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Attorneys for The City of Helena

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF:)	Docket No. CWA-08-2021-0017
)	
The City of Helena, Montana,)	THE CITY OF HELENA'S ANSWER
)	TO COMPLAINT AND REQUEST
)	FOR HEARING
Respondent)	Section 309(g) of the Clean Water Act
)	
)	
)	

Respondent, the City of Helena, by and through its counsel Catherine A. Laughner and Thomas J. Jodoin, hereby answers the Complaint and Notice of Opportunity for Hearing as follows:

1. Paragraphs 1 through 40 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.

B. The EPA's 2009 Audit

41. Denied. The City admits EPA conducted an Audit in 2009 and that the City responded to EPA on 10/7/2009, 11/19/2009, 1/22/2010, 3/15/2010, 3/29/2010, 4/21/2010, 4/22/2010, 6/3/2010, and 9/22/2010.

C. The EPA's 2017 Audit

42. Denied. The City admits EPA conducted an Audit in 2017 and that the City responded to EPA on 2/14/2018, 8/31/2018, 2/5/2019, 2/28/2019, 3/14/2019, 4/8/2019, 5/11/2020, 6/11/2020, 6/30/2020, 7/16/2020, 7/23/2020, 7/27/2020, 8/3/2020, 8/31/2020, 10/2/2020, 10/19/2020, 10/23/2020, 10/26/2020, 12/11/2020, 1/27/2021, 2/1/2021, 4/9/2021, 3/15/2021, 3/17/2021, 3/22/2021, 3/24/2021, 3/30/2021, 4/9/2021, 4/29/2021, 5/4/2021, 5/17/2021, and 5/18/2021. The City admits EPA cannot be satisfied because (1) EPA changes what it requires of the City (i.e. moves the target); (2) EPA requires things the City cannot control (e.g, VA IGA within 30 days); and (3) EPA requires tasks that are not in the regulation or are so vague there could be multiple interpretations, and there is no way for the City to know what would satisfy EPA until after EPA informs the City that what it submitted was wrong.
43. Denied. The City admits in 2017 it inspected DIP, an industrial user, located at 2531 Dodge Avenue, Helena, Montana.

V. ALLEGED VIOLATIONS OF LAW

Count I:

Failure to Operate Pursuant to Adequate Legal Authority

44. Paragraph 44 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.
45. Paragraph 45 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.
46. Paragraph 46 of the Complaint are Complainant's statements and/or conclusions about an audit which speaks for itself, or of regulatory authorities Complainant deems applicable and thus do not require a response or are otherwise denied.
47. Answering Paragraph 47, Denied. The POTW operated pursuant to legal authority enforceable in federal, state, or local courts. It has been only EPA's interpretation of 40 CFR 408(f)(1) demanding an Ordinance. Nevertheless, the City had a 2015 Ordinance in place. Even prior to the 2017 Audit, the City had informed EPA's Al Garcia on April 22, 2010, that pursuant to §69-7-101, Mont. Code Ann., the City has the power and authority to regulate the usage of municipal utilities by persons and entities served by the City's utilities that are located outside the corporate City limits. Section 6-4-3 of the draft legal authority implements this power. The City sent a revised ordinance to EPA's Al Garcia on April 15, 2019. As of June 12, 2019, the City had received no response from EPA. On June 12, 2019, the City sent an email to EPA's Al Garcia asking if EPA had any comment or feedback on the revised ordinance provided on April 15, 2019.

48. Answering Paragraph 48, Admitted,
49. Paragraph 49 of the Complaint are statements and/or conclusions made by the Complainant it deems applicable and thus do not require a response or are otherwise denied. Information provided by the City speaks for itself.
50. Paragraph 50 of the Complaint are statements and/or conclusions made by the Complainant it deems applicable and thus do not require a response or are otherwise denied. Respondent admits it participated (unrepresented) in a July 23, 2020 call with EPA, including Robyn Hanson. During that call a September 1, 2020 deadline was set, and the City provided EPA with the Ordinance on July 27, 2020, and further documents on August 3, 2020. The City admits EPA provided emails on July 24, 2020, and July 31, 2020, and approved the Ordinance on August 11, 2020.
51. Paragraph 51 of the Complaint are statements and/or conclusions made by the Complainant it deems applicable and thus do not require a response or are otherwise denied. Respondent admits it sent EPA an email on July 31, 2020, and that information provided by the City speaks for itself.
52. Respondent admits on August 3, 2020, the City provided the EPA the November 4, 2019 and November 18, 2019 City Council Readings, affirming that Ordinance 3265 had been adopted, and states that the August 3, 2020 email speaks for itself. Respondent denies the second sentence of Paragraph 52.
53. Paragraph 53 of the Complaint are statements and/or conclusions made by the Complainant it deems applicable and thus do not require a response or are otherwise denied. Respondent admits it participated (unrepresented) in a July 23, 2020 call with EPA, including Robyn Hanson. During that call a September 1, 2020 deadline was set, and the City provided EPA with the Ordinance on July 27, 2020, and further documents on August 3, 2020. The City admits EPA provided emails on July 24, 2020, and July 31, 2020, and approved the Ordinance on August 11, 2020.
54. Respondent is without information or knowledge sufficient to either admit or deny the allegations contained Paragraph 54 of the EPA's Complaint, and denies the same.
55. Denied.

