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**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 24-35 (ACO)

CITY OF SANTA FE,

Respondent.

**RESPONDENT CITY OF SANTA FE'S
REQUEST FOR HEARING AND ANSWER TO THE ADMINISTRATIVE
COMPLIANCE ORDER**

Respondent the City of Santa Fe ("City"), by and through its counsel of record, Montgomery & Andrews, P.A., and Marcos D. Martínez, Senior Assistant City Attorney, and requests a hearing and answers the Administrative Compliance Order as follows.

REQUEST FOR HEARING

The City, pursuant to NMSA 1978, § 74-6-10(G) (1993) and 20.1.3.19.A NMAC, hereby requests a hearing on the Administrative Compliance Order. A copy of the Administrative Compliance Order is attached to this Request as City Exhibit A.

ANSWER

The City, pursuant to 20.1.4.19.A NMAC, submits the following answers to the factual assertions in the Administrative Compliance Order. Except where the City expressly admits a factual assertion in this Answer, the City expressly denies every allegation of the Administrative Compliance Order.

I. FINDINGS OF FACT

1. In response to Paragraph 1, the City states that the paragraph states a legal assertion and conclusion for which a response is not required. To the extent a response is required, the City denies the factual assertion.

2. In response to Paragraph 2, the City states that the paragraph paraphrases a statute subsection for which a response is not required. The Statute, NMSA 1978, Section 74-6-4(E) (2019) speaks for itself. To the extent a response is required, the City denies the assertion.

3. In response to Paragraph 3, the City states that the paragraph paraphrases a statute subsection for which a response is not required. The Statute, Section 74-6-4(F) speaks for itself. To the extent a response is required, the City denies the assertion.

4. In response to Paragraph 4, the City answers that the paragraph paraphrases a statute subsection for which a response is not required. The Statute, NMSA 1978, Section 9-7A-6(B)(3) speaks for itself. To the extent a response is required, the City denies the assertion.

5. In response to Paragraph 5, the City answers that the paragraph restates a statute subsection for which a response is not required. The Statute, NMSA 1978, Section 74-6-10(A)(1) speaks for itself. To the extent a response is required, the City denies the assertion.

6. The City admits the factual assertions in Paragraph 6.

7. The City admits the factual assertions in Paragraph 7.

8. The City admits the factual assertions in Paragraph 8.

9. In Response to Paragraph 9, the City admits that it maintains and operates the sewer collection system and wastewater treatment facility. The City denies that the treated wastewater is exclusively from the City and asserts that it is responsible for the discharge of

treated wastewater from the City and County of Santa Fe to the Santa Fe River in Santa Fe County.

10. In response to Paragraph 10, the City admits that domestic wastewater may contain “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. And that such wastewater may exceed surface water quality standards. The City is without sufficient information to admit or deny that the standards “are intended to protect designated uses such as aquatic life and primary contact recreation, and therefore, denies the assertion”

11. In response to Paragraph 11, the City denies that NMED’s Water Protection Division’s Ground Water Quality Bureau (“GWQB”) regulates groundwater discharges from the facility. The City asserts that the WQCC regulates discharges to groundwater from the facility and has delegated administration and enforcement of the groundwater discharge permit program to NMED. The City admits that EPA region 6 regulates surface water discharges from the facility to the lower Santa Fe River.

12. In response to Paragraph 12, the City admits that GWQB regulates groundwater discharges from the Facility through a groundwater discharge permit, DP-289.

13. The City admits the assertions in Paragraph 13.

14. The City admits the assertions in Paragraph 14.

15. The City admits the assertions in Paragraph 15.

16. In response to Paragraph 16, the City states that 20.6.4.136 NMAC and 20.6.4.7 NMAC speak for themselves and no answer is necessary. In addition, the City states that the

paragraph states a legal conclusion for which a response is not required. To the extent a response is required, the City denies the assertion.

17. In response to Paragraph 17, the City states that 20.6.4.113 NMAC speaks for itself and no answer is necessary. In addition, the City states that the paragraph states a legal conclusion for which a response is not required. To the extent a response is required, the City denies the assertion.

18. In response to Paragraph 18, the City states that the paragraph states a legal conclusion for which a response is not required. To the extent a response is deemed required, the City denies the assertions.

19. In response to Paragraph 19, the City states that 20.9.4.900(D) NMAC speaks for itself and no answer is necessary. To the extent a response is required, the City denies the assertion.

20. The City admits the factual assertions in the first sentence of Paragraph 20, but asserts that the concentration relates to the City's effluent discharge to the Santa Fe River. In response to the second sentence, the City denies that the applicable water quality criterion is set forth in 20.6.4.900(D) NMAC, and asserts that the criteria applicable to the discharge is specified in the City's NPDES permit.

21. In response to Paragraph 21, the City states that 20.6.4.900(D) NMAC speaks for itself and that a response is not required. Also, the assertion that 20.6.4.900(D) NMAC contains criteria applicable to the City's discharge is a legal conclusion to which an answer is not necessary. To the extent a response is required, the City denies the assertion.

22. The City admits the factual assertions in the first sentence of Paragraph 22, but asserts that the concentration relates to the City's effluent discharge to the Santa Fe River.

23. The City admits the factual assertions in the first sentence of Paragraph 23, but asserts that the concentration relates to the City's effluent discharge to the Santa Fe River.

24. In response to Paragraph 24, the City states that the 2017 TMDL speaks for itself, and no answer is necessary'. The City admits that the TMDL was approved by EPA on May 3, 2017, but denies that the TMDL states effluent criteria applicable to the City's discharge to the Santa Fe River. The City asserts that effluent criteria applicable to the discharge must first be included in the City's NPDES permit to establish such effluent criteria.

25. The City admits the factual assertions in the first sentence of Paragraph 25, but asserts that the concentration relates to the City's effluent discharge to the Santa Fe River. The City denies that the wasteload allocation in the TMDL is directly applicable to the City's discharge to the Santa Fe River, and asserts that for the wasteload allocation to be applicable, it must be included in the City's NPDES permit.

26. In response to Paragraph 26, the City states that 20.6.4.13(E) NMAC speaks for itself and a response is not required. To the extent a response is required, the City denies the assertion.

27. In response to Paragraph 27, the City is without sufficient information to admit or deny the factual assertions, and therefore, denies the assertions.

28. In response to Paragraph 28, the City states that 20.6.4.8 NMAC speaks for itself and no answer is necessary. To the extent that the factual assertions in Paragraph 28 are inconsistent with 20.6.4.8 NMAC, the assertions are denied.

29. In response to Paragraph 29, the City states that the Antidegradation Policy speaks for itself and no answer is necessary. To the extent that the factual assertions in Paragraph 29 are inconsistent with the Antidegradation Policy, the assertions are denied.

30. In response to Paragraph 30, the City states that the WQCC's antidegradation policy and implementation procedures speak for themselves, and no answer is necessary. In addition, the factual assertions in Paragraph 30 are legal conclusions to which no answer is necessary. If an answer is required, the City denies the assertions.

31. In response to Paragraph 31, the City is without sufficient information to admit or deny the assertions, and therefore, denies the assertions. The City notes that the SWQB has no authority to "establish" limits applicable to the Plant. Only the WQCC, after exercising the rulemaking authority under the Water Quality Act, has authority to "establish" discharge limits.

32. The City admits the assertions in Paragraph 32.

33. The City admits the assertion in the first sentence of Paragraph 33 that its "total nitrogen concentration discharged to the Santa Fe River averaged 12.1 mg/L, but denies that there is an antidegradation limit applicable to the Plant. The City admits the assertions in the second sentence of Paragraph 33. The City denies assertions in the third sentence of the paragraph.

