

ARKANSAS DEPARTMENT OF ENERGY AND ENVIRONMENT
DIVISION OF ENVIRONMENTAL QUALITY

IN THE MATTER OF:

City of Bethel Heights
530 Sunrise Drive
Bethel Heights, AR 72764

LIS No. 19-070
Permit No. 4725-WR-5
AFIN 04-00630

Secretary
Arkansas Pollution Control and Ecology
101 East Capitol, Suite 205
Little Rock, AR 72201
Filed PL 6/9/19

**RESPONSE TO NOTICE OF VIOLATION
AND REQUEST FOR HEARING**

The City of Bethel Heights, Arkansas (hereafter “Bethel Heights,” “the City” or “Respondent”) by and through undersigned counsel, hereby responds to Notice of Violation (“NOV”) LIS-19-070 received from the Arkansas Department of Energy and Environment, Division of Environmental Quality (“DEQ”) alleging violations of the Arkansas Water and Air Pollution Control Act, Ark. Code Ann. § 8-4-101 *et seq.*, and the regulations and rules promulgated thereunder, including without limitation Arkansas Pollution Control and Ecology Commission (“APC&EC” or “Commission”) Regulation 17; Arkansas Underground Injection Control (UIC) Code and requests a hearing before the Commission.

INTRODUCTION

This Response to Notice of Violation and Request for Hearing (hereinafter “Response”) is filed pursuant to Ark. Code Ann. § 8-4-205 and APC&EC Regulation No. 8. The NOV is dated August 16, 2019. It was served on Bethel Heights Mayor Cynthia Black August 19, 2019. Bethel Heights’s investigation into the allegations set forth in the NOV is ongoing. Based on the information known to date, Bethel Heights denies each and every allegation contained in the NOV except as hereinafter specifically admitted. In addition, where DEQ alleges dates which it sent, mailed, or received communications described in the NOV, Respondent lacks knowledge or information sufficient to admit or deny such allegations. Bethel Heights reserves the right to supplement its Response as additional information becomes known.

ALLEGATIONS AND PROPOSED FINDINGS OF FACT

1. Answering Paragraph 1, Respondent admits that it operates a wastewater treatment system pursuant to permit 4725-WR-5.
2. Respondent admits the allegations and proposed findings of fact in Paragraph 2.
3. Respondent admits the allegations and proposed findings of fact in Paragraph 3.
4. Answering Paragraph 4, Respondent states that DEQ's description of its wastewater treatment system ("WWTS") appears to be accurate but denies any statement that varies from the system as designed.
5. Answering Paragraph 5, Respondent states that DEQ's description of its WWTS appears to be accurate but denies any statement that varies from the system design.
6. Answering Paragraph 6, Respondent states that DEQ's description of its WWTS appears to be accurate but denies any statement that varies from the system design.
7. Answering Paragraph 7, Respondent states that DEQ's description of topography at the 901 S. Lincoln St. location appears generally correct.
8. Paragraph 8 is a statement of law to which no response is required.
9. Paragraph 9 is a statement of law to which no response is required.
10. Paragraph 10 is a statement of law to which no response is required.
11. Answering Paragraph 11, Respondent admits it executed CAO LIS 15-131 to address issues with its wastewater treatment system.
12. Answering Paragraph 12, Respondent admits that Exhibit D to the NOV is amendment 001 to CAO 15-131 and that it references a Corrective Action Plan submitted by Respondent.
13. Answering Paragraph 13, Respondent admits that Exhibit E is a letter from Mayor Black to DEQ.

14. Answering Paragraph 14, Respondent admits that Exhibit F is a letter from DEQ to Mayor Black.

15. Answering Paragraph 15, Respondent admits that DEQ personnel performed an inspection of the City's WWTS on or about February 4, 2019, and Exhibit G purports to be a copy of DEQ's Inspection Report. With regard to subparts a.-c. of Paragraph 15, Respondent denies any allegations that mischaracterize the Inspection Report or conditions that existed at the time of the inspection. Pleading affirmatively, the allegations contained in Exhibit G are denied.

16. Answering Paragraph 16, Respondent admits that DEQ personnel performed another inspection of the City's WWTS on or about February 12, 2019, and Exhibit H purports to be a copy of DEQ's Inspection Report. With regard to subparts a.-c. of Paragraph 16, Respondent denies any allegations that mischaracterize the Inspection Report or conditions that existed at the time of the inspection. Pleading affirmatively, the allegations contained in Exhibit H are denied.

