

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

In the Matter of:)

NEWTON COUNTY MINE TAILINGS)
SUPERFUND SITE)

ACCESS TO PROPERTY)

ADMINISTRATIVE ORDER DIRECTING
COMPLIANCE WITH REQUEST FOR
ACCESS

LOCATED IN)
Newton County, Missouri)

OWNED BY)
Sam & Cheryl Atwell)

U.S. EPA Region VII
Docket No. CERCLA-07-2008-0003

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 is issued to Sam and Cheryl Atwell, Respondents, pursuant to the authority vested in the President of the United States pursuant to Section 104(e)(5) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended, (CERCLA), 42 U.S.C. § 9604(e)(5), and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.400(d)(4), which 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, further delegated to the Regional Administrators of EPA on May 11, 1994 by EPA Delegation No.14-6. The Regional Administrator, EPA Region VII, redelegated this authority to the Superfund Division Director, EPA Region VII, by Regional Delegation No. R7-14-006, dated June 30, 1997, and the authority was further delegated to the Superfund Branch Chiefs by Regional Delegation No. R7-DIV-14-006, dated July 25, 1997.

2. This Administrative Order establishes that Respondents have denied EPA access to their property, sets forth the relief EPA is seeking, and provides Respondents with an opportunity to confer with EPA regarding access.

II. STATEMENT OF PURPOSE

3. This Administrative Order requires Respondents to provide to EPA, and its authorized representatives, access to the property described in Paragraph 4 below (“Respondents’ Property”) so that environmental sampling may be conducted on the property. Respondents’ Property is located within the current boundaries of the Newton County Mine Tailings Superfund Site (the “Site”). Hazardous substances have been released at the Site and the EPA is investigating the nature and extent of the release in order to evaluate the need to conduct additional response actions to address the hazardous substances. The access is necessary at Respondents’ Property to determine if hazardous substances are present and evaluate if the substance present a threat to human health or the environment.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

4. Respondents are the owners of certain property described as:

All that part of the SE $\frac{1}{4}$ of Section 18, Township 26 North, Range 31 West, Newton County, Missouri, EXCEPT two tracts described as (a) beginning at the Northeast Corner of the southeast Quarter of the Southeast Quarter of said Section 18; thence S 38° W, 11 rods; thence S 57° W, 26 $\frac{1}{2}$ rods; thence West, 16 rods 20 links; thence N $27^{\circ}16'$ W, 42 rods 11 links; thence N $34^{\circ}45'$ E, 13 rods, 15 links; thence N $44^{\circ}45'$ E, 16 rods; thence N $75^{\circ}30'$ E, 16 rods; thence N 67° E, 32 rods 15 links; thence South to the place of beginning, and (b) beginning at a point 6 rods South of the Northeast Corner of the Southeast Quarter of the Southeast Quarter of said Section 18; thence South 22 rods 18 links; thence West, 20 rods 20 links; thence South 22 rods 18 links; thence West 20 rods 20 links; thence North, 8 rods; thence North 33° East, 20 rods to the place of beginning. ALSO part of the NE $\frac{1}{4}$ of the SE $\frac{1}{4}$, Section 18, Township 26 North, Range 31 West, Newton County, Missouri, described as commencing at the NE Corner of the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of said Section 18; thence North 866.9 feet; thence West 65.14 feet to the point of beginning; thence S $20^{\circ} 00'$ East 40 feet; thence South $76^{\circ}47'$ W, 479.57 feet; thence N 67° E, 480 feet to the point of beginning. ALSO EXCEPT (c) beginning at the NE Corner of the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of said Section 18; thence South 38° West 181.5 feet to an iron pin; thence South 57° West 437.3 feet to an iron pin; thence West 277.2 feet to an iron pin; thence North $27^{\circ}15'$ West 100.3 feet to the point of beginning; thence North $27^{\circ}15'$ West 600 feet; thence South $34^{\circ}45'$ West 16 feet; thence South $27^{\circ}15'$ East 600 feet; thence Northwesterly 16 feet to the point of beginning.

