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CERCLA-08-2022-0003

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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Ref: ORC-C

February 28, 2022

Sent via electronic mail

Ms. Stephanie Talbert
EPA Neutral Official
Office of Regional Counsel
U.S. Environmental Protection Agency Region 8
R8_Hearing_Clerk@epa.gov

RE: Colorado Smelter Superfund Site, Pueblo, Colorado
Superfund Lien – EPA Response to Companies' Response

Dear Ms. Talbert:

On February 24, 2022, EPA and representatives for 1000 South Santa Fe LLC and 1100 South Santa Fe LLC participated in an appearance before yourself, the neutral EPA official, regarding EPA's intent to perfect a federal Superfund lien on the Companies property that is located within the Colorado Smelter Superfund Site. Please find attached EPA Region 8's written Response to the Companies' response dated February 17, 2022.

If you have any questions, please contact me by phone at (303) 312-6839 or by email at Rae.Sarah@epa.gov.

Sincerely,

SARAH RAE Digitally signed by SARAH RAE Date: 2022.02.28 16:32:48 -07'00'

Sarah Rae
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency Region 8

cc: Christopher Thompson, EPA
Andrea Madigan, EPA
Christina Baum, EPA
Sabrina Forrest, EPA
Connie King, Counsel for the Companies

Colorado Smelter Site
Superfund Lien – 1000 South Santa Fe LLC and 1100 South Santa Fe LLC
EPA Response

I. CERCLA Remedial Action at the Colorado Smelter Site

The parties disagree whether the property is subject to remedial action under CERCLA. The Companies claim that 1994 TCLP sampling performed on the property would not warrant remediation of the property. The Companies also claim that December 2021 soil sampling on the property does not exceed EPA's residential soil screening levels.

The Colorado Department of Public Health and Environment (CDPHE) began sampling the former Colorado Smelter area in the early 1990s and conducted a preliminary assessment of the area in 2008. The 2008 assessment concluded that emissions from the Colorado Smelter smokestacks resulted in widespread contamination of soils with heavy metals (including lead, cadmium, arsenic, zinc). This report is already included in the Lien Filing Record. In 2014, EPA made the determination that the Colorado Smelter Site presents an unacceptable risk to public health and the environment and requires remediation. This determination is based upon a comprehensive analysis of Site conditions and an evaluation of environmental conditions in accordance with the Hazardous Ranking System. Subsequently, the EPA conducted a formal rule making process to list the Colorado Smelter Site on the National Priorities List. As a part of the rule making process, EPA made this information available to the public and sough public comment. Since listing the site on the National Priorities List, EPA has sampled surface soil, surface water, sediment, and pore water within the former smelter area of OU2, including the Companies' parcels. Elevated levels of heavy metals, including lead and arsenic, have been identified within all media sampled. A map of EPA's OU2 soil sampling that shows elevated levels of heavy metals is included as Appendix D to EPA's February 3, 2022 Response.

The EPA maintains that it is not appropriate to reply upon limited sampling and analysis that was performed by the Companies' environmental consultants. Under CERCLA, EPA is required to follow the comprehensive requirements of the Superfund process for the site remedial investigation and feasibility study and for developing alternatives and selecting a cleanup remedy. EPA is currently in the remedial investigation stage of the Superfund process for OU2.

II. All Appropriate Inquiry

a. The Companies must prove that AAI was performed in 2011 and 2012

The Companies bear the burden of proving that AAI was performed in 2011 and 2012, prior to the Companies' acquisition of the parcels. However, Cecil Brown, registered agent for the Companies, claims that EPA should ignore the fact that the current owners of the property are the Companies, and instead look back to 1982 and 1986 when he and his wife acquired the property. There is no legal or factual basis to ignore the legal existence of the Companies or their ownership of the property. The Companies were created by or on behalf of Cecil Brown in accordance with the Colorado law and with the assistance of legal counsel. This type of business structure provides the limited liability protection features of a corporation and the tax efficiency and operational flexibility of a partnership.