17. Answering Paragraph 17, Respondent admits that Exhibit H was mailed to it.

18. Answering Paragraph 18, Respondent admits that Exhibit G was mailed to it.

19. Answering Paragraph 19, Respondent admits that it responded to DEQ in a timely fashion by letter dated April 8, 2019.

20. Answering Paragraph 20, Respondent admits that DEQ wrote Mayor Black by letter dated April 18, 2019, but denies that the City's response was inadequate.

21. Answering Paragraph 21, Respondent admits that DEQ wrote Mayor Black by letter dated May 6, 2019, requesting that Respondent submit a Corrective Action Plan (CAP), and that Exhibit I is a copy of said letter.

22. Answering Paragraph 22, Respondent admits that DEQ personnel returned to the City's WWTS on May 16, 2019, and that Exhibit J purports to be a copy of a DEQ inspection report.

23. Answering Paragraph 23, Respondent lacks information or knowledge regarding DEQ's internal review of Respondent's submissions, its findings or conclusions regarding same, and therefore denies the allegations in Paragraph 23.

24. Answering Paragraph 24, Respondent admits DEQ performed yet another inspection on or about July 16, 2019, and that it sent the City a copy of Exhibit L. Respondent lacks information or knowledge regarding DEQ's findings or conclusions and therefore denies same.

25. Answering Paragraph 25, Respondent admits DEQ performed yet another inspection on or about July 16, 2019, and that it sent the City a copy of Exhibit L. Respondent lacks information or knowledge regarding DEQ's findings or conclusions and therefore denies same.

26. Answering Paragraph 26, the City admits DEQ performed yet another inspection on or about July 16, 2019, and that it sent the City a copy of exhibit L. Respondent lacks information or knowledge regarding DEQ's findings or conclusions and therefore denies same.

27. Answering Paragraph 27, Respondent admits DEQ appears to accurately quote language from the permit.

28. Answering Paragraph 28, Respondent admits there have been periodic operational issues with its WWTS which the City has addressed when they arise. The City denies these operational problems have been as extensive as DEQ attempts to characterize them or that they differ materially from other similar WWTS that routinely experience the same issues and which DEQ is aware of but has chosen to either ignore or fail to take enforcement action against.

29. Answering Paragraph 29, Respondent admits there have been periodic operational issues with its WWTS which the City has addressed when they arise. Respondent denies these operational problems have been as extensive as DEQ alleges or that they differ materially from other similar drip irrigation type systems which routinely experience the same issues and which DEQ is aware of but has chosen to either ignore or take no action against.

30. Answering Paragraph 30, Respondent admits there have been times when it has mowed grass and not removed all clippings, something common with this type of WWTS and which occurs with all such systems.

31. Answering Paragraph 31, Respondent admits that GTS, Inc. does sampling for the City and that Exhibit M reflects a portion of the results of sampling from July 30, 2019.

32. Answering Paragraph 32, allegations of what “could” happen prove nothing. Moreover, Respondent is unable to admit or deny what “DEQ observed” or alleges to have “observed.” Respondent admits that drip irrigation fields have a slight slope but denies that operations have resulted in “pollution to waters of the state.”

33. Answering Paragraph 33, Respondent admits that it took samples on July 30, 2019, but denies that the results of these samples indicate permit violations, that areas where wastewater may have surfaced were extensive, or caused pollution to waters of the State. Throughout the summer, Respondent was in the process of making improvements to its WWTS while dealing with conditions of higher precipitation amounts than normal for the time of year.

34. Answering Paragraph 34, Respondent admits DEQ requested copies of internal sampling results.

35. Answering Paragraph 35, Respondent admits that Exhibits N, O and P reflect sampling performed for the City.

36. Answering Paragraph 36, Respondent admits it has submitted MMRs per its permit requirements and that Exhibits Q, R and S appear to be copies of its MMRs for the months of May, June and July of 2019.

37. Answering Paragraph 37, Respondent lacks information or knowledge regarding DEQ’s findings or conclusions and therefore denies same.

38. Answering Paragraph 38, Respondent lacks information or knowledge regarding DEQ’s findings or conclusions and therefore denies same. Respondent has, pursuant to technical

guidance, performed certain operation and maintenance activities in an attempt to improve treatment efficiency and performed internal sampling in an effort to determine the success of these actions. This has been done in an effort to improve results and achieve compliance, not to evade or mislead. Moreover, all records have been maintained by the City and are made available to DEQ at all times.

39. Answering Paragraph 39, Respondent admits it submitted a CAP in response to DEQ's letter of May 6, 2019, but denies its CAP is incomplete.

PROPOSED CIVIL PENALTY ASSESSMENT AND ORDER

40. Answering Paragraph 1 of this section, the City has in the past and continues to promptly take all necessary action to achieve permit compliance.

