September 8, 2021

5:02 PM

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**REGION 8**

Received by
EPA Region VIII
Hearing Clerk

| | | |
|---|---|---|
| IN THE MATTER OF: | ) | Docket No. CWA-08-2021-0017 |
| | ) | |
| The City of Helena, Montana, | ) | COMPLAINT AND NOTICE OF |
| | ) | OPPORTUNITY FOR HEARING |
| Respondent | ) | Section 309(g) of the Clean Water Act |
| | ) | |
| | ) | |
| | ) | |

## I. INTRODUCTION

1. In this Complaint and Notice of Opportunity for Hearing (Complaint), the undersigned official of the U.S. Environmental Protection Agency proposes to assess a civil administrative penalty against the City of Helena, Montana (City or Respondent), as more fully described below.

2. This is a pretreatment case. It pertains to the City's wastewater treatment plant located at 2108 Custer Avenue East, Helena, Montana, 59602.

## II. JURISDICTIONAL ALLEGATIONS

3. This Complaint is issued under the authority vested in the Administrator of the EPA by section 309(g) of the Clean Water Act (Act), 33 U.S.C. §1319(g). The undersigned EPA official has been duly authorized to institute this action.

4. This proceeding is subject to the EPA's *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits*, 40 Code of Federal Regulations (C.F.R.) part 22 (Consolidated Rules of Practice), a copy of which is being provided to the City with this Complaint.

## III. GOVERNING LAW

### A. The NPDES Program

5. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters, except as in compliance with other sections of the Act, including section 402, 33 U.S.C. § 1342, which allows discharges authorized by National Pollutant Discharge Elimination System (NPDES) permits.

6. The Act defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

7. The Act defines "pollutant" to include "sewage . . . chemical wastes, biological materials . . . and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6).

8. The Act defines "navigable waters" as the "waters of the United States." 33 U.S.C. § 1362(7).

9. "Waters of the United States" are defined in 40 C.F.R. § 122.2.

10. The Act defines "point source" to include any "discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure [or] container . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

11. The EPA, and states with NPDES programs approved by the EPA, may issue NPDES permits that authorize discharges of pollutants into waters of the United States, subject to conditions and limitations set forth in such permits. 33 U.S.C. § 1342.

12. Among the types of dischargers that can receive NPDES permits authorizing pollutants to be discharged into waters of the United States are publicly owned treatment works, or POTWs. The term "POTW" encompasses a treatment works itself and a municipality with jurisdiction over discharges to and from such a treatment works. 40 C.F.R. § 403.3(q).

## B. The EPA's Pretreatment Program

13. Pollutants from non-domestic sources that are introduced into a POTW are subject to the EPA's pretreatment regulations at 40 C.F.R. chapter I, subchapter N, parts 400 through 471 (the Pretreatment Regulations) and section 307 of the Act, 33 U.S.C. § 1317.

14. Non-domestic sources that introduce pollutants into POTWs are known as "Industrial Users" or "IUs," as defined in 40 C.F.R. § 403.3(j).

15. The introduction of pollutants from an IU to a POTW is known as "Indirect Discharge" or "Discharge," as defined in 40 C.F.R. § 403.3(i). Unless otherwise stated, any reference to a "discharge" in this Complaint shall be the introduction of pollutants from an IU to a POTW, as distinguished from the POTW's discharge of pollutants to waters of the United States.

16. The Pretreatment Regulations include regulations containing pollutant discharge limits. These regulations are known as Pretreatment Standards. 40 C.F.R. § 403.3(l). Other requirements relating to pretreatment are known as Pretreatment Requirements. 40 C.F.R. § 403.3(t).

17. The Pretreatment Regulations also include requirements for IUs in specific industrial categories, as described in 40 C.F.R. § 403.6 and 40 C.F.R. parts 405-471. In this Complaint, these regulations are referenced as the Categorical Pretreatment Standards.

18. According to 40 C.F.R. § 403.3(v), the term "Significant Industrial User," also referenced as "SIU," includes, with exceptions provided in 40 C.F.R. §§ 403.3(v)(2) and 403.3(v)(3):

    (i) Any IU subject to the Categorical Pretreatment Standards (a Categorical Industrial User, or "CIU"); and

    (ii) Any other IU that discharges an average of at least 25,000 gallons per day of process wastewater (excluding sanitary, non-contact cooling and boiler blowdown water) to a POTW; contributes a process wastestream that makes up five or more percent of the average dry weather hydraulic or organic capacity of the POTW's

treatment plant; or is designated as an SIU by the relevant Control Authority (defined in 40 C.F.R. § 403.3(f)) on the basis of having a reasonable potential for adversely affecting the POTW's operation or for violating any Pretreatment Standard or Requirement (in accordance with 40 C.F.R. § 403.8(f)(6)).

19. The Pretreatment Regulations require certain POTWs to establish EPA-approved pretreatment programs. An NPDES permit issued to a POTW must, among other things, incorporate the requirements of the POTW's approved pretreatment program as enforceable terms of the permit. 40 C.F.R. §§ 122.44(j) and 403.8(c).

