

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

February 3, 2021
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Received by
EPA Region VIII
Hearing Clerk

IN THE MATTER OF:

Lodge Grass Drum Site
Lodge Grass, Montana

U.S. EPA Region 8

CERCLA Docket No. CERCLA-08-2021-0003

Donna Bends,

Respondent.

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**

TABLE OF CONTENTS

I.	JURISDICTION.....	1
II.	DEFINITIONS.....	1
III.	FINDINGS OF FACT.....	1
IV.	CONCLUSIONS OF LAW AND DETERMINATIONS	3
V.	ORDER	3
VI.	OPPORTUNITY TO CONFER.....	4
VII.	EFFECTIVE DATE.....	4
VIII.	NOTICE OF INTENT TO COMPLY	5
IX.	ENFORCEMENT	5
X.	RESERVATIONS OF RIGHTS BY EPA.....	5
XI.	NOTICES AND SUBMISSIONS.....	6
XII.	ADMINISTRATIVE RECORD	6
XIII.	TERMINATION	6

I. JURISDICTION

1. This Administrative Order (“Order”) is issued under the authority vested in the President of the United States by Section 104(e)(5) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, and Section 300.400(d)(4) of the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.400(d)(4). This authority was delegated to the Administrator of the United States Environmental Protection Agency (EPA) by Executive Order 12580, 52 Fed. Reg. 2923 (Jan. 23, 1987), and further delegated to the Regional Administrator of EPA Region 8 on January 18, 2017, by EPA Delegation No. 14-6, and further redelegated to the below-signed official.

2. This Order applies to and is binding on Respondent and Respondent’s successors, heirs, and assigns.

II. DEFINITIONS

3. Terms not otherwise defined in this Order have the meanings assigned in CERCLA or in regulations promulgated under CERCLA. Whenever the terms set forth below are used in this Order, the following definitions apply:

“CERCLA” means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

“Day” or “day” means a calendar day. In computing any period under this Order, where the last day is not a working day, the period runs until the close of business of the next working day. “Working day” means any day other than a Saturday, Sunday, or federal or state holiday.

“Effective Date” means the date this Order becomes effective as provided in Paragraph 24.

“EPA” means the U.S. Environmental Protection Agency.

“Paragraph” means a portion of this Order identified by an Arabic numeral or an upper- or lower-case letter.

“Property” means the property with global positioning coordinates 45.305631, - 107.359759, located approximately ¼ mile south of Lodge Grass, Montana, on the Crow Reservation.

“Respondent” means Donna Bends.

III. FINDINGS OF FACT

4. The Property is in a rural area and includes a vacant house and adjoining field where approximately twenty drums have been abandoned.

5. The Property is within the exterior boundaries of the Crow Reservation in Big Horn County, Montana. It was originally allotted land held by the United States in trust for the original allottee Grey Dog.

6. The Property passed via probate to Respondent in 2007.

7. According to the Respondent, the abandoned drums contain used motor oil. The drums are deteriorating and uncovered. At least one drum is open, and at least two are bulging. There is oily film in the area around the drums, indicating that at least one drum is leaking.

8. Bulging drums indicate over pressurization that would not be expected from solely used motor oil; bulging may indicate that the drums have flammable solvents mixed in with the used oil. When improperly managed, used oil is often stored in combination with halogenated and non-halogenated flammable solvents.

9. Used motor oil contains lead, cadmium and chromium, all of which are hazardous substances pursuant to CERCLA, 42 U.S.C. § 9601(14).

10. The drums are approximately 500 feet from the Little Bighorn River, which is a source of drinking water for the Crow Reservation. The Property is upstream of the drinking water intake.

11. To address the release or threatened release of a hazardous substance at the Property, EPA is planning to conduct certain response actions. These actions include sampling, stabilization of compromised drums and/or transferring/bulking liquids into new suitable containers, and removing the drums to a secure staging location prior to final disposal. EPA will also remove and dispose of any visibly impacted soils.