B. Legal Authority in An Intergovernmental Agreement

56. Paragraph 56 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.
57. Paragraph 57 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do

not require a response or are otherwise denied. Respondent admits Fort Harrison is a military installation which contributes wastewater to the POTW.

58. Answering Paragraph 58, denied. The 2017 Pretreatment Audit and Corrective Action No. 3 on page 3 cites 40 CFR Part 403.8(f)(1) as the authority for requiring an Intergovernmental Agreement (IGA) but the regulation allows the authority to be contained in an ordinance. Respondent admits Helena City Code Title 6 Chapter 4, Industrial Wastewater, is applicable to all users of the POTW. Including the following rules: RULE 11: Authorized employees of the city shall have free access at proper hours of the day to all parts of buildings in which wastewater service is provided by the city for the purpose of inspecting the condition of the pipes and fixtures and the manner in which wastewater is generated. RULE 14: On failure to comply with the rules and regulations established as a condition to the use of the city's wastewater system, or to pay the wastewater rates, or any charge or penalty imposed, in the time and manner herein provided, the water or wastewater service or both may be terminated until payment is made of the amounts due including current charges, together with an amount to be set by resolution to cover the expense of interrupting and reinstating each of the water or wastewater service.

6-4-3: APPLICATION OF CHAPTER:

The provisions of this chapter apply to all users of the city POTW, including those located outside the city. (Ord. 3124, 6-21-2010)

https://codelibrary.amlegal.com/codes/helenamt/latest/helena_mt/0-0-0-2857

Respondent admits EPA incorrectly and without basis interprets this as users of the POTW within the City limits. The POTW operates with adequate legal authority without an IAG. Respondent admits EPA has called for an IGA with Ft. Harrison, nevertheless, as documented in the 2017 Audit Corrective Action No. 3, July 24, 2020 Deliverable #2, and EPA's April 29, 2021 AOC # 111. The insistence was for an IGA with Ft. Harrison, not the VA. Respondent admits, in an effort to satisfy EPA, the City proposed and executed an agreement with Ft. Harrison and provided this to EPA on July 26, 2021.

59. Paragraph 59 of the Complaint are statements and/or conclusions made by the Complainant it deems applicable and thus do not require a response or are otherwise denied. The MOU speaks for itself. The City denies it did not respond to EPA's inquiries. Respondent admits the City's counsel responded on May 17, 2021 that Paragraph 118 of EPA's proposed AOC only concerned an IGA with Ft. Harrison.
60. Respondent admits the first sentence of Paragraph 60 but denies the second sentence. The VA hospital discharges into the Ft. Harrison sewer line and if necessary, the City can enforce its Title 6-4-2, its pretreatment regulations, and the Ft. Harrison IGA.
61. Denied.

Count II:
Failure to Include All Required Elements in SIU Permits

62. Paragraph 62 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.

A. DIP IU Permit

63. Denied. Paragraph 63 of the Complaint are statements and/or characterizations made by the Complainant and thus do not require a response or are otherwise denied. Permit DIP005 speaks for itself. Respondent admits on February 14, 2018, the City wrote to EPA's Al Garcia that the administrative extending language had been removed from the permit template and the language was not in any current permit.

64. Paragraph 64 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.

65. Denied. The 2017 Audit Corrective Action #8 provided, "Incorporate the authority to administratively extend permits or remove this language from the permit template." Respondent admits on February 14, 2018, the City wrote to EPA's Al Garcia that the administrative extending language had been removed from the permit template and the language was not in any current permit. Respondent admits on July 16, 2020, the City provided EPA's Emilio Llamozas with the DIP permit. Respondent admits on July 24, 2020, EPA's Robyn Hanson requested the City reissue the DIP permit by August 15, if EPA provides comments by August 5, 2020. Respondent admits the new DIP permit was issued, effective August 15, 2020.