34. The City admits that the "reported 30-day average total nitrogen load was 1,251 lbs/day in December 2023, but denies that there is an antidegradation limit applicable to the Plant.

35. The City admits the assertion in the first sentence of Paragraph 35 that its average total nitrogen load discharged to the Santa Fe River was 475 lbs/day, but denies that there is an antidegradation limit applicable to the Plant. The City admits the assertions in the second sentence of Paragraph 35. The City states that the assertions in the third sentence of the paragraph are legal conclusions to which no answer is necessary. To the extent that an answer is necessary, the City denies the assertions.

36. In response to Paragraph 36, the City states that the assertions are legal conclusions to which no answer is required. To the extent that an answer is necessary, the City denies the assertions.

37. In response to Paragraph 37, the City states that the assertions are legal conclusions to which no response is required. To the extent an answer is required, the City denies the assertions.

38. In response to Paragraph 38, the City states that the assertions are legal conclusions to which no response is required. To the extent an answer is required, the City denies the assertions.

39. In response to Paragraph 39, the City admits that the SWQB sent the City a notice of non-compliance on February 16, 2024. City Exhibit B to this Request. However, the City denies that the SWQB notified the City of any specific violations “of the New Mexico Water Quality Act and Water Quality Control Commission Regulations adopted pursuant to the Act, 20.6.2 and 20.6.4 NMAC.”

40. The City admits the assertions in Paragraph 40.

41. The City admits the assertions in Paragraph 41.

42. In response to Paragraph 42, the City admits that the SWQB denied the City’s request for an extension. The City denies that the SWQB offered the City “an opportunity to confer as soon as possible to discuss the noncompliance.” Rather, NMED stated that “NMED will contact the City to set up a meeting as soon as possible to discuss the noncompliance and actions needed now to comply with the water quality standards.” *See* City Exhibit C to this Request.

43. In response to Paragraph 43, the City admits that it did not confer with the SWQB “before the 30-day deadline, but denies that it started meeting weekly on March 22, 2024. The City states that the weekly meetings started on March 15, 2024.

44. The City admits the assertions in Paragraph 44. *See* City Exhibit D to this Request.

II. VIOLATIONS

45. Paragraph 45 states a legal conclusion that does not require an answer. To the extent that an answer is required, the City denies the assertions.

46. Paragraph 46 states a legal conclusion that does not require an answer. To the extent that an answer is required, the City denies the assertions.

47. Paragraph 47 states a legal conclusion that does not require an answer. To the extent that an answer is required, the City denies the assertions.

48. Paragraph 48 states a legal conclusion that does not require an answer. To the extent that an answer is required, the City denies the assertions.

49. Paragraph 49 states a legal conclusion that does not require an answer. To the extent that an answer is required, the City denies the assertions.

III. COMPLIANCE ORDER

50. In response to Paragraph 50, the City states that no answer is necessary.

51. In response to Paragraph 51, the City states that no answer is necessary

52. In response to Paragraph 52, the City states that no answer is necessary. The City notes that § 74-6-10(A) only authorizes NMED to issue a compliance order requiring “compliance immediately or within a specified time period.” The actions required by Paragraph 52 are beyond the authority granted by § 74-6-10(A).

53. In response to Paragraph 53, the City states that no answer is necessary. The City notes that § 74-6-10(A) only authorizes NMED to issue a compliance order requiring “compliance immediately or within a specified time period.” The actions required by Paragraph 53 are beyond the authority granted by § 74-6-10(A).

54. In response to Paragraph 54, the City states that no answer is necessary. The City notes that § 74-6-10(A) only authorizes NMED to issue a compliance order requiring “compliance immediately or within a specified time period.” The actions required by Paragraph 54 are beyond the authority granted by § 74-6-10(A).

55. In response to Paragraph 55, the City states that no answer is necessary. The City notes that § 74-6-10(A) only authorizes NMED to issue a compliance order requiring “compliance immediately or within a specified time period.” The actions required by Paragraph 55 are beyond the authority granted by § 74-6-10(A).

56. In response to Paragraph 56, the City states that no answer is necessary. The City notes that § 74-6-10(A) only authorizes NMED to issue a compliance order requiring “compliance immediately or within a specified time period.” The actions required by Paragraph 56 are beyond the authority granted by § 74-6-10(A).

57. In response to Paragraph 57, the City states that no answer is necessary. The City notes that § 74-6-10(A) only authorizes NMED to issue a compliance order requiring “compliance immediately or within a specified time period.” The actions required by Paragraph 57 are beyond the authority granted by § 74-6-10(A).

58. In response to Paragraph 58, the City states that no answer is necessary. The City notes that § 74-6-10(A) only authorizes NMED to issue a compliance order requiring

“compliance immediately or within a specified time period.” The actions required by Paragraph 58 are beyond the authority granted by § 74-6-10(A).

59. In response to Paragraph 59, the City states that no answer is necessary.

60. In response to Paragraph 60, the City states that no answer is necessary. The City notes that § 74-6-10(A) only authorizes NMED to issue a compliance order requiring “compliance immediately or within a specified time period.” The actions required by Paragraph 60 are beyond the authority granted by § 74-6-10(A).

IV. CIVIL PENALTY

61. In response to Paragraph 61, the City states that § 74-6-10(C)(2) and § 74-6-10.1 speak for themselves, and no answer is necessary. The City notes that § 74-6-10.1 applies only to judicial enforcement and is not applicable to this proceeding.

62. In response to Paragraph 62, the City admits that NMED has assessed a civil penalty, but contests all legal conclusions and denies that the assessed penalty is reasonable, appropriate, or consistent with the Water Quality Act.

63. In response to Paragraph 63, states that no answer is necessary. The City notes that, pursuant to § 74-6-10(G), the Administrative Compliance Order is not effective and the proposed penalties are not due and owing.

64. In response to Paragraph 64, the City states § 74-6-10(F) speaks for itself and no answer is necessary.

V. NOTICE OF OPPORTUNITY TO ANSWER AND REQUEST A HEARING

65. In response to Paragraph 65, the City states that no answer is necessary. The City further states that it is requesting a hearing on the Administrative Compliance Order pursuant to § 74-6-10(G).

66. In response to Paragraph 66, the City states that no answer is necessary.

67. In response to Paragraph 67, the City states that no answer is necessary. The City notes that it is submitting this request within 30 days after its receipt of the Administrative Compliance Order.

68. In response to Paragraph 68, the City states that no answer is necessary. The City notes that it is attaching a copy of the Administrative Compliance Order to this Request.

69. In response to Paragraph 69, the City states that no answer is necessary.

70. In response to Paragraph 70, the City states that no answer is necessary.

71. In response to Paragraph 71, the City states that the WQCC's Adjudicatory Procedures speak for themselves, and no answer is necessary.

VI. FINALITY OF ORDER

72. In response to Paragraph 72, the City states that no answer is necessary.

73. In response to Paragraph 73, the City states that § 74-6-10(G) speaks for itself, and no answer is necessary.

74. In response to Paragraph 74, the City states that no answer is necessary. The City notes that it is requesting a hearing and filing an answer to the Administrative Compliance Order and therefore, the assessed penalty is not due and owing.

