U.S. DEPARTMENT OF JUSTICE
Environment and Natural Resources
Division
ENVIRONMENTAL DEFENSE SECTION
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TO: Tim Elliot (continuation of previous fax)

FROM: J. Steven Rogers

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Tim - The 8/14/91 letter and the 8/1/91 Letter (Attachment D) are the most useful in assessing where EPA comes from here. JSR

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February 29, 1988

Mr. Ed Hastey
State Director
Bureau of Land Management
2800 Cottage Way, Room E-2841
Sacramento, CA 95825

Re: Atlas Asbestos Mine Site

Dear Mr. Hastey:

Since our meeting with you and your staff on August 30, 1987 and in subsequent correspondence and conversations, coordination between the Bureau of Land Management and the U.S. Environmental Protection Agency on the Atlas Asbestos Superfund site has improved. We look forward to continued cooperation in the next few months while the Atlas Remedial Investigation (RI) and Feasibility Study (FS) are completed.

I am pleased that the Bureau of Land Management accepts some of its responsibilities for the Atlas project and plans to take additional measures to reduce soil erosion and restrict access in the region. Notwithstanding the importance of a formal agreement between the Bureau and EPA regarding our respective responsibilities at this NPL site, I do not feel it is appropriate to concur on the November 27th letter prior to resolution of the Bureau of Land Management's status as a Potentially Responsible Party by the Department of Justice. However, I have enclosed EPA's response to this and other issues addressed in your letter.

I want to personally express my appreciation for your attention to the Atlas project and understand your concerns. If you have any additional questions, please contact me at (415)974-8153 or FTS 454-8153. Jennifer Decker, the Remedial Project Manager, may be contacted at (415)974-8161 or FTS 454-8161 and is available to assist you or your staff at any time.

Sincerely,

John C. Wise
Deputy Regional Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, Ca. 94105

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August 1, 1991

Martin McDermott, Esq.
U.S. Department of Justice
Environment and Natural Resources Division
Defense Section
10th and Pennsylvania Avenues
Washington D.C. 20530

Re: Atlas Mine Site
Mine Area Operable Unit
Settlement Negotiations
Response to June 11, 1991 Correspondence

Dear Mr. McDermott:

This letter responds to the June 11, 1991 letter received from Edward L. Hastey, State Director of the Bureau of Land Management ("BLM") with respect to the above-referenced site. It also addresses EPA's concern that an important opportunity to resolve this matter efficiently without extensive litigation is about to be lost.

The Innocent Landowner Defense: As you know, Mr. Hastey's letter explains that BLM believes that it is an "innocent landowner" with respect to the Mine Area Operable Unit, and that its "liability is limited in accordance with Section 107(b) of CERCLA." BLM has based this contention on the fact that the 1872 mining law gave miners a statutory right to mine minerals at the Atlas Site without giving BLM a statutory or regulatory basis for controlling this mining activity.

While remaining sympathetic with BLM's position, EPA is not convinced that BLM will prevail on this basis in the contribution action that has been brought by the private parties, Atlas Corporation ("Atlas") and Vinnell Mining and Minerals Corporation ("VMMC"). Under Section 107(b) of CERCLA BLM would have the burden of establishing by a preponderance of the evidence that

(1) the release or threat of release of the hazardous substance and the damages resulting therefrom were caused solely by acts or omissions of third parties, such as

Atlas and Vinnell, and

(2) BLM "exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and . . . took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . ."

In this case, EPA believes that BLM would be vulnerable to arguments that it did not meet either of these criteria. With respect to the criteria that the sole source of the release or threat of release be the actions of others, BLM's operation of the site following its abandonment by the miners may be found to be the basis for liability as an operator, who contributed to the spread of contamination.

With respect to the second criteria, BLM may be found not to have exercised due care and taken precautions against foreseeable acts or omissions, because it could be argued:

(a) During Atlas' and VMMC's operation of the site, the United States was aware and BLM either knew or should have known that (i) asbestos is a hazardous substance, and (ii) huge quantities of a more friable and erodible and hence more dangerous form of the substance were being deposited in unstable piles at the Mine Area OU. In this context, even if BLM did not believe it had the authority to take action under any statute or regulation, BLM certainly had the authority to write to the private parties as well as to the appropriate arms of the state and federal government and urge them to take some action to abate the threat.

(b) After the private parties abandoned the Mine Area OU and until EPA intervened, BLM allowed the Mine Site to be used for a variety of purposes including the riding of off-highway vehicles, as well as other recreational uses which contributed to the erosion and instability of the piles and exposed the public to airborne asbestos.

BLM may be able to explain these courses of action as basically reasonable under the circumstances. However, EPA remains very concerned that the courts will be reluctant to hold that BLM's actions met the statutory standard. As a result, it is EPA's evaluation that, if BLM hopes to establish favorable precedent on the innocent landowner defense, the Mine Area OU is probably not an appropriate case to bring to court.

The Appropriate Level Of BLM Participation In Performance of the Remedy and Payment of Past Costs: Given that BLM appears unlikely to prevail on the innocent landowner defense in the pending contribution action, the remaining question is the appropriate level of participation by BLM in a settlement with EPA and the private party PRPs. According to Mr. Hastey's letter, BLM apparently erroneously became concerned that EPA intended to require BLM to take responsibility for "remediation of the entire Atlas Site." This is not the case. EPA has used the criteria in the reported decisions described below to estimate the appropriate allocation. These cases appear to present the range in reported decisions on allocation of landowner liability, where the landowner was not also an operator, generator or transporter.

In the Matter of El Capitan Site, Final Arbitration Decision of the California, Office of the Secretary of Environmental Affairs, Hazardous Substance Cleanup Arbitration Panel, Case No. 89-0102, July 15, 1990. - This decision which was made under the California superfund law uses the same criteria as those applied by the federal courts in deciding CERCLA cases. It addresses a site at which BLM was the landowner, but where there was "no evidence that the BLM was involved in the generation, transportation, treatment or disposal of the hazardous substance, or had any actual or constructive knowledge as to the actions or inactions on the part of [the operators] in this regard." (Decision at p.6.) In these circumstances the panel chose to allocate 10% of the liability to BLM based on its apparent failure "at least upon termination or abandonment of a lease or mining patent, to inspect the premises and to make a reasonable effort to determine if any hazardous substances have been introduced to or left on the property." (Decision at p.8.) BLM did not participate in the arbitration or present any evidence.

United States v. R.W. Meyer, Hazardous Waste Litigation Reporter, May 20, 1991 at pages 20994-21004 (Case No. 89-2236, decided May 9, 1991 by the Sixth Circuit Court of Appeals) - This decision pursuant to CERCLA holds that the district court did not abuse its discretion in allocating one third of the liability for EPA's response costs to the owner of the property. It cites six factors to be considered in making such allocations derived from CERCLA's legislative history. They are:

"the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous substance can be distinguished;

the amount of hazardous waste involved;

the degree of toxicity of the hazardous waste involved;