20. According to 40 C.F.R. § 403.8, a POTW with an approved pretreatment program must develop and implement procedures to ensure compliance with its pretreatment program. These procedures must ensure the POTW is able, among other things:

- to operate pursuant to enforceable legal authority that authorizes or enables the POTW to apply and to enforce the requirements of sections 307(b) and (c) and 402(b)(8) of the Act and any regulations implementing those sections (per 40 C.F.R. § 403.8(f)(1));
- to issue permits, orders, or other control mechanisms to control Indirect Discharges by IUs (per 40 C.F.R. § 403.8(f)(1)(iii));
- to identify IUs that may be subject to the pretreatment program (per 40 C.F.R. § 403.8(f)(2)(i));
- to identify the character and volume of pollutants contributed to the POTW by these IUs (per 40 C.F.R. § 403.8(f)(2)(ii));
- to notify Industrial Users of applicable Pretreatment Standards and any applicable requirements under sections 204(b) and 405 of the Act, 33 U.S.C. §§ 1284(b) and 1345, and subtitles C and D of the Resource Conservation and Recovery Act (per 40 C.F.R. § 403.8(f)(2)(iii));
- to receive and analyze the self-monitoring reports and other notices that 40 C.F.R. § 403.12 requires IUs to submit (per 40 C.F.R. § 403.8(f)(2)(iv));
- to randomly sample and analyze the effluent from IUs and conduct surveillance activities in order to identify, independent of information supplied by IUs, occasional and continuing noncompliance with Pretreatment Standards and to inspect and sample the effluent from each SIU at least once a year (per 40 C.F.R. § 403.8(f)(2)(v));
- to evaluate SIUs for the need to develop a plan or other actions to control Slug Discharges, as defined in 40 C.F.R. § 403.8(f)(2)(vi) (per 40 C.F.R. § 403.8(f)(2)(vi));
- to investigate instances of noncompliance by IUs with Pretreatment Standards and Requirements, as indicated in reports and notices required by 40 C.F.R. § 403.12 or by

analysis, inspection, and surveillance activities described in 40 C.F.R. § 403.8(f)(2)(v) (per 40 C.F.R. § 403.8(f)(2)(vii));

- to comply with the public participation requirements of 40 C.F.R. part 25, including developing and implementing a procedure to evaluate and provide annual public notices of any Significant Non-Compliance (SNC), as defined in 40 C.F.R.§ 403.8(f)(2)(viii), by any IUs (per 40 C.F.R.§ 403.8(f)(2)(viii));

- to have sufficient resources and qualified personnel to carry out its authorities and procedures (per 40 C.F.R.§ 403.8(f)(3));

- to develop and effectively enforce specific limits, known as "local limits," as required by 40 C.F.R. § 403.5(c)(1), to ensure IUs comply with the prohibitions in 40 C.F.R. § 403.5(a)(1) and (b) (per 40 C.F.R.§ 403.8(f)(4)); and

- to develop and implement an enforcement response plan for investigating and responding to instances of noncompliance by IUs (per 40 C.F.R.§ 403.8(f)(5)).

21. Permits that POTWs issue to IUs or SIUs to authorize discharges of pollutants into POTWs are known as "IU permits" or "SIU permits," respectively.

## IV. FINDINGS OF FACT AND LAW

The following findings apply at all times relevant to this proceeding, unless otherwise stated.

### A. The City's POTW

22. The City is a "municipality" as defined by section 502(4) of the Act, 33 U.S.C. § 1362(4), and a "person" as defined by section 502(5) of the Act, 33 U.S.C. § 1362(5).

23. The City owns and operates a wastewater treatment plant (WWTP) located at 2108 Custer Avenue East, Helena, Montana, 59602.

24. The WWTP discharges treated wastewater into Prickly Pear Creek.

25. Prickly Pear Creek is a year-round tributary, via Lake Helena, of the Missouri River, which is navigable-in-fact.

26. Prickly Pear Creek, Lake Helena, and the Missouri River are each a "water of the United States" as defined in 40 C.F.R. § 122.2 and a "navigable water" as defined in section 502(7) of the Act, 33 U.S.C. § 1362(7).

27. The WWTP and the sewers, pipes, and other conveyances leading to it are part of the City's POTW.

28. As a municipality with jurisdiction over discharges to and from its treatment works, the City itself is a "POTW" as defined in 40 C.F.R. §§ 122.2 and 403.3(q).

29. Unless otherwise stated, any references to "the POTW" below in this Complaint shall mean the POTW owned and operated by the City, or the City itself, as the context requires.

30. The SIUs that discharge to the POTW include the following SIUs:

- Decorative Industrial Plating (DIP), which performs electroplating, a core process subject to the Metal Finishing Point Source Category regulations in 40 C.F.R. part 433 and, therefore, a CIU; and

- Montana Rail Link (MRL), which collects wastewater from a train yard facility and has been designated by the City as a SIU, pursuant to 40 C.F.R. § 403.3(v)(ii), on the basis that MRL has a reasonable potential for adversely affecting the POTW's operation.

## B. The City's 1997 and 2012 MPDES Permits

31. On December 11, 1996, the State of Montana Department of Environmental Quality (MDEQ) issued NPDES Permit Number MT0022641 (the 1997 MPDES Permit) to the City, effective January 1, 1997, and expiring October 31, 2001. When the City applied to renew the 1997 MPDES Permit, it was administratively extended until September 30, 2012.

32. On August 22, 2012, MDEQ issued NPDES Permit Number MT0022641 (the 2012 MPDES Permit) to the City, effective October 1, 2012 and expiring September 30, 2017.

33. On June 14, 2017, the City applied to renew the 2012 MPDES Permit, but the application was not complete. On September 21, 2017, the City submitted additional information to correct the noticed deficiency. On September 26, 2017, the City's renewal application was deemed complete, which administratively extended the 2012 MPDES Permit. The administrative extension continues and the 2012 MPDES Permit has been in effect at all times relevant to this Complaint.

34. The 2012 MPDES Permit authorizes the City to discharge from the WWTP into Prickly Pear Creek.

## C. The City's Approved Pretreatment Program

35. The State of Montana is an "NPDES State" as defined in 40 C.F.R. § 403.3(o) because the EPA has approved the State of Montana's NPDES program pursuant to section 402(b) of the Act, 42 U.S.C. § 1342(b).

36. The State of Montana has not, however, sought or received approval for a pretreatment program from the EPA. Therefore, at all times relevant to this Complaint, the State of Montana did not

have an "Approved POTW Pretreatment Program" as defined in 40 C.F.R. § 403.3(d) and the EPA has been the "Approval Authority" as defined in 40 C.F.R. § 403.3(c).

37. The EPA approved the City's pretreatment program on July 24, 1986, at which time the City became the "Control Authority" as defined in 40 C.F.R. § 403.3(f).

