

**STATE OF NEW MEXICO
ENVIRONMENT DEPARTMENT**

NEW MEXICO ENVIRONMENT)	
DEPARTMENT,)	
Complainant,)	
)	NO. HWB-20-70 (AO)
v.)	
)	
D. AND D. MOUNTAIN AIR CLEANERS, Inc.)	
EPA ID #: NMR000024885)	
Respondent.)	
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ADMINISTRATIVE COMPLIANCE ORDER

Pursuant to NMSA 1978, Section 74-4-10, of the New Mexico Hazardous Waste Act (“HWA”), NMSA 1978, §§ 74-4-1 to -14, the Hazardous Waste Bureau (“HWB”) of the Resource Protection Division (“Division”) of the New Mexico Environment Department (“NMED”) issues this Administrative Compliance Order (“Order”) to D. and D. Mountain Air Cleaners, Inc. (“Mountain Air” or “Respondent”). This Order requires that Mountain Air, located at 309 Paseo De Oñate, Española, New Mexico, comply with the HWA and the Hazardous Waste Management Rules (“HWMR”), 20.4.1 NMAC, and assesses civil penalties for violations of the HWA and the HWMR.

I. FINDINGS

A. PARTIES

1. Pursuant to the Department of Environment Act, NMSA 1978, Sections 9-7A-1 to -15, NMED is an agency of the executive branch within the government of the State of New Mexico.
2. NMED, through its HWB, is charged with administration and enforcement of the HWA and HWMR.

3. The U.S. Environmental Protection Agency (“EPA”) has granted the State of New Mexico delegated authority to implement the federal Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901 to 6992k, within the state. The HWMR incorporate portions of 40 Code of Federal Regulation (“C.F.R”) §§ 260 through 270, 40 C.F.R.§ 279 and related federal regulations by reference.

4. The State of New Mexico adopted the federal hazardous waste regulations by reference on June 14, 2000. The State of New Mexico subsequently amended the HWMR on March 1, 2009 and on December 1, 2018, to adopt changes to the federal hazardous waste regulations.

5. Respondent is a “person” within the meaning of NMSA 1978, Section 74-4-3(M) of the HWA.

6. Respondent is a New Mexico for-profit corporation.

7. Respondent is a Very Small Quantity Generator (“VSQG”) of hazardous waste, as defined by 20.4.3.7(T) NMAC, under EPA I.D. Number NMR000024885.

8. Respondent’s facility is located at 309 Paseo De Oñate, Española, New Mexico (“Facility”).

B. INVESTIGATION

9. Tetrachloroethylene, also known as perchloroethylene (“PCE”), meets the definition of a characteristic hazardous waste pursuant to 40 C.F.R. Part 261 Subpart C. A solid waste is a hazardous waste if it exhibits the characteristic of toxicity, using the Toxicity Characteristic Leaching Procedure, if the waste has a concentration of 0.7 parts per million of tetrachloroethylene.

10. PCE meets the definition of a listed hazardous waste pursuant to 40 C.F.R. §

261.31. A solid waste is a hazardous waste if it is specifically listed as a known hazardous waste or meets the characteristics of a hazardous waste. Listed wastes are wastes from common manufacturing and industrial processes, specific industries and can be generated from discarded commercial products.

11. Trichloroethylene (“TCE”) meets the definition of a characteristic hazardous waste according to 40 C.F.R. Part 261 Subpart C. A solid waste is a hazardous waste if it exhibits the characteristic of toxicity, using the Toxicity Characteristic Leaching Procedure, if the waste has a concentration of 0.5 parts per million of trichloroethylene.

12. TCE meets the definition of a listed hazardous waste according to 40 C.F.R. § 261.31. A solid waste is a hazardous waste if it is specifically listed as a known hazardous waste or meets the characteristics of a hazardous waste. Listed wastes are wastes from common manufacturing and industrial processes, specific industries and can be generated from discarded commercial products.

13. During the North Railroad Avenue Plume (“NRAP”) data analysis conducted by NMED’s Ground Water Quality Bureau in 2015, increasing concentrations of PCE and TCE, were observed in a groundwater monitoring well on the eastern margin of the NRAP Site.

