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UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT  
WASHINGTON, D.C. 20240

JAN 10 1989

1703 (509)

Memorandum

To: Deputy Assistant Secretary - Land and Minerals Management

From: <sup>Acting</sup> Director, Bureau of Land Management

Subject: Transmittal of Requested Analysis on the Atlas Asbestos National  
Priority List Site in California

Attached is the flow chart and issue analysis on the Atlas Asbestos Mine site that you requested from the Hazardous Materials Staff at the December 8, 1988, meeting that you and Deputy Assistant Secretary Marchant had with Dick Johnson of the California State Office and other agency and Solicitor staffs.

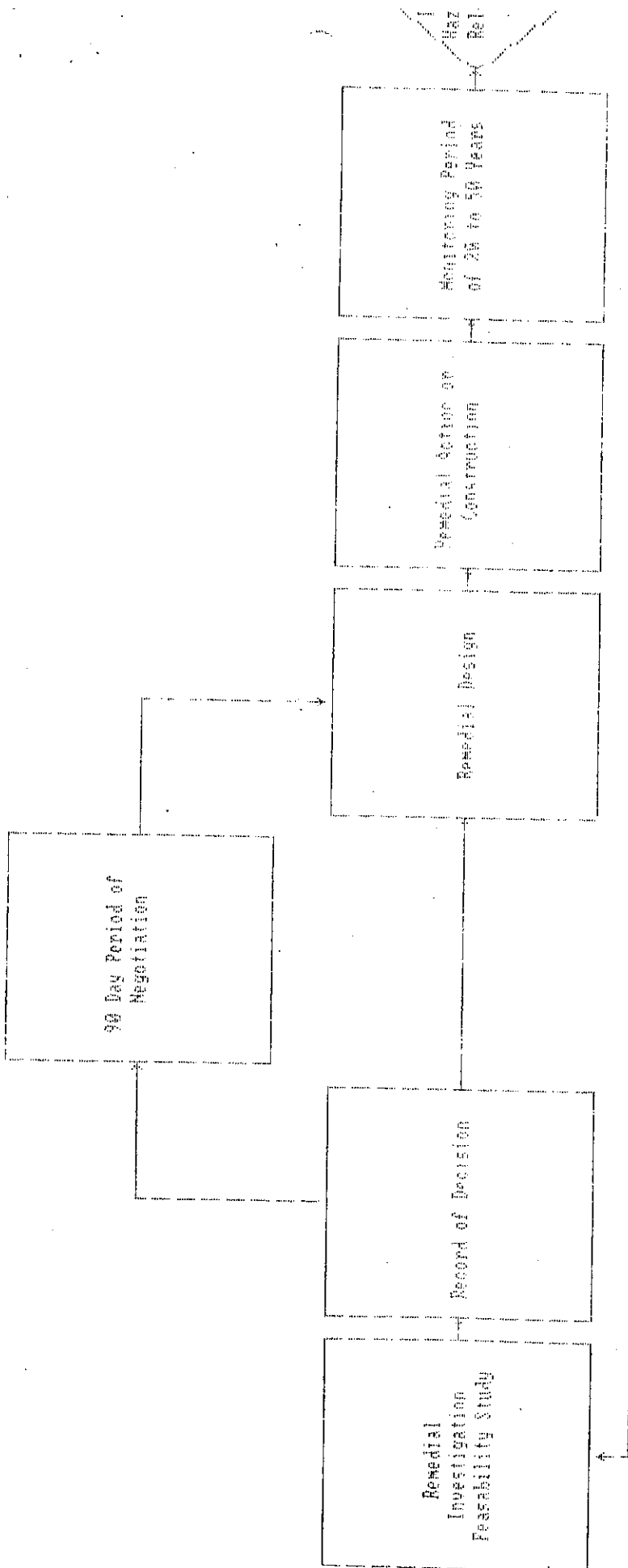
Also attached is a copy of State Director Hestey's December 30, 1988, correspondence on the subject with the Environmental Protection Agency's Regional Administrator.

If there is anything else that we can provide on the subject please contact Bernie Hyde at 343-5517.

/s/ ROLAND G. ROBISON, Jr.

