

**STATE OF NEW MEXICO
SECRETARY OF ENVIRONMENT**

**ENVIRONMENTAL PROTECTION DIVISION
OF THE NEW MEXICO ENVIRONMENT
DEPARTMENT,**

Complainant,

v.

No. AQCA 10-40 (CO)

SOUTHWESTERN PUBLIC SERVICE COMPANY,

Respondent.

SETTLEMENT AGREEMENT AND STIPULATED FINAL COMPLIANCE ORDER

This Settlement Agreement and Stipulated Final Compliance Order (“Final Order”) is entered into between the Environmental Protection Division (“Division”) of the New Mexico Environment Department (the “Department”) and the Southwestern Public Service (“SPS”) (collectively, the “Parties”) to resolve alleged violation of the New Mexico Air Quality Control Act (“AQCA”), NMSA 1978, § 74-2-1 to 74-2-17; the Air Quality Control Regulations (“AQCR”), 20.2. NMAC (“Regulations”), and of Construction Permit PSD-NM-622-M-2 and Operating Permit P080-R1.

I. BACKGROUND

A. PARTIES

1. The Department is an agency of the executive branch of the State of New Mexico, created pursuant to NMSA 1978, § 9-7A-4. The Division is an organizational unit of the Department. The Secretary of the Department has delegated to the Director of the Division the authority to seek administrative enforcement of the AQCA and the AQCR, including assessing

civil penalties for violations thereof. NMSA 1978, § 74-2-12. The Air Quality Bureau is an organizational unit of the Division.

2. The Respondent Southwestern Public Service Company is a New Mexico domestic for-profit corporation with a corporate address of 111 E. Fifth Roswell ,NM, 88201, which owns and operates the Cunningham Station (“the facility”), a 516 MW (total nominal) electric power generating station located west of Hobbs, New Mexico

B. HISTORY AND ALLEGED VIOLATIONS

3. On February 10, 1997, the Department issued Construction Permit PSD-NM-622-M-2 to respondent for construction and operation of the facility.

4. On June 2, 2004, the Department issued Operating Permit P080-R1 for operation of the facility.

5. Construction Permit PSD-NM-622-M-2 Condition 2.b provides:

Nitrogen dioxide emissions include all oxides of nitrogen expressed as NO₂.

The nitrogen oxide concentration in the exhaust gas for Units No. 3 and 4 shall not exceed 15 ppmv at 15% O₂ when not running in power augmentation mode and shall not exceed 25 ppmv at 15% O₂ when running in power augmentation mode, as obtained from the Best Available Control Technology (BACT) analysis.

The nitrogen oxide emissions, when burning oil, from Units No. 1 and 2 shall not exceed 0.3 lb/mmbtu [*sic*] of heat input.

6. The emission limits established in Construction Permit PSD-NM-622-M-2, Condition 2.b are incorporated in Operating Permit P080-R1, Condition 1.9 by specific reference.

7. Operating Permit P080-R1, Condition 5.3 states in part, “The permittee shall submit reports of all deviations (including emergencies) from permit requirements to the

Department when they occur. The permittee shall communicate initial notice of the deviation to the Department within 24 hours of the start of the first business day following the start of the occurrence via telephone or facsimile. Within ten (10) calendar days of the start of the first business day following the start of the occurrence, written notice...shall be submitted to the Department.”

8. Operating Permit P080-R1, Condition 5.1 states in part, “All instances of deviations from permit requirements, including emergencies, shall be clearly identified in these reports. Conditions of 5.1 are pursuant to 20.2.70.302.E NMAC.”

9. Operating Permit P080-R1, Condition 6.1 states in part, “The permittee shall submit compliance certification reports certifying the compliance status of this facility with respect to all permit terms and conditions, including applicable requirements.”

10. Operating Permit P080-R1, Condition 1.5 states in part, “A responsible official...shall certify the accuracy, truth and completeness of every report and compliance certification submitted to the Department was required by this permit. These certifications shall be part of each document. This condition is pursuant to 20.2.70.300.E NMAC.”