In their Response, the Companies claim that transfer of property to an LLC does not require an environmental review. The Companies submitted statements from Cecil Brown's estate attorney and his environmental consultant claiming an environmental assessment was not triggered when Mr. Brown transferred his ownership interest in the property to the Companies. These statements are misleading and

insufficient to establish that the Innocent Landowner Defense applies under the circumstances presented. CERCLA does not mandate that property owners undertake an environmental assessment anytime property is acquired. Rather, if a property owner seeks to insulate themselves from CERCLA liability based upon the Innocent Landowner Defense, then the property owner must prove that they conducted AAI prior to acquiring the property.

b. The information the Companies provided is not sufficient to prove that AAI was performed in 2011 and 2012.

The Companies have not provided any information or documentation to prove that AII was performed in 2011 and 2012 prior to the Companies' acquisition of the parcels. Had the Companies reviewed the historical information about the property and any reasonably ascertainable information about the property, as required by the AAI Rule, they would have discovered that the property was contaminated. For example, in 2011 and 2012, Mr. Brown was represented by legal counsel and could have also reached out to an environmental consultant, EPA, or CDPHE to inquire about the former smelter that was located on the property and the nearby slag pile.

c. The information the Companies provided is not sufficient to prove that AAI was performed in 1982 and 1986.

The EPA maintains it is not appropriate to look back to 1982 and 1986 to determine whether AAI was performed. Nonetheless, the information the Companies submitted to support their claim that Cecil Brown performed AAI in 1982 and 1986 is not sufficient. Mr. Brown had reason to know in 1982 and 1986 that the property was contaminated.

For property acquired prior to 1997, a property owner must prove that they conducted AAI into previous ownership and property uses in accordance with generally accepted good commercial and customary practices. CERCLA § 101(35)(B)(iv)(I) instructs courts to consider the following:

- Obviousness of the presence or likely presence of contamination at the property
- Commonly known or reasonably ascertainable information about the property;
- Any specialized knowledge or experience of the property owner;
- The relationship of the purchase price to the value of the property, if the property is uncontaminated; and
- The ability of the defendant to detect contamination by appropriate detection.

i. Obviousness of the presence or likely presence of contamination at the property

The presence of contamination was obvious in 1982 and 1986. The property includes the site of the former Colorado Smelter facility and is adjacent to a historic slag pile, approximately 700,000 square feet in size and as high as 30 feet in some places, made up of dark brown/black, molten-like material. A map that overlays the former smelter facility buildings with OU2 is included as Appendix E to this Response. Mr. Brown has stated that he was aware in 1982 that there were slag piles on nearby properties. Appendix F to this Response shows the location of the slag piles. Upon seeing the slag piles, a reasonable person would have inquired about the origin of the slag and whether the slag was contaminated.

ii. Information was reasonably ascertainable prior to Mr. Brown's acquisition of the parcels in 1982 and 1986

Mr. Brown claims that in 1982 to 1986, when he acquired the property, he did not know about the contamination and was not aware of any published studies that characterized slag from silver and lead smelters. However, at the February 24, 2022 appearance, it was disclosed that Mr. Brown knew when he acquired the property in the 1980s, the deeds included a railroad easement and referenced the former smelter. Even if slag studies were not available in 1982 and 1986, there was information that was reasonably ascertainable at the time about the Colorado Smelter and its operations. Newspaper articles dating back to 1900 disclose information about the Colorado Smelter's operations and the slag pile and were reasonably ascertainable in 1982 and 1986. Mr. Brown could have conducted a title search, which would have revealed the previous ownership history of the property, including information that the property was previously owned by a smelter company. Additionally, Mr. Brown could have contacted an environmental consultant, EPA, or CDPHE to inquire about the former smelter operations, the smelter slag, and whether the property was likely contaminated.