Attachments (2)

cc:  
200-Howell, 500, 509 RF, SD-California, CA930-Johnson,  
AS/LMM-Niebauer, SOL-Elliot, SOL-Clark, SOL-Brown  
509: BHyde: Fig: 01/06/89: 343-5517: [D-0136H]



## THE CERCLA CLEANUP PROCESS

CERCLA Section 120 requires that certain actions be carried out by Federal Agencies once a hazardous substance release site is designated for placement on the National Priority List (NPL) for Superfund sites. EPA regulations and guidelines specify the processes and procedures of each step. The steps and their timing and source of authorization are set out below:

- A. A Remedial Investigation/Feasibility Study (RI/FS) -- a detailed characterization of the NPL site and a cost effectiveness analysis of alternative strategies for cleaning up the site is required by Sec. 120(e). There are detailed statutory provisions and rules on the participation of the public (Sec. 117) and potentially responsible parties (PRPs) as well as the order of document preparation and the creation of a detailed administrative record (Sec. 113(k)). This is generally a 2-3 year project. (All time periods used here assume available funding and no procurement delays.)
- B. Following the RI/FS is a formal Record of Decision on the selection of the appropriate cleanup remedy(Sec. 104(c), based solely on the Administrative record of the site, including hearings on the decision, and reviewable only on that record (Sec. 113(k)). In most cases, EPA makes the decision. If a Federal agency takes the lead in the RI/FS preparation, that agency will make the decision, but subject to EPA concurrence (Sec. 120). The period is generally 45 to 180 days.
- C. Following remedy selection is a 90 day period of negotiation among the responsible parties (RPs) and EPA regarding allocation of cost of implementation of the selected strategy (regulatory). In general, cost and liability are allocated on a responsibility basis. EPA and DOJ attempt to reduce Federal costs to zero unless there are one or more other Federal agencies involved.
- D. The next step is for the lead RP (or EPA) to contract for a remedial design. This is a specific engineering design to implement the selected remedy(regulatory). It requires EPA approval. This will take 4 to 12 months.
- E. Once the remedial design is complete, the lead RP or EPA will contract for the remedial action or construction to the design specifications. This will also require EPA approval. For most NPL sites, the Remedial action will range from a few months to a few decades, averaging 3 to 4 years.
- F. After EPA testing and approval of the completion of construction, the monitoring period of 20 to 50 years begins. If periodic testing indicates new or continuing release, EPA will initiate an abbreviated process starting over at step A, and the RPs, including Federal agencies, will be required to redo the cleanup until it is right.

The Atlas site is completing Step A. EPA is completing the RI/FS and expects to go to Step B (the Record of Decision) in March.

## LEGAL REQUIREMENTS/ISSUES

1. Liability -- Section 107(a) of CERCLA makes anyone who disposed of hazardous substances or transported them for disposal or owned or operated the facility (including land) from which the substances were released, liable for the investigation, cleanup and damages resulting from such release. Section 120(a)(1) makes Federal agencies subject to the provisions of Section 107 of the Act. CERCLA liability is "strict" (i.e., it applies whether or not there is any fault, negligence or criminal intent by any of the parties). The liability is also referred to as "joint and several" (i.e., any single party can be held liable for 100% of the costs of investigation and cleanup, but might by subsequent litigation, recover portions of those costs from other responsible parties).

The Atlas Asbestos Mine case is even more complex, however. Section 107(b) and Section 101(35)(A) provide exemptions from liability for current owners, under certain circumstances. One of those circumstances is when the "facility" was "acquired by the defendant after the disposal or placement of the hazardous substances" and when the "defendant is a governmental entity which acquired the facility by escheat or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation". Arguably, the BLM acquired its portion of the mine lands by claim abandonment and the BOR and California Department of Water Resources acquired the land by condemnation, so there may be some basis for this defense. Unfortunately, CERCLA also provides that no Superfund monies may be spent on Federal facilities, so if there are no other viable, responsible parties, the Federal land managing agencies would be fully responsible for any cleanup required on their land, even if it were the product of midnight dumping. The Department of Justice or in some cases the Office of Management and Budget, will be the final arbiter of liability questions that arise among the agencies.

