DISTRICT COURT, ADAMS COUNTY, COLORADO 110 Judicial Center Drive Brighton, Colorado 80601 THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, Plaintiff, v. JAY H. BROWN AND THORNTON, LLC, Defendants.	▲ **COURT USE ONLY** ▲
PHILIP J. WEISER, Attorney General MARY EMILY SPLITEK, 46619* Assistant Attorney General REBECCA FISCHER, 51604* Assistant Attorney General Ralph L. Carr Colorado Judicial Center 1300 Broadway, 7th Floor Denver, Colorado 80203 Telephone: (720) 508-6453; (720) 508-6265 FAX: (720) 508-6039 E-mail: emily.splitek@coag.gov; rebecca.fischer@coag.gov *Counsel of Record	Case No. Div: Ctrm:
COMPLAINT	

COMES NOW the Colorado Department of Public Health and Environment, Hazardous Materials and Waste Management Division ("Department"), by and through the Office of the Colorado Attorney General, and for its Complaint states the following:

INTRODUCTION

1. The Department comes before the Court to compel Jay H. Brown and Thornton, LLC ("Defendants") to comply with agreements they made to remediate contamination in accordance with the Colorado Hazardous Waste Act, sections 25-15-101 to 328, C.R.S.

("Act") and the Colorado Hazardous Waste Regulations, 6 C.C.R. 1007-3 ("Regulations"). The administrative agreement Defendants entered into and are now in violation of is known as a Corrective Action Plan permit ("CAP"), approved pursuant to section 100.26 of the Regulations.

2. Defendants are responsible for continuing to implement agreements they made to investigate and remediate contamination resulting from release of hazardous waste from the Thornton Shopping Center ("Facility").

3. The CAP requires Defendants to remediate soil and groundwater contaminated with a dry cleaning solvent known as tetrachloroethylene (alternatively, "perchloroethylene," "PCE," or "perc"), as well as related chemicals which can result from the breakdown of PCE, including but not necessarily limited to trichloroethylene ("TCE"), cis-1,2,-dichloroethylene, and vinyl chloride.

4. The contamination has migrated off-site and is underneath neighboring properties. The CAP requires Defendants perform environmental testing and remediation until both on-site and off-site conditions meet regulatory requirements, as determined by the Department.

5. Corrective action is results-driven and may be phased to accommodate changing conditions over time. The approved CAP for the Facility adopts a measured and phased approach to remediation.

6. The current phase of the approved CAP requires Defendants to treat contamination on neighboring properties by injecting a material called BOS-100 in six areas. Defendants were required to complete initial injections in the first three areas by August 14, 2020. Defendants did not complete the initial injections by August 14, 2020. Defendants are not currently performing treatment in any of the off-site areas. Defendants have not complied with the requirements of the approved CAP.

JURISDICTION AND VENUE

7. This Court has jurisdiction over the claims set forth herein pursuant to sections 13-1-124 and 25-15-309(1), C.R.S., and Colo. Const. art. VI section 9.

8. Venue is proper in the Adams County District Court pursuant to section 25-15-309(1), C.R.S. and C.R.C.P. 98(b) and (c). The Thornton Shopping Center ("Facility") is located in Adams County.

PARTIES

9. Plaintiff Colorado Department of Public Health and Environment's Hazardous Materials and Waste Management Department is the state agency vested with authority to enforce the Act and Regulations. The Department enforces the Act in lieu of the federal hazardous waste program, known as the Resource Conservation and Recovery Act, Subtitle C, 42 U.S.C. sections 6901-6992k ("RCRA"), pursuant to 42 U.S.C. section 6926. The Department issues permits pursuant to Section 100.26 of the Regulations authorizing corrective action at previously unpermitted hazardous waste facilities where a release has occurred. The Department has authority to issue and enforce the conditions of permits for treatment, storage and disposal facilities. § 25-15-301(2)(a), C.R.S. An approved CAP serves as a permit for the facility and describes required environmental investigation and remediation activities.

