

BRIEFING PAPER

Prepared for: The Secretary

**Key Point:** Whether to agree to pay the EPA and past mining claimants for a portion (15%-25% or approximately \$1+ million) of the cost of the investigation and cleanup of the Atlas Asbestos Mine (CA) National Priority List site or to refuse to enter the agreement and proceed with the litigation already filed against the Department and BLM by the claimants, the Atlas and Vinnell corporations. The issue must be resolved in a manner that alerts key Administration decision makers to the policy/budget issue precedents involving DOI liability.

**Issues:** The precedent in either agreeing to pay or in losing the litigation will involve the BLM and DOI in liability and very large future costs at each of potentially thousands of mine sites authorized under the Mining Law of 1872, where there are existing, financially viable claimants and patentees. The defenses proposed in litigation are that the BLM and the DOI are "innocent landowners" under the law and if found to be technically liable, that the share of the cost apportioned to the BLM/DOI should be minimal (1% or so). The Department of Justice is conservative with the use of the "innocent landowner" defense and worries that DOI could lose more by litigation (up to 30%) than by agreement in this case. Precedent does not appear to be a major consideration in the DOJ position.

The EPA and the DOJ are pushing for a quick resolution, by Wednesday, August 21, 1991, even though EPA's own procedures would allow consideration until November.

Additionally, EPA is demanding in the agreement, the inclusion in the NPL site of a large recreation management area on public lands. The inclusion is apparently designed to prohibit the use of the recreation area by offroad motorcycles and to ensure the inclusion of three small mines, that would not otherwise be subject to EPA jurisdiction or probably to any control action, to force a BLM cleanup.

**Positions of Department and other Entities:** DAS Ed Cassidy has discussed the matter with Ron Cogswell at the Office of Management and Budget and plans to pursue the issues of precedent, and future cost and liability with the OMB this week. The OMB has not yet taken a position on the questions.

The DOJ would like to resolve the issue quickly, whether because of the case specifics or their large workload is unclear. The attorney is Steven Rogers.

The EPA would like to establish BLM as an inexpensively accessed "deep pocket" for site cleanup, so wants no exception for innocent landowner status. This appears to a matter of administrative convenience and regulatory "pique" for EPA.

Background: The Atlas Asbestos Mine near Coalinga, CA was mined by the two claimants from 1962 to 1974, when it was sold to the now bankrupt Wheeler Corporation which operated it until about 1980 and abandoned it. In 1983 it was identified as a water quality problem, and placed on the NPL in 1984. The BLM cooperated in the EPA studies and controlled access to the site. It was assumed that the claimants, which profited from the operation of the site and which had full possessory rights when the contamination occurred, and then abandoned it, would be liable for the costs except those costs associated with continuing BLM stewardship of the resources, such as security, patrol, assessment of the permanence of the remedy and evaluation of revegetation potential. In fact, BLM understood that this was agreed to by EPA Region IX, but the positions changed in the last few months.

There is no question of BLM responsibility for NPL mine sites on public lands if there are no viable responsible parties, that is because EPA is prohibited from expending Superfund money on Federal lands and cleanup must be effected for public safety. Where there are viable claimants and patentees, however, on claims abandoned prior to the promulgation of 43 FR 3809, surface management rules under the Federal Land Policy and Management Act, BLM believes that EPA enforcement against the liable polluters is legally appropriate and would save the Federal government substantial money. There are estimated to be 250,000 mines on public lands, about 10,000 of substantial size. Liability for even a small percentage of the substantial mine sites would easily exceed BLM's annual budget and is sure to adversely effect prime mission resource management programs.

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