

STATE OF NEW MEXICO

NEW MEXICO ENVIRONMENT DEPARTMENT
WATER PROTECTION DIVISION



Water Protection Division of the)
New Mexico Environment Department,)
Complainant,)

v.)

Cannon Air Force Base,)
Respondent.)

No. ~~GWQB~~ ___-(CO)
WQCC 20-08 (CO)

UNITED STATES AIR FORCE'S REQUEST FOR HEARING AND
ANSWER TO ADMINISTRATIVE COMPLIANCE ORDER REQUIRING
COMPLIANCE AND ASSESSING A CIVIL PENALTY

Comes now the United States Air Force (USAF or Respondent) and Requests a Hearing and Answers the State of New Mexico Environment Department's (NMED) Administrative Compliance Order Requiring Compliance and Assessing a Civil Penalty (CO), GWQB ___-___, relating to Cannon Air Force Base (CAFB or Facility), and assessing a civil penalty for alleged violations of the New Mexico Water Quality Act (WQA), NMSA 1978 Sections 74-6-1 to 17 and the Ground and Surface Water Protection Regulations (Regulations), 20.6.2 NMAC.

ANSWER

I. FINDINGS

1. Paragraph 1 is a conclusion of law, which requires no response.
2. Paragraph 2 is a conclusion of law, which requires no response.
3. Paragraph 3 is a conclusion of law, which requires no response.
4. Paragraph 4 is a conclusion of law, which requires no response.

5. Paragraph 5 is a conclusion of law, which requires no response.
6. Paragraph 6 is a conclusion of law, which requires no response.
7. Paragraph 7 is a conclusion of law, which requires no response.
8. Paragraph 8 is a conclusion of law, which requires no response.
9. For paragraph 9, Respondent admits.
10. For paragraph 10, Respondent admits that DP-873 was originally issued on December 8, 1994 and renewed on March 31, 2014, but denies that DP-873 expired on March 31, 2019.
11. For paragraph 11, Respondent admits.
12. For paragraph 12, Respondent avers that the notification referenced speaks for itself and is the best evidence of its own contents.
13. For paragraph 13, Respondent admits.
14. The first sentence of paragraph 14 contains legal conclusions, to which no response is required. To the extent a response is required, Respondent denies the allegations in the first sentence. For the second sentence of paragraph 14, Respondent does not have sufficient knowledge or belief to admit or deny that PFCs detected in monitoring wells are “associated” with Respondent’s discharge permit or of the likelihood of PFCs in any discharge.
15. For paragraph 15, the paragraph contains legal conclusions, to which a response is not required. To the extent a response is required, Respondent denies the allegation.
16. For paragraph 16, Respondent admits.
17. For paragraph 17, the paragraph contains legal conclusions, to which a response is not required. To the extent a response is required, Respondent denies the allegation.
18. For paragraph 18, the paragraph contains legal conclusions, to which a response is not required. To the extent a response is required, Respondent denies the allegation.
19. For paragraph 19, the paragraph contains legal conclusions, to which not response is required. To the extent a response is required, Respondent denies the allegation.
20. For paragraph 20, Respondent neither admits nor denies the facts as alleged. The allegations contained in paragraph 20 contain communications made during compromise negotiations covered under Federal Rule of Evidence 408 and New Mexico Rule of Evidence 11-408.
21. For paragraph 21, Respondent avers that the notification referenced speaks for itself and is the best evidence of its own contents.

22. For paragraph 22, Respondent avers that the notification referenced speaks for itself and is the best evidence of its own contents.
23. For paragraph 23, Respondent avers that the document referenced speaks for itself and is the best evidence of its own contents.
24. For paragraph 24, Respondent avers that the document referenced speaks for itself and is the best evidence of its own contents.
25. For paragraph 25, Respondent avers that the document referenced speaks for itself and is the best evidence of its own contents.
26. For paragraph 26, Respondent avers that the document referenced speaks for itself and is the best evidence of its own contents.
27. For paragraph 27, Respondent denies. A permit renewal and modification application addressing PFCs was submitted on January 13, 2020.
28. For paragraph 28, Respondent denies.

II. VIOLATION

29. For paragraph 29, Respondent denies the allegation and requests a hearing to contest both the allegations in this Order and the proposed penalty.
30. For paragraph 30, Respondent denies the allegation and requests a hearing to contest both the allegations in this Order and the proposed penalty.