VII. SETTLEMENT

75. In response to Paragraph 75, the City states that no answer is necessary.

76. In response to Paragraph 76, the City states that no answer is necessary.

77. In response to Paragraph 77, the City states that no answer is necessary.

78. In response to Paragraph 78, the City states that no answer is necessary.

VIII. COMPLIANCE WITH OTHER LAWS AND WAIVER

79. In response to Paragraph 79, the City states that the assertions in the paragraph are legal conclusions to which no answer is required. To the extent that an answer is required, the City denies the assertions.

IX. TERMINATION

80. In response to Paragraph 80, the City states that no answer is necessary.

DEFENSES

1. The Administrative Compliance Order in whole or in part, fails to state a claim upon which relief can be granted.
2. NMED lacks jurisdiction to enforce the requirements and impose the penalties it seeks because the discharge occurred into a navigable waterway governed by the federal Clean Water Act, 33 U.S.C. Section 1251, *et seq.*
3. NMED lacks jurisdiction to enforce the requirements and impose the penalties it seeks because the Water Quality Act and the relevant regulations are preempted by federal law as applied in this case.
4. NMED assessed civil penalties are excessive. For example, under NMSA 1978, sec. 74-6-10, “a single operational event that leads to simultaneous violations of more than one standard shall be treated as a single violation.” NMED does not distinguish between a single operational event that led to simultaneous violations of more than one standard and discrete violations.
5. The relevant regulations have no force of law to the extent that they require the City to engage in higher levels of service or activities beyond that required by existing law unless and until the state provides sufficient new funding or means of new funding to the City to pay the cost of performing the mandated activity or service as required by the New Mexico Constitution:

A state rule or regulation mandating any county or city to engage in any new activity, to provide any new service or to increase any current level of activity or to provide any service beyond that required by existing law, shall not have the force of law, unless, or until, the state provides sufficient new funding or a means of new funding to the county or city to pay the cost of performing the mandated activity or service for the period of time during which the activity or service is required to be performed.

N.M. Const. art. X, § 8.

6. The SWQB's is attempting to prosecute the City for violations for which the EPA has already taken administrative action resulting in duplicate enforcement and a lack of coordination between the EPA and NMED. *See* City Exhibit A to this Request.

7. The SWQB violated the City's due process rights by failing to provide the City reasonable notice with any specificity such that a reasonable person would know what violation the SWQB was alleging that the City had made when it issued its notice of noncompliance on February 16, 2024. The failure to provide pre-deprivation notice to the City violated the City's due process rights.

8. The SWQB's February 16, 2024 notice of non-compliance was unconstitutionally vague. Likewise, the Administrative Compliance Order is unconstitutionally vague and unsubstantiated.

9. NMED fails to allege facts that support a finding of a violation of a requirement, applicable regulation, or water quality standard adopted pursuant to the Water Quality Act.

Request For Relief

WHEREFORE, the City of Santa Fe hereby requests that the Commission grant a hearing to address the issues raised in the Administrative Compliance Order, dismiss the Administrative Compliance Order against the City, grant such further relief as may be just and reasonable.

Respectfully submitted,

CITY OF SANTA FE

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2024, a true copy of the foregoing Respondent City of Santa Fe's Request for Hearing and Answer to Administrative Compliance Order was served via electronic mail to the following:

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**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 24-__ (ACO)

CITY OF SANTA FE,

Respondent.

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

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 Surface Water Quality Bureau (“SWQB”) of the Water Protection Division of the New Mexico Environment Department (“NMED”) issues this Administrative Compliance Order (“Order”) to the City of Santa Fe (“Respondent”) for violations of the Act and Regulations. The purpose of this Order is to attain compliance with, and assess civil penalties 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 (“WQCC” or “Commission”).

2. Pursuant to Section 74-6-4(E) of the Act, the Commission shall adopt, promulgate

and publish regulations to prevent or abate water pollution in the state.

3. Pursuant to Section 74-6-4(F) of the Act, the Commission shall assign responsibility for administering its regulations to constituent agencies and shall give priority to the primary interests of the constituent agencies.

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

5. Pursuant to NMSA 1978, Section 74-6-10(A)(1), when NMED determines that a person violated or is violating the Act, a regulation, or permit created pursuant to the Act, NMED may issue a compliance order requiring compliance immediately or within a specified time period or issue a compliance order assessing a civil penalty, or both.

6. Respondent, City of Santa Fe, is a chartered municipal corporation in the State of New Mexico, with its principal place of business at 200 Lincoln Avenue, Santa Fe, New Mexico 87501.

7. The Respondent is the owner and operator of the Paseo Real Wastewater Treatment Plant (“Facility”), located at 73 Paseo Real, Santa Fe, Santa Fe County, New Mexico, 87507.

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

9. Respondent maintains and operates the sewer collection system and wastewater treatment facility and is responsible for the discharge of treated domestic wastewater from the City of Santa Fe to the Santa Fe River in Santa Fe County.

10. Domestic wastewater 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 and primary contact recreation.

11. The NMED Ground Water Quality Bureau (“GWQB”) and the U.S. Environmental Protection Agency (“EPA”) Region 6 dually regulate the Facility.

12. The GWQB regulates the Facility through a groundwater discharge permit (DP-289).

13. EPA Region 6 regulates the facility through a National Pollutant Discharge Elimination System (“NPDES”) permit (NM0022292), which covers the discharge from the Facility to the Santa Fe River.

14. The Respondent is authorized to discharge pollutants from the Facility’s outfall to the Santa Fe River only in compliance with the specific terms and conditions of the NPDES permit.

15. The Facility’s outfall discharges to the Santa Fe River at the following coordinates: latitude 35° 37’ 52.41” N, longitude 106° 05’ 18.88” W.

16. The Santa Fe River upstream of the outfall is a surface water of the State of New Mexico protected under 20.6.4.136 NMAC and is an ephemeral surface water¹ with designated uses of limited aquatic life, wildlife habitat, primary contact recreation, livestock watering, and irrigation. “Ephemeral” means the water body contains water briefly only in direct response to precipitation; its bed is always above the water table of the adjacent region. 20.6.4.7 NMAC.

17. The Santa Fe River downstream of the outfall is a perennial surface water of the State of New Mexico and protected under 20.6.4.113 NMAC with designated uses of irrigation, coolwater aquatic life, livestock watering, wildlife habitat, and primary contact recreation.

¹ <https://www.env.nm.gov/surface-water-quality/santa-fe-river-uaa/>

“Perennial” means the waterbody typically contains water throughout the year and rarely experiences dry periods. This reach of the Santa Fe River is effluent dominated, meaning that greater than fifty percent of the stream flow consists of the effluent discharged from the facility.

18. The water quality in the Santa Fe River downstream of the outfall (Cienega Creek to Santa Fe WWTP) is impaired due to excessive E. coli bacteria.

19. The monthly geometric mean criterion for E. coli bacteria is 126 colony forming units per 100 milliliters (“cfu/100mL”). 20.6.4.900(D) NMAC.

20. From April 2023 to March 2024, the Respondent’s monthly geometric mean E. coli concentration averaged 506.88 cfu/100 mL, ranging from 75.3 cfu/100 mL (September 2023) to 1,815.7 cfu/100 mL (November 2023). The Respondent’s reported monthly geometric mean E. coli concentration was greater than the water quality criterion for ten of twelve months during this time.

21. The single sample criterion for E. coli bacteria is 410 cfu/100 mL. 20.6.4.900(D) NMAC.

22. From February 2023 to March 2024, the Respondent’s reported single sample maximum E. coli concentration averaged 11,725 cfu/100 mL, ranging from 1,220 cfu/100 mL (February 2023) to 87,000 cfu/100 mL (November 2023). The Respondent’s reported single sample maximum E. coli concentration was greater than the water quality criterion for fourteen consecutive months during this time.

