BRIEFING STATEMENT

Prepared for: Ed Cassidy, Deputy Assistant Secretary for Policy
Submitted: September 30, 1991

TITLE: Atlas Asbestos Mine Superfund Site, Coalinga, California

ISSUE: Is it appropriate for the Department (and the taxpayers) to pay the cost of Superfund cleanups at mine sites where there are viable mining claimants?

STATUS:

o On February 14, 1991, Region IX of the Environmental Protection Agency (EPA) selected a remediation strategy and issued a Record of Decision (ROD) for the Atlas Mine Operable Unit. The ROD also included the Bureau of Land Management (BLM) Clear Creek Management Area (CCMA) as part of the National Priority List Site and sought a change in the land use plan for the area to exclude off-road vehicle use.

o Since two large firms (Atlas Mining and the Vinnell Corp.) which had been mining claimants at the site are financially viable, BLM did not expect to be required to participate in the remedy itself. The BLM did offer to carryout certain post-cleanup site monitoring activities as part of its stewardship responsibilities.

o On March 29, 1991, EPA requested that BLM enter into a Federal Facilities Agreement to perform the remedy at the Atlas Operable Unit. The Department of the Interior (DOI) responded that such an agreement is inappropriate in this instance; however, EPA continues to insist on it.

o The DOI has taken the position that BLM is an "innocent landowner" in this and similar cases, because public lands were wide open to exploration and development of minerals and BLM had no authority to regulate or otherwise control mining activities, including waste. This issue has significant potential precedent because there are thousands, if not tens of thousands, of abandoned mines on public lands, many of which still have economically viable claimants. Such a precedent could make BLM the target of responsible parties and others in third party suits where BLM has had even tiny past holdings, even if EPA chooses not to pursue the issue.

o Atlas and Vinnell insisted that BLM pay one third of the cost of remedy and investigation. They dismissed the innocent landowner position as well as a generous offer of post remedy activities. When BLM refused to make a further offer, they filed suit for recovery on May 30, 1991.

o Despite the availability of the private polluters and the potential cost of the precedent, EPA in August, 1991, proposed a resolution in which BLM would sign an agreement to pay 15% of remedy costs, plus 15% of 90% of the investigation costs, plus some post remedy activities, with the claimants paying most of the remaining costs. Negotiations are still in progress. Most recently, with some misgivings, BLM made 3 offers, varying from $800,000 cash, to significant post remedy services (~ $960,000), to a mix of cash and services. The offers did not include BLM administrative and management costs of ~ $600,000+. After all three offers were rejected by the private parties, BLM withdrew the cash offers leaving only the services consistent with our stewardship role. (EPA's strong positions on some of the issues recently seems to have undermined BLM's negotiating stands. Some of the positions demanding BLM payment and asserting liability were contrary to written EPA policy in the Federal Facilities Compliance Strategy.)

o The latest offer (15% of cleanup cost) was already higher than the share DOI/DOJ negotiators thought was fair for the site. EPA has also recently reversed positions on issues BLM believed to be settled and has now demanded that BLM pay 1/3 of past EPA site costs and sign a "standard" Federal Facilities Agreement that could make BLM ultimately responsible for the entire cost of site cleanup.

DEPARTMENTAL POSITION: The Department's current position is that BLM will pay for all costs of investigation and remedy at mining claims where there are no viable potentially responsible parties (PRPs). In those limited number of cases dealing with mining claims filed and abandoned prior to BLM's rules on mining law and surface protection (43 CFR 3809) where viable PRPs exist, DOI intends to make the polluters pay for the costs of their actions. It is also the Department's position that EPA should adhere to their policy of seeking out the polluters first, rather than going first to BLM because it is an easier tactic.

POSITIONS OF MAJOR CONSTITUENCIES:

o The EPA's position in the Federal Facility Compliance Strategy for sites with Federal and private PRP's is that viable private parties will be pursued by EPA first. Some regional EPA enforcement officers, however, focus on BLM rather than the private parties on mining claim sites.

o The Department of Justice Defense Section has been reluctant to support the DOI "innocent landowner" position, seemingly due to the additional workload involved in the extant and potential litigation.

o Any deadline will result from the cost recovery suit filed by the private parties at the end of May, 1991. The Federal government's response is due October 25, 1991. A countersuit to recover costs is planned.

ISSUE BACKGROUND: 42 U.S.C. Section 9607(b) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) sets out the defenses for the strict, joint, and several liability requirement of CERCLA and applicable case law. BLM's "innocent landowner" defense needs to be supported in view of the potentially substantial costs over and above current liability for all abandoned mining claims where no viable responsible party can be found.

RECOMMENDED ACTION: The Department will coordinate activities to assist BLM in resolving the issues of precedent, future cost, and liability with EPA and Office of Management and Budget.

PROGRAM CONTACT: Mary Josie Smith, Chief, Division of Hazardous Materials Management, (202) 208-7877.

If an exemption is granted to a Federal facility, EPA will provide assistance to the facility in order to correct the pollution problem as expeditiously as possible. The objective is to bring the facility into compliance prior to the expiration of the exemption to preclude the need for a renewal. A copy of the exemption will be sent to any affected States.

