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**ATTORNEY FOR PLAINTIFF**  
**UNITED STATES OF AMERICA**

**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF MONTANA**  
**MISSOULA DIVISION**

**IN THE MATTER OF 185 WEST**  
**VALLEY DRIVE, KALISPELL,**  
**MONTANA**

**Case No. MJ-22- -M-KLD**

**EX PARTE APPLICATION OF**  
**THE UNITED STATES FOR**  
**ADMINISTRATIVE WARRANT**  
**TO ENTER AND ACCESS**  
**PROPERTY**

The United States of America, on behalf of the United States Environmental Protection Agency (EPA), seeks a civil, administrative warrant authorizing EPA and its representatives to enter and access, for a period of 12 weeks, an unoccupied property located at 185 West Valley Drive, Kalispell, Montana (the Property). In July 2022, EPA received a report of a substance leaking from abandoned tanks on the Property and has identified hazardous substances including polynuclear

aromatic hydrocarbons (PAHs), xylene, ethylbenzene, and naphthalene at the Property. EPA has determined that entry on the Property is necessary to conduct further investigation, including sampling of the substance and the tanks' contents, and to take action to remove the hazardous substances.

By this Application, the United States requests authority to enter onto, move about, and remain on the Property so that EPA and its authorized representatives can undertake investigatory, response, and removal actions pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as follows:

- Perform site preparations, including clearing debris and vegetation to establish a work area and creating vehicle access to the 11 tanks;
- Inspect and assess property conditions;
- Inspect and obtain samples and analysis from the tanks and the surrounding area, including soil, surface water, and groundwater, as needed;
- Remove and recycle and/or dispose of the contents of the tanks;
- Recycle and/or dispose of the tanks and debris;
- Excavate and remove any contaminated soils and materials;
- Restore disturbed areas;
- Take photographs and video to document the above activities; and

- Conduct other actions as needed to respond to the release or threatened release of hazardous substances, pollutants, or contaminants.

These activities are described in greater detail in the Declaration of Paul Peronard attached to this Application as Exhibit 1 (Peronard Declaration). EPA estimates that the work on the Property will take approximately 11-12 weeks. Weather and other factors may cause delays to this timeline. The United States is seeking access for 12 weeks. Should EPA require more than 12 weeks to conduct the work authorized in the Administrative Warrant, the United States will return to the Court to seek an extension.

As detailed in the Peronard Declaration, EPA used its best efforts to obtain consent from the owner to enter and access the Property. Despite these efforts, EPA was unable to obtain consent from the owner to access the Property.

For the reasons set forth in this Application, the United States respectfully requests that the Court issue the attached Administrative Warrant for entry and access to the Property pursuant to CERCLA, 42 U.S.C. § 9604(e).

### **STATUTORY BACKGROUND**

CERCLA authorizes this Court to allow EPA to engage in investigations at the Property. Congress enacted CERCLA in response to widespread concern over the serious environmental and health hazards posed by industrial pollution. *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA's purpose "is to

facilitate the prompt clean-up of hazardous waste sites.” *In re Bell Petrol. Servs.*, 3 F.3d 889, 894 (5th Cir. 1993); *see also Burlington N. & Santa Fe Ry. v. United States*, 556 U.S. 599, 602 (2009). To further that purpose, Congress provided EPA with “the authority and the funds necessary to respond expeditiously to serious hazards without being stopped in its tracks by legal entanglement before or during the hazard clean-up.” *Boarhead Corp. v. Erickson*, 923 F.2d 1011, 1019 (3d Cir. 1991); *see also J.V. Peters & Co. v. EPA*, 767 F.2d 263, 264 (6th Cir. 1985). One of the agency’s tools for prompt and effective response action is the access and information gathering authority of CERCLA, 42 U.S.C § 9604(e).

“As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites.” *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994); *see also New Jersey Dep’t of Env’t Prot. v. Briar Lake Dev. Corp.*, 736 F. Supp. 62, 66 (D.N.J. 1990) (recognizing that property access for remediation is one of the “tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal”). Specifically, CERCLA provides that any officer, employee, or representative of the EPA is authorized to take actions, including sampling and inspection, “at a vessel, facility, establishment, place, property, or location” if there is “a reasonable basis to believe there may be a release or threat of release of a hazardous substance or

pollutant or contaminant.” 42 U.S.C. § 9604(e)(1). CERCLA further provides than any officer, employee, or representative of EPA is authorized to enter at reasonable times any “vessel, facility, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this title,” and is further authorized to inspect and obtain samples from any such location or property. *Id.* § 9604(e)(3)-(4).

