

## **Tribbett, Katherine (Kate)**

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**From:** Rae, Sarah  
**Sent:** Tuesday, March 8, 2022 12:30 PM  
**To:** R8 Hearing Clerk; Tribbett, Katherine (Kate)  
**Cc:** Baum, Christina (she/her/hers); 'Dan Brown'; 'Brandice Eslinger'; connie@chkinglaw.com  
**Subject:** RE: Brown - Response to 02-24-22 proceeding and 02-28-22 EPA post-proceeding submission - Colorado Smelter Superfund Site, Pueblo, Colorado, Superfund Lien - Email 1 of 3

Good afternoon Stephanie,

I would like to respond to one of the statements made in the Companies' March 8, 2022 response.

Statement: However, during the February 24<sup>th</sup> proceeding, EPA attorney Sarah Rae admitted she could not tell us what the difference between the two slags was. So, an EPA attorney in 2022 doesn't know the difference, but an ordinary citizen in 1982 should have?

- EPA Response: This is not accurate. At the February 24, 2022 hearing the EPA discussed the visible differences between the CF&I slag (light grey, porous) and the OU2 slag (dark brown/black, molten-like). I discussed the reasons for the differences, such as differences in feedstock inputs (steel vs. silver & lead). When Brandice asked me whether the light grey slag from the CF&I Steel Mill was from the CF&I Electric Arc Furnaces (EAF) – I was unable to answer, and indicated that I was not familiar with the specifics of the CF&I processes.

At this time, the EPA does not intend to respond further. The agency believes that we have already addressed the issues raised in the Companies' March 8, 2022 response. Please let me know if you have any additional questions for EPA or would like any additional written materials.

Respectfully,

### **Sarah Rae**

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Pronouns: she/her/hers

 Please consider the environment before printing this email

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**From:** connie@chkinglaw.com <connie@chkinglaw.com>

**Sent:** Tuesday, March 8, 2022 11:25 AM

**To:** R8 Hearing Clerk <R8\_Hearing\_Clerk@epa.gov>; Tribbett, Katherine (Kate) <Tribbett.Katherine@epa.gov>

**Cc:** Rae, Sarah <Rae.Sarah@epa.gov>; Baum, Christina (she/her/hers) <Baum.Christina@epa.gov>; 'Dan Brown' <deelby@earthlink.net>; 'Brandice Eslinger' <brandice@allphaseenvironmental.com>

**Subject:** Brown - Response to 02-24-22 proceeding and 02-28-22 EPA post-proceeding submission - Colorado Smelter Superfund Site, Pueblo, Colorado, Superfund Lien - Email 1 of 3

Dear Ms. Stephanie Talbert,

On behalf of Cecil H. Brown, I am submitting three emails with Attachments #14 - #20 in response to claims made by the EPA during the February 24, 2022 proceeding regarding Colorado Smelter Superfund Site – Object to perfection of liens and request (February 24<sup>th</sup> proceeding) and in the February 28, 2022 post-proceeding submission from EPA regarding the Colorado Smelter Superfund Site, Pueblo, Colorado, Superfund Lien – EPA’s Response to Companies’ Response – In the matter of 1045-1049, 1103 South Santa Fe Avenue, City of Pueblo, Colorado; Docket No.: CERCLA-08-2022-0003 (February 28<sup>th</sup> EPA post-proceeding submission).

This is the first of the three emails.

We continue to believe the EPA does not have a statutory basis to perfect the liens pursuant to Section 107(l) of CERCLA. This response presents additional information that contradicts the EPA’s right to assert or perfect the liens.

#### February 24, 2022 Proceeding

During the February 24<sup>th</sup> proceeding, Brandice Eslinger, President, All-Phase Environmental Consultants, Inc., referred to an EPA document regarding manganese in electric arc furnace (EAF) steel slag. The EPA document to which Ms. Eslinger referred is the September 2020 EPA Region 8 Colorado Smelter Superfund Site Fact Sheet entitled “How Residents Can Minimize Contact With EAF Slag Landscaping Material” in which the EPA states the EAF slag produced during the steel-making process, which is used locally for landscaping, contains elevated levels of manganese and other metals.