III. COMPLIANCE ORDER

31. For paragraph 31, out of comity, Respondent complied on January 13, 2020.
32. For paragraph 32, the allegations require no answer.
33. For paragraph 33, the allegations require no answer.

IV. CIVIL PENALTY

34. Paragraph 34 is a conclusion of law, which requires no response.
35. Paragraph 35 is a conclusion of law, which requires no response.

36. For paragraph 36, the allegations require no answer; however, Respondent requests a hearing to contest both the allegations in this Order and the proposed penalty.
37. For paragraph 37, the allegation requires no answer; however, Respondent requests a hearing to contest both the allegations in this Order and the proposed penalty.

V. NOTICE OF OPPORTUNITY TO ANSWER AND REQUEST A HEARING

38. Paragraph 38 is a conclusion of law, which requires no response.
39. Paragraph 39, the allegations require no answer.
40. For paragraph 40, the allegations require no answer.
41. For paragraph 41, the allegations require no answer.
42. For paragraph 42, the allegations require no answer.
43. For paragraph 43, the allegations require no answer.
44. Paragraph 44 is a conclusion of law, which requires no response.

VI. FINALITY OF ORDER

45. For paragraph 45, the allegations require no answer.
46. Paragraph 46 is a conclusion of law, which requires no response.
47. For paragraph 47, the allegations require no answer.

VII. SETTLEMENT

48. For paragraph 48, the allegations require no answer.
49. For paragraph 49, the allegations require no answer.
50. For paragraph 50, the allegations require no answer.
51. For paragraph 51, the allegations require no answer.

VIII. COMPLIANCE WITH OTHER LAWS AND WAIVER

52. For paragraph 52, the allegations require no answer.

IX. TERMINATION

53. For paragraph 53, the allegations require no answer.

X. AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

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

SECOND AFFIRMATIVE 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 Water Quality Act or a condition of a permit issued under the Water Quality Act.

THIRD AFFIRMATIVE DEFENSE

Respondent had an administratively complete application for renewal of discharge permit number 873 pending with Complainant since September 26, 2018.

FOURTH AFFIRMATIVE DEFENSE

All discharges from Respondent's wastewater treatment facilities since April 1, 2019 were in compliance with Respondent's valid discharge permit number 873.

FIFTH AFFIRMATIVE DEFENSE

Respondent's discharge permit number 873 was automatically continued pursuant to NMSA §74-6-5(D) and 20.6.2.3106.G NMAC because Respondent was not in violation of the permit on March 31, 2019, the date of expiration.

SIXTH AFFIRMATIVE DEFENSE

In the alternative, Complainant's purported action that it was not continuing the discharge permit violates due process. Furthermore, such purported action was arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or otherwise not in accordance with the law.

SEVENTH AFFIRMATIVE DEFENSE

Complainant fails to substantiate claims that Respondent violated 20.6.2.3103.A(2) NMAC. Allegations that Respondent violated 20.6.2.3103.A(2) NMAC violates due process and is arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or otherwise not in accordance with the law.

EIGHTH AFFIRMATIVE DEFENSE

Respondent was not legally required to submit a second permit renewal application after its original application was deemed administratively complete.

NINTH AFFIRMATIVE DEFENSE

There has not been a significant change in the quality of Respondent's discharge from the facilities covered by discharge permit number 873.

TENTH AFFIRMATIVE DEFENSE

After cooperating with Complainant in good faith, answering Complainant's questions, and apprising Complainant of its progress throughout the permit renewal process, Respondent updated its existing renewal application by submitting the PFC-related information Complainant sought. This information was submitted on January 13, 2020 and, on February 3, 2020, Complainant found Respondent's application to be administratively complete, for the second time.

ELEVENTH AFFIRMATIVE DEFENSE

With respect to the civil penalties proposed by Complainant for those findings and/or conclusions admitted to by Respondent, it asserts the following defenses:

- A. Complainant failed to consider Respondent's cooperation with Complainant and Respondent's good faith efforts in keeping Complainant apprised of its progress pursuant to NMSA § 74-6-10(D);
- B. Complainant's proposed penalty is grossly excessive, as well as arbitrary, capricious, or an abuse of discretion; not supported by substantial evidence in the record; or otherwise not in accordance with the law; and
- C. Complainant improperly imposed penalties for violations of law which did not occur.

