

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of

ESPANOLA MERCANTILE COMPANY, INC.

d/b/a ESPANOLA TRANSIT MIX

Docket No. VI-93-1604

Respondent

Judge Greene

ORDER GRANTING MOTION
FOR FURTHER CONSIDERATION AND ACTION BY THE COURT
and ORDER DISPOSING OF THE QUESTION ON ITS MERITS

By the Ruling Relating to Respondent's Motion to Enforce Agreement, May 5, 1995 ("Ruling"), the parties were required to show cause why the matter described therein should not be set for hearing or, alternatively, decided upon submissions including the form and language of the consent agreement favored by each party at that time. The parties were also urged to resume their efforts to agree upon the language and form of the agreement and consent order, since the facts and settlement amount were essentially not in dispute.¹ Each party did then submit a proposed agreement, including proposed stipulations of facts and law. The parties' versions of the stipulations differed only in minor ways.

Thereafter, in keeping with the intent of the Ruling, Complainant sought a compromise with Respondent as to wording and other matters, and prepared a revised proposal. The result is a document styled "Settlement Agreement and Order" which was attached to Complainant's May 22, 1995, Motion for Further Consideration and Action by the Court. This document was prepared by Complainant alone, presumably in the expectation that Respondent would cooperate in the effort to arrive at complete, or at least substantial, agreement as to the language and form of the agreement. Respondent did not respond to the new proposal,² and nothing has been received by way of a response to Complainant's May 22, 1995, motion. In view of Respondent's failure to make itself heard in any effort to refine the offered compromise, in view of the

consistency of Complainant's document with the "provisions and objectives of the Act and applicable regulations,"³ and in view of Respondent's disinclination to articulate a particular basis for its objection to Complainant's original proposed agreement -- such as that it was inappropriate, unfair, or prejudicial in some specified way, -- it is concluded that Complainant's revised document accurately reflects the undisputed facts as proposed in both Respondent's and Complainant's versions⁴, and that its recitations in the "Statutory Authority" and "Order" sections of the document are reasonable, proper, and appropriate in the circumstances. Accordingly, the document should be entered.

Respondent's original motion to enforce its version of the settlement agreement, therefore, is denied. Complainant's motion for a ruling in favor of its May 22, 1995, "Settlement Agreement and Order" is hereby granted.

The Matter of Deference

It is important to address an argument incompletely made and responded to by the parties, to the effect that EPA's statutory and regulatory interpretations are "entitled to great deference."⁵ Complainant is correct in pointing out that EPA's interpretations of the statutes and applicable regulations it enforces are generally *accorded* deference if they are reasonable, but fails to add that this is an *appellate review standard*; it is upon appellate review that deference is usually accorded reasonable EPA interpretations by federal courts.⁶ There has been considerable discussion in the cases, particularly in the Court of Appeals for the District of Columbia Circuit, as to when and just how much deference (not to say "great" deference) is to be accorded. It is noted further that while some decisions do speak of entitlement, the thrust has been that federal appellate courts *will not disturb* reasonable agency interpretations, which is closer akin to according deference than to recognizing entitlement. Arguments made for agency interpretations at the trial level are, obviously, not accorded such deference. If this were not so, little purpose would be served by Congressional mandates in many statutes, including the Clean Water Act, that persons against whom agency charges are lodged are entitled to adjudication of those charges before an independent federal administrative law judge appointed pursuant to the Administrative Procedure Act, 5 U.S.C. § 3105.

ORDER

1. It is Ordered that Complainant's Motion for Further Consideration and Action by the Court to specify the attached "Settlement Agreement and Order" shall be,

and it is hereby, granted. The "Settlement Agreement and Order" is accordingly entered as representing the appropriate disposition of the issues of form and language of the settlement agreement, and of the entire matter on its merits.

2. It is FURTHER ORDERED that Complainant' s motions to strike and for sanctions by "accelerated decision" shall be, and they are hereby, denied. Respondent's motion to enforce the settlement agreement is denied.

3. And it is FURTHER ORDERED that during the week ending April 11, 1997, the parties shall report upon their progress in executing the agreement.⁷

J. F. Greene
Administrative Law Judge

Washington, D. C.
March 10, 1997

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order, was filed with the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on March 10, 1997.

