

STATE OF NEW MEXICO
NEW MEXICO ENVIRONMENT DEPARTMENT



IN THE MATTER OF
ACME HOME TOWN CLEANERS
Sandy Ochoa and Retha Ochoa, Property Owners

REQUEST FOR HEARING
AND
SECOND AMENDED ANSWER TO ADMINISTRATIVE COMPLIANCE ORDER

COME NOW Sandy Ochoa and Retha Ochoa (the Ochoas), by and through undersigned counsel, and hereby submit their Request for Hearing pursuant to NMSA §74-6-10(G) and 20.1.3 NMAC and their Answer to Administrative Compliance Order. A copy of the Administrative Compliance Order is attached hereto.

ANSWER

I. FINDINGS

1. In response to Paragraph 1 of the Administrative Compliance Order, the Ochoas admit they purchased the property at issue in 2005. The allegations in the remainder of the paragraph are legal conclusion to which no response is required. To the extent a response is required, the Ochoas deny the allegations.

2. The Ochoas are without sufficient information to admit or deny the allegations contained in Paragraph 2, 3, 4, 5, 6, and 7 of the Administrative Compliance Order and therefore deny the same.

3. Paragraph 8 of the Administrative Compliance Order is a legal conclusion to which no response is required. To the extent a response is required, the Ochoas deny the allegations.

4. The Ochoas deny the allegations contained in Paragraph 9, 10, 11, 12, 13, and 14.

II. VIOLATIONS

5. The Ochoas deny the allegations contained in Paragraph 15 of the Administrative Compliance Order, including subparts A, B and C of Paragraph 15 for the reasons set forth in the Affirmative Defenses.

AFFIRMATIVE DEFENSES

1. Based on the investigation that has already occurred, there is no evidence that further action is needed to protect groundwater. A monitoring well has been installed and shows that groundwater is compliant. Vapor tests show no concentrations that will impact groundwater.
2. The regulation upon which the requirement to install a soil-vapor extraction is based is an illegal regulation that does not have any basis in the Water Quality Act or other statutory provisions.
3. The regulation requiring soil-vapor extraction cannot be applied retroactively in this matter.
4. To the extent that the regulation requiring soil-vapor extraction is deemed applicable, the regulation has already been satisfied because the building on the site is vacant, which constitutes an appropriate mitigation.
5. The Ochoas have been without the financial means to undertake the actions set forth in Section III, Compliance Order. The property was purchased by the Ochoas from the First National Bank of Alamogordo, which did not provide full disclosure regarding the condition of the property and no Phase II investigation was performed. Any deadlines set forth in the Administrative Compliance Order should be stayed and extended until the Ochoas are able to obtain the necessary funds to pursue the proposal presented by EA Engineering.

6. The Ochoas have not violated any applicable statutory or regulatory provisions and there is no basis for finding that they have failed to take corrective action, as alleged in Paragraph 15, subparts A, B and C.

7. The corrective action identified in Section III, Compliance Order, Paragraphs 16 to 22, is not necessary “to identify the extent of, and contain, any discharges to groundwater.”

8. There is no legal or factual basis for the imposition of the civil penalties set forth in Section IV of the Administrative Compliance Order.

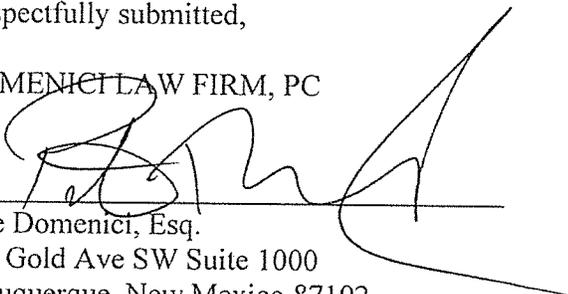
9. The civil penalties are not justified in light of the fact that the Ochoas do not have the funds to pay such penalties, as they have previously informed the Department.

