STATE OF NEW MEXICO
ENVIRONMENT DEPARTMENT
WATER PROTECTION DIVISION

GROUND WATER QUALITY BUREAU of
THE NEW MEXICO ENVIRONMENT DEPARTMENT,

Complainant,

v. **No: WQCC 20-04**

ACME HOMETOWN CLEANERS
Sandy and Retha Ochoa, property owners,

Respondents.

SETTLEMENT AGREEMENT AND STIPULATED FINAL ORDER

This Settlement Agreement ("Agreement") is made between the Ground Water Quality Bureau ("Bureau") of the Water Protection Division ("Division") of the New Mexico Environment Department ("Department"), and Sandy and Retha Ochoa ("Respondents"). The parties enter into this Agreement to resolve alleged violations of the New Mexico Water Quality Act ("WQA"), NMSA 1978, §§ 74-6-1 to -17, and its associated Ground and Surface Water Protection Rules ("Rules"), 20.6.2 NMAC, at the former Acme Hometown Cleaners ("site") in Alamogordo, New Mexico, as specified in the Administrative Compliance Order ("ACO") issued November 20, 2019.

I. BACKGROUND

A. PARTIES

1. Pursuant to NMSA 1978, § 9-7A-4, the Department is an executive agency within the government of the State of New Mexico.

2. Pursuant to NMSA 1978, § 9-7A-6(B), the secretary of the Department has every power expressly enumerated in the laws, whether granted to the secretary, the Department or any division of the Department.

3. Pursuant to NMSA 1978, § 74-6-10(A), the Department may enforce the WQA and its Rules.

4. Pursuant to NMSA 1978, § 9-7A-6(B)(2), the secretary may delegate authority to subordinates as deemed necessary and appropriate. The Division is an organizational unit of the Department created pursuant to such authority. NMSA 1978, § 9-7A-6(B)(3). Through delegation by the secretary, the director of the Division has authority to seek administrative enforcement, including injunctive relief and civil penalties, for violations of the WQA and the Rules.

5. The Respondents are "persons" as defined by NMSA 1978, § 74-6-2(I) and 20.6.2.7(P)(2) NMAC.

6. Respondents own the former Acme Hometown Cleaners site located at 901 East 10th Street, Alamogordo, New Mexico.

B. HISTORY AND ALLEGED VIOLATIONS

7. As described in the ACO, the site functioned as a dry-cleaning business from approximately 2012 to 2015 and utilized the chlorinated solvent tetrachloroethene ("PCE"), which is also known as tetrachloroethylene and perchloroethylene or "perc."

8. Soil-vapor tests performed at the site by the Department's Superfund Oversight Section in 2009 exceeded industrial soil-gas vapor intrusion screening levels ("VISL") for PCE (which are 6,550 micrograms per cubic meter) at three points, including 1,500,000 micrograms per cubic meter at one location.

9. During the 2009 testing, Department inspectors also measured trichloroethene ("TCE") concentrations of 2,500 micrograms per cubic meter. TCE's industrial VISL is 328 micrograms per cubic meter.

10. The Rules list both PCE and TCE as toxic pollutants. 20.6.2.7(T)(2)(k) NMAC. Human health standards limit their presence in water. 20.6.2.3103(A)(1)(x) and (y) NMAC.

11. In a January 22, 2016 letter, the Department notified Respondents that further investigation was necessary. Initially participatory, the Respondents commenced corrective action by hiring Terracon Consultants Inc. to perform a site assessment, which confirmed excessive soil-vapor levels of PCE. In the *Limited Site Investigation* report dated April 6, 2017, Terracon recommended installation of a vapor mitigation system "in consideration of potential exposures to future building occupants."

12. In early 2018, Respondents' new consultant, EA Engineering, Science, and Technology, Inc., installed a combined groundwater/soil-vapor monitoring well ("MW-1") on the upgradient side of the property.

13. In an April 27, 2018 letter, the Department approved a corrective action plan that proposed a requirement of quarterly monitoring of MW-1, installation of a vapor-extraction pump at MW-1 and further characterization of the groundwater through installation of additional wells on the downgradient side of the site.