11. Construction Permit PSD-NM-622-M-2, Table 1 sets forth the NOx emission limits for Units No. 3 and 4 as 78.1 pounds per hour while operating without power augmentation and 129.0 pounds per hour while operating with power augmentation.

12. Operating Permit P080-R1, Condition 3.2.5 sets forth the NOx emission limits for Units No. 3 and 4 as 78.1 pounds per hour while operating without power augmentation and 129.0 pounds per hour while operating with power augmentation.

13. On November 6, 2007, the Air Quality Bureau received from SPS Continuous Emissions Monitoring System (CEMs) data pertaining to Units 3 and 4 for the period October

11, 2005 through September 24, 2007. On December 17, 2008, the Air Quality Bureau received from SPS CEMs data pertaining to Units 3 and 4 for the period September 24, 2007 through September 25, 2008. On September 2, 2009, the Air Quality Bureau received from SPS CEMs data pertaining to Units 3 and 4 for the period August 24, 2005 through August 25, 2009. On November 23, 2009, the Air Quality Bureau received from SPS CEMs data pertaining to Units 3 and four for the period January 1, 2009 through September 21, 2009.

14. On September 28, 2010, the Department issued an Administrative Compliance Order (“Compliance Order”) alleging violations of the above permit conditions, including hourly exceedences of applicable emission limits, which were set forth with particularity in the Order and attached exhibits. The Compliance Order required SPS to take actions immediately or within a specified time period to comply with permit terms and conditions, and assessed a civil penalty for the alleged violations.

15. On October 28, 2010, SPS filed an Answer and Request for Hearing, denying the alleged violations and raising affirmative defenses.

II. COMPROMISE AND SETTLEMENT OF ALLEGED VIOLATIONS

16. To avoid litigation, the Division and SPS propose the settlement in this Final Order to resolve the alleged violations in the Compliance Order. Under 20.1.5.600.B NMAC, the Division and SPS agree to this Final Order for the sole purpose of resolving the alleged violation in the Compliance Order. SPS does not admit any of the allegations in the Compliance Order. The Division does not concede the validity of any of the affirmative defenses raised.

17. For purposes of this proceeding only, the parties the parties admit the jurisdictional allegations of the Compliance Order and consent to the relief specified herein, including the assessment of the stated civil penalty.

18. In compromise and settlement of the alleged violations set forth in the Compliance Order, the Parties agree as follows:

a. By SPS revising the ppmv nitrogen oxide concentration limits for Units 3 and 4 in condition 2.b of Construction Permit PSD-NM-622-M-2, and taking other appropriate action, no further action is necessary to correct the alleged violations.

b. The Environmental Improvement Board revised 20.2.70.302.E(2) NMAC, which was the basis for Condition 5.3 of Operating Permit P080R1 and Alleged Violations 3, and eliminated the obligation to immediately report all deviations from permit terms. As amended, 20.2.70.302.E(2) NMAC now requires that deviations from permit terms must be reported as part of the semi-annual reports required by 20.2.70.302.E(1) NMAC. The parties agree that until Condition 5.3 of Operating Permit P080R1 is revised to conform to the changes in the regulation, SPS is not required to immediately report deviations that do not result in excess emissions, but is required to report such deviations in accordance with the schedule specified in 20.2.70.302E(1) NMAC and the conditions in Operating Permit P080R1 implementing that regulation. Nothing in this paragraph eliminates or alters SPS's duties and obligations with respect to excess emissions pursuant to 20.2.7 NMAC.

c. The total assessment under the Compliance Order is \$800,000.00, comprising \$300,000 in cash equivalent and \$500,000 in Supplemental Environmental Projects ("SEP").

19. SPS shall pay a civil penalty \$300,000 to the State of New Mexico within 30 calendar days after the effective date of this Final Order.

20. Payment shall be made to the *State of New Mexico* by certified or corporate check and sent to the following address:

New Mexico Environment Department
Air Quality Bureau
c/o Debra McElroy, Compliance and Enforcement Manager
1301 Siler Rd., Building B
Santa Fe, New Mexico 87507-3541

21. If SPS fails to make timely and complete payment of the civil penalty, SPS shall pay interest on the outstanding balance at the rate established for judgments and decrees under NMSA 1978, § 56-8-4.

