

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.

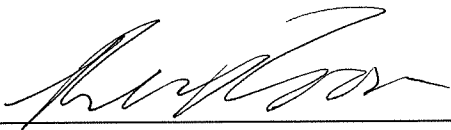
51. Any settlement reached by the parties shall be finalized by written settlement agreement and a stipulated final order. A settlement agreement and stipulated final order must resolve all issues raised in the Order, must be final and binding all parties to the Order, and may not be appealed.

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