released.

Respectfully,

Denise Parra | Public Affairs Officer
El Paso Water
1154 Hawkins Boulevard | El Paso, TX 79925
(915) 594-5510 Office | (915) 319-3284 Mobile





Ruben Rodriguez

From: Ruben Rodriguez
Sent: Monday, January 24, 2022 9:11 AM
To: Matthews, Rachel
Cc: Bernier, Roberto; Esparza, David; Smalley, Bryant; Nystrom, Thomas; LucasKamat, Susan, NMENV; Marisela Montelongo
Subject: RE: Frontera FM Break - Remediation Efforts and River Authorization

Good morning Ms. Matthews,

I appreciate the information. I will keep you posted on any developments.

Best regards,

Ruben Rodriguez | Environmental Compliance Manager
210 N. Lee St. | El Paso, TX 79901
(915) 594-5772 Telephone | (915) 238-5050 Mobile



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From: Matthews, Rachel <Matthews.Rachel@epa.gov>
Sent: Monday, January 24, 2022 7:07 AM
To: Ruben Rodriguez <rrodriguez@epwater.org>
Cc: Bernier, Roberto <bernier.roberto@epa.gov>; Esparza, David <esparza.david@epa.gov>; Smalley, Bryant <smalley.bryant@epa.gov>; Nystrom, Thomas <Nystrom.Thomas@epa.gov>; LucasKamat, Susan, NMENV <Susan.LucasKamat@state.nm.us>; Marisela Montelongo <Marisela.Montelongo@Tceq.Texas.Gov>
Subject: RE: Frontera FM Break - Remediation Efforts and River Authorization

Good morning,

There is no process through EPA for approval of remediation. The federal process for approval is to through the US Army Corps of Engineers.

We appreciate you keeping us updated.

Thank you,

Rachel Matthews
Municipal & Industrial Wastewater Section
Enforcement and Compliance Assurance Div.
U.S. EPA – Region 6 (ECOWM)
1201 Elm St. Suite 500
Dallas, TX 75270
(214) 665-8589



From: Ruben Rodriguez <rrodriguez@epwater.org>
Sent: Friday, January 21, 2022 11:03 AM
To: Matthews, Rachel <Matthews.Rachel@epa.gov>; LucasKamat, Susan, NMENV <Susan.LucasKamat@state.nm.us>; Marisela Montelongo <Marisela.Montelongo@Tceq.Texas.Gov>
Subject: Frontera FM Break - Remediation Efforts and River Authorization
Importance: High

Good morning ladies,

Hope this email finds you all well. I wanted to take this opportunity to update you on our remediation efforts and to reach out to you to inquire about authorization to begin remediation efforts on the Rio Grande River.

EPWater will be working diligently with our partners Arcadis, Inc. U.S., the International Boundary and Water Commission (IBWC) and the El Paso County Water Improvement District No.1 over the next few months to complete clean-up of the Rio Grande River and the American and Riverside Canals before the start of the 2022 irrigation season which is expected to begin in late May to early June. We will also be working with our partners at Oscar Renda Contracting and Blue Life Environmental on clean-up and restoration efforts at the break sites and the affected ponding sites, while moving forward on Phase 2 of our Frontera Force Main replacement project with our partners Jacobs Engineering and Oscar Renda Contracting.

EPWater is working with our environmental consultant Arcadis on start-up of remediation and restoration efforts along the first two-mile stretch of the Rio Grande River. We have also had preliminary coordination discussions with IBWC staff on the general clean-up procedures, start-up, access, logistics, and other related activities and they have given us authorization to begin these efforts and will continue to be available for support and guidance on our remediation plan moving forward. Arcadis has also reached out to the US Army Corps of Engineers and will be submitting the pre-applications needed to access surface waters of the U.S. such as the Rio Grande, and they have received initial positive feedback from the USACE Albuquerque District staff who will work to expedite the approval process given the emergency situation. Arcadis will also be requesting a right of entry access for the portions of the river that are within IBWC jurisdiction.

Additionally, I have received verbal confirmation from Ms. Montelongo that EPWater does not require any specific permits/authorizations from TCEQ to proceed with remediation efforts on the river. Does EPWater require any authorization from EPA or NMED to proceed with these activities along the New Mexico border? I will of course follow-up with a more details from our remediation/restoration plan from our consultant Arcadis when it becomes available, but I wanted to reach to you to inquire about any authorization procedures you many require to proceed. Given our limited window of opportunity, your prompt response is greatly appreciated as we would like proceed as soon as possible. Thank you.

Kind regards,



Ruben Rodriguez | Environmental Compliance Manager
210 N. Lee St. | El Paso, TX 79901
(915) 594-5772 Telephone | (915) 238-5050 Mobile



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