From: Peter Ornstein
To:
Subject: UPLOAD F:\MyFiles\Documents\wp\CERCLA\Libby\PHE FOIA\Baucus press release re PHE May_21_2009.pdf
Date: 06/02/2011 02:59 PM
Attachments: Baucus press release re PHE May_21_2009.pdf

- Baucus press release re PHE May_21_2009.pdf

Robert Ward/RC/R8/USEPA/US
05/21/2009 11:47 AM

To "Peter Ornstein" <Ornstein.Peter@epamail.epa.gov>
cc
bcc
Subject Fw: Baucus Press release Today

Sent by EPA Wireless E-Mail Services
Shirley Kelley

----- Original Message -----
From: Shirley Kelley
Sent: 05/21/2009 11:23 AM MDT
To: Robert Ward
Subject: Fw: Baucus Press release Today

Hi Bob, from Carol's email today.

Shirley A. Kelley
Staff Assistant to the Regional Administrator
US EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129
303-312-6532

----- Forwarded by Shirley Kelley/RA/R8/USEPA/US on 05/21/2009 11:22 AM -----

Bob Sussman/DC/USEPA/US
05/21/2009 10:58 AM

To Carol Rushin/R8/USEPA/US@EPA, Barry Breen/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, James Woolford/DC/USEPA/US@EPA, Renee Wynn/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA
cc
Subject Baucus Press release Today

FYI, here is the press release we put out today.

BAUCUS: HEALTH CARE FUNDING HEADED TO LIBBY
Senator Says Federal Funding Could Lay The Groundwork For A Public Health Emergency

(Washington D.C.) Montana Senator Max Baucus today announced that funding is being sent to Libby to provide health care for people with asbestos-related illness and help pave the way for a possible public health emergency.

Baucus said tomorrow the Department of Health and Human Services (HHS) will announce a $6 million grant opportunity for the Lincoln County Health Department and a consortium of at least three health care entities to provide screenings and health care services to people battling asbestos-related illnesses.

"This funding is vital to folks up in Libby who are victims of asbestos-related disease, and will benefit a lot of people," Baucus said. "And just as important, it could lay the groundwork for the next step in this process - the declaration of a public health emergency."

Baucus said that if a public health emergency is declared, the Federal Government would be required to provide health care to Libby residents with asbestos-related disease.

The grant from HHS would then serve as part of the Federal Government's effort to build the capacity on the ground in Lincoln County to meet its obligation should a public health emergency be declared.

A public health emergency would authorize cleanup work in homes and other structures as well as require the Federal government to provide screenings and health care for Libby residents with asbestos related disease.

The public health emergency would be declared by the Environmental Protection Administration.

"I've talked with the head of HHS, Kathleen Sebelius and the head of the EPA, Lisa Jackson, and they both know how important it is to help the folks in Libby," Baucus said "We all have been working for months together to figure out how to best help folks affected by this tragedy."

Examples of potential consortium members identified by HHS include the Center for Asbestos - Related Diseases (CARD) Clinic, Lincoln County Community Health Center (LCCHC), St. John's Lutheran Hospital, or the Montana Department of Public Health and Human services (MD-PHHS.)

Baucus has been a long time champion of getting a public health emergency declared in Libby. In 2008, Baucus released a report detailing a 2002 attempt by the EPA to declare a Public Health Emergency that was thwarted by the previous Administration's Office of Management and Budget.

Baucus lambasted the decision to not declare a public health emergency at the time, calling it an "outrage."

Since news reports linked widespread deaths and illness to exposure to deadly asbestos fibers at the defunct W.R Grace and Co. mine, Baucus has visited Libby personally more than 20 times, secured millions for healthcare and cleanup, brought numerous White House cabinet secretaries to the town, helped save the CARD clinic, and has dogged the EPA to keep cleanup efforts moving forward.

Baucus said this is one more step in his decade-long fight to bring justice to folks in Libby "who were poisoned at the hands of Grace."

"I made a promise that I intend to keep," Baucus said. "I have every confidence that a Public Health Emergency will be declared in Libby. We won't stop pushing until that happens. We expect this Administration to make decisions based on sound science and to right the sins of the last Administration."

Baucus is chairman of the Senate Finance Committee, which has jurisdiction over HHS, as well as a senior member of the Senate Environment and Public Works Committee which has jurisdiction over the EPA.

From:	Ted Linnert
To:	Carol Rushin
Cc:	Sonya Pennock; Carol Campbell; Victor Ketellapper
Subject:	$6M HHS Grant for Libby
Date:	06/04/2009 04:28 PM

Hi Carol,

You asked me to obtain a copy of the grant application package given to the health care entities in Libby. The following link will take you directly to the application packet:

https://apply07.grants.gov/apply/UpdateOffer?id=12261&is2006=false

I'm afraid it won't be very helpful to us - it's really a sole source generic rural health grant that a division of HHS routinely issues; however, the amount and means of distribution of the funds were tailored specifically for Libby (no doubt by Senator Baucus).

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
Denver, CO 80202-1129

(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

From:	Betsaida Alcantara
To:	Ellen Manges; Mary-Kay Lynch; Elizabeth Southerland
Subject:	AP: EPA declares health emergency in Montana town
Date:	06/17/2009 02:12 PM

EPA declares health emergency in Montana town

By MATTHEW DALY – 34 minutes ago

WASHINGTON (AP) — The Environmental Protection Agency for the first time has declared a public health emergency in a contaminated community, targeting a Montana town Wednesday for immediate federal attention.

The declaration by EPA Administrator Lisa Jackson involving Libby, Mont., will not result in an evacuation, but will require an extensive cleanup and better health protections for residents with asbestos-related illnesses.

Jackson called Libby a "tragic public health situation" that has not received the recognition it deserves from the federal government for far too long.

Asbestos contamination from a now-closed vermiculite mine near Libby has been cited in the deaths of more than 200 people and illnesses of thousands more.

Jackson said the public health emergency declaration was the first time the EPA has made such a determination under authority of the 1980 Superfund law that requires the clean up of contaminated sites.

Investigations performed by the federal Agency for Toxic Substance and Disease Registry have found that occurrences of asbestosis, a lung condition, near Libby are staggeringly higher than the national average for the period from 1979 to 1998, Jackson said. EPA is working with the Department of Health and Human Services, which is making available a $6 million grant to provide asbestos-related medical care to Libby and residents of Troy, another Montana town.

"Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," Jackson said. "We're here to help create a long and prosperous future for this town."

Sen. Max Baucus, D-Mont., called the emergency declaration a great day for Libby, which he said "had to wait year after year as the last administration failed to determine that a public health emergency exists."

"Today is the day that after years of work we were able to succeed in getting this done," Baucus said. "We will continue to push until Libby has a clean bill of health."

Sen. Jon Tester, D-Mont., called the declaration long-overdue.

"We still have a long way to do right by the folks in Libby. Working together with the Department of Health and Human Services and the Environmental Protection Agency, we're making very good progress," Tester said.

From: Eugene Lee
To: OSWER OEM POCD; Dana Tulis; Debbie Dietrich
Subject: ASBESTOS INFORMATION: Libby hearing story in Inside EPA
Date: 09/26/2008 02:17 PM

FYI,

Subject: Libby hearing story in Inside EPA

Baucus Call For Superfund Health 'Emergency' May Set Key Cleanup Precedent

Sen. Max Baucus' (D-MT) vow to force EPA to declare a public health emergency under Superfund law to address asbestos contamination stemming from a mine in Libby, MT, could set a precedent triggering landmark nationwide residential cleanup actions for structural products and requiring financial assistance for victims' health care that the law typically bars.

Baucus is seeking to force the agency to declare a public health emergency to address contamination from the mine after a report Democrat investigators prepared with assistance from EPA's Inspector General suggested that White House officials may have blocked EPA in 2002 from issuing the finding.

The findings contradict long-standing claims by Bush administration appointees at EPA, who have long denied claims that the White House blocked agency efforts to declare the emergency.

IG investigator Stephen Nesbitt said during a Sept. 25 hearing on the report that his office presented its own findings, which he said included potential criminal violations, to the Department of Justice (DOJ), but that DOJ declined to prosecute after determining “that the initiation of criminal proceedings was not warranted.”

According to Baucus, Nesbitt and other witnesses at the hearing, a public health emergency would set a number of precedents. Nesbitt explained that the Superfund law -- the Comprehensive Environmental Response and Compensation Act (CERCLA) -- generally bars EPA from using Superfund money to clean up “products,” such as the asbestos-containing Zonolite Attic Insulation (ZAI) that the W.R. Grace company produced in Libby, unless it declares that it constitutes a public health emergency under section 104 (a) (4) of the law.

The section of the law provides an exception to the law's general limitation barring regulators from requiring cleanup actions for “products which are part of the structure of, and result in exposure within, residential buildings or business or community structures.”

And Baucus noted that an emergency declaration under Superfund would allow EPA to do a more extensive cleanup of homes and other structures and would mandate that the Agency for Toxic Substances and Disease Registry “provide medical care and testing to exposed individuals.”

“In the words of an EPA Region VIII attorney, 'EPA rarely finds health problems of the magnitude of those found in Libby',” Baucus said during the Sept. 25 oversight hearing. “'If a precedent is to be set using this section of CERCLA [to declare a public health emergency], Libby is an appropriate place to do so',” he quoted the official saying.

Similarly, Dr. Brad Black, director of the non-profit Center for Asbestos Related Disease in Libby, testified that health care provided under an emergency declaration would surpass that which is currently provided by W.R. Grace and could also provide assistance to those exposed to Libby-generated asbestos in other parts of the country.

In one sign of the scope of the contamination, EPA officials are poised to begin indoor tests for Libby asbestos in 30 to 50 homes in northeast Minneapolis next week, according to local press reports. The reports say Grace provided its asbestos waste at no charge to unsuspecting local homeowners who used the substance as fill in their homes' driveways and gardens.

Nesbitt testified that in a November 2001 draft memo, EPA's on-scene coordinator in Libby proposed that the agency should make such a declaration and, according to internal emails, officials in EPA Region VIII and the agency's Office of Solid Waste and Emergency Response agreed with the proposal until February 2002, when White House Office of Management and Budget (OMB) staff began to raise questions and express doubts over whether the declaration was necessary.

EPA's Office of Prevention, Pesticides, and Toxic Substances also raised concerns, "noting that declaring a public health emergency requiring the removal of ZAI could then necessitate its removal from homes nationwide, which could cost billions of dollars," Nesbitt told the hearing.

Baucus is now vowing to do everything in his power to force EPA to make a public health emergency declaration at the site. Although he concedes there may be little chance to do anything in the 110th Congress, Baucus vows to push the issue next year. To bolster his effort, the lawmaker is pointing to a new report -- drafted by Senate environment committee majority staff -- that suggests top White House and EPA officials may have prevented the agency from making such a declaration.

According to the report, which Democratic aides conducted with assistance from OIG and that Baucus unveiled at the oversight hearing, at least some EPA officials cited the high cost of a potential nationwide cleanup as a reason for opposing the declaration. The W.R. Grace company, which would be potentially liable for the cleanup, also objected to the declaration, according to IG officials.

The report says then-EPA Administrator Christine Todd Whitman was briefed on the proposal in March 2002, and a draft press release was later prepared for her announcing a planned declaration of a public health emergency. But following an April 2002 letter from W.R. Grace objecting to the proposed declaration and communications involving EPA, OMB and White House Council on Environmental Quality (CEQ) officials, a new memorandum was circulated in May 2002 that removed all references to a public health emergency" Nesbitt's testimony says.

According to Baucus, high-level White House officials were copied on a May 8, 2002 e-mail between Marcus Peacock -- the current EPA deputy administrator and then an OMB official -- and Elizabeth Stolpe then of CEQ, in which Peacock tells Stolpe that OMB's Office of General Council and Nancy Dorn, then the second-ranking official at OMB have put a hold on EPA's announcement regarding Libby. Among others, the email was copied to CEQ Chairman James Connaughton, Jay Leftkowitz, deputy director of domestic policy at the White House, and Karen Knutson, of Vice President Dick Cheney's office.

Then-EPA waste chief Marianne Horinko, who was also copied on the

Peacock-Stolpe email according to Baucus, ultimately signed a final memo on May 9, 2002, which allowed for the clean up of homes and yards in Libby at a cost of $54 million without declaring a public health emergency under Superfund, Nesbitt noted in his testimony. EPA did not seek reimbursement from W.R. Grace for the residential cleanup costs, Nesbitt notes.

Horinko told the Associated Press Sept. 24 that she did not have “any recollection of OMB telling us not to do that,” adding, “it was a public policy decision on Gov. Whitman's part.”

Her comments are consistent with Whitman's own statements at the time following earlier revelations of the issue. Whitman told Sen. Patty Murray (D-WA) in early 2003 that, “Ultimately, EPA chose not to rely upon [Superfund's] health emergency provision, in part, to minimize the possibility of removal work being delayed by possible legal challenges to this novel approach, and instead relied upon more traditional removal authorities,” Whitman's letter says.

Whitman also says OMB played no role in the agency's decision to refrain from issuing a health warning. “I want to make it clear that neither OMB nor any other federal agencies directed EPA to take a specific course of action regarding whether to employ the public health emergency provision of [Superfund],” the letter states.

Baucus also charged that EPA officials refused to allow Paul Pernard, a former EPA on-scene coordinator for the Libby site, and Christopher Weiss, a senior EPA toxicologist in Region VIII, to testify at the hearing or be interviewed by IG investigators and committee staff. Current EPA Administrator Stephen Johnson also refused testify at the hearing, Baucus said.

According to a Sept. 24 letter from Johnson to Baucus, EPA initially agreed to allow Peronard testify but then learned he would not be able to attend “due to personal obligations.” Johnson said that he was unable to testify himself due to “prior travel commitments.”

Carol Rushin, acting regional administrator for Region VIII and Mike Ciran, EPA's Libby Remedial Project Manager arrived at the hearing in their place, but left after Democratic aides told them they would not be permitted to testify because they were “not familiar with the issues” that would be the focus of the hearing. Johnson had argued in his letter that Rushin and Cirian “would be the ideal witnesses to talk about what is going on directly at the Libby site.”

Baucus told reporters following the hearing that it would likely be difficult to force the agency to declare the public health emergency this year given limited amount of time left in the legislative session, but that next year he would do everything possible to try and force the issue. --Douglas P. Guarino

9252008_baucus

Meeting Invitation Accepted:

Calendar Entry

Subject:	Call w/ CDC OGC re: Libby
When	
Date:	Thursday 02/19/2009
Time:	01:30 PM - 02:30 PM (1 hour)
Chair:	Jennifer Lue
Invitees	
Required (to):	Earl Salo/DC/USEPA/US@EPA; John Michaud/DC/USEPA/US@EPA; Lee Tyner/DC/USEPA/US@EPA
Optional (cc):	
Where	
Location:	Maybe we can get Sheryl to open MK's office?

Good idea on using MK's office. Would you mind sending an email to Sheryl to let her know?

Thanks.

Meeting Invitation Accepted:

Calendar Entry

Subject:	Call w/ CDC OGC re: Libby
When	
Date:	Thursday 02/19/2009
Time:	01:30 PM - 02:30 PM (1 hour)
Chair:	Jennifer Lue
Invitees	
Required (to):	Earl Salo/DC/USEPA/US@EPA; John Michaud/DC/USEPA/US@EPA; Lee Tyner/DC/USEPA/US@EPA
Optional (cc):	
Where	
Location:	Maybe we can get Sheryl to open MK's office?

Meeting Invitation Accepted:

Calendar Entry

Subject:	Libby PHE Brief
When	
Date:	Wednesday 02/04/2009
Time:	03:00 PM - 03:30 PM (0 hours 30 minutes)

Meeting is in time zone (GMT-07:00) Mountain Time (US & Canada)

Here:	03:00 PM - 03:30 PM
There:	01:00 PM - 01:30 PM
Chair:	Victor Ketellapper
Invitees	
Required (to):	Andy Lensink/ENF/R8/USEPA/US@EPA; Carol Campbell/R8/USEPA/US@EPA; Martin Hestmark/R8/USEPA/US@EPA; Matthew Cohn/R8/USEPA/US@EPA; Michael Boydston/R8/USEPA/US@EPA; Peter Ornstein/RC/R8/USEPA/US@EPA
Optional (cc):	Penney Trujillo/EPR/R8/USEPA/US@EPA
Where	
Location:	Platte River Room

Meeting Invitation Accepted:

Calendar Entry

Subject:	Libby PHE Brief
When	
Date:	Wednesday 02/04/2009
Time:	03:00 PM - 03:30 PM (0 hours 30 minutes)

Meeting is in time zone (GMT-07:00) Mountain Time (US & Canada)

Here:	03:00 PM - 03:30 PM
There:	01:00 PM - 01:30 PM
Chair:	Victor Ketellapper
Invitees	
Required (to):	Andy Lensink/ENF/R8/USEPA/US@EPA; Carol Campbell/R8/USEPA/US@EPA; Martin Hestmark/R8/USEPA/US@EPA; Matthew Cohn/R8/USEPA/US@EPA; Michael Boydston/R8/USEPA/US@EPA; Peter Ornstein/RC/R8/USEPA/US@EPA
Optional (cc):	Penney Trujillo/EPR/R8/USEPA/US@EPA
Where	
Location:	Platte River Room

Meeting Invitation Accepted:

Calendar Entry

Subject:	Libby PHE Brief
When	
Date:	Wednesday 02/04/2009
Time:	03:00 PM - 03:30 PM (0 hours 30 minutes)

Meeting is in time zone (GMT-07:00) Mountain Time (US & Canada)

Here:	03:00 PM - 03:30 PM
There:	01:00 PM - 01:30 PM
Chair:	Victor Ketellapper
Invitees	
Required (to):	Andy Lensink/ENF/R8/USEPA/US@EPA; Carol Campbell/R8/USEPA/US@EPA; Martin Hestmark/R8/USEPA/US@EPA; Matthew Cohn/R8/USEPA/US@EPA; Michael Boydston/R8/USEPA/US@EPA; Peter Ornstein/RC/R8/USEPA/US@EPA
Optional (cc):	Penney Trujillo/EPR/R8/USEPA/US@EPA
Where	
Location:	Platte River Room

From: Carol Campbell
To: Trujillo.Penney@epamail.epa.gov
Subject: Administrator announces Public Health Emergency at Libby, Montana Superfund site today
Date: 06/17/2009 12:53 PM

Please send to all staff in EPR after 11:20 today

To All Staff

This is a historic day. The first Public Health Emergency ever declared by EPA will be announced today at 11:20 our time by Administrator Jackson. Health and Human Services will be providing Health Care to Libby citizens affected by asbestos. I want to personally thank all of the staff and managers in EPR that have been involved in this site for their hard work under often trying conditions. We will continue to move aggressively to clean up the Libby and Tryoy communities and protect the health of the people.