10. Defendant Jay H. Brown is a "person" subject to the requirements of the Act as that term is defined in section 25-15-101(13), C.R.S. Mr. Brown is an "operator" of Thornton, LLC and the Facility as that term is defined in 6 C.C.R. 1007-3, section 260.10 and in *United States v. Bestfoods,* 524 U.S. 51, 66-67 (1998). This District Court concluded in 2012 that Mr. Brown was an operator subject to liability under the Act. Finding of Fact, Conclusions of Law, and Order, *Colo. Dep't of Pub. Health & Env't v. Brown*, Case No. 11-CV-171 (Adams Cty. Dist. Ct. Oct. 5, 2012).

11. Defendant Thornton, LLC is a Colorado corporation in good standing and registered to conduct business in the State of Colorado. Colorado Secretary of State Business Center records list the formation date of the corporation as March 24, 2005. The principal office street address for Thornton, LLC is 2530 Crawford Avenue, Suite 102, Evanston, IL 60201. The Registered Agent for Thornton, LLC is Mark C. Willis, c/o Kutak Rock LLP, 1801 California Street, Suite 3000, Denver, CO 80202.

12. Thornton, LLC owns the Facility, which is located at the northwest corner of East 88th Avenue and Corona Street in the City of Thornton, Colorado. Thornton, LLC is the "owner" of the Facility as that term is defined in 6 C.C.R. 1007-3 sections 100.26(a) and 260.10.

GENERAL ALLEGATIONS

13. Thornton, LLC has owned the Facility since May 2005, and Mr. Brown has operated the Facility since that date.

14. Six historic dry cleaning businesses have been located in the Facility. The source of the release is a now-vacant unit in the Facility, located at 8866 Washington Street. The property and nearby commercial and residential properties to the southeast, are contaminated with PCE, a commonly used dry cleaning chemical and other related

chlorinated solvents. PCE, TCE, and the other chlorinated chemicals at the Facility are listed hazardous waste regulated by the Act and Regulations.

15. The Department became aware of the contamination in 2005. In December of that year, the Department notified Defendants that the release constituted an illegal disposal of a listed hazardous waste and gave Defendants the option of submitting a CAP to establish an enforceable process for investigating and remediating PCE contamination at the Facility.

16. Groundwater sampling results document chlorinated solvent concentrations in groundwater above standards. According to the Defendants' own consultant, as stated in the Second Semi-Annual 2019 Groundwater Monitoring Report, it is "somewhat disconcerting" that "PCE concentrations in four out of the eight off-site monitoring wells (MW-18, MW-19, MW-24, and MW-25) were at all-time highs, ranging from 3,900 µg/L at MW-18 to 13,000 µg/L at MW-24. MW-19, MW-24, and MW-25 are just upgradient of a residential area." These concentrations of PCE are significantly above the Colorado State groundwater standard of 5 µg/L (5 C.C.R. 1002-41).

17. Defendants hired an environmental contractor to conduct initial site investigation to determine the extent and source of the contamination. Defendants decided to proceed with a phased CAP, which the Department approved on May 29, 2008. A phased CAP provides a phased approach to investigation and remediation of contamination. A phased CAP requires a Facility to submit successive plans for approval. Because Defendants opted for this phased approach, CDPHE has made numerous determinations regarding the CAP for the Facility over the past 12 years. Together, the following documents constitute the approved CAP:

    a. The original CAP approved by the Department on May 29, 2008;
    b. A CAP Amendment approved by the Department on May 5, 2010, which this District Court upheld as a valid and enforceable administrative order in 2012;
    c. A CAP Amendment approved by the Department on March 4, 2013;
    d. A CAP Amendment approved by the Department on March 5, 2018; and
    e. A CAP Amendment approved by the Department on June 23, 2020 ("2020 CAP Amendment").

