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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
Denver, CO 80202-1129

IN THE MATTER OF:	)	
	)	CERCLA Docket No. CERCLA-08-2020-0001
United States Department of the Army,	)	
	)	
Respondent.	)	**ADMINISTRATIVE COMPLAINT**
	)	**AND**
Rocky Mountain Arsenal	)	**NOTICE OF OPPORTUNITY**
Commerce City, CO,	)	**FOR HEARING**
	)	
Facility	)	
	)	

COMPLAINT

This Administrative Complaint and Notice of Opportunity for Hearing ("Complaint") is issued pursuant to Section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended, 42 U.S.C. § 9609. The Complainant is Kenneth C. Schefski, Regional Counsel, EPA Region 8 ("EPA"). The President's authority under Section 109 is delegated to the EPA Administrator in Section 4(d)(2) of Executive Order No.12580, and the Administrator's authority has been properly delegated, pursuant to EPA CERCLA Delegation 14-31 and Office of Enforcement and Compliance Assurance Delegation 14-31, to the undersigned EPA Region 8 Regional Counsel. This proceeding is subject to EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Consolidated Rules"), a copy of which is enclosed with this complaint, 40 C.F.R. Part 22, including 40 C.F.R. §§ 22.1(a)(7) and 22.39. This Complaint is issued against the United States Department of the Army ("Respondent" or the "Army") for the alleged failure or refusal to comply with a term or condition of an agreement

under Section 120 of CERCLA, 42 U.S.C. § 9609. Complainant alleges that the Army has failed or refused to reimburse EPA's costs for Rocky Mountain Arsenal , as required by the CERCLA Section 120(e) interagency agreement, among the EPA, the Army, the Department of Interior ("DOI"), the Agency for Toxic Substances and Disease Registry ("ATSDR") and Shell Oil Company.

PRELIMINARY STATEMENT

1. This proceeding for the assessment of civil penalties pursuant to sections 109(b)(5) and 122(l) of CERCLA, 42 U.S.C. §§ 9609(b)(5) and 9622(l), is commenced pursuant to 40 C.F.R. §§ 22.13(a) and 22.14.

STATUTORY BACKGROUND

2. CERCLA Section 120(a)(1), 42 U.S.C. § 9620(a)(1), states that each department, agency and instrumentality of the United States shall be subject to and comply with CERCLA in the same manner and to the same extent, both procedurally and substantively as any other non-governmental entity.

3. CERCLA Section 120(e)(2), 42 U.S.C. § 9620(e)(2), requires the owner or operator of a federal facility on the National Priorities List ("NPL") to enter into an interagency agreement, commonly referred to as a Federal Facility Agreement ("FFA"), with the Administrator of EPA to expeditiously complete all remedial action at the facility.

4. Section 109(b)(5) of CERCLA, 42 U.S.C. § 9609(b)(5), authorizes the President to assess a civil penalty of not more than $25,000 per day for each day during which the violation continues in the case of any failure or refusal referred to in CERCLA Section 122(l), 42 U.S.C. § 9622(l).

5. Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), states that a party's failure or refusal to comply with any term or condition of an agreement (*e.g.*, an FFA) made under CERCLA Section 120, 42 U.S.C. § 9620, shall subject such party to a civil penalty under CERCLA Section 109, 42 U.S.C. § 9609.

GENERAL ALLEGATIONS

6. The following general allegations are hereby incorporated into the ensuing count.

7. Respondent, the United States Army, is a department, agency, or instrumentality of the United States government.

8. Respondent is a "person" as defined in CERCLA Section 101(21), 42 U.S.C. § 9601(21).

9. Rocky Mountain Arsenal is a "facility" as that term is defined in CERCLA Section 101(9), 42 U.S.C. § 9601(9).

10. Respondent is an "owner or operator" of Rocky Mountain Arsenal as that term is defined in Section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A).

11. Rocky Mountain Arsenal is located on land owned by the United States, some of which is owned and operated by the Respondent.

12. Respondent was the owner and operator of Rocky Mountain Arsenal at the time of disposal of hazardous substances.

13. Rocky Mountain Arsenal constitutes a federal facility that is "owned or operated" by Respondent under CERCLA Section 120(a)(2), 42 U.S.C. § 9620(a)(2), and is subject to the

National Contingency Plan ("NCP"), 40 C.F.R. Part 300, and the other rules, regulations, guidelines, and criteria specified therein.

14. EPA placed Rocky Mountain Arsenal on the NPL in August 1987 and March 1989.

15. In February 1989, the EPA, the Army, Shell Oil Company, the ATSDR, and the DOI entered into an FFA for the investigation and cleanup of Rocky Mountain Arsenal.