66. Denied.

B. MRL IU Permit

67. Denied. Respondent admits that neither the 2017 Audit, the May 14, 2020 Letter of Violation, nor EPA's Robin Hanson's July 24, 2020 e-mail allege MRL's permit improperly allowed administrative extensions.

68. Paragraph 68 of the Complaint are statements and/or conclusions made by the Complainant it deems applicable and thus do not require a response or are otherwise denied. The MRL permit speaks for itself.

69. Denied. The City provided the MRL permit to EPA on July 16, 2020. The City sent a revised MRL permit to EPA's Al Garcia on December 11, 2020, stating, "Attached is the final version of the MRL Industrial User permit we will be issuing by Dec. 31. Please let me know if you have comments or revisions." The City received no response to its December 11, 2020 email, except for EPA's Robyn Hanson stating on December 15,

2020, “EPA recognizes the big strides made by the City in the past 5 months.” On February 5, 2021, EPA acknowledged it received the MRL permit on December 11, 2020. Respondent admits the MRL permit was issued, effective January 1, 2021, and states the MRL permit speaks for itself.

70. Denied. Respondent admits four months after receiving the MRL permit, on April 29, 2021, EPA provided the City with an email explanation of why EPA continues to think the City is not in compliance due to the sampling language in the MRL permit. A revised MRL permit was provided by the City to EPA on May 5, 2021. EPA provided additional comments on May 17, 2021. The City responded May 18, 2021. EPA sent the City additional comments on May 28, 2021, and the City responded on June 7, 2021. The MRL permit was reissued June 28, 2021, and a copy provided to EPA.
71. Denied.

Count III:
Failure to Implement its Procedure to Identify and Locate IUs

72. Paragraph 72 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.
73. Denied.
74. Denied.
75. The City admits the first sentence of Paragraph 75, but denies the rest.
76. The City admits on August 27, 2020, the City sent EPA the City’s final Industrial User Inventory and Characterization Procedures, but denies Complainant’s characterization.
77. Denied.
78. Denied.
79. Denied.

Count IV:
Failure to Identify Character and Volume of Pollutants Contributed to POTW

80. Paragraph 80 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.
81. Denied.
82. Denied.

83. Denied.

Count V:

Failure to Implement Procedure to Notify IUs of Applicable Pretreatment Standards and Requirements

84. Denied. On June 11, 2020, the City wrote to EPA asking for additional guidance. None has been received.

85. Paragraph 85 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied. The 2017 Audit speaks for itself. On June 11, 2020, the City wrote to EPA asking for additional guidance. None has been received.

86. Paragraph 86 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied. The 2017 Audit speaks for itself. On June 11, 2020, the City wrote to EPA asking for additional guidance. None has been received.

87. Denied.

88. Denied.

Count VI:

Failure to Analyze Self-Monitoring Report

89. Paragraph 89 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.

90. Paragraph 90 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.

Count VII:

Failure to Sample, Analyze, and Conduct Surveillance of IUs and Failure to Implement Procedures to Investigate Noncompliance

91. Paragraph 91 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.

92. Denied. Paragraph 92 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.
93. Denied. Paragraph 93 of the Complaint are statements and/or conclusions made by the Complainant about regulation it deems applicable and thus do not require a response or are otherwise denied. The 2017 Audit speaks for itself.
94. Denied. The 2017 Audit speaks for itself.
95. Denied.
96. Denied. Respondent admits on August 3, 2020, the City provided EPA with the City's Industrial Pretreatment Sampling and Analysis Plan (Plan) for sampling the City's SIUs and on August 31, 2020, the City addressed EPA's comments. Respondent admits the City wrote on August 31, 2020, "Please let me know if there are any other required changes needed that do not meet the regulations." EPA did not respond.
97. Paragraph 97 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied. The 2017 Audit speaks for itself.
98. Denied. The 2017 Audit speaks for itself.
99. Admitted.
100. Denied.
101. Denied.

Count VIII:
Failure to Update Local Limits

102. Denied. Paragraph 102 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.
103. Denied. Paragraph 103 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.
104. Denied. Paragraph 104 of the Complaint are statements and/or conclusions made by the Complainant about statutory and regulatory authorities it deems applicable and thus do not require a response or are otherwise denied.

