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**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

Received by
EPA Region VIII
Hearing Clerk

IN THE MATTER OF:

Bonita Peak Mining District Site,
San Juan County, Colorado

Todd C. Hennis,

Respondent.

MODIFIED ADMINISTRATIVE ORDER
DIRECTING COMPLIANCE WITH
REQUEST FOR ACCESS

U.S. EPA Region 8
Docket No. CERCLA 08-2021-0002

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

**MODIFIED ADMINISTRATIVE ORDER DIRECTING COMPLIANCE
WITH REQUEST FOR ACCESS**

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I. BACKGROUND AND JURISDICTION

1. This Modified Administrative Order Directing Compliance with Access (Order) supersedes the Administrative Order Directing Compliance with Access issued by the United States Environmental Protection Agency (EPA) to Todd C. Hennis (Respondent) on January 6, 2021 (Initial Order). Respondent timely requested a telephone conference and timely provided written comments to EPA pursuant to Paragraph 33 of the Initial Order. Based upon the information provided by Respondent, EPA has determined modification of the Initial Order is appropriate.

2. This Order is issued to 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 CFR § 300.400(d)(4). This authority was delegated to the Administrator of 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, and further delegated to the undersigned officials.

II. STATEMENT OF PURPOSE

3. This Order requires Respondent to grant EPA, the U.S. Department of Interior (DOI), the U.S. Department of Agriculture (USDA), the Colorado Department of Public Health and Environment (CDPHE), and their authorized representatives entry and access to the Respondent's property which includes the following three claims (1) Herbert Placer (M.S. #13562), (2) Anglo Saxon (M.S. #14875), and (3) the Harrison Millsite (M.S. #14710) (collectively, the Gladstone Property) located in San Juan County, Colorado, for the purpose of

determining the need for response, choosing a response action, taking a response action, or otherwise enforcing the provisions of CERCLA by conducting response activities at the Bonita Peak Mining District Superfund Site (Site). This Order further requires Respondent to refrain from interfering with access to the Gladstone Property or with activities conducted within the scope of this Order by EPA, DOI, USDA, CDPHE and their authorized representatives for the purposes set forth herein.

III. FINDINGS OF FACT

4. The Bonita Peak Mining District Site is located in southwestern Colorado in San Juan County. Within the Site there are three main drainages (Mineral Creek, Cement Creek, and the Upper Animas River) that reach a confluence with the Animas River at Silverton, Colorado. These drainages include over 400 abandoned or inactive mines, where large to small scale mining operations occurred. EPA has identified 48 mining-related features that contribute to a comingled release of hazardous substances into the environment. These mining-related source areas include 35 mines, seven tunnels, four tailings impoundments and two study areas. Attached hereto as Appendix 1 is a map of the Site depicting the mining-related source areas.

5. Historic mining operations at the Site have contaminated soil, groundwater, and surface water with heavy metals. These operations have resulted in the release of hazardous substances within the meaning of Section 101(1) of CERCLA, 42 U.S.C. § 9601(14). These releases are associated with acid mine drainage at the Site originating from waste rock, tailings piles, seeps, springs, and mine adit discharges and include but are not limited to aluminum, arsenic, cadmium, copper, manganese, and zinc.

6. On September 9, 2016, EPA added the Site to the CERCLA National Priorities List, 40 C.F.R. Part 300, App. B, pursuant to Section 105(a)(8)(B) of CERCLA, 42 U.S.C. § 9605(a)(8)(B).

7. EPA, DOI, USDA, and CDPHE are conducting a remedial investigation and feasibility study (RI/FS) at the Site to determine the nature and extent of contamination at and from each source area and to evaluate cleanup options.

8. In August 2015, EPA was investigating the Gold King Mine, one of the source areas within the Site. While investigating the mine adit, pressurized water began leaking above the mine tunnel, releasing approximately three million gallons of water pooled behind collapsed material into Cement Creek. In response EPA, among other things, took action to restore access to Level 7 of the Gold King Mine and stabilize the portal, and to establish ground control in the adit to provide safe access and prevent ground collapse near the portal. EPA then installed a lockable gate to secure the portal area. Immediately following the release, EPA constructed a series of settling ponds to retain and treat the water flowing from the Gold King Mine. To control the continuing flow of acid mine drainage from the Gold King Mine, EPA installed piping and surge protection and constructed a water conveyance from the portal to an Interim Water Treatment Plant constructed at the location of a former water treatment facility on the Gladstone Property. The Interim Water Treatment Plant was designed to treat ongoing discharge of acid mine drainage from the Gold King Mine. Construction of the Interim Water Treatment Plant was completed in November 2015. These CERCLA response actions are documented in an action memorandum for an emergency removal action associated the Gold King Mine Release Site, signed on January 11, 2016. Subsequently, EPA issued a non-time critical removal action associated with the Interim Water Treatment Plant on January 12, 2017. This action

memorandum transitioned the Interim Water Treatment Plant from the emergency removal action to a non-time critical removal action. The action memorandum also authorized an exemption from the 12-month, \$2 million limitation for a removal action as specified in the National Contingency Plan and CERCLA. *See* 42 U.S.C. § 9604(c) and 40 C.F.R. § 300.415(b). Finally, On October 16, 2019, EPA issued an action memorandum amendment of the non-time critical removal action associated with the Interim Water Treatment Plant. This amendment increased the funding ceiling for the non-time critical removal action by \$20.7 million to allow for continued operation of the Interim Water Treatment Plant for an estimated seven additional years. Since November 2015, EPA has continuously treated discharge of acid mine drainage from the Gold King Mine at the Interim Water Treatment Plant. In total, EPA has incurred over \$44,500,000 in past response costs associated with the Gold King Mine response and operation of the Interim Water Treatment Plant.

9. The Gladstone Property is a prime location for the Interim Water Treatment Plant, evidenced by the fact that it is the location of the previous water treatment plant. Prior to the construction of the Interim Water Treatment Plant, the Gladstone Property was uninhabited and undeveloped except for structures that appear to have been used for storage. The location is relatively flat and open in comparison to the surrounding terrain. The location also provides direct access to the county road, allowing for delivery of necessary supplies. EPA has expended considerable funds in constructing and maintaining the Interim Water Treatment Plant and relocating it to a different suitable location would be extremely difficult and extremely expensive.

10. To perform the response actions described above, it is necessary for employees, agents, contractors, and other representatives of EPA, DOI, USDA, and CDPHE to enter Respondent's Gladstone Property. The activities for which entry is required include:

- a. Implementing the response actions set forth in EPA's action memorandum for its non-time critical removal action, as amended.
- b. Conducting investigation activities associated with the Site; and
- c. Any other actions the EPA determines are necessary to address releases of hazardous substances from the Bonita Peak Mining District Superfund Site.

11. EPA estimates that entry and access will be necessary over the next five years. Access for a five-year period will allow EPA to carry out investigations that are necessary to make future response decisions related to the Gold King Mine, while continuing to treat water from the Gold King Mine. Further, access will provide EPA with the certainty it needs to ensure the Interim Water Treatment Plant's operations will continue uninterrupted and ensure EPA's limited resources are not spent negotiating access with the property owner several times per year.

12. Respondent is the owner of the Gladstone Property. As described above, the Gladstone Property includes three mining claims: (1) the Anglo Saxon claim; (2) the Harrison Millsite claim; and (3) the Herbert Placer claim. On May 1, 2000, the Pitchfork M Corporation conveyed the Anglo Saxon, the Harrison Millsite, and other claims to the Commonwealth Chartered Trust Company, Ltd. (CCTC). On June 30, 2000 CCTC, in turn, conveyed these claims to the Gold King Mines Corporation via quitclaim deed. Following a default, the Public Trustee of San Juan County conveyed these claims via a public trustee's deed to the San Juan Corporation on December 22, 2005. Respondent is listed as the registered agent for the San Juan Corporation. On May 18, 2007, San Juan Corporation conveyed the Anglo Saxon and Harrison

Millsite claims to Respondent. On July 10, 2003, Sunnyside Gold Corporation conveyed its interest in the Herbert Placer claim to San Juan Corporation. On March 18, 2005, San Juan Corporation conveyed the Herbert Placer claim to Respondent. Accordingly, by March 18, 2005, Respondent owned the three claims that comprise the Gladstone Property. Prior to the Gold King release in August 2015, the Gladstone Property was uninhabited.

13. Respondent has been unwilling to give his consent to EPA to access the Gladstone Property for the requisite amount of time for EPA to carry out the activities described in Paragraph 10. Further, Respondent has indicated that such consent may be withdrawn at any time or not extended. Since August 2015, EPA has requested and negotiated the terms of access with Respondent at least sixteen times.

14. For the past year, EPA has engaged in negotiations with Respondent to lease the Gladstone Property, but the parties have not been able to reach agreement.