38. On June 5, 2002, the EPA approved an update to the City's local limits.

39. The City's pretreatment program as approved by the EPA on July 24, 1986, with the modification approved on June 5, 2002, will be referenced in this Complaint as the "City's Pretreatment Program."

40. Part I.E of the 2012 MPDES Permit requires the City to develop, implement, document, and enforce a pretreatment program in accordance with the Pretreatment Regulations.

### D. The EPA's 2009 Audit

41. On July 14-16, 2009, the EPA conducted an audit of the City's Pretreatment Program (2009 Audit). The EPA mailed a report of the 2009 Audit (2009 Audit Report) to the City on September 8, 2009. The City responded to the 2009 Audit Report on November 19, 2009.

### E. The EPA's 2017 Audit

42. On September 11-13, 2017, the EPA conducted an audit of the City's Pretreatment Program (2017 Audit). The EPA mailed a report of the 2017 Audit (2017 Audit Report) to the City on December 21, 2017. The City responded to the 2017 Audit Report on January 22, 2018 and February 14, 2018.

43. As part of the 2017 Audit, the EPA, along with the City, inspected one IU in Helena, Montana, that introduces non-domestic pollutants into the POTW: DIP, located at 2531 Dodge Avenue, Helena, Montana.

## V. ALLEGED VIOLATIONS OF LAW

### Count I:
### Failure to Operate Pursuant to Adequate Legal Authority

44. As set forth in Paragraph 20, above, the City is required to operate pursuant to legal authority enforceable in federal, state or local courts, which authorizes or enables the City to apply and to enforce the requirements of sections 307(b) and (c) and 402(b)(8) of the Act and any regulations implementing those sections. 40 C.F.R. § 403.8(f)(1). Such authority may be contained in a statute, ordinance, or series of contracts or joint powers agreements the City is authorized to enact, enter into, or implement, and which are authorized by state law. *Id*.

45. The City's legal authority must, at a minimum, enable the City to exercise all functions enumerated in 40 C.F.R. § 403.8(f)(1)(i) through (vi).

### A. Legal Authority in An Ordinance

46. In the 2017 Audit Report, the EPA noted that the City's municipal ordinance (the City Code of Helena, Montana, at Title 6, Public Utilities, Chapter 4, Industrial Wastewater Regulations) needed to be updated, finding that the City's legal authority lacked the following:

    (a) The correct definition of SIU, as required by 40 C.F.R. § 403.3(v);

    (b) The ability to enforce Best Management Practices, as required by 40 C.F.R. § 403.5(c)(4);

    (c) A specific prohibition for toxic gases, vapors and fumes aligning with the corresponding Federal regulations, as required by 40 C.F.R. § 403.5(b)(7); and

    (d) The enforcement authority to immediately and effectively halt or prevent any discharge of pollutants to the POTW which reasonably appears to present an imminent endangerment to the health or welfare of persons or which presents or may present an endangerment to the environment or which threatens to interfere with the operation of the POTW, as required by 40 C.F.R. § 403.8(f)(1)(vi)(B).

47. The City did not take action to address the deficiencies described in Paragraph 46, above, until April 15, 2019, when the City submitted draft updates to its municipal ordinance (2019 Draft Ordinance) to the EPA. On June 17, 2019, the EPA sent two emails to the City, indicating that the 2019 Draft Ordinance was approvable and asking the City to provide supporting information.

48. The City adopted the 2019 Draft Ordinance (Ordinance 3265) on November 18, 2019 (Adopted Ordinance 3265).

49. On July 27, 2020, the City provided to the EPA the supporting information referenced in Paragraph 47, above, including a document proposed as the final Title 6, Chapter 4 of Helena City Code, Industrial Wastewater Regulations.

50. On July 31, 2020, the EPA provided comments to the City on the submittal of information referenced in Paragraph 49, above. The Adopted Ordinance 3265 was identical to the 2019 Draft Ordinance the EPA considered approvable. However, the EPA advised the City that Title 6, Chapter 4 of Helena City Code, Industrial Wastewater Regulations did not incorporate the approvable modifications in the Adopted Ordinance 3265.

51. On July 31, 2020, the City indicated that the City's codifier had not completed the formal codification of the changes shown by Adopted Ordinance 3265.

52. 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. The City also indicated that the changes would be codified in three to four weeks.

53. On August 11, 2020, the EPA indicated that based on the submittal on July 27, 2020, referenced in Paragraph 49, above, and a supplemental submittal on August 3, 2020 referenced in Paragraph 52, above, the ordinance codified in Title 6, Chapter 4 of Helena City Code, Industrial Wastewater Regulations (Approvable Ordinance 3265) was approvable by the EPA, subject to public notice.

54. On October 29, 2020, the EPA public noticed the modifications to the Approvable Ordinance 3265 in the Helena Independent Record for a period of 30 days. No substantive comments were received during the public notice period. On December 1, 2020, pursuant to 40 C.F.R. § 403.18(c), the EPA approved Approvable Ordinance 3265.

55. The City's operation without required legal authorities, as described in Paragraph 46, above, violated 40 C.F.R. § 403.8(f)(1) and part I.E.a of the 2012 MPDES Permit.

### B. Legal Authority in An Intergovernmental Agreement

56. Where necessary, the City is required to establish legally binding agreements with other jurisdictions to ensure compliance by any IUs in those jurisdictions. Part I.E.a of the 2012 MPDES Permit.

57. The Fort Harrison military installation, which is located three miles west of Helena, is a jurisdiction outside of the City's service area that contributes wastewater to the POTW.

58. As part of the 2017 Audit, the EPA determined that the City did not have an intergovernmental agreement (IGA) with the Fort Harrison military installation. The Veterans Affairs Hospital located on the Fort Harrison military installation generates non-domestic pollutants that discharge to the City's sanitary sewer system. These pollutants may impact the POTW. Therefore, the City did not have the authority to implement the City's Pretreatment Program fully within the Fort Harrison military installation as required by 40 C.F.R. § 403.8(f)(1) and part I.E.a of the 2012 MPDES Permit.