23. The Respondent’s maximum reported E. coli concentration was 87,000 cfu/100 mL in November 2023, over two hundred times higher than New Mexico’s water quality standard.

24. In the 2017 Total Maximum Daily Load (“TMDL”) for E. coli, NMED assigned a wasteload allocation of 31 billion cfu per day (“bcfu/day”) to the facility. The TMDL was approved

by EPA on May 3, 2017.

25. From February 2023 to March 2024, the Respondent's reported load for *E. coli* averaged 214.65 bcfu/day, ranging from 29.27 bcfu/100 mL (September 2023) to 1,367 bcfu/100 mL (November 2023) – almost forty-five times higher than the wasteload allocation in the TMDL. The Respondent's reported load for *E. coli* was greater than the wasteload allocation for thirteen of the fourteen months during this time.

26. The state's plant nutrient criterion states, "Plant nutrients from other than natural causes shall not be present in concentrations that will produce undesirable aquatic life or result in a dominance of nuisance species in surface waters of the state." 20.6.4.13(E) NMAC.

27. The water quality in the Santa Fe River downstream of the outfall (Cienega Creek to Santa Fe WWTP) is impaired due to excessive nutrients.

28. The state antidegradation rule at 20.6.4.8 NMAC delineates three tiers of protection for New Mexico surface waters.

29. New Mexico's tier 1 antidegradation protections, outlined in the *Antidegradation Policy Implementation Procedures for Regulated Activities*, which is Appendix A of the *State of New Mexico Continuing Planning Process*, define the minimum level of protection for all waters and prohibit further degradation of waters that do not meet water quality standards.

30. Pursuant to New Mexico's antidegradation policy and implementation procedure, the SWQB established antidegradation limits for the Facility to prohibit additional degradation of water quality where pollutants of concern, including plant nutrients, do not meet applicable water quality standards. 20.6.4.8 NMAC; 20.6.4.13 NMAC.

31. The SWQB established concentration-based and load-based antidegradation limits for total nitrogen. The SWQB established a 30-day average antidegradation concentration limit of

6.9 milligrams per liter (“mg/L”) and a 30-day average antidegradation loading limit of 265 pounds per day (“lbs/day”).

32. The Respondent’s reported 30-day average total nitrogen concentration was 30.1 mg/L in December 2023, over four times higher than New Mexico’s antidegradation limit.

33. Between December 2022 and March 2024, the Respondent’s total nitrogen concentration discharged to the Santa Fe River averaged 12.1 mg/L – almost two times higher than New Mexico’s antidegradation limit. The Respondent’s total nitrogen concentrations ranged from 3.2 mg/L (July 2023) to 30.1 mg/L (December 2023). The Respondent’s reported total nitrogen concentration was greater than the antidegradation limit for eleven of the sixteen months during this time.

34. The Respondent’s reported 30-day average total nitrogen load was 1,251 lbs/day in December 2023, almost five times higher than New Mexico’s antidegradation limit.

35. Between December 2022 and March 2024, the Respondent’s average total nitrogen load discharged to the Santa Fe River was 475 lbs/day – almost two times higher than the antidegradation limit. The Respondent’s total nitrogen loads ranged from 116 lbs/day (July 2023) to 1,251 lbs/day (December 2023). The Respondent’s reported total nitrogen load was greater than the antidegradation limit for eleven of the sixteen months during this time.

36. The Respondent is discharging water contaminants into the Santa Fe River 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 the property.

20.6.4.7(W)(3) NMAC; 20.6.4.13 NMAC.

37. The Respondent’s discharge is impacting a surface water of the State. 20.6.4.8 NMAC; 20.6.4.13 NMAC; 20.6.4.113 NMAC; 20.6.4.900 NMAC.

38. The Respondent is disposing of refuse into the Santa Fe River, a natural watercourse and surface water of the State. 20.6.2.2201 NMAC.

39. The SWQB issued a Notice of Non-Compliance to the Respondent on February 16, 2024, notifying the Respondent of violations of the New Mexico Water Quality Act and Water Quality Control Commission Regulations adopted pursuant to the Act, 20.6.2 and 20.6.4 NMAC.

40. The Notice of Non-Compliance required the Respondent to submit to the SWQB evidence to demonstrate that the City is complying with the New Mexico Water Quality Act and corresponding regulations, water quality standards, and the state's water quality management plan, including total maximum daily loads and the antidegradation policy, within 30 days of receipt of the notice.

41. On February 23, 2024, Respondent requested a 30-day extension of time to submit the information and evidence requested by the SWQB.

42. On March 1, 2024, the SWQB issued correspondence to the Respondent denying the City's request for an extension and offering an opportunity to confer as soon as possible to discuss the noncompliance and necessary actions to comply with the water quality standards. In the correspondence the SWQB stated, "[t]he single sample E. coli criterion should never be exceeded, and the general plant nutrients criterion applies to all waters at all times."

43. The City and SWQB did not confer before the 30-day deadline; however, the Water Protection Division (SWQB, GWQB, and Construction Programs Bureau) started meeting weekly with the City on March 22, 2024, to discuss corrective actions.

44. On March 15, 2024, Respondent submitted a response to NMED that stated, "...the City is unable to determine or even guess at what violation NMED is asserting the City has made." In their response, the City requested a more definitive statement from the Department, "...which

will inform the City of what violations the Department believes the City may have made and when.”

II. VIOLATIONS

45. **Violation 1:** The Respondent violated and continues to violate 20.6.4.113 NMAC by discharging E. coli bacteria and total nitrogen in such quantities that exceed the criteria at 20.6.4.900 NMAC and 20.6.4.13 NMAC, respectively, such that the cool water aquatic life and primary contact designated uses in the Santa Fe River are not supported.

46. **Violation 2:** The Respondent violated and continues to violate 20.6.4.900 NMAC by discharging E. coli bacteria in such quantities that exceed the criteria for primary contact recreation at 20.6.4.900(D) NMAC, which 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.

47. **Violation 3:** The Respondent violated and is violating the May 3, 2017, EPA-approved TMDL by failing to comply with the wasteload allocation for E. coli bacteria established by the SWQB. The TMDL and associated wasteload allocation can be found in Appendix B of the Water Quality Management Plan and Continuing Planning Process.

48. **Violation 4:** The Respondent violated and continues to violate 20.6.4.13(E) NMAC by discharging total nitrogen in such quantities that have produced undesirable aquatic life or resulted in the dominance of nuisance species and 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.

49. **Violation 5:** The Respondent violated and continues to violate 20.6.4.8 NMAC by failing to comply with the antidegradation limits for total nitrogen established by the SWQB, in

collaboration with the City, for the City's 2016 NPDES permit renewal. The SWQB's antidegradation limits are continued in the City's current NPDES permit, which was re-issued with an effective date of September 1, 2021.

III. COMPLIANCE ORDER

50. Based upon the foregoing findings and conclusions, Respondent is hereby ordered to complete the following Corrective Actions.

51. Within thirty (30) calendar days after the date of service of this Order, Respondent shall submit to NMED a list that details any specific actions taken to correct the violations cited in this Order.