What is troubling about the Atlas case is that EPA is going to so much trouble to involve BLM in the site when there are several private responsible parties that were the claimants and operators of the mine for years. In many such cases in the past, EPA has ignored the landowner, even if the owner contracted, and was paid for, the use of the lands. BLM acted only under a non-discretionary provision of statute both in turning the land over to the claimants and in transferring it back into public lands when it was abandoned. In other CERCLA cases, where other responsible parties were available, EPA assessed only minimal costs against owners, allowing them to "cash-out" of the case and placing the major costs on the generators, disposers and transporters that profited from the disposal.

2. RI/FS -- The EPA is preparing the RI/FS for the Atlas site simultaneously with another National Priority List (NPL) site, the neighboring Coalinga Mine. The owner/operator of the Coalinga mine has apparently settled with EPA for remedial actions at the mine and in the City of Coalinga. Also included in the joint report is an analysis of the problems at Arroyo Pasajero, the impoundment at the end of the Los Gatos Creek basin in which the two mines are located.

CERCLA states that no Superfund money can be spent on Federal Facilities (Sec. 111(e)). EPA knew when the site was designated that the mine was located largely on public land by virtue of being abandoned mining claims and that the stream impoundment near the aqueduct was primarily Federal land. EPA apparently chose to spend the more than \$3 million in superfund monies on the RI/FS for the site because only portions of the problem areas were on Federal land and because there were private PRPs. Despite this, they may attempt to recover some of the money from BLM and BOR.

EPA has established clear guidelines on the implementation of RI/FSs by potentially responsible parties (PRPs). Many of the requirements of these guidelines appear to be missing from the Atlas RI/FS, especially those related to public participation and review of agency actions prior to the decision. DOI is now being asked to review and comment on the remedy alternatives in the Feasibility Study, without having had access to the RI which purports to describe the site and the risks involved upon which the FS is based.

3. Data Questions -- BLM has not been able to obtain a copy of the draft RI from EPA even though it was purportedly available in late June, 1988. It is notable that in conversations, even in formal presentations and articles, EPA personnel admit that the data used to prepare the case is virtually useless. The data are by EPA's own estimate unable to support the modeling that the agency used to prepare the RI/FS. These models, used to allocate responsibility among other things, are reported to show that significantly more than 30% of all the asbestos problems in the several hundred square mile basin are attributable to the Atlas mine. This is reported despite the fact that EPA's best sampling techniques cannot distinguish between mined and naturally eroded asbestos. Most available tests cannot even quantify or consistently distinguish among the varieties of asbestos. Additionally, we cannot assess the value of the models themselves, because EPA has not released the model mechanicals, assumptions or input data.

4. Record of Decision -- According to EPA's schedule, the Regional Administrator is supposed to select the preferred remedial alternative from the Atlas/Coalinga FS and sign the ROD in March, making the decision final. By the end of January, 1989, DOI must obtain and review copies of the Atlas case administrative record to assure that the record on which the decision is made reflects the situation as we understand it and contains a full discussion of the data limitations and alternative interpretations. The Department of Justice should be kept informed of all issues we have with the EPA documents and administrative record so that they can insure "legal consistency" in the issue resolution.

5. Negotiation Period -- During the negotiation period (or usually before given the short time frame), it is often possible to reach agreement with other parties on the allocation of financial liability and to designate and fund a lead party or committee to contract for and supervise the remedial design and construction. When EPA or other Federal agencies are involved, Executive Order #12580 requires that the Attorney General approve any such settlements. In the Atlas case, there are seven potentially responsible parties that have already been named and could be several more. Most of these are financially viable; some like Union Carbide and Vinelle are large and stable. There has been some preliminary discussion between BLM and at least one of the parties, but more consultation, especially legal consultation, is needed before the EPA decision is made and the firms and Bureaus are working under severe time constraints. It should be made very clear that BLM and BOR cannot be made the deep pockets in this case.

