

STATE OF NEW MEXICO
SECRETARY OF ENVIRONMENT

NEW MEXICO ENVIRONMENT DEPARTMENT
WATER PROTECTION DIVISION
DRINKING WATER BUREAU,

Complainant,

v.

FRED WHISTLE

and

AV WATER CO., LLC

Respondents.

COPY

No. DWIB 16-26 CCO



ADMINISTRATIVE COMPLIANCE ORDER AND
ASSESSMENT OF CIVIL PENALTIES

1. Pursuant to the Environmental Improvement Act ("EIA"), NMSA 1978, § 74-1-10, the Utility Operator Certification Act ("UOCA"), NMSA 1978, §§ 61-33-1 to -10, the Drinking Water Regulations, 20.7.10 NMAC, and the Utility Operator Certification Regulations, the Secretary of the New Mexico Environment Department ("NMED"), acting through the Director of the Water Protection Division of the NMED, issues this Administrative Compliance Order to Fred Whistle and AV Water Co., LLC ("Respondents") to enforce the EIA, UOCA, Utility Operator Certification Regulations and Drinking Water Regulations.

FINDINGS

2. The NMED is an executive agency within the government of the State of New Mexico and is charged with administration and enforcement of the EIA, UOCA, Utility Operator Certification Regulations, and Drinking Water Regulations.

3. Respondent AV Water Co., LLC owns and operates the Harvest Gold Subdivision public drinking water system (“System”), PWS# NM3511524, located in San Juan County, New Mexico.

4. Respondent Whistle is the general manager of and administrative contact for the System.

5. Each Respondent is a “person” as defined by NMSA 1978, § 74-1-3, and 20.7.10.100 NMAC [incorporating 40 C.F.R. § 141.2].

6. On June 2, 2016, personnel from NMED’s Drinking Water Bureau (“DWB”) conducted an inspection at the System.

7. As of the date of this inspection, Respondents employed two (2) certified operators to manage the System: Jose Grijalva and Thomas Barrow.

8. Mr. Grijalva is a level 3 water supply (“WS3”) operator. Mr. Barrow is a level 2 water supply (“WS2”) operator.

9. The System is a surface water system that serves between twenty-five (25) and five hundred (500) residents.

10. The System draws water from the Bloomfield Irrigation District Ditch and treats it in a treatment plant.

11. Due to the population served and water treatment processes, the System must employ at least one operator who holds either a small water advanced (“SWA”), WS3, or level 4 water supply (“WS4”) certification. (20.7.4.12 NMAC).

12. It is unlawful to operate or allow the operation of a public water supply system unless the system is operated by or under the supervision of a certified operator who meets or

exceeds the appropriate level of certification required to operate the system. (NMSA 1978, § 61-33-6, 20.7.4.20.A NMAC).

13. On or about October 11, 2016, Mr. Grijalva's employment with Respondents came to an end.

14. Since that date, the System has not employed an operator who holds either SWA, WS3, or WS4 certification.

15. Stephanie Stringer, DWB Chief, informed Respondent Whistle in an October 14, 2016 email that he must find an immediate replacement for Mr. Grijalva who holds the appropriate level of certification.

16. NMED's DWB issued a Notice of Violation ("NOV") to the Respondent Whistle on October 21, 2016 for operating without a certified operator of the appropriate level.

VIOLATION

17. VIOLATION OF UOCA AND UTILITY OPERATOR CERTIFICATION REGULATIONS: FAILURE TO RETAIN SWA, WS3, OR WS4 CERTIFIED OPERATOR. Respondents are in violation of NMSA 1978, § 61-33-6, 20.7.10.400.Q NMAC, and 20.7.4.20(A) NMAC. Respondents are operating the System without a certified operator of the appropriate level despite having received written notification from the NMED on October 21, 2016 that a certified operator was required. Respondents are required to engage the services of a certified operator of the appropriate level to operate the System.

ORDERS AND CIVIL PENALTIES

18. Respondents are hereby ordered to perform the following actions to correct the violation listed in Paragraph 17: Hire or contract with a WSA, WS3, or WS4 certified operator to

operate the System immediately. Pay a penalty of thirty-eight thousand dollars (\$38,000) within sixty (60) days following receipt of this Order.