59. On April 2, 2001, the City, the Department of Veterans Affairs (DVA), and the Montana Department of Military Affairs (DMA) entered into a Memorandum of Understanding (MOU) allowing the DVA and the DMA "full use" of a sewer line connecting the Fort Harrison military installation to the POTW. In response to the EPA's finding in Paragraph 58, above, the City proposed a draft Addendum to MOU. The City provided the EPA with a draft Addendum to the MOU. The draft Addendum did not include the DVA as a party. The City did not respond to the EPA's inquiries as to the reason for this omission.

60. On July 26, 2021, the City and the DMA executed the Addendum to the MOU referenced in paragraph 59, above. The Addendum indicated that it was specific to the DMA and did not

address, impact, or otherwise affect in any way the DVA's contribution of pollutants to the POTW.

61. The City's operation without required legal authorities, as described in Paragraphs 58 through 60, above, violated and continues to violate 40 C.F.R. § 403.8(f)(1) and part I.E.a of the 2012 MPDES Permit.

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

62. In each SIU permit it issues, the City is required to include, among other things:

(a) a statement of duration (in no case more than five years), under 40 C.F.R. § 403.8(f)(1)(iii)(B)(*1*) and part I.E.a.vi(A) of the 2012 MPDES Permit;

(b) a statement of non-transferability without, at a minimum, prior notification to the POTW and provision of a copy of the existing control mechanism to the new owner or operator, under 40 C.F.R. § 403.8(f)(1)(iii)(B)(*2*) and part I.E.a.vi(B) of the 2012 MPDES Permit;

(c) effluent limits, including Best Management Practices, based on applicable general Pretreatment Standards in 40 C.F.R. part 403, categorical Pretreatment Standards, local limits, and State and local law, under 40 C.F.R. § 403.8(f)(1)(iii)(B)*(3)* and part I.E.a.vi(C) of the 2012 MPDES Permit;

(d) self-monitoring, sampling, reporting, notification, and recordkeeping requirements, under 40 C.F.R. § 403.8(f)(1)(iii)(B)*(4)* and part I.E.a.vi(D) of the 2012 MPDES Permit; and

(e) a statement of applicable civil and criminal penalties for violation of Pretreatment Standards and Requirements, under 40 C.F.R. § 403.8(f)(1)(iii)(B)(*5*) and part I.E.a.vi(E) of the 2012 MPDES Permit.

### A. DIP IU Permit

63. At the time of the 2017 Audit, the IU permit the City had issued to DIP, permit number DIP005, effective October 1, 2016, to September 30, 2020 (DIP IU Permit), allowed for administrative extensions of permits.

64. At the time of the 2017 Audit, and through August 11, 2020, the DIP IU Permit:

(a) failed to include a Total Toxic Organics (TTO) daily maximum permit limit of 2.13 milligrams per liter (mg/L), as required by 40 C.F.R. §§ 403.8(f)(1)(iii)(B)(*3*) and 433.17(a);

(b) allowed for grab sampling for compliance purposes, although there was no support provided for grab sampling being representative of the eight-hour discharge from the facility; and

(c) included the limits listed in the following table for arsenic, chromium III, chrome VI, mercury, molybdenum and selenium, although these limits were not included in the City's local limits or 40 C.F.R. part 433.

| Pollutant | Daily Maximum (mg/L) | Monthly Average (mg/L) |
|---|---|---|
| Arsenic | 0.01 | 0.006 |
| Chromium III | 2.36 | 1.46 |
| Chromium VI | 0.41 | 0.25 |
| Mercury | 0.25 | - |
| Molybdenum | 1.28 | - |
| Selenium | 0.95 | - |

65. On August 11, 2020, the City reissued the DIP IU Permit, permit number DIP005, effective August 15, 2020, to August 14, 2025 (Reissued DIP IU Permit) to remove the administrative extension allowance and correct the deficiencies identified in Paragraph 64, above.

66. The City's failure to include each required condition in the DIP IU Permit and the City's previous allowance of administrative extensions of the permit violated 40 C.F.R. § 403.8(f)(1)(iii)(B) and part I.E.a.vi of the 2012 MPDES Permit.

### B. MRL IU Permit

67. The IU permit the City issued to MRL, permit number 0002-A, effective January 1, 2016 through December 31, 2020 (MRL IU Permit), improperly allowed for administrative extension of permits and did not include each condition required by 40 C.F.R. § 403.8(f)(1)(iii)(B) and part I.E.a.vi of the 2012 MPDES Permit.

68. The MRL IU Permit also:

(a) allowed for sampling to occur "before discharging to [the] sanitary sewer," instead of during the discharge, thus failing to ensure an appropriate sampling location as required

by 40 C.F.R. § 403.8(f)(1)(iii)(B)*(4)*;

(b) allowed for electronic submittals of reports to the City, although the City has not been certified pursuant to 40 C.F.R. part 3, which, under 40 C.F.R. § 403.8(g), is a prerequisite for receiving electronic reports;

(c) allowed for the permit to be reopened to incorporate new or revised requirements contained 40 C.F.R. part 433, although MRL is not subject to that categorical standard;

(d) allowed for permit appeals, although the City's ordinance does not allow for permit appeals;

(e) did not include a statement regarding transferability, despite the requirement for such a statement in 40 C.F.R. § 403.8(f)(1)(iii)(B)*(2)*;

(f) failed to incorporate the hazardous waste notification requirements found in Section 6-4-17.I of the City's ordinance, in violation of the requirement of 40 C.F.R. § 403.8(f)(1)(iii)(B)*(4)* to include notifications based on state and local law; and

(g) incorrectly cited the City's ordinance regarding penalties for violation of the permit conditions.