14. Respondents did not satisfy these requirements and, despite several attempts at follow-up by the Department, ceased communications. Thus, the Department issued a Notice of Violation on February 28, 2019. Still receiving no response, it followed with the ACO on November 20, 2019.

II. COMPROMISE AND SETTLEMENT

15. The parties have engaged in settlement discussions to resolve the ACO. As a result, the parties agree to the corrective actions set forth below.

A. SOIL VAPOR EXTRACTION

16. Within 120 days of the effective date of this Agreement, the Respondents shall connect a soil-vapor extraction unit to MW-1, which is a nested well consisting of three strings of 2-inch schedule-40 PVC blank-and-screened casing. Respondents shall connect the soil vapor extraction unit to all three strings of MW-1 and operate the unit until soil vapor concentrations of chlorinated solvents are measured and confirmed to be below residential VISLs.

17. Within 120 days of the effective date of this Agreement, the Respondents shall submit a soil-vapor-extraction work plan detailing criteria and milestones for system design. Within 10 days after submission, the Department will approve or deny the work plan. Thereafter, the Respondents shall submit a startup report, monthly operations reports, a system shutdown report and a system closure request.

B. DOWNGRADIENT CHARACTERIZATION

18. Within 180 days of signing this Agreement, the Respondents shall install a groundwater monitoring well downgradient of the existing structure on the site. Downgradient is estimated to be approximately west-southwest of the structure. The Respondents or their consultant shall confirm this action by notifying the Bureau contact listed in Paragraph 27 and submitting a completion report within 60 days of installation.

C. GROUNDWATER MONITORING

19. Within seven days after installation of the downgradient monitoring well, the Respondents shall sample both wells and analyze the samples using acceptable EPA

methodologies for chlorinated volatile organic compounds ("CVOC"). Respondents will report the results to the Department no later than 10 days after Respondents receive the sampling results. Subsequent sampling will occur every three months thereafter with results reported to the Department no later than 10 days after Respondents receive the sampling results. If the first four consecutive sampling events from both wells find CVOC concentrations below the standards specified in 20.6.2.3103 NMAC, no further groundwater sampling is required. Prior written approval from the Department is necessary for plugging and abandoning any site well.

20. Upon completion of Paragraphs 16 through 19, the site will become eligible for the Voluntary Remediation Program ("VRP") due to removal of the regulatory bar found at 20.6.3.200(A)(4)(d) NMAC.

D. THIRD MONITORING WELL

21. If any sample analytical result conducted pursuant to Section II.C yields CVOC concentrations above the standards listed at 20.6.2.3103 NMAC, the Respondents may confirm the exceedance by resampling within 5 days. If the exceedance is confirmed, the Respondents shall, within 60 days of the confirmation, install a third groundwater-monitoring well to complete triangulation.

22. Within 55 days after installation, the Respondents shall collect groundwater samples from the third well, analyze the samples using acceptable EPA methodologies for the contaminants of concern, and submit the results to the Department. Respondents will continue quarterly monitoring for the contaminants of concern in all three wells until at least eight consecutive monitoring events meet abatement standards per 20.6.2.4103(D) NMAC.

23. If any sample collected and analyzed pursuant to Section II.C yields CVOC concentrations above the standards listed at 20.6.2.3103 NMAC, the Department will also

generate a notice requiring the submittal of a stage-1 abatement plan, which would normally block eligibility for the VRP per NMSA 1978, §74- 4G-5(D)(2). However, if a third party submits a VRP application and the Department finds both the applicant and the site preliminarily eligible, the Department will conditionally suspend the requirement to submit a stage-1 abatement plan, thus removing the statutory bar.

a. If a third party has not entered into a Voluntary Remediation Agreement ("VRA") within 60 days after the Department finds it preliminarily eligible, the suspension terminates and responsibility for soil-vapor abatement reverts to the Respondents.

b. If, after public comment on the VRA per 20.6.3.300(D) NMAC, the Department does not find final eligibility under 20.6.3.200(A)(7) NMAC, the suspension terminates and responsibility for soil-vapor abatement reverts to the Respondents.

c. If, at any time, the applicant withdraws the application or either party terminates the VRA pursuant to NMSA 1978, § 74-4G-6(D), the suspension shall be terminated and responsibility for soil-vapor abatement reverts to the Respondents.