18. The 2020 CAP Amendment is the latest phase of the approved CAP. The 2020 CAP Amendment requires Defendants to perform the next phase of remediation: initial treatment of areas with off-site contamination using a material called BOS-100. BOS-100 must be injected into the ground to come into contact with the subsurface contamination. The 2020 CAP Amendment requires injections in six off-site areas adjacent to nearby businesses, a daycare facility, and residential buildings.

19. Pursuant to the 2020 CAP Amendment, Defendants were to begin initial off-site work by July 1, 2020 by taking "concrete actions such as scheduling fieldwork dates for the

month, staging equipment, and starting BOS-100 injection activities." Injections in areas OFS-1, OFS-2 and OFS-3 were to be completed by August 14, 2020.

20. On August 17, 2020, an inspector for the Department conducted an inspection at the Facility. The inspector determined that Defendants had taken no action on the required off-site injections in OFS-1, OFS-2, and OFS-3. In response to the inspector, the Defendants' consultant explained that Defendants had not procured the BOS-100 material and had no plans to commence injections due to an alleged lack of funds.

21. On August 21, 2020, the Department issued a Compliance Advisory to Defendants. The Compliance Advisory stated that Defendants appeared to be in violation of the approved CAP because they had not taken concrete actions to begin any injections by July 1, 2020, nor had they completed the required injections by August 14, 2020.

22. When a Compliance Advisory is issued by the Department's Corrective Action Unit, regulated entities and persons may request to meet with the Department. Mr. Brown requested a compliance conference. On October 2, 2020, the Department met with Defendants for an online compliance conference. During the conference, Mr. Brown stated that Defendants do not have the funds to pay for injections in OFS-1, OFS-2, and OFS-3 as required under the approved CAP. Mr. Brown stated that he would submit a proposed amendment to the as-approved CAP to the FINADepartment for review. The proposed amendment would reduce the scope of the off-site injections required under the approved CAP. Mr. Brown stated that the main reason for the proposed amendment was a lack of funds to pay for the injections as currently approved.

23. On October 6, 2020, Defendants submitted a proposed amendment to the as-approved CAP. This proposal sought to reduce the scope of the off-site injections required under the approved CAP. Defendants' proposal would limit the injections to approximately 1,500 square feet in each of areas OFS-1, OFS-2, and OFS-3 (4,500 square feet total). This reduction would fail to treat the hazardous waste on neighboring properties as quickly as required by the agreed-upon CAP.

24. On October 15, 2020, the Department wrote a letter responding to this proposal. The Department denied Defendants' proposal because it would authorize Defendants to perform only 22% of the injections required under the 2020 CAP Amendment. Because BOS-100 is a contact-based treatment, a reduction in injection area and material would result in less treatment of contamination on neighboring properties. Additionally, the Department rejected the new proposal because it did not include injections in areas OFS-4, OFS-5, and OFS-6, where injections are currently required to be completed by December 11, 2020. The Department also rejected the proposal because it lacked a timeline. In rejecting the proposal, the Department stated that all of the requirements of the approved CAP, including the requirements of the 2020 CAP Amendment, remain in place.

25. In response to the Department's rejection of the new proposal, Defendants stated in a bi-weekly status update dated October 15, 2020 that "No BOS-100 treatment material will be ordered, and no off-site injections will commence."

FIRST CLAIM FOR RELIEF
(For Injunction to Comply with Approved CAP)

26. The allegations of the preceding paragraphs are incorporated herein by reference.

27. The Act and Regulations authorize the Attorney General to bring civil actions in District Court for injunctive relief and penalties based on a finding that any person is or has been in violation of Part 3 of the Act or the Regulations. § 25-15-308(2)(a), C.R.S.; 6 C.C.R. 1007-3 § 101.3(a).

28. The Act and Regulations define "person" to include "any individual, public or private corporation, partnership or association . . ." § 25-15-101(13), C.R.S.; 6 C.C.R. 1007-3 § 260.10. Both Defendants are "persons" as that term is defined in the Act and Regulations and as found by this District Court in 2012.

29. The Thornton Shopping Center is a "treatment, storage, or disposal site or facility" as that term is defined section 25-15-101(18), C.R.S. and as found by this District Court in 2012.