69. On January 1, 2021, the City reissued the MRL permit (January 2021 MRL Permit). The January 2021 MRL Permit addressed some, but not all, of the deficiencies cited in Paragraph 68, above. The January 2021 MRL Permit still:

(a) allowed for sampling to occur "before discharging to [the] sanitary sewer," instead of during the discharge, thus failing to ensure an appropriate sampling location as required by 40 C.F.R. §§ 403.8(f)(1)(iii)(B)*(4)*; and

(b) allowed for the permit to be reopened to incorporate new or revised requirements contained in 40 C.F.R. part 433, although MRL is not subject to that categorical standard;

70. On May 7, 2021, the City provided the EPA with a proposed update to the MRL permit. The EPA provided comments to the City. In response, the City issued the MRL permit on June 28, 2021, addressing the deficiencies identified in Paragraph 68, above.

71. The City's failure to include each required condition in the MRL IU Permit and the City's allowance of administrative extensions of that permit violated 40 C.F.R. § 403.8(f)(1)(iii)(B) and part I.E.a.vi of the 2012 MPDES Permit.

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

72. The City is required to develop and implement a procedure to identify and locate all possible IUs that might be subject to the City's Pretreatment Program and to make any inventory of IUs available to the EPA upon request. 40 C.F.R. § 403.8(f)(2)(i); part I.E.a.i of the 2012 MPDES Permit. The City is also required to update this information at least yearly or sufficiently frequently to ensure all IUs are properly permitted or controlled (part I.E.a.i of the 2012 MPDES Permit) and to include updated lists of IUs in the annual reports it is required to submit to the EPA (40 C.F.R. § 403.12(i)(1) and part I.E.f.i of the 2012 MPDES Permit).

73. Prior to the 2017 Audit, the City developed an IU inventory of its service area (the City's IU Inventory), which it is required to keep updated and maintained as set forth in Paragraph 72, above. The City's IU Inventory was a listing of IUs in the City's service area that was generated by a computer program known as the JobCal program. The City's IU Inventory identified approximately 525 industrial users in the service area and provided names, addresses, and a broad characterization of the IUs. Based on a review of available IU survey and inspection records during the 2017 Audit, the EPA determined that the City had not invested resources in using the methods discussed in its own inventory procedure. For example, the City had not performed drive-by inspections and facility inspections as identified in its inventory procedure. Additionally, the City had not conducted an inventory of the non-domestic users, including dental facilities, in the Aspen Meadows service area.

74. Based on the EPA's evaluation of the City's IU Inventory mentioned in Paragraph 73, above, the City's IU Inventory had not been updated or maintained as of the date of the 2017 Audit.

75. On July 30, 2020, the City provided the EPA a narrative of the City's IU survey procedures and an industrial waste survey (IWS) form. On August 18, 2020, the EPA provided comments on the IU survey procedures, including citations to requirements that were missing, an observation that the procedures differed from the IU survey procedures presented during the 2017 Audit, and feedback on the City's IWS form. The City and the EPA engaged in additional email discussions concerning the IU survey procedures and the IWS form between August 24, 2020, and August 27, 2020.

76. On August 27, 2020, the City sent the EPA the City's final Industrial User Inventory and Characterization Procedures and indicated that these new procedures superseded the prior IU survey procedures.

77. Also on August 27, 2020, the City notified the EPA that the new Industrial User Inventory and Characterization Procedures were effective immediately and that the City had already begun sending out the IWS form to IUs.

78. Also on August 27, 2020, the EPA asked the City to submit, by April 1, 2021, a summary of the City's inspections of potential IUs. The City has not submitted that information to the EPA.

79. The City's failure to implement its procedure to identify and locate all possible IUs that might be subject to the City's Pretreatment Program violated and continues to violate 40 C.F.R. § 403.8(f)(2)(i) and part I.E.a.i of the 2012 MPDES Permit. In addition, the City's failure to update this information at least yearly or sufficiently frequently to ensure all IUs are properly permitted or controlled violated and continues to violate 40 C.F.R. § 403.12(i)(1) and parts I.E.a.i and I.E.f.i of the 2012 MPDES Permit.

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

80. According to 40 C.F.R. § 403.8(f)(2)(ii), the City is required to develop and implement procedures to enable it to identify the character and volume of pollutants contributed by IUs to the POTW.

81. The IU permits the City issued in 2016 and 2021 to MRL required MRL to sample "[p]rior to discharging to the sanitary sewer" instead of sampling during the discharge event. (See Part 2.a of each permit) Thus, the City failed to include a sampling requirement to ensure the sample would be representative of daily operations or would accurately identify the character and volume of pollutants being contributed to the POTW.

82. The 2017 Audit found that MRL sampled the final batch tank prior to discharge and submitted the results to the City for permission to discharge. MRL did not sample the effluent from the final batch tank during the actual discharge, meaning that its sample was not representative of the discharge. As mentioned in Paragraph 68, above, the permit the City issued to MRL allowed sampling to occur before, and not during, the discharge. Thus, the City failed to ensure that its sampling requirement would accurately identify the character and volume of pollutants being contributed to the POTW. On June 28, 2021, the City modified the MRL permit to require sampling prior to and during each discharge from Outfall 001. The permit modification also indicated that the compliance sample is the sample taken during the discharge.

83. The City's failure to implement procedures to enable it to identify the character and volume of pollutants contributed to the POTW by MRL, as described in Paragraph 81, above, violated 40 C.F.R. § 403.8(f)(2)(ii).

**Count V:**
**Failure to Implement Procedure to Notify IUs of Applicable Pretreatment Standards and Requirements**

84. The City is required to notify the IUs it has identified under 40 C.F.R. § 403.8(f)(2)(i) of applicable Pretreatment Standards and any applicable requirements of sections 204(b) and 405 of the Act and subtitles C and D of the Resource Conservation and Recovery Act. 40 C.F.R. § 403.8(f)(2)(iii) and part I.E.a.i of the 2012 MPDES Permit and, as to the RCRA notifications, part I.E.a.x of the 2012 MPDES Permit.