TWELFTH AFFIRMATIVE DEFENSE

Respondent cannot fully anticipate at this time all defenses that may be applicable. Respondent reserves the right to assert additional affirmative or subject matter jurisdiction defenses if and to the extent such defenses are later discovered or found to be applicable.

XI. REQUEST FOR HEARING

Respondent respectfully requests a hearing on this matter pursuant to Section 74-6-10(G) of the WQA and WQCC's Adjudicatory Procedures, 20.1.3 NMAC.

WHEREFORE, Respondent respectfully requests that the determination be made that it did not commit the violations alleged in the Compliance Order unless specifically admitted to by Respondent in this Answer, that the civil penalties proposed by Complainant be denied where the underlying alleged violation has been denied by Respondent in this Answer, and that all other such relief as the Hearing Officer deems just and appropriate be granted.

On behalf of Respondent, I certify and affirm that the information contained herein is, to the best of my belief, true and correct.

Respectfully submitted this 7th day of February 2020.

By:



Major Mark E. Coon, Legal Counsel
United States Air Force
Regional Counsel's Office
1492 First Street, Ste 213
Dobbins Air Reserve Base, Georgia 30069
Phone: 678-655-9535

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing United States Air Force's Request for Hearing and Answer to Administrative Order Requiring Compliance and Assessing a Civil Penalty was served on the following parties, on February 7, 2020 to:

Via in-person service and electronic mail:

Cody Barnes, Administrator
Water Quality Control Commission, Room S-2104
Harold Runnels Building
1190 S. Saint Francis Dr.
Santa Fe, NM 87505

Via First Class Mail:

Cody Barnes, Commission Administrator
Water Quality Control Commission
P.O. Box 5469
Santa Fe, New Mexico 87502

Via First Class Mail and Electronic mail:

Christopher N. Atencio
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Avenue NE, Ste. 1000
Albuquerque, New Mexico 87102



Signature: _____
Major Mark E. Coon

ATTACHMENT

STATE OF NEW MEXICO

NEW MEXICO ENVIRONMENT DEPARTMENT
WATER PROTECTION DIVISION

_____)
Water Protection Division of the)
New Mexico Environment Department,)
Complainant,)
)
v.)
)
Cannon Air Force Base,)
)
Respondent.) No.: GWQB __-__ (CO)
_____)

**ADMINISTRATIVE COMPLIANCE ORDER
REQUIRING COMPLIANCE AND ASSESSING A CIVIL PENALTY**

Pursuant to the New Mexico Water Quality Act ("WQA"), NMSA 1978 Sections 74-6-1 to -17, and the Ground and Surface Water Protection regulations ("Regulations"), 20.6.2 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 Ground Water Quality Bureau ("Bureau" or "Complainant") to Cannon Air Force Base ("Respondent"). The purpose of this Order is to compel compliance and assess civil penalties for the Respondent's violations of the WQA and WQCC Regulations.

I. FINDINGS OF FACT

1. Pursuant to the NMSA 1978, Section 9-7A-4 (1991), NMED is an executive agency within the government of the State of New Mexico. Pursuant to NMSA 1978, Section 74-6-2(K)(1) (2003), NMED is a constituent agency of the New Mexico Water Quality Control Commission.

2. The Complainant is an organizational unit of NMED within its Water Protection Division. The Complainant was created pursuant to the authority granted to the Secretary of NMED under NMSA 1978, Section 9-7A-6(B)(3) (1991).

3. The WQA directs the New Mexico Water Quality Control Commission ("WQCC") to adopt water quality standards for ground waters of the state including narrative standards as appropriate as well as regulations to prevent water pollution in the state and govern the disposal of septage and sludge. NMSA 1978, § 74-6-4(D) and (E) (2019).

4. The purpose of the permitting regulations, 20.6.2.3101 to .3114 NMAC, is to protect all ground water of the state of New Mexico that has an existing concentration of 10,000 mg/l or less TDS, for present and potential future use as domestic and agricultural water supply. 20.6.2.3101.A NMAC.

5. Pursuant to NMSA 1978, Section 74-6-10(A)(1) (1993), whenever, on the basis of any information, a constituent agency determines that a person violated or is violating a requirement, regulation, or water quality standard adopted pursuant to the WQA or a condition of a permit issued pursuant to that act, the constituent agency may issue a compliance order requiring compliance immediately or within a specified time period or issue a compliance order assessing a civil penalty.