5. Respondents acquired their current interest in Respondents' Property on September 8, 1998. A copy of a Quit-Claim Deed is attached as Exhibit 1.

6. The Newton County Mine Tailings Site is located in the Missouri portion of the Tri-State Mining District. The Tri-State Mining District covers approximately 2500 square miles in southwest Missouri, southeast Kansas and northeast Oklahoma. The Tri-State Mining District was one of the foremost lead-zinc mining areas of the world and provided nearly continuous production from about 1850 until 1970. The Newton County portion of the Tri-State Mining District is included on the National Priorities List (NPL).

7. The Site has an extensive history of investigations and response activities to address threats to human health and the environment presented by mining, milling, and smelting related contamination. Since initial investigations of the site began, the EPA has performed or has overseen the performance of response actions that include, among others, temporary provision of bottled water to residences with ground-water wells that were contaminated by mining related activities, excavation and replacement of residential soils that were contaminated by mining, milling or smelting activities, and the installation replacement drinking water-water wells and extensions to public water systems to provide permanent alternative water supplies to impacted residences.

8. Past mining operations have resulted in the disposal of large volumes of mining wastes scattered throughout Newton County. Exposure of the waste piles to ambient conditions has resulted in the release of heavy metals, primarily cadmium, lead, and zinc to the environment.

9. EPA has begun a Remedial Investigation/Feasibility Study (RI/FS) to identify the locations of waste piles, evaluate their impact on human health and the environment, and propose remediation alternatives if the waste piles pose a threat.

10. Evaluation of recent aerial photographs leads EPA to conclude that mining related wastes were disposed at Respondents' Property and as a result may present a threat to human health or the environment. The aerial photograph is attached and incorporated into this Order as Exhibit 2. Exhibit 2 also demonstrates the locations where samples will be taken. Soil samples will be analyzed to determine if lead, cadmium, zinc or other heavy metals contaminated soils above levels of concern are present.

11. Sampling activities at Respondents' Property will require approximately one hour to complete and will consist of little more than the collection of several spoonfuls of material at each sample location. A description of the sampling protocols is contained in Remedial Investigation Field Sampling Plan that is attached and incorporated into this Order as Exhibit 3. The EPA does not need to enter Respondents' home or any other outside buildings. The small volume of material may be removed from Respondents' Property and placed in a small container for analytical testing at a laboratory and retained for subsequent analytical verification. EPA will enter the Respondents' Property at reasonable times. EPA will provide the sample results to the Respondents. Respondents may observe EPA sampling procedures but may not interfere with sampling activities.

12. Considerable efforts have been made by EPA to obtain permission to access Respondents' Property, but such efforts have failed. The EPA sent the Respondents letters requesting access to the Respondents' Property and access agreements to perform the sampling activities on November 14, 2006, and March 22, 2007. Copies of these form letters are attached as Exhibits 4 and 5. EPA has contacted Respondents in person. In November, 2006, an EPA representative visited Respondents and they refused access. Subsequent attempts by EPA have been unsuccessful. Respondents have had many opportunities to enter into an access agreement with EPA. However, Respondents have rejected all attempts by EPA to obtain access for sampling Respondents' Property.

13. Lead is a hazardous substance within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

14. There is a reasonable basis to believe that there may be a release or threat of release of hazardous substances on Respondents' Property within the meaning of Section 104(e)(1) of CERCLA, 42 U.S.C. § 9604(e)(1).

15. Respondents' Property is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), and within the meaning of Section 104(e)(3)(D) of CERCLA, 42 U.S.C. § 9604(e)(3)(D), where entry is needed to perform appropriate response actions.

IV. DETERMINATION

16. Based on the Findings of Fact and Conclusions of Law set forth above and based on the administrative record, the Superfund Branch Chief has determined that there is a reasonable basis to believe (a) that there has been a release or threat of release of a hazardous substance at Respondents' Property, within the meaning of Section 104(e) of CERCLA, 42 U.S.C. § 9604(e); (b) that access to Respondents' Property is needed in order for EPA to perform appropriate response actions; and (c) that EPA's requests for such access have been denied.