Attachment #14 – 09-01-20 EPA - CO Smelter Superfund Site Fact Sheet - How Residents Can Minimize Contact With EAF Slag Landscaping Material.pdf

During the February 24<sup>th</sup> proceeding, Ms. Eslinger described the March 27, 2019 memo which I submitted to you on February 25<sup>th</sup> as Attachment #13 - 03-27-19 All-Phase Env Consultants Memo re Mtg - EPA Superfund OU2 Remedial Investigation Plan.pdf. Based upon July 2019 email exchanges, **Ms. Eslinger has determined the EPA Region 8 Representative who attended the March 27, 2019 meeting on Cecil Brown’s property was Jesse Aviles, Remedial Project Manager, EPA, Denver, Colorado.**

During the February 24<sup>th</sup> proceeding, EPA attorney Andrea Madigan referred to a recent Continuing Legal Education (CLE) course that she helped present to the Colorado Bar Association (CBA), and she claimed that this CLE presentation was to the CBA’s Environmental Law Section and Real Estate Law Section. I had virtually attended the October 19, 2021 CBA – Environmental Law Section CLE course entitled “Colorado Environmental Covenants Statute at 20” for which Ms. Madigan was listed as one of the four speakers. The documentation that I received regarding the October 19<sup>th</sup> CLE course referred to the CBA – Environmental Law Section and did not refer to the CBA - Real Estate Section.

Attachment #15 - 10-19-21 CBA Env Law Section CLE - CO Environmental Covenants Statute at 20.pdf

I also received a recording of the CLE course from the CBA. The panel discussion that Ms. Madigan participated in had nothing to do with the transfer of property to Limited Liability Companies (LLCs) and no mention was made of LLCs by Ms. Madigan or the other speakers. Lawyers that practice Estate Law would be members of the CBA - Trust & Estate Section. There is no indication that members of the CBA – Trust & Estate Section would have received a notice for this October 19<sup>th</sup> CLE course. **For lawyers who practice Estate Law to be aware of EPA’s claims that the transfer of property to LLCs would trigger an environmental site assessment, EPA could make an effort to provide guidance to members of the CBA – Trust & Estate Section** (e.g., write an article for the Estate and Trust column of The Colorado Lawyer magazine, or make a presentation during a CBA – Trust & Estate Section CLE course). I could not find any such articles or presentations by EPA to members of the CBA – Trust & Estate Section.

#### February 28, 2022 Post-Proceeding Submission from EPA

In the February 28<sup>th</sup> post-proceeding submission from EPA, in:

- Section I, first paragraph, EPA stated “The parties disagree whether the property is subject to remedial action under CERCLA. ... The Companies also claim that December 2021 soil sampling on the property does not exceed EPA’s residential soil screening levels.” EPA’s statements are incorrect.

In our February 17, 2022 email to you, we stated:

**“EPA has not proven that soil contamination is present at a level that would require remediation on the entire 12 acres of the property.** For Cecil Brown, All-Phase Environmental Consultants, Inc. (APEC) performed a soil confirmation investigation. APEC sample analytical results indicate there are elevated levels of lead and arsenic in some limited areas along the northern boundary of the property. On December 22, 2021, APEC personnel collected soil samples at the four sampling sites on the property (labeled by EPA in March 2020 as DU-0031, DU-0032, DU-0033, and DU-0035) for which EPA’s sample analytical results were the highest for arsenic and lead. **APEC had the soil samples they collected analyzed for arsenic and lead using the Metals - Inductively Coupled Plasma (ICP) test and the Toxicity Characteristic Leaching Procedure (TCLP) test. APEC’s findings include:**

**-APEC sample results indicate there are elevated levels of lead and arsenic in soils, specifically along the northern property boundary (DU-0032, DU-0033, DU-0035) when compared to current EPA RSLs for Lead and TCLP Lead, and the OU1 Site Specific Residential Soil Value for Arsenic, that has been established for the Colorado Smelter Superfund Site. It should be noted that the Property is not zoned, nor is it utilized, as residential. It is an industrial zoned property, specifically, I-2. Therefore, until a site-specific value is determined for the property and the specific zoning/use type, it is speculative to indicate whether or not arsenic, specifically, is above RSLs.**