105. Denied. The 2012 MPDES Permit speaks for itself.
106. Respondent is without information or knowledge sufficient to either admit or deny the allegations contained therein, and accordingly denies the same.
107. Respondent is without information or knowledge sufficient to either admit or deny the allegations contained therein, and accordingly denies the same.
108. Respondent is without information or knowledge sufficient to either admit or deny the allegations contained therein, and accordingly denies the same.
109. Respondent is without information or knowledge sufficient to either admit or deny the allegations contained therein, and accordingly denies the same.
110. Denied. Respondent admits the City submitted the revised local limits to EPA on April 21, 2016, and that due to the expiration of the MPDES permit the resubmittal evaluation was postponed.
111. Denied. The 2017 Audit and 2009 Audit speak for themselves.
112. Denied. Respondent admits on August 31, 2018, the City wrote to EPA's Al Garcia that the City has not received a new permit from DEQ and that once DEQ issues its new permit with the new discharge limits it will complete the local limits. No response from EPA.
113. Denied. Respondent admits that on February 5, 2019 an electronic copy of the detailed re-evaluation of the January 2019 of local limits was submitted to EPA's Al Garcia and mailed by certified mail. Respondent admits on February 29, 2019 the City submitted a status update and Sampling and Analysis Plan to EPA's Al Garcia, and notice that a detailed re-evaluation of the local limits was submitted to EPA's Al Garcia at US EPA Region 8 on February 5, 2019. The City is currently waiting comments from EPA's Al Garcia. Respondent admits that on March 14, 2019 LeeAnn Wiegard of CDM, on behalf of the City, sent a follow-up email to EPA's Al Garcia checking if he had received the hard copy of the local limits sent by certified mail on February 5, 2019. Respondent admits the City and CDM called EPA's Al Garcia on April 8, 2019 to discuss the Pretreatment Audit Letter and the City's February 5, 2019 local limit submittal. EPA's Al Garcia said he would provide a response on the audit summary. On April 15, 2019, EPA's Al Garcia emailed the City but did not provide a response to the audit summary, and no deadline was included for local limits. No MPDES permit renewal had been received by the City. On May 14, 2020, EPA (Boeglin) issued a Letter of Violations stating failure to update local limits. Respondent admits the City provided a response to EPA's Emilio Llamozas, with 8 attachments including a 23-page Local Limit update. On June 11, 2020 The City informed EPA the implementation of local limits was delayed due to the anticipated new MPDES permit but the new permit has been delayed again by the State of Montana. A detailed re-evaluation of the local limit was submitted to EPA's

Al Garcia on February 5, 2019. Respondent admits it resent the 8 attachments and the June 11, 2020 23-page update to EPA on June 30, 2020.

114. Denied. Not realizing that the City had sent the June 11, 2020 Local Limits Re-Evaluation Update to EPA's Al Garcia on June 11, 2020 and again on June 30, 2020, on July 8, 2020 EPA's Emilio Llamozas told the City to submit the draft local limits as revised based on EPA's April 15, 2019 comments. On July 24, 2020 EPA's Robyn Hanson identified a deliverable for EPA to "Review the City's recently proposed draft Local Limits, as submitted via email to EPA's Al Garcia on 6/30 to ensure they are approvable." No due date was set. On August 11, 2020, Mr. Garcia notified the City that the local limits are in his queue. As requested by EPA's Al Garcia, on September 2, 2020 the City resent the January 2019 Local limits previously provided Feb. 5, 2020, EPA's April 15, 2019 comments, and the City's June 11, 2020 23-page Local Limit Re-Evaluation Update. On September 8, 2020, EPA notified the City that it wanted more sampling.
115. Denied. Respondent admits on October 2, 2020, the City notified EPA that CDM Smith will provide assistance in response to EPA's September review. On October 19, 2020, the City responded to the comments and advised it will be taking two more data points from each service area and the updated local limits in early 2021, barring any delays with the sample collection schedule. The City admits on October 23, 2020, it sent EPA a sampling plan for the two data points and request EPA's response. Respondent admits on October 26, 2020 the City again asks EPA to respond to the sampling plan sent on October 23, 2020.
116. Denied. Respondent admits on March 30, 2021, the City sent EPA two spreadsheets regarding the samples collected and the January 2019 Local limits previously provided on February 5, 2020. On April 7, 2021, EPA required the City to resend once again all of the local limit documents so EPA would have them in one email. On April 15, 2021, the City sent two local limits spreadsheets, a local limits re-evaluation document dated January 2019, a local limits re-evaluation document dated June 11, 2020, and copies of emails dated September 8, 2020, and October 19, 2020. Due to EPA's inefficiencies and/or other problems, EPA required the City to submit the same document at least four times.
117. Denied. Respondent admits on June 17, 2021, the EPA commented on the City's April 15, 2021 submission and the City submitted the final Local Limits to EPA on July 8, 2021 by email and a hard copy was delivered July 15, 2021.
118. Denied. Respondent admits on August 5, 2021, the EPA sent an email to the City approving the local limits submitted on July 8, 2021.
119. Denied.