22. SPS shall perform the SEP described in Exhibit A attached hereto.

23. The SEP shall be completed within 180 days of the effective date of this order, and SPS shall submit a certified statement of all costs associated with the SEP within 30 days of the SEP completion date.

24. If SPS fails to complete the SEP within 180 days of the effective date of this order, SPS stipulates to pay a civil penalty of \$500.00 for each day thereafter until the SEP is completed.

25. If SPS fails to submit a certified statement of all costs associated with the SEP on within 30 days of the SEP completion date, SPS stipulates to pay a civil penalty of \$250.00 for each day thereafter until the certified statement of all costs associated with the SEP is submitted.

26. Within 10 days following its receipt of a written demand by the Department, SPS shall make payment of any stipulated penalty. SPS shall make a cash payment, by certified or corporate check, of any stipulated penalty to the State of New Mexico General Fund, and sent to the address specified in Paragraph 20.

III. OTHER TERMS AND CONDITIONS

A. RESERVATION OF RIGHTS AND DEFENSES

27. This Final Order shall not be construed to prohibit or limit in any way the Department from requiring SPS to comply with any applicable state or federal requirement. This Final Order shall not be construed to prohibit or limit in any way the Department from seeking any relief authorized by the AQCA for violation of any state or federal requirement applicable to SPS not resolved herein. This Final Order shall not be construed to prohibit or limit in any way SPS from raising any defense to a Department action seeking such relief.

B. MUTUAL RELEASE

28. The Parties mutually release each other from all claims that each Party raised or could have raised against the other regarding the facts and violations alleged in the compliance order. Such release applies only to civil liability.

C. WAIVER OF STATE LIABILITY

29. SPS shall assume all costs and liabilities incurred in performing all obligations under this Final Order. The Department, on its own behalf and on behalf of the State of New Mexico, does not assume any liability for SPS's performance of any obligation under this Final Order.

D. EFFECTIVE DATE AND TERMINATION DATES

30. This Final Order shall become effective on the date it has been signed by the Department Secretary.

31. Except as otherwise provided in this Paragraph, the terms of this Final Order shall terminate when SPS has fulfilled the requirements of this Final Order. The reservations of rights

and defenses and the mutual release in Paragraphs 27 and 28 shall not terminate, and shall remain in effect as an agreement between the Parties.

E. INTEGRATION

32. This Final Order merges all prior written and oral communications between the Parties concerning the subject matter of this Final Order, contains the entire agreement between the Parties, and shall not be modified without the express written agreement of the Parties.

F. BINDING EFFECT

33. This Final Order shall be binding on the Parties and their officers, directors, employees, agents, subsidiaries, successors, assigns, trustees, or receivers.

G. AUTHORITY OF SIGNATORIES

34. The person executing this Final Order on behalf of SPS represents that he or she has the authority to execute this Final Order on behalf of SPS.

**ENVIRONMENTAL PROTECTION DIVISION
NEW MEXICO ENVIRONMENT DEPARTMENT:**

By: Mary Rose
MARY ROSE
ACTING DIRECTOR

Date: 12/13/11

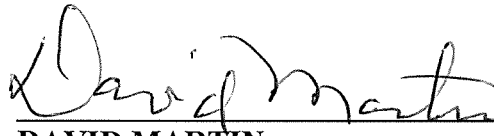
SOUTHWESTERN PUBLIC SERVICE COMPANY

By: Kiley Hill

Date: 11/30/11

STIPULATED FINAL COMPLIANCE ORDER

Pursuant to section 20.1.5.600.B(2) NMAC, this Settlement Agreement and Stipulated Final Compliance Order, agreed to by the Division and the Respondent Southwestern Public Service Company, is hereby incorporated herein and **APPROVED AS A FINAL COMPLIANCE ORDER** issued pursuant to NMSA 1978, §74-2-12.



DAVID MARTIN
SECRETARY OF ENVIRONMENT

Date: 12-12-11