41. Answering Paragraph 2 of this section, DEQ's penalty assessments are contrary to the factors DEQ is required to consider under APC&EC Regulation 7 and the Uniform Penalty Policy dated March 1, 2012, unwarranted, in excess of statutory and regulatory provisions, made upon unlawful procedure, not supported by substantial evidence, arbitrary, capricious and characterized by an abuse of discretion affected by error of law.

42. Answering Paragraph 3 of this section, Respondent denies that the DEQ has demonstrated compliance with either APC&EC Regulation 7 or the Uniform Penalty Policy dated March 1, 2012.

43. The statement in Paragraph 4 of this section contains legal conclusions to which no response is required.

44. The final paragraph of DEQ's NOV contains legal conclusions to which no response is required.

45. The City denies all allegations not specifically admitted herein and demands strict proof of same.

AFFIRMATIVE DEFENSES

46. The NOV fails to state facts upon which relief can be granted.

47. The NOV is made upon unlawful procedure.

48. In issuing a NOV before attempting to resolve the issues by agreement, DEQ has violated its own guidelines.

49. Bethel Heights was not granted a reasonable opportunity to address the issues leading to issuance of the NOV contrary to DEQ's stated policy. DEQ's actions are a departure from its normal approach with municipalities notwithstanding the fact that the City has made prompt and diligent efforts to achieve permit compliance.

50. Bethel Heights, Arkansas, is a political subdivision of the State of Arkansas. DEQ is part of the executive branch of the State of Arkansas. DEQ issued Respondent a permit to operate the WWTS after reviewing and approving all plans, submissions and other materials from the City, including the information provided to the City by the manufacturer of the WWTS. DEQ renewed the City's permit five (5) times. During this entire time, the City has operated the WWTS under the guidance of DEQ and has taken such actions as DEQ has required of it. As such, DEQ's attempt to now penalize the City through the NOV should be rejected.

51. At all times since issuance of the original permit, and any renewals thereof, ADEQ has had access to and the opportunity to inspect all monitoring data, test results, and operations data. DEQ representatives reviewed this documentation as recently as February of 2019. All such test results DEQ now claims to have been withheld or not reported which it alleges shows non-compliance with the permit was previously provided to DEQ.

52. Pleading affirmatively, the actions of DEQ are in excess of statutory provisions, made upon unlawful procedure, not supported by substantial evidence, arbitrary, capricious and characterized by an abuse of discretion affected by error of law.

53. The City requests that DEQ be held to a standard of strict proof for each and every allegation contained in its NOV.

PRAYER FOR RELIEF

WHEREFORE, Bethel Heights, Arkansas, prays that it be granted relief as follows:

- a. Dismissal of the NOV;
- b. In the event the NOV is not dismissed, that the proposed penalty be denied, and that DEQ take nothing thereby;
- c. In the event the NOV is not dismissed or the proposed penalty denied, the City respectfully requests a full hearing before the ALJ and Commission Review on all issues, factual allegations and legal assertions contained in the NOV; and
- d. For all other equitable and just relief to which it is entitled.

Respectfully submitted,

Robert K. Rhoads
HALL ESTILL
75 N. East Ave., Ste 500
Fayetteville, Arkansas 72701
Telephone: 479-973-5202
rrhoads@hallestill.com

And

McMATH WOODS P.A.
711 West Third Street
Little Rock, Arkansas 72201
Telephone: 501-396-5400
Facsimile: 501-374-5118
sam@mcmathlaw.com

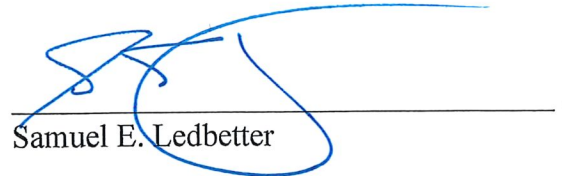
By 
Samuel E. Ledbetter, ABN 83110

Attorneys for Bethel Heights, Arkansas

CERTIFICATE OF SERVICE

I, Samuel E. Ledbetter, hereby certify that a true and correct copy of the foregoing has been sent via email on this 4TH day of September, 2019, to the following:

Hon. Becky W. Keogh, Secretary/Director, Arkansas Department of Energy and Environment, Division of Environmental Quality
c/o Basil Hicks (hicks@adeq.state.ar.us)
c/o Stacie Wassell (wassell@adeq.state.ar.us)
DIVISION OF ENVIRONMENTAL QUALITY
5301 Northshore Drive
North Little Rock, Arkansas 72118-5317



Samuel E. Ledbetter