6. Pursuant to NMSA 1978, Section 9-7A-6(B), the Secretary of NMED has every power expressly enumerated in the laws, whether granted to the secretary, the department, or any division of the department.

7. Pursuant to NMSA 1978, Section 9-7A-6(B)(2), the Secretary of NMED may delegate authority to subordinates as necessary and appropriate. Pursuant to a delegation of authority

from the Secretary of NMED, the Director of the Water Protection Division of NMED has the authority to issue Administrative Compliance Orders on behalf of the Complainant.

8. The WQCC adopted amendments to 20.6.2 NMAC, including the addition of three perfluorinated chemicals ("PFCs") -- perfluorohexane sulfonic acid ("PFHxS"), perfluorooctane sulfonate ("PFOS"), and perfluorooctanoic acid ("PFOA") -- to the toxic pollutants defined at 20.6.2.7.T(2) NMAC. These amendments became effective on December 21, 2018.

9. Respondent is a "person" as defined in Section 74-6-2(I) of the WQA and 20.6.2.7(P) NMAC.

10. The Bureau issued a renewal of Discharge Permit Number 873 ("DP-873") to Respondent on March 31, 2014, which subsequently expired on March 31, 2019. Respondent received its original discharge permit on December 8, 1994.

11. The discharge sites are located at Cannon Air Force Base, approximately seven miles west of Clovis, New Mexico within Sections 18, 19, 20 and 24, Township 02N, Range 35E and in Sections 12, 13, 24, 25, and 30, Township 02N, Range 34E, Curry County. The physical address is 100 Air Commando Way, Cannon Air Force Base, New Mexico, 88103.

12. On August 14, 2018, the USAF officially notified the NMED that PFCs had been detected in the groundwater at CAFB.

13. Respondent submitted a permit renewal application on September 10, 2018 proposing to discharge up 1,500,000 gallons per day ("gpd") of domestic and industrial wastewater from facilities at Cannon Air Force Base to a mechanical wastewater treatment plant and to fourteen septic tank leachfield systems. Under the permit issued March 31, 2014, treated wastewater may be stored in a four-acre synthetically lined impoundment, a partially lined golf

course impoundment, and a playa, and reclaimed wastewater from the golf course impoundment may be used to irrigate approximately 117 acres of turf.

14. PFCs have been detected in monitoring wells at and downgradient of Cannon Air Force Base in concentrations that violate the standard of 20.6.3.3103.A(2) NMAC. See paragraph 12 of this Order. PFCs have also been detected in monitoring wells associated with Respondent's Discharge Permit, indicating the likely presence of PFCs in the discharge.

15. Because of the nature of the discharge and the contamination disclosed by the USAF (see paragraph 12), the discharge contains water contaminants such as nitrate, chloride, total Kjeldahl nitrogen, dissolved solids, PFCs, and dissolved metals that may exceed the standards of 20.6.2.3103 NMAC.

16. The Bureau determined the application was administratively complete, pursuant to 20.6.23108(A) NMAC on September 26, 2018, and sent a letter to Respondent on October 24, 2018 with instructions to complete the public notice.

17. In order for the Bureau to prepare a draft discharge permit, an applicant must provide enough technical information for the Bureau to prepare a draft discharge permit. 20.6.2.3108.H NMAC.

18. Because Respondent's permit renewal application does not address the inclusion of PFCs, the application cannot be deemed technically complete pursuant to 20.6.2.3108.H NMAC, and the Bureau cannot prepare a draft discharge permit.

19. The presence of PFCs in the discharge constitutes a significant change in discharge quality pursuant to 20.6.2.3106.C NMAC, requiring a Discharge Permit modification as defined in 20.6.2.7.D(4) NMAC, in addition to the renewal.

20. On February 13, 2019, NMED Cabinet Secretary James Kenney verbally informed John Henderson, Assistant Secretary of the Air Force for Installations, Environment and Energy, that the September 10, 2018, permit application omitted information about PFCs that the USAF knew to be in the groundwater at Cannon Air Force Base.