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

From:	Mike Stiehl
Reply To:	Mike Stiehl
To:	Ted Linnert
Subject:	Asbestos cleanup 'emergency' declared in Montana town - CNN.com
Date:	06/17/2009 08:13 PM

I hope this gives some respite to you, my friend.

-Mike Stiehl

http://www.cnn.com/2009/US/06/17/montana.asbestos/index.html?eref=rss_topstories

From:	Richard Mylott
To:	Carol Campbell; Martin Hestmark; Bill Murray; Victor Ketellapper; Russell Leclerc; Mike Cirian; Libby Faulk; Ted Linnert; Lawrence Grandison; Carol Rushin; Mike Shanahan; Wendy Chipp; Richard Mylott; Laura Niles; Wendy Dew; Sandy Fells
Subject:	Baucus, Tester Press Release -- FYI
Date:	06/17/2009 12:42 PM

In case you hadn't seen...

BAUCUS, TESTER: PUBLIC HEALTH EMERGENCY FOR LIBBY
Senators Call Announcement a "Monumental Victory"

(Washington D.C.) – After a nearly decade-long fight, Montana Senators Max Baucus and Jon Tester, joined by Environmental Protection Agency Administrator Lisa Jackson and Health and Human Services Secretary Kathleen Sebelius, today announced a long-awaited Public Health Emergency for Libby.

The Public Health Emergency determination requires the federal government to provide screenings and health care for Libby residents with asbestos-related disease. The Department of Health and Human Services is making available a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents. The EPA will also invest an additional $333 million in the ongoing cleanup in Libby.

This is the first time in EPA's history that they have determined a public health emergency under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

"Today I fulfilled a promise I made many years ago to friends like Les Skramstad and to the entire community of Libby," Baucus said. "I am pleased that this Administration makes decisions based on sound science and rights the wrongs that have been done to the people of Libby."

"This is a long-overdue, common-sense decision that will go a long way for Libby and the thousands of folks who were poisoned there," Tester said. "This finding will help make quality health care more accessible, and it will finally cut the red tape that's been getting in the way."

Baucus and Tester are working with the U.S. Department of Health and Human Services (HHS) to organize short-term and long-term plans to fund and provide health care to the eligible affected residents of Libby.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long. We're making a long-delayed commitment to the people of Libby and Troy. Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people,"

said EPA Administrator Lisa P. Jackson. “We're here to help create a long and prosperous future for this town."

She added, "Senator Max Baucus has been a tireless advocate for the people living in Libby and Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elected to the Senate to bring much needed support to these communities."

"Senator Baucus and Senator Tester have powerfully brought the voices of the people of Libby and Troy to Washington so the nation could hear and understand what happened. They refused to give up on finding the best ways to help those who have suffered so much. Today's announcement reflects our Administration's concern for the residents of Lincoln County and our intention to act decisively to protect and improve their health and quality of life,” said Secretary Sebelius."The Department of Health and Human has been working closely with the EPA and the residents of Lincoln County for a number of years to conduct screenings and help provide access to care. Now, we have come together with Senator Baucus and Senator Tester, Administrator Jackson, and agencies across HHS, to offer a new grant to support EPA's Public Health Emergency determination. This new grant will enable HHS to provide short-term medical assistance for screening, diagnostic and treatment services in a comprehensive and coordinated manner in partnership with local officials on the ground in Lincoln County.”

Richard Mylott
Public Affairs Specialist
Office of Communications and Public Involvement
U.S. Environmental Protection Agency, Region 8
Phone: 303-312-6654

From:	Ellyn Fine
To:	James Woolford
Cc:	Carol Campbell; Debbie Dietrich; Elizabeth Southerland; manges.ellen@epa.gov; Mary-Kay Lynch; michaud.john@epa.gov; tulis.dana@epa.gov; Barry Breen; Renee Wynn; Jennifer Wilbur; Randy Deitz
Subject:	Briefing on Libby for Administrator Jackson next week (Wed/Thurs)
Date:	01/30/2009 01:58 PM

All - I just got off the phone with the Administrator's office. It sounds like her folks are looking at either Wednesday or Thursday for a "Libby" briefing. The Special Assistant who called me wasn't prepared to answer any questions about the focus of the briefing. I urged her to find out ASAP if it's to focus on the public health emergency issue or something else entirely.

I pass along anything else I hear. Thanks, Ellyn

Ellyn Krevitz Fine
U.S. Environmental Protection Agency
Office of Solid Waste and Emergency Response
p: 202-566-2775

▼ James Woolford---01/30/2009 01:18:18 PM---We have been. Betsy, et. al. are now working on a revision to what we sent earlier in a format that

From:	James Woolford/DC/USEPA/US
To:	Carol Campbell/R8/USEPA/US@EPA
Cc:	Elizabeth Southerland/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, michaud.john@epa.gov, Debbie Dietrich/DC/USEPA/US@EPA, tulis.dana@epa.gov, manges.ellen@epa.gov, Ellyn Fine/DC/USEPA/US@EPA
Date:	01/30/2009 01:18 PM
Subject:	Re: Fw: FYI -- Fw: Briefing on Libby for Administrator Jackson

---

We have been. Betsy, et. al. are now working on a revision to what we sent earlier in a format that seems to be favored. I know we have gotten comments both from OGC and Region 8.

FYI -- I will be on travel Feb 3 - 12. in California.

James E. Woolford, Director
Office of Superfund Remediation &
Technology Innovation (OSRTI)
Office of Solid Waste and Emergency Response
US Environmental Protection Agency

▼ Carol Campbell---01/30/2009 01:08:44 PM---so we may have less time than we thought to pull together the Libby briefing Carol L. Campbell, Ass

From:	Carol Campbell/R8/USEPA/US
To:	Woolford.James@epamail.epa.gov, Elizabeth Southerland/DC/USEPA/US@EPA
Date:	01/30/2009 01:08 PM

Subject: Fw: FYI -- Fw: Briefing on Libby for Administrator Jackson

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so we may have less time than we thought to pull together the Libby briefing
Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 01/30/2009 11:07 AM -----

Martin Hestmark/R8/USEPA/US

01/30/2009 08:53 AM

To: Sandy Fells/OCP/R8/USEPA/US@EPA

cc: Andy Lensink/ENF/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Helen Dawson/EPR/R8/USEPA/US@EPA, Lawrence Grandison/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA, Steve Tuber/P2/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA

Subject: Re: FYI -- Fw: Briefing on Libby for Administrator Jackson

I know there is a start on the PHE briefing. I have not heard about a schedule.
▼ Sandy Fells/OCP/R8/USEPA/US

Sandy Fells/OCP/R8/USEPA/US

01/29/2009 03:58 PM

To: Carol Campbell/R8/USEPA/US@EPA

cc: Martin Hestmark/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA, Andy Lensink/ENF/R8/USEPA/US@EPA, Helen Dawson/EPR/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Steve Tuber/P2/R8/USEPA/US@EPA, Lawrence Grandison/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA

Subject: FYI -- Fw: Briefing on Libby for Administrator Jackson

Hi, Carol -- Anybody going back to DC in the next couple of weeks?

----- Forwarded by Sandy Fells/OCP/R8/USEPA/US on 01/29/2009 03:54 PM -----

Carolyn

Levine/DC/USEPA/US

01/29/2009 03:12 PM

To Amy Hayden/DC/USEPA/US@EPA, Sandy Fells/OCP/R8/USEPA/US@EPA, Randy Deitz/DC/USEPA/US@EPA, George Hull/DC/USEPA/US@EPA, Ellen Manges/DC/USEPA/US

cc

Subject Briefing on Libby for Administrator Jackson

While the Administrator's staff is still working on sorting out all the commitments made at the confirmation hearing, they did mention Libby as an issue that we should go ahead and start preparing for a briefing for the Administrator. There is no specific timing, but I would aim for the next 1-2 weeks. Can OSWER and R8 work together on briefing materials--- updated issue paper (there is at least one from the September Fed Facilities hearing), hearing testimony, etc. and Amy can coordinate for OCIR. Please give us an idea on suggested timing. Thanks!

Carolyn Levine
U.S. EPA/Office of Congressional Affairs
(202) 564-1859
FAX: (202) 501-1550

From: Victor Ketellapper
To: Ted Linnert
Subject: Carol Rushin Pre Brief
Date: 02/04/2009 10:19 AM

The pre brief with Carol Rushin for the Administrator's briefing on the Libby PHE is Thursday at 10 in the administrator's conference room . Please attend.

Victor Ketellapper, P.E.
USEPA
1595 Wynkoop St. (8EPR-B)
Denver, CO 80202

(303)312-6578

Meeting Invitation Declined:

Calendar Entry

Subject:	Libby PHE Brief
When	
Date:	Wednesday 02/04/2009
Time:	03:00 PM - 03:30 PM (0 hours 30 minutes)

Meeting is in time zone (GMT-07:00) Mountain Time (US & Canada)

Here:	03:00 PM - 03:30 PM
There:	01:00 PM - 01:30 PM
Chair:	Victor Ketellapper
Invitees	
Required (to):	Andy Lensink/ENF/R8/USEPA/US@EPA; Carol Campbell/R8/USEPA/US@EPA; Martin Hestmark/R8/USEPA/US@EPA; Matthew Cohn/R8/USEPA/US@EPA; Michael Boydston/R8/USEPA/US@EPA; Peter Ornstein/RC/R8/USEPA/US@EPA
Optional (cc):	Penney Trujillo/EPR/R8/USEPA/US@EPA
Where	
Location:	Platte River Room

Meeting Invitation Declined:

Calendar Entry

Subject:	Libby PHE Brief
When	
Date:	Wednesday 02/04/2009
Time:	02:00 PM - 03:00 PM (1 hour)

Meeting is in time zone (GMT-07:00) Mountain Time (US & Canada)

Here:	02:00 PM - 03:00 PM
There:	12:00 PM - 01:00 PM
Chair:	Victor Ketellapper
Invitees	
Required (to):	Andy Lensink/ENF/R8/USEPA/US@EPA; Carol Campbell/R8/USEPA/US@EPA; Martin Hestmark/R8/USEPA/US@EPA; Matthew Cohn/R8/USEPA/US@EPA; Michael Boydston/R8/USEPA/US@EPA; Peter Ornstein/RC/R8/USEPA/US@EPA
Optional (cc):	Penney Trujillo/EPR/R8/USEPA/US@EPA
Where	
Location:	Platte River Room

It appears that it is at 1:00. matt

From:	Andy Lensink
To:	James Woolford; Elizabeth Southerland; Ellen Manges
Cc:	Mary-Kay Lynch; John Michaud; Carol Campbell; Sandy Fells
Subject:	FINAL Action Memorandum Amendment
Date:	06/17/2009 12:45 PM
Attachments:	FINAL scanned Action Memo Amendment - 6-17-09.pdf FINAL AM amendment- 6-17-09 10.28 am.pdf FINAL AM amendment signed first page - 6-17-09.pdf

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All:

Enclosed are three documents: a pdf scan of the entire action memorandum amendment signed by Carol Rushin, a scan of the signed first page only, and an unsigned pdf version of the same document converted directly from the original Microsoft Word document. You will find that the scanned version takes up a lot of bytes. You may find it easier to scan just the first page and send it around.

Call me at 303-312-6908 if you have questions.

Andy Lenssink

FINAL scanned Action Memo Amendment - 6-17-09.pdf

FINAL AM amendment signed first page - 6-17-09.pdf

FINAL AM amendment- 6-17-09 10.28 am.pdf

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
http://www.epa.gov/region08

Ref: EPR-SR

ACTION MEMORANDUM AMENDMENT

SUBJECT: Action Memorandum Amendment Request: Approval of a Ceiling Increase for the Time-Critical Removal Action at the Libby Asbestos Site - Libby, Lincoln County, Montana

FROM: Carol Rushin
Acting Regional Administrator

THROUGH: James E. Woolford, Director
Office of Superfund Remediation and Technology Innovation

Deborah Y. Dietrich, Director
Office of Emergency Management

TO: Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

Re: Site ID#: BC
Category of Removal: Time-Critical, NPL, EPA Fund-Lead

I. INTRODUCTION

(b) (5)

(b) (5)

II. SITE CONDITIONS AND BACKGROUND

(b) (5)

(b) (5)

[redacted]

(b) (5)

(b) (5)

(b) (5)

(b) (5)

[redacted]

(b) (5)

(b) (5)

III. THE THREAT POSED BY ASBESTOS AT THE LIBBY SITE IS UNIQUE IN ITS SEVERITY AND SCOPE

(b) (5)

(b) (5)

(b) (5)

IV. THREATS TO PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT, AND STATUTORY AND REGULATORY AUTHORITIES

(b) (5)

(b) (5)

[redacted]

(b) (5)

(b) (5)

V. ENDANGERMENT DETERMINATION

(b) (5)

(b) (5)

VI. EXEMPTION FROM STATUTORY LIMITS

(b) (5)

(b) (5)

VII. PROPOSED ACTIONS AND ESTIMATED COSTS

(b)(5)

[redacted]

(b)(5)

(b) (5)

[redacted]

VIII. EXPECTED CHANGE IN THE SITUATION SHOULD ACTION BE DELAYED OR NOT TAKEN

(b) (5)

IX. OUTSTANDING POLICY ISSUES

(b) (5)

X. ENFORCEMENT

(b) (5)

XI. RECOMMENDATION

(b) (5)

(b) (5)

REFERENCES

(b) (5)

(b) (5)

[redacted]

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TO: Mathy V. Stanislaus
Assistant Administrator
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Re: Site ID#: BC
Category of Removal: Time-Critical, NPL, EPA Fund-Lead

I. INTRODUCTION

(b) (5)

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Ref: EPR-SR

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Assistant Administrator
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XI. RECOMMENDATION

(b) (5)

(b) (5)

REFERENCES

(b) (5)

(b) (5)

Printed on Recycled Paper

From: Rodriguez-Newstrom, Linda
To: Ted Linnert; Mike Cirian
Subject: FW: LIbby CAG - Request for New Facilitator
Date: 06/02/2009 11:08 AM

From: DC Orr [mailto:xcav8orr@(b) (6)
Sent: Tuesday, June 02, 2009 9:02 AM
To: gordsull@(b) (6) perquiaga@eaglesvoice.com; ketellapper.victor@epamail.epa.gov; bpatt@(b) (6) brad@libbyasbestos.org; dhersman@(b) (6) grandison.lawrence@epa.gov; gs56b555@(b) (6) jecarney@(b) (6) Kirby Campbell-Rierson; Mayor Hammons; mgiesey_card@(b) (6) montmac@(b) (6) mvolesky@mt.gov; news@montanian.com; parkers257@(b) (6) Rodriguez-Newstrom, Linda; sd4@libby.k12.mt.us; Terry Spear; Tony Berget; Virginia Sloan
Cc: ppeters@asbestoswatch.net
Subject: RE: LIbby CAG - Request for New Facilitator

Victor;
The date for the CAG meeting is getting closer by the minute and you have not answered the questions from the Board.
Will EPA have a representative at the CAG meeting? Will you attend? Will there be a facilitator? Will EPA acknowledge that there was a meeting if we have it? Who made the decision to take away the Public Address system? Who are you communicating with that refuse to copy the group as a whole in their communications? I know from listening in on the County Health Board discussions with the Commissioners that the EPA Administrator has scheduled a visit to Libby and they are putting together a list of questions for her. When is she coming and who will develope that list? Will the questions be pertinent to the public, or just the special interests who have your ear?
Sincerely, DC Orr

Date: Sat, 30 May 2009 06:19:01 -0700
From: gordsull@(b) (6)
Subject: RE: LIbby CAG - Request for New Facilitator
To: perquiaga@eaglesvoice.com; xcav8orr@(b) (6)
Ketellapper.Victor@epamail.epa.gov
CC: tberget@libby.org; brad@libbyasbestos.org; clecours@mt.gov; sd4@libby.k12.mt.us; bpatt@(b) (6) ppeters@asbestoswatch.net

Victor, DC and Phillip,

In response to your email chain concerning the June CAG meeting, I will be at the other end of the state a few days prior to your scheduled meeting, however I believe CAG is important to our community and we continue the process in a constructive manner. With this in mind I will travel over 600 miles to be here for the meeting so I would like to know something of a formidable nature will take place. It appears Ms. Tribe will facilitate and other arrangements have been made. It will be helpful to see some sort of agenda set forth SOON so attendance can be waged against that. Due to the amount of "gamesmanship" that has gone on around the important subject of CAG, it is my feeling that the air should be cleared among various factions including and particularly the EPA within the confines of the next CAG meeting. I believe as well the County Commissions new direction with regard to Dr. Black being appointed as the "only voice in town" needs to be clarified in order to further define CAG's

role in a community group.

Victor, I really believe it is important for you to step out in the lead of EPA and do so immediately. Too much time has been spent in secret deliberations and diatribe. There are significant unanswered questions of an important nature that have been diverted by this discussion.

Thank you for your considerations.
Gordon

--- On **Fri, 5/29/09, Phillip Erquiaga** ***<perquiaga@eaglesvoice.com>*** wrote:

From: Phillip Erquiaga <perquiaga@eaglesvoice.com>
Subject: RE: LIbby CAG - Request for New Facilitator
To: "DC Orr" <xcav8orr@[redacted] ketellapper.victor@epamail.epa.gov, bpatt@[redacted] brad@libbyasbestos.org, "Mayor Hammons" <citytroy@troymt.net>, clecours@mt.gov, dhersman@[redacted] gordsull@[redacted] gs56b555@[redacted] jecarney@[redacted] "Kirby Campbell-Rierson" <kirby_campbell-rierson@baucus.senate.gov>, mgiesey_card@[redacted] montmac@[redacted] mvolesky@mt.gov, perquiaga@eaglesvoice.com, rodriguez-newstroml@cdm.com, sd4@libby.k12.mt.us, "Tony Berget" <tberget@libby.org>, "Virginia Sloan" <virginia_sloan@tester.senate.gov>, linnert.ted@epamail.epa.gov
Date: Friday, May 29, 2009, 9:53 AM

DC & Victor,

I think it is VERY critical that Victor attend this meeting. EPA also promised, in December or January, that they would get the EPA Administrator here to speak to folks. I, for one, would like to see this promise kept more than any other.

I will wait for a response from Victor, then I will give Senator Baucus, and Senator Testor a call on getting the Administrator here. I think she has had plenty of time to settle into her new job.