BLM, as current landowner, should consider funding, and perhaps supervising, the closing of the mine site to the public and even limiting access to the mine site (e.g., mining law withdrawal to protect the public and private investments being made in any cleanup, or under extreme circumstances road closings may be needed.) This should be undertaken as part of the Bureau's normal management responsibility. In the same vein, BLM might, in return for renumeration by the RPs, agree to patrol and monitor the site, for the RP committee and/or lead firm. BLM should not agree to lead the cleanup of the mine or to pay for anything else. The remedial lead role and all other remedial requirements at the mine should be the responsibility of the claimant/generator RPs, who after all, created the problems and profited thereby. A similar strategy can be devised for the BOR at the Arroyo Pasajero.

6. Precedent -- A substantial amount of EPA's effort in this situation appears to be geared toward getting DOI and DOJ to accept the minimum data, minimum risk assessment, minimum PRP search and logic of their Atlas mine case and thus getting BLM to accept the "generic liability for mines" concept. Concurrent with the Atlas NPL site studies, EPA is conducting a non-NPL study of the remaining three river basins associated with the New Idria (asbestos) Formation, with the intent of controlling "the problems" of those basins, as well. One of these basins appears to be a carbon copy of the Los Gatos Creek/ Arroyo Pasajero situation and another drains most of the Formation and leads directly into the Hernandez Reservoir. EPA plans to complete this work three months after the ROD on the Atlas site. There are 25 mines on the Formation that are known to be at least partially on public land; between 50 and 75 additional mines on the Formation are unidentified as to ownership. Most of the mines have not been worked since World War II, many since before 1920. EPA has indicated that since these are abandoned, cleanup on them will probably be BLM's responsibility. While agency staffers have indicated an antipathy for the recreational uses of the area, BLM has not been shown any specific technical criticisms or proposals for changing those uses.

7. Later Remedial Steps -- If a Federal agency has the lead in the remedial action, CERCLA Section 120 requires that "substantial, continuous, physical, on-site" action commence within 15 months of EPA approval of the ROD. This includes no extra time for interagency agreement negotiation, appropriations, procurement or engineering design, all of which must precede such action. This deadline does not apply to sites where private parties have the lead; the timing of action at those sites is negotiable with EPA. At Atlas, there is no need for BLM or BOR to take the lead when there are so many viable responsible parties.

Additionally, if BLM or BOR do take the lead, it is probable that some RP will hold out, figuring that if the amount is small enough (under about \$1 million), the U.S. will not find it cost effective to litigate for it. The cost of any such recovery action will have to be paid by the lead agency to the DOJ. The costs of such litigation is high and the recovered monies go to the General Fund rather than returning to the lead agency. Thus, there is a good chance that such an assessment by RPs could be correct, and very costly to the Federal taxpayer.

Finally, if the bureaus hold out for only carrying out their own management responsibilities, the U.S. can negotiate with the RPs for reimbursement for any long term costs, such as monitoring, and for indemnification for any future problems on the same sites. This will limit current costs, litigation costs and future costs and most negotiation can be on the discounting of future costs.

MIB

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CA-932.7

DEC 30 1988

Mr. Daniel McGovern  
Regional Administration  
Environmental Protection Agency  
215 Fremont Street  
San Francisco, California 94105

Dear Mr. McGovern:

This is to bring you current on what we have accomplished over the past few weeks regarding the Bureau's efforts to address the issues in the Atlas Mine area.

As I said to you when we met last, we needed to get away from the conceptual discussion on remedial action and begin to develop some site specific recommendations, which would not only help reach our goal of protecting human health, but would be realistic and reasonable to accomplish. To follow through on this, on December 20, 1988, I met with representatives of Harding Lawson Associates, representing Vinnel, Inc., and Western Technologies, Inc., representing Atlas Mining Co. At my invitation, we asked them to join with the Bureau in developing a joint draft remediation plan for Atlas. At our meeting, we agreed to an action plan which will result in a draft plan of remedial actions, including estimated costs. I expect to have that draft plan in hand by January 25, 1989, and would shortly after that like to meet and discuss it with you. I expect we will be able to come to agreement on such a plan in enough time to augment EPA's public presentation of the RI/FS on February 15, 1989.