**-All arsenic samples were below the TCLP threshold of 5 mg/kg.**

**-The lead is elevated in all samples with the exception of DU-0031 (APEC Sample) and DU-0033 (APEC Sample).**

**-The only TCLP Lead exceedance was in sample DU-0032, at 25.2 mg/kg.**

**-Further investigation may be warranted in this area and/or remedial efforts may be necessary dependent upon site specific arsenic RSLs that have yet to be established. Delineation of the TCLP results will better define what area specifically needs to be “capped” by an impervious surface, however with the vast amount of EPA data, coupled with the APEC results, initial opinions are that DU-0032 (area 32) may be the highest/only priority. Furthermore, the remaining parcels, as a remedial solution, could operate under a Materials Management Plan and potentially “use restrictions” to ensure that human health is protected during any potential work on site, specifically underground digging (utility work, etc.) and from future development, other than industrial.**

Attachment #11: 02-14-22 APEC Soil Confirmation Investigation, Brown Property, Pueblo, CO 81006” (bolded emphasis added)

EPA does not have enough information to determine whether remedial action is needed. This property is zoned as industrial, not residential. The Metals ICP analytical results for Arsenic should not be compared to the OU1 Site Specific Residential Soil Value for Arsenic and the EPA has not yet determined the OU2 Site Specific Industrial Soil Value for Arsenic. No TCLP data has yet been collected by EPA. We conducted our own sampling and TCLP analysis of the samples, and we compared the TCLP analytical results to the Regional Screening Levels (RSLs). **All TCLP Arsenic results were below the TCLP threshold of 5 mg/kg. The only TCLP Lead exceedance (above the TCLP threshold of 5 mg/kg) was in sample DU-0032, at 25.2 mg/kg.** Delineation of TCLP results can determine what area might need to be “capped” by an impervious surface.

-Section II, paragraph a, EPA claimed “These statements are misleading and insufficient to establish that the Innocent Landowner Defense applies under the circumstances presented.”

**EPA has not presented any evidence to support its claim that our statements are misleading.**

-Section II, paragraph c.i, EPA claimed “The presence of contamination was obvious in 1982 and 1986.”

**EPA has not presented any evidence to support its claim that the presence of contamination was obvious in 1982 and 1986.** In 1982 and 1986, no one was aware that in the distant future EPA would characterize slag as contamination.

**EPA’s claim has been refuted by our evidence, including statements by other Pueblo developers (i.e., Attachment #2: 12-16-21 RSams to CBrown Ltr re South Santa Fe Ave Pueblo CO Property.pdf, December 22, 2021 email to Sarah Rae, EPA).**

As stated in my February 17<sup>th</sup> email to you, **“from 1982 to 1986, when Cecil Brown purchased the property, it does not appear that there were any published characterization studies on slag from silver**

**and lead smelters.** The 1997 and 2009 publications ... occurred after Cecil Brown purchased the property in 1982 and 1986, and before the EPA listed the Colorado Smelter site on the National Priorities List in December 2014. This information is supportive of the statement previously made in the December 22<sup>nd</sup> email to Ms. Rae: "At the time Cecil H. Brown bought the property no one was concerned about the potential for contamination at the Colorado Smelter Superfund Site."

**EPA's characterization of slag as contamination seems to be evolving over time** (e.g., the September 2020 EPA Region 8 Colorado Smelter Superfund Site Fact Sheet entitled "How Residents Can Minimize Contact With EAF Slag Landscaping Material" which is described above.)

-Section II, paragraph c.ii, EPA claimed "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."

**In 1982 and 1986, it was not common practice for a regular person, or even an environmental consultant, to go to the library to review records from newspapers from 100 years ago; in fact, no one would do this today.**

In the February 3<sup>rd</sup> letter from EPA, on page 13 of 16, Appendix C – Newspaper Articles, the March 23, 1907 The Indicator newspaper article entitled "Busy at Eilers Smelter" refers to the continuously growing slag pile as "evidence in itself of the work going on at the plant. From 400 to 500 men working on the three-shift turn are able to produce something worth while. The Eilers, or Colorado smelter, as it is sometimes called is located the nearest to the steel works and adjoining Bessemer, and has within the past three years been greatly improved and modernized. The Pueblo smelter and the U.S. Zinc smelter are also running at full capacity, and the smelting industry in the city was never in a more flourishing condition." The focus of the historic newspaper articles is positive, uplifting and inspiring news, and it describes what we know. Pueblo was, and is, a blue-collar town that thrived on the presence of the steel mill and the smelters associated with the steel mill. It created jobs and a way of life for many that is still present today. There is nothing in the historic newspaper articles that alleges the Colorado smelter would cause environmental contamination.