iii. In the 1970s information about the health impacts from lead exposure were commonly known

The Colorado Smelter was a lead and silver smelter. In the 1970s there were national discussions about the human health risks associated with lead exposure. For example, lead was being phased out of gasoline starting in 1975 and lead was banned in paint in 1978.

iv. Mr. Brown had specialized knowledge about the property

Mr. Brown claims that when he acquired the property in 1982, he had been a tenant on the property since 1963. He explains that he was aware of the former smelter, just like everyone was, but commercial property owners, tenants and developers were not concerned about potential contamination near slag piles in Pueblo in 1982 and 1986. He further explained that simply seeing slag piles did not automatically trigger concern regarding hazardous substances. To support this claim, Mr. Brown has cited to the development of the nearby Minnequa Industrial Park during the 1970s, which is located between Interstate Highway 25 and the slag pile originating from the steel production of Colorado Fuel and Iron Corp (CF&I). Mr. Brown has explained that the design engineer for development of the industrial park has stated that at the time of the development there was no active search for or concern over the presence of hazardous substances. To further support his claim, Mr. Brown has also pointed to the fact that slag was being sold and used in driveways and parking lots and railroad tracks in Pueblo.

From the time the industrial park was developed in the 1970s and the time Mr. Brown acquired the parcels in 1982 and 1986, new information was available about hazardous substances. For example, there was commonly known information about the health impacts from lead exposure, and CERCLA became law in 1980 following national discussions about toxic contamination at sites including Love Canal, New York. Additionally, Mr. Brown would have been able to see the visible differences between the OU2 slag material and the CF&I slag material. Slag is an industrial waste product and not all slag is the same. Slag composition is dependent on what feedstock is used – said more simply, what comes out depends on what goes in. The Colorado Smelter was a silver and lead smelter, whereas the CF&I facility is a steel mill. The slag generated by these facilities would have different compositions based on the different feedstocks used at a lead and silver smelter versus a steel mill. The OU2 slag pile is dark brown/black, and molten like, whereas the crushed slag from the steel mill is much lighter in color (light grey) and has a more porous texture. The slag that is being used in driveways and parking lots in Pueblo, is crushed slag that is sold from the CF&I steel mill. Photos of the crushed slag that is sold at the CF&I

steel mill are attached to this Response as Appendix G. A reasonable person would have inquired about the origin of the dark brown/black slag and whether it was contaminated. Mr. Brown could have contacted an environmental consultant, CDPHE, or the EPA.

v. Relationship of purchase price to the value of the property, if uncontaminated

No information was provided regarding the relationship between the purchase price paid for the property in the 1980s and the value of the property if uncontaminated. Mr. Brown's son surmised that the property was purchased based upon fair market value at the time without consideration of the contamination. Following cleanup of OU2, the property will likely increase in property value. The Pueblo community is very interested in reuse and redevelopment of OU1 and OU2 of the Colorado Smelter Site. The Pueblo City Council recently adopted the Colorado Smelter Revitalization Plan. The EPA has been contacted by various prospective purchasers that have expressed interested in purchasing parcels in OU2 to develop in the future after EPA's cleanup efforts have been completed.