E. CIVIL PENALTY

24. Provided the Respondents timely meet the respective deadlines outlined in Paragraphs 16-19 (120 days to connect soil vapor extraction to MW-1, 180 days to install a downgradient well, and one year of quarterly monitoring/sampling), the Department will hold the civil penalty in abeyance. If a deadline is missed without advanced approval by the Department, the $340,496 penalty immediately becomes due. If the aforementioned deadlines are met, the Department will reduce the penalty by $330,496, leaving a balance of $10,000 due in unison with completion of the fourth sampling event and associated reporting requirements prescribed in

Paragraph 19. These terms are independent of Paragraphs 21 and 22 addressing a potential third well.

25. Payment shall be made by certified or cashier's check payable to the State of New Mexico and mailed (certified) or hand delivered to the following address:

Bureau Chief
Ground Water Quality Bureau
New Mexico Environment Department
1190 St. Francis Dr., Suite N-2200
Santa Fe, NM 87505

F. ONGOING RESPONSIBILITY

26. This Agreement does not relieve Respondents of the responsibility for further characterization, remediation or abatement of potential contamination if data yielded from the aforementioned activities necessitates such actions.

27. All reporting and plan submittals shall be sent to the Ground Water Quality Bureau at the following address:

Paul Chamberlain
Ground Water Quality Bureau
New Mexico Environment Department
1190 South St. Francis Drive
Santa Fe, New Mexico 87505
Ph: 505-827-9669
E-mail: paul.chamberlain@state.nm.us

III. ADDITIONAL TERMS AND CONDITIONS

A. ENFORCEMENT

28. The Department retains the right to pursue any relief authorized by the WQA, the Ground and Surface Water Protection Rules, or other law for any violation not addressed herein.

29. The Department retains the right to enforce this Agreement and Stipulated Final Order by administrative or judicial action, which decision shall be in its sole discretion.

30. In the event that the Department elects to file a judicial action to enforce this Agreement and Stipulated Final Order, the Parties agree that the First Judicial District Court of Santa Fe County, New Mexico shall have exclusive jurisdiction over the Parties, the Agreement, and the Stipulated Final Order. The Parties agree to waive any right to challenge that jurisdiction or venue lies with the First Judicial District Court of Santa Fe County, New Mexico.

31. The laws of the State of New Mexico shall govern the construction and interpretation of this Agreement and the Stipulated Final Order.

B. BINDING EFFECT

32. This Agreement and Stipulated Final Order shall be binding upon the Department and its successor agencies and shall be binding upon the Respondents and their officers, directors, employees, agents, subsidiaries, successors, heirs, assigns, trustees, or receivers.

C. EFFECTIVE DATE

33. This Agreement shall become effective upon execution by the Respondents, upon execution by the Director of the Water Protection Division, and upon approval by the Water Quality Control Commission through the issuance of a Stipulated Final Order.

D. INTEGRATION

34. This Agreement merges all prior written and oral communications between the Parties concerning the subject matter of this Settlement Agreement and contains the entire agreement between the Parties.

E. MODIFICATION

35. This Agreement shall not be modified except by express written Agreement of the Parties.

F. RESERVATION OF RIGHTS AND DEFENSES

36. This Agreement and Stipulated Final Order shall not be construed to prohibit or limit the Department in any way from requiring the Respondents to comply with any state or federal requirements applicable to the site.

37. This Settlement Agreement and Stipulated Final Order shall not be construed to prohibit or limit the Department in any way from seeking any relief authorized by the WQA or the Ground and Surface Water Protection Rules for violations of any state requirements that occur in the future at the site.

38. This Agreement and Stipulated Final Order shall not be construed to prohibit or limit the Respondents in any way from raising any defense to any action by the Department for violations of the WQA or the Ground and Surface Water Protection Rules.

