

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:
Jacobs Smelter Site
Tooele County, Utah

ADMINISTRATIVE ORDER DIRECTING
COMPLIANCE WITH REQUEST FOR
ACCESS

Ricky P. Wheeler
Respondent.

U.S. EPA Region 8
CERCLA Docket No. CERCLA - 08-2007-0007

Proceeding Under Section 104(e) of the
Comprehensive Environmental Response,
Compensation, and Liability Act, as
amended, 42 U.S.C. § 9604(e)

**ADMINISTRATIVE ORDER DIRECTING COMPLIANCE
WITH REQUEST FOR ACCESS**

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ATTACHMENTS: Exhibits A, B, C

I. JURISDICTION

1. This Administrative Order (“Order”) is issued to Ricky P. Wheeler (hereinafter, “Respondent”), pursuant to the authority vested in the President of the United States by Section 104(e)(5) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9604(e)(5), and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR § 300.400(d)(4). This authority was delegated to the Administrator of the United States Environmental Protection Agency (“EPA”) on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2923, redelegated to the Regional Administrators of EPA on May 11, 1994, by EPA Delegation No. 14-6, and further jointly delegated to the Supervisors in the Legal Enforcement and Technical Enforcement Programs.

II. STATEMENT OF PURPOSE

2. This Order requires Respondent to grant EPA and its authorized representatives entry and access to the property described in Paragraph 4 below (“the Property”) located in Tooele County, Utah for the purpose of determining the need for response, choosing a response action, taking a response action, or otherwise enforcing the provisions of CERCLA performing a cultural survey as required by Section 106 of the National Historic Preservation Act (“NHPA”), sampling and analysis at the Jacob Smelter Superfund Site (the “Site”) and removal or remedial

response activities. This Order further requires Respondent to refrain from interfering with access to the Property by EPA and its authorized representatives for the purposes set forth herein.

III. FINDINGS OF FACT

3. Respondent owns and controls property in Tooele County, Utah at or near the Site, as demonstrated by the Warranty Deed of September 4, 2001 recorded in the County Records in the Clerk and Recorder's Office of Tooele County, Utah .

4. The exact legal description to which access is sought is attached to the Warranty Deed which is Exhibit A to this Administrative Order.

5. The Site is listed on the CERCLA National Priorities List, 40 C.F.R. Part 300, App. B, pursuant to Section 105(a)(8)(B) of CERCLA, 42 U.S.C. § 9605(a)(8)(B).

6. Initial remedial sampling at the Site, on or around the property for which access is sought indicates that a release of lead and arsenic has taken place and potential threat of ongoing release continues. Lead and arsenic are hazardous substances and entry is needed to determine the need for response or the appropriate response, or to perform a response action. See CERCLA § 104(e)(3); 40 C.F.R. § 300.400(d).

7. The levels of lead on or around the property for which access is sought exceed 10,000 parts per million and in some instances rise to 50,000 parts per million from historic smelting activities.

8. To address the release or threatened release of a hazardous substance or pollutant

or contaminant at the Site, EPA is planning to conduct certain response actions. These actions include a Cultural Survey at the Site pursuant to the NHPA, then further sampling and analysis and response activities including removal of contaminated soils and backfilling.

9. To perform the response actions described above, it will be necessary for employees, agents, contractors, and other representatives of EPA and the State of Utah to immediately enter the Property. The activities for which entry is required include: a Cultural Survey at the Site pursuant to the NHPA, then further sampling and analysis and response activities including removal of contaminated soils and backfilling.

10. EPA estimates that the duration of the required entry and access to be approximately one year.

11. Despite requests from representatives of EPA, Respondent has failed and refused to provide access for purposes of performing the response activities described above. These requests include letters requesting access and containing Requests for Access forms dated April 14, 2006 and December 4, 2006, and phone calls leaving messages requesting return of Requests for Access on February 13, 2007, February 25, 2007 and March 21, 2007 from EPA Senior Enforcement Attorney, to Respondent. Attached as Exhibits B and C are correspondence related to attempts to gain access.

12. EPA and its contractors are prepared to perform the identified site activities on all the parcels involved, and Respondent is the only owner who has failed to grant Access. Other Access agreements have expired while access has been sought from Respondent. EPA and its contractor are again preparing to perform the identified activities. Lack of access to

Respondent's property can again prevent EPA and its contractors from moving forward with the necessary work . Due to the high levels of lead involved, there are risks associated with delay.