B.2 Enforcement Actions For Violations at Federal Facilities Directed at Non-Federal Parties

This section outlines EPA's enforcement approach for addressing violations at Federal facilities which are operated by private contractors or other non-Federal parties, which generally are subject to the full range of EPA's civil judicial and administrative enforcement authorities.

B.2.a Limitation on Civil Judicial Enforcement Actions Applies Only to Executive Branch Agencies

Although EPA will not bring civil judicial enforcement action or assess civil penalties under most statutes against other Executive Branch Departments and Agencies, EPA intends to exercise its full authority to bring civil suits and assess civil penalties, as appropriate, against parties that are not subject to this constraint.

B.2.b Contractor and Other Private Party Arrangements Involving Federal Facilities

Most environmental statutes authorize enforcement response to be pursued against either facility owners, operators or both to correct violations of environmental law. There are numerous Federal facilities and public lands which have some level of private party or non-Federal government involvement in their operation or use. In its April 28, 1987 Congressional testimony the Department of Justice stated that EPA has the authority to take enforcement action against private contractors at Federal facilities (See Appendix H). There may be cases where it will be more appropriate to direct enforcement responses to these other parties, or to both the non-Federal party and the Federal agency depending on the nature of the non-Federal involvement, the language of the involved environmental statute or other factors. This issue arises frequently at government-owned, contractor-operated Federal facilities, commonly known as GOCO facilities.

- *EPA Enforcement Response Policy at GOCO Facilities*

EPA's initial enforcement response at GOCO facilities is influenced by a number of factors including: the statutory language as to who can be held responsible, (i.e., providing that enforcement can be directed at the owner, operator or both); decisions made by State and EPA officials in deciding who the permit holder should be in the case of permit violations; established contractual arrangements; the nature and type of violation(s); and other factors which may determine where enforcement response will yield the most expeditious return to compliance and deterrence for future violations. In this regard, it is EPA policy to pursue the full range of its enforcement authorities against contractor operators of government-owned facilities in appropriate circumstances. EPA also may take enforcement actions against Federal agencies at GOCO facilities following the procedures outlined earlier in this chapter. In certain situations, it may be appropriate to pursue enforcement actions against both the private contractor and the involved Federal agency.

As a follow-up to this strategy, EPA will be developing an Agencywide GOCO Enforcement Strategy which will provide more detailed criteria and factors to be considered in determining which party or parties to pursue enforcement action against. This strategy shall also address the extent to which there are certain Federal agency-specific circumstances which could affect to whom EPA's initial enforcement response should be directed.

Exhibit VI-3 provides definitions of the various types of facilities and lands with Federal involvement. This exhibit designates which party EPA generally will direct its initial enforcement response against when violations are identified (i.e., either the Federal agency or the involved private party). Given the complex mix of public and private ownership, operation, and use of the term "Federal facilities," the guidelines in Exhibit VI-3 should help EPA to eliminate delays in taking initial action to return violators to compliance.

It is important to note that this approach focuses only on the party at which EPA's "initial enforcement response" will be directed. Following this initial response, EPA's review of additional information and possible discussions with each party may affect against which party any further enforcement action should be taken, if such further action is necessary. In addition, EPA's enforcement response against either or both parties does not limit or otherwise restrict any future determination of their possible joint or several liability in cases involving CERCLA or RCRA cleanup actions. Simultaneous enforcement actions against both the Federal agency and the contractor should be considered if this would facilitate resolution of the compliance problem.

- *Notification Procedures for GOCO Enforcement Actions*

When EPA has determined which party it will pursue enforcement action against, EPA will make every effort to notify (through, at a minimum, a formal copy (cc) of the enforcement action) other involved parties of the action being taken against either the Federal facility or the contractor. This is important not only to enhance effective communication but also to assist in bringing about expeditious compliance and remedying the violation as soon as possible.

When EPA determines that its initial enforcement response will be directed at the contractor, EPA will take enforcement action appropriate for private parties. This will usually be an NOV, administrative complaint or the program equivalent (depending on the nature of the violation and the media program guidance) to the contractor explicitly stating that they are primarily or individually responsible for correcting the violation in a timely manner and for responding directly to EPA by the date specified. The limitations on civil judicial enforcement and on the imposition of penalties that is applicable to enforcement actions against Federal Executive Branch Agencies, are not applicable to enforcement actions taken against non-Federal parties. Where the notice or complaint is sent to the contractor, it also will state that the involved Federal agency has been simultaneously notified of the action being taken against the contractor. A copy (cc) of the action taken against the contractor should not only inform the Agency of the enforcement action being taken against the contractor but also include a notice which emphasizes the importance of their responsibility to effectively oversee their contractor to ensure compliance (See Appendix J). It should also request the Agency's complete cooperation in working with the contractor to correct the violation and return the facility to compliance as quickly as possible. In circumstances where Federal funding is required to correct the violation, the approach and considerations described in Section B.1.j. are applicable and will be considered in any agreements reached on expeditious compliance schedules.