vi. The ability of Mr. Brown to detect contamination by appropriate detection

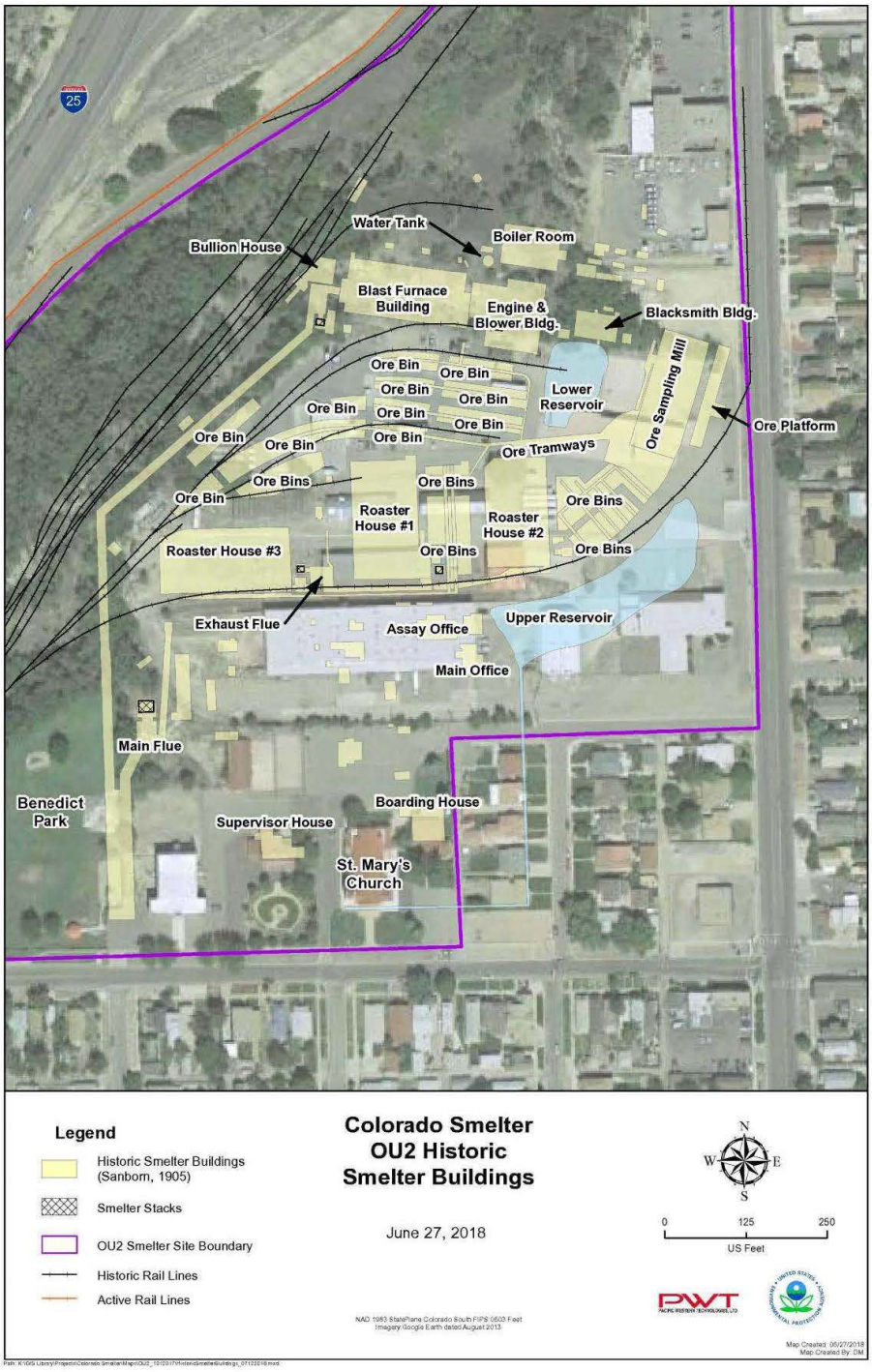
It appears that in 1982 and 1986, Mr. Brown only talked to the current owners/tenants of the property when investigating the previous ownership and uses of the property. Had Mr. Brown conducted additional investigations into the previous ownership and uses of the property, he would have detected the contamination. As explained above, a variety of commonly known and reasonably ascertainable information was available to Mr. Brown in 1982 and 1986.

III. Conclusion

After considering all of the information included in the Lien Filing Record, the Companies' December 22, 2021 Written Objection, and the parties Responses, the neutral EPA official should find that: (1) the Companies has failed to prove, by a preponderance of the evidence, that the innocent landowner defense applies, and (2) EPA has a reasonable basis to believe that the statutory elements have been satisfied for the perfection of a Superfund Lien against the Properties.