10. The penalties are arbitrary and capricious and constitute selective enforcement and application. Further, the penalties assess multiple penalties for the same conduct, in violation of the Constitution of the United States and the Constitution of the State of New Mexico. The penalty policy may be invalid and unconstitutional. The penalty calculations may be invalid, duplicative and unconstitutional.

11. The civil penalties constitute punitive damages that are barred by the Constitution of State of New Mexico and by the Constitution of the United States.

Respectfully submitted,

DOMENICI LAW FIRM, PC


Pete Domenici, Esq.

320 Gold Ave SW Suite 1000

Albuquerque, New Mexico 87102

505-883-6250

pdomenici@domicilaw.com

STATE OF NEW MEXICO
NEW MEXICO ENVIRONMENT DEPARTMENT

IN THE MATTER OF
ACME HOME TOWN CLEANERS
Sandy Ochoa and Retha Ochoa, Property Owners

ADMINISTRATIVE COMPLIANCE ORDER

Pursuant to the New Mexico Water Quality Act (“WQA”), NMSA 1978, §§ 74-6-1, the Secretary of the New Mexico Environment Department (“Department”), acting through his designee, the Director of the Water Protection Division, issues this Compliance Order (“Order”) to Sandy Ochoa and Retha Ochoa (“the Ochoas”). The Order assesses a civil penalty for violation of the WQA and associated Ground Water Regulations (“Regulations”), 20.6.2 NMAC. It further compels corrective action at the relevant property, 901 East 10th Street, Alamogordo, New Mexico – the former location of Acme Home Town Cleaners (“Acme”).

I. FINDINGS

1. The Ochoas purchased the property at issue in 2005 and are “persons” as defined by NMSA 1978, § 74-6-2(I) and 20.6.2.7 NMAC.
2. Acme operated as a dry-cleaning business at the relevant address from at least 2012 to 2015 and utilized one of the industry’s most widely used chlorinated solvents: tetrachloroethene (“PCE”), which is also known as tetrachloroethylene, perchloroethylene or “perc.”
3. In September 2014, the Superfund Oversight Section of the Ground Water Quality Bureau (“Bureau”) issued a Site Reassessment Report for White Sands Boulevard between 8th

and 10th Streets, which is approximately one-half mile west of Acme. The Bureau concluded that a plume partly composed of PCE exists at that site.

4. Inspectors also tested soil vapor at three points on the Acme property. Each result exceeded soil-gas vapor-intrusion screening levels (“VISL”) for PCE, including 1,500,000 micrograms per cubic meter at one test point. The industrial soil-gas VISL for that compound is 6,550 micrograms per cubic meter.

5. In addition to PCE, one of the Acme soil-vapor sampling locations found trichloroethylene (“TCE”) concentrations of 2,500 micrograms per cubic meter. Industrial supplies of PCE historically contained a percentage of TCE byproduct; TCE is also produced during the anerobic degradation of PCE in the environment. The industrial soil-gas VISL for TCE is 328 micrograms per cubic meter.

6. Both PCE and TCE are listed as toxic pollutants in the Regulations. 20.6.2.7(T)(2)(k) NMAC. Their presence in water is also limited by human health standards. 20.6.2.3103(A)(1)(x) and (y) NMAC.

7. Any toxic pollutant or constituent of 20.6.2.7(T)(2) NMAC in the vadose zone must be abated so that it is not able to endanger human health due to inhalation of vapors. 20.6.2.4103(A)(2) NMAC.

8. Corrective action is required for any discharge of a water contaminant in such quantity as may with reasonable probability be detrimental to human health or welfare. 20.6.2.1203(A) NMAC. The owner of the facility shall take such corrective actions as are necessary to contain and remove or mitigate damage caused by the discharge. 20.6.2.1203(A)(5) NMAC.

9. Consequently, in a January 22, 2016 letter, the Department notified the Ochoas of

a need to further investigate the Acme property due to vapors that could accumulate in a structure and endanger human health. The Department offered three options: corrective action pursuant to 20.6.2.1203(A) NMAC, abatement pursuant to 20.6.2.4106(B) NMAC or voluntary remediation pursuant to 20.6.3.200 NMAC. The Ochoas opted for the first option.