85. The 2017 Audit found that the City's industrial waste survey procedure did not address notifying IUs of applicable Pretreatment Standards and any applicable requirements under sections 204(b) and 405 of the Act and subtitles C and D of the Resource Conservation and Recovery Act.

86. On August 18, 2020, in the course of providing comments to the City on the City's IWS procedure (see Count III, above), the EPA noted that the City's procedures were still missing notifications to IUs of applicable Pretreatment Standards and other requirements referenced in Paragraph 85, above. The EPA also referred the City to the 2017 Audit for more information on this requirement.

87. On August 27, 2020, the City provided the EPA the City's final IWS procedure, which included notification to IUs of applicable Pretreatment Standards and other requirements referenced in Paragraph 85, above. The City has not, however, demonstrated that it has implemented its procedure by notifying any IUs as required by 40 C.F.R. § 403.8(f)(2)(iii) and part I.E.a.i of the 2012 MPDES Permit and, as to the RCRA notifications, part I.E.a.x of the 2012 MPDES Permit.

88. The City's failure to implement its procedure to notify IUs of applicable Pretreatment Standards and other requirements referenced in Paragraph 85, above, violated and continues to violate 40 C.F.R. § 403.8(f)(2)(iii) and part I.E.a.i of the 2012 MPDES Permit and, as to the RCRA notifications, part I.E.a.x of the 2012 MPDES Permit.

## Count VI:
## Failure to Analyze Self-Monitoring Report

89. According to 40 C.F.R. § 403.8(f)(2)(iv), the City is required to receive and analyze self-monitoring reports and other notices submitted by IUs.

90. The City's failures to analyze the MRL self-monitoring report referenced in Paragraph 82, above, and to discern that MRL was not collecting a sample representative of the discharge to the City's POTW, as described in Paragraph 82, above, violated 40 C.F.R. § 403.8(f)(2)(iv).

## Count VII:
## Failure to Sample, Analyze, and Conduct Surveillance of IUs and Failure to Implement Procedures to Investigate Noncompliance

91. According to 40 C.F.R. § 403.8(f)(2)(v), the City is required:

    (a) to conduct random sampling and analysis of effluent from IUs and to conduct surveillance activities to identify, independent of information supplied by IUs, occasional and continuing noncompliance with Pretreatment Standards, and

    (b) to develop and implement procedures to inspect and sample each SIU at least once a year, with exceptions not applicable here.

92. The City is required to develop and implement procedures to investigate instances of noncompliance with Pretreatment Standards and Requirements, as indicated in reports and notices required under § 403.12, or indicated by analysis, inspection, and surveillance activities. 40 C.F.R. § 403.8(f)(2)(vii) and part I.E.a.ii of the 2012 MPDES Permit.

93. The 2017 Audit found that the City's inspection reports for DIP and MRL were not adequate to determine compliance with Pretreatment Standards and Requirements. The SIU inspection reports were not based on current information gathered during the facility inspection. Instead, the reports were copied and pasted from prior years, going back as far as three years prior to the date of the inspection. In addition, the reports failed to include sufficient information on these facilities' discharges to ensure compliance sampling was representative.

94. The 2017 Audit found that the City failed to perform independent pH samples at DIP.

95. DIP discharges from the electrolytic cleaner an average of eight hours per day. The City sampled the facility using a grab sampling technique that is not representative of the discharge.

96. On August 3, 2020, the City provided the EPA with the City's Industrial Pretreatment Sampling and Analysis Plan (Plan) for sampling the City's SIUs. On August 18, 2020, the EPA provided comments to the City on the Plan. On August 31, 2020, the City addressed EPA's comments, except for the comment that the Plan did not address creating and maintaining required records needed to assure compliance with 40 C.F.R. § 403.12(o).

97. The 2017 Audit found that during the City's annual inspection of DIP, the City had not evaluated DIP's safety data sheets (SDS) of the chemicals used in its process to determine if DIP discharged TTOs in quantities with the potential to impact the TTO daily maximum limit found in 40 C.F.R. § 433.17(a).

98. After the 2017 Audit, on June 11, 2020, the City indicated to the EPA that during annual inspections of DIP, the City's staff was evaluating DIP for chemicals to determine whether the facility was discharging any total toxic organics subject to 40 C.F.R. part 433. The City indicated that DIP had been submitting a Toxic Organic Management Plan and the TTO certification statement throughout 2018.

99. On August 11, 2020, when the City reissued the DIP IU permit (see Paragraph 65, above) it included a requirement for DIP to maintain Safety Data Sheets (SDS) on file at the facility and notify the City with each quarterly report of any new chemicals used in the DIP process.

100. The City's failure to develop an adequate sampling and analysis plan, as described in Paragraph 96, above, violated and continues to violate 40 C.F.R. §§ 403.8(f)(2)(v) and 403.8(f)(2)(vii).

101. The City's failures to conduct inspections and produce inspection reports in a manner adequate to identify noncompliance, to perform independent pH sampling at DIP, to perform representative sampling at DIP, and evaluate whether DIP discharged TTOs, as described in Paragraphs 93, 94, 95, and 97, above, violated 40 C.F.R. §§ 403.8(f)(2)(v) and 403.8(f)(2)(vii).

## Count VIII:
## Failure to Update Local Limits

102. The City is required either to develop specific local limits on discharges to the POTW to implement the prohibitions in 40 C.F.R. § 403.5(a)(1) and (b) or to demonstrate these limits are not necessary. 40 C.F.R. §§ 403.5(c)(1) and 403.8(f)(4); part I.E.b of the 2012 MPDES Permit.

103. The City is required to continue to develop its local limits as necessary based, for example, on current data and standards, and to enforce these limits effectively. 40 C.F.R. §§ 403.5(c)(1); part I.E.b of the 2012 MPDES Permit.

104. In developing and enforcing local limits, the City is required to provide notice to persons who have requested notice and an opportunity to respond. 40 C.F.R. § 403.5(c)(3).