21. On March 29, 2019, the Bureau notified Respondent in writing that the Bureau had not received a Discharge Permit renewal and modification application as necessitated by the likely presence of PFCs in the discharge, and that the Bureau found Respondent out of compliance with its effective Discharge Permit at the time. Therefore, pursuant to 20.6.2.3106.G NMAC, the effective DP-873 would not be considered administratively continued when it expired at midnight on March 31, 2019, and Respondent would be discharging without a permit pursuant to 20.6.2.3104 NMAC after that time.

22. In the same letter, the Bureau gave Respondent until April 28, 2019, to submit a permit renewal and modification application that includes information about the presence of the contaminants and a proposed treatment or other remedy.

23. On April 23, 2019, the Bureau received a Request for Clarification from Respondent that assumed that the Bureau was requesting mitigation of PFC contamination through the discharge permit and asking the Bureau to clarify if it was denying the permit renewal application or requesting additional information.

24. On June 12, 2019, the Bureau sent Respondent a response clarifying the Bureau's March 29, 2019 directive and extending the deadline for Respondent to submit a permit renewal and modification application to July 15, 2019.

25. On July 16, 2019, the Bureau received a Request for Extension from Respondent for

30 days to allow Respondent to review the Bureau's requested modifications to the permit application, take samples, and analyze the samples.

26. On July 22, 2019, the Bureau sent Respondent an Extension Approval and extended the deadline for Respondent to submit a permit renewal and modification application to August 8, 2019.

27. To date, Respondent has not submitted a complete permit renewal and modification application that addresses changes to the quality of its discharge because of the likely presence of PFCs.

28. Since April 1, 2019, Respondent has been continually discharging effluent, which likely contains PFCs, without a valid discharge permit.

II. VIOLATION

29. **Violation 1:** Respondent has continuously violated 20.6.2.3104 NMAC since April 1, 2019, by discharging effluent from Respondent's wastewater treatment facilities so that it could move directly or indirectly into groundwater without a discharge permit issued by NMED.

30. **Violation 2:** Respondent has violated 20.6.2.3106.C NMAC since amendments 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" (20.6.2.7.D(2) NMAC) associated with PFCs.

III. COMPLIANCE ORDER

31. Based upon the foregoing findings and conclusions, Respondent is hereby ordered to complete the following corrective actions in order to comply with the WQA and the WQCC Regulations:

Respondent shall submit a complete Discharge Permit renewal and modification application in accordance with 20.6.2.3106 NMAC and including data and provisions adequately addressing PFCs in its discharge no later than January 31, 2020. The application must be accompanied by the filing fee identified in 20.6.2.3114 NMAC.

32. The application and other associated documents or information to be submitted to the Bureau under the terms of this Order shall be sent to:

Michelle Hunter
New Mexico Environment Department
Ground Water Quality Bureau
P.O. Box 5469 – 1190 St. Francis Dr.
Santa Fe, New Mexico 87502 – 5469

33. Failure to comply with the requirements set forth in Paragraph 32 above may subject Respondent to the assessment of an additional civil penalty. Section 74-6-10(F) of the WQA authorizes the assessment of an additional civil penalty of not more than \$25,000 for each day of continued noncompliance if Respondent fails to submit an application as required by this Order. If Respondent fails to timely comply with the application requirements, NMED may seek to assess an additional civil penalty of not more than \$25,000 for each day of noncompliance.

IV. CIVIL PENALTY

34. Section 74-6-10(C)(1) (1993) of the WQA authorizes assessment of a civil penalty of up to \$15,000 per day for noncompliance with the provisions of Section 74-6-5 of the WQA, including a regulation adopted or a permit issued pursuant to that section.

35. Section 74-6-10(C)(2) (1993) of the WQA authorizes a civil penalty of up to \$10,000 per day for each violation of a provision of the WQA other than those based in Section 74-6-5.