19. A copy of the contract or agreement that secures the services of a certified operator shall be sent with return receipt requested by certified U.S. mail to:

Anne Keller
Acting Certification Officer
Drinking Water Bureau
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502-5469

Maria J. Medina
Enforcement Coordinator
Drinking Water Bureau
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502-5469

20. A certified or cashier's check for thirty-eight thousand dollars (\$38,000) made payable to the State of New Mexico shall be sent with return receipt required by U.S. mail certified mail to:

David Soveranez
Financial Manager
Drinking Water Bureau
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502-5469

21. If Respondents fail to comply with the requirements of Paragraph 18 of this Order, the Secretary of the NMED may assess additional civil penalties not to exceed five thousand dollars (\$5,000) per day for each day of continued noncompliance with this Order.

NOTICE OF RIGHT TO ANSWER AND REQUEST A HEARING

22. Pursuant to NMSA 1978, §§ 61-33-10(E) and 74-1-10(E), and 20.1.5 NMAC, Respondents have the right to request a hearing. If Respondents: (a) contests any material or legal

matters upon which this Order is based; (b) contends that Respondent is entitled to prevail as a matter of law; or (c) otherwise contests the appropriateness of this Order, Respondents may mail or deliver within thirty (30) days of receipt of this Order a written Request for Hearing at the following address:

Hearing Clerk
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502-5469

Respondents must attach a copy of this Order to the Request for Hearing. 20.1.5.200.A(2)(d) NMAC.

23. The Request for Hearing shall include an Answer. Respondents' Answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Order with regard to which Respondents have any knowledge. Where Respondents have no knowledge of a particular factual allegation, Respondents should so state, and the Respondents may deny the allegation on that basis. Any allegation in this Order not specifically denied shall be deemed admitted. 20.1.5.200.A(2)(a) NMAC.

24. Respondents' Answer shall also include any affirmative defenses upon which Respondents intend to rely. Any affirmative defense not asserted in the Answer, except for a defense asserting lack of subject matter jurisdiction, shall be deemed waived. 20.1.5.200.A(2)(b) NMAC.

25. Respondents' Answer shall be signed under oath or affirmation that the information contained therein is true and correct to the best of the signer's knowledge and belief. 20.1.5.200.A(2)(a) NMAC.

FINALITY OF ORDER

26. Pursuant to NMSA 1978, §§ 61-33-10(E) and 74-1-10(E), this Order shall become final unless the Respondents file an Answer and a Request for Hearing with the Hearing Clerk within thirty (30) days of receipt of this Order.

SETTLEMENT CONFERENCE

27. Whether or not a Request for Hearing has been filed, Respondents may confer with the NMED concerning settlement of this Order. The NMED encourages settlement consistent with the provisions and objectives of the EIA, UOCA, Utility Operator Certification Regulations and the Drinking Water Regulations. Settlement discussions neither extend the thirty (30) day deadline for filing a Request for Hearing and Answer nor alter the deadline imposed for compliance with the mandate of this Order. Settlement discussion may be pursued as an alternative to, or simultaneously with, the hearing proceedings. Respondents may appear at the settlement conference alone or accompanied or represented by legal counsel.

28. A Stipulated Final Order shall finalize any settlement reached by the parties. The Stipulated Final Order must resolve all issues raised in this Order, shall be final and binding on the parties, and may not be appealed.

29. To explore the possibility of settlement in this matter, contact Maria J. Medina, Drinking Water Bureau, New Mexico Environment Department, P.O. Box 5469, Santa Fe, NM 87502-5469, or (505) 476-8629.

COMPLIANCE WITH OTHER LAWS

30. Compliance with the requirements of this Order does not relieve Respondents of the obligation to comply with all other applicable laws and regulations. This Order does not constitute a waiver, suspension, or modification of the requirements of 20.7.10 NMAC and 20.7.4

NMAC, which remain in full force and effect. Issuance of this Order is not an election by the NMED to forgo any civil or criminal action otherwise authorized under the EIA and UOCA.

TERMINATION

31. This Order shall terminate when Respondents certify that all requirements of this Order have been met and all penalties paid, and the NMED has approved such certification in writing, or when the Secretary approves a Stipulated Final Order.



Bruce J. Yurdin
Division Director
Water Protection Division
Harold L. Runnels Building
1190 St. Francis Drive
Santa Fe, NM 87502

11/18/2016
Date

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Administrative Compliance Order and Assessment of Civil Penalty" was sent via certified mail, return receipt requested, to the following party of record on November 18, 2016:

Fred Whistle
Harvest Gold Subdivision, NM3511524
P.O. Box 5520
Farmington, NM 87499

s/ Annie Maxfield
Assistant General Counsel
New Mexico Environment Department