G. WAIVER OF STATE LIABILITY

39. The Respondents shall assume all costs and liabilities incurred in performing any obligation under this Agreement and Stipulated Final Order.

40. The Department shall not assume any liability for the performance of any obligation under this Agreement and Stipulated Final Order.

H. DISCLOSURE TO SUCCESSORS-IN-INTEREST

41. Until such time as the Respondents comply with the terms and conditions of the Agreement and Stipulated Final Order or it is terminated by written agreement of the parties, the Respondents shall disclose this Agreement and Stipulated Final Order to any successor-in-interest to the site and shall advise such successor-in-interest that the Agreement and Stipulated Final Order are binding on the successor-in-interest.

I. FORCE MAJEURE

42. The Respondents' obligation to comply with this Agreement and Stipulated Final Order shall be deferred only to the extent and only for the duration that the failure in compliance is caused by "force majeure." For purposes of this Agreement, "force majeure" is defined as an event or set of circumstances which are beyond the Respondents' control and could not have been prevented by the Respondents' reasonable action or due diligence. "Force majeure" shall not apply to any failure in compliance due to increased costs or Respondents' financial inability to carry out this Agreement. Respondents shall submit notification to the Department within 10 days after the date when it first knows or should have known that a failure in compliance is reasonably foreseeable. Such written notice shall include the nature, cause and anticipated length of the delay associated with the failure of compliance and all steps that Respondents have taken and will take to avoid or minimize the failure of compliance, with a schedule of implementation. Failure to provide this written notice within the required time period shall constitute a waiver of the Respondents' right to invoke "force majeure" for the particular event at issue. If the Department agrees that the failure in compliance is attributable to "force majeure," it shall extend the time for compliance only to the extent and only for the duration necessary to accommodate the "force majeure."

J. EXTENSION OF DEADLINES

43. Upon a showing of good cause, the Department may grant an extension of any deadline to perform any activity required by this Agreement and Stipulated Final Order. Respondents shall submit all requests for an extension of a deadline in writing to the Bureau. The request shall propose a new deadline for the activity and shall include the basis for the request. The Bureau shall respond by approving, approving in part or denying the request as soon as

possible, but no later than fifteen days after receipt. If the Bureau approves in part or denies the request, the response shall specify the reasons for the Bureau's actions.

K. AUTHORITY OF SIGNATORIES

44. The persons executing this Agreement represent that they have the requisite authority to bind either the Department or the Respondents, as appropriate, to this Agreement, and that their representation shall be legally sufficient evidence of actual or apparent authority to bind the Department or the Respondents to this Agreement.

L. TERMINATION

45. This Agreement and Stipulated Final Order shall terminate upon the completion of all requirements contained within Paragraphs 16-22.

M. STIPULATED FINAL ORDER

46. In accordance with 20.1.3.22(B)(1) NMAC, Respondents admit the jurisdictional allegations of the compliance order and consent to the relief specified in this Agreement, including the assessed civil penalty.

SANDY OCHOA, property owner,
ACME HOMETOWN CLEANERS

DATE: 6/11/20

RETHA OCHOA, property owner,
ACME HOMETOWN CLEANERS

Retha Ochoa

DATE: 6/11/20

NEW MEXICO ENVIRONMENT DEPARTMENT

Rebecca Roose Digitally signed by Rebecca Roose
Date: 2020.06.11 11:45:09 -06'00'

REBECCA ROOSE
DIRECTOR
WATER PROTECTION DIVISION

DATE

FINAL ORDER

Pursuant to 20.1.3.22(B) NMAC, this Agreement, as agreed to by the Department and Respondents, is hereby APPROVED as a FINAL ORDER.

