



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

April 8, 2004

MEMORANDUM

SUBJECT: Issuance of "CERCLA Model Administrative Order Directing Compliance With Request For Access"

FROM: Susan E. Bromm, Director /s/
Office of Site Remediation Enforcement

TO: Addressees

Attached is the "CERCLA Model Administrative Order Directing Compliance With Request For Access." EPA needs access to private property to conduct investigations, studies, and cleanups. CERCLA grants EPA the authority to enter property for each of these purposes under Section 104(e)(1). EPA is granted power to enforce its access authority under Section 104(e)(5) of CERCLA, which provides that if consent for access is not granted, EPA can issue an administrative order directing compliance with its request for access.

This model is designed for those situations where EPA needs access to property to address the release or threatened release of a hazardous substance, pollutant or contaminant, but is unable to get such access on a consensual basis. It does not change any of our current policies on when or how we will seek access, rather it provides a consistent approach to drafting orders for access. CERCLA staff are encouraged to conform access orders as closely as possible to the terms of this model, subject to modifications needed to address site-specific circumstances. The Regional Support Division (RSD) currently has a consultation role (Roles Chart C.1.) when Regions wish to issue an administrative order for access under CERCLA. With the issuance of this model, RSD intends to revisit the necessity of that consultation.

Thank you to all EPA and DOJ staff who carefully reviewed and provided valuable input into this document. Please address any questions about the model to Douglas Dixon of the Regional Support Division at (202) 564-4232.

Attachment

Addressees: Director, Office of Site Remediation and Restoration, Region I
Director, Emergency and Remedial Response Division, Region II
Director, Hazardous Site Cleanup Division, Region III
Director, Waste Management Division, Region IV
Directors, Superfund Division, Regions V, VI, VII and IX
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation,
Region VIII
Director, Office of Environmental Cleanup, Region X
Director, Office of Environmental Stewardship, Region I
Director, Environmental Accountability Division, Region IV
Regional Counsel, Regions II, III, V, VI, VII, IX, and X
Assistant Regional Administrator, Office of Enforcement, Compliance, and
Environmental Justice, Region VIII
Office of Regional Counsel Branch Chiefs, Regions I-X
Superfund Program Branch Chiefs, Regions I-X

cc: Mike Cook, Office of Superfund Remediation and Technology Innovation
Earl Salo, Office of General Counsel
Bruce S. Gelber, Environment and Natural Resources Division, U.S. Department of Justice

bcc: Alan Carpien, OGC

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION ____**

IN THE MATTER OF:
[Site Name]
[City or Town, County, State]

ADMINISTRATIVE ORDER DIRECTING
COMPLIANCE WITH REQUEST FOR
ACCESS

[Names of Respondents (if many,
reference attached list)],

U.S. EPA Region ____
CERCLA Docket No. ____

Respondents

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

**MODEL ADMINISTRATIVE ORDER DIRECTING COMPLIANCE
WITH REQUEST FOR ACCESS**
(April 2004)

This model and any internal procedures adopted for its implementation and use are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this model or its internal implementing procedures.

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I. JURISDICTION

1. This Administrative Order (“Order”) is issued to _____ (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 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, and further delegated to **[insert Regional delegation information]**.

II. STATEMENT OF PURPOSE

2. This Order requires Respondent to grant EPA and its authorized representatives entry and access to the property described in Paragraph **[4]** below (“the Property”) located in **[City, State]** for the purpose of **[delete those that do not apply: determining the need for response, choosing a response action, taking a response action, or otherwise enforcing the provisions of CERCLA]** by **[insert brief description of proposed response activities]** **[at the [insert Site name] Site (the “Site”)]**. 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. Respondent owns **[controls]** property in **[City, State]** **[at/near the Site]**.

[Provide facts to show that the Respondent owns or controls the property, and that the property, if applicable, is at or near the Site.]

4. **[Provide a brief description of the Property, Site or facility where the release or threatened release is located. Provide an accurate legal description of the property to which access is sought, including street address or describing adjacent properties, referencing appropriate deed, citation to tax map parcel, or similar public record precisely identifying property in question.]**

[5. The Site is listed on 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).]