36. NMED hereby assesses a civil penalty in the amount of \$1,699,872.60 for the violations set forth in Paragraphs 29-30 above. The penalty is based upon the penalty calculation narratives attached to this Order. *See Attachment 1.*

37. Payment of the civil penalty is due no later than 30 calendar days after this Order becomes final. Payment shall be made by certified or cashier's check payable to the State of New Mexico and mailed (certified) or hand delivered to the Bureau at the following address:

Michelle Hunter, Bureau Chief
Ground Water Quality Bureau
New Mexico Environment Department
1190 St. Francis Dr., Suite N-2250
Santa Fe, New Mexico 87505

Written notification of the payment shall also be provided to the following address:

Christopher N. Atencio, Assistant General Counsel
Office of General Counsel
New Mexico Environment Department
121 Tijeras Avenue NE, Ste. 1000
Albuquerque, New Mexico 87102
Facsimile: (505) 383-2064

V. NOTICE OF OPPORTUNITY TO ANSWER AND REQUEST A HEARING

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

39. 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 WQCC, at the following address:

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

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

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

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

Christopher N. Atencio
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Avenue NE, Suite 1000
Albuquerque, New Mexico 87102-3400

43. Respondent's Answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Order with regard to 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.

44. WQCC's Adjudicatory Procedures, 20.1.3 NMAC, shall govern the hearing if

Respondent requests a hearing.

VI. FINALITY OF ORDER

45. This Order shall become final unless Respondent files a Request for Hearing and Answer to the Order with the WQCC within 30 days of receipt of this Order.

46. The failure to file an Answer 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 WQA concerning this Order.

47. Unless Respondent requests a hearing and files an Answer, the penalty proposed in this Order shall become due and payable without further proceedings within 30 days after receipt of this Order.

VII. SETTLEMENT

48. 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 WQA and applicable WQCC Regulations. To explore the possibility of settlement in this matter, Respondent may contact the attorney assigned to this case at the following address:

Christopher N. Atencio
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Avenue NE, Ste. 1000
Albuquerque, New Mexico 87102
Telephone: (505) 222-9554

49. Settlement discussions do not extend the 30-day deadline for filing of Respondent's Request for Hearing and Answer to the Order or alter the deadlines for compliance with this Order. Settlement discussions may be pursued as an alternative to and simultaneously

with the hearing proceedings.

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

51. 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

52. Compliance with the requirements of this Order does not relieve Respondent of the obligation to comply with all other applicable laws and regulations.

IX. TERMINATION

53. 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 Secretary approves a stipulated final order.



Rebecca Roose, Director
Water Protection Division
New Mexico Environment Department

Jan. 9, 2020

Date

CERTIFICATE OF SERVICE

I hereby certify that on January 09, 2020, a true and accurate copy of the Administrative Compliance Order Requiring Compliance and Assessing a Civil Penalty was served as indicated on Respondent at the following address:

VIA CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Col. Stewart A. Hammons, Commander
27th Special Operations Wing
Cannon Air Force Base
506 N Air Commando Way
Cannon AFB, New Mexico 88103-5214



Christopher N. Atencio
Assistant General Counsel
New Mexico Environment Department

**CANNON AIR FORCE BASE
NARRATIVE FOR PENALTY CALCULATION
January 9, 2020**

VIOLATION 1: Discharging without Obtaining a Permit pursuant to 20.6.2.3104 NMAC

1. GRAVITY-BASED PENALTY

(a) Potential for Harm: MAJOR

Risk of Ground Water Contamination: The native sediments in the discharge area are made up of fine sandy loams of the Amarillo series, which consists of very deep, well drained, moderately permeable soils, derived from eolian sediments from the Black Water Draw Formation of the Pleistocene; the depth to groundwater is approximately 300 feet. Based upon these factors, there is a significant potential for discharge that may cause ground water contamination. The most likely ground water contamination would be elevated nitrate, chloride, total dissolved solids (“TDS”), and perfluorinated chemicals (“PFCs”). The most recent groundwater monitoring data from the facility (2014) exceeded the WQCC human health standards for groundwater for nitrate. Further, based on data provided by USAF, there is documented PFC contamination on and immediately adjacent to the facility.

Potential Seriousness of Contamination: Domestic wastewater contains Total Kjeldahl Nitrogen (“TKN”), chlorides, sulfates, and TDS, contaminants that are a risk to human health and the environment. Wastewater discharge specific to this facility may contain PFCs

(b) Extent of Deviation from Requirement: MAJOR

Cannon Air Force Base has ignored repeated directives and deadline extensions by the Bureau to voluntarily come into compliance. As a result, Cannon Air Force Base is not meeting the necessary requirements for domestic wastewater discharges.

(c) Calculation of Multi-Day Penalty: Cannon Air Force Base’s wastewater treatment plant alone has discharged wastewater continuously since the most recent discharge permit expired on March 31, 2019.