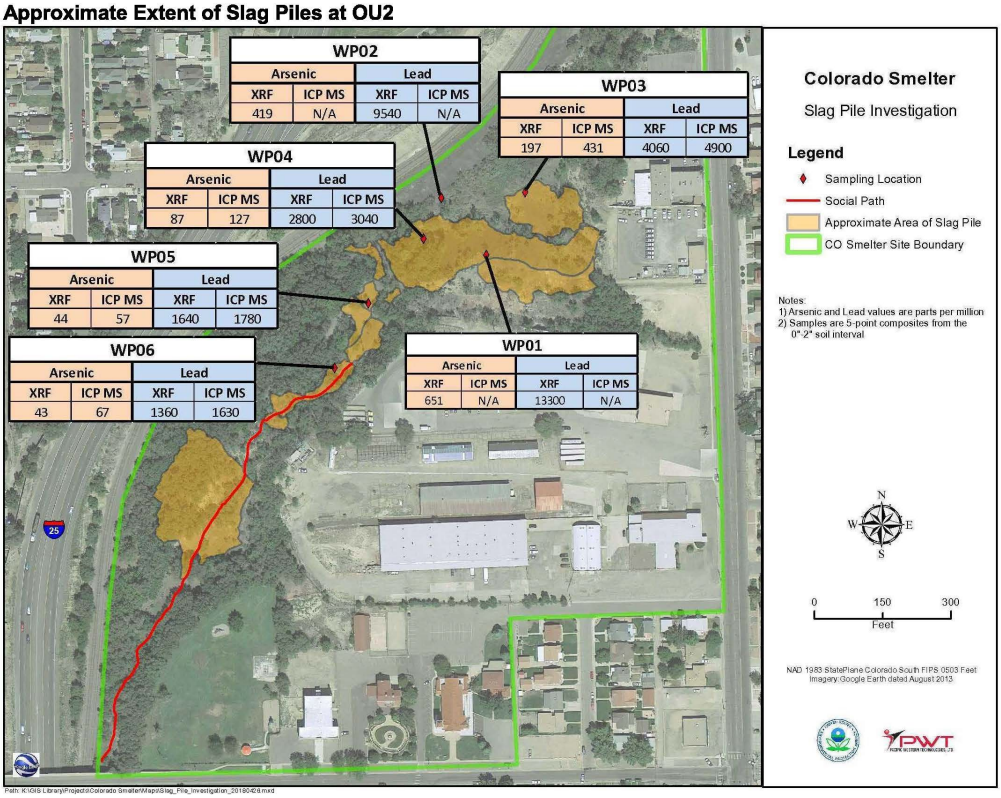
Appendix E: Colorado Smelter Overlay Map

Figure 3 Colorado Smelter Historical Smelter Buildings Map



Appendix F: Map of Slag Piles

Figure 4 Approximate Extent of Slag Piles at OU2



Appendix G: Photos of Crushed Slag
Sold by the CF&I Steel Mill

CERTIFICATE OF SERVICE

The undersigned certifies that the attached **RESPONSE** in the matter of **1045-1049, 1103 South Santa Fe Avenue, City of Pueblo, Colorado; DOCKET NO.: CERCLA-08-2022-0003** was filed with the Regional Hearing Clerk on February 28, 2022.

Further, the undersigned certifies that a true and correct copy of the documents were sent via certified receipt email on February 28, 2022, to:

Respondents

Connie King
Law Firm of Connie H. King, LLC
Email: Connie@chkinglaw.com

February 28, 2022

SARAH RAE Digitally signed by SARAH RAE Date: 2022.02.28 16:33:21 -07'00'

Sarah Rae
Senior Assistant Regional Counsel
EPA R8, ORC