16. In February 1989, the United States, on behalf of the Army, the EPA, the DOI, the ATSDR, and the Department of Justice ("DOJ"), and Shell Oil Company entered into a Settlement Agreement. The 1989 Settlement Agreement was later adopted and incorporated into a February 12, 1992 Consent Decree entered into between the United States, on behalf of the the Army, the EPA, the DOI, the ATSDR and the DOJ, and Shell Oil Company.

17. The FFA Section II (Purpose), paragraph 2.3 states, "the Army's compliance with the terms and conditions of this Agreement [the FFA] and the Settlement Agreement shall constitute compliance with the Army's obligations under CERCLA."

18. The FFA Section II (Purpose), paragraph 2.5, states, "[t]o assist in the performance of [EPA's responsibilities at this site and under this Agreement in accordance with Section 120], the Army and Shell agree to pay EPA Costs as defined in the Settlement Agreement payable and pursuant to Section XII of the Settlement of Agreement."

19. FFA Section XXVIII (Enforceability), paragraph 28.1(b), states, "[a]ll terms and conditions of this Agreement which relate to remedial actions and all work associated with the remedial actions shall be enforceable by any person to the extent permitted under Section 310 of

CERCLA and any violations of such terms and conditions will be subject to civil penalties under . . . 109 of CERCLA."

20. FFA Section XXIX (Stipulated Civil Penalties), paragraph 29.6, states that stipulated penalties are not the exclusive remedy for violations under the FFA: "[s]ubject to paragraph 28.4 [which does not apply here], the payment of a stipulated civil penalty in accordance with this Agreement does not preclude the invocation of any other remedy or sanction [i.e. statutory penalties] available pursuant to CERCLA for noncompliance with a provision of this Agreement."

21. FFA Section V (Statement of Facts), paragraph 5.20, states, "the Army, EPA . . . executed this Agreement in order . . . to preserve the related arrangements for the recovery of Response Costs. . ."

22. Section III (Definitions) of the Settlement Agreement, paragraph 3.60, defines the parties to the Settlement Agreement as the United States and Shell Oil Company. Section III (Definitions) of the Settlement Agreement, paragraph 3.100, further defines the United States as various departments and agencies including the "Army."

23. Section VII (Limitation of Scope) of the Consent Decree, paragraph 7.3, states, "[t]he Parties consider the Federal Facility Agreement to be binding upon each Party individually, and both of them together."

24. Section III (Definitions), paragraph 3.29, of the Settlement Agreement defines "EPA Costs" as "all costs incurred by EPA or its Contractors on or after October 1, 1987, in

carrying out its responsibilities in providing technical assistance for any activity in connection with this Settlement Agreement or the Federal Facility Agreement."

25. Section I (Statement of Purpose), paragraph 1.2, of the Settlement Agreement states, "[t]his Settlement Agreement thus. . . provides for payment by the Army and Shell of certain costs incurred by other federal agencies at the Arsenal, establishes a process for allocation of payment of costs of Response Actions and residual Natural Resource Damages resulting from releases of hazardous substances at or from the Arsenal. . ."

26. Section XII (EPA Costs), paragraph 12.6, of the Settlement Agreement states, "[t]he Army and EPA agree that the execution of this Settlement Agreement by the Army and EPA shall constitute an obligation of all appropriated funds designated by the Army for transfer to EPA pursuant to this Settlement Agreement."

27. Section XL (Funding), paragraph 40.1, of the FFA and Section XXIII (Funding) paragraph 23.1 of the Settlement Agreement state, "[i]t is the expectation of the Parties that all obligations of the United States under this Settlement Agreement will be funded. The United States, or any agency thereof, shall take all necessary steps and make every effort within its authority to assure that timely funding is available to meet all obligations of the United States under this Settlement Agreement."

28. Section XL (Funding), paragraph 40.2, of the FFA and Section XXIII (Funding) paragraph 23.2 of the Settlement Agreement state, "[t]he Army shall submit an annual report to Congress which shall include, at a minimum . . . the specific cost estimates and budgetary proposals anticipated by the Army over the following three-year period."

29. Section XII (EPA Costs), paragraph 12.3, of the Settlement Agreement states, "[o]n or about June 1, 1990, and June 1 every three years thereafter, EPA, the Army and Shell shall confer and attempt to reach consensus on the annual amount to be paid to EPA for EPA Costs over the following three-year period. During such negotiations, EPA's actual expenditures of EPA Costs over the prior three years shall be considered. If EPA, the Army and Shell fail to reach unanimous agreement five days after commencement of any such negotiating sessions, the annual payment for the following three-year period shall be equal to $550,000 (referred to herein as the "default amount") plus a percentage of $550,000 equal to the percentage increase in the Index between October 1, 1989, and the first day of the negotiating session. . ."

30. In practice, the Army and the EPA have used yearly billings in the form of a letter to the Army.

31. For FY 2016 and 2017, the EPA did not send a funding request to the Army, but later provided certified costs showing the EPA's expenditures through an email to the Army on June 13, 2018.