Shirley Smith
Legal Staff Assistant
For Judge J. F. Greene

NAME OF RESPONDENT: Espanola Mercantile Company, Inc. d/b/a Espanola Transit Mix

DOCKET NUMBER: VI-93-1604

Loren Vaughn
Regional Hearing Clerk
Region VI - EPA
1445 Ross Avenue
Dallas, Texas 75202-2733

Mark S. Forcier, Esq.
Office of Regional Counsel
Region VI - EPA

1445 Ross Avenue
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

DOCKET NO. VI -93-1604

**Espanola Mercantile Company,
Inc., a New Mexico corporation,
d. b. a. ESPANOLA TRANSIT MIX,**

**Respondent
AGREEMENT**

SETTLEMENT

AND ORDER

Facility No. NMU000003

I. STATUTORY AUTHORITY

1. This Settlement Agreement and Order is issued under the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by Section 309(g) of the Clean Water Act (herein "the Act"), 33 U.S.C. § 1319(g). The Administrator has delegated this authority to the Regional Administrator of EPA Region 6, who hereby issues this document in accord with

the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits", 40 C.F.R. Part 22, as a Consent Agreement within the meaning of 40 C.F.R. § 22.03(a), and as an "an order assessing a civil penalty" within the meaning of 40 C.F.R. § 22.18(b) and (c) and 33 U.S.C. §

II. STIPULATIONS

2. Espanola Mercantile Company, Inc., d.b.a. Espanola Transit Mix (herein "Respondent") is a corporation chartered under the laws of the State of New Mexico, and doing business in the State of New Mexico.

3. As a "corporation", Respondent is a "person" within the meaning of the Section 502(5) of the Act, 33 U.S.C. § 1362(5).

4. Respondent owns and operates a facility located in Espanola, New Mexico (the "facility"), alleged in the Complaint to have discharged pollutants to the receiving waters of the Rio Grande, a navigable water of the United States within the meaning of Section 502 of the Act, 33 U.S.C. § 1362.

5. Respondent is, therefore, subject to the provisions of the Act, 33 U.S.C. § 1251 et seq., including Sections 301(a) and 309(g) of the Act, 33 U.S.C. §§ 1311(a) and 1319(g).

6. On January 11, 1993, EPA Region 6 issued to Respondent a Proposal to Assess a Class II Administrative Penalty under Clean Water Act § 309(g) ("the Complaint") pursuant to Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), Docket No. VI-93-1604, which included formal findings of violation, a notice of the proposed assessment of a civil penalty of \$125,000 against Respondent, and a notice of Respondent's opportunity to request a hearing on the proposed administrative penalty assessment.

7. On January 11, 1993, the Surface Water Bureau of the New Mexico Environmental Department was notified and given an opportunity to consult with EPA regarding the proposed assessment of an administrative penalty against Respondent.

8. EPA notified the public of the Administrative Complaint and afforded the public thirty (30) days in which to comment on the Complaint and proposed penalty. At the expiration of the notice period, EPA had received no comments from the public.

9. Section 301 of the Act, 33 U.S.C. § 1311, makes it unlawful for any person to discharge any pollutant to the waters of the United States except with authorization and in compliance with effluent limitations established pursuant to the Act.

10. Respondent was alleged in the Complaint to have been required by the Act to make application for and to be issued an NPDES permit prior to any discharge of pollutants from its facility to the waters of the United States, as well as to comply with the other requirements and conditions of the issuance of such permit.

11. At the times described in the Complaint, Respondent had neither made application for, nor been issued, an NPDES permit for any discharges from the facility. Respondent was, therefore, alleged in the Complaint described above to have violated Section 301 of the Act, 33 U.S.C. § 1311, by discharging without a permit.

12. On January 22, 1993, Respondent timely filed a response to the Complaint and requested a Hearing regarding the violations alleged, addressing the specific allegations in the Complaint within the meaning of 40 C.F.R. § 22.15(b) and (d).

13. The Parties agree that settlement of this matter without litigation will save time and resources, that it is in the public interest, and that entry into this Settlement Agreement and order is the most appropriate means of resolving this matter.

14. Respondent admits the jurisdictional allegations of the Complaint and expressly waives its right to a hearing or appeal of this Order pursuant to Sections 309(g) (2) and (8) of the Act, 33 U.S.C. §§ 1319(g)(2) and (8), on penalty assessment, or on any other issue of law or fact relevant to this proceeding.

Respondent waives all defenses which have been or could have been raised to the claims set out in the Complaint, and waives its right to judicial review of this administrative assessment.

15. Respondent neither admits nor denies the findings of fact and conclusions of law contained in the Complaint, nor the allegations contained in the Stipulations of Fact and of Law herein, for the purposes of this Settlement Agreement and Order.

16. Before the taking of any testimony, and without adjudication of any issues of law or fact, the parties agree to the terms of this Settlement Agreement and Order and to its issuance; Respondent consents to the payment of the amount and by the method stated below.

IV. ORDER

17. Based on the foregoing Stipulations, EPA Region 6 having taken into account the statutory requirements stated in Section 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), EPA Region 6 hereby ORDERS, AND RESPONDENT AGREES, that Respondent shall pay to the United States the amount of FIFTY THOUSAND DOLLARS (\$50,000) to settle all claims and allegations contained in the Complaint.

18. Payment shall be made within **thirty (30) days of the effective date of this Settlement Agreement and order** by mailing a money order, cashier's check, or certified check, payable to

"Treasurer of the United States", to the following address:

Regional Hearing Clerk (6C)
U.S. EPA, Region 6
P.O. Box 360582M
Pittsburgh, PA 15251

Docket No. VI-93-1604 should be clearly typed on the check to ensure credit for payment.