14. Exterior soil gas samples collected at 28 locations for a soil gas survey conducted by EPA in 2017 to further define the extent of contamination within the shallow groundwater plume also detected PCE and TCE at concentrations ranging from 1.0 to 670 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) and 1.4 to 2800 $\mu\text{g}/\text{m}^3$, respectively.

15. Data from a vapor intrusion (“VI”) investigation of indoor air at two structures over the shallow plume conducted by EPA in 2018 indicated PCE and TCE at concentrations below residential VI screening levels for indoor air.

16. Samples from three new shallow groundwater monitoring wells installed by NMED 's Superfund Oversight Section in January 2019 confirmed a separate contaminant source for the groundwater plume east of the NRAP Site.

17. Based on the findings of their investigations, NMED's Superfund Oversight Section concluded that PCE and TCE groundwater contamination identified beyond the eastern extent of the NRAP Site is attributable to Mountain Air.

18. On June 14, 2018, NMED's HWB conducted a hazardous waste Compliance Evaluation Inspection ("Inspection-1") at Mountain Air.

19. Based on Inspection-1, NMED determined that Mountain Air is a Conditionally Exempt Small Quantity Generator (Very Small Quantity Generator or "VSQG") of hazardous waste.

20. Inspection-1 revealed a small amount of perchloroethylene-based product on site used for spot-treating.

21. NMED reported no hazardous waste violations at the time of Inspection-1.

22. On December 27, 2019 NMED's HWB received a complaint regarding alleged waste dumping on site at Mountain Air.

23. On January 6, 2020, NMED's HWB conducted a second hazardous waste Compliance Evaluation Inspection ("Inspection-2") at Mountain Air.

24. NMED reported no hazardous waste violations at the time of Inspection-2.

25. On May 21, 2020, the HWB sent a Request for Information Letter ("RFI-1") to the Facility, pursuant to NMSA 1978, Section 74-4-4.3(A).

26. RFI-1 requested the following:

- a) An inventory of any chemicals stored, accepted, used, generated, emitted,

discharged, and/or disposed at Mountain Air from January 1, 2002 to present, including any available purchase orders, receipts, bills of lading, Material Safety Data Sheets (“MSDS”) and/or Safety Data Sheets (“SDS”) for these chemicals.

- b) All purchasing and/or receiving records for the chemicals identified in (a) above, from January 1, 2002 to present. Including the quantities received by Mountain Air and the dates of receipt.
- c) An inventory of all chemicals, including hazardous and solid wastes, currently on site at Mountain Air.
- d) All disposal records of hazardous waste and/or solid waste transported off site from Mountain Air from January 1, 2002 to present. If disposal records are not available, provide the name of the disposal company Mountain Air used to dispose of hazardous waste.
- e) All records of wastes transported from Mountain Air for purposes of storage, treatment or disposal including but not limited to manifests and bills of lading from January 1, 2002 to present.
- f) All contracts or agreements between Mountain Air and any entity used for storage, treatment, or disposal of solid or hazardous waste between January 1, 2002 and present.
- g) Any records and/or recollections concerning emissions, releases, or disposal of the chemicals identified in (a) above at Mountain Air between January 1, 2002 and present.
- h) Any data or reports from sampling of any environmental media on any

portion of the Mountain Air property from January 1, 2002 to present. This must include exact sample locations and the rationale for initiating the data collection or reporting.

- i) Any environmental assessments of any portion of Mountain Air conducted by or on behalf of Mountain Air from January 1, 2002 to present.
- j) Any information or recollections concerning any environmental investigatory or remediation work conducted on behalf of any party concerning the Mountain Air property.
- k) A timeline and all documentation concerning any corrective actions taken by, or on behalf of, Mountain Air in response to any releases of chemicals stored, accepted, used, generated, emitted, discharged, and/or disposed.

27. Mountain Air responded to RFI-1 on June 19, 2020.

28. Mountain Air's response to RFI-1 included Uniform Hazardous Waste Manifests from 2003-2009 and 2013-2015, and perchloroethylene purchase records from Laun-Dry Supply, dated from 2009-2014.

