CASO Atlas
✓ Site Security
✓ Employee Access
Consistent w/ NCP
1221(e) agreement
Protect on liability
113(k) on all actions not specified.

ATLAS ASBESTOS -- ISSUES AND STRATEGY
DRAFT PROPOSAL 6-30-88

ATLAS MINE (ONLY)

° Some people at EPA are apparently very unhappy about their relations with the Bureau on the Atlas Mine NPL site. The Agency's Office of General Counsel has recently approached the Department of Justice to enlist DOJ assistance and intervention in resolving the issues on the NPL site so that a (SARA) 120(e) interagency agreement can be cleared and signed before, or simultaneously with, the Administrator's decision on the preferred remedial alternative. According to DOJ, some of the EPA enforcement people feel that the Bureau is not being cooperative on Atlas. EPA is apparently considering issuing a cleanup order to the Bureau. The authority for and timing of such an order is highly questionable both by this office and by DOJ, but the objective, embarassing and getting the attention of the Bureau, might be quite sucessful.

show salt

° BLM (and DOI) must consider the precedent and ultimate fiscal impact of agreeing to liability and cleanup for the Atlas mine. Our defense at Atlas is that in the 107 years from 1872 to 1979, BLM had no authority to control the private use of public lands under the Mining Law and is therefore, an innocent landowner. During that same century-plus period, roughly a quarter of a million mines were opened on public lands under the Mining Law. It is the Bureau's position that the Congress did not consider those cases where private parties with no relation to the Federal government would create hazardous substance releases as a by-product of private use of public lands and so, did not intend for the BLM to pay for the cleanup of such releases resulting from the actions of these private claimants. If the Department accepts it, EPA's assertion of BLM liability at Atlas could very well establish the precedent of Bureau liability for all abandoned mines that were created under the 1872 Mining Law. At current prices, such potential liability could easily be in the billions of dollars. Even where EPA or a State did not bring action against the Department for mine cleanup, under the principle of joint and several liability, there is the risk that any mine owner that is currently, or was previously a mining claimant, might sue for recovery of some portion of any costs that they have been required to expend for CERCLA cleanups.

Protect joint and several liability foreseen.

° A national interagency strategy is needed to resolve this issue, coordinated among BLM/DOI, DOJ, OMB and EPA. The strategy must involve an agreement that if BLM is determined to be liable on Atlas by the Congress or OMB, we will act as expeditiously as funds are available to cleanup the site. EPA will probably strongly oppose this proposal. Due to the scale of the potential unintended effects of the CERCLA legislation, however, it is essential that the issue be resolved at the highest levels. Signatures will probably be at least at the Assistant Secretary level.

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finish proposal paper then complete memo to CASO

STRATEGY FOR THE ATLAS NPL MINE SITE

° In this strategy, BLM would propose a joint DOI/BLM-EPA-OMB-DOJ agreement at the Secretarial level to go forward to the Congress with a request for clarification of the application of Section 120 of the Superfund Amendments to mines under the 1872 Mining Law. If the Congress found that it did not intend that SARA 120 apply to DOI as a landowner under the Mining Law, Department would request for relief for BLM from the unintended consequences of the law. Conversely, if the Congress finds that Section 120 is applicable to the Department/BLM under the Mining Law, the request will be for fiscal resources adequate to meet this monumental task. The agreement would act as a SARA Section 120(e) agreement through which the Bureau would accept a schedule for cleanup of the Atlas mine, but on a schedule based on an indefinite starting date that could only be triggered by OMB or the Congress upon the resolution of the issue. This approach would have to be approved by the Department of the Interior first, of course.