52. Within thirty (30) calendar days of the effective date of this Order, Respondent shall submit to NMED a comprehensive written plan for the elimination of the cited violations.

a. The plan shall include a list of all noncompliance related deficiencies and a schedule of actions to correct each deficiency.

b. The plan shall describe in detail the specific corrective actions to be taken and why such actions are sufficient to correct the water quality standard violations cited herein.

c. The plan may include interim corrective measures to address water quality standard violations cited herein as quickly as possible, followed by subsequent permanent measures.

d. The plan shall include a detailed schedule of actions to eliminate the water quality standard violations cited herein. E. coli violations must be eliminated within the shortest time possible to protect public health and shall be corrected no later than 30 days after the effective date of this order. Total nitrogen violations must be eliminated within the shortest time practicable, but no longer than 12 months after the effective date of this Order.

e. The plan shall include preventative measures the Respondent will take to prevent these or similar violations from recurring.

f. The plan shall include a multi-year training plan and schedule that familiarizes staff with plans, policies, agreements, and procedures and provides managers and responders with a mechanism to evaluate operations and plans for continual improvement.

53. Within ninety (90) calendar days after the date of service of this Order, Respondent shall develop and submit to NMED a Nutrient Pollutant Minimization Plan (“PMP”). A PMP examines all possible pollutant minimization activities including, but not limited to, identifying and implementing process control strategies to optimize existing treatment, ongoing training of operations staff in advanced operational strategies, minor changes to infrastructure to complement and further advance operational strategies, identifying nutrient sources in the sewershed/watershed and implementing strategies to reduce inputs, including inputs from pretreatment sources, and implementing reuse of effluent, if feasible.

54. Within thirty (30) calendar days after the date of service of this Order, Respondent shall develop and submit to NMED a public notification plan for the Respondent to inform downstream users, the general public, and stakeholders when the City of Santa Fe Paseo Real wastewater treatment plant discharge exceeds water quality standards for *E. coli* and total nitrogen and poses a threat to human health and the environment. The notification action levels for *E. coli* are 126 cfu/100 mL (monthly geometric mean) and 410 cfu/100 mL (single sample). The notification action level that may contaminate private wells and poses a threat to human health is 10 mg/L of nitrate as N.

55. On a semiannual basis, beginning on July 1, 2024, Respondent shall submit a status report to NMED that includes:

- a. A detailed description of the projects and tasks as implemented according to the plan,
- b. A detailed description of any new standard operating procedures and process improvements that the Respondent has implemented,
- c. A description of any operating problems encountered, and the solutions thereto, and
- d. Photographs of project activities.

The reporting periods for status updates are January 1 to June 30 and July 1 to December 31. Reports are due within 45 days of the end of the reporting period.

56. Within thirty (30) calendar days after the date of service of this Order, Respondent shall submit a sampling and analysis plan (“SAP”) to NMED for review and approval that measures E. coli bacteria and plant nutrient (total nitrogen, total phosphorus, dissolved oxygen) levels in the Santa Fe River (Cienega Creek to Santa Fe WWTP), assessment unit identification number NM-2110_00. The SAP shall include the following:

- a. monthly monitoring for E. coli, total nitrogen, and total phosphorus.
- b. laboratory analysis using sufficiently sensitive methods (0.42 mg/L total nitrogen; 0.061 mg/L total phosphorus).
- c. deployment of sondes or dissolved oxygen data loggers for three to fourteen days during the growing season (June 15-November 1) to record at least hourly dissolved oxygen values.
- d. data collection at existing SWQB water quality stations, at a minimum:
 - i. Upstream: 30SantaF032.4, Santa Fe River Upper Preserve below the Paseo Real WWTP, 35.627607° N, W -106.095222° W.

- ii. Middle: 30SantaF030.5, Santa Fe River Lower Preserve, 35.61842° N, -106.11178° W.
- iii. Downstream: 30SantaF028.4, Santa Fe River above CR 56, 35.60279° N, -106.12134° W.

57. Within 45 days of completion of the 12-month sampling and analysis period, Respondent shall provide an electronic data submittal package of E. coli bacteria, nutrient (total nitrogen and total phosphorus), and dissolved oxygen analytical results in either MS Excel or compatible format, which shall include (at a minimum) all the fields in the NMED-SWQB Data Template (*See Attachment 1*). Respondent shall report the analytical laboratory and City of Santa Fe qualifier codes (i.e., data flags) and “field notes” as well as “analytical comments” fields included in the data template, 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. Reporting periods are January 1 to December 31.

58. Respondent shall monitor the Santa Fe River pursuant to the approved SAP for two years.

59. All plans, reports, corrective actions, schedules, and other documents or information submitted to the NMED under the terms of this Order shall be sent to:

Susan Lucas Kamat
NMED-SWQB
P.O. Box 5469
Santa Fe, New Mexico 87502-5469
Telephone: (505) 827-0187
Email: swq.reporting@env.nm.gov

60. NMED may require additional corrective actions if NMED finds that previous corrective actions are insufficient for Respondent to meet water quality standards.

IV. CIVIL PENALTY

61. Sections 74-6-10(C)(2) and 74-6-10.1(B) of the Act authorizes a civil penalty of up to \$10,000.00 per day for each violation of a provision of the Act other than those based in Section 74-6-5, or for each violation of a regulation, water quality standard, or compliance order adopted pursuant to the Act.

62. NMED hereby assesses a total civil penalty of \$2,317,875.00 for the violations set forth in Paragraphs 45 through 49. The penalties are based upon the penalty calculation narrative attached to this Order. *See Attachment 2.*

63. Payment of the civil penalties is due no later than 30 calendar days after this Order becomes final. The Respondent shall make the payment by certified or cashier's check **payable to the State of New Mexico** and mailed (certified) or by pre-arranged hand delivery to the SWQB at the following address:

Shelly Lemon, Chief
Surface Water Quality Bureau
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502-5469
Telephone: 505-470-5018
Email: Shelly.Lemon@env.nm.gov

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

Bruce Baizel, Compliance and Enforcement Director
New Mexico Environment Department
1190 St. Francis Drive, Suite N4050
Santa Fe, New Mexico 87505
Telephone: 505-490-5427
Email: Bruce.Baizel@env.nm.gov

and

Christal Weatherly, Assistant General Counsel

New Mexico Environment Department
121 Tijeras Avenue NE, Ste. 1000
Albuquerque, New Mexico 87102
Telephone: 505-490-0681
Email: Christal.Weatherly@env.nm.gov

64. Failure to comply with this 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.

V. NOTICE OF OPPORTUNITY TO ANSWER AND REQUEST A HEARING

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

66. 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 87502-5469
Telephone: 505-660-4305
Email: Pamela.Jones@env.nm.gov

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

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

69. A copy of the Answer and Request for Hearing must also be served on counsel for

NMED at the following address:

Christal Weatherly
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Avenue NE, Suite 1000
Albuquerque, New Mexico 87102
Email: Christal.Weatherly@env.nm.gov

70. Pursuant to 20.1.3.19 NMAC, 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.

71. 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

72. 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.

73. 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.

74. 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

75. 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:

Christal Weatherly
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Avenue NE, Suite 1000
Albuquerque, New Mexico 87102
Phone: 505-490-0681
Email: Christal.Weatherly@env.nm.gov

76. 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.

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

78. Any settlement reached by the parties shall be finalized by a 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 on all parties to the Order, and may not be appealed.

VIII. COMPLIANCE WITH OTHER LAWS AND WAIVER

79. 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

80. This Order shall terminate when Respondent certifies that all requirements of this Order have been met, and NMED has approved such certification.