V. ORDER

17. Respondents shall provide EPA and its authorized representatives, including but not limited to, contractors and subcontractors, full and unrestricted access at reasonable times to Respondents' Property for the purpose of conducting sampling activities that EPA deems necessary to evaluate the threat to public health, welfare or the environment posed by the release or threatened release of hazardous substances at Respondents' Property. Respondents shall not interfere in any way with the activities described above. Any such interference shall be deemed a violation of this Order. This Order shall be binding on Respondents and Respondents' heirs, agents, successors, and/or assigns.

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

19. In the event of any conveyance by Respondents or Respondents' agents, heirs, successors and/or assigns of an interest in Respondents' Property, Respondents and Respondents' agents, heirs, successors and/or assigns shall convey the interest subject to this Order, so as to insure access by EPA and/or its representatives for the purpose of carrying out the sampling actions. Any such conveyance shall restrict the use of Respondents' Property so that the use will not interfere with response actions undertaken pursuant to CERCLA. Respondents or Respondents' agents, heirs, successors and/or assigns shall notify EPA in writing at least fifteen (15) days before any conveyance of an interest in Respondents' Property, and shall, prior to any such transfer, provide notification of the provisions of this Order to the other parties involved in the conveyance.

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 fail 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 Respondents' Property, and recover 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 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 or to take any other administrative or civil action against Respondents or any other parties under CERCLA which relate to Respondents' Property or any other site.

23. Nothing in this Order constitutes a decision on preauthorization of funds under Section 111(a)(2) of CERCLA, 43 U.S.C. § 9611(a)(2).

VII. NOTICE OF INTENT TO COMPLY

24. Within ten (10) days of the effective date of this Administrative Order, Respondents shall provide and EPA must receive written notice stating unequivocally whether Respondents intend to comply with the terms of this Order. Such written notice shall be sent to:

Dan Breedlove
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region VII
901 North 5th Street
Kansas City, Kansas 66101
Facsimile (913) 551-7925.

25. If the Respondents fail to provide such notice, Respondents shall be deemed to be in noncompliance with the terms of this Order.

VIII. ADMINISTRATIVE RECORD

26. The EPA has prepared an administrative record that contains documents that form the basis for EPA's determination that access to the Respondents' Property is necessary. The administrative record is available for public inspection, by appointment, at the EPA Regional Office in Kansas City, Kansas and at Granby City Hall, 302 North Main, Granby, Missouri. An appointment to review the Administrative Record can be made by contacting Granby City Hall or Dan Breedlove, Assistant Regional Counsel, at (913) 551-7172.

IX. OPPORTUNITY TO CONFER AND EFFECTIVE DATE OF ADMINISTRATIVE ORDER

27. Within seven (7) calendar days of receipt of this Administrative Order, Respondents may request a conference with EPA, to be held no later than ten (10) calendar days after Respondents' request, to discuss any matter pertinent to this Administrative 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. The Respondents may appear in person or by an attorney or other representative at the conference. The Respondents may also submit written comments or statements of position on any matter pertinent to this Order. The Respondents will waive their opportunity to a conference or to submit written comments if Respondents fail to request the conference or submit comments prior to the effective date of this Order. Any request for a conference shall be submitted to Dan Breedlove, Assistant Regional Counsel, at telephone number (913) 551-7172, by facsimile

number (913) 551-7925, or by electronic mail at breedlove.dan@epa.gov. The Respondents can also reach EPA toll free at 1-800-223-0425.


28. This Administrative Order shall become effective seventeen (17) calendar days from Respondents' receipt.

X. TERMINATION

29. This Order shall remain in effect for one (1) year from the effective date or until EPA notifies Respondents in writing that access to the Property is no longer needed, whichever comes first.

SO ORDERED.

11/21/07
Date of Issuance


Gene Gunn
Chief
Federal Facilities/Special Emphasis Branch
Superfund Division
U.S. Environmental Protection Agency, Region VII