29. The purchasing records from Laun-Dry Supply indicated that Respondent purchased 480 gallons of Dowper solvent (a perchloroethylene solvent).

30. The Uniform Hazardous Waste Manifests indicated the Respondent disposed of 1,667 pounds of hazardous waste from 2007-2009 and 110 pounds of hazardous waste from 2013-2015.

31. No disposal records were provided for 2010, 2011 and 2012.

32. Mountain Air stated in their reply they did not have any other information requested in RFI-1.

33. On June 30, 2020, the HWB sent a second Request for Information Letter (“RFI-2”) to the Facility in order to clarify information received and confirm NMED had received all the information Mountain Air had pertaining to the chemicals purchased and disposed of at their Facility.

34. On July 18, 2020 Mountain Air responded to RFI-2.

35. In their response to RFI-2, Mountain Air stated that the only additional information they had acquired was purchasing records from another chemical company called Katzson Brothers, Inc.

36. The purchasing records from Katzson Brothers, Inc. indicated the Respondent had purchased 480 gallons of perchloroethylene from 2008-2011 and 390 gallons of Dowper Solvent from 2011-2014.

37. Total purchasing records submitted by the Respondent in response to RFI-1 and RFI-2 indicate they purchased 1,350 gallons of perchloroethylene from 2008-2014.

38. Of this total, 630 gallons of perchloroethylene/Dowper solvent were purchased from 2010 through 2012; however, Respondent did not produce hazardous waste disposal records for 2010 through 2012 nor did Respondent provide any information concerning the disposal of hazardous waste for those three years.

39. For the period from 2013 through 2014, 390 gallons of perchloroethylene/Dowper solvent were purchased; however, Mountain Air records document proper off-site disposal of only a very small quantity.

40. The HWMR provide that VSQGs are subject to regulations under 40 C.F.R. § 262.14(a)(5), incorporated by reference at 20.4.1.500 NMAC; therefore, the owner and operator of a VSQG must either treat or dispose of its hazardous waste in an on-site facility or ensure

delivery of their hazardous waste to an off-site treatment, storage or disposal facility, either of which, if located in the U.S., is:

- (i) Permitted under part 270 of [40 C.F.R. Chapter I];
- (ii) In interim status under pars 265 and 270 of [40 C.F.R. Chapter I];
- (iii) Authorized to manage hazardous waste by a state with a hazardous waste management program approved under part 271 of [40 C.F.R. Chapter I];
- (iv) Permitted, licensed, or registered by a state to manage municipal solid waste and, if managed in a municipal solid waste landfill is subject of part 258 of [40 C.F.R. Chapter I];
- (v) Permitted, licensed, or registered by a state to manage non-municipal non-hazardous waste and, if managed in a non-municipal non-hazardous waste disposal unit, is subject to the requirements in §§257.5 through 257.30 of [40 C.F.R. Chapter I];
- (vi) A facility which:
 - (A) Beneficially uses or reuses, or legitimately recycles or reclaims its waste; or
 - (B) Treats its waste prior to beneficial use or reuse, or legitimate recycling or reclamation;
- (vii) For universal waste managed under part 273 of [40 C.F.R. Chapter I], a universal waste handler or destination facility subject to the requirements of part 273 of [40 C.F.R. Chapter I];
- (viii) A large quantity generator under the control of the same person as the very small quantity generator, provided the following conditions are met:
 - (A) The very small quantity generator and the large quantity generator are

under the control of the same person as defined in § 260.10 of this chapter. “Control,” for the purposes of this section, means the power to direct the policies of the generator, whether by the ownership of stock, voting rights, or otherwise, except that contractors who operate generator facilities on behalf of a different person as defined in § 260.10 of this chapter shall not be deemed to “control” such generators.