Phillip

> -----Original Message-----
> **From:** DC Orr [mailto:xcav8orr@[redacted]
> **Sent:** Friday, May 29, 2009 5:47 AM
> **To:** ketellapper.victor@epamail.epa.gov; bpatt@[redacted] brad@libbyasbestos.org; Mayor Hammons; clecours@mt.gov; dhersman@[redacted] gordsull@[redacted] gs56b555@[redacted] jecarney@[redacted] Kirby Campbell-Rierson; mgiesey_card@[redacted] montmac@[redacted] mvolesky@mt.gov; perquiaga@eaglesvoice.com; rodriguez-newstroml@cdm.com; sd4@libby.k12.mt.us; Tony Berget; Virginia Sloan; linnert.ted@epamail.epa.gov
> **Subject:** RE: LIbby CAG - Request for New Facilitator
>
> Victor;

It is now three weeks since this process began. You have not identified a facilitator for the June meeting even though Philip Erquiaga has offered and is trained to do so. The last time we held a meeting without a facilitator, EPA refused to recognize that a meeting had indeed taken place. You have effectively stalled this out until it is too late to organize a proper meeting. Please name a facilitator for the June meeting.

This group has done everything EPA asked. We have established open communications and made great effort to "reorganize" as you have requested. These emails are copied to the entire group, but you obviously are having private discussions with some members. If those members don't want to put their views on the record with the group as a whole by copying their communications to the group, their views hold no weight. Secret dealings have no place in public discourse. You and that "majority" have formed another group and I don't see any real committment on your part to support the CAG.

Who made the decision to do away with the PA system? Give us names Victor, no more of this "I believe" and "it is my understanding" language. It sounds like you are still dealing with some folks out of the publics view. That is how the last meeting got cancelled.

Who thinks we don't need to make CAGs' deliberations a part of the Administrative Record? That would not be in the best interests of the public. Let them step forward and publicly state that.

I also don't see any mention of EPA representation at the CAG. You may be able to meet secretly with the "majoritys'" new group, but CAG has always been open to everyone. Gerald Meuller stated in his resignation that facilitation requires two parties. If EPA pulls away from attending CAG meetings, EPA has effectively destroyed the CAG. CAG cannot be a conduit of information if EPA refuses to supply the information.

Sincerely, DC Orr

> Subject: RE: LIbby CAG - Request for New Facilitator
> To: xcav8orr@[redacted] (b) (6) bpatt@[redacted] (b) (6) brad@libbyasbestos.org; citytroy@troymt.net; clecours@mt.gov; dhersman@[redacted] (b) (6) gordsull@[redacted] (b) (6) gs56b555@[redacted] (b) (6) jecarney@[redacted] (b) (6) kirby_campbell-rierson@baucus.senate.gov; mgiesey_card@[redacted] (b) (6) montmac@[redacted] (b) (6) mvolesky@mt.gov; perquiaga@eaglesvoice.com; rodriguez-newstroml@cdm.com; sd4@libby.k12.mt.us; tberget@libby.org; virginia_sloan@tester.senate.gov; Linnert.Ted@epamail.epa.gov
> From: Ketellapper.Victor@epamail.epa.gov
> Date: Thu, 28 May 2009 15:17:26 -0600
>
> Dear CAG Board:
>
> From the emails and discussions I have had concerning the CAG, I believe
> the group, for the most part, agrees with the following next steps for
> the CAG:
>
> 1. I will start the process to hire Virginia Tribe to assist the CAG.
> In my discussions with Ms. Tribe, she will only be available in July and
> August to assist the CAG. She will retire at the end of the summer.
> Part of her assistance will be to help the group select a new

> facilitator for the CAG and help reorganize the CAG.
>
> 2. EPA will rent the Ponderosa Room for the CAG meeting on June 11. I
> will need someone from the CAG board to take responsibility for the room
> and borrowing the recorder from EPA for the meeting. A public address
> system is not needed for the meeting.
>
> If you have any concerns regarding these next steps, please respond to
> this email.
>
>
> Victor Ketellapper, P.E.
> USEPA
> 1595 Wynkoop St. (8EPR-B)
> Denver, CO 80202
>
> (303)312-6578
>

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Hotmail® has ever-growing storage! Don't worry about storage limits. Check it out.

From:	Roland, Kenneth L
To:	Andy Lensink
Subject:	FW: Superfund & Brownfields News Release (HQ): EPA Announces Public Health Emergency in Libby, Montana
Date:	06/17/2009 02:49 PM

Way to go Andy!

From: U.S. EPA [mailto:usaepa@govdelivery.com]
Sent: Wednesday, June 17, 2009 11:39 AM
To: Roland, Kenneth L
Subject: Superfund & Brownfields News Release (HQ): EPA Announces Public Health Emergency in Libby, Montana

CONTACTS:
EPA Press Office-202-564-1692
HHS Press Office-202-690-6343

FOR IMMEDIATE RELEASE
June 17, 2009

EPA Announces Public Health Emergency in Libby, Montana

EPA to Move Aggressively on Cleanup and HHS to Assist Area Residents with Medical Care

WASHINGTON – U.S. Environmental Protection Agency Administrator Lisa P. Jackson today announced the agency has determined that a public health emergency exists at the Libby asbestos site in northwest Montana. Over the past years, hundreds of asbestos-related disease cases have been documented in this small community, which covers the towns of Libby and Troy. The announcement was made today at a joint press conference with Department of Health and Human Services Secretary Kathleen Sebelius and U.S. Sens. Max Baucus and Jon Tester.

This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that conditions at a site constitute a public health emergency. This determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos. Investigations performed by the Agency for Toxic Substance and Disease Registry have found the incidence of occurrence of asbestosis, a lung condition, in the Libby area staggeringly higher than the national average for the period from 1979-1998. EPA is working closely with the Department of Health and Human Services, which is making available a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents.

During her Senate confirmation hearing, Administrator Jackson committed to review the situation at the Libby asbestos site based on current site information, sound science and EPA's legal authorities. As a result of her review, the Administrator has decided that conditions at the site present a significant threat to public health and that making a public health emergency determination is appropriate.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long. We're making a long-delayed commitment to the people of Libby and Troy. Based on a rigorous re-evaluation of the situation on the ground, we will continue to move

aggressively on the cleanup efforts and protect the health of the people," said EPA Administrator Lisa P. Jackson. "We're here to help create a long and prosperous future for this town." She added, "Senator Max Baucus has been a tireless advocate for the people living in Libby and Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elected to the Senate to bring much needed support to these communities."

"Senator Baucus and Senator Tester have powerfully brought the voices of the people of Libby and Troy to Washington so the nation could hear and understand what happened. They refused to give up on finding the best ways to help those who have suffered so much. Today's announcement reflects our Administration's concern for the residents of Lincoln County and our intention to act decisively to protect and improve their health and quality of life,' said Secretary Sebelius. "The Department of Health and Human Services has been working closely with the EPA and the residents of Lincoln County for a number of years to conduct screenings and help provide access to care. Now, we have come together with Senator Baucus and Senator Tester, Administrator Jackson, and agencies across HHS, to offer a new grant to provide short-term medical assistance for screening, diagnostic and treatment services in a comprehensive and coordinated manner in partnership with local officials on the ground in Lincoln County. "

Sen. Max Baucus, a long-time advocate on this issue, consistently sought out a determination of a public health emergency in this region.

"This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day," said Sen. Baucus. "Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need. Today is the day that after years of work we were able to succeed in getting this done. Yet, we won't stop here. We will continue to push until Libby has a clean bill of health."

"This is a long-overdue, common-sense decision that will go a long way for Libby and the thousands of folks who were poisoned there," Sen. Tester said. "This decision will help make quality health care more accessible and it will open the door to get new resources on the ground. We still have a long way to do right by the folks in Libby. Working together with the Department of Health and Human Services and the Environmental Protection Agency, we're making very good progress."

Secretary Sebelius tasked two HHS agencies – the Health Resources and Services Administration and the Centers for Disease Control and Prevention/Agency for Toxic Substances and Disease Registry – to help county residents. These two agencies will support a new grant to assist affected residents who need medical care. Local officials are currently putting together a grant proposal that will lay out options for provision of medical care that will work for the residents of Lincoln County. HHS anticipates that this grant can be awarded in August 2009.

The Libby asbestos site has been on the EPA's Superfund National Priorities List since 2002, and cleanup has taken place since 2000. EPA has made progress in helping to remove the threat of asbestos in the land and air, and with it, the increased risks of lung cancer, asbestosis, and other respiratory problems. While EPA's cleanup efforts have greatly reduced exposure, actual and potential releases of amphibole asbestos remain a significant threat to public health in that area.

The Libby asbestos site includes portions of the towns of Libby and Troy and an inactive vermiculite mine seven miles northeast of the town. Gold miners discovered vermiculite in Libby in 1881; in the 1920s the Zonolite Company formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990. It is estimated that the Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919 to 1990.

More information: http://www.epa.gov/libby

R176

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From:	Craig Matthiessen
To:	Constance Haaser; Dana Stalcup; Dana Tulis; Debbie Dietrich; Deborah Nagle; Gilberto Irizarry; Kathy Jones; Kim Jennings; Mark Mjoness; Schatzi Fitz-James; Steve Hawthorn
Subject:	FYI - BNA Article on Libby Announcement
Date:	06/18/2009 08:24 AM

From BNA - FYI

First-Ever Health Emergency Declared by EPA At Montana Site of Asbestos Contamination

The Environmental Protection Agency declared a public health emergency June 17 at a superfund site in Libby, Mont., committing the federal government to providing medical care for asbestos-related disease and to "move more aggressively" to complete cleanup of tremolite asbestos contamination that permeates the area.
"This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act that conditions at a site constitute a public health emergency," EPA Administrator Lisa Jackson said at a news conference.
The declaration also applies to Troy, about 18 miles west of Libby, where many residents were exposed to tremolite asbestos as a result of working in Libby.
She said conditions at Libby and Troy constitute "a unique public health tragedy" where investigators have found rates of asbestos-related illness and mortality "staggeringly higher than the national average."
The Libby site was added in 2002 to EPA's National Priorities List, its list of most seriously contaminated superfund sites. The Libby asbestos site includes the towns of Libby and Troy and an inactive vermiculite mine seven miles northeast of Libby, according to EPA.
Tremolite asbestos found throughout the community results from the W.R. Grace & Co.'s mining of vermiculite, which contains asbestos, and its manufacture of Zonolite insulation that contains the substance. The company operated in Libby and Troy, in Lincoln County, Mont., from 1963 to 1990.

Financial Resources Assured
Jackson said declaring a public health emergency under CERCLA "assures the financial resources needed for the cleanup" as well as "a comprehensive risk assessment and research program … that will assure that the cleanup is fully protective."
An EPA official who briefed reporters following the news conference said the public health emergency gives EPA "clear legal authority" to remove building materials, specifically the Zonolite insulation product, from the site. Without the public health emergency designation, EPA would not be authorized to carry out removal actions that include commercial building products, the official said.

Grant Will Pay for Medical Care
Montana's two U.S. senators, Max Baucus (D) and Jon Tester (D), joined Jackson at the news conference, along with Health and Human Services Secretary Kathleen Sebelius.
Sebelius told reporters that a noncompetitive $6 million grant will be awarded in August as a consequence of the EPA declaration. The grant will support a Lincoln County health clinic providing free care for asbestos-related conditions to those who lack health insurance. For those with insurance, it will pay for the uninsured portion of the care, the EPA official said.
The grant is just a first step, Sebelius said, "to provide short-term medical assistance for screening, diagnostic and treatment service in a comprehensive and coordinated manner in partnership with … Lincoln County."
Tester, a member of the Senate Appropriations Committee, pledged to do whatever he can to

appropriate funds for the Libby effort. EPA's decision "will go a long way to make quality health care more accessible, and it will open the door to get new resources on the ground," he said.

200 Deaths From Exposure

Baucus said there have been 200 deaths attributable to tremolite asbestos exposure in Libby through any number of pathways. The Zonolite insulation, as well as the raw mined material, is "everywhere," Baucus said.

W.R. Grace provided the raw material free to workers and the community, according to Baucus, which means "it's in playgrounds and ballfields and yards, not just in the area of the mine."

Baucus said tremolite asbestos is "more pernicious" than other types. "Most lung experts don't even know that much about this kind of asbestos," he said. "I cannot emphasize strongly enough how tragic this situation has been," he added.

Baucus, who serves on the Senate Environment and Public Works Committee, convened a hearing before that committee in September 2008, where he charged that officials "in the highest echelons" of the Bush administration officials blocked an earlier decision to declare a public health emergency in Libby.

Then-EPA Administrator Christine Todd Whitman told Libby residents at a congressional field hearing there in September 2001 that she would declare the emergency, but Baucus said she was prevented from carrying out her promise by officials at the White House (187 DEN A-8, 9/26/08) .

Jackson said EPA will launch "a massive outreach program" for homeowners and others outside Libby who may have Zonolite vermiculite insulation in their buildings.

Public Advised Not to Disturb Insulation

"We are advising the public to take a precautionary approach" if they think they have the product in their homes, she said. EPA is advising them not to disturb the product.

"We're not sounding a general alarm," Jackson said, adding that if the product is sealed behind a wall, it is not a health threat.

However, the EPA official who briefed reporters said anyone doing renovation or demolition work on a structure that contains Zonolite insulation needs to have a licensed asbestos removal professional do the job.

The official added that the public outreach campaign will be launched on EPA's website on June 18, and all further information will be available then.

Vermiculite was discovered by gold miners in Libby in 1881, and the Zonolite Company formed in the 1920s and began mining it. W.R. Grace bought the Zonolite mining operations in 1963, and provided over 70 percent of all vermiculite sold in the United States until it closed the operation in 1990, according to the EPA.

On May 8, 2009, a federal jury in Montana found W.R. Grace and three former executives not guilty on all counts of conspiracy, obstruction of justice, knowing endangerment, and criminal violations of the Clean Air Act in connection with asbestos contamination in Libby (*United States v. W.R. Grace & Co.,* D. Mont., No. 9:05-cr-7, 5/8/09; 88 DEN A-10, 5/11/09).

Charges against the sole remaining defendant, the company's inhouse counsel, were dismissed June 16 (114 DEN A-8, 6/17/09).

By Janice Valverde

Further information on the Libby, Montana superfund site is available at http://www.epa.gov/libby/.

From:	Sandy Fells
To:	R8 SLT
Cc:	Bill Murray; Russell Leclerc; Richard Mylott; Wendy Chipp; Laura Niles; Wendy Dew; Tim Davis; Sonya Pennock; Ted Linnert; Mike Cirian; John Wardell; Victor Ketellapper; Andy Lensink
Subject:	FYI - E & E PM Edition: SUPERFUND: Obama admin declares health emergency in Libby, Mont.
Date:	06/17/2009 05:18 PM

From this afternoon's *Environment & Energy PM Edition* . . .

SUPERFUND: Obama admin declares health emergency in Libby, Mont.

Taryn Luntz, E&E reporter

The Obama administration declared a public health emergency today for a Montana town contaminated by asbestos, the first such use of the Superfund law.

The declaration by U.S. EPA Administrator Lisa Jackson and Health and Human Services Secretary Kathleen Sebelius opens the door for federal medical and cleanup resources for people suffering what Jackson called a "unique public health tragedy."

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long," Jackson said.

Nearly 200 residents have died and many more have suffered from asbestos-related diseases as the result of vermiculite mining by W.R. Grace & Co. People were exposed through the extensive use of vermiculite insulation in their homes and the use of mine waste as fill for driveways, gardens and playgrounds.

The disease and death rate from asbestosis in the Libby area for decades has been "staggeringly higher" than the national average, Jackson said.

The company closed the mine in 1990.

Sen. Max Baucus (D-Mont.), who has long advocated for more federal resources for the remote timber town, last fall said an investigation by his office found EPA had been ready to declare a public health emergency for the site before the Bush White House intervened (*E&ENews PM*, Sept. 25, 2008).

At Jackson's confirmation hearing in January, Baucus elicited a pledge from her to reconsider the declaration.

Baucus said today, "This is truly a historic day for the people of Libby, Mont., for justice, for

the U.S. government standing up and doing what's right."

Jackson said the extent of the contamination in Libby, combined with the residents' limited access to health care, prompted the decision, the first such declaration in the 29-year history of Comprehensive Environmental Response, Compensation, and Liability Act, which is commonly known as the Superfund law.

"I'm not naïve enough to think that others won't ask us," Jackson said of the declaration. "I won't say that there isn't potentially another situation out there."

From:	Craig Matthiessen
To:	Gilberto Irizarry; Dana Tulis; Debbie Dietrich
Subject:	FYI - EPA IG Releases Report on Asbestos Removal From Libby
Date:	05/01/2009 08:16 AM

From BNA - FYI

Superfund

Inspector General Agrees to Release Report On Removal of Asbestos From Libby, Mont.

The Environmental Protection Agency released on April 28 an inspector general's report on an investigation of asbestos removal at the Libby, Mont., superfund site.

Public Employees for Environmental Responsibility had filed a Freedom of Information Act (FOIA) lawsuit April 21 in U.S. District Court for the District of Columbia against EPA's Office of Inspector General, following three refusals to release the report since 2007 (*Public Employees for Environmental Responsibility v. EPA,* D.D.C., No. 1:09-cv-723, 4/21/09; 76 DEN A-1, 4/23/09).

PEER Staff Counsel Christine Erickson told BNA April 30 that she will ask the court for a summary judgment, most likely by May 5, since the "Rumple report" from the EPA Office of Inspector General is now public and no other issues remain.

In a statement, PEER called the "quick resolution" of its lawsuit a "first indication" that President Obama's pledge for new openness and "presumption of disclosure in administering the Freedom of Information Act" will be honored.

Erickson said PEER is "glad that the report was finally released," but now that it is, "there is a lot of work to be done."

PEER Executive Director Jeff Ruch said "the report raises more questions than it answers."

Rumple Calls It 'Memo,' Not Report

Special agent Cory Rumple, in an April 28 statement, said the so-called report was actually a memo and not an Office of Inspector General report intended for public release. Written in April 2006, it followed his preliminary investigation of accusations against EPA and its contractors regarding an emergency-response cleanup of tremolite asbestos in homes in Libby, Mont.

The accusations were that EPA contractors had artificially and temporarily reduced airborne asbestos measurements by using "an encapsulate liquid or water on carpets in order to deem a home 'clean' of Libby-amphibole asbestos," according to Rumple.

He concluded that "the use of the encapsulate liquid appeared to be a very isolated situation" and that there was evidence of "confusion on the part of the residents who had their homes cleaned."

