

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2010 MAY 10 PM 2:00

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:

Billings PCE Site
Yellowstone County, Montana

J.E.M., LLC,
711 Central Avenue
Billings, Montana 59102,

Respondent.

ADMINISTRATIVE ORDER
DIRECTING COMPLIANCE WITH
REQUEST FOR ACCESS

U.S. EPA Region 8
CERCLA Docket No. **CERCLA-08-2010-0003**

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

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I. JURISDICTION

1. This Administrative Order (“Order”) is issued to J.E.M., LLC, (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 C.F.R. § 300.400(d)(4) (“NCP”). 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, re-delegated 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 undersigned officials.

II. STATEMENT OF PURPOSE

2. This Order requires Respondent to grant EPA and its authorized representatives entry and access to Respondent’s property generally described as 711 Central Avenue, Billings, Yellowstone County, Montana, and further described in Paragraphs 3 and 4 below (the “Property”). Such access is required for the purpose of implementing response actions and otherwise enforcing the provisions of CERCLA. 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. The Property is located at the Billings PCE Site (“Site”). From 2007 to the present, EPA has undertaken a response action (“clean-up”) at the Site pursuant to CERCLA to address risks to public health and the environment posed by the release and threatened release of hazardous substances, pollutants and contaminants. The main contaminant of concern at the Site addressed in EPA’s clean-up is the chlorinated solvent perchloroethylene (“PCE”), a hazardous substance listed under CERCLA and the NCP. The daughter products of PCE, trichloroethylene (TCE), 1,1- and 1,2-dichloroethylene (DCE) and vinyl chloride, were also found at the Site and are hazardous substances listed under CERCLA and the NCP. EPA’s response actions at the Site, as described in EPA’s Action Memorandum issued October 12, 2007 (“Action Memorandum”), were necessary to substantially reduce the threat to public health and welfare and the environment from the PCE release.

4. The Property is in a mixed residential and commercial area of Billings, Montana, and includes a two-story (with basement) commercial structure that is operated by Respondent, in connection with Ray & Company Realtors, LLC, to manage and rent out office space. The Property is located immediately adjacent to the property at 715 Central Avenue, a commercial laundry facility operated by Billings Laundry Company and Big Sky Linen Supply, Inc. (“Big Sky”). The Big Sky laundry facility and the commercial building at the Property are separated by a driveway owned by Big Sky. Respondent is the current owner of the Property and is a limited liability company registered in the State of Montana active and in good standing, organized in Montana on January 24, 1997.

5. EPA determined that PCE is present at the Site in concentrations and quantities that may pose an imminent and substantial endangerment to the public health or welfare or the environment. Samples collected from sub-surface soils and the groundwater at the Site showed PCE concentrations to be as high as 316 ppm, indicating the presence of free-product. PCE presents a risk of migrating from source areas and groundwater as soil gas vapors which seep into and accumulate in residential and commercial building crawl spaces and basements. Concentrations of PCE in indoor air measured at the Site range up to 170ug/m³, with approximately 8% of the residences sampled measuring indoor air concentrations exceeding EPA's target indoor air concentration of 41ug/m³ for PCE in residential settings. PCE in the groundwater presents an additional risk to human health through use by residents at the Site of domestic irrigation wells.

6. During the Site clean-up, PCE contamination was discovered in the soils and floor drain system emanating from the 715 Central Avenue facility and leading to the main City storm drain line running under Central Avenue. As a major part of the response action taken by EPA, EPA excavated and removed, to the extent feasible, these sub-soil PCE source materials from the 715 Central Avenue driveway between the 715 Central Avenue facility and the Property and in the Central Avenue roadway and adjacent areas. EPA also conducted sub-surface treatment of groundwater at these locations. EPA installed sheet piling into the excavation to provide stabilization and also to create a PCE containment cell. The excavation was backfilled and the driveway, side walk and roadway features were restored and the work was largely completed in September 2008.

7. PCE releases from the source areas have migrated in the subsoil and

groundwater to form a significant “plume” with associated subsoil and indoor air vapors. EPA installed numerous groundwater monitoring wells at the Site to define and measure the areal extent of, and PCE levels in, the groundwater plume. The PCE contamination plume is situated in shallow groundwater and extends from the 700 block of Central Avenue in Billings in an east-northeast direction, following the groundwater flow, through a residential neighborhood toward the downtown Billings area in the vicinity of North 30th Street. The known groundwater plume at this time is approximately 1.75 miles long and averages a width of approximately several hundred feet. The plume underlies approximately 300 homes and 180 commercial properties. The most concentrated portion of the PCE plume includes the groundwater at and flowing directly under the Property.

8. Because the Property is an approximately one acre lot situated immediately adjacent to and down-gradient of the major PCE source areas, EPA determined it necessary to install approximately seventeen groundwater monitoring wells on the Property to map and measure the plume. EPA has utilized and currently intends to utilize these wells for ongoing measurement of the PCE levels in the plume.

9. Because of the Property’s location, EPA also determined it was necessary to perform activities at the Property to support and effectuate the clean-up, including staging materials and machinery and parking construction vehicles, excavating several feet onto the Property and installing one edge of the sheet pile containment cell as part of the Central Avenue excavation, and excavating the 715 Central Avenue driveway next to the Property. EPA also installed indoor air venting systems to reduce the levels of PCE vapors inside certain structures at the Site, where the levels were determined to be of

concern. As part of the clean-up, EPA installed such a system in the basement of Respondent's building at the Property, in response to elevated indoor air PCE levels.

10. In September 2006, Respondent granted access to EPA for sampling and investigation work at the Property, including installation of groundwater monitoring wells and an indoor air venting system, through an access agreement signed by Jerry T. Ray, Manager, J.E.M., LLC. On June 20, 2007, in response to EPA's request, Respondent provided additional access to EPA and its authorized representatives to conduct portions of the response action on the Property, through a signed Consent for Access to Property agreement ("2007 access agreement".) The 2007 access agreement was signed by Jennifer E. Ray, Assistant Manager of J.E.M., LLC. By this agreement Respondent provided access to the Property for EPA and its representatives to perform the aspects of the clean-up described above, including ongoing access for EPA to monitor the groundwater wells installed at the Property.

11. PCE contamination at the Site is expected to continue to migrate from the source areas where EPA was not able to remove such material completely. Consequently, EPA has determined it is necessary to continue to monitor groundwater wells at the Site to ensure that the clean-up is effective and remains so in the future. Alternatively, it is critical for EPA to determine if PCE concentrations in the plume are not attenuating so that additional response actions may be considered. EPA also needs to determine if short term increases in PCE levels have occurred from the excavation and treatment activities conducted at the Site. Samples from the groundwater wells at the Property are especially important given the proximity to the PCE source areas.

12. To perform the response actions as described herein, it is necessary for EPA and its authorized representatives to enter the Property. EPA estimates the duration of the required entry and access to be approximately five years. EPA is currently planning a bi-annual groundwater sampling effort, although samples may need to be taken more often, depending on the sample quality and results obtained. It is not currently necessary for EPA to enter the building. EPA also does not currently envision any additional excavation of PCE source areas at the Site.

13. Access is needed at the Property for the taking of such soil, groundwater and soil vapor samples outside the building as may be determined to be necessary, including from existing groundwater wells; the installation and maintenance of sampling equipment, including, but not limited to, additional groundwater monitoring wells outside the building as may be determined to be necessary; the closing and removal of any existing groundwater wells as may be determined to be necessary; the “leveling” of groundwater well heads for wells installed at the Property to minimize risk of damage to the wells from normal snow removal and lawn maintenance; the prevention of surface water infiltration into the wells (in the case of a well being too low compared to the surrounding ground); the locating and uncovering of wells covered up by landscaping materials (such as landscaping fabrics); the implementation of response actions described in the Action Memorandum for the Site; and the assessment of the need for, and planning for, any additional response actions at or near the Site. EPA also needs to enter the Property to assess and secure the wells following recent re-landscaping by the owner, to guard against inadvertent damage, plugging or contamination of the wells from activities such as landscaping and lawn mowing.

14. Initiation of these response actions must be performed in an expeditious manner in order to maintain a continuous set of groundwater data for the PCE plume, so that accurate predictions of any attenuation trend may be completed. EPA and its contractors were prepared to sample the existing groundwater wells at the Property in early April 2010, and mobilized to do so at that time, but Respondent's denial of access prevented that sampling. Delay in sampling and any consequential delay in assessing and implementing necessary response actions may exacerbate existing health risks at the Site. In addition, delay in entering the Property to secure the wells may jeopardize the integrity of the wells resulting in additional costs to replace wells.

15. On March 28, 2010, by e-mail to EPA representatives, Respondent provided notice that EPA and ER/URS, EPA clean-up contractors, were "not authorized" to access the Property. This notice revoked Respondent's June 20, 2007 access agreement and constitutes a denial of access. On March 31, 2010, EPA sent an e-mail to Respondent asking Respondent to re-consider the denial of access. On April 5, 2010, by e-mail to EPA, Respondent again confirmed the denial of access.

16. Despite EPA's requests, Respondent has not provided EPA with consent to access for purposes of performing the ongoing and planned future response activities described above. On April 6, 2010, EPA sent Respondent a letter requesting access. EPA specifically requested re-instatement by Respondent of the 2007 access agreement, rather than introduce a new agreement. On April 14, 2010, Respondent sent EPA a notice that access was still denied. On April 23, 2010, EPA sent Respondent a second request to re-instate the 2007 access agreement. On April 28, 2010, Respondent sent EPA an additional notice confirming that access was denied. On May 5, 2010, EPA

representatives contacted Respondent by telephone and discussed the matter, but were not able to secure a grant of access.

IV. CONCLUSIONS OF LAW AND DETERMINATIONS

17. The Site and Property are each a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

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

19. All of the substances listed in Paragraphs 3 and 5 above are hazardous substances or pollutants or contaminants within the meaning of Sections 101(14) and 101(33) of CERCLA, 42 U.S.C. §§ 9601(14) and 9601(33).

20. The past and present disposal and migration or potential migration of a hazardous substance or pollutant or contaminant at or from the Property and the Site 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).

21. The Property owned or controlled by Respondent referred to in Paragraphs 3 and 4 above is a vessel, facility, establishment or other place or property:

- a. where a hazardous substance or pollutant or contaminant may be or has been disposed of, or deposited or otherwise come to be located;
- b. from which or to which a hazardous substance or pollutant or contaminant has been or may have been released or otherwise come to be located;
- c. where such release is or may be threatened; and

d. where entry is needed 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).

22. Entry to property owned or controlled by Respondent by the agents, contractors, or other representatives of the United States is necessary 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).

23. EPA's request for access to the Property has not been granted, and Respondent's refusal to grant consent or delay in granting such consent and Respondent's attempts to condition its grant of access constitutes 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

24. Based upon the foregoing Findings of Fact, Conclusions of Law and Determinations, and the Administrative Record, Respondent is hereby ordered to provide EPA 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 necessary for implementing the Action Memorandum for the Site, including but not limited to sampling and monitoring, assessing and determining aspects of implementation of a response action, taking a response action, including the response actions described above in Paragraphs 11-13 of this Order, or otherwise enforcing the provisions of CERCLA.

25. 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.

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

27. 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.

28. 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

29. 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 \$37,500 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 Property or Site, and recovery of the costs thereof.

30. 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.

31. 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 Property, the Site or any other site.

32. 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

33. 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 8 a.m. and 4 p.m. at the EPA offices at 1595 Wynkoop Street, Denver, Colorado. To review the Administrative Record, please contact Phoebe MacLeish at 303-312-6546 to make an appointment. A copy of the Administrative Record is also available for viewing at the Billings Library, 510 N. Broadway, Billings, Montana; Contact Dee Ann Redman, Librarian, at 406-657-8258.

VIII. OPPORTUNITY TO CONFER

34. Within three (3) business days after receipt of this Order by Respondent, Respondent may request a conference with EPA, to be held no later than five (5) 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 (2) 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:

James Stearns
Legal Enforcement Program
United States Environmental Protection Agency
1595 Wynkoop Street
Denver, Colorado 80202
Telephone: 303-312-6912

IX. EFFECTIVE DATE; COMPUTATION OF TIME

35. Because of the immediate need to conduct the activities described above, this Order shall be effective five (5) 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.

36. 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

37. 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.

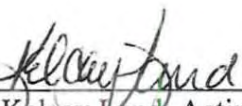
Such written notice shall be sent to:


James Stearns
Legal Enforcement Program
United States Environmental Protection Agency
1595 Wynkoop Street
Denver, Colorado 80202
Telephone: 303-312-6912.

XI. TERMINATION

38. This Order shall remain in effect until the undersigned officials or the designee thereof notifies Respondent in writing that access to the Property is no longer needed.

SO ORDERED.

BY:  DATE: 5/5/10
Kelcey Land, Acting Director
Technical Enforcement Program
Office of Enforcement, Compliance and Environmental Justice
United States Environmental Protection Agency, Region 8

BY:  DATE: 5/5/10
Matthew Cohn, Supervisor
Legal Enforcement Program
Office of Enforcement, Compliance and Environmental Justice
United States Environmental Protection Agency, Region 8

In the Matter of: J.E.M., LLC
Billings PCE Site
Docket No. CERCLA-08-2010-0003

The undersigned hereby certifies that the original and one copy of the attached ADMINISTRATIVE ORDER DIRECTING COMPLIANCE WITH REQUEST FOR ACCESS was hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street, Denver, Colorado, 80202, and that a true copy of the same was sent via Certified Mail, Return Receipt Requested, to:

Jerry T. Ray, Manager
J.E.M., LLC
2646 Grand Avenue, Suite #1
Billings, Montana 59102

5/10/10
Date

Judith M. McTernan
Judith M. McTernan