

**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**

IN THE MATTER OF:

**WATER PROTECTION DIVISION OF THE
NEW MEXICO ENVIRONMENT DEPARTMENT
Complainant,**

v.

WQCC 20-08 (C0)

**CANNON AIR FORCE BASE,
Respondent.**

ORDER

This matter came before me on the motion of the Respondent, Cannon Air Force Base (“CAFB”) pursuant to 20.1.3.19.I NMAC for an order allowing Respondent to serve a number of interrogatories on Complainant. In support of this motion Respondent argues that the interrogatories that were attached to Respondent’s motion are necessary to gather information to allow Respondent to prepare a defense to the allegations and violations asserted in the Administrative Compliance Order (“ACO”) issued on January 9, 2020. Respondent also contends that it cannot obtain the information sought in the attached interrogatories through the request for admissions and for the production of documents Respondent served on Complainant on May 6, 2020. I will take notice from the record that the Complainant has until June 25, 2020 to submit the requested admissions and documents.

Discovery as of right for a compliance order hearing is limited to requests for admissions and requests for the production of documents. 20.1.3.19.H NMAC. Interrogatories may be permitted by the hearing officer, however, upon finding: "(1) such discovery will not unreasonably delay the proceeding; (2) the information to be obtained is not otherwise

reasonably available ... and (3) there is a substantial reason to believe that the information sought will be admissible at the hearing or will be likely to lead to the discovery of admissible evidence." 20.1.3.19.I(2) NMAC. A request for additional discovery must set forth: (1) the circumstances and necessity warranting the taking of the discovery; (2) the nature of the information expected to be discovered; and (3) the proposed time and place where the discovery will be taken. 20.1.3.19.I(1) NMAC. "Upon determining that a motion for additional discovery should be granted, the hearing officer shall issue an order for the taking of such discovery together with any conditions and terms of the additional discovery." 20.1.3.19.I(3) NMAC.

Having reviewed the Respondent's motion and argument in support thereof and the Complainant's response filed in opposition to the motion and being otherwise fully advised, I hereby deny Respondent's motion for the following reasons.

1. As pointed out by Complainant, the Respondent's motion failed to comply with the rules governing motions in administrative hearings. 20.1.3.15 (A) NMAC states that all motions shall state whether they are opposed or unopposed. Respondent's motion does not state whether it was opposed or unopposed or any reason why Respondent did not attempt to determine Complainant's position on the motion. This failure to comply the requirements of 20.1.3.15 (A) constitutes grounds, albeit rather insignificant ones, upon which to deny the motion under 20.1.3.10(B)(2)(b) NMAC.

2. Of more significance, I find that Respondent has completely failed to explain why the information to be obtained by the interrogatories is not otherwise reasonably available and the circumstances and necessity warranting the taking of the discovery. More specifically, the Respondent has failed to explain why the information sought to be discovered through the interrogatories is not otherwise reasonably available given that the Complainant has not nor has

the Complainant yet been required to submit the admissions and documents requested by Respondent on May 5, 2020. I find that a mere conclusory allegation that Complainant's responses will not be sufficient, sight unseen, is in itself insufficient to meet Respondent's burden under 20.1.3.19.I (2) NMAC. Nor do I find that the Hearing Officer is obligated to review the request for admissions and production of documents submitted to Complainant by the Respondent to determine if that requested discovery will provide the information sought to be discovered through the requested interrogatories.

3. Finally, and most determinative, I find that Respondent's basic arguments in support of its request for additional discovery through interrogatories is refuted by the ACO itself. The Respondent is charged with two violations of the New Mexico Water Quality Act, 1978, §74-6-1 to 17 and the Ground and Surface Water Protection regulations, 20.6.2 NMAC. First the Respondent is charged with continuously violating 20.6.2.3104 NMAC since April 1, 2019 by discharging effluent from Respondent's waste water treatment facilities... without a discharge permit issued by NMED. Second, Respondent is charged with violating 20.6.2.3106 NMAC since the amendment to 20.6.2. NMAC went into effect on December 21, 2018 by not submitting a complete permit renewal and modification application to address the "significant change in the quality of the discharge associated with the PFCs."