On March 29, 2019, the Bureau notified Respondent that a Discharge Permit modification application had yet to be received and that the Bureau found Respondent out of compliance with its effective Discharge Permit at the time. Therefore, pursuant to 20.6.2.3106.G NMAC, the effective DP-873 would not be considered administratively continued when it expired at midnight on March 31, 2019, and Respondent would be discharging without a permit pursuant to 20.6.2.3104 NMAC after that time. The Bureau gave Respondent until April 28, 2019, to submit a permit modification application. On April 23, 2019, the Bureau received a Request for Clarification from Respondent. On June 12, 2019, the Bureau sent Respondent a response clarifying the Bureau’s initial request sent on March 29, 2019, and extending the deadline for Respondent to submit a permit

modification application to July 15, 2019. On July 16, 2019, the Bureau received a Request for Extension from Respondent for 30 days to allow Respondent to review the Bureau's requested modifications to the permit application, take samples, and analyze the samples. On July 22, 2019, the Bureau sent Respondent an Extension Approval and extended the deadline for Respondent to submit a permit modification application to August 8, 2019. To date, Respondent has not submitted a complete permit renewal and modification application.

Pursuant to the Ground Water Quality Bureau Civil Penalty Assessment Policy, violations characterized as Major/Major must include a multi-day adjustment. The Bureau provided extensions and clarification without resorting to formal enforcement action for nearly one year to aid Respondent in coming into compliance to no avail. Cannon Air Force Base knew about the PFC contamination at its facility well in advance of submitting its permit renewal application. The United States Air Force also participated in the revisions to 20.6.2 NMAC throughout 2017 and 2018 and was well aware of the addition of PFCs to the list of toxic pollutants found in 20.6.2.7 NMAC. While the Ground Water Quality Bureau generally limits assessed civil penalties with a multi-day component to 60 days, these circumstances warrant an assessment beyond 60 days. The Ground Water Quality Bureau granted continued extensions and provided clarity in an effort to secure voluntary compliance. However, CAFB has provided not met the deadline extensions or complied with the applicable regulations, continuing to discharge wastewater that exceeds the applicable standards for nitrate and likely contains PFCs. As such, the Department assesses a multi-day adjustment of 150 days multiplied by the applicable modifier of \$3,750. This represents the time elapsed since the expiration of the most recent extension (August 9, 2019) to the date of this penalty calculation.

(d) In assessing the degree of willfulness and/or negligence, the following factors were considered: Cannon Air Force Base had complete control over the events constituting the violation and chose to disregard several warnings. Cannon Air Force Base knew of the hazards associated with the conduct and knew the legal requirements which were violated contained in the WQA and WQCC Regulations.

2. ADJUSTMENT FACTORS

- (a) Good Faith: Not applicable.
- (b) Willfulness/Negligence: 10%
- (c) History of noncompliance: Not Applicable.
- (d) Ability to pay: Not applicable.
- (e) Environmental Project: Not applicable.

(f) Other Unique Factors: None.

3. ECONOMIC BENEFIT: (see Attachment 1, Penalty Calculation Matrix)

\$25,947.60

4. PENALTY AMOUNT:	Gravity Based Penalty	\$15,000.00
	Multi-Day (# days X penalty)	+\$3,750 x 153 days
	Total Prior to Adjustments	\$588,750.00
	Adjustment Factors	+ 10%
	Economic Benefit	+\$,25,947.60
	TOTAL AFTER ADJUSTMENTS	\$673,572.60

**CANNON AIR FORCE BASE
NARRATIVE FOR PENALTY CALCULATION
January 9, 2020**

VIOLATION 2: Failure to submit a Discharge Permit Modification pursuant to 20.6.2.3106.C NMAC

1. GRAVITY-BASED PENALTY

(a) Potential for Harm: MAJOR

Risk of Ground Water Contamination: The native sediments in the discharge area are made up of fine sandy loams of the Amarillo series, which consists of very deep, well drained, moderately permeable soils, derived from eolian sediments from the Black Water Draw Formation of the Pleistocene; the depth to groundwater is approximately 300 feet. Based upon these factors, there is a significant potential for discharge that may cause ground water contamination. The change in discharge quality is due to the presence of perfluorinated-chemicals (PFCs), which was disclosed in the Final Site Inspection Report, which received by NMED in August of 2018.