IV. CONCLUSIONS OF LAW AND DETERMINATIONS

13. The Site is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

14. Respondent is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

15. All of the substances listed in Paragraphs 6 and 7 above are hazardous substances or pollutants or contaminants within the meaning of Sections 101(14) and 101(23) of CERCLA, 42 U.S.C. §§ 9601(14), 9601(23).

16. The past and[/or] present disposal and migration or potential migration of a hazardous substance or pollutant or contaminant at or from the Property constitutes an actual "release" or a threat of such a release into the "environment" within the meaning of Sections 101(8) and 101(22) of CERCLA, 42 U.S.C. §§ 9601(8) and (22), and thus there is a reasonable basis to believe that there may be a release or threat of release within the meaning of Section 104(e)(1) of CERCLA, 42 U.S.C. § 104(e)(1).

17. The property owned or controlled by Respondent referred to in Paragraph 4 above is, or is adjacent to, property:

- a. where a hazardous substance or pollutant or contaminant has been generated, stored, treated, disposed of, or transported from; and

- b. from or to which a hazardous substance or pollutant or contaminant has been or may have been released; and
- c. where such release is or may be threatened; and
- d. where entry is needed to determine the need for response, to identify the appropriate response, or to effectuate a response action within the meaning of Section 104(e)(3) of CERCLA, 42 U.S.C. § 9604(e)(3).

18. Entry to property owned or controlled by Respondent by the agents, contractors, or other representatives of the United States and the State of Utah is needed for the purposes of determining the need for response, choosing a response action, taking a response action, or otherwise enforcing the provisions of CERCLA, within the meaning of Section 104(e)(1) of CERCLA, 42 U.S.C. § 9604(e)(1).

19. EPA's multiple requests for access to the Property have not been granted.

V. ORDER

20. Based upon the foregoing Findings of Fact, Conclusions of Law and Determinations, and the Administrative Record, Respondent is hereby ordered to provide EPA and the State of Utah, and its officers, employees, agents, contractors, and other representatives, full and unrestricted access at all reasonable times to the Property for the purpose of conducting response activities, including but not limited to those described herein, including a Cultural Survey at the Site pursuant to the NHPA, further sampling and analysis and response activities including removal of contaminated soils and backfilling.

21. Respondent shall not interfere with EPA's exercise of its access authorities pursuant to 42 U.S.C. § 9604(e) and 40 C.F.R. § 300.400(d), and shall not interfere with or otherwise limit any activity conducted at the Property pursuant to this Order by EPA, its officers, employees, agents, contractors, or other representatives. Any such interference shall be deemed a violation of this Order.

22. Nothing herein limits or otherwise affects any right of entry held by the United States pursuant to applicable laws, regulations, or permits.

23. This Order shall apply to and be binding upon Respondent and its successors, heirs and assigns, and each and every agent of Respondent and upon all other persons and entities who are under the direct or indirect control of Respondent, including any and all lessees of Respondent.

24. In the event of any conveyance by Respondent, or Respondent's agents, heirs, successors and assigns, of an interest in the Property, Respondent or Respondent's agents, heirs, successors and assigns shall convey the interest in a manner which insures continued access to the Property by EPA and its representatives for the purpose of carrying out the activities pursuant to this Order. Any such conveyance shall restrict the use of the Property so that the use will not interfere with activities undertaken or to be undertaken by EPA and its representatives. Respondent, or Respondent's agents, heirs, successors and assigns shall notify EPA in writing at least thirty (30) days prior to the conveyance of any interest in the Property, and shall, prior to the transfer, notify the other parties involved in the conveyance of the provisions of this Order.

VI. ENFORCEMENT

25. Compliance with this Order shall be enforceable pursuant to Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5). A court may impose a civil penalty on Respondent of up to \$32,500 for each day that Respondent unreasonably fails to comply with this Order, as provided in Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5), and the Civil Monetary Penalty Inflation Adjustment Rule, 69 Fed. Reg. 7121, 40 C.F.R. Part 19.4. In addition, any person who is liable for a release or threat of release of a hazardous substance or pollutant or contaminant and who fails to comply with this Order may be liable for punitive damages in an amount up to three times the amount of any costs incurred by the United States as a result of such failure, as provided in Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Nothing herein shall preclude EPA from taking any additional enforcement actions, and/or other actions it may deem necessary for any purpose, including the prevention or abatement of a threat to the public health, welfare, or the environment arising from conditions at the Site, and recovery of the costs thereof.