10. Initially participatory, the Ochoas hired Terracon Consultants Inc. to perform a Limited Site Assessment focused on evaluation of volatile organic compounds. In its April 6, 2017 report, Terracon confirmed excessive soil-vapor levels of PCE, which now reached 2,400,000 micrograms per cubic meter at sample point three ("SV-3"). Terracon recommended installation of a vapor mitigation system "in consideration of potential exposures to future building occupants." (Terracon report pg. 6).

11. In early 2018, the Ochoas enlisted EA Engineering, Science and Technology Inc. to install a combined groundwater/soil-vapor monitoring well ("MW-1") on the *upgradient* side of the property. In its March 9, 2018 Corrective Action Report ("CAR"), EA recommended ongoing monitoring of MW-1 and, echoing Terracon, installation of a vapor-extraction pump.

12. The Bureau reviewed the CAR and, in an April 27, 2018 letter, endorsed the two EA recommendations by also requiring the Ochoas to monitor MW-1 on a quarterly basis and install a vapor-extraction pump. Additionally, the Bureau required the Ochoas to further investigate the boundaries of potential groundwater contamination through installation of additional monitoring wells or "grab" samples on the *downgradient* side of the property. The Ochoas were also required to submit quarterly monitoring reports of MW-1 and any additional wells within 90 days of each sampling event.

13. Because the Bureau did not receive quarterly monitoring reports, it followed up with a letter dated December 14, 2018. Therein, it instructed the Ochoas to submit, within 30

days, a “Modified CAR” that included a statement acknowledging the need for continued groundwater monitoring and a copy of any analytical reports obtained from MW-1 or other wells since March 2018. Additionally, it required the Ochoas to provide specifics as to how they would accomplish the soil-vapor extraction and define the downgradient extent of “the observed chlorinated solvent groundwater contamination.”

14. Receiving no response, the Bureau issued a Notice of Violation on February 28, 2019. The Ochoas have not responded.

II. VIOLATIONS

15. The Ochoas have not taken the corrective actions that, as owners of the Acme property, they are obligated to undertake pursuant to the conditionally approved Corrective Action Report of April 27, 2018. The violations are as follows:

- A. **Violation 1:** Failure to perform quarterly monitoring and reporting of MW-1 and any subsequently installed groundwater-monitoring wells.
- B. **Violation 2:** Failure to connect a soil-vapor extraction system to MW-1 at three screened intervals.
- C. **Violation 3:** Failure to define the downgradient extent of groundwater contamination through either installation of additional monitoring wells or collection of grab samples.

III. COMPLIANCE ORDER

16. Upon receipt of this Order, the Ochoas shall take any corrective action necessary to identify the extent of, and contain, any discharges to groundwater. Within 15 days of receipt of this Order, they shall submit a plan for identifying the boundaries of groundwater contamination originating from the property. This may be accomplished by drilling monitoring

wells and/or taking grab samples. 20.6.2.1203.A(5) NMAC.

17. Within 45 days of receiving this Order, the Ochoas shall submit a monitoring report for MW-1 listing analytical results for PCE and TCE concentrations.

18. Within 60 days of receiving this Order, the Ochoas shall install a vapor extraction system on MW-1.

19. The Department may require additional corrective action or an abatement plan if the investigation fails to adequately define the extent of contamination at the site or if ground water is contaminated in excess of the standards specified in 20.6.2.3103 and 4103 NMAC. If deemed necessary by the Department, this plan could include the installation of additional soil borings and/or monitoring wells and a plan to restore groundwater below regulatory standards.

21. All corrective action, work plans, progress reports, other reports, or other documents or information to be submitted to the Department under the terms of this Order shall be sent to:

Paul Chamberlain
Ground Water Quality Bureau
New Mexico Environment Department
1190 S. Saint Francis Drive
Santa Fe, NM 87505

The Department may change the name or address for such submissions at any time by providing the Respondent with written notice, effective ten (10) days after receipt.