Shelly Lemon
Digitally signed by Shelly
Lemon
Date: 2024.05.16
07:09:49 -06'00'

Shelly Lemon, Bureau Chief
Surface Water Quality Bureau
Water Protection Division
New Mexico Environment Department

May 16, 2024

Date

Pursuant to the February 19, 2024, Delegation Order from the NMED Office of the Secretary, the NMED Surface Water Quality Bureau Chief has authority to approve the commencement of a civil enforcement action, with the concurrence of the Compliance and Enforcement division Director, on behalf of NMED when the alleged violations cite violations of water quality standards. NMSA 1978, § 9-7A-6(B)(2).

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2024, a true and accurate copy of the Administrative Compliance Order Requiring Compliance and Assessing a Civil Penalty was served by certified mail and electronic mail on Respondent at the following addresses:

Alan Webber, Mayor
200 Lincoln Ave.
P.O. Box 909
Santa Fe, NM 87504
Email: mayor@santafenm.gov

Erin K. McSherry, City Attorney
200 Lincoln Ave.
P.O. Box 909
Santa Fe, NM 87504-0909
Email: ekmcsberry@santafenm.gov

Michael Dozier, Director
Wastewater Management Division
73 Paseo Real
Santa Fe, NM 87507
Email: mldozier@santafenm.gov

/s/ Christal Weatherly
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Avenue NE, Suite 1000
Albuquerque, New Mexico 87102
Email: Christal.Weatherly@env.nm.gov

**NMED ATTACHMENT 1
SWQB DATA TEMPLATES**

NMED - Attachment 1 Data Template - Discrete monitoring

Reported Value (if "<", leave blank)	UNITS	Sample Detection Limit (SDL)	SDL UNITS	Less than SDL?	Analytical Method	DILUTION FACTOR	LAB Name	ANALYSIS DATE AND TIME	LAB QUALIFIER CODE (if any)	Submitter QUALIFIER CODE (if any)	LAB COMMENTS (if any)
498 mg/l		10 mg/l		N	2540C	1	SLD	4/28/11 12:00 AM			
3 mg/l		3 mg/l		N	2540D	1	SLD	4/29/11 12:00 AM			
0.32 mg/l		0.1 mg/l		N	353.2	353.2	SLD	5/2/11 12:00 AM			
0.009 mg/l		0.003 mg/l		N	365.1	365.1	SLD	5/4/11 12:00 AM			
8.5 cfu/100ml		1 cfu/100ml		N	Colliert/2000	1	SWQB field unit	4/26/11 12:00 AM			
1986.3 cfu/100ml		1 cfu/100ml		N	Colliert/2000	1	SWQB field unit	4/26/11 12:00 AM			
0.12 mg/l		0.01 mg/l		N	200.8	200.8	SLD	6/27/11 12:00 AM			
		0.0002 mg/l		Y	245.1	245.1	SLD	5/10/11 12:00 AM			
		0.005 mg/l		Y	200.9	200.9	SLD	5/20/11 12:00 AM			
		0.01 mg/l		Y	200.8	200.8	SLD	6/24/11 12:00 AM			
0.008 mg/l		0.001 mg/l		Y	200.8	200.8	SLD	6/24/11 12:00 AM			
		0.001 mg/l		Y	200.8	200.8	SLD	6/24/11 12:00 AM			
		0.1 mg/l		Y	200.8	200.8	SLD	6/24/11 12:00 AM			
0.1 mg/l		0.001 mg/l		Y	200.8	200.8	SLD	6/24/11 12:00 AM			
		0.05 mg/l		N	200.7	200.7	SLD	5/24/11 12:00 AM			
		0.001 mg/l		Y	200.8	200.8	SLD	6/24/11 12:00 AM			
45 mg/l		1 mg/l		N	200.7	200.7	SLD	5/24/11 12:00 AM			
0.002 mg/l		0.001 mg/l		N	200.8	200.8	SLD	6/21/11 12:00 AM			
		0.001 mg/l		N	200.8	200.8	SLD	6/24/11 12:00 AM			
		0.01 mg/l		Y	200.8	200.8	SLD	6/24/11 12:00 AM			
		0.01 mg/l		Y	200.8	200.8	SLD	6/24/11 12:00 AM			
		0.001 mg/l		Y	200.8	200.8	SLD	6/24/11 12:00 AM			
2 mg/l		0.1 mg/l		N	200.7	200.7	SLD	5/24/11 12:00 AM			
0.003 mg/l		0.001 mg/l		N	200.8	200.8	SLD	6/24/11 12:00 AM			
		0.0002 mg/l		Y	245.1	245.1	SLD	5/3/11 12:00 AM			
0.002 mg/l		0.001 mg/l		N	200.8	200.8	SLD	6/24/11 12:00 AM			
		0.01 mg/l		Y	200.8	200.8	SLD	6/24/11 12:00 AM			
		0.005 mg/l		Y	200.9	200.9	SLD	5/17/11 12:00 AM			
		0.001 mg/l		Y	200.8	200.8	SLD	6/24/11 12:00 AM			
0.005 mg/l		0.001 mg/l		Y	200.8	200.8	SLD	6/24/11 12:00 AM			
0.005 mg/l		0.001 mg/l		N	200.8	200.8	SLD	6/24/11 12:00 AM			
		0.01 mg/l		Y	200.8	200.8	SLD	6/24/11 12:00 AM			
6.2 cfu/100ml		1 cfu/100ml		N	Colliert/2000	1	SWQB field unit	4/26/11 12:00 AM			
1986.3 cfu/100ml		1 cfu/100ml		N	Colliert/2000	1	SWQB field unit	4/26/11 12:00 AM			

Start Temp=35.2;End Temp=35.1;Large/Small=77;95% CI Low/High=3.9/15.6;
 Start Temp=35.2;End Temp=35.1;Large/Small=49/46;95% CI Low/High=1222/3300.2;
 Aluminum Digest RPD = 31.2%. Sample digested using SLD Method 41414.

Sample digested using SLD Method 41414.

Start Temp=35.2;End Temp=35.1;Large/Small=42;95% CI Low/High=2.4/12.2;
 Start Temp=35.2;End Temp=35.1;Large/Small=49/46;95% CI Low/High=1222/3300.2;

**NMED ATTACHMENT 2
PENALTY CALCULATIONS**

VIOLATION

NM Surface Water Quality Standards:

20.6.4.8 NMAC - Antidegradation Policy and Implementation Plan

20.6.4.13(E) NMAC – General Criteria – Plant Nutrients

20.6.4.113 NMAC – Rio Grande Basin: The Santa Fe River (Cochiti Pueblo boundary to Santa Fe WWTP)

20.6.4.900 NMAC – Water Quality Criteria Applicable to Designated Uses

1. Gravity Based Penalty

a. Potential for Harm

The discharge of water contaminants in the observed quantities and durations is not protective of surface water quality and human health and the environment. In this case, the Respondent discharged domestic wastewater containing E. coli bacteria and nutrients in the form of total nitrogen and total phosphorus, in quantities that exceeded the New Mexico surface water quality standards intended to protect human health and the environment into a reach of the Santa Fe River. The affected reach of the Santa Fe River (assessment unit NM-2110_00, Cienega Creek to Santa Fe wastewater treatment plant) has designated uses of irrigation, livestock watering, wildlife habitat, primary contact, and coolwater aquatic life.

The discharge of untreated or partially treated wastewater into a surface water poses health hazards through irrigation, crop production, livestock watering, and recreational or other activities with direct human contact and/or the potential for ingestion (e.g., ceremonial uses). E. coli bacteria exposure is linked to bacterial diseases such as diarrhea, urinary tract infections, respiratory illness and pneumonia, and other illnesses.