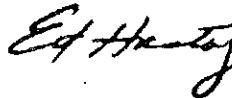
We are proceeding on schedule in reviewing the preliminary draft of the Atlas Feasibility Study. Our plan is still to have our comments to you by January 20, 1989 for inclusion in your draft RI/FS. I have a meeting scheduled with Southern Pacific in mid-January to review their work on the Coalinga Mine.



On the areawide basis, our Hollister Area Office continues to work with the King City Asbestos Co. on vegetation reestablishment efforts and to assess their engineering studies. In addition, we are starting a record search of all mining claim holders in the area, and are developing the resource themes for input into our geographic information system. All efforts may have benefits to not only our efforts on other disturbed areas, but at Atlas as well.

At our last meeting, you agreed to send me a sample of a Section 106 agreement for us to use in drafting such an agreement for the Atlas site. I would still like to have you send one as soon as possible. Also, I would appreciate your sending me a copy of the remedial investigation report. As it is the key document upon which the feasibility study is based, it would be useful to me to review the two in context.

Sincerely,



Ed Hastey  
State Director

cc: WO 509, Room 3061, MIB  
DM, Bakersfield  
AM, Hollister  
DSD, L&RR  
CA-932

M.  
1/22/89

### Atlas Asbestos Mine Site

The BLM is currently negotiating with EPA and potentially responsible parties with regard to Atlas Asbestos Mine remedial actions. The Atlas Asbestos Mine, 25 miles from Coalinga, California is an EPA-designated Superfund (National Priority List NPL) site which covers 400 to 500 acres, most of which is Public Land. EPA believes that there may be potential sources of air and water contaminants, as well as a potential threat to the public entering the site. The EPA is currently completing the draft RI/FS, including alternatives for cleanup of the site. The selection of the appropriate alternative by EPA will not take place at least until March, 1989. From the date of that decision, the responsible parties have 90 days to allocate liability among themselves. No specific amount for BLM actions will be known until then. Also, under Section 120 of CERCLA, the BLM must, within 15 months of the selection of the alternative, have a substantial, continuous, physical, on-site remedial action underway.

Because the actions required and associated costs are not yet known, funding for this project has not been included in this request. However, if EPA's schedule is maintained, the remedial action must be underway by June, 1990. This will mean that internal funding adjustments and/or supplemental funding may be required later. Because of restrictions in law as interpreted by EPA, the Public Lands within the Atlas Mine site are not eligible for cleanup from the Superfund. Meanwhile, BLM is taking action to control access to that portion of the site on the Public Lands.

### Emergency Situations

Tracking of various waste disposal and emergency situations will result in approximately 17 separate reports being filed by the BLM in compliance with the Resource Conservation and Recovery Act (RCRA).

Current levels of limited emergency response capability for isolated situations such as illegal dumping of chemical wastes or of abandoned cyanide and pesticide containers will continue to be available in 1990. Based on prior year records approximately 30 incidents requiring an emergency response by BLM are anticipated to occur in 1990.

### Program Evaluation

The interagency agreement between BLM and the National Academy of Sciences/National Academy of Engineers was signed on September 30, 1988. This agreement calls for a comprehensive evaluation of the BLM Hazardous Materials Management Program. The BLM and the Academy have begun an initial information exchange process. The final evaluation report is to be delivered by March 30, 1990. Implementation of the recommendations from this program evaluation will begin in late 1990.

Also, the BLM will continue to develop and initiate policies and procedures needed to reduce future hazardous waste control activities, costs and liabilities, provide programmatic and safety training to BLM employees, and ensure compliance with statutory and regulatory requirements.

### Decrease From 1990 Base

	1990 Base	1990 Estimate	Difference
\$	12,344	12,332	-12
FTE	(56)	(56)	(---

A decrease of \$12,000 will result in the reduction, by one unit, in the number of assessments that will be conducted. This reduction is based on more recently available information concerning the number of assessments that may be required and reflects the impact of BLM absorbing the increased Bureauwide fixed costs in 1990.

LAND ACQUISITION  
OREGON AND CALIFORNIA  
DRAFT TAMP  
HARVEST IMPROVEMENTS  
CONSTRUCTION AND ACCESS  
PAYMENTS IN LIEU OF TAXES