26. Nothing in this Order constitutes a waiver, bar, release, or satisfaction of or a defense to any cause of action which EPA has now or may have in the future against Respondent, or against any entity which is not a party to this Order.

27. Nothing in this Order shall affect in any manner the right of EPA to issue any other orders to or take any other administrative or civil action against Respondent or any other parties under CERCLA which relate to this Site or any other site.

28. Nothing in this Order constitutes a decision on preauthorization of funds under

Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2).

VII. ADMINISTRATIVE RECORD

29. EPA has established an Administrative Record which contains the documents that form the basis for the issuance of this Order. It is available for review by appointment on weekdays between the hours of 9 a.m. and 5 p.m. at the EPA offices in Denver, Colorado. An additional copy of the Administrative Record is available at:

Tooele City Library
47 East Vine Street
Tooele, UT 84074
(435) 882-2182
Hours: Tuesday - Friday, 11 a.m. to 8:30 p.m.

VIII. OPPORTUNITY TO CONFER

30. Within three business days after receipt of this Order by Respondent, Respondent may request a conference with EPA, to be held no later than two business days after Respondent's request, on any matter pertinent to this Order, including its applicability, the factual findings and the determinations upon which it is based, the appropriateness of any actions Respondent is ordered to take, or any other relevant and material issues or contentions which Respondent may have regarding this Order. Respondent may appear in person or by an attorney or other representative at the conference. Respondent may also submit written comments or

statements of position on any matter pertinent to this Order no later than the time of the conference, or at least two business days before the effective date of this Order if Respondent does not request a conference. EPA will deem Respondent to have waived its right to the conference or to submit written comments if it fails to request the conference or submit comments within the specified time period(s). Any request for a conference or written comments or statements should be submitted to:

Katherine Letson,
Senior Enforcement Attorney
Legal Enforcement Program
United States Environmental Protection Agency, Region 8
1595 Wynkoop Street, ENF-L
Denver, Colorado 80111
Telephone: (303) 312-6641

IX. EFFECTIVE DATE; COMPUTATION OF TIME

31. This Order shall be effective ten business days after its receipt by Respondent or Respondent's designated representative unless a conference is timely requested as provided above. If a conference is timely requested, then at the conclusion of the conference or after the conference, if EPA determines that no modification to the Order is necessary, the Order shall become effective immediately upon notification by EPA of such determination. If modification of the Order is determined by EPA to be necessary, the Order shall become effective upon notification by EPA of such modification. Any EPA notification under this paragraph may, at EPA's discretion, be provided to Respondent by facsimile, electronic mail, or oral communication; provided that if EPA does use such a form of notification, it will also confirm

such notification by first class, certified or express mail to Respondent or its legal counsel. Any amendment or modification of this Order by EPA shall be made or confirmed in writing.

32. For purposes of this Order, the term "day" shall mean a calendar day unless expressly stated to be a business day. "Business day" shall mean a day other than a Saturday, Sunday, or federal legal holiday. When computing any period of time under this Order, if the last day would fall on a Saturday, Sunday, or federal legal holiday, the period shall run until the next business day.

X. NOTICE OF INTENT TO COMPLY

33. On or before the effective date of this Order, Respondent shall notify EPA in writing whether Respondent will comply with the terms of this Order. Respondent's failure to notify EPA of its unconditional intent to fully comply with this Order by the time the Order becomes effective shall be 1) construed as a denial of EPA's request for access, and 2) as of the effective date of the Order, treated as a violation of the Order. Such written notice shall be sent to:

Katherine Letson,
Senior Enforcement Attorney
Legal Enforcement Program
United States Environmental Protection Agency, Region 8
1595 Wynkoop Street, ENF-L
Denver, Colorado 80111
Telephone: (303) 312-6641

XI. TERMINATION

34. This Order shall remain in effect until Katherine L. Letson, or her designee notifies Respondent in writing that access to the Property is no longer needed.

SO ORDERED.

Date: 2 May 2007 Sharon L Kercher
Sharon Kercher
Director, Technical Enforcement Program
Office of Enforcement, Compliance and Environmental Justice

Date: 3 May 2007 David J. Janik
David J. Janik
Acting Director, Legal Enforcement Program
Office of Enforcement, Compliance and Environmental Justice