The discharge of excess nutrients into surface water also poses environmental harm. For example, excessive nutrients can cause adverse ecological effects such as large swings in dissolved oxygen (which stresses or kills aquatic life), reduction of habitat utilized by aquatic life, fish kills, and injury to people, pets, wildlife, and livestock by promoting harmful algal blooms and eutrophication.

Because the discharge of untreated or partially treated effluent into an effluent dominated river reach has the high potential to transmit disease and to impair aquatic life and wildlife habitat (20.6.4 NMAC), it poses a potential for harm.

The Respondent has continuously discharged excess water contaminants identified above into an effluent dominated reach of the Santa Fe River, where they are transported downstream. This results in the major potential for harm.

b. Extent of Deviation(s)

The extent of deviation is major for both E. coli bacteria and total nitrogen. The Respondent discharged E. coli bacteria and plant nutrients into the Sant Fe River in quantities

that exceeded the New Mexico surface water quality standards intended to protect human health and the environment. The Respondent discharged excess E. coli bacteria for 425 days, from February 1, 2023, until March 31, 2024. Water quality data provided by the Respondent indicate the monthly geometric mean of E. coli bacteria was as high as 1,367.41 billion colony forming units (cfu) per day in November 2023. Moreover, the data provided by the Respondent also indicate daily maximum concentrations of E. coli ranging from 13,200 to 87,000 cfu/100 mL or too numerous to count (TNTC) from October 2023 to December 2023. For comparison, the waste load allocation assigned in the total maximum daily load (TMDL) for this reach of the Santa Fe River is 31 billion cfu/day, and the single sample primary contact criterion is 410 cfu/100mL (20.6.4.900 NMAC). The respondent also discharged excess total nitrogen for 334 days, from December 1, 2022, to April 30, 2023, and from October 1, 2023, to March 31, 2024. Water quality data provided by the Respondent indicate the 30-day average load of total nitrogen was as high as 1,251 pounds per day in December 2023. For comparison, the antidegradation threshold for total nitrogen in this reach of the Santa Fe River is 265 pounds per day.

c. Gravity-Based Penalty Assessed

Section 74-6-10(D) of the Water Quality Act (WQA) requires that the Department take into consideration the seriousness of the violation when assessing a penalty. The seriousness is determined using the potential for harm and extent of deviation. Section 74-6-10.1 of the WQA provides for two categories of violations, each subject to different maximum penalties.

Section 74-6-10.1(B) of the WQA states that any person who violates any provision of the WQA other than Section 74-6-5 of the WQA or any person who violates any regulation, water quality standard, or compliance order adopted pursuant to the WQA shall be assessed civil penalties up to the amount of \$10,000 per day for each violation. The WQCC promulgated surface water quality standards in 20.6.4 NMAC pursuant to Section 74-6-4 of the WQA. Therefore, the penalty provisions in Section 74-6-10.1(B) of the WQA apply to violations of these specific WQCC Regulations. Considering the major potential for harm and major extent of deviation, and the violation of water quality standards including antidegradation thresholds, NMED assesses a civil penalty of \$10,000 for each violation.

d. Multi-Day Penalty

The WQA gives the Department the authority to assess civil penalties in administrative actions or seek civil penalties in court based on the number of days during which a single violation occurred (Sections 74-6-10(C) and (D) and 74-6-10.1 of the WQA). This language explicitly authorizes the Department to consider the duration of each violation as a factor in determining an appropriate total penalty amount.

The Respondent discharged excess E. coli for 425 days, from February 1, 2023 to March 31, 2024. NMED assesses this violation as a multi-day penalty of \$5,000 for days 2 through 60 (59 days) and \$2,500 for days 61 through 425 (365 additional days).

- Days 2 to 60 \$295,000.00
- Days 61 to 425 \$912,500.00



MICHELLE LUJAN GRISHAM
GOVERNOR

JAMES C. KENNEY
CABINET SECRETARY

Certified Mail - Return Receipt Requested
Copy via email

February 16, 2024

Mayor Alan Webber
200 Lincoln Ave
P.O. Box 909
Santa Fe, NM 87504
505-955-6590
mayor@santafenm.gov

Wastewater Management Division
Director Michael Dozier
73 Paseo Real
Santa Fe, NM 87507
505-955-4650
mldozier@santafenm.gov

RE: Notice of Noncompliance, City of Santa Fe Paseo Real Wastewater Treatment Plant

Dear Mayor Alan Webber and Wastewater Management Division Director Michael Dozier:

The purpose of this letter is to notify you that the New Mexico Environment Department (NMED) has determined that the City of Santa Fe Paseo Real Wastewater Treatment Plant (WWTP) has been operating in noncompliance with the New Mexico Water Quality Act (WQA) and Water Quality Control Commission (WQCC) regulations (20.6.2 and 20.6.4 New Mexico Administrative Code) adopted pursuant to the WQA. Based on NMED's review of the data associated with the Santa Fe River and the Paseo Real WWTP discharge into the Santa Fe River, this Notice of Noncompliance covers the following:

- Discharging water contaminants into the Santa Fe River, Santa Fe County, New Mexico, 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 the property. The discharge impacted a surface water of the State. [20.6.2.1203 NMAC; 20.6.4.7 NMAC; 20.6.4.13 NMAC; 20.6.4.113 NMAC]
- Failure to comply with New Mexico water quality standards and the state's water quality management plan, including relevant total maximum daily loads and the antidegradation policy. [20.6.4.8 NMAC; 20.6.4.13 NMAC; 20.6.4.113 NMAC; 20.6.4.900 NMAC]
- Failure to take corrective actions to control the water contaminants and mitigate damages to the environment and relieve the potential public health threat. [20.6.2.1203 NMAC]
- Disposal of refuse into the Santa Fe River. [20.6.2.2201 NMAC]

NMED is considering appropriate enforcement actions pursuant to state law, including, but not limited to, the alleged violations listed above. NMED has observed significant surface water quality impacts and water quality standards exceedances since at least 2019. Violations of New Mexico water quality standards may lead to penalties under Section 74-6-10 of the New Mexico Water Quality Act, as well as requirements for corrective actions to ensure compliance with New Mexico surface water quality standards and other legal requirements.

Within 30 calendar days of receipt of this letter the City of Santa Fe must submit to the Department evidence to demonstrate that the City is complying with the New Mexico Water Quality Act and corresponding regulations, water quality standards, and the state's water quality management plan, including total maximum daily loads and the antidegradation policy.

Nothing in this letter shall be construed as relieving the City of Santa Fe of its obligation to comply with all applicable federal, state, and local laws, regulations, permits or orders. It is the responsibility of the City to be familiar with and comply with the requirements and regulations of the State of New Mexico. Please contact me with any questions.