(B) The very small quantity generator marks its container(s) of hazardous waste with:

(1) The words “Hazardous Waste”; and

(2) An indication of the hazards of the contents (examples include, but are not limited to, the applicable hazardous waste characteristic(s) (i.e., ignitable, corrosive, reactive, toxic); hazard communication consistent with the Department of Transportation requirements at 49 C.F.R. part 172 subpart E (labeling) or subpart F (placarding); a hazard statement or pictogram consistent with the Occupational Safety and Health Administration Hazard Communication Standard at 29 C.F.R. § 1910.1200; or a chemical hazard label consistent with the National Fire Protection Association code 704);

41. There is no evidence that all hazardous waste was delivered to an off-site treatment, storage, or disposal facility pursuant to 40 C.F.R. § 262.14(a)(5) from 2010 through 2014.

42. The HWMR provide that VSQGs are not exempt from requirements under 40 C.F.R. Parts 124, 262 (except §§ 262.10 through 262.14) through 268, and 270, if they do not meet the conditions as listed under 40 C.F.R. § 262.14, incorporated by reference at 20.4.1.500 NMAC; therefore, the owner and operator must obtain a hazardous waste treatment, storage, and

disposal permit for the disposal of perchloroethylene, pursuant to 20.4.1.900 NMAC, incorporating 40 C.F.R. § 270.1(b).

43. Respondent did not acquire a hazardous waste treatment, storage, and disposal permit for any on-site disposal of perchloroethylene during this time frame.

44. The HWMR provide that VSQGs are not exempt from requirements under 40 C.F.R. Parts 124, 262 (except §§ 262.10 through 262.14) through 268, and 270, if they do not meet the conditions as listed under 40 C.F.R. § 262.14, incorporated by reference at 20.4.1.500 NMAC; therefore, the owner and operator must design, construct, maintain and operate the facility in order to minimize the potential possibility of a fire, explosion or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water which could threaten human health or the environment, including the release of perchloroethylene, pursuant to 40 C.F.R. § 264.31

45. Respondent did not design, construct, maintain and operate the facility in order to minimize the potential possibility of any release of hazardous waste, specifically perchloroethylene, to soil, which could threaten human health or the environment.

II. VIOLATIONS

46. Respondent's failure to ensure delivery of hazardous waste to an off-site treatment, storage or disposal facility is a violation of 20.4.1.300 NMAC, incorporating 40 C.F.R. § 262.14(a)(5) by reference.

44. Respondent's failure to obtain a hazardous waste treatment, storage and disposal permit is a violation of 20.4.1.900 NMAC, incorporating 40 C.F.R. § 270.1(b) by reference.

45. Respondent's failure to design, construct, maintain and operate the facility in order to minimize the potential for fire, explosion or unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water that could threaten

human health or the environment is a violation of 20.4.1.500 NMAC, incorporating 40 C.F.R. § 264.31 by reference.

III. SCHEDULE OF COMPLIANCE

46. Based upon the foregoing findings and conclusions, Respondent is hereby ordered to take the following corrective actions, according to the following schedule, to achieve compliance with the HWA and the HWMR.

47. No later than 30 days after this Order becomes final, the Respondent shall submit a written response describing the procedures for disposing of hazardous waste in the future.

48. Any written response must include appropriate evidence and a certification from a responsible official designated to act on behalf of Mountain Air.

49. The certification of the responsible official shall state: "I certify under penalty of law that the information in this letter and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

IV. CIVIL PENALTY

50. Pursuant to NMSA 1978, Sections 74-4-10(B) and 74-4-12 of the HWA, the Respondent is liable for a civil penalty of up to \$10,000.00 per day of noncompliance for each violation of the HWMR. The Department hereby assesses a civil penalty of \$56,000.00 against the Respondent for the HWA violations described above.

51. No later than 30 days after this Order becomes final, the Respondent shall make payment to the State of New Mexico-Hazardous Waste Emergency Fund by certified check, bank draft or other guaranteed negotiable instrument, and mailed to or hand delivered to:

Kevin Pierard, Chief
Hazardous Waste Bureau
New Mexico Environment Department
2905 Rodeo Park Drive East, Building 1
Santa Fe, New Mexico 87505.

A copy of the transmittal letter shall be sent to counsel for the Department.

52. If the Respondent is unable, or has limited ability, to pay, the Respondent must demonstrate this with auditable financial documents.