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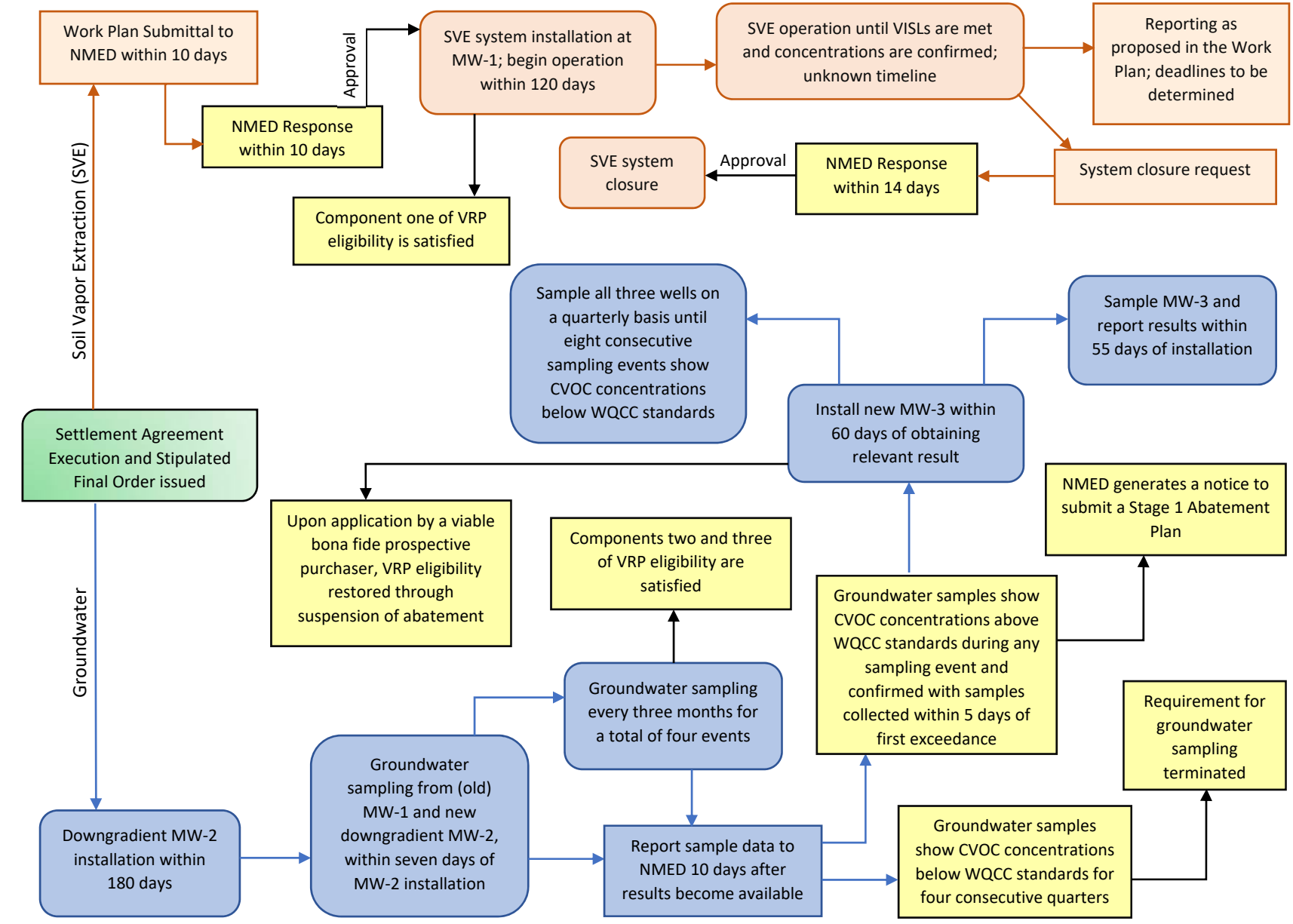
JENNIFER J. PRUETT
CHAIR
NEW MEXICO WATER QUALITY CONTROL COMMISSION

Date: _____

Attachment A: Acme Hometown Cleaners Settlement Agreement Process Map



Disclaimer: This diagram is intended to aid in understanding the complexities of the Settlement Agreement and Stipulated Final Order. In the event of any discrepancy between this diagram ("Attachment A") and the language of the Settlement Agreement and Stipulated Final Order, the Settlement Agreement and Stipulated Final Order controls.