12. EPA estimates it will need seven days to complete this work once access is provided.

13. Despite requests from EPA, Respondent has failed to take action to address the drums.

14. Respondent failed to take action under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973, despite EPA requests on October 9, 2018, and September 5, 2019.

15. Respondent refused to provide access for purposes of performing the CERCLA response activities described in Paragraph 11.

16. These requests include a letter addressed to Respondent sent on August 20, 2020, and text messages to Respondent sent on August 14, October 19, and October 22, 2020.

17. EPA has been ready to take action since August 2020, but has been prevented from so doing because of Respondent's failure to grant access to the Property. Additional delay in addressing the drums leads to an increased likelihood that the drums will further deteriorate,

and that their contents will migrate to the Little Bighorn River, potentially contaminating the drinking water source.

IV. CONCLUSIONS OF LAW AND DETERMINATIONS

18. Based on the foregoing Findings of Fact, and the administrative record supporting issuance of this Order, EPA has determined that:

a. Hazardous substances as defined by Section 101(14) CERCLA, 42 U.S.C. § 9601(14) or pollutants or contaminants as defined by Section 101(33) of CERCLA, 42 U.S.C. § 9601(33) may be or have been generated at, stored at, treated at, disposed of at, transported to or from, or released to or from, or a release of hazardous substances is or may be threatened at the Property.

b. The Property is where a hazardous substance may be or has been generated, stored, treated, disposed of, or transported from; from or to which a hazardous substance has been or may have been released; where such release is or may be threatened; 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).

c. EPA has a reasonable basis to believe that there may be or has been a release or threat of release of a hazardous substance at the Property.

d. Respondent controls the Property.

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

f. Entry to the Property by EPA and its officers, employees, agents, contractors, and other authorized representatives is needed for the purposes of inspecting and obtaining samples, determining the need for response, and choosing or taking a response action at the Property.

g. Respondent has not granted EPA’s request for access to the Property.

V. ORDER

19. Based upon the foregoing Findings of Fact, Conclusions of Law and Determinations, and the administrative record supporting the issuance of this Order, EPA hereby orders Respondent to provide EPA and its officers, employees, agents, contractors, and other authorized representatives, full and unrestricted access at all reasonable times to the Property for the purpose of conducting response activities, including, but not limited to, inspecting and obtaining samples, determining the need for response, and choosing or taking a response action at the Property.

20. Respondent shall not prevent, limit, or otherwise interfere with EPA’s access to the Property as described in Paragraph 19 or any activity described in Paragraph 19 by EPA, its

officers, employees, agents, contractors, and other authorized representatives. Any interference with any activity described in Paragraph 19, including removing the drums prior to EPA's entry, is a violation of this Order.

21. EPA anticipates accessing the Property within two weeks of the Effective Date of this Order. However, due to the COVID-19 pandemic and potential weather conditions, EPA may not access the Property until summer, 2021. EPA will provide Respondent with 24 hours notice prior to accessing the Property.

VI. OPPORTUNITY TO CONFER

22. Respondent may request a telephone conference with EPA to discuss the 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, provided Respondent submits a request to EPA for such telephone conference within three working days after receipt of the Order. Respondent is entitled to submit written comments or a statement of position, provided Respondent submits, within three working days after receipt of the Order, a notice to EPA of its intent to submit these written materials.

23. If Respondent timely requests a telephone conference, the telephone conference must be held within seven working days after Respondent's request. Respondent and/or Respondent's representative may participate in the telephone conference. If Respondent timely notifies EPA of its intent to submit written materials, Respondent must submit those written materials via email within five working days after receipt of the Order, or, if a telephone conference is scheduled, within two working days after the telephone conference. EPA may specify in writing later deadlines for the telephone conference or for submission of written materials. The telephone conference is not an evidentiary hearing, does not constitute a proceeding to challenge this Order, and does not give Respondent a right to seek review of the Order. EPA will deem Respondent to have waived its right to the telephone conference or to submit written comments if Respondent fail to request or schedule the telephone conference or submit comments via email within the specified time period(s). Any request for a telephone conference or written comments or statements should be submitted electronically to:

Amelia Piggott
Office of Regional Counsel
United States Environmental Protection Agency
piggott.amelia@epa.gov

VII. EFFECTIVE DATE

24. This Order is effective as of the later of: (a) three working days after Respondent or Respondent's designated representative receives the Order; (b) three working days after the telephone conference scheduled by EPA under Paragraph 23, provided that Respondent timely requested a conference in accordance with Paragraph 22; (c) three working days after the deadline for submission of written materials if a telephone conference is not scheduled in accordance with Paragraph 23, provided that Respondent timely notified EPA of Respondent's

intent to submit written materials in accordance with Paragraphs 22. If EPA determines that the Order should be modified based on the telephone conference or written materials, EPA shall notify Respondent, within the applicable three-day period, that EPA intends to modify the Order. The modified Order shall be effective two working days after it is received by Respondent.

VIII. NOTICE OF INTENT TO COMPLY

25. In accordance with Paragraph 32, Respondent shall provide to EPA a written denial, on or before the Effective Date, if Respondent does not intend to fully and unconditionally comply with this Order. Should EPA not receive a written denial on or before the Effective Date, EPA will assume Respondent intends to fully and unconditionally comply with this Order.

IX. ENFORCEMENT

26. Any non-compliance with this Order is enforceable under Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5). Section 104(e)(5)(B) of CERCLA provides that a court may assess civil penalties for each day of noncompliance against any person who unreasonably fails to comply with an access order issued under Section 104(e)(5)(A) of CERCLA. As of the date of issuance of this Order, the statutory maximum amount is \$59,017 per violation per day. This maximum amount may increase in the future, as EPA amends its civil penalty amounts through rulemaking pursuant to the 1990 Federal Civil Penalties Inflation Adjustment Act (Public Law 101-410, codified at 28 U.S.C. § 2461), as amended by the 2015 Federal Civil Penalties Inflation Adjustment Act Improvement Act (Section 701 of Public Law 114-74)). The maximum amount to be applied to this violation will be set as the most recent maximum amount set forth in 40 C.F.R. § 19.4 as of the date that the U.S. District Court assesses any such penalty. Respondent may also be subject to punitive damages in an amount up to three times the amount of any cost incurred by the United States as a result of such failure to comply, as provided in Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3).

27. Nothing in this Order precludes 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 Property, and recovery of the costs thereof.

X. RESERVATIONS OF RIGHTS BY EPA

28. 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 person or entity who is not a Respondent to this Order.

29. Nothing in this Order limits or otherwise affects the right of EPA to issue any other orders to, or take any other administrative or civil action against, Respondent or any other person under CERCLA which relate to the Property or any other site.

30. Nothing in this Order limits or otherwise affects any right of entry held by the United States under applicable laws, regulations, or permits.

31. 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).

XI. NOTICES AND SUBMISSIONS

32. All notices and requests specified in this Order (collectively, “Notices”) must be in writing and must be sent to EPA via email as specified below.

Amelia Piggott
Office of Regional Counsel
United States Environmental Protection Agency
piggott.amelia@epa.gov

XII. ADMINISTRATIVE RECORD

33. EPA has established an administrative record that contains the documents that form the basis for the issuance of this Order. An index of the Administrative Record is attached hereto as Appendix 1. To request an electronic copy of the Administrative Record, please contact Amelia Piggott at piggott.amelia@epa.gov. A copy of the administrative record is also available for viewing online at https://response.epa.gov/site/doc_list.aspx?site_id=14865.

XIII. TERMINATION

34. This Order is in effect, and Respondent shall provide access to the Property, from the Effective Date until EPA notifies Respondent that the activities for which access is needed are complete and access to the Property is no longer needed.

It is so ORDERED.

KENNETH
BY: **SCHEFSKI**
Kenneth C. Schefski
Regional Counsel
Region 8
U.S. Environmental Protection Agency

Digitally signed by
KENNETH SCHEFSKI
Date: 2021.02.03
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DATE: _____