22. If the deadlines specified in Paragraphs 17-19 are met, the Department will consider holding the civil penalties described in Paragraph 24 in abeyance.

IV. CIVIL PENALTY

23. Section 74-6-10(C)(2) of the WQA authorizes the assessment of a civil penalty of up to \$10,000 per day for violations of the WQA (except Section 74-6-5) or violations of any

regulation or water quality standard adopted pursuant to the WQA.

24. The Department hereby assesses a civil penalty in the amount of \$340,346 for the three violations set forth in Paragraph 16. The penalty is calculated based on the Department's Ground Water Quality Bureau Civil Penalty Policy. The individual penalty for each violation is as follows:

Violation 1, failure to perform quarterly monitoring: \$18,781

Violation 2, failure to install a vapor-extraction system: \$163,592

Violation 3, failure to establish extent of groundwater contamination: \$158,123

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 Department at the following address:

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

V. NOTICE OF OPPORTUNITY TO ANSWER AND REQUEST A HEARING

26. Pursuant to section 74-6-10(G) of the WQA, and the Water Quality Control Commission's Adjudicatory Procedures, 20.1.3 NMAC, entities receiving a Compliance Order may request a hearing by filing a written request for a public hearing with the Commission Administrator no later than thirty (30) days from the receipt of this Order. An Answer must be filed with the Request for Hearing. The Answer shall:

a. Clearly and directly admit, deny, or explain each of the factual allegations contained in this Order with regard to which the Respondents have any knowledge. Where the Respondents have no knowledge of a particular factual allegation, the Respondents shall so state,

and the Respondents may deny the allegation on that basis. Any allegation of the Order not specifically denied shall be deemed admitted.

b. Assert any affirmative defenses upon which the Respondents intend to rely. Any affirmative defense not asserted in the Answer, except a defense asserting lack of subject matter jurisdiction, shall be deemed waived.

c. Be signed under oath or affirmation that the information contained therein is, to the best of the signer's knowledge, believed to be true and correct.

d. Include a copy of this Order attached.

The Answer and Request for Hearing shall be filed with the Hearing Clerk at the following address:

Cody Barnes, Hearing Clerk
Office of Public Facilitation
New Mexico Environment Department
P.O. Box 5469
Santa Fe, NM 87502

VI. FINALITY OF ORDER

27. This Order shall become final unless a Request for Hearing and Answer is filed with the Hearing Clerk within thirty (30) days after the date of receipt of this Order. For purposes of this section, failure to file an Answer constitutes an admission of all facts alleged in the Order and a waiver of the right to a hearing under section 74-6-10(G) of WQA concerning this Order.

VII. SETTLEMENT

28. Whether or not an Answer is filed and a hearing is requested, entities receiving a Compliance Order may confer with the Department concerning settlement. The Department encourages settlement consistent with the provisions and objectives of the WQA. Settlement

discussions do not extend the thirty (30) day deadline for filing an Answer and Request for Hearing or alter the deadlines for compliance with this Order. Settlement discussions may be pursued as an alternative to or simultaneously with the hearing proceedings. An entity may appear at the settlement conference on their own behalf or may be represented by legal counsel.

29. Any settlement reached by the Parties shall be finalized by written settlement agreement and a stipulated final order. A settlement agreement and a stipulated final order must serve to resolve all issues raised in the Order, shall be final and binding on all Parties to the Order, and shall not be appealable.

30. To explore the possibility of settlement in this matter, contact Owen Johnson, Assistant General Counsel, New Mexico Environment Department, Office of General Counsel, at (505) 222-9508.

VIII. COMPLIANCE WITH OTHER LAWS

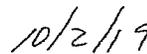
31. Compliance with the requirements of this Order does not remove the obligation to comply with all other applicable laws and regulations.

IX. TERMINATION

32. This Order shall terminate when the Ochoas certify that all requirements of this Order have been met and the Department has approved such certification, or when a settlement agreement has been executed and stipulated final order has been signed.



Rebecca Roose,
Water Protection Division Director



Date