Sincerely,

Shelly Lemon
Surface Water Quality Bureau Chief

Cc: John Blair, City Manager (City of Santa Fe), wblair@santafenm.gov
John Rhoderick, Water Protection Division Director (NMED), john.rhoderick@env.nm.gov
Christal Weatherly, Assistant General Counsel (NMED), christal.weatherly@env.nm.gov
Andrew Knight, Assistant General Counsel (NMED), andrew.knight@env.nm.gov
Susan A. Lucas Kamat, Point Source Section Manager (NMED), susan.lucaskamat@env.nm.gov
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Rachel Mathews, Enforcement Officer/New Mexico Coordinator (EPA R6), matthews.rachel@epa.gov



MICHELLE LUJAN GRISHAM
GOVERNOR

JAMES C. KENNEY
CABINET SECRETARY

March 1, 2024

Mayor Alan Webber
200 Lincoln Ave
P.O. Box 909
Santa Fe, NM 87504
505-955-6590
mayor@santafenm.gov

Wastewater Management Division
Director Michael Dozier
73 Paseo Real
Santa Fe, NM 87507
505-955-4650
mldozier@santafenm.gov

RE: Request for Extension, Response to Notice of Noncompliance

Dear Mayor Alan Webber and Wastewater Management Division Director Michael Dozier:

In response to NMED's Notice of Noncompliance, on February 23, 2024, the City of Santa Fe requested a 30-day extension of time to submit evidence that the City is complying with the New Mexico Water Quality Act and corresponding regulations, water quality standards, and the state's water quality management plan, including total maximum daily loads and the antidegradation policy.

NMED denies the City's request for an extension; however, NMED will contact the City to set up a meeting as soon as possible to discuss the noncompliance and actions needed now to comply with the water quality standards. The single sample E. coli criterion should never be exceeded, and the general plant nutrients criterion applies to all waters at all times.

Nothing in this letter shall be construed as relieving the City of Santa Fe of the obligation to comply with all other applicable federal, state, and local laws, regulations, permits, or orders. All information and evidence should be sent to Susan Lucas Kamat of the NMED's Surface Water Quality Bureau (SWQB) at susan.lucaskamt@env.nm.gov. If you have any questions about this letter, you can reach Susan at (505) 946-8924 or via email.

Sincerely,

Shelly Lemon, Chief
Surface Water Quality Bureau

Cc: John Rhoderick, Water Protection Division Director (NMED), john.rhoderick@env.nm.gov
Christal Weatherly, Assistant General Counsel (NMED), christal.weatherly@env.nm.gov
Susan A. Lucas Kamat, Point Source Section Manager (NMED), susan.lucaskamat@env.nm.gov
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City of Santa Fe, New Mexico

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Alan Webber, Mayor

Councilors:
Signe I. Lindell, Mayor Pro Tem, District 1
Alma G. Castro, District 1
Michael J. Garcia, District 2
Carol Romero-Wirth, District 2
Lee Garcia, District 3
Pilar F.H. Faulkner, District 3
Jamie Cassutt, District 4
Amanda Chavez, District 4

Sent via:
Email
and
Certified Mail

March 15, 2024

Shelly Lemon
Surface Water Quality Bureau Chief
Post Office Box 5649
Santa Fe, NM 87502-5649

Re: Notice of Noncompliance, City of Santa Fe Paseo Real Wastewater Treatment Plant

Dear Shelly Lemon:

This letter responds to the letter “Notice of Noncompliance, Paseo Real Wastewater Treatment Plant” dated February 16, 2024. The letter states that the purpose of the letter “is to notify you that the New Mexico Environment Department (NMED) has determined that the City of Santa Fe Paseo Real Wastewater Treatment Plant (WWTP) has been operating in noncompliance with the New Mexico Water Quality Act (WQA) and Water Quality Control Commission (WQCC) regulations (20.6.2 and 20.6.4 New Mexico Administrative Code) adopted pursuant to the WQA.” Further, the letter states that the Notice of non-compliance covers the following:

- Discharging water contaminants into the Santa Fe River, Santa Fe County, New Mexico, 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 the property. The discharge impacted a surface water of the State. [20.6.2.1203 NMAC; 20.6.4.7 NMAC; 20.6.4.13 NMAC; 20.6.4.113 NMAC]



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- Failure to comply with New Mexico water quality standards and the state's water quality management plan, including relevant total maximum daily loads and the antidegradation policy. [20.6.4.8 NMAC; 20.6.4.13 NMAC; 20.6.4.113 NMAC; 20.6.4.900 NMAC]
- Failure to take corrective actions to control the water contaminants and mitigate damages to the environment and relieve the potential public health threat. [20.6.2.1203 NMAC]
- Disposal of refuse into the Santa Fe River. [20.6.2.2201 NMAC]

Unfortunately, the letter does not identify any particular violation of the Water Quality Control Commission (WQCC) regulations for any particular period of time. Rather, the letter only cites general regulations without indicating what are the City's alleged actions or failures to act. Consequently, the City is unable to determine or even guess at what violation NMED is asserting the City has made.

To explain more fully, the City examined each of the regulations cited.

First, 20.6.2.1203 NMAC, deals with "Notification of Discharge Removal." The letter gives no indication of what "water contaminant, 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" occurred and when. The letter also cites this section under the third bullet.

Second, 20.6.4.7 NMAC, provides definitions under "standards for interstate and intrastate surface waters." It is not clear how the City violated one or more definitions.

Third, 20.6.4.13 NMAC describe general criteria "established to sustain and protect existing or attainable uses of surface waters of the state." *Id.* However, a reference to general criteria as to such contaminants does not provide the City notice of what contaminants, if any, the State is alleging that the City discharged and at what time. The letter also cites this section under the second bullet.



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Fourth, 20.6.4.113 NMAC defines standards for the Rio Grande Basin at “the Santa Fe river and perennial reaches of its tributaries from the Cochiti pueblo boundary upstream to the outfall of the Santa Fe wastewater treatment facility.” *Id.* Yet the letter does not inform the City which of the standards, if any, that the City may have violated and when. The letter also cites this section under the second bullet.

Fifth, 20.6.4.8 NMAC sets forth the anti-degradation policy for surface waters of the state. The letter, however, does not identify what actions of the City, if any, may have violated the anti-degradation policy and when. Further, the letter gives no indication that the state has followed the process described in 20.6.4.8(A)(3)(a).

Sixth, 20.6.4.900 NMAC sets forth “criteria applicable to existing, designated or attainable uses unless otherwise specified.” Again, the letter does not explain to the City which of the criteria, if any, the City may have violated and when.

Seventh, 20.6.2.2201 NMAC is perhaps the most baffling citation. This regulation states in its entirety: “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. Solids diverted from the stream and returned thereto are not subject to abatement under this Section.” The letter offers no indication of what refuse, if any, the state alleges that the City may have disposed of in a natural watercourse.

All of these purported violations suffer from the same legal infirmity. They fail to provide the City reasonable notice of the violation, which would allow an “individual of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited.” *State v. Laguna*, 1999-NMCA-152, ¶ 25. An enforcement action that fails to provide such notice is potentially void-for-vagueness. Moreover, as the New Mexico Court of Appeals has noted, “the other arm of the vagueness test is whether the statute permits police officers, prosecutors, judges, or juries to engage in arbitrary and discriminatory enforcement of the statute, which occurs because the statute has no standards or guidelines and therefore allows, if not encourages, subjective and ad hoc application.” *State v. Laguna*, 1999-NMCA-152, ¶26 (emphasis added).



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As the U.S Supreme Court has stated, an agency's new interpretation of a regulation, which imposes new penalties, "would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012). See also *Kisor v. Wilkie*, 139 S. Ct. 2400, 2404 (2019), "A court should decline to defer, for example, to... a new interpretation that creates 'unfair surprise' to regulated parties."

Consequently, the City respectfully requests a more definitive statement from the Environment Department, which will inform the City of what violations the Department believes the City may have made and when. This will allow the City to respond to the agency consistent with the U.S. and New Mexico Constitution's due process protections.

Sincerely,

Michael Dozier

Wastewater Management Division Director

Cc John Blair, City Manager
John Dupuis, Public Utilities Director
Marcos D. Martinez, Senior Assistant City Attorney