32. The Army informed the EPA in a June 2018 meeting that it could no longer pay the EPA's costs from existing appropriations as it had for over 25 years.

33. For EPA costs for FY 2015, EPA sent a letter on September 30, 2014, to the Army demanding $1,200,000 in EPA costs.

34. For EPA costs for FY 2015, the Army paid a total of $470,000.00 in two installments on January 28, 2015 and March 30, 2015, constituting only a portion of EPA's demand amount of $1,050,038.71.

35. For remaining EPA costs for FY 2015, EPA demanded $580,038.71 in a letter delivered to the Army, dated August 21, 2018. This amount is based on calculating the default amount under the Settlement Agreement for 2015 and subtracting the partial payment of $470,000 that the Army made for FY 2015. The default amount was applied once the Army informed EPA in a June 2018 meeting that it could no longer pay the EPA's costs from existing appropriations, thus the Army and the EPA failed to come to an agreement on the amount due to EPA triggering the default amount under the Settlement Agreement.

36. The Army has failed to pay the remaining $580,038.71 balance for reimbursement costs owed to the EPA for FY 2015.

37. For EPA costs for FY 2016, the EPA demanded $1,050,038.71, the default amount provided for in the Settlement Agreement adjusted for inflation, in a letter delivered to the Army dated August 21, 2018. The default amount was applied once the Army informed the EPA in a June 2018 meeting that it could no longer pay the EPA's costs from existing appropriations, thus the Army and the EPA failed to come to an agreement on the amount due to EPA triggering the default amount under the Settlement Agreement.

38. For EPA costs for FY 2016, the Army failed to reimburse the EPA $1,050,038.71.

39. For EPA costs for FY 2017, the EPA demanded $1,087,225.81, the default amount provided for in the Settlement Agreement adjusted for inflation, in a letter delivered to the Army, dated August 21, 2018. The default amount was applied once the Army informed the EPA in a June 2018 meeting that it could no longer pay the EPA's costs from existing appropriations, thus the Army and the EPA failed to come to an agreement on the amount due to the EPA triggering the default amount under the Settlement Agreement.

40. For EPA costs for FY 2017, the Army has failed to reimburse the EPA its costs of $1,087,225.81.

41. For FY 2018, the EPA demanded $1.1 million, in a letter delivered to the Army, dated January 25, 2018. The Army paid only $482,131.84 on April 5, 2018. In a letter dated August 21, 2018, the EPA demanded $605,093.97 for FY 2018. This amount is based on calculating the default amount under the Settlement Agreement for FY 2018 and subtracting the partial payment of $482,131.84 that the Army made for FY 2018.

42. The Army has failed to pay the remaining $605,093.97 balance for reimbursement costs owed to the EPA for FY 2018.

43. For FY 2019, the EPA demanded $1,486,653.45 in oversight costs, in a letter to the Army, dated December 19, 2018, requesting that $743,326.73 be paid in March 2019 and $743,326.72 be paid in August 2019.

44. The Army did not respond to the EPA's December 2018 demand letter and failed to reimburse the EPA for any of its FY 2019 costs of $1,486,653.45.

45. In total, for FY 2015-2019, the Army owes the EPA $4,809,050.65 in reimbursement costs as required by the FFA.

VIOLATIONS

Count 1: Failure to Reimburse the EPA its Costs as Required by the Rocky Mountain Arsenal FFA

46. Paragraphs 1 through 45 are incorporated by reference as though fully set forth herein.

47. Respondent failed to pay EPA Costs as required by the FFA and provided for in Section XII of the Settlement Agreement.

48. Respondent's alleged failure or refusal to properly pay reimbursements in FY 2015 through FY 2019 constitutes a failure or refusal to comply with a term or condition of an agreement under CERCLA Section 120, 42 U.S.C. § 9620, pursuant to CERCLA Sections 109(b)(5) and 122(l), 42 U.S.C. §§ 9609(b)(5) and 9622(l).

49. Due to Respondent's alleged failure or refusal to reimburse EPA's costs as required by the FFA and provided for in the Settlement Agreement, Respondent is subject to civil penalties under CERCLA Sections 109(b)(5) and 122(l), 42 U.S.C. §§ 9609(b)(5) and 9622(l).

CIVIL PENALTY ASSESSMENT

50. Paragraphs 1 through 49 are incorporated by reference.

51. Respondent's alleged failure or refusal to comply with a term or condition of an agreement under CERCLA Section 120, 42 U.S.C. § 9620, subjects Respondent to civil penalties pursuant to CERCLA sections 109(b)(5) and 122(l), 42 U.S.C. §§ 9609(b)(5) and 9622(l).