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VI. PROPOSED PENALTY

Paragraphs 120-121 contain legal conclusions to which no response is required. Respondent contests the proposed assessment of a penalty and denies the allegation of Paragraphs 120-121. The City admits there has been no violation, no harm to the environment, no economic benefit, no history of violations, and the concerns EPA has are all administrative in nature and are paperwork exercises. The City has worked in good faith to address EPA's concerns. Other factors to consider are through no fault of the City, EPA dropped the ball but blamed the City. An example is the revised draft MRL permit that the City provided to EPA on 12/17/2020. During a 1/21/2021 conference call, EPA did not even acknowledge that it had the revised permit in hand, and then EPA further failed to provide any comments until 4/29/2021. The comments it did provide, after five months, were to correct typos. Another example is the draft sampling and analysis plan. The City provided a revised plan on 8/31/2020 and EPA failed to communicate any alleged deficiencies until Thursday, 4/29/2021. Considering all of the facts and circumstances, including the City's many attempts to satisfy EPA's moving target as noted in this Answer in Paragraph 42, assessing a penalty would be grossly unjust.

VII. ANSWER AND RIGHT TO REQUEST A HEARING

Paragraphs 122 – 127 contain legal conclusion to which no response is required. Respondent requests a hearing.

VIII. FAILURE TO FILE AN ANSWER

With respect to Part VIII of the Complaint, Respondent submits this Answer.

IX. SETTLEMENT CONFERENCE

With respect to Part IX of the EPA Complaint, Respondent reserves its right to request a settlement conference.

X. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

The City contests the assessed Penalty.

XI. PUBLIC NOTICE AND

XII. CONSULTATION WITH STATE

With Respect to Parts XI and XII, Respondent states that no response is required for the allegations contained therein, but to the extent that an answer is required, Respondent denies the same and puts EPA on the strictest burden of proof.

XIII. CONTINUING OBLIGATION TO COMPLY

With respect to Part XIII of EPA's complaint, Respondent is without information or knowledge sufficient to either admit or deny the allegations contained there, in accordingly denies the same and puts the EPA to its strictest burden of proof.

XIV. EFFECTIVE DATE

With respect to Part XIV of EPA's complaint, it contains legal conclusion to which no response is required.

AFFIRMATIVE DEFENSES

1. The City denies each and every allegation of the Complaint not specifically admitted.
2. The Complaint fails to state a claim upon which relief may be granted and contains matters of speculation and unsupported by any factual basis.
3. EPA's claims are barred, in whole or in part, because the Pretreatment Regulations of the Clean Water Act, and EPA's interpretations do not provide and have not provided fair notice of the interpretations of law now advanced in the Complaint. Accordingly, EPA's efforts to enforce retroactively those new or vague interpretations deprive the City of Due Process of law and Equal Protection of the law as guaranteed by the Firth Amendment to the Constitution of the United States, and the Administrative Procedure Act, 5 USC. 551-59.
4. The City asserts and preserves the affirmative defenses of Act of God or impossibility.

WHEREFORE, Respondent prays as follows:

1. That the Complaint be dismissed on its merits and with prejudice.
2. That no penalty be imposed upon Respondent.
3. For its costs and disbursement of this action.
4. For any other and further relief deemed just and equitable.

Respectfully submitted this 6 day of October 2021.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.



Catherine A. Laughner

Attorneys for The City of Helena

CERTIFICATE OF SERVICE

I certify the foregoing Answer to Complaint and Notice of Opportunity for Hearing was sent by certified mail, return receipt requested, on this 6 day of October 2021 to:

Colleen Rathbone, Chief
Water Enforcement Branch
Enforcement and Compliance Assurance Division
Region 8, U.S. EPA
1595 Wynkoop Street
Denver, Colorado 80202

In addition, a copy of the Answer to the Complaint and Notice of Opportunity for Hearing was also filed with the Regional Hearing Clerk via email, at Haniewicz.melissa@epa.gov.



BROWNING, KALECZYC, BERRY & HOVEN, P.C.