EPA does not hold itself to the same standard in reviewing newspaper articles that it claims everyone else should do. For example, if EPA reviewed articles published under their watch, such as the December 30, 2013 Pueblo Chieftain article entitled "Residents want EPA to work quickly" (previously referred to in our February 17, 2022 email to you), EPA would have an opportunity to correct news that EPA viewed as misinformation.

-Section II, paragraph c.iv, EPA claimed that the dangers of lead were known, so Cecil Brown should have known that the property was dangerous.

**Knowing lead is dangerous does not mean Mr. Brown was aware of the presence of lead on his property, just as no one in the neighborhood was aware of it in their own lawns.**

In the same paragraph, EPA stated: "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."

However, during the February 24<sup>th</sup> proceeding, EPA attorney Sarah Rae admitted she could not tell us what the difference between the two slags was. So, an EPA attorney in 2022 doesn't know the difference, but an ordinary citizen in 1982 should have?

-Section II, paragraph c.v, there is a discussion about the purchase price and the current value of Cecil Brown's property.

Property/parcel # 1406332002, located within sight of, and across Santa Fe Street from, the slag piles, but not designated as OU2 by EPA, was sold for only \$400k in 2000, but sold in 2021 for \$2.2M. This shows the level of appreciation for industrial/commercial properties in Pueblo in the past 20 years. The owners of this property that sold it in 2021 were not held to CERCLA standards by the EPA.

Additionally, we have supported the fact that the current appraisal was based on **income only**. New leases are being signed at market rate dollars per square foot (\$/sq.ft.) compared to the rest of the city. To support that, attached is the lease brochure for a current similar Pueblo property that is being leased at \$5.99/sq.ft. annually.

Attachment #16 - Lease Brochure for Similar Property - 905-1019 N Erie Ave, Pueblo, CO.pdf

Also attached is the September 23, 2021 Ecologic Materials, LLC lease, currently leased at \$5.95/sq.ft. annually, for 1107A South Santa Fe Avenue, Pueblo, CO.

Attachment #17 – Ecologic Materials Lease – 1107A South Santa Fe Ave, Pueblo, CO.pdf

1109 South Santa Fe Avenue is currently leased at \$6.25/sq.ft. annually and 1045 South Santa Fe Avenue is currently leased at \$6.18/sq.ft. annually. **There is no evidence that Cecil Brown's property value is discounted now or that it will go up after remediation.**

-Appendix F: Map of Slag Piles, Figure 4. Approximate extent of slag piles on OU2.

We appreciate the EPA providing the Appendix F, Figure 4, which illustrates the locations of the slag piles. We have revised the EPA's Appendix F, Figure 4, to provide the approximate location of the Brown property boundaries, to further illustrate that the slag piles are located on property adjacent to the Brown property, and are not located on the Brown property.

Attachment #18 – Slag piles located on property adjacent to the Brown property.pdf

On March 4, 2022, Dan Brown took photos from the 2<sup>nd</sup> floor of the building at 1103 South Santa Fe Avenue, Pueblo, CO to illustrate the view of the adjacent property from Cecil Brown's property.

Attachment #19 – Photos taken from 2<sup>nd</sup> floor of building at 1103 South Santa Fe Avenue, Pueblo, CO.pdf

On March 3, 2022, Ms. Eslinger took photos of the property that is adjacent to the northern boundary of the Brown property. Remnants of old blast furnaces are located on this adjacent property. On the northern boundary of the Brown property, the retaining wall is broken, exposing native soil. Smelter slag piles on this adjacent property are located further from the northern boundary of the Brown property than where these photos were taken.

Attachment #20 - Photos of property adjacent to the Brown property.pdf

Please don't hesitate to contact me if you have any questions or comments. Thanks very much for your consideration.

Connie

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