Rumple said conclusions from his investigation were "verified" and released publicly in December 2006, in a "quick action report" from the Office of Inspector General, *EPA Needs to Plan and Complete a Toxicity Assessment for the Libby Asbestos Cleanup*.

Following that, the Justice Department conducted a formal investigation and ultimately declined to pursue the allegations, Rumple wrote.

Failure to Conduct Risk Assessment

Rumple reported that the more pressing concern in Libby was the EPA's failure to conduct a toxicity or risk assessment of the Libby asbestos.

"[T]he information surrounding the lack of a risk assessment seemed to be more urgent and warranting investigation," Rumple wrote. Witnesses familiar with the science surrounding the Libby-amphibole asbestos told Rumple that they were concerned that EPA was trying to "rush through" a record of decision without conducting the "proper scientific studies needed to justify the decision," according to Rumple's memo.

Ruch told BNA that it is this "disconnect between the scientists and the agency" that Rumple documented and his group wants to pursue.

PEER has been "receiving more information and requests from Libby residents, and from current and former EPA employees" who worked on the Libby cleanup, Ruch said.

For example, Ruch said a Libby resident recently wrote to PEER questioning whether it is safe for 370 elementary school children to play on the Asa Wood Elementary School grounds where vermiculite has been found by EPA.

Decision Not to Remove Asbestos From Homes

"Besides the adequacy of the cleanup, we are looking at EPA's decision not to remove tremolite asbestos from area homes—or to track it as it was sold around the country," he said.

Since 2002, Libby has been on EPA's National Priorities List, the agency's list of most contaminated sites, because of contamination by tremolite asbestos, a byproduct of W.R. Grace & Co.'s vermiculite mining and manufacturing operations there from 1963 through 1990.

EPA received a $250 million settlement from W.R. Grace in 2008 to cover future cleanup costs in Libby (48 DEN A-13, 3/12/08).

A criminal case is under way in the U.S. District Court for the District of Montana, against W.R. Grace senior managers accused of knowingly keeping information on the hazard of the mined material and the manufactured products from employees and residents of Libby (*United States v. W.R. Grace*, D. Mont., No. 9:05-cr-7) (See related article in this report.)

PEER describes itself as a nonprofit public interest group "focused on the environment, as well as funding and ethics of government agencies dedicated to environmental protection."

By Janice Valverde

Public Release of the "Rumple Report" on Preliminary Investigation of EPA Cleanup of Amphibole Asbestos in Libby, Montana is available at http://www.epa.gov/oig/reports/2009/20090428-09-N-0146_glance.pdf.

EPA Needs to Plan and Complete a Toxicity Assessment for the Libby Asbestos Cleanup Report No. 2007-P-00002 is available at http://www.epa.gov/oig/reports/2007/20061205-2007-P-00002.pdf.

From:	Richard Mylott
To:	Carol Campbell; Russell Leclerc; Bill Murray; Sandy Fells; Wendy Chipp
Subject:	FYI -- Inaccuracy (EPA providing $333M under PHE) removed from Sen. Tester press release
Date:	06/17/2009 06:47 PM

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http://tester.senate.gov/Newsroom/pr_061709_libby.cfm

Richard Mylott
Public Affairs Specialist
Office of Communications and Public Involvement
U.S. Environmental Protection Agency, Region 8
Phone: 303-312-6654

From: Carol Campbell
To: Mike Cirian
Subject: Final press release
Date: 06/17/2009 02:18 PM
Attachments: R176-6.17.doc

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

R176-6.17.doc

CONTACTS:
EPA Press Office-202-564-1692
HHS Press Office-202-690-6343

FOR IMMEDIATE RELEASE
June 17, 2009

EPA Announces Public Health Emergency in Libby, Montana

EPA to Move Aggressively on Cleanup and HHS to Assist Area Residents with Medical Care

WASHINGTON – U.S. Environmental Protection Agency Administrator Lisa P. Jackson today announced the agency has determined that a public health emergency exists at the Libby asbestos site in northwest Montana. Over the past years, hundreds of asbestos-related disease cases have been documented in this small community, which covers the towns of Libby and Troy. The announcement was made today at a joint press conference with Department of Health and Human Services Secretary Kathleen Sebelius and U.S. Sens. Max Baucus and Jon Tester.

This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that conditions at a site constitute a public health emergency. This determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos. Investigations performed by the Agency for Toxic Substance and Disease Registry have found the incidence of occurrence of asbestosis, a lung condition, in the Libby area staggeringly higher than the national average for the period from 1979-1998. EPA is working closely with the Department of Health and Human Services, which is making available a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents.

During her Senate confirmation hearing, Administrator Jackson committed to review the situation at the Libby asbestos site based on current site information, sound science and EPA's legal authorities. As a result of her review, the Administrator has decided that conditions at the site present a significant threat to public health and that making a public health emergency determination is appropriate.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long. We're making a long-delayed commitment to the people of Libby and Troy. Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," said EPA Administrator Lisa P. Jackson. "We're here to help create a long and prosperous future for this town." She added, "Senator Max Baucus has been a tireless advocate for the people living in Libby and Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elected to the Senate to bring much needed support to these communities."

"Senator Baucus and Senator Tester have powerfully brought the voices of the people of Libby and Troy to Washington so the nation could hear and understand what happened. They refused to give up on finding the best ways to help those who have suffered so much. Today's announcement reflects our Administration's concern for the residents of Lincoln County and our intention to act decisively to protect and improve their health and quality of life,' said Secretary Sebelius. "The Department of Health and Human Services has been working closely with the EPA and the residents of Lincoln County for a number

of years to conduct screenings and help provide access to care. Now, we have come together with Senator Baucus and Senator Tester, Administrator Jackson, and agencies across HHS, to offer a new grant to provide short-term medical assistance for screening, diagnostic and treatment services in a comprehensive and coordinated manner in partnership with local officials on the ground in Lincoln County. "

Sen. Max Baucus, a long-time advocate on this issue, consistently sought out a determination of a public health emergency in this region.

“This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day,” said Sen. Baucus. “Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need. Today is the day that after years of work we were able to succeed in getting this done. Yet, we won’t stop here. We will continue to push until Libby has a clean bill of health.”

“This is a long-overdue, common-sense decision that will go a long way for Libby and the thousands of folks who were poisoned there,” Sen. Tester said. “This decision will help make quality health care more accessible and it will open the door to get new resources on the ground. We still have a long way to do right by the folks in Libby. Working together with the Department of Health and Human Services and the Environmental Protection Agency, we’re making very good progress.”

Secretary Sebelius tasked two HHS agencies – the Health Resources and Services Administration and the Centers for Disease Control and Prevention/Agency for Toxic Substances and Disease Registry – to help county residents. These two agencies will support a new grant to assist affected residents who need medical care. Local officials are currently putting together a grant proposal that will lay out options for provision of medical care that will work for the residents of Lincoln County. HHS anticipates that this grant can be awarded in August 2009.

The Libby asbestos site has been on the EPA’s Superfund National Priorities List since 2002, and cleanup has taken place since 2000. EPA has made progress in helping to remove the threat of asbestos in the land and air, and with it, the increased risks of lung cancer, asbestosis, and other respiratory problems. While EPA's cleanup efforts have greatly reduced exposure, actual and potential releases of amphibole asbestos remain a significant threat to public health in that area.

The Libby asbestos site includes portions of the towns of Libby and Troy and an inactive vermiculite mine seven miles northeast of the town. Gold miners discovered vermiculite in Libby in 1881; in the 1920s the Zonolite Company formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990. It is estimated that the Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919 to 1990.

More information: http://www.epa.gov/libby

R176

From:	James Woolford
To:	johnson.barnes@epa.gov; southerland.elizabeth@epa.gov; RobinH Richardson; Arnold Layne; Phyllis Anderson; Connie Andrews; heimerman.jeff@epa.gov
Cc:	John Reeder; GailAnn Cooper; James Owens; Walter Mugdan; James Burke; Franklin Hill; karl.richard@epa.gov; coleman.sam@epa.gov; Cecilia Tapia; Robertw Jackson; Carol Campbell; takata.keith@epa.gov; opalski.dan@epa.gov; Amanda Halstead; Sherri Clark; Tracey Stewart; Art Flaks; wynn.renee@epa.gov; deitz.randy@epa.gov; breen.barry@epa.gov
Subject:	From Today's BNA - Lisa Jackson on Superfund from yesterday's hearing- FYI
Date:	01/15/2009 08:28 AM

Note Boxer's focus on the Human Exposure sites, Lautenberg on funding and CCs, Baucus on Libby - the PHE question - looks like a visit is in the offing, and FF generally .

Superfund

Obama Choice for EPA Chief Commits To Site Cleanups, Sees Funding as Limitation

Lisa Jackson, President-elect Obama's choice for Environmental Protection Agency administrator, said during her confirmation hearing before the Senate Environment and Pubic Works Committee Jan. 14 that EPA "will need to double and redouble cleanup efforts at hazardous waste sites."
Jackson said one of the "five key objectives" of the Obama administration—along with reducing greenhouse gas emissions, reducing other air pollutants, addressing toxic chemicals, and protecting water—will be cleaning up hazardous waste sites.
"But it's a matter of resources," Jackson said.

Sen. Barbara Boxer (D-Calif.), who chairs the committee, asked Jackson if she would commit, within three months of her pending confirmation, to gather data and develop plans to eliminate human exposure to contamination at the 92 superfund sites where "human exposure [is] not under control."
Jackson said, "Yes, absolutely, but with the caveat that there are limited resources."
Boxer then said to Jackson, "I just want your honest answer on what it will take to bring toxic exposures under control. … It's not your job to get the money. That's our job. We just want your commitment."

Senators Say Funding Has Been Inadequate.

New Jersey Sen. Frank Lautenberg (D), whose state has more superfund sites than any other, said that part of the Bush administration's "very disappointing EPA record" was its failure to adequately fund the superfund program.
In September 2008, Boxer and Lautenberg sponsored a bill, along with Sen. Hillary Clinton (D-N.Y.) and a number of cosponsors including then-Sen. Barack Obama, to reauthorize the superfund tax until 2018. The bill never came to a vote (188 DEN A-7, 9/29/08).
The superfund tax was a "polluter pays" tax levied on oil and chemical company profits. Its legislative authorization expired in 1995 and the superfund trust fund was depleted by 2003. General appropriations have supported the superfund program since.
In a statement issued when the reauthorization was introduced, the bill sponsors said the Bush administration "had shifted the burden of funding the Superfund from polluters to taxpayers when it allowed the trust fund to go bankrupt five years ago. As a result, the number of cleanups has dropped dramatically."
Lautenberg said at the hearing that under the Clinton administration, an average 80 sites per year were cleaned up, but that the number has fallen off. In 2008, only 30 site cleanups were completed.
Neither the environment and public works committee staff nor a Lautenberg spokesman would speculate on the chance of a similar bill being introduced in the current session of Congress.

Jackson Would Visit Montana Site.

Sen. Max Baucus (D-Mont.) asked Jackson to visit Libby, Mont., to "see the suffering there."

Libby is the site of a former W.R. Grace plant that operated an asbestos mining operation and factory where asbestos-based Zonolite insulation was manufactured. Operations ceased in 1990.
The site was added to the superfund National Priorities List in 2002. However, according to Baucus, the insulation is still pervasive in Libby, as is lung disease.
Baucus asked Jackson to issue the first-ever public health emergency under provisions of the Comprehensive Environmental Response, Liability and Compensation Act.
Jackson agreed to visit Libby as soon as possible and to report back to Baucus within 90 days. She also said she would review the record, consult EPA staff, and determine if a public health emergency is appropriate.
Baucus said more than 200 people have died from asbestosis or pleural mesothelioma caused by exposure to asbestos in the mines and the Zonolite product in homes and other buildings. He also said more than 1,000 residents have had X-rays showing abnormality due to the exposure.
In 2001, then-EPA Administrator Christine Todd Whitman visited Libby and said she would declare a public health emergency. Baucus said Whitman was "overruled" when the White House Office of Management and Budget and the White House Council on Environmental Quality intervened.
The declaration of a public health emergency would oblige the federal government to remove the asbestos contamination, provide medical care for those affected, and could also trigger nationwide removal of Zonolite at the government's expense. Baucus said in September 2008, when he held hearings on the matter, that the cost of the declaring a public health emergency was the reason administration officials quashed the declaration.

Federal Facilities Cleanup.

Jackson also pledged herself to doing what she could to expedite cleanups at two federal facilities where senators are impatient with cleanup efforts to date. The facilities are the Hanford nuclear project site in Washington state along the Columbia River, and the Fort Detrick site in Frederick, Md.
Sen. Benjamin Cardin (D-Md.) said, "Cleanup at federal facilities must be as stringent as those in the private sector."
Cardin and Sen. Barbara A. Mikulski (D-Md.) have repeatedly expressed concern about the site. In November 2008, they signed a joint letter to President-elect Obama urging him "to bring the Department of Defense into compliance with an EPA order to clean up hazardous sites at Fort Meade and Fort Detrick as soon as his administration takes office."

By Janice Valverde

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OSRTI Web Site: http://www.epa.gov/superfund

From: Mary-Kay Lynch
To: Lee Tyner; Earl Salo; John Michaud; Charles Openchowski
Subject: Fw: AP: EPA declares health emergency in Montana town
Date: 06/17/2009 02:27 PM

Congratlations.
▼ Betsaida Alcantara

----- Original Message -----
From: Betsaida Alcantara
Sent: 06/17/2009 02:12 PM EDT
To: Ellen Manges; Mary-Kay Lynch; Elizabeth Southerland
Subject: AP: EPA declares health emergency in Montana town

EPA declares health emergency in Montana town

By MATTHEW DALY – 34 minutes ago

WASHINGTON (AP) — The Environmental Protection Agency for the first time has declared a public health emergency in a contaminated community, targeting a Montana town Wednesday for immediate federal attention.

The declaration by EPA Administrator Lisa Jackson involving Libby, Mont., will not result in an evacuation, but will require an extensive cleanup and better health protections for residents with asbestos-related illnesses.

Jackson called Libby a "tragic public health situation" that has not received the recognition it deserves from the federal government for far too long.

Asbestos contamination from a now-closed vermiculite mine near Libby has been cited in the deaths of more than 200 people and illnesses of thousands more.

Jackson said the public health emergency declaration was the first time the EPA has made such a determination under authority of the 1980 Superfund law that requires the clean up of contaminated sites.

Investigations performed by the federal Agency for Toxic Substance and Disease Registry have found that occurrences of asbestosis, a lung condition, near Libby are staggeringly higher than the national average for the period from 1979 to 1998, Jackson said. EPA is working with the Department of Health and Human Services, which is making available a $6 million grant to provide asbestos-related medical care to Libby and residents of Troy, another Montana town.

"Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," Jackson said. "We're here to help create a long and prosperous future for this town."

Sen. Max Baucus, D-Mont., called the emergency declaration a great day for Libby, which he said "had to wait year after year as the last administration failed to determine that a public health emergency exists."

"Today is the day that after years of work we were able to succeed in getting this done," Baucus said. "We will continue to push until Libby has a clean bill of health."

Sen. Jon Tester, D-Mont., called the declaration long-overdue.

"We still have a long way to do right by the folks in Libby. Working together with the Department of Health and Human Services and the Environmental Protection Agency, we're making very good progress," Tester said.

From: Eugene Lee
To: OSWER OEM POCD; Debbie Dietrich; Dana Tulis
Subject: Fw: ASBESTOS INFORMATION: FYI -- Re: Grace Trial from Today's EPA Newsclips
Date: 03/11/2009 01:30 PM

Former EPA Official Aubrey Miller (from R8) testifying on the Libby health threat. Article ends with the following:

Finally, Assistant U.S. Attorney Kris McLean asked Miller his opinion on the health hazards in Libby. Over the objections of defense counsel, Molloy allowed the doctor to answer.

"Exposure in this community has created not only increased risks, but it's posed a clear danger to these individuals, and it still does now," Miller said. "It's imminent endangerment in my opinion and it needs to be cleaned up, and we need to resolve this problem."

EL

Medical expert testifies on Libby asbestos data (*Helena Independent Record*)

By TRISTAN SCOTT - Missoulian - 03/11/09

Montana

MISSOULA — A medical expert in the W.R. Grace & Co. trial on Tuesday recounted his astonishment over meeting Libby residents who were dying from asbestos-related disease, but who never worked at the town's vermiculite mine.

"To see an individual who had died of asbestos-related disease who was not a worker was unheard of," said Dr. Aubrey Miller, formerly a senior medical officer with the U.S. Environmental Protection Agency. "I had never seen a case or heard of a case like that."

Miller was part of the EPA's emergency response team that went to Libby in November 1999, after a series of newspaper articles exposed the town's contamination. Miller said he expected to quickly debunk the reports.

"My initial impression was that this was probably, you know, just a story," he said.

Then the doctor met Gayla Benefield, whose mother had died of asbestosis three years earlier, and who herself had been diagnosed with the disease. Miller reviewed the family's medical records, and said he was dumbstruck by what he learned.

“This person was not a worker,” he said. “Still to this day we’ve never seen other reports (outside of Libby) of a nonworker dying of asbestosis.”

Miller also talked at length about a range of product tests that company officials used to assess the hazards of Libby vermiculite. Among its findings, Grace learned that the vermiculite had a high tendency to release deadly asbestos fibers into the air.

“Grace had information about the asbestos, about the nature of the asbestos to become airborne; they had information about health effects on their workers; and they had information about animal studies where the animals were being exposed to the same materials as the workers,” Miller said.

Jurors received Tuesday’s evidence over the objections of defense lawyers, who sought to exclude or severely limit Miller’s testimony and the studies on which he relied. The lawyers said the testimony and the government’s exhibits would unfairly prejudice the jury.

Grace and five one-time employees are charged with a federal conspiracy involving Clean Air Act violations and obstruction of justice. The charges relate to whether the company and its top employees knew they were endangering the community of Libby by mining asbestos-laced ore, and whether they did so in violation of federal law.

Although Miller’s testimony spoke directly to the heart of the government’s theory of knowing endangerment that company officials knew the vermiculite contained a highly toxic form of asbestos and allowed its release anyway, it does not directly prove that Grace committed any crimes.

The criminal provision to the Clean Air Act wasn’t enacted until 1990, the same year the Libby mine ceased operations. Prosecutors face the difficult task of proving that Grace committed overt criminal acts not only after 1990, but also within a 1999 statute of limitations.

To that end, prosecutors are attempting to show that normal human activity in Libby has continued to disturb the vermiculite that Grace left behind, causing ongoing asbestos releases into the air.