52. Respondent is liable under CERCLA sections 109(b)(5) and 122(l), 42 U.S.C. §§ 9609(b)(5) and 9622(l), for a civil penalty of up to $25,000 for each day that a violation continues. Pursuant to the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, 40 C.F.R. part 19, violations that occurred after November 2, 2015 and where penalties are assessed on or after January 13, 2020 are subject to penalties of up to $58,328 for each day the violation continues.

53. Complainant alleges that Respondent has been in violation of a term or condition of the FFA since October 1, 2015 due to Respondent's alleged failure or refusal to properly reimburse the EPA's costs at Rocky Mountain Arsenal as required by the FFA and provided for in the Settlement Agreement. This constitutes a severe violation of the FFA that jeopardizes the EPA's ability to carry out its congressionally-mandated oversight role at Rocky Mountain Arsenal.

54. Based on an evaluation of the facts alleged in the Complaint, Complainant intends to seek the assessment of a civil penalty for Respondent's violation under sections 109(b)(5) and 122(l), 42 U.S.C. §§ 9609(b)(5) and 9622(l).

55. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant is not proposing a specific civil penalty at this time but will do so within fifteen (15) days after Respondent files its prehearing information exchange. 40 C.F.R. § 22.19(a)(4).

56. Given the facts alleged in this Complaint, Complainant could propose the assessment of a civil penalty of up to $58,328 per day for the violations alleged.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

57. Respondent may request, within 30 days of service of this Complaint, a hearing before an EPA Administrative Law Judge on the Complaint and at the hearing may contest any material fact and the appropriateness of any penalty amount. To request a hearing, Respondent must file a written Answer within 30 days of service of this Complaint. The Answer shall clearly and directly admit, deny or explain each of the factual allegations contained in this Complaint of which Respondent has any knowledge. Where Respondent has no knowledge of a particular factual allegation, the Answer should so state. Such a statement is deemed to be a denial of the

allegation. The Answer shall contain: (1) the circumstances or arguments which are alleged to constitute the grounds of any defense; (2) the facts which Respondent disputes; (3) the basis for opposing any proposed relief; and (4) whether a hearing is requested. Failure of Respondent to admit, deny or explain any material factual allegation contained in the Complaint constitutes an admission of the allegation.

58. If Respondent fails to file a written Answer within 30 days of receipt of this Complaint, such failure shall constitute an admission of all facts alleged in the Complaint and waiver of the right to contest such factual allegations. Failure to Answer within 30 days may result in the filing of a Motion for Default and Default Order. The Default Order may impose the penalties proposed herein without further proceedings.

59. Any hearing requested will be conducted in accordance with the Consolidated Rules, 40 C.F.R. part 22. Respondent must send any request for a hearing to:

Regional Hearing Clerk (8RC)
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

60. A copy of Respondent's Answer and all other documents that Respondent files in this action should be sent to William Lindsey the attorney assigned to represent Complainant in this matter, at the following address:

William Lindsey
Office of Regional Counsel
R8-ORC-LEB-CES
1595 Wynkoop Street
Denver, CO 80202

SETTLEMENT CONFERENCE

61. Whether or not Respondent requests a hearing, Respondent may request an informal conference in order to discuss the facts of this case and to arrive at a settlement. To request an informal settlement conference, please write to or telephone the undersigned attorney, William Lindsey, at 303-312-6282 or lindsey.william@epa.gov.

62. Please note that a request for, the scheduling of, or participation in, an informal settlement conference does not extend the 30-day period during which a written Answer and Request for hearing must be filed as set forth above. The informal settlement conference procedure, however, may be pursued simultaneously with the adjudicatory hearing procedure.

63. Under the Consolidated Rules 22.18(b), the EPA encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of CERCLA and its applicable regulations. In the event settlement is reached, its terms shall be expressed in a written Consent Agreement prepared by Complainant, signed by the parties and incorporated into a Final Order signed by Regional Judicial Officer.

SEPARATION OF FUNCTIONS AND EX PARTE COMMUNICATIONS

64. The Consolidated Rules Part 22.8 prohibit any unilateral discussion or ex parte communication of the merits of a case with the Administrator, Judicial Officer, Regional Administrator, Regional Judicial Officer, or the Administrative Law Judge after issuance of a Complaint. From the date of this Complaint until the final Agency decision in this case, neither the Administrator, Judicial Officer, Administrative Law Judge, Regional Administrator, nor the Regional Judicial Officer, shall have any ex parte communication with the EPA trial staff or the Respondent on the merits of any issues involved in this proceeding.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 8
Complainant.

Date:_____

By: KENNETH SCHEFSKI Digitally signed by KENNETH SCHEFSKI Date: 2020.06.12 13:40:24 -06'00'

Kenneth C. Schefski
Regional Counsel
Office of Regional Counsel
EPA Region 8