V. NOTICE OF POTENTIAL ADDITIONAL PENALTIES

53. If the Respondent fails to comply in a timely manner with the Schedule of Compliance, the Secretary may assess additional civil penalties of up to \$25,000 for each day of continued noncompliance pursuant to NMSA 1978, Section 74-4-10(C) of the HWA.

VI. RIGHT TO ANSWER AND REQUEST A HEARING

54. Pursuant to NMSA 1978, Section 74-4-10(H) of the HWA, and NMED's Adjudicatory Procedures, 20.1.5.200 NMAC, the Respondent may file a written request for a public hearing with the Hearing Clerk no later than 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 assertions contained in this Order with regard to which the Respondent has any knowledge.

Where the Respondent has no knowledge of a particular factual allegation, the Respondent shall so state, and the Respondent may deny the allegation on that basis.

Any allegation of the Order not specifically denied shall be deemed admitted.

20.1.5.200(A)(2)(a) NMAC.

b. Indicate any affirmative defenses upon which the Respondent intends to rely. Any affirmative defense not asserted in the Request for Hearing, except a defense asserting lack of subject matter jurisdiction, shall be deemed waived.

20.1.5.200(A)(2)(b) NMAC.

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.

20.1.5.200(A)(2)(c) NMAC.

d. Include a copy of this Order attached. 20.1.5.200(A)(2)(d) NMAC.

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

Hearing Clerk
New Mexico Environment Department
1190 Saint Francis Drive, S-2103
P.O. Box 5469
Santa Fe, New Mexico 87502

Respondent must also serve a copy of the Request for Hearing on counsel for the HWB, pursuant to 20.1.5.200(A)(1) NMAC.

VII. FINALITY OF ORDER

55. This Order shall become final unless the Respondent files a Request for Hearing and Answer with the Hearing Clerk within 30 days after the date of receipt of this Order pursuant to NMSA 1978, Section 74-4-10(H) and 20.1.5.200(A)(2) NMAC.

VIII. SETTLEMENT CONFERENCE

56. Whether or not the Respondent requests a hearing and files an Answer, the Respondent may confer with the HWB concerning settlement, pursuant to 20.1.5.600(B) NMAC. Settlement is encouraged at any time if the settlement is consistent with the provisions and

objectives of the HWA and regulations. Settlement discussions do not extend the 30-day deadline for filing the Respondent's Answer and Request for Hearing or alter the deadlines for compliance with this Order. 20.1.5.600(B)(1) NMAC. Settlement discussions may be pursued as an alternative to and simultaneously with the hearing proceedings. The Respondent may appear at the settlement conference on its own behalf or may be represented by legal counsel.

57. Any settlement reached by the Parties shall be finalized by written settlement agreement and stipulated final order. A settlement agreement 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.

58. To explore the possibility of settlement in this matter, the Respondent may contact Christal Weatherly, Assistant General Counsel, Office of General Counsel, New Mexico Environment Department, 121 Tijeras Ave. NE, Suite 1000, Albuquerque, New Mexico 87102, (505) 222-9524, christal.weatherly@state.nm.us.

IX. TERMINATION

59. This Order shall terminate when the Respondent certifies that all requirements of this Order have been met and the Department has approved such certification, or when the Secretary of the Environment approves a settlement agreement and signs a stipulated final order.

X. COMPLIANCE WITH OTHER LAWS

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

61. Pursuant to the NMED Delegation Order dated September 14, 2020, the Cabinet Secretary has delegated the authority to sign Hazardous Waste Act Compliance Orders to the Director of the Resource Protection Division.

**STEPHANIE STRINGER, DIRECTOR
RESOURCE PROTECTION DIVISION**

DATE: _____

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Administrative Compliance Order was mailed via electronic mail and Certified Mail, Return Receipt Requested, on this 19th day of November 2020, to the following:

Tom Hnasko
Hinkle Shanor LLP
P.O. Box 2068
Santa Fe, New Mexico 87504
thnasko@hinklelawfirm.com

Attorney for Respondent

Christal Weatherly, Assistant General Counsel
New Mexico Environment Department