U.S. District Court Judge Donald Molloy repeatedly instructed jurors to only consider Miller’s testimony with respect to the endangerment object, and not as evidence of post-1990 releases.

“I hope we’re not misleading you, but there is no violation of the law prior to 1990 because it wasn’t illegal,” Molloy told jurors at one point.

A main component of the EPA investigation was to establish the health effects of vermiculite on nonworkers — meaning residents who encountered the asbestos through day-to-day activities, like gardening and lawn mowing.

The EPA team also set out to identify exposure pathways through which non-miners might have encountered asbestos fibers during the course of their daily lives, Miller said.

The doctor heard stories about people "popping" the vermiculite on their stoves, or driving ATVs through the contaminated mine site.

"Playing in piles (of vermiculite) came up quite a bit," Miller said. "People said they were playing in piles at the ballfield."

Miller spent much of Tuesday afternoon talking about the testing of air samples in Libby, which showed "extremely high concentrations" of asbestos fibers. The fiber concentrations routinely violated the EPA's own standards governing asbestos, as well as those enacted by various occupational agencies.

Again, Molloy warned jurors not to confuse violations of industrial standards with criminal conduct.

Jurors heard about activity-based sampling meant to imitate scenarios of daily life, such as child's play and lawn care. In one scenario, a worker affixed an air monitor to his lapel and raked a lawn for two hours. Those test results showed 150,000 asbestos fibers in his breathing zone, which far exceeds government safety standards.

Finally, Assistant U.S. Attorney Kris McLean asked Miller his opinion on the health hazards in Libby. Over the objections of defense counsel, Molloy allowed the doctor to answer.

"Exposure in this community has created not only increased risks, but it's posed a clear danger to these individuals, and it still does now," Miller said. "It's imminent endangerment in my opinion and it needs to be cleaned up, and we need to resolve this problem."

From:	Mike Gaydosh
To:	kercher.sharon@epa.gov; Peter Ornstein; Bill Murray; Russell Leclerc; cohn.matthew@epa.gov; Michael Boydston; Robert Ward; Rushin.Carol@epamail.epa.gov; Carol Campbell; Sonya Pennock
Subject:	Fw: Baucus Press release Today
Date:	05/22/2009 10:20 AM

For those of you who were out of the loop, the below is what we hope to discuss with Carol R. at 9:00 today. If you believe anyone else needs to attend please let them know.

Andrew Michael Gaydosh
Acting Deputy Regional Administrator
USEPA Region VIII
(303)312-6773
gaydosh.mike@epa.gov

----- Forwarded by Mike Gaydosh/R8/USEPA/US on 05/22/2009 08:16 AM -----

Shirley Kelley/RA/R8/USEPA/US	To	Mike Gaydosh/R8/USEPA/US@EPA
	cc	
05/21/2009 11:24 AM	Subject	Fw: Baucus Press release Today

Mike, from Carol's email today. I forwarded to Carol Campbell and Bob Ward for their information.

Shirley

----- Forwarded by Shirley Kelley/RA/R8/USEPA/US on 05/21/2009 11:23 AM -----

Bob Sussman/DC/USEPA/US	To	Carol Rushin/R8/USEPA/US@EPA, Barry Breen/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, James Woolford/DC/USEPA/US@EPA, Renee Wynn/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA
05/21/2009 10:58 AM	cc	
	Subject	Baucus Press release Today

FYI, here is the press release we put out today.

BAUCUS: HEALTH CARE FUNDING HEADED TO LIBBY
Senator Says Federal Funding Could Lay The Groundwork For A Public Health Emergency

(Washington D.C.) Montana Senator Max Baucus today announced that funding is being sent to Libby to provide health care for people with asbestos-related illness and help pave the way for a possible public health emergency.

Baucus said tomorrow the Department of Health and Human Services (HHS) will announce a $6 million grant opportunity for the Lincoln County Health Department and a consortium of at least three health care entities to provide screenings and health care services to people battling asbestos-related illnesses.

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From: Mary-Kay Lynch
To: Pat Hirsch; Byron Brown; Richard Witt; Kevin McLean
Subject: Fw: Baucus Press release Today
Date: 05/21/2009 01:00 PM

----- Forwarded by Mary-Kay Lynch/DC/USEPA/US on 05/21/2009 01:00 PM -----

From: Bob Sussman/DC/USEPA/US
To: Carol Rushin/R8/USEPA/US@EPA, Barry Breen/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, James Woolford/DC/USEPA/US@EPA, Renee Wynn/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA
Date: 05/21/2009 12:58 PM
Subject: Baucus Press release Today

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From: Carol Campbell
To: Murray.Bill@epamail.epa.gov; Leclerc.Russell@epamail.epa.gov; Hestmark.Martin@epamail.epa.gov; Ketellapper.Victor@epamail.epa.gov
Subject: Fw: Baucus Press release Today
Date: 05/21/2009 01:26 PM

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 05/21/2009 11:25 AM -----

Shirley Kelley/RA/R8/USEPA/US

05/21/2009 11:23 AM

To: Carol Campbell/R8/USEPA/US@EPA
cc:
Subject: Fw: Baucus Press release Today

From Carol's email today.

Shirley A. Kelley
Staff Assistant to the Regional Administrator
US EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129
303-312-6532

----- Forwarded by Shirley Kelley/RA/R8/USEPA/US on 05/21/2009 11:23 AM -----

Bob Sussman/DC/USEPA/US

05/21/2009 10:58 AM

To: Carol Rushin/R8/USEPA/US@EPA, Barry Breen/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, James Woolford/DC/USEPA/US@EPA, Renee Wynn/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA
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From: Sharon Kercher
To: Andy Lensink
Subject: Fw: Baucus Press release Today
Date: 05/22/2009 10:56 AM

Sharon L. Kercher
Acting Deputy Asst. Regional Administrator
Office of Enforcement Compliance and
Environmental Justice
EPA Region VIII
1595 Wynkoop Street
Denver, CO 80202-1129
(303) 312-6352
(303) 312- 6953 (FAX)

----- Forwarded by Sharon Kercher/ENF/R8/USEPA/US on 05/22/2009 08:55 AM -----

Mike Gaydosh/R8/USEPA/US

05/22/2009 08:20 AM

To: kercher.sharon@epa.gov, Peter Ornstein/RC/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, cohn.matthew@epa.gov, Michael Boydston/R8/USEPA/US@EPA, Robert Ward/RC/R8/USEPA/US@EPA, Rushin.Carol@epamail.epa.gov, Carol Campbell/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA

cc:

Subject: Fw: Baucus Press release Today

For those of you who were out of the loop, the below is what we hope to discuss with Carol R. at 9:00 today. If you believe anyone else needs to attend please let them know.

Andrew Michael Gaydosh
Acting Deputy Regional Administrator
USEPA Region VIII
(303)312-6773
gaydosh.mike@epa.gov

----- Forwarded by Mike Gaydosh/R8/USEPA/US on 05/22/2009 08:16 AM -----

Shirley Kelley/RA/R8/USEPA/US

05/21/2009 11:24 AM

To: Mike Gaydosh/R8/USEPA/US@EPA

cc:

Subject: Fw: Baucus Press release Today

Mike, from Carol's email today. I forwarded to Carol Campbell and Bob Ward for their information.

Shirley

----- Forwarded by Shirley Kelley/RA/R8/USEPA/US on 05/21/2009 11:23 AM -----

Bob Sussman/DC/USEPA/US

05/21/2009 10:58 AM

To: Carol Rushin/R8/USEPA/US@EPA, Barry Breen/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, James Woolford/DC/USEPA/US@EPA, Renee Wynn/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA

cc:

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From: Mary-Kay Lynch
To: Ellen Manges
Subject: Fw: Baucus Press release Today
Date: 05/21/2009 01:02 PM

----- Forwarded by Mary-Kay Lynch/DC/USEPA/US on 05/21/2009 01:02 PM -----

From: Bob Sussman/DC/USEPA/US
To: Carol Rushin/R8/USEPA/US@EPA, Barry Breen/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, James Woolford/DC/USEPA/US@EPA, Renee Wynn/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA
Date: 05/21/2009 12:58 PM
Subject: Baucus Press release Today

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From: Barry Breen
To: Ellen Manges
Subject: Fw: Baucus Press release Today
Date: 05/21/2009 02:28 PM

----- Forwarded by Barry Breen/DC/USEPA/US on 05/21/2009 02:28 PM -----

From: Bob Sussman/DC/USEPA/US
To: Carol Rushin/R8/USEPA/US@EPA, Barry Breen/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, James Woolford/DC/USEPA/US@EPA, Renee Wynn/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA
Date: 05/21/2009 12:58 PM
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From:	Victor Ketellapper
To:	Rebecca Thomas; Stanley Christensen; Bonita Lavelle; Mike Cirian; Russell Leclerc; Ted Linnert; Sonya Pennock; Helen Dawson; Mary Goldade; Wendy OBrien; Dan Wall; Andy Lensink; Martin Mccomb; Tony Selle; Chris Poulet; Bob Benson; Kelcey Land; clecours@mt.gov
Subject:	Fw: Baucus Press release Today
Date:	05/21/2009 04:01 PM

FYI, attached is the press release put out today from Senator Baucus's office.

Victor

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From: Ellen Manges
To: Amy Hayden; Carolyn Levine
Subject: Fw: Briefing on Libby for Administrator Jackson next week (Wed/Thurs)
Date: 01/30/2009 03:06 PM

----- Forwarded by Ellen Manges/DC/USEPA/US on 01/30/2009 03:05 PM -----

From: Ellyn Fine/DC/USEPA/US
To: James Woolford/DC/USEPA/US@EPA
Cc: Carol Campbell/R8/USEPA/US@EPA, Debbie Dietrich/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, manges.ellen@epa.gov, Mary-Kay Lynch/DC/USEPA/US@EPA, michaud.john@epa.gov, tulis.dana@epa.gov, Barry Breen/DC/USEPA/US, Renee Wynn/DC/USEPA/US@EPA, Jennifer Wilbur/DC/USEPA/US@EPA, Randy Deitz/DC/USEPA/US@EPA
Date: 01/30/2009 01:58 PM
Subject: Briefing on Libby for Administrator Jackson next week (Wed/Thurs)

All - I just got off the phone with the Administrator's office. It sounds like her folks are looking at either Wednesday or Thursday for a "Libby" briefing. The Special Assistant who called me wasn't prepared to answer any questions about the focus of the briefing. I urged her to find out ASAP if it's to focus on the public health emergency issue or something else entirely.

I pass along anything else I hear. Thanks, Ellyn

Ellyn Krevitz Fine
U.S. Environmental Protection Agency
Office of Solid Waste and Emergency Response
p: 202-566-2775

▼ James Woolford---01/30/2009 01:18:18 PM---We have been. Betsy, et. al. are now working on a revision to what we sent earlier in a format that

From: James Woolford/DC/USEPA/US
To: Carol Campbell/R8/USEPA/US@EPA
Cc: Elizabeth Southerland/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, michaud.john@epa.gov, Debbie Dietrich/DC/USEPA/US@EPA, tulis.dana@epa.gov, manges.ellen@epa.gov, Ellyn Fine/DC/USEPA/US@EPA
Date: 01/30/2009 01:18 PM
Subject: Re: Fw: FYI -- Fw: Briefing on Libby for Administrator Jackson

---

We have been. Betsy, et. al. are now working on a revision to what we sent earlier in a format that seems to be favored. I know we have gotten comments both from OGC and Region 8.

FYI -- I will be on travel Feb 3 - 12. in California.

James E. Woolford, Director

Office of Superfund Remediation &
Technology Innovation (OSRTI)
Office of Solid Waste and Emergency Response
US Environmental Protection Agency

▼ Carol Campbell---01/30/2009 01:08:44 PM---so we may have less time than we thought to pull together the Libby briefing Carol L. Campbell, Ass

From: Carol Campbell/R8/USEPA/US
To: Woolford.James@epamail.epa.gov, Elizabeth Southerland/DC/USEPA/US@EPA
Date: 01/30/2009 01:08 PM
Subject: Fw: FYI -- Fw: Briefing on Libby for Administrator Jackson

---

so we may have less time than we thought to pull together the Libby briefing
Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 01/30/2009 11:07 AM -----

Martin Hestmark/R8/USEPA/US

01/30/2009 08:53 AM

To: Sandy Fells/OCP/R8/USEPA/US@EPA
cc: Andy Lensink/ENF/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Helen Dawson/EPR/R8/USEPA/US@EPA, Lawrence Grandison/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA, Steve Tuber/P2/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA
Subject: Re: FYI -- Fw: Briefing on Libby for Administrator Jackson

I know there is a start on the PHE briefing. I have not heard about a schedule.
▼ Sandy Fells/OCP/R8/USEPA/US

Sandy Fells/OCP/R8/USEPA/US

01/29/2009 03:58 PM

To: Carol Campbell/R8/USEPA/US@EPA
cc: Martin Hestmark/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA, Andy Lensink/ENF/R8/USEPA/US@EPA, Helen Dawson/EPR/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Steve

Tuber/P2/R8/USEPA/US@EPA, Lawrence Grandison/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA

Subject FYI -- Fw: Briefing on Libby for Administrator Jackson

Hi, Carol -- Anybody going back to DC in the next couple of weeks?

----- Forwarded by Sandy Fells/OCP/R8/USEPA/US on 01/29/2009 03:54 PM -----

Carolyn Levine/DC/USEPA/US

01/29/2009 03:12 PM

To Amy Hayden/DC/USEPA/US@EPA, Sandy Fells/OCP/R8/USEPA/US@EPA, Randy Deitz/DC/USEPA/US@EPA, George Hull/DC/USEPA/US@EPA, Ellen Manges/DC/USEPA/US

cc

Subject Briefing on Libby for Administrator Jackson

While the Administrator's staff is still working on sorting out all the commitments made at the confirmation hearing, they did mention Libby as an issue that we should go ahead and start preparing for a briefing for the Administrator. There is no specific timing, but I would aim for the next 1-2 weeks. Can OSWER and R8 work together on briefing materials--- updated issue paper (there is at least one from the September Fed Facilities hearing), hearing testimony, etc. and Amy can coordinate for OCIR. Please give us an idea on suggested timing. Thanks!

Carolyn Levine
U.S. EPA/Office of Congressional Affairs
(202) 564-1859
FAX: (202) 501-1550

From:	James Woolford
To:	Mary-Kay Lynch; Carol Campbell; Phyllis Anderson; Doug Ammon; John Michaud; Amanda Halstead; Suzanne Wells; Mathy Stanislaus; Barry Breen; Ellen Manges; Ellyn Fine; Brigid Lowery
Cc:	John Reeder; GailAnn Cooper; Elliott Gilberg; Sandra Connors; Debbie Dietrich; Dana Tulis; Gilberto Irizarry; DavidR Lloyd; Carolyn Hoskinson; Renee P Wynn; Marsha Minter; Randy Deitz; George Hull
Subject:	Fw: CNN - Asbestos cleanup 'emergency' declared in Montana town
Date:	06/17/2009 03:48 PM

FYI.

Sent from my BlackBerry Wireless Handheld

From: James Woolford
Sent: 06/17/2009 03:41 PM AST
To: Elizabeth Southerland
Cc: James Woolford
Subject: CNN - Asbestos cleanup 'emergency' declared in Montana town

Sent from woolford.james@epa.gov's mobile device from http://www.cnn.com.

Asbestos cleanup 'emergency' declared in Montana town

A Montana town where asbestos contamination has been blamed for more than 200 deaths will get new cleanup and medical assistance from the Obama administration under a "public health emergency" declared Wednesday.

The declaration is the first ever issued by the Environmental Protection Agency, which has been overseeing the cleanup of Libby, Montana, for 10 years.

The town was heavily contaminated with asbestos-laced dust that federal

prosecutors said resulted in more than 200 deaths and 1,000 illnesses.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long," EPA Administrator Lisa Jackson said in a statement accompanying the declaration.

In May, a federal jury acquitted mine operator W.R. Grace and three of its former executives of criminal charges related to the contamination. During Jackson's confirmation hearing in January, Montana Sen. Max Baucus said the town's 12,000 residents had been "hung out to dry" and pressed Jackson to review the issue.

The Libby operation began producing vermiculite -- a mineral often used in insulation -- in 1919. But the vermiculite was contaminated with tremolite asbestos, a particularly toxic form of asbestos that has been linked to mesothelioma, a cancer that can attack the lining of the lungs, abdomen, or heart.

Dust from the plant covered patches of grass, dusted the tops of cars and drifted through the air in a hazy cloud that became a part of residents' daily lives.

Grace operated the facility from 1963 until it closed in 1990. During the company's three-month trial, prosecutors argued that its executives knowingly released the substance and tried to hide the danger from the community.

The company did not deny that the asbestos came from its mine, but it said it acted responsibly to clean up the contamination. It paid millions in medical bills for residents of Libby and neighboring Troy, and agreed in 2008 to pay $250 million to reimburse the EPA for its cleanup efforts.

From: Michael Boydston
To: Peter Ornstein; Robert Ward
Subject: Fw: Change in PHE Title
Date: 06/16/2009 03:14 PM

FYI

Michael Boydston
Associate Regional Counsel
EPA Region 8
1595 Wynkoop St.
Denver CO 80202
303.312.7103

----- Forwarded by Michael Boydston/R8/USEPA/US on 06/16/2009 01:12 PM -----

Andy Lensink/R8/USEPA/US
06/16/2009 01:03 PM

To: Carol Campbell/R8/USEPA/US@EPA
cc: Mike Gaydosh/R8/USEPA/US@EPA, Michael Boydston/R8/USEPA/US@EPA
Subject: Re: Fw: Change in PHE Title

We don't think we need to get the concurrence sheets redone, we just need to get the cover sheets redone. I think HQ will have Mathy Stanislaus resign first and then pdf them back to us. We will need to have Mike resign but I understand he is out at a conference all day. Do we have anyone acting as RA right now?

▼ Carol Campbell/R8/USEPA/US

Carol Campbell/R8/USEPA/US
06/16/2009 01:00 PM

To: Andy Lensink/R8/USEPA/US@EPA
cc: Mike Gaydosh/R8/USEPA/US@EPA
Subject: Re: Fw: Change in PHE Title

i am here

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

▼ Andy Lensink/R8/USEPA/US

Andy

Lensink/R8/USEPA/US

06/16/2009 12:53 PM

To Mike Gaydosh/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA

cc

Subject Fw: Change in PHE Title

Looks like the title has been changed. We are being asked to change all documents to reflect this new title. We will have to get everything resigned. Who is around?