105. Part I.E.b of the 2012 MPDES Permit states:

> The Permittee shall establish and enforce specific local limits to implement the provisions of 40 CFR Section 403.5(a) and (b), as required by 40 CFR Section 403.5(c). The Permittee shall continue to develop these limits as necessary and effectively enforce such limits. In accordance with EPA policy and with the requirements of 40 CFR sections 403.8(f)(4) and 403.5(c), the Permittee shall determine if technically based local limits are necessary to implement the general and specific prohibitions of 40 CFR sections 403.5(a) and (b).
>
> This evaluation should be conducted in accordance with the latest revision of the "EPA Region VIII Strategy for Developing Technically Based Local Limits[,"] and after review of EPA's "Local Limits Development Guidance" July 2004. Where the Permittee determines that revised or new local limits are necessary, the Permittee shall submit the proposed local limits to the Approval Authority in an approvable form in accordance with 40 CFR Section 403.18.

106. The City included local limits with its original program submission to the EPA in 1986.

107. The EPA approved updated local limits for the City in 2002.

108. The 2009 Audit found that the City had not updated its local limits since 2002 and indicated that the City needed to update its local limits as a corrective action.

109. In response to the October 1, 2012 MPDES permit reissuance and the 2009 Audit Report, the City provided a technical memorandum to the EPA on June 28, 2013. The City's technical memorandum stated that its local limits needed to be updated. The City proposed to provide a first draft of its local limits to the EPA by February 1, 2016.

110. The City submitted the first draft of its revised local limits to the EPA on April 21, 2016, and the EPA provided comments to ensure the local limits were approvable. The City submitted a second draft of local limits on November 21, 2016. On April 21, 2017, the City indicated to the EPA that it would update its municipal ordinance and submit it with the final draft of its local limits.

111. The 2017 Audit, like the 2009 Audit, found that the City had not updated its local limits since 2002 and indicated that the City needed to update its local limits as a corrective action.

112. On February 14, 2018, the City indicated that MDEQ was in the process of writing the City's new MPDES Permit and that once the City received the permit with new discharge limits, the City would continue working on development of the local limits.

113. On February 12, 2019, the City sent its draft local limits to the EPA for approval. On April 15, 2019, the EPA provided comments on the City's draft local limits.

114. On June 11, 2020, the City submitted its reevaluation of local limits for EPA approval. On September 8, 2020, the EPA notified the City that the submittal did not consider all of the EPA comments referenced in Paragraph 113, above, and was otherwise not complete.

115. On October 2, 2020, the City notified the EPA that the City had hired a contractor to provide assistance with updating the local limits. On October 19, 2020, the City notified the EPA that it would address the EPA's comments referenced in Paragraph 113, above, and would provide updated local limits in early 2021.

116. On April 15, 2021, the City sent the EPA, for review and approval, 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.

117. On June 17, 2021, the EPA commented on the City's April 15, 2021 submission. In response the City submitted revised local limits to the EPA on July 8, 2021 via email.

118. On August 5, 2021, the EPA sent an email to the City indicating that the local limits submitted on July 8, 2021 corrected issues previously identified by the EPA. The EPA indicated that the local limits update would constitute a substantial program modification requiring approval at the local level and from the EPA as the Approval Authority. The EPA requested that the City submit the local limits to the City Council for a first approval reading during a public meeting. The EPA's email indicated that if no changes were made during the first City Council reading, the local limits should be formally submitted to the EPA for public notice and approval.

119. The City's failure to update its local limits violated and continues to violate 40 C.F.R. §§ 403.5(c) and 403.8(f)(4) and part I.E.b of the 2012 MPDES Permit.

## VI. PROPOSED PENALTY

120. Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), and 40 C.F.R. part 19 authorize the EPA to impose Class I administrative penalties of up to $22,584 per violation, up to a total of $56,469, for violations occurring after November 2, 2015, where penalties are assessed on or after December 23, 2020. The EPA proposes to assess a penalty of **$40,000** for the violations alleged above.

121. In determining the amount of the penalty to be assessed, the EPA considered the nature, circumstances, extent, and gravity of the violations, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require, in accordance with section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3).

## VII. ANSWER AND RIGHT TO REQUEST A HEARING

122. Pursuant to 40 C.F.R. § 22.15(a), the City may file an answer in order to contest any material fact upon which this Complaint is based, contend that the proposed penalty is inappropriate, or contend that The City is entitled to judgment as a matter of law.

123. Any such answer to the Complaint must be filed with the Regional Hearing Clerk within 30 days of the Effective Date of this Complaint (see Paragraph 139, below). Filing can be accomplished by email, in accordance with the accompanying May 8, 2020 Standing Order by Regional Judicial and Presiding Officer Katherin E. Hall. The email address for the Regional Hearing Clerk is Haniewicz.melissa@epa.gov. Filing can also be accomplished by U.S. mail or delivery to the following:

> Regional Hearing Clerk
> U.S. Environmental Protection Agency (8RC)
> 1595 Wynkoop Street
> Denver, Colorado 80202-1129

124. The City must provide a copy of the answer and every other document filed in this proceeding to the EPA enforcement attorney. This can be accomplished via email, to Livingston.peggy@epa.gov. It can also be accomplished by mail or delivery to the following:

> Margaret J. (Peggy) Livingston, Enforcement Attorney
> Legal Enforcement Program, 8ENF-L
> U.S. Environmental Protection Agency, Region 8
> 1595 Wynkoop Street
> Denver, Colorado 80202-1129

125. Pursuant to 40 C.F.R. § 22.15(b), the City's answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with respect to which the City has any knowledge, or clearly state that the City has no knowledge as to particular factual

allegations in the Complaint. If the City states in its answer that it has no knowledge of a particular factual allegation, the allegation shall be deemed denied. The City's answer shall also state the circumstances or arguments for any defense the City wishes to assert, challenges to any factual allegation in the Complaint, and any basis the City may have to oppose the Complaint's proposed penalty.

126. Pursuant to 40 C.F.R. § 22.15(d), the City's failure to admit, deny, or explain any factual allegation in its answer constitutes an admission of that allegation.

127. The City has the right to request a hearing in its answer. Pursuant to 40 C.F.R. § 22.15(c), the City has the right to request a hearing upon any issue raised by the Complaint and answer, including any fact alleged in this Complaint, the appropriateness of the proposed penalty, and/or to assert that it is entitled to judgment as a matter of law. Even if the City does not explicitly request a hearing in its answer, the Presiding Officer assigned to this case may hold such a hearing if the City's answer raises issues appropriate for adjudication. The procedures for any such hearing and for all proceedings in this action are set out in the Consolidated Rules of Practice.

## VIII. FAILURE TO FILE AN ANSWER

128. If the City fails to file an answer as further specified above, the City may be found to be in default. Default constitutes an admission of all facts alleged in this Complaint and a waiver of the City's right to a hearing on the EPA's factual allegations. In order to avoid default in this matter, the City must, within 30 days of the Effective Date of this Complaint, either: (1) settle this matter with the EPA or (2) file both an original and one copy of a written answer to this Complaint with the Regional Hearing Clerk at the address specified above.

129. ***Failure to file a written answer within 30 days may result in the issuance of a default order imposing the penalty proposed above without further proceedings.***

130. If the City fails to pay the entire penalty assessed in any default order by the due date, the United States may file a civil judicial action to collect the assessed penalty and any applicable interest, handling fees, and additional penalties pursuant to the Federal Claims Collection Act, 31 U.S.C. § 3701 et seq. or any other applicable law.

## IX. SETTLEMENT CONFERENCE

131. Regardless of whether the City files an answer or requests a hearing, the City may confer with EPA staff concerning the alleged violations and the amount of any penalty. Such a conference provides the City with an opportunity to respond informally to the allegations in this Complaint, to submit any additional information to the EPA that may be relevant to this matter, and to explore any opportunities for settling this matter.

132. A settlement conference does not, however, affect the City's obligation to file a written answer within 30 days of the Effective Date of the Complaint, nor does it waive the City's right to

request a hearing. The City and the EPA may simultaneously pursue the adjudicatory hearing process and possible settlement of this matter. Any request for settlement negotiations should be directed to the enforcement attorney named above, who can also be reached by telephone at (303) 312-6858.

## X. RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

133. The City may resolve this proceeding at any time by paying the penalty amount proposed in this Complaint in full. Such payment need not contain any response to, or admission of, the allegations in this Complaint. Such payment would waive the City's rights to contest the allegations in this Complaint and to appeal any final order resulting from this Complaint.

134. If such payment is made within 30 calendar days of the Effective Date of this Complaint, the City need not file an answer. The City may obtain a 30-day extension to pay the proposed penalty in full without filing an answer by complying with the requirements of 40 C.F.R. § 22.18(a)(2).

135. The payment shall be made in the amount stated in Paragraph 120, above.

**a.** Payment shall be made by any method provided on the following website https://www.epa.gov/financial/makepayment, following the instructions under the heading "Civil Penalties.

b. Within five days of payment, copies of the record of payment shall be emailed to Llamozas.emilio@epa.gov and Haniewicz.melissa@epa.gov or, alternatively, sent to:

Emilio Llamozas, Environmental Engineer
U.S. Environmental Protection Agency (8ENF-W-NP)
1595 Wynkoop Street
Denver, Colorado 80202-1129

and

Regional Hearing Clerk
U.S. Environmental Protection Agency (8RC)
1595 Wynkoop Street
Denver, Colorado 80202-1129

The email transmitting the record of payment must include the case title and docket number of this proceeding (see the first page of this Complaint). If the record of payment is not transmitted by email, it must be accompanied by a transmittal letter identifying the case title and docket number.

## XI. PUBLIC NOTICE

136. As required by section 309(g)(4) of the Act, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45(b)(1), prior to assessing an administrative penalty, the EPA will provide public notice of the proposed penalty and a reasonable opportunity to comment on the matter and, if a hearing is held, to be heard and present evidence.

## XII. CONSULTATION WITH STATE

137. As required by section 309(g) of the Act, 33 U.S.C. § 1319(g), and 40 C.F.R. § 22.38(b), the EPA will notify the State of Montana Department of Environmental Quality of the issuance of this Complaint..

## XIII. CONTINUING OBLIGATION TO COMPLY

138. Neither assessment nor payment of the administrative penalty shall affect the City's continuing obligation to comply with the Act, any regulation, permit, or order issued under the Act, or any other federal, state, or local law.

## XIV. EFFECTIVE DATE

139. The "Effective Date" of this Complaint is the date of service. The date of service is the date the City Manager (see certificate of service, below) is personally served with this Complaint or signs a return mail receipt or other written verification of delivery, in accordance with 40 C.F.R. §§ 22.5(b) and 22.7(c).

**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

Date: September 3, 2021

By: COLLEEN RATHBONE Digitally signed by COLLEEN RATHBONE Date: 2021.09.03 14:16:51 -06'00'

Colleen Rathbone, Chief
Water Enforcement Branch
Enforcement and Compliance Assurance Division
Region 8, U.S. EPA
1595 Wynkoop Street
Denver, Colorado 80202
(303) 312-6133
**Complainant**

## CERTIFICATE OF SERVICE

I certify the foregoing Complaint and Notice of Opportunity for Hearing, with a copy of 40 C.F.R. part 22 and a copy of the May 8, 2020 Standing Order of Regional Judicial and Presiding Officer Katherin E. Hall, was sent by certified mail, return receipt requested, on this day to:

Ms. Rachel Harlow-Schalk
City Manager
City of Helena
316 North Park Avenue
Helena, Montana 59623

A copy was also transmitted by email to Catherine Laughner, counsel for the City of Helena, at cathyl@bkbh.com.

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

_____ By: _____
Date

Region 8, U.S. EPA
1595 Wynkoop Street
Denver, Colorado 80202