19. Respondent shall send simultaneous notice of each payment, including a copy of the money order, cashier's check, or certified check, to each of the following:

(1) Regional Hearing Clerk (6C)
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

(2) Ms. Ruth Gibson (6W-EA)
Water Management Division
Enforcement Branch
U.S. EPA, Region 6

1445 Ross Avenue
Dallas, Texas 75202-2733

(3)Associate Regional Counsel
for Water Enforcement (6C-AW)
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Respondent's adherence to these procedures will ensure proper credit when payments are received.

20. If the United States does not receive payment within the time and under the terms specified herein, interest will accrue on the unpaid balance, from the due date, at the current annual rate prescribed and published by the Secretary of the Treasury in the Federal Register and the Treasury Fiscal Requirements Manual Bulletin, per annum, through the date of payment. Late payments and final payments shall include all accrued interest.

21. If all or part of the payment is overdue, EPA will impose a late-payment handling charge of \$15, with an additional delinquent notice charge of \$15 for each subsequent 30-day period. EPA will also apply a six percent (6%) per annum penalty on any principal amount not paid within ninety (90) days of the due date. Penalties under other federal statute for failure to make timely payment may also apply.

22. Failure by Respondent to pay the described amounts according to the terms of this Settlement Agreement and order, in full, by the due date, may subject Respondent to a civil action to collect the amounts described herein, including any fees, and interest described herein, plus all reasonable costs and expenses, including attorneys' fees, court costs, and other legal expenses incurred by the United State, pursuant to Section 309 (g) (9) of the Act, 33 U. S.,C. § 1319 (g) (9). In any such enforcement or collection action, neither the validity, amount, nor appropriateness of the settlement, nor the terms of this Settlement Agreement and Order, shall be subject to review.

V. GENERAL PROVISIONS

23. To execute this Agreement, Respondent shall forward two (2) copies of this Settlement Agreement and Order, each with original signatures, to:

Ms. Darlene Whitten-Hill
Water Enforcement Branch (6W-EA)
U.S. EPA Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

24. Issuance of this Order does not relieve Respondent from responsibility to comply with all requirements of the Act and the requirements of any permits issued thereunder, as described in Section 309 (g) (7) , 33 U. S. C. § 1319 (g) (7), nor does it constitute a waiver by EPA of its right to enforce compliance with the requirements of Respondent's permits or other requirements of the Act, except as to any requirement to pay any amount or perform any corrective action described herein for the violations alleged in the Complaint.

25. The provisions of this Settlement Agreement shall be binding upon Respondent, its officers, directors, agents, employees, successors and assignees.

26. Each party agrees to bear its own costs and attorneys fees in this matter, except to the extent that Respondent agrees herein to be responsible for reasonable costs and expenses of enforcement and collection proceedings for failure to comply with the terms of this Settlement Agreement and order.

VI. EFFECTIVE DATE

27. This Settlement Agreement and Order shall become effective on the date it is signed below by the Regional Administrator.

In recognition and acceptance of the foregoing:

Mr. Richard P. Cook
for Espanola Mercantile Company, Inc.
d.b.a. Espanola Transit Mix
Espanola, New Mexico

Myron O. Knudson, P.E.
Director, Water Management Division (6W)
EPA Region 6

Jane N. Saginaw
Regional Administrator (6A)
U.S. EPA Region 6

¹ Complainant's Response on the Merits to Respondent's Motion to Enforce Settlement Agreement, at 1. See also proposed agreements submitted by the parties.

² Complainant's Motion for Further Consideration, at 2-3.

³ 40 C.F.R. §§ 22.03, 22.03(a).

⁴ Respondent's version of the stipulations contains slightly different, but equally accurate and appropriate language. For instance, there is no why Respondent's language "and water quality standards" in stipulation 9 should not be used; in stipulation 11, Respondent proposes ". . . . NPDES permit for the discharges alleged to have come from the facility," while Complainant proposed ". . . . NPDES permit for any discharges from the facility." Both are accurate, and both could be used since they are not inconsistent.

⁵ Complainant's Response on the Merits to Respondent's Motion to Enforce Settlement Agreement, at 9; Respondent's Reply to Response on the Merits to Motion to Enforce Settlement Agreement at 7-8; Complainant's Further Response to Respondent's Arguments in Favor of a Motion to Enforce Settlement Agreement, at 10-12.

⁶ But, see various circuit court decisions where Judge (now Justice) Scalia seemed to say that even where such interpretations are reasonable, if another interpretation seems more reasonable, the court may or will substitute it for the Agency's judgment. Before his elevation to the Circuit Court, Scalia was Chair of the Administrative Conference of the United States, and made a something of a specialty of administrative law.

⁷ Complainant states that following consideration of the parties' submissions, the parties "will then execute the selected document, and present it to the Court to resolve the case." Complainant's Third Request for Expedited Consideration, August 12, 1996.