----- Forwarded by Andy Lensink/R8/USEPA/US on 06/16/2009 12:51 PM -----

John Michaud/DC/USEPA/US

06/16/2009 12:35 PM

To Andy Lensink/R8/USEPA/US@EPA

cc

Subject Change in PHE Title

Andy --

Here is the new title of the PHE:

Determination and Findings of Public Health Emergency
For the Libby Asbestos Site
In Lincoln County, Montana

John R. Michaud
Assistant General Counsel for RCRA
Solid Waste and Emergency Response Law Office
Office of General Counsel
U.S. EPA, Washington, D.C.
Mail Code: 2366A
tel: 202-564-5518
fax: 202-564-5531
email: michaud.john@epa.gov

From: Peter Ornstein
To: Michael Boydston
Cc: Robert Ward
Subject: Fw: Conference call with Jim Woolford on Libby- remaining items
Date: 01/28/2009 07:18 PM

Looks like we will need to reschedule our call w Earl and Lee.

****

Peter Ornstein, Deputy Regional Counsel
Office of Regional Counsel, EPA Region VIII
1595 Wynkoop Street [R8-ORC]
Denver, Colorado 80202-1129
303-312-6854 (fax: 303-312-6859)
ornstein.peter@epa.gov
[SENT FROM BLACKBERRY DEVICE]

▼ Carol Campbell

----- Original Message -----
From: Carol Campbell
Sent: 01/28/2009 05:10 PM MST
To: James Woolford; Phyllis Anderson; Elizabeth Southerland; Barnes Johnson
Cc: Victor Ketellapper; Russell Leclerc; Helen Dawson; Martin Hestmark; Andy Lensink; Bill Murray; Peter Ornstein; Michael Boydston; Matthew Cohn
Subject: Fw: Conference call with Jim Woolfo r ems

Lets use my call in number for the call- (b) (6) (b) (6) 3 pm your time, 1 pm my time. I have set aside 2 hours- hopefully it won't be that long but I didn't think yesterday's meeting would last that long either. Agenda for the call is :

o Libby congressional briefings
o Administrator PHE briefing
o Administrator visit
o Housekeeping items such as how often to have Region/HQ calls, etc.

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 01/28/2009 05:03 PM -----

Penney Trujillo/EPR/R8/USEPA/US

01/28/2009 03:47 PM

To Carol Campbell/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA
cc
Subject Conference call with Jim Woolford

I called early this a.m. and left several message - - Phyllis Anderson called me back and said that most of HQ personnel were home due to severe weather conditions. I also left a message for Jim Woolford's secretary with no response. Phyllis said that a conference call should be done, not a video conference as requested by Victor's voicemail. They are having difficulties with video calls.

Bottom line: I see it on Carol's calendar, but didn't speak to anyone in HQ office today. I'm out tomorrow. See you Friday

Thanks,

Penney Trujillo
Office Manager
Office of Ecosystems Protection & Remediation
Denver, CO
303.312.6691

From:	Carol Campbell
To:	Woolford.James@epamail.epa.gov; Phyllis Anderson; Elizabeth Southerland; Barnes Johnson
Cc:	Victor Ketellapper; Leclerc.Russell@epamail.epa.gov; Dawson.Helen@epamail.epa.gov; Hestmark.Martin@epamail.epa.gov; Lensink.Andy@epamail.epa.gov; Murray.Bill@epamail.epa.gov; Ornstein.Peter@epamail.epa.gov; Michael Boydston; Cohn.Matthew@epamail.epa.gov
Subject:	Fw: Conference call with Jim Woolford on Libby- remaining items
Date:	01/28/2009 07:10 PM

Lets use my call in number for the call- (b) (6) (b) (6) 3 pm your time, 1 pm my time. I have set aside 2 hours- hopefully it won't be that long but I didn't think yesterday's meeting would last that long either. Agenda for the call is :

o Libby congressional briefings
o Administrator PHE briefing
o Administrator visit
o Housekeeping items such as how often to have Region/HQ calls, etc.

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 01/28/2009 05:03 PM -----

Penney Trujillo/EPR/R8/USEPA/US	To	Carol Campbell/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA
01/28/2009 03:47 PM	cc	
	Subject	Conference call with Jim Woolford

I called early this a.m. and left several message - - Phyllis Anderson called me back and said that most of HQ personnel were home due to severe weather conditions. I also left a message for Jim Woolford's secretary with no response. Phyllis said that a conference call should be done, not a video conference as requested by Victor's voicemail. They are having difficulties with video calls.

Bottom line: I see it on Carol's calendar, but didn't speak to anyone in HQ office today. I'm out tomorrow. See you Friday

Thanks,

Penney Trujillo
Office Manager
Office of Ecosystems Protection & Remediation
Denver, CO
303.312.6691

From: Peter Ornstein
To: Jennifer Lue; Sonya Pennock; Sandy Fells; Ted Linnert
Cc: Earl Salo; Russell Leclerc; Matthew Cohn
Subject: Fw: Declined: Libby PHE - R8 and HQ
Date: 03/13/2009 10:45 AM

Jennifer:

I need to go with the earlier meeting because Matt Cohn is not available later (I erred in the original scheduler). HOWEVER, I suggest we have a second meeting with you and our external/congressional affairs folks to talk through the Qs and As.

Sandy/Sonya/Ted: Jennifer works in OGC and has been tasked to develop a Qs and As document. If you are available at 11am MDT (1pm EDT), lets go ahead and schedule it as an additional meeting. Also, if there is anyone from OCIR who ought to be involved, we should include her/him.

****

Peter Ornstein, Deputy Regional Counsel
Office of Regional Counsel, EPA Region VIII
1595 Wynkoop Street [R8-ORC]
Denver, Colorado 80202-1129
303-312-6854 (fax: 303-312-6859)
ornstein.peter@epa.gov

----- Forwarded by Peter Ornstein/RC/R8/USEPA/US on 03/13/2009 08:38 AM -----

Calendar Entry

Subject	Libby PHE - R8 and HQ	Chair	Peter Ornstein/RC/R8/USEPA/US
Date	Monday 03/16/2009	Invitees	
Time	10:00 AM - 11:00 AM (1 hour)	Required (to)	Andy Lensink/ENF/R8/USEPA/US@EPA, Earl Salo/DC/USEPA/US@EPA, Jennifer Lue/DC/USEPA/US@EPA, Kelcey Land/ENF/R8/USEPA/US@EPA, Lee Tyner/DC/USEPA/US@EPA, Matthew Cohn/R8/USEPA/US@EPA, Michael Boydston/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Sonya
Where	Location 1- (b) (6) code: (b) (6)		

	Pennock/OCP/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA
Optional (cc)	Sandy Fells/OCP/R8/USEPA/US@EPA, Ward.Robert@epamail.epa.gov

Hi Peter -- I can't make that time at all. I am free all day on Monday except for 11:30 to 1:30 EST. If your original time of 1 p m. EST/11 a m. MST works best, just go back to that and Ill call in from out of the office.

From: Bill Murray
To: Mike Gaydosh; Peter Ornstein; Sonya Pennock; Russell Leclerc; Ketellapper.Victor@epamail.epa.gov
Subject: Fw: Draft Desk Statement on Libby HHS Grant
Date: 05/21/2009 06:16 PM

Mike et al: Looks like Wendy has OPA direction on how to respond to questions on the HHS grant. Until I hear otherwise, I'll direct calls to my group to Brenda Gilfillan per Ellen's email below.

later, Bill . . .
----- Forwarded by Bill Murray/EPR/R8/USEPA/US on 05/21/2009 04:13 PM -----

Ellen Manges/DC/USEPA/US
05/21/2009 03:49 PM

To: Bill Murray/EPR/R8/USEPA/US@EPA
cc: Carol Campbell/R8/USEPA/US@EPA
Subject: Re: Fw: Draft Desk Statement on Libby HHS Grant

Bill-

Apparently OPA briefed Wendy Chipp in R-8 on how to handle the press calls. Calls should be routed to OPA HQ Brendan Gilfillan: gilfillan.brendan@epa.gov or 202-564-2081.

Ellen

▼ Bill Murray---05/21/2009 04:40:17 PM---Ellen: I'm going to be the key contact in the region on issues related to this desk statement. We wo

From: Bill Murray/EPR/R8/USEPA/US
To: Ellen Manges/DC/USEPA/US@EPA
Date: 05/21/2009 04:40 PM
Subject: Fw: Draft Desk Statement on Libby HHS Grant

Ellen: I'm going to be the key contact in the region on issues related to this desk statement. We wondered: 1) is there a contact name/number at HHS? People will probably ask for that. 2) Is there a contact name/number at HQ regarding our assessment of the need for a PHE?

later, Bill . . .
----- Forwarded by Bill Murray/EPR/R8/USEPA/US on 05/21/2009 02:38 PM -----

Carol Campbell/R8/USEPA/US
05/21/2009 01:37 PM

To: "Barry Breen" <Breen.Barry@epamail.epa.gov>
cc: "Carol Rushin" <Rushin.Carol@epamail.epa.gov>, "Mike Gaydosh" <Gaydosh.Mike@epamail.epa.gov>, "Russell Leclerc" <Leclerc.Russell@epamail.epa.gov>, "Bill Murray"

<Murray.Bill@epamail.epa.gov>, "Martin Hestmark" <Hestmark.Martin@epamail.epa.gov>

Subject Fw: Draft Desk Statement on Libby HHS Grant

This is ok. All use this if called.
Sent by EPA Wireless E-Mail Services

▼ Ellen Manges

----- Original Message -----
From: Ellen Manges
Sent: 05/21/2009 03:27 PM EDT
To: Carol Campbell; Martin Hestmark; Bill Murray
Subject: Draft Desk Statement on Libby HHS Grant

Here is a basic draft statement. Barry wanted to get a quick review from you before we send it up to the Administrator's office. We should take care of this ASAP.

[attachment "Libby Desk Statement.doc" deleted by Ellen Manges/DC/USEPA/US]

From: Kathy Petruccelli
To: Jane Moore; Daiva Balkus; Pat Hull; Debbie Dietrich; Beth Craig
Subject: Fw: EPA Regional posts according to Greenwire
Date: 07/27/2009 06:35 PM

interesting.....

----- Forwarded by Kathy Petruccelli/DC/USEPA/US on 07/27/2009 06:34 PM -----

From: Anna Phillips/DC/USEPA/US
To: OIA-EVERYONE
Date: 07/27/2009 06:28 PM
Subject: EPA: Regional posts key as Obama admin reshapes agency

Greenwire
THE LEADER IN ENERGY & ENVIRONMENTAL POLICY NEWS
An E&E Publishing Service

EPA: Regional posts key as Obama admin reshapes agency *(Monday, July 27, 2009)*

Robin Bravender, E&E reporter

Up next at U.S. EPA: appointments for regional administrators.

Those 10 posts are seen as critical to the Obama administration's efforts to reshape the agency, whose morale was said to have sagged under President George W. Bush. In its first months, the Obama EPA has shifted Bush-era policies on climate change and air pollution, and the White House has proposed massive agency budget increases.

Regional administrators are charged with building bridges between the administration and state and local governments.

Regional administrators "have a tremendous amount of authority over the relations with the states in their regions, the Superfund cleanups, the spills, the local controversies and the interactions with the state agencies," said John Walke, a senior attorney at the Natural Resources Defense Council.

Some expect to see a radical shift in the leadership of regional offices under President Obama.

"The staff at both headquarters and at the regions is so beaten down at this point and unwilling to make any radical changes or stick their neck out, they need active leadership," Earthjustice attorney Paul Cort said. "If anything's going to change at the regional level, they need a regional administrator who will stand up for them, be aggressive, take on headquarters when necessary."

Past administrations have drawn heavily on state and local officials to fill top posts in regional offices, insiders say, because the positions require so much close work with state and local governments.

"You really do want people where this isn't going to be their first big job," said former Region 9 administrator Felicia Marcus, who headed the San Francisco office in the Clinton administration after serving as president of the Board of Public Works for the city of Los Angeles.

Many leaders of the Obama EPA joined the agency after long stints as regulators. Administrator Lisa Jackson led New Jersey's Department of Environmental Protection; air chief Gina McCarthy was Connecticut's top environmental regulator; and Stephen Owens, chief of EPA's pesticides and toxics office, headed the Arizona Department of Environmental Quality for seven years.

Of the pool of people thought to be under consideration for regional posts, "many of them seem to be current or former government officials at the federal, state and local level," said Bill Becker, executive director of the National Association of Clean Air Agencies.

"That makes eminent sense to us," Becker added. "Pick someone who has experience out in the regions knowing what works and what doesn't, not someone who hasn't actually walked the walk."
But some say Obama could draw from advocacy groups, as well.
"I think the environmental community is a very important constituency for the Obama administration, and so they are much more likely to choose people who come out of the environmental-activist community, or at least state officials who have close ties with environmental groups," said Jeff Holmstead, who was EPA's top air official under President George W. Bush.
Several top officials at EPA headquarters have both advocacy and government experience.
Bob Perciasepe, the nominee for deputy administrator, has been chief operating officer for the National Audubon Society, assistant administrator in EPA's air and water offices during the Clinton administration and Maryland's top environmental official. Top enforcement official Cynthia Giles worked at the New England-based Conservation Law Foundation after working at the Massachusetts Department of Environmental Protection and leading enforcement efforts at EPA's Region 3 office in Philadelphia.
By contrast, the Bush administration drew several regional chiefs from the private sector. John Askew, president of the Iowa Soybean Association, served as Region 7 chief; L. John Iani, vice president for corporate affairs and general counsel for UniSea Inc., a major seafood company, was appointed Region 10 administrator; and James Palmer, the Region 4 administrator, came from a Memphis law firm, although he served before that as executive director of Mississippi's Department of Environmental Quality from 1987 to 1999.

Regional autonomy

Historically, EPA regional offices have had a large degree of autonomy, in part because "it's often difficult to be in Washington and pay attention to the operations that have been happening out in the regions," said Marcus Peacock, who served as deputy administrator in the Bush administration and now works at the Pew Charitable Trusts.
And with Jackson and other top officials expected to focus on ramping up climate programs and other regulatory programs, some observers expect regional chiefs to have a great deal of independence.
"Lisa Jackson's top priority is probably going to be climate, and she's going to be so focused on climate that she's going to want to depend on regional administrators taking a lot of responsibility," Becker said.
Even if Jackson and other EPA officials wanted to be very involved on a regional level, "There's no way they can," Holmstead said. "There's just too much going on."

Names in the mix

E&E interviewed dozens of sources to discuss key regional issues and to identify possible leading candidates for top posts. Many of the names that surfaced are those of EPA employees, state and local officials, and environmental advocates.

Region 1, Boston

Territory: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont and tribal nations.
Issues: Mercury emissions from coal-fired power plants; automobile emissions in congested areas; and waterways under pressure from increasing development. With EPA expected to take on responsibilities for regulating greenhouse gas emissions, the region will be watching the Regional Greenhouse Gas Initiative.
Possible administrators: David Cash, assistant secretary for policy at the Massachusetts Executive Office of Energy and Environmental Affairs and Charlie Lord, director of the Urban Ecology Institute at Boston College. The *Boston Globe* reported in February that the field had been narrowed to Cash and Lord. Other names that have been floated are Robert Varney, EPA Region 1 administrator in the Bush administration who joined an environmental consulting firm in February, and Curt Spalding, former executive director of the Rhode Island-based advocacy group Save the Bay.

Region 2, New York City

Territory: New York, New Jersey, Puerto Rico and the U.S. Virgin Islands.
Issues: State regulators have been under fire for wastewater permit reviews, and some environmentalists are hoping the Obama EPA will step up its scrutiny of the Clean Water Act program. Air quality in major

metropolitan areas will continue to be a major concern, and because New York and New Jersey are members of the Regional Greenhouse Gas Initiative, Region 2 may also help to shape EPA's climate policies. Stormwater management issues are facing Puerto Rico, where discharges from small municipal sewer systems can contaminate drinking water and recreational waterways.
Possible picks: Rich Kassel, a senior attorney at the Natural Resources Defense Council's New York City office, and Judith Enck, New York Gov. David Paterson's (D) deputy secretary for the environment.

Region 3, Philadelphia

Territory: Delaware, District of Columbia, Maryland, Pennsylvania, Virginia and West Virginia.
Issues: Chesapeake Bay restoration, mountaintop coal mining, air quality nonattainment areas and abandoned hazardous-waste sites.
Possible picks: William Early, acting regional administrator, who has served as regional counsel since 1999, and Stanley Alpert, an environmental attorney in New York who served for 13 years as an assistant U.S. attorney for the Eastern District of New York.

Region 4, Atlanta

Territory: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee and six tribes.
Issues: Oversight of coal-fired power plants and coal-ash dumps. Of 44 coal-ash impoundment sites determined by the Obama administration to be high-hazard sites, 20 of them are this region. Wetlands protection is also a top issue, since the region includes Gulf Coast marshes and the Everglades.
Possible picks: Acting Region 4 Administrator Stanley Meiburg; acting Deputy Administrator Beverly Banister; Russell Wright, assistant administrator of Region 4's Office of Policy and Management; John Hankinson, former Region 4 administrator in the Clinton administration; and Jim Powell, a former senior official with the Energy Department who retired in 2007.

Region 5, Chicago

Territory: Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.
Issues: Addressing high concentrations of contaminants in waterways that feed the Great Lakes and other water quality issues. The Region 5 post has been the subject of controversy in recent years, after Mary Gade, who headed the office under the Bush administration, said she was forced to resign after months of internal bickering with Dow Chemical Co. over dioxin contamination surrounding its Midland, Mich., plant (*Greenwire*, May 2, 2008).
Possible picks: Doug Scott, director of the Illinois EPA; Steve Chester, director of the Michigan Department of Environmental Quality; and Todd Ambs, administrator of the Wisconsin Department of Natural Resources' water division.

Region 6, Dallas

Territory: Arkansas, Louisiana, New Mexico, Oklahoma and Texas.
Issues: Clean air and toxic cleanup programs will be top priorities in what one source called the "heart of the petrochemical and oil and gas industries." The region includes Houston and Dallas, both of which exceed EPA's ozone standards.
Possible picks: John Hall, an industry lobbyist who has worked for Waste Management Inc. and a former head of the Texas Natural Resource Conservation Commission; Al Armendariz, an engineering professor at Southern Methodist University; and Ron Curry, secretary of the New Mexico Environment Department.