15. Most recently, Respondent refused to grant EPA's request for an extension of access beyond February 28, 2021, a wholly insufficient time period for implementation of the CERCLA response action, including treatment of the discharge of acid mine drainage from the Gold King Mine at the Interim Water Treatment Plant.

16. The constant need to re-negotiate access with Respondent imposes unnecessary costs on EPA and injects significant uncertainty into the planning and implementation of response actions at the Site. In addition, if Respondent's consent to access is not extended, EPA may need to terminate operation of the Interim Water Treatment Plant, which continually treats acid mine drainage from the Gold King Mine.

IV. CONCLUSIONS OF LAW AND DETERMINATIONS

17. The Site is 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. Each 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).

20. The past and present disposal and migration of a hazardous substance or pollutant or contaminant at or from 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 Gladstone Property owned by Respondent is, or is adjacent to, a vessel, facility, establishment, or other place or property:

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

22. Entry to the Respondent's Gladstone Property by the agents, contractors, or other representatives of the United States is needed for the purposes of determining the need for response, choosing a response action, 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. Respondent's refusal to grant access to the Gladstone Property for the necessary duration of time needed to implement the CERCLA response action, including the treatment of the discharge of acid mine drainage from the Gold King Mine at the Interim Water Treatment Plant 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

24. Based upon the foregoing Findings of Fact, Conclusions of Law and Determinations, and the Administrative Record, Respondent is hereby ordered to provide EPA, DOI, USDA, CDPHE, and their officers, employees, agents, contractors, and other representatives, full and unrestricted access at all reasonable times to the Gladstone Property for the purpose of conducting response activities, including but not limited to:

- a. Implementing the response action set forth in EPA's action memorandum for its non-time critical removal action, as amended; and
- b. Conducting investigation activities associated with the Site; and
- c. Any other actions the EPA determines are necessary to address releases of hazardous substances from the Bonita Peak Mining District Superfund site.

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 Gladstone Property pursuant to this Order by EPA, DOI, USDA, CDPHE, their 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 his 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 Gladstone Property, Respondent or Respondent's agents, heirs, successors, and assigns shall convey the interest in a manner that ensures continued access to the Gladstone Property by EPA, DOI, USDA, CDPHE, and their representatives for the purpose of carrying out the activities pursuant to this Order. Any such conveyance shall restrict the use of the Gladstone Property so that the use will not interfere with activities undertaken or to be undertaken by EPA, DOI, USDA, CDPHE, and their representatives. Respondent, or Respondent's agents, heirs, successors, and assigns shall notify EPA in writing at least 30 days prior to the conveyance of any interest in the Gladstone 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 \$59,017 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, 85 Fed. Reg. 83818 (December 23, 2020), 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 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 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. An index of the Administrative Order is attached hereto as Appendix 2. Following issuance of the Initial Order, Respondent requested an electronic copy of the Administrative Record. EPA satisfied this request by transmitting the

Administrative Record to Respondent. To request an electronic copy of the Administrative Record for this Order please contact Christopher Thompson at Thompson.Christopher@epa.gov.

VIII. OPPORTUNITY TO CONFER

34. Respondent was provided an opportunity to confer with EPA under the Initial Order and raised concerns and requested certain clarifications. In response, EPA is issuing this Order to address those concerns and provide the requested clarifications.

IX. EFFECTIVE DATE; COMPUTATION OF TIME

35. This Order shall be effective three business days after its receipt by Respondent or Respondent's designated representative.

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. COMPLIANCE

37. During the telephone conference requested by Respondent following issuance of the Initial Order, Respondent stated that EPA had access to the Gladstone Property and that he had not interfered with EPA's continued access to the Gladstone Property.

38. On or before the effective date of this Order, Respondent shall notify EPA in writing via email if Respondent does not intend to comply with the terms of this Order. Such written notice shall be sent via email to:

Christopher Thompson
Office of Regional Counsel
Region 8
U.S. Environmental Protection Agency
Email: Thompson.Christopher@epa.gov

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

XI. TERMINATION

40. This Order shall remain in effect until such time as (1) Respondent signs a consent for access for at least a five-year period; (2) Respondent enters into a lease agreement for the Gladstone Property; (3) EPA notifies Respondent in writing that access to the Gladstone Property is no longer needed; or (4) December 31, 2025, whichever first occurs.

SO ORDERED.

Date: _____

Kenneth C. Schefski
Regional Counsel