° If EPA supports this approach, the multi-agency agreement proposal can be brought to OMB rather quickly and with luck, the request can go equally quickly to the Congress. If EPA reject the strategy, however, the issue will still go to OMB but on a slower schedule, through the dispute resolution provisions of Executive Order 12088 which provides for OMB decision on environmental policy issues. It is possible that the DOJ will support the strategy of going to the Hill because of the cost of dealing with the potential explosion of litigation from the precedent. Staff with whom we discussed the issue feel that it is ripe for a decision. The reception of the issue at OMB is also unknown, but the probable hemmorhage of Federal outlays resulting from a precedent establishing BLM as liable for private actions at mines on public lands and formerly public lands, should at least entitle the Bureau to a hearing.

° The request to the Congress will be based on the fact that the cost of BLM mine waste cleanups and the sharing of the cost of private cleanups on formerly public lands would probably soon exceed the Bureau's total budget. At current EPA cost estimates, one or more billion dollars could easily be consumed over ten years and a huge work force would be required to provide the activities. As the situation currently stands, the only options appear to be imposing what is essentially a new "Superfund" program with enormous cleanup, administrative, and litigation costs on the Bureau of Land Management (which has no experience, infrastructure or enforcement authority), or relieving the BLM of this unintended liability for private actions, finding new ways to make the responsible parties pay for cleanups and using the actual EPA "Superfund" to supplement enforcement efforts. Under the latter option agencies with experience, funding and authority to require private response (i.e., EPA and the States) will handle the enforcement and recovery cases and BLM will not be automatically liable for all past claims in civil actions for recovery.

- The State Office and District need to assemble all documents and information relating to the defense in litigation: specifying all players (private, financial, state, local, etc.) involved in the site, dates of use and contamination, BLM's relation to the claimant(s) and other users (what authorizations were issued?), maps, aerial photos, legal documentation (including authorizations, filings, SOL opinions, records of operations, etc.), any data on local conditions on and around the mine (regardless of source), records of what BLM did (directly or through the claimant) to control conditions at the mine before or after it was abandoned, and the timing of Bureau knowledge of the problem conditions at the mine. If this information indicates that contamination was added after 1979, the current defense postion may be unworkable. The assembly of this information is essential for the DOJ to prepare a proper defense for the Bureau in this case. It should be available before the end of the fiscal year.

NON-NPL ASBESTOS ZONE STRATEGY

- On the Clear Creek recreation area, and other serpentine zones in the Hollister RA, the basic condition in question by EPA is that of natually occurring asbestos (not covered by Federal law) and non-point source and therefore, should require no cleanup activities. This is not to say that no management control requirements will be imposed to avoid, minimize or control risk, or that efforts will not be made to close certain public lands to certain uses, but that cleanup costs should be minimal. No Section 120(e) agreement should be necessary for this, although EPA may want some sort of agreement in order to formalize completion of the action. On the other hand, EPA may insist on a 120(e) agreement and try to include several smaller cleanup sites (especially mines) in such an agreement. BLM should resist any 120(e) agreements on the non-NPL portions of the area; other agreements can be negotiated.

- These non-NPL areas will also require additional future supervision and compliance work and efforts to avoid an attractive nuisance problem. EPA may wish to participate more or less directly in the Bureau's management of these lands. Where this is required such intervention should be formal (i.e., in writing) prepared as an order, or at least as a formal risk assessment based on individual land uses.

- The State and District Offices need to assemble all documents relating to the Bureau's defense in litigation: specifying all players (private, state, local, etc.) involved in the area and its management, dates of use and contamination, what was BLM's relation to the users (what authorizations were issued and what level of control is exerted?), maps, aerial photos, legal documentation (including authorizations, filings, SOL opinions, records of operations, etc.), any data on local conditions

(regardless of source), records of what BLM has done, is doing or plans to control conditions on the recreation area (for example) and the timing of Bureau knowledge of the problems. Information or data relating to the historical levels of air or water borne contaminations of the area by asbestos will be very important, especially pre-ORV use. The assembly of this information is essential for the DOJ to prepare a defense for the Bureau. The information should be compiled by the end of the calendar year.

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