In regards to violation 1, the Respondent argues that the ACO does not identify how the Respondent was out of compliance with its 2014 permit, DP 837, on April 1, 2019 which caused the permit to not be automatically extended under 20.6.2.3106.G until the renewal application had been ruled on. Consequently, Respondent argues without the factual and legal basis for the Complainant's determination of "out of compliance" Respondent is unable to prepare a defense. While the Respondent refers to being "out of compliance", 20.6.2.3106.

G actually states that a discharge permit shall not expire during the time a renewal application is being considered if the discharger, i.e., Respondent in this case, is not in violation of the discharge permit...

I find no basis in a review of the ACO and the referenced correspondence to support Respondent's argument. To the contrary, I find that the ACO sets forth allegations that clearly form the basis for the Complainant's determination that Respondent was in violation of its discharge permit as of April 1, 2019 and the ACO thus states with reasonable specificity the nature of the violations charged as required by NMSA 1978, §74-6-10 (C) . These allegations are as follows. On August 14, 2018 the USAF officially notified NMED that PFCs had been detected in the ground water at CAFB. ACO, ¶ 12. On September 10, 2018 Respondent submitted a permit renewal application to renew DP 873, ACO, ¶ 13. On September 26, 2018 the Bureau determined that the Respondent's permit renewal application (" PRA") was administratively complete, ACO, ¶ 16. Effectively on December 21, 2018 the Water Quality Control Commission adopted amendments to 20.6.2 NMAC to include the addition of three PFCs to the toxic pollutants defined in 20.6.2.7.T (2). ACO, ¶ 8. Although the USAF had officially informed NMED of the existence of PFCs in the groundwater at CAFB, the issue of PFCs was not addressed in the PRA submitted by Respondent on September 10, 2018, apparently because PFCs had not been included in 20.6.2 NMAC as a toxic pollutant at that time. The presence of PFCs in the discharge at CAFB allegedly constitutes a significant change in discharge quality pursuant to 20.6.2.3106.C NMAC requiring a discharge permit modification pursuant to 20.6.2.7.D (4). ACO, ¶ 19. The Respondent was informed of the necessity of filing a discharge modification plan to comply with the requirements of the Water

Quality Act and given extensions of time to file such a plan. ACO, ¶¶20-26, but no such plan was filed.

I find that these allegations in the ACO are sufficient to essentially state a cause of action for being in violation of DP 873 as of April 1, 2019 and are, therefore sufficient to allow Respondent to prepare a defense to these allegations. This finding is supported by the letter April 19, 2019 Informing the NMED that the USAF did not intend to file a PFC plan mitigation as part of its PRA.

Violation 2 alleges that Respondent violated 20.6.2.3106.C NMAC... by not submitting a complete permit renewal and modification application to address ‘significant change in the quality of the discharge’ associated with PFCs. In response Respondent argues that the ACO does not allege a legal basis for requiring Respondent to submit a renewal and modification application for its 2014 permit when Respondent had already submitted an administratively complete application. Contrary to Respondent’s argument I find that the ACO does allege a basis for requiring Respondent to submit a modification plan that addressed the presence of PFCs in the groundwater at CAFB. The allegation is in ¶19 of the ACO referencing 20.6.2.7.D (4).

The Respondent also argues that there is not sufficient information in the ACO to allow it to prepare a defense to the allegation that there was a “significant change in the quality of the discharge” from CAFB. However, the ACO alleges that the change in the quality of the discharge, i.e., the presence of PFCs, was brought to NMED’s attention by representatives of CAFB apparently as a result of site inspection by a federal agency if not the USAF itself of the area where fire training had been conducted on the base. The ACO is alleging a change in the quality of the discharge not the quantity of the discharge. It would seem that the

presence of PFCs in the discharge would by definition constitute a change in the quality of that discharge.

In conclusion for the reasons set forth above I find that Respondent's motion for additional discovery is not well taken and is hereby denied.

June 8, 2020.

Max Shepherd
Hearing Officer

Certificate of Service

I hereby certify that on June 8, 2020 a copy of the **Order** was emailed to the persons listed below. A copy will be mailed first class upon request.

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