6. **[Provide facts to show that the Property is a place where a hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from; to or from which a hazardous substance or pollutant or contaminant has been or may have been released; where there is or may be a threat of release; where entry is needed to determine the need for response or the appropriate response, or to perform a response action; or a property adjacent to one of the foregoing. See CERCLA § 104(e)(3); 40 C.F.R. § 300.400(d).]**

7. **[Provide facts to support EPA's belief that there may be a release or threat of release of a hazardous substance or pollutant or contaminant at the Property, Site or facility.]**

8. To address the release or threatened release of a hazardous substance or pollutant or contaminant at **[and adjacent to]** the **[Property/Site]**, EPA is conducting **[planning to conduct]** certain response actions. These actions include **[describe in general terms the nature of the contemplated response action, e.g., performing an RI/FS.]**

9. To perform the response actions described above, it will be necessary for employees, agents, contractors, and other representatives of EPA to **[immediately]** enter the Property. The activities for which entry is required include: **[describe in detail the particular activities to be performed on the Property].**

10. EPA estimates that the duration of the required entry and access will be approximately **[specify the approximate duration of the entry].**

11. Despite requests from representatives of EPA, Respondent has refused to provide access for purposes of performing the response activities described above. These requests include **[describe requests, e.g., phone calls, letters dated ____ and ____ from ____, EPA Assistant Regional Counsel, to ____, attorney for Respondent. Include a description of any attempts by Respondent to condition a grant of access in any manner. Attach to the Order all correspondence related to attempts to gain access.]**

[12. If the action must be performed in an expeditious manner, describe why. An example is:

EPA and its contractors have been ready to perform the sampling since [date], but have been prevented from so doing because of the Respondent's failure to grant access.

If there are perceived health/safety risks associated with delay, so indicate and describe why.]

IV. CONCLUSIONS OF LAW AND DETERMINATIONS

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

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

15. All of the substances listed in Paragraph [6-7] 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).

16. The past and[/or] present disposal and migration [**or potential migration**] of a hazardous substance or pollutant or contaminant at or from the [**Property/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). [**OR: Based on the information provided in Paragraph(s) (6) and (7) of this Order, EPA has a reasonable basis to believe**

that there may be a release or threat of release of a hazardous substance or pollutant or contaminant, within the meaning of Sections 101(22) and 104(e)(1) of CERCLA, 42 U.S.C. §§ 9601(22) and 9604(e)(1), at the Property/Site.]

17. The property owned or controlled by Respondent referred to in Paragraph [4] above is, or is adjacent to, a vessel, facility, establishment, or other place or property: **[(delete those that do not apply)**

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

18. Entry to property owned or controlled by Respondent by the agents, contractors, or other representatives of the United States is needed for the purposes of **[(delete those that do not apply: 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).

19. EPA's request for access to the Property has not been granted **[OR: Respondent's attempts to condition its grant of 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

20. 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, including but not limited to **[describe in general, e.g., performing an RI/FS]**, including **[specify the activities to be taken on the Respondent’s property. NOTE: If including “designated representatives” need to officially designate those parties as our representatives in writing.] [EPA [has designated][intends to designate] _____ as its representative(s) solely for the purpose of obtaining access to the Property.]**

21. 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.

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

23. 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.

24. **[Add where Respondent is owner of the Property:** 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

25. 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 \$32,500 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/Site]**, and recovery of the costs thereof.

26. 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.

27. 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/Site]** or any other site.

28. 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

29. 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 ___ and ___ at the EPA offices in _____. To review

the Administrative Record, please contact [] at [] to make an appointment. A copy of the Administrative Record is also available for viewing at the [].

VIII. OPPORTUNITY TO CONFER

30. Within **[three]** business days after receipt of this Order by Respondent, Respondent may request a conference with EPA, to be held no later than **[two]** 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 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:

[Attorney]
[Office of Regional Counsel or Office of Environmental Stewardship]
United States Environmental Protection Agency
[Address, mail code]
City, State Zip
Telephone:

IX. EFFECTIVE DATE; COMPUTATION OF TIME

31. **[Because of the immediate need to conduct the activities described above,]**
[t]This Order shall be effective **[five]** 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.

32. 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

33. 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:

[Attorney]
[Office of Regional Counsel or Office of Environmental Stewardship]
United States Environmental Protection Agency
[Address, mail code]
City, State Zip
Telephone:

XI. TERMINATION

34. This Order shall remain in effect until **[Name and Title of Delegated Official]** or his/her designee notifies Respondent in writing that access to the Property is no longer needed.

SO ORDERED.

Date: _____

[Name and Title of Delegated Official]