Potential Seriousness of Contamination: Aqueous Film Forming Foam (AFFF) contains PFCs and was routinely used at Cannon Air Force Base for training and emergency operations. PFCs has been linked to six major health effects for humans and causes serious environmental contamination and down gradient receptors have been impacted.

(b) Extent of Deviation from Requirement: MAJOR

Cannon Air Force Base has ignored repeated directives and deadline extensions by the Bureau to voluntarily come into compliance. As a result, Cannon Air Force Base is not meeting the necessary requirements for industrial wastewater discharges.

(c) Calculation of Multi-Day Penalty: Cannon Air Force Base's wastewater treatment plant has been discharging wastewater containing PFCs prior to NMED's notification to the permittee on March 29, 2019 that a permit modification was required.

On March 29, 2019, the Bureau notified Respondent that a Discharge Permit modification application had yet to be received and that the Bureau found Respondent out of compliance with its effective Discharge Permit at the time; therefore, pursuant to 20.6.2.3106.G NMAC, the effective DP-873 would not be considered administratively continued when it expired at midnight on March 31, 2019 and Respondent would be discharging without a permit pursuant to 20.6.2.3104 NMAC after that time. The Bureau gave Respondent until April 28, 2019 to submit a permit modification application. On April 23, 2019, the Bureau received a Request for Clarification from Respondent. On June 12, 2019, the Bureau sent Respondent a response clarifying the Bureau's initial request sent on March 29, 2019, specifically requesting that Respondent address suspected presence of

PFCs in its wastewater, and extending the deadline for Respondent to submit a permit modification application to July 15, 2019. On July 16, 2019, the Bureau received a Request for Extension from Respondent for 30 days to allow Respondent to review the Bureau's requested modifications to the permit application, take samples, and analyze the samples. On July 22, 2019, the Bureau sent Respondent an Extension Approval and extended the deadline for Respondent to submit a permit modification application to August 8, 2019. To date, Respondent has not submitted a complete permit renewal and modification application.

Pursuant to the Ground Water Quality Bureau Civil Penalty Assessment Policy, violations characterized as Major/Major must include a multi-day adjustment. The Bureau provided extensions and clarification without resorting to formal enforcement action for nearly one year to aid Respondent in coming into compliance to no avail. Cannon Air Force Base knew about the PFC contamination at its facility well in advance of submitting its permit renewal application. The United States Air Force also participated in the revisions to 20.6.2 NMAC throughout 2017 and 2018 and was well aware of the addition of PFCs to the list of toxic pollutants found in 20.6.2.7 NMAC. While the Ground Water Quality Bureau generally limits assessed civil penalties with a multi-day component to 60 days, these circumstances warrant an assessment beyond 60 days. The Ground Water Quality Bureau granted continued extensions and provided clarity in an effort to secure voluntary compliance. However, CAFB has provided not met the deadline extensions or complied with the applicable regulations, continuing to discharge wastewater that exceeds the applicable standards for nitrate and likely contains PFCs. As such, the Department assesses a multi-day adjustment of 150 days multiplied by the applicable modifier of \$6,000. This represents the time elapsed since the expiration of the most recent extension (August 9, 2019) to the date of this penalty calculation. Further, failure to address known contamination in its wastewater has the potential to put the public health and environment at further risk.

(d) In assessing the degree of willfulness and/or negligence, the following factors were considered: Cannon Air Force Base had complete control over the events constituting the violation and chose to disregard several warnings. Cannon Air Force Base knew of the hazards associated with the conduct and knew the legal requirements which were violated contained in the WQA and WQCC Regulations.

2. ADJUSTMENT FACTORS

- (a) Good Faith: Not applicable.
- (b) Willfulness/Negligence: 10%
- (c) History of noncompliance: Not applicable.
- (d) Ability to pay: Not applicable.
- (e) Environmental Project: Not applicable.

(f) Other Unique Factors: None.

3. ECONOMIC BENEFIT:

Not assessed.

4. PENALTY AMOUNT:	Gravity Based Penalty	\$15,000.00
	Multi-Day (# days X penalty)	+\$6,000 x 153 days
	Total Prior to Adjustments	\$933,000
	Adjustment Factors	+ 10%
	Economic Benefit	0
	TOTAL AFTER ADJUSTMENTS	\$1,026,300.00