If consent is not granted regarding any request for access under CERCLA, EPA may issue an order directing compliance with the request or ask the Attorney General to commence a civil action to compel compliance with the request. *Id.* § 9604(e)(5). Notably, CERCLA states that EPA may “secur[e] access or obtain[] information in any other lawful manner.” *Id.* § 9604(e)(6). A court may thus issue an ex parte administrative warrant for access and entry when EPA is unable to obtain consent to access property from an owner. *In re Yoder’s Slaughterhouse Site*, 519 F. Supp. 2d 574, 579 (D. Md. 2007); *Bunker Hill Co. Lead & Zinc Smelter v. EPA*, 658 F.2d 1280, 1285 (9th Cir. 1981).

## **FACTUAL BACKGROUND**

### **A. The Property**

The Property consists of a single parcel (assessor number 0325250) located at 185 West Valley Drive in Kalispell, Montana and owned by Irene Serio.

Peronard Declaration ¶¶ 5, 7. The Property is a vacant field with some trees and does not contain a residence. *Id.* ¶ 26. Several residences are located within a few hundred feet of the Property. *Id.* ¶ 27. The Property is uphill of Ashley Creek, which feeds into the Flathead River and Flathead Lake. *Id.* ¶¶ 6, 32.

## **B. Response to Contamination**

On July 14, 2022, a neighbor called the National Response Center<sup>1</sup> and reported that 11 large, abandoned tanks containing possibly 50,000 gallons of materials were at the Property and leaking. *Id.* ¶¶ 5-6. The reporting party expressed concern about the leak reaching well water and a nearby waterway. *Id.* ¶ 6. The report was conveyed to EPA, which assigned an EPA On-Scene Coordinator (OSC) to investigate the size and nature of the contamination and assess the need for preventive actions and cleanup. *Id.* ¶¶ 3, 5-6.

EPA promptly gathered information about the Property from state and local authorities. The Montana Department of Environmental Quality (MDEQ) provided EPA with sampling data taken at the Property in 2018 that documented the presence of PAHs, xylene, ethylbenzene, and naphthalene. *Id.* ¶¶ 11, 16. Exposure to these hazardous substances can harm the respiratory system and central nervous system and has been linked to cancer. *Id.* ¶ 18. MDEQ believed

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<sup>1</sup> The National Response Center provides a 24-hour hotline staffed by the U.S. Coast Guard for reporting oil and chemical spills into the environment anywhere in the United States. See <https://www.epa.gov/emergency-response/national-response-center>.

the property owner, Irene Serio, likely kept tack oil—a substance used as a binder for pavement surfacing—at the Property. *Id.* ¶¶ 14-15. MDEQ had conducted prior investigations related to the Property and Ms. Serio’s road dust suppression business and had found that she had handled crude oil tank bottoms and various industrial wastes. *Id.* ¶ 13. MDEQ had previously attempted to contact Ms. Serio on multiple occasions through mail, family members, a process server, and social media but was unsuccessful. *Id.* ¶ 12.

Flathead County previously issued a notice of violation of a community ordinance to Ms. Serio for trash and debris on the Property. *Id.* ¶ 9. The County attempted to contact Ms. Serio on multiple occasions in 2018, 2019, and 2020 through mail, and by posting a notice on the Property, but was unsuccessful. *Id.*

The EPA OSC visited the Property on August 2 and 3, 2022, and observed conditions without entering the Property. *Id.* ¶ 26. Tanks were visibly degrading and unstable or leaning and lacked any secondary containment for a spill. *Id.* ¶ 28. The largest tank was located on the top of a small rise, a few feet from the road, and was visibly leaning and in danger of rolling on to the road. *Id.* ¶¶ 28, 30. A dark substance was leaking from the largest tank and pooling on the ground. *Id.* ¶ 29. The leaking substance was sampled without entering the Property, and it contained PAHs. *Id.*

Based on the above information, the OSC determined there will be a direct impact on the watershed if the leaking continues or if a catastrophic failure of one of the degrading tanks occurs. *Id.* ¶ 31. He further determined that EPA needs access to the Property to investigate and cleanup the leaking tanks. *Id.* ¶¶ 33-35.

### **C. EPA's Attempts to Obtain Consensual Access**

EPA has repeatedly attempted to obtain consent from Ms. Serio to access the Property to investigate and address the leaking tanks. The OSC attempted to contact Ms. Serio by telephone, placing six calls for her and leaving messages where possible. *Id.* ¶ 21. On July 27, 2022, the OSC spoke by phone with Ms. Serio and requested consent to access the Property to investigate and respond to the leaking tanks. *Id.* ¶ 22. Ms. Serio stated her refusal to consent. *Id.* Ms. Serio stated that she kept tack oil and pine resin at the Property and was not afraid of EPA, and that EPA “couldn’t do s\*\*\*” on her property. *Id.* In addition, on July 27, 2022, in response to an email requesting consent to access the property, Ms. Serio’s husband Anthony Serio wrote “f\*\*\* you and the horse you rode in on.” *Id.* ¶ 23.

EPA also mailed six letters requesting consent to the last known addresses associated with Ms. Serio in Montana and Florida, including the Property. *Id.* ¶ 24. The letters included a standard consent to access form. *Id.* EPA received



confirmation that the letter sent to a Columbia Falls, Montana address was received and signed for by Ms. Serio or her agent. *Id.* ¶ 25.

#### **D. The Planned Field Work on the Property**

To investigate and cleanup the leaking tanks located on the Property, EPA and its representatives need access and entry to the Property to conduct planned field work authorized by CERCLA. The activities for which entry is required are:

- Perform site preparations, including clearing debris and vegetation to establish a work area and creating vehicle access to the 11 tanks;
- Inspect and assess property conditions;
- Inspect and obtain samples and analysis from the tanks and the surrounding area, including soil, surface water, and groundwater, as needed;
- Remove and recycle and/or dispose of the contents of the tanks;
- Recycle and/or dispose of the tanks and debris;
- Excavate and remove any contaminated soils and materials;
- Restore disturbed areas;
- Take photographs and video to document the above activities; and
- Conduct other actions as needed to respond to the release or threatened release of hazardous substances, pollutants, or contaminants.

*Id.* ¶ 35.

Completion of this work on the Property should take no longer than 11-12 weeks. *Id.* ¶ 43. Due to potential weather delays and other factors that may cause delay, it is not possible to predict a precise timeframe for completing the field work on the Property. *Id.* ¶ 44. Should EPA require more than 12 weeks to conduct the field work on the Property, the United States would return to the Court to seek an extension. *Id.*

## **ARGUMENT**

The United States applies to this Court to enforce its right to enter the Property to evaluate and address the release or threat of release of hazardous substances, pollutants, or contaminants. The EPA has a reasonable basis to believe that hazardous substances, including PAHs, xylene, ethylbenzene, and naphthalene, were released at the Property and may be present in soils at the Property, and that active leaks and the deteriorated and unstable condition of the tanks pose a threat of further releases.

As discussed above, EPA made extensive efforts to obtain consensual access to the Property. The Court should grant EPA an ex parte warrant to ensure that EPA can promptly carry out necessary field work at the Property to assess the contamination and threat of release and take appropriate response actions to remove the hazardous substances and prevent further release.

**A. Issuance of the Requested Ex Parte Administrative Warrant is Authorized by Law**

CERCLA grants EPA and its representatives a right to enter and access property associated with a release or threat of release of hazardous substances, pollutants, or contaminants, including property where entry is needed to determine the appropriate response or to effectuate a response action. 42 U.S.C.

§ 9604(e)(1), (3). EPA’s access authority under CERCLA is broad, and not limited to the statutory procedures and methods specifically set forth in Section 9604(e)(1)-(5). Rather, Section 9604(e)(6) provides that “[n]othing in this subsection shall preclude [EPA] from securing access . . . in any other lawful manner.”

The Supreme Court has recognized that “[w]hen Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing” that authority. *Dow Chem. Co. v. United States*, 476 U.S. 227, 233 (1986).

Federal courts routinely enforce EPA’s right of access under environmental statutes—including CERCLA—even where those statutes do not expressly provide for warrant authority. *See, e.g., Koppers Indus. Inc. v. EPA*, 902 F.2d 756 (9th Cir. 1990) (affirming district court’s denial of motion to quash warrant issued under CERCLA); *Nat’l-Standard Co. v. Adamkus*, 881 F.2d 352 (7th Cir. 1989) (upholding issuance of warrant to EPA under analogous statute, the Resource

Conservation and Recovery Act); *Mobil Oil Corp. v. EPA*, 716 F.2d 1187 (7th Cir. 1983) (upholding issuance of warrant to EPA under the Clean Water Act); *Pub. Serv. Co. of Ind. v. EPA*, 682 F.2d 626 (7th Cir. 1982), cert. denied, 459 U.S. 1127 (1983) (upholding issuance of warrant to EPA under the Clean Air Act).

Further, the probable cause standard for issuance of civil administrative warrants is less stringent than the criminal probable cause standard. As the United States Supreme Court has stated,

Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. **Probable cause in the criminal sense is not required. For the purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that “reasonable legislative or administrative standards for conducting an . . . inspection are satisfied** with respect to a particular [establishment].”

*Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 320-21 (1978) (emphasis added) (quoting *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 538 (1967)). Determining “cause” to support the issuance of an administrative warrant does not require a showing of probability of a violation, but only of specific evidence that is sufficient to support a “reasonable suspicion” of circumstances designated by statute. See *W. Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 958 (11th Cir. 1982).

## **B. EPA Has Satisfied the Warrant Requirements Under CERCLA**

The standard for EPA to obtain an administrative warrant under CERCLA is satisfied here. *United States v. Tarkowski*, 248 F.3d 596, 599 (7th Cir. 2001) (“[t]he requirement of reasonable basis is easily satisfied”); *United States v. Fisher*, 864 F.2d 434, 438 (7th Cir. 1988) (the standard is “undemanding”). EPA need only show that “there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant.” 42 U.S.C. § 9604(e)(1). Further, EPA need not prove that any minimum amount of hazardous substances have been, or are threatened to be released. *United States v. Mountaineering Ref. Co.*, 886 F. Supp. 824, 828 (D. Wyo. 1995); *Tarkowski*, 248 F.3d at 599 (“there is nothing in [CERCLA] about magnitude”). Here, EPA has shown through a sworn declaration, sampling information, and photos that PAHs, xylene, ethylbenzene, and naphthalene have been detected at the Property, that a large tank is leaking a substance containing PAHs on the ground, and that the degrading and leaning tanks threaten further releases to the environment. Peronard Decl. ¶¶ 16, 28-32. PAHs, xylene, ethylbenzene, and naphthalene are listed hazardous substances under CERCLA. 40 C.F.R. § 302.4; Peronard Decl. ¶ 17.

## **C. The Court Should Issue the Warrant Ex Parte**

This Court has the authority to issue the warrant ex parte under CERCLA where, as here, the “owner will not consent to the EPA’s proposed activities,” and

the EPA has a reasonable basis to believe there may be a release or threat of release of a hazardous substance at the property. *In re Yoder's Slaughterhouse*, 519 F. Supp. 2d at 579; *see also Bunker Hill*, 658 F.2d at 1285; *Nat'l-Standard*, 685 F. Supp. at 1048-49 (ex parte warrant issued to EPA to perform inspections under analogous federal environmental statute); *In re Search Warrant*, No. MISC.NO.04-00079-MPT, 2004 WL 1368848, at \*4 (D. Del. June 10, 2004) (concluding that ex parte application for warrant under Clean Water Act was proper and not indicative of bad faith by EPA).

Here, EPA has produced sufficient evidence to justify issuance of the administrative warrant ex parte pursuant to CERCLA. As described above, EPA has undertaken extensive efforts to communicate with the owner of the Property and has been unable to obtain consensual access. Peronard Decl. ¶¶ 20-25.

Further, the Property is vacant and unoccupied, and the planned field work will not interfere with any ongoing activity at the Property or with the use and enjoyment of neighboring properties. Under these circumstances and in view of the valid public interest to be served by EPA's entry onto the Property, the issuance of an administrative warrant is justified. The Court should issue the warrant ex parte for a period of 12 weeks for EPA to conduct the necessary field work at the Property.

## CONCLUSION

For the reasons stated, the Court should grant the Application of the United States and issue the requested ex parte warrant.

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