

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

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FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:
Clear Creek/Central City Superfund Site
Gilpin County, Colorado

ADMINISTRATIVE ORDER DIRECTING
COMPLIANCE WITH REQUEST FOR
ACCESS

Jefferson Alan Fassler and
Blanca Lidia Leonardo de Fassler,

U.S. EPA Region 8
CERCLA Docket No. **CERCLA-08-2007-0006**

Respondents.

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**

I. JURISDICTION

1. This Administrative Order (“Order”) is issued to Jefferson Alan Fassler and Blanca Lidia Leonardo de Fassler (hereinafter, “Respondents”), 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, further delegated to the Assistant Regional Administrator, Office of Ecosystems Protection and Remediation and the Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice on December 20, 1996, and further delegated to the Directors of the Technical Enforcement and Legal Enforcement Programs.

II. STATEMENT OF PURPOSE

2. This Order requires Respondents to grant EPA, the Colorado Department of Public Health and the Environment (“CDPHE”), and their authorized representatives entry and access to Respondents’ property known as Silver Dollar Claim and further described in Paragraphs 3 and 4 below (hereinafter the “Property”) located in Gilpin

County, Colorado. Such access is required for the purpose of taking response actions and otherwise enforcing the provisions of CERCLA. This Order further requires Respondents to refrain from interfering with access to the Property by EPA, CDPHE and their authorized representatives for the purposes set forth herein.

III. FINDINGS OF FACT

3. The Property is included within operable unit 4 (“OU4”) of the Clear Creek/Central City Superfund Site. The Clear Creek/Central City Superfund Site is a State-lead site, included on the National Priorities List in September 1983. OU4 was created in 1999 to study the impacts of acid and metals loading to the North Fork of Clear Creek, a tributary to Clear Creek, caused by the vestiges of historic mining activity in the district. EPA and CDPHE issued a Record of Decision selecting a remedy for OU4 in September 2004 which was amended in September 2006 (“OU4 ROD”).

4. Respondents acquired the Property pursuant to Personal Representatives’ Deeds, both dated June 27, 2000, copies of which are attached hereto as Attachment A.

5. There are waste rock piles located on and near the Property including the Hampton, the Anchor and the Iroquois waste piles that are contaminated with heavy metals including arsenic, cadmium, copper, lead and zinc that pose a threat to human health and the environment. EPA and CDPHE are planning a response action to address releases of hazardous substances from these waste piles that will include re-grading and capping, erosion protection, channel stabilization and run-on control structures. In addition, the Property is adjacent to Russell Gulch where EPA and CDPHE are planning on constructing a sediment pond in accordance with the OU4 ROD.

6. To perform the response actions set forth in the OU4 ROD, including the work described above, it will be necessary for employees, agents, contractors, and other representatives of EPA and CDPHE to enter the Property.

7. EPA estimates that the duration of the required entry and access will be three years.

8. On or about June 30, 2006, EPA requested access to the Property from the Respondents in writing by registered mail sent to the Respondents' address identified in the Gilpin County tax assessor's office in La Joya, Guatemala. EPA received verification that the letter was received on or about July 18, 2006. Respondents have failed to respond to EPA's request for access.

IV. CONCLUSIONS OF LAW AND DETERMINATIONS

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

10. Respondents are each a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

11. All of the substances listed in Paragraph 5 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).

12. The past and present disposal and migration of hazardous substances 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).

13. Entry to Property by agents, contractors, or other representatives of EPA and CDPHE is needed for the purposes of 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).

14. Respondents' failure to respond to EPA's request for access amounts to a denial of access within the meaning of Section 104(e)(5)(A) of CERCLA, 42 U.S.C. § 9604(e)(5)(A), and 40 C.F.R. 300.400(d)(4)(i).

V. ORDER

15. Based upon the foregoing Findings of Fact, Conclusions of Law and Determinations, and the Administrative Record, Respondents are hereby ordered to provide EPA, CDPHE, and their 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 necessary to implement the OU4 ROD.

16. Respondents 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, CDPHE, their officers, employees, agents, contractors, or other representatives. Any such interference shall be deemed a violation of this Order.

17. Nothing herein limits or otherwise affects any right of entry held by EPA or CDPHE pursuant to applicable laws, regulations, or permits.

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

19. In the event of any conveyance by Respondents, or Respondents' agents, heirs, successors and assigns, of an interest in the Property, Respondents or Respondents' 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. Respondents, or Respondents' 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

20. 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 Respondents of up to \$32,500 for each day that Respondents 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 or CDPHE 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 Property, and recovery of the costs thereof.

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

22. 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 Respondents or any other parties under CERCLA which relate to this Property or any other site.

23. 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

24. 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 at EPA offices located at 1595 Wynkoop Street, Denver, Colorado. To review the Administrative Record, please contact Peggy Linn at (303) 312-6622. A copy of the Administrative Record is also available for viewing at the Gilpin County Court House, 203 Eureka Street, Central City, Colorado.

VIII. OPPORTUNITY TO CONFER

25. Within three business days after receipt of this Order by Respondents,

Respondents may request a conference with EPA, to be held no later than five business days after Respondents' 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 Respondents are ordered to take, or any other relevant and material issues or contentions which Respondents may have regarding this Order.

Respondents may appear in person or by an attorney or other representative at the conference. Respondents 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 Respondents do not request a conference. EPA will deem Respondents to have waived their 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:

Andrea Madigan
Legal Enforcement Program
U.S. EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202
303-312-6904

IX. EFFECTIVE DATE; COMPUTATION OF TIME

26. This Order shall be effective five business days after its receipt by Respondents or Respondents' 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 Respondents 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 Respondents or their legal counsel. Any amendment or modification of this Order by EPA shall be made or confirmed in writing.

27. 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

28. On or before the effective date of this Order, Respondents shall notify EPA in writing whether Respondents will comply with the terms of this Order. Respondents' 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:

Andrea Madigan
Legal Enforcement Program
U.S. EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202
303-312-6904

XI. TERMINATION

29. This Order shall remain in effect until the Assistant Regional Administrator, Office of Ecosystems Protection and Remediation and the Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice their designees notify Respondents in writing that access to the Property is no longer needed.

SO ORDERED.

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 8

By: Sharon L Kercher Date: 4/24/2007
Sharon Kercher
Director, Technical Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice

By: Matt Polner for Date: 4/26/07
David Janik
Acting Director, Legal Enforcement Program
Office of Enforcement, Compliance
and Environmental Justice