30. Thornton, LLC is the "owner" of the Facility as that term is defined in 6 C.C.R. 1007-3 section 260.10 and referenced in 6 C.C.R. 1007-3 section 100.26(a) and as found by this District Court in 2012.

31. The Act and Regulations define "operator" as "the person operating a hazardous waste management facility or site either by contract or permit." § 25-15-101(12),C.R.S.; 6 C.C.R. 1007-3 § 260.10.

32. Operator liability applies to parties who "manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste . . ." or to parties who make "decisions about compliance with environmental regulations." *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998).

33. Mr. Brown is the operator of the Facility pursuant to a 2012 order by this District Court.

34. The Regulations provide that an owner or operator of a hazardous waste facility may submit a CAP proposal to the Department to conduct corrective action. 6 C.C.R. 1007-3 § 100.26(a). Once approved, the CAP provisions become a permit and requirements of Part 3 of the Act. 6 C.C.R. 1007-3 § 100.26(g). Any subsequent determinations made by the Department pursuant to the CAP are likewise requirements of Part 3 of the Act. *Id.*

35. Pursuant to 6 C.C.R. 1007-3 section 100.26(g), all of the documents which together comprise the approved CAP, including the 2020 CAP Amendment, are a permit and constitute determinations by the Department subsequent to the CAP. The requirements in the approved CAP are therefore requirements of Part 3 of the Act.

36. Defendants never requested an administrative review of the Department's approval of the 2020 CAP Amendment with modifications as allowed by section 25-15-305, C.R.S.

37. Defendants' failure to exhaust administrative remedies resulted in their nonconstitutional defenses being barred from this Court's consideration. *Colo. Dep't of Pub. Health & Env't v. Bethell*, 60 P.3d 779, 784-85 (Colo. App. 2002).

38. Defendants did not complete injections in areas OFS-1, OFS-2, and OFS-3 by August 14, 2020. Defendants have therefore failed to comply with the requirements of the approved CAP, 6 C.C.R. 1007-3 section 100.26, and Part 3 of the Act.

39. The Department need not meet the requirements of C.R.C.P. 65 or the common law criteria for an injunction because this action is authorized by special statute. *People ex rel. Rein v. Meagher,* 465 P.3d 554, 563 (Colo. 2020) (C.R.C.P. 65); *Lloyd A. Fry Roofing Co. v. Colo. Dep't of Health Air Pollution Variance Bd.*, 191 Colo. 463, 473, 553 P.2d 800, 808 (1976) (common law factors). Any violation of a regulatory scheme constitutes sufficient injury for injunctive relief. *Fry Roofing Co.*, 553 P.2d at 808.

40. The Department seeks an injunction pursuant to section 25-15-309(2)(a), C.R.S. requiring Defendants to comply with the approved CAP.

SECOND CLAIM FOR RELIEF
(For Civil Penalties for Failure to Implement the CAP Permit)

41. The allegations of the paragraphs above are incorporated herein by reference.

42. The Act and Regulations provide for civil penalties of up to $25,000 per day per violation for violations of the Act. § 25-15-309(1), C.R.S.; 6 C.C.R. 1007-3 § 101(3)(b).

43. Defendants have been in violation of the Act and Regulations since August 14, 2020–the date the Defendants were required to complete injections in areas OFS-1, OFS-2 and OFS-3. Defendants continue to be in violation of the Act and Regulations to date.

PRAYER FOR RELIEF
THEREFORE, THE DEPARTMENT REQUESTS THIS COURT:

1. Find Defendants in violation of the Act and Regulations, and enter judgment in favor of the Department;

2. Order Defendants to implement the approved CAP according to a schedule set by the Court;

3. Assess civil penalties against Defendants for past, present, and ongoing violations of the Act and Regulations in an amount to be determined; and,

4. Provide such other relief as the Court determines appropriate.

Dated this 29th day of October, 2020.

PHILIP J. WEISER
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