Region 7, Kansas City

Territory: Iowa, Kansas, Missouri, Nebraska, and nine tribal nations.
Issues: The relationship between agriculture, air quality and renewable energy is expected to be critical as the new administration and Congress work to craft climate legislation. Water quality and runoff pollution from

agricultural sources are also pressing issues, and the new administrator could play a role in the regulatory battle over the controversial Sunflower coal-fired power plant planned for western Kansas.
Possible picks: Steve Mahfood, former director of the Missouri Department of Natural Resources. Former Kansas Rep. Nancy Boyda (D) from Kansas's 2nd District was also rumored to be a possible candidate early on, but she was sworn in last week as deputy assistant secretary of Defense for manpower and personnel at the Pentagon.

Region 8, Denver

Territory: Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming and 27 tribal nations.
Issues: Cleanup of the region's 69 Superfund sites will be a top priority. Last month, Administrator Jackson issued a public health emergency finding at the Libby Asbestos Superfund site in northwest Montana. The region is also home to the Leadville, Colo., Superfund site and other areas that bear the toxic legacy of the region's historic mining industry. Air and water quality concerns will also be key issues in a region with an increasing population and a booming oil and gas sector.
Possible picks: Jim Martin, director of the Colorado Department of Public Health and Environment; Joshua Epel, assistant general counsel for DCP Midstream and a member of Colorado's Oil and Gas Commission; Macon Cowles, an environmental attorney who sits on Boulder, Colo.'s City Council; Roger Freeman, an environmental attorney at Davis, Graham & Stubbs in Denver; and Barbara Roberts, an independent consultant specializing in environment and natural resources issues and a member of the Colorado Air Quality Control Commission.

Region 9, San Francisco

Territory: Arizona, California, Hawaii, Nevada, the Pacific Islands and tribal nations.
Issues: Air pollution continues to be a pressing issue for the region, which contains both Los Angeles and the San Joaquin Valley, two of the most polluted areas in the nation. Tackling those issues will involve addressing motor vehicle standards and retrofitting older, dirtier diesel engines, sources say. The region is also engaged in efforts to improve the quality of water supplies and is working with states and other federal agencies to restore damaged ecosystems.
Possible picks: Peter Sherman, former executive director of MoveOn.org; Jared Blumenfeld, former interim chief of the San Francisco Recreation and Park Department and director of the San Francisco Department of the Environment; Laura Yoshi, the acting Region 9 administrator; and Tim Carmichael, former president of the California Coalition for Clean Air.

Region 10, Seattle

Territory: Alaska, Idaho, Oregon, Washington and native tribes.
Issues: Efforts to protect and restore watersheds, including the Puget Sound, Columbia River and the Coeur d'Alene Basin. The region is also focused on reducing sources of mercury contamination in water and is working with the area's 270 tribal communities to build environmental management capacity and to restore natural resources.
Possible picks: Dennis Hession, former mayor of Spokane, Wash.; state Sen. Phil Rockefeller (D), who represents Washington's 23rd District; and Michael Grady, a natural resource specialist in the habitat conservation division of the National Oceanic and Atmospheric Administration.

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About Greenwire
Greenwire is written and produced by the staff of E&E Publishing, LLC. The one-stop source for those who need to stay on top of all of today's major energy and environmental action with an average of more than 20 stories a day, Greenwire covers the complete spectrum, from electricity industry restructuring to Clean Air Act litigation to public lands management. Greenwire publishes daily at Noon.

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From:	Brandon Foreman
To:	Andrea Abat; Brandon Solari; Ted Stanich; Stacey Noem; Steven Drielak; John Neville; John Gregory; Tony Amos; Jimmy Seidel; Kurt Grunert; Julie Lastra; Eric Nottingham; Chris Weis; Samuel Wiggins; Eugene ONeill; Kevin Guarino; Epahq Eoc; Gilberto Irizarry; Kevin Mould
Subject:	Fw: Environmental Protection Agency Declares Health Emergency - Libby, Montana--NOC Media Monitoring--MMC IOI #249-06/09
Date:	06/17/2009 08:32 PM

FYI..... This info was also on the news tonight as well.

M. Brandon Foreman
Senior Special Agent
U.S. Environmental Protection Agency
Homeland Security Division
Intelligence/Tactics
1200 Pennsylvania Avenue, NW
Ariel Rios South-Room 4226
Mail Code-2231A
Washington, DC 20004
(C) (b) (6)
(W) (202)-564-1868

From: "NOC Media Monitoring" [bmiley@techopsolutions.net]
Sent: 06/17/2009 08:16 PM AST
To: "NOC Media Monitoring" <bmiley@techopsolutions.net>
Subject: Environmental Protection Agency Declares Health Emergency - Libby, Montana--NOC Media Monitoring--MMC IOI #249-06/09

Title: EPA Declares Health Emergency In Libby, Montana
Location: Libby, Montana

MMC CIR #3: Identifying events with operational value…corroborating critical information

Excerpt from News Article:

The Environmental Protection Agency [EPA] for the first time has declared a public health emergency in a contaminated community, targeting a Montana town Wednesday for immediate federal attention.

The declaration by EPA Administrator Lisa Jackson involving Libby, Mont., will not result in an evacuation, but will require an extensive cleanup and better health protections for residents with asbestos-related illnesses.

Asbestos contamination from a now-closed vermiculite mine near Libby has been cited in the deaths of more than 200 people and illnesses of thousands more.

Jackson said the public health emergency declaration was the first time the EPA has made such a determination under authority of the 1980 Superfund law that requires the clean up of contaminated sites.

Investigations performed by the federal Agency for Toxic Substance and Disease Registry have found that occurrences of asbestosis, a lung condition, near Libby are staggeringly higher than the national average for the period from 1979 to 1998, Jackson said.

Source:
Casper Star-Tribune
http://www.casperstartribune.net/articles/2009/06/17/news/breaking/doc4a393539b2fb0578727405.txt

Brian Miley
Operations Analyst
DHS NOC Media Monitoring
Phone: 703-802-6231 ext 5809
Cell: (b) (6)

From: Elizabeth Southerland
To: Phyllis Anderson; Doug Ammon; Earl Salo; John Michaud; Ellen Manges
Subject: Fw: FYI -- Fw: Briefing on Libby for Administrator Jackson
Date: 01/30/2009 02:15 PM

----- Forwarded by Elizabeth Southerland/DC/USEPA/US on 01/30/2009 02:14 PM -----

From: Carol Campbell/R8/USEPA/US
To: Woolford.James@epamail.epa.gov, Elizabeth Southerland/DC/USEPA/US@EPA
Date: 01/30/2009 01:08 PM
Subject: Fw: FYI -- Fw: Briefing on Libby for Administrator Jackson

---

so we may have less time than we thought to pull together the Libby briefing
Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 01/30/2009 11:07 AM -----

Martin Hestmark/R8/USEPA/US

01/30/2009 08:53 AM

To: Sandy Fells/OCP/R8/USEPA/US@EPA
cc: Andy Lensink/ENF/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Helen Dawson/EPR/R8/USEPA/US@EPA, Lawrence Grandison/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA, Steve Tuber/P2/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA
Subject: Re: FYI -- Fw: Briefing on Libby for Administrator Jackson

I know there is a start on the PHE briefing. I have not heard about a schedule.
▼ Sandy Fells/OCP/R8/USEPA/US

Sandy Fells/OCP/R8/USEPA/US

01/29/2009 03:58 PM

To: Carol Campbell/R8/USEPA/US@EPA
cc: Martin Hestmark/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA, Andy Lensink/ENF/R8/USEPA/US@EPA, Helen Dawson/EPR/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Steve Tuber/P2/R8/USEPA/US@EPA, Lawrence Grandison/R8/USEPA/US@EPA, Sonya

Pennock/OCP/R8/USEPA/US@EPA

Subject FYI -- Fw: Briefing on Libby for Administrator Jackson

Hi, Carol -- Anybody going back to DC in the next couple of weeks?

----- Forwarded by Sandy Fells/OCP/R8/USEPA/US on 01/29/2009 03:54 PM -----

Carolyn Levine/DC/USEPA/US

01/29/2009 03:12 PM

To Amy Hayden/DC/USEPA/US@EPA, Sandy Fells/OCP/R8/USEPA/US@EPA, Randy Deitz/DC/USEPA/US@EPA, George Hull/DC/USEPA/US@EPA, Ellen Manges/DC/USEPA/US

cc

Subject Briefing on Libby for Administrator Jackson

While the Administrator's staff is still working on sorting out all the commitments made at the confirmation hearing, they did mention Libby as an issue that we should go ahead and start preparing for a briefing for the Administrator. There is no specific timing, but I would aim for the next 1-2 weeks. Can OSWER and R8 work together on briefing materials--- updated issue paper (there is at least one from the September Fed Facilities hearing), hearing testimony, etc. and Amy can coordinate for OCIR. Please give us an idea on suggested timing. Thanks!

Carolyn Levine
U.S. EPA/Office of Congressional Affairs
(202) 564-1859
FAX: (202) 501-1550

From:	Annie Jarabek
To:	MaryJane Selgrade; Jennifer Orme-Zavaleta; Stephen Gavett; Urmila Kodavanti; Robert Luebke; Danielle Carlin; Wendy OBrien; Mary Goldade; birnbaumls@niehs.nih.gov; Maureen Gwinn
Subject:	Fw: FYI: Superfund & Brownfields News Release (HQ): EPA Announces Public Health Emergency in Libby, Montana
Date:	06/17/2009 03:30 PM

I think this is not a second too soon.

Annie M. Jarabek
Special Assistant to the Associate Director for Health
National Center for Environmental Assessment (NCEA) -- Immediate Office (IO)
on detail to:
National Health and Environmental Effects Research Laboratory (NHEERL) -- Environmental Public Health Division (EPHD)
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B-143-01 ETD
U.S. EPA
Research Triangle Park, NC 27711

Think occasionally of the suffering of which you spare yourself the sight. (Albert Schweitzer)

----- Forwarded by Annie Jarabek/RTP/USEPA/US on 06/17/2009 03:21 PM -----

From:	Linda Tuxen/DC/USEPA/US
To:	NCEA ALL
Date:	06/17/2009 03:16 PM
Subject:	FYI: Superfund & Brownfields News Release (HQ): EPA Announces Public Health Emergency in Libby, Montana

----- Forwarded by Linda Tuxen/DC/USEPA/US on 06/17/2009 03:15 PM -----

From:	"U.S. EPA" <usaepa@govdelivery.com>
To:	Linda Tuxen/DC/USEPA/US@EPA
Date:	06/17/2009 03:14 PM
Subject:	Superfund & Brownfields News Release (HQ): EPA Announces Public Health Emergency in Libby, Montana

CONTACTS:
EPA Press Office-202-564-1692

HHS Press Office-202-690-6343

FOR IMMEDIATE RELEASE
June 17, 2009

EPA Announces Public Health Emergency in Libby, Montana

EPA to Move Aggressively on Cleanup and HHS to Assist Area Residents with Medical Care

WASHINGTON – U.S. Environmental Protection Agency Administrator Lisa P. Jackson today announced the agency has determined that a public health emergency exists at the Libby asbestos site in northwest Montana. Over the past years, hundreds of asbestos-related disease cases have been documented in this small community, which covers the towns of Libby and Troy. The announcement was made today at a joint press conference with Department of Health and Human Services Secretary Kathleen Sebelius and U.S. Sens. Max Baucus and Jon Tester.

This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that conditions at a site constitute a public health emergency. This determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos. Investigations performed by the Agency for Toxic Substance and Disease Registry have found the incidence of occurrence of asbestosis, a lung condition, in the Libby area staggeringly higher than the national average for the period from 1979-1998. EPA is working closely with the Department of Health and Human Services, which is making available a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents.

During her Senate confirmation hearing, Administrator Jackson committed to review the situation at the Libby asbestos site based on current site information, sound science and EPA's legal authorities. As a result of her review, the Administrator has decided that conditions at the site present a significant threat to public health and that making a public health emergency determination is appropriate.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long. We're making a long-delayed commitment to the people of Libby and Troy. Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," said EPA Administrator Lisa P. Jackson. "We're here to help create a long and prosperous future for this town." She added, "Senator Max Baucus has been a tireless advocate for the people living in Libby and

Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elec ted to the Senate to bring much needed support to these communities."

"Senator Baucus and Senator Tester have powerfully brought the voices of the people of Libby and Troy to Washington so the nation could hear and understand what happened. They refused to give up on finding the best ways to help those who have suffered so much. Today's announcement reflects our Administration's concern for the residents of Lincoln County and our intention to act decisively to protect and improve their health and quality of life,' said Secretary Sebelius. "The Department of Health and Human Services has been working closely with the EPA and the residents of Lincoln County for a number of years to conduct screenings and help provide access to care. Now, we have come together with Senator Baucus and Senator Tester, Administrator Jackson, and agencies across HHS, to offer a new grant to provide short-term medical assistance for screening, diagnostic and treatment services in a comprehensive and coordinated manner in partnership with local officials on the ground in Lincoln County. "

Sen. Max Baucus, a long-time advocate on this issue, consistently sought out a determination of a public health emergency in this region.

"This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day," said Sen. Baucus. "Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need. Today is the day that after years of work we were able to succeed in getting this done. Yet, we won't stop here. We will continue to push until Libby has a clean bill of health."

"This is a long-overdue, common-sense decision that will go a long way for Libby and the thousands of folks who were poisoned there," Sen. Tester said. "This decision will help make quality health care more accessible and it will open the door to get new resources on the ground. We still have a long way to do right by the folks in Libby. Working together with the Department of Health and Human Services and the Environmental Protection Agency, we're making very good progress."

Secretary Sebelius tasked two HHS agencies – the Health Resources and Services Administration and the Centers for Disease Control and Prevention/Agency for Toxic Substances and Disease Registry – to help county residents. These two agencies will support a new grant to assist affected residents who need medical care. Local officials are currently putting together a grant proposal that will lay out options for provision of medical care that will work for the residents of Lincoln County. HHS anticipates that this grant can be awarded in August 2009.

The Libby asbestos site has been on the EPA's Superfund National Priorities List since 2002, and cleanup has taken place since 2000. EPA has made progress in

helping to remove the threat of asbestos in the land and air, and with it, the increased risks of lung cancer, asbestosis, and other respiratory problems. While EPA's cleanup efforts have greatly reduced exposure, actual and potential releases of amphibole asbestos remain a significant threat to public health in that area.

The Libby asbestos site includes portions of the towns of Libby and Troy and an inactive vermiculite mine seven miles northeast of the town. Gold miners discovered vermiculite in Libby in 1881; in the 1920s the Zonolite Company formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990. It is estimated that the Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919 to 1990.

More information: http://www.epa.gov/libby

R176

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From:	Carol Campbell
To:	ropper@mt.gov
Subject:	Fw: Final Public Q&A to post on web
Date:	06/17/2009 01:17 PM
Attachments:	External Libby Q&A draft final 061709.doc

---

fyi
Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 06/17/2009 11:15 AM -----

Ellen Manges/DC/USEPA/US

06/17/2009 08:55 AM

To	Carol Campbell/R8/USEPA/US@EPA, Martin Hestmark/R8/USEPA/US@EPA, Sandy Fells/OCP/R8/USEPA/US@EPA, Andy Lensink/R8/USEPA/US@EPA, Lawrence Grandison/R8/USEPA/US@EPA, Wendy Dew/OCP/R8/USEPA/US@EPA
cc	Mary-Kay Lynch/DC/USEPA/US@EPA, Adora Andy/DC/USEPA/US@EPA, Betsaida Alcantara <alcantara.betsaida@epa.gov>, Marta Montoro/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, John Michaud/DC/USEPA/US@EPA, Brendan Gilfillan <Gilfillan.Brendan@epamail.epa.gov>
Subject	Final Public Q&A to post on web

Here's the final

External Libby Q&A draft final 061709.doc

Q & As for R8 Web Page
Determination of a Public Health Emergency– Libby Asbestos

What is the basis for the EPA's Determination of a Public Health Emergency (PHE)?

Despite considerable progress on the cleanup in Libby, EPA believes that conditions present significant ongoing threats to public health from exposure to asbestos. The PHE is based on the uniqueness of exposure in Libby and Troy due to a number of factors:

- Atmospheric and terrain-related conditions
- Multiple sources of potential exposure and exposure pathways
- Limited available medical care
- High rate of occurrence of asbestos-related disease. For example, the incidence of occurrence of asbestosis, a lung condition, in the Libby area is significantly higher than the national average

Why is EPA issuing the public health emergency?

During her Senate confirmation hearing, EPA Administrator Lisa P. Jackson committed to review the situation at the Libby site. Her evaluation was based on available site-specific information, sound science and EPA's legal authorities. Following her review, the Administrator decided that conditions at the site present a significant threat to public health and that it is appropriate for her to find that a public health emergency exists under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund).

Is this the first time EPA has issued a Public Health Emergency determination under the Superfund law?

Yes. This is the first time EPA has issued a Public Health Emergency determination under the Superfund law in its history.

What impact will the determination have on residents of Libby?

The determination recognizes the serious impacts of contamination at Libby and Troy to the public and underscores the need for health care for residents. EPA is working closely with the Department of Health and Human Services who will provide asbestos-related medical care to Libby and Troy residents.

EPA has also issued a document for the Libby site that delineates the continued actions that will be taken to address the public health emergency including the cleanup of residential properties in Libby.

Will the determination change what EPA is doing in Libby?

EPA's cleanup work at the site will continue, including removal of uncontained vermiculite insulation in homes. In addition to cleaning up yards, EPA inspects attics and interior living spaces for visible vermiculite, and if visible vermiculite is present, EPA addresses those areas. If visible vermiculite is not present, EPA samples the dust in the house. If the dust poses a risk, EPA cleans the house with a HEPA vacuum and wet wipe. EPA conducts clearance sampling to ensure that the cleanup is effective and provides residents with a HEPA vacuum to use for future interior cleanup.

The Agency will expeditiously analyze the results of an activity-based sampling effort undertaken at the Libby site. This sampling works to assess the level of exposure residents might encounter during outdoor activities such as digging, raking and mowing. Preliminary review of the sampling results indicates that the current removal action level for asbestos in soil is likely to be revised to a lower concentration. EPA plans to issue the report this fall If EPA revises its cleanup action level, more properties may require cleanup.

Will the cleanup in Libby be conducted faster as a result of the determination?

EPA will move to aggressively clean up the site with a renewed focus and collaboration with the Department of Health and Human Services (HHS). EPA will proceed with the cleanup in the town at the fastest rate that the Libby infrastructure allows.

Why is EPA planning to leave asbestos-containing vermiculite insulation in the walls of homes?

Unless asbestos-contaminated vermiculite inside the walls is disturbed, there is no exposure to it and, therefore, it poses no risk and does not need to be removed. EPA has made the Environmental Resource Specialist Program available to homeowners when walls are accidently breached or if the resident plans remodeling work that will disturb the asbestos inside walls.

How long will the public health emergency last?

CERCLA does not establish a timeframe to revisit this determination. EPA has discretion to change the finding whenever conditions merit. Any change that EPA makes to the finding will be in consultation with the Department of Health and Human Services and the Libby site community which includes Libby and Troy, Montana.

Does this mean EPA is going to issue a public health emergency at other vermiculite sites around the country?

This public health emergency is related to the specific conditions at a particular site. The Administrator's finding applies only to the Libby site which includes the towns of Libby and Troy, Montana, and is based on the specific ongoing impacts to public health from exposure to asbestos in these communities. It is based on the uniqueness of exposure in these towns due to multiple sources and pathways of exposure, both indoors and outdoors, and significant cumulative exposures resulting in a high rate of occurrence of asbestos-related disease.

Do homes around the country containing vermiculite insulation require cleanup?

No. EPA recommends that vermiculite insulation be left undisturbed whenever possible. If removal is necessary for remodeling or other purposes, EPA recommends that a trained asbestos removal professional be used to ensure the material is handled without risk of exposure to the home's residents.

More information on vermiculite insulation is available on EPA's website. Link to OPPTS website that includes FAQs and fact sheet.

Will EPA be addressing the other vermiculite processing plants around the country?

EPA has evaluated over 270 sites around the country where Libby vermiculite ore was processed. The EPA has completed cleanup actions at 14 sites, and states or responsible parties have conducted cleanups at six additional locations. EPA is now undertaking further assessments at 105 of the processing sites where 95% of the Libby ore was shipped. None of these sites present the conditions that exist in Libby since they did not involve mining. As a result, this reduces the principal routes of exposure and concern for neighboring communities.

From:	Danielle DeVoney
To:	Helen Dawson; Wendy OBrien; Mary Goldade; Bob Benson
Subject:	Fw: From E&E Daily -- SUPERFUND: Sen. Jon Tester (D-Montana) floats plan to clean up Libby site, provide health care
Date:	05/14/2009 01:02 PM

Hi -

FYI - if you haven't seen this yet -

danielle

Danielle DeVoney, PhD, DABT, PE
National Center for Environmental Assessment
USEPA Office of Research and Development
1200 Pennsylvania Ave., NW (8623P)
Washington, DC 20460
703.347.8558
FAX: 703.347.8692

----- Forwarded by Danielle DeVoney/DC/USEPA/US on 05/14/2009 12:58 PM -----

From:	David Bussard/DC/USEPA/US
To:	Preuss.Peter@epamail.epa.gov, clark.becki@epamail.epa.gov, Bob Sonawane@EPA, Charles Ris/DC/USEPA/US@EPA, Gina Perovich/DC/USEPA/US@EPA, Kathleen Deener/DC/USEPA/US@EPA, Paul White@EPA, Devoney.Danielle@epamail.epa.gov, Thomas Bateson/DC/USEPA/US@EPA
Date:	05/14/2009 12:55 PM
Subject:	Fw: From E&E Daily -- SUPERFUND: Sen. Jon Tester (D-Montana) floats plan to clean up Libby site, provide health care

---

"...Jackson also promised Tester that risk assessors would be available as needed in Libby...":

David Bussard
_____

email: bussard.david@epa.gov / phone: 703-347-8647 / fax: 703-347-8690
US mail address: USEPA (mailcode 8623P), 1200 Pennsylvania Ave, NW, Washington, DC 20460
Physical office location: Two Potomac Yard, 7th floor, 2733 S. Crystal Dr., Arlington, VA 22202

----- Forwarded by David Bussard/DC/USEPA/US on 05/14/2009 12:53 PM -----

ENVIRONMENT & ENERGY DAILY
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SUPERFUND: Tester floats plan to clean up Libby site, provide health care

(Thursday, May 14, 2009)

Katherine Boyle, E&E reporter

Montana Sen. Jon Tester (D) yesterday called on U.S. EPA and the Health and Human Services Department to collaborate on cleaning up a Superfund site in L bby, Mont., and provide health care for citizens affected by asbestos exposure.

Tester was backed by Senate Interior Appropriations Subcommittee Chairwoman Dianne Feinstein (D-Calif.), who suggested lawmakers put together report language for a bill requiring EPA and HHS to re-examine the plight of Libby citizens.

"Nearly 200 people have lost their lives to asbestos-related diseases," Tester told EPA Administrator Lisa Jackson during a hearing on the White House fiscal 2010 budget proposal. "Many more are sick. The town is struggling to meet health care needs. ... If you dovetail your efforts, I think we can make a giant step forward in meeting some of the challenges that occur in Libby."

Residents of Libby have suffered myriad health problems thanks to exposure to asbestos due to vermiculite mining by W.R. Grace & Co.

Sen. Max Baucus (D-Mont.) last fall revealed EPA had been ready to declare the site a public health emergency before the White House intervened. Baucus has asked Jackson to consider supporting a public health emergency declaration for the town (*E&E Daily*, Jan. 15).

"The problem is this has gone on year after year after year for a long time," Feinstein told Jackson. "I really think it needs to be addressed."

Tester also accused EPA officials of abandoning their commitment to community groups by failing to show up to meetings, saying the situation called for Jackson's attention. "I think that with some attention by people l ke you, Administrator Jackson, I think we can get a big bang for the buck," he said. "We can help make L bby whole again, and we can solve a huge problem that we have in one of the most beautiful places in the world."

Jackson acknowledged a number of problems have plagued the Libby cleanup. It "has not progressed as quickly as it should for the people of Libby," Jackson said. She noted she already promised Baucus she would visit the Superfund site.

Jackson also promised Tester that risk assessors would be available as needed in L bby. She said she had not yet met with Health and Human Services Secretary Kathleen Sebelius but noted EPA and HHS staff have been working together on Libby issues.

"We will continue that work and in doing so address your concerns about people falling through the cracks, either on the cleanup side or the health side," she said.

A federal jury last week cleared W.R. Grace executives of conspiring to hide the health risks of asbetsos in L bby (*E&ENews PM*, May 8).

"Last week the Justice Department failed in their criminal case against W.R. Grace, and the people in Libby and Montana are extremely frustrated," Tester told Jackson. "The situation in L bby is serious enough that it demands your personal attention. And immediate attention."

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From: Carol Campbell
To: Victor Ketellapper; Russell Leclerc; Elisabeth Evans; Martin Hestmark; Mike Gaydosh; Carol Rushin
Subject: Fw: Fw: Draft Desk Statement on Libby HHS Grant
Date: 05/21/2009 06:45 PM

Fyi
Sent by EPA Wireless E-Mail Services
▼ Ellen Manges

----- Original Message -----
From: Ellen Manges
Sent: 05/21/2009 05:49 PM EDT
To: Bill Murray
Cc: Carol Campbell
Subject: Re: Fw: Draft Desk Statement on Libby HHS Grant

Bill-

Apparently OPA briefed Wendy Chipp in R-8 on how to handle the press calls. Calls should be routed to OPA HQ Brendan Gilfillan: gilfillan.brendan@epa.gov or 202-564-2081.

Ellen

▼ Bill Murray---05/21/2009 04:40:17 PM---Ellen: I'm going to be the key contact in the region on issues related to this desk statement. We wo

From: Bill Murray/EPR/R8/USEPA/US
To: Ellen Manges/DC/USEPA/US@EPA
Date: 05/21/2009 04:40 PM
Subject: Fw: Draft Desk Statement on Libby HHS Grant

Ellen: I'm going to be the key contact in the region on issues related to this desk statement. We wondered: 1) is there a contact name/number at HHS? People will probably ask for that. 2) Is there a contact name/number at HQ regarding our assessment of the need for a PHE?

later, Bill . . .

----- Forwarded by Bill Murray/EPR/R8/USEPA/US on 05/21/2009 02:38 PM -----

Carol Campbell/R8/USEPA/US

05/21/2009 01:37 PM

To "Barry Breen" <Breen.Barry@epamail.epa.gov>
cc "Carol Rushin" <Rushin.Carol@epamail.epa.gov>, "Mike Gaydosh" <Gaydosh.Mike@epamail.epa.gov>, "Russell Leclerc" <Leclerc.Russell@epamail.epa.gov>, "Bill Murray" <Murray.Bill@epamail.epa.gov>, "Martin Hestmark" <Hestmark.Martin@epamail.epa.gov>
Subject Fw: Draft Desk Statement on Libby HHS Grant

This is ok. All use this if called.
Sent by EPA Wireless E-Mail Services

▼ Ellen Manges

----- Original Message -----
From: Ellen Manges
Sent: 05/21/2009 03:27 PM EDT
To: Carol Campbell; Martin Hestmark; Bill Murray
Subject: Draft Desk Statement on Libby HHS Grant

Here is a basic draft statement. Barry wanted to get a quick review from you before we send it up to the Administrator's office. We should take care of this ASAP.

[attachment "Libby Desk Statement.doc" deleted by Ellen Manges/DC/USEPA/US]

From:	David Janik
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Subject:	Fw: Greenwire article - Regional posts key as Obama admin reshapes agency (07/27/2009), includes potential names in the mix
Date:	07/28/2009 10:39 AM

http://www.eenews.net/Greenwire/print/2009/07/27/2

EPA: Regional posts key as Obama admin reshapes agency (07/27/2009)

Robin Bravender, E&E reporter

Up next at U.S. EPA: appointments for regional administrators.

Those 10 posts are seen as critical to the Obama administration's efforts to reshape the agency, whose morale was said to have sagged under President George W. Bush. In its first months, the Obama EPA has shifted Bush-era policies on climate change and air pollution, and the White House has proposed massive agency budget increases.

Regional administrators are charged with building bridges between the administration and state and local governments.

Regional administrators "have a tremendous amount of authority over the relations with the states in their regions, the Superfund cleanups, the spills, the local controversies and the interactions with the state agencies," said John Walke, a senior attorney at the Natural Resources Defense Council.

Some expect to see a radical shift in the leadership of regional offices under President Obama.

"The staff at both headquarters and at the regions is so beaten down at this point and unwilling to make any radical changes or stick their neck out, they need active leadership," Earthjustice attorney Paul Cort said. "If anything's going to change at the regional level, they need a regional administrator who will stand up for them, be aggressive, take on headquarters when necessary."

Past administrations have drawn heavily on state and local officials to fill top posts in regional offices, insiders say, because the positions require so much close work with state and

local governments.

"You really do want people where this isn't going to be their first big job," said former Region 9 administrator Felicia Marcus, who headed the San Francisco office in the Clinton administration after serving as president of the Board of Public Works for the city of Los Angeles.

Many leaders of the Obama EPA joined the agency after long stints as regulators. Administrator Lisa Jackson led New Jersey's Department of Environmental Protection; air chief Gina McCarthy was Connecticut's top environmental regulator; and Stephen Owens, chief of EPA's pesticides and toxics office, headed the Arizona Department of Environmental Quality for seven years.

Of the pool of people thought to be under consideration for regional posts, "many of them seem to be current or former government officials at the federal, state and local level," said Bill Becker, executive director of the National Association of Clean Air Agencies.

"That makes eminent sense to us," Becker added. "Pick someone who has experience out in the regions knowing what works and what doesn't, not someone who hasn't actually walked the walk."

But some say Obama could draw from advocacy groups, as well.

"I think the environmental community is a very important constituency for the Obama administration, and so they are much more likely to choose people who come out of the environmental-activist community, or at least state officials who have close ties with environmental groups," said Jeff Holmstead, who was EPA's top air official under President George W. Bush.

Several top officials at EPA headquarters have both advocacy and government experience.

Bob Perciasepe, the nominee for deputy administrator, has been chief operating officer for the National Audubon Society, assistant administrator in EPA's air and water offices during the Clinton administration and Maryland's top environmental official. Top enforcement official Cynthia Giles worked at the New England-based Conservation Law Foundation after working at the Massachusetts Department of Environmental Protection and leading enforcement efforts at EPA's Region 3 office in Philadelphia.

By contrast, the Bush administration drew several regional chiefs from the private sector. John Askew, president of the Iowa Soybean Association, served as Region 7 chief; L. John Iani, vice president for corporate affairs and general counsel for UniSea Inc., a major seafood company, was appointed Region 10 administrator; and James Palmer, the Region 4

administrator, came from a Memphis law firm, although he served before that as executive director of Mississippi's Department of Environmental Quality from 1987 to 1999.

Regional autonomy

Historically, EPA regional offices have had a large degree of autonomy, in part because "it's often difficult to be in Washington and pay attention to the operations that have been happening out in the regions," said Marcus Peacock, who served as deputy administrator in the Bush administration and now works at the Pew Charitable Trusts.

And with Jackson and other top officials expected to focus on ramping up climate programs and other regulatory programs, some observers expect regional chiefs to have a great deal of independence. "Lisa Jackson's top priority is probably going to be climate, and she's going to be so focused on climate that she's going to want to depend on regional administrators taking a lot of responsibility," Becker said.

Even if Jackson and other EPA officials wanted to be very involved on a regional level, "There's no way they can," Holmstead said. "There's just too much going on."

Names in the mix

E&E interviewed dozens of sources to discuss key regional issues and to identify possible leading candidates for top posts. Many of the names that surfaced are those of EPA employees, state and local officials, and environmental advocates.

Region 1, Boston

Territory: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont and tribal nations.
Issues: Mercury emissions from coal-fired power plants; automobile emissions in congested areas; and waterways under pressure from increasing development. With EPA expected to take on responsibilities for regulating greenhouse gas emissions, the region will be watching the Regional Greenhouse Gas Initiative.
Possible administrators: David Cash, assistant secretary for policy at the Massachusetts Executive Office of Energy and Environmental Affairs and Charlie Lord, director of the Urban Ecology Institute at Boston College. The *Boston Globe* reported in February that the field had been narrowed to Cash and Lord. Other names that have been floated are Robert Varney, EPA Region 1 administrator in the Bush administration who joined an environmental consulting firm in February, and Curt Spalding, former executive director of the Rhode Island-based advocacy group Save the Bay.

Region 2, New York City

Territory: New York, New Jersey, Puerto Rico and the U.S. Virgin Islands.
Issues: State regulators have been under fire for wastewater permit reviews, and some environmentalists are hoping the Obama EPA will step up its scrutiny of the Clean Water Act

program. Air quality in major metropolitan areas will continue to be a major concern, and because New York and New Jersey are members of the Regional Greenhouse Gas Initiative, Region 2 may also help to shape EPA's climate policies. Stormwater management issues are facing Puerto Rico, where discharges from small municipal sewer systems can contaminate drinking water and recreational waterways.
Possible picks: Rich Kassel, a senior attorney at the Natural Resources Defense Council's New York City office, and Judith Enck, New York Gov. David Paterson's (D) deputy secretary for the environment.

Region 3, Philadelphia

Territory: Delaware, District of Columbia, Maryland, Pennsylvania, Virginia and West Virginia.
Issues: Chesapeake Bay restoration, mountaintop coal mining, air quality nonattainment areas and abandoned hazardous-waste sites.
Possible picks: William Early, acting regional administrator, who has served as regional counsel since 1999, and Stanley Alpert, an environmental attorney in New York who served for 13 years as an assistant U.S. attorney for the Eastern District of New York.

Region 4, Atlanta

Territory: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee and six tribes.
Issues: Oversight of coal-fired power plants and coal-ash dumps. Of 44 coal-ash impoundment sites determined by the Obama administration to be high-hazard sites, 20 of them are this region. Wetlands protection is also a top issue, since the region includes Gulf Coast marshes and the Everglades.
Possible picks: Acting Region 4 Administrator Stanley Meiburg; acting Deputy Administrator Beverly Banister; Russell Wright, assistant administrator of Region 4's Office of Policy and Management; John Hankinson, former Region 4 administrator in the Clinton administration; and Jim Powell, a former senior official with the Energy Department who retired in 2007.

Region 5, Chicago

Territory: Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.
Issues: Addressing high concentrations of contaminants in waterways that feed the Great Lakes and other water quality issues. The Region 5 post has been the subject of controversy in recent years, after Mary Gade, who headed the office under the Bush administration, said she was forced to resign after months of internal bickering with Dow Chemical Co. over dioxin contamination surrounding its Midland, Mich., plant (*Greenwire*, May 2, 2008).
Possible picks: Doug Scott, director of the Illinois EPA; Steve Chester, director of the Michigan Department of Environmental Quality; and Todd Ambs, administrator of the Wisconsin Department of Natural Resources' water division.

Region 6, Dallas

Territory: Arkansas, Louisiana, New Mexico, Oklahoma and Texas.
Issues: Clean air and toxic cleanup programs will be top priorities in what one source called the "heart of the petrochemical and oil and gas industries." The region includes Houston and

Dallas, both of which exceed EPA's ozone standards.
Possible picks: John Hall, an industry lobbyist who has worked for Waste Management Inc. and a former head of the Texas Natural Resource Conservation Commission; Al Armendariz, an engineering professor at Southern Methodist University; and Ron Curry, secretary of the New Mexico Environment Department.

Region 7, Kansas City

Territory: Iowa, Kansas, Missouri, Nebraska, and nine tribal nations.
Issues: The relationship between agriculture, air quality and renewable energy is expected to be critical as the new administration and Congress work to craft climate legislation. Water quality and runoff pollution from agricultural sources are also pressing issues, and the new administrator could play a role in the regulatory battle over the controversial Sunflower coal-fired power plant planned for western Kansas.
Possible picks: Steve Mahfood, former director of the Missouri Department of Natural Resources. Former Kansas Rep. Nancy Boyda (D) from Kansas's 2nd District was also rumored to be a possible candidate early on, but she was sworn in last week as deputy assistant secretary of Defense for manpower and personnel at the Pentagon.

Region 8, Denver

Territory: Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming and 27 tribal nations.
Issues: Cleanup of the region's 69 Superfund sites will be a top priority. Last month, Administrator Jackson issued a public health emergency finding at the Libby Asbestos Superfund site in northwest Montana. The region is also home to the Leadville, Colo., Superfund site and other areas that bear the toxic legacy of the region's historic mining industry. Air and water quality concerns will also be key issues in a region with an increasing population and a booming oil and gas sector.
Possible picks: Jim Martin, director of the Colorado Department of Public Health and Environment; Joshua Epel, assistant general counsel for DCP Midstream and a member of Colorado's Oil and Gas Commission; Macon Cowles, an environmental attorney who sits on Boulder, Colo.'s City Council; Roger Freeman, an environmental attorney at Davis, Graham & Stubbs in Denver; and Barbara Roberts, an independent consultant specializing in environment and natural resources issues and a member of the Colorado Air Quality Control Commission.

Region 9, San Francisco

Territory: