ISSUE PAPER
ATLAS ASBESTOS MINE /ARROYO PASAJERO AREA NEAR COALINGA, CALIFORNIA
AN EPA - DEPARTMENT OF THE INTERIOR COORDINATION PROBLEM

The Atlas Asbestos Mine is an abandoned, partially patented mine located mostly on public lands, in Fresno County, approximately 20 miles northwest of Coalinga, California, in the Bureau of Land Management's (BLM) Hollister Resource Area. The area is positioned halfway between Los Angeles and San Francisco near the San Andreas Rift Zone, at the meeting point of Fresno, San Benito and Monterey Counties. Most of the mine is part of BLM's Clear Creek Management Area, a 55,000 acre, serpentine rock zone made up almost entirely of a huge asbestos bearing outcropping (called the New Idria Formation), in the San Benito Mountains. The Clear Creek Management Area is comprised of portions of four drainage basins. The Atlas mine is located in the largest of these, the Los Gatos Creek basin.

The mining claims for the Atlas Mine were primarily filed in the 1950s and the major development and production took place in the 1960s and early 1970s. The claims included 10 acres of millsite claims which were patented; patent applications were never filed on the remaining 300+ acres. The last claimant/operator abandoned the claims in 1980 just before the 43 CFR 3809 regulations would have required regulation of the activity. The millsite patents were salvaged and abandoned by the company within a year or two of the beginning of EPA's investigations. They have now become the property of the State of California due to tax delinquency.

In 1984, the Environmental Protection Agency (EPA) listed the Atlas Mine, along with the Coalinga Mine, located about three miles away on private land, on their National Priority List (NPL) of hazardous substance release sites. The grounds for these designations were never entirely clear, but seemed to be based on the assertion of risk to drinking water from non-point source runoff of asbestos from the two mines into Los Gatos Creek, an intermittant stream. EPA's assessment of this situation has changed at least once since then, and the Remedial Investigation/Feasibility Study (RI/FS) design has changed with it.

In EPA's current assessment, the risk of lung cancer in the area is created by particles of asbestos that have eroded from the Atlas mine, the Coalinga mine and the smaller Butler mine, and been carried by runoff through several square miles of erodible asbestos soils in the New Idria Formation. From there, according to this theory, the particles flow through a system of streams in the Los Gatos Creek basin, 30 or so miles into the Arroyo Pasajero and to a point past the town of Huron where the creek empties onto the flood impoundment area near the California Aquaduct. On this journey, the Los Gatos Creek is joined by streams that drain the Juniper and Joaquin Ridges, both noted for natural outcroppings of asbestos at the soil surface.

The Arroyo Pasajero is the mouth of the Los Gatos Creek basin, where it empties onto the valley floor, two miles northwest of the town of Huron and two and a half miles east of the California Aquaduct. The aquaduct is a barrier to the flow of wet season stream flow and sediments from the entire river basin. The waters of Los Gatos Creek pond and evaporate behind 30 foot high, 4 mile long dikes and the asbestos laden sediments dry and are annually cultivated by farmers for soil preparation and crop planting. According to EPA, the plowing raises dust clouds that block the sun in the area for days at a time and spreads asbestos fibers more than 100 miles downwind. The EPA has never included the Arroyo Pasajero on the NPL, despite their assertion of the risk of lung cancer from airborne particles of asbestos that come from the diked fields each spring. The Bureau of Reclamation, the California Department of Water Resources, and the various other landowners and farmers in the area have never been officially named as responsible parties for these releases, but they remain potentially responsible parties and some damage claims have been made against BOR for asbestos related losses as well as flooding.

EPA Region IX seems to have concentrated enforcement efforts for the Atlas portion of asbestos release site on the potential liability of the Bureau of Land Management and spent less effort on the private firms that owned and operated the mine and mill. This may be because they have a rather weak case and hope that a Federal lead will encourage private parties to participate. Whatever EPA's reason, if BLM were to take the lead, the action would result in expenditure from the General Fund for which there is virtually no hope of recovery.

The current status of activites regarding the Atlas site include the following:

EPA has finished a draft version of the Remedial Investigation/Feasibility Study (RI/FS) for the area. The Region appears to be dividing the draft RI/FS into subareas and preparing the new sections for public review, prior to development of the ROD.

There has been extensive documentation by EPA, its staff and its contractors of the extensive problems with data collection and validation throughout the RI/FS. This theme is reiterated in the rather inconclusive draft risk assessment.

EPA enforcement (HQ & IX) and BLM/DOI have made early presentations to DOJ Washington regarding some of the issues cited above and a number of technical issues. Plans were made last winter for Assistant Secretary/Assistant Administrator level discussions to try to resolve the overall issue. The plans are on hold pending confirmations. DOJ has refereed some legal discussions and technical discussions continue at the Region/State Office level. More significant negotiations await Department level discussions.

For safety purposes, BLM is proceding with actions limiting access (fencing, road closures, etc.) of recreationists in the Clear Creek Management Area to the mine site. These actions are taken pursuant to the Bureau's management authority and responsibility in the area.

The Atlas Asbetos Mine case, contains some of the classical problems facing Federal land management agencies in complying with CERCLA: inconsistant application of law and policy from region to region; cost recovery inefficiencies; the "Federal Deep Pocket" as the first target of opportunity; and, one of BLM's special problems, Mining Law related CERCLA sites. The Atlas Asbestos Mine case raises two issues of significance to the Bureau's hazardous materials management program. The first has to do with the Mining Law of 1872. For 104 years (1872-1976), this law required mandatory transfer of possessory rights to the claimant by the Secretary of the Interior, but provided the Bureau with no authority to regulate activities at mining claims or even to require claimants to report their claims to the Federal government. It also allowed for abandonment of such claims and possessory rights at the claimant's will, regardless of any damage to the environment. For three additional years, after amendment of the Mining Law by the Federal Land Policy and Management Act (FLPMA), the regulatory authority existed, but regulation was not possible because FLPMA also provided that time period for miners to report their activities to the Bureau. Thus, for 107 years the Mining Law has provided for a nondiscretionary transfer of mining claim possession to the claimant with no environmental regulation.

EPA Region IX and some EPA headquarters staff have argued that despite this history, the Bureau has complete liability for anything that ever happened on BLM administered land regardless of a claimant's possessory status. BLM, in turn, contends that EPA should enforce against any viable claimants, mine operators, transporters and related parties before coming to BLM, so that the Federal taxpayer is not paying for cleanup of the externalities of private operators over whom the government had no control and then paying for the additional costs of finding and suing such operators to recover the funds, if possible. The Region IX position also appears to be inconsistant with the enforcement policy set out in the Federal Facilities Compliance Strategy, EPA Office of Federal Activities, November 1988, p.VI-23.

The question, in all such cases, is does the location of any land within the boundaries of an NPL site make BLM a "responsible party", or "the trustee for adversely impacted, Federal natural resources"? The answer, in the case of the Atlas Asbestos Mine, according to EPA Region IX, is that BLM is a major responsible party. Under similar circumstances at the Uravan Uranium Mine, EPA Region VIII, the Department of Justice (DOJ) and the Attorney General of Colorado found BLM to be the trustee for adversely affected natural resources. The legal differences between the two cases are not clear, but both decisions have defenders within EPA. At the Bunker Hill Mining and Metalurgical Complex, DOJ (and presumeably EPA Region X) and the State of Idaho (which had 500 responsible parties listed) found that the Bureau's land holdings in the area constituted below minimal responsibility and BLM was not included in either the State or Federal action. In other actions, RPs are trying to force EPA to include BLM into enforcement actions based on small public land in-holdings between patented mines or pre-1900 ownership. This would allow the RPs to try to force Federal taxpayer contributions for the cleanups of conditions the RPs created, without any adjudication of the cases.

Since the program began, the Bureau has recognized that as a Federal land owner, BLM has responsibility under CERCLA for cleanup of significant hazardous substance releases at mines on public lands, whenever the responsible parties, "the polluters", cannot be found. The Bureau treats such cases like any other "midnight dumping" or chemical abandonment on public land where no perpetrators can be found. The Bureau absorbs the cost in the interest of public safety and because EPA is prohibited from expending superfunds at Federal Facilities. This is not the case at Atlas Asbestos.

The second issue is that of cost recovery. Where no viable, responsible parties can be found for a public lands cleanup, the Bureau has no opportunity for cost recovery, but there are also no associated costs. Where there are such responsible parties, but the Bureau is forced nonetheless to take the lead in a cleanup, cost recovery becomes an expectation of senior management, the Congress, and taxpayers. It is, however, very difficult to achieve. Cost recovery litigation could theoretically be filed once a substantial remediation expenditure has been made by the Bureau, but the Department of Justice and U.S. Attorneys Offices often want a clearer idea of the total cost of the remediation before they are willing to file a such a suit, in order to assess the cost effectiveness of the litigation. This means that several years could elapse between the expenditure and the initiation of litigation. Additionally, DOJ and U.S. Attorneys have made it clear that they require upfront funding of the costs of such litigation in order to avoid waste of effort caused by losing funding in the middle of a multi-year effort. While this is an understandable concern on DOJ's part, it is difficult for a Bureau to find or allocate millions for such an effort, on a speculative basis, when there are still sites of known risk to be managed. There are also many internal support costs during the negotiation and litigation that could go on for several more years. These and related costs of recovery will almost certainly detract from other Bureau hazardous materials management efforts, but the recovery, if there is a recovery, will go to the General Fund. This makes it not only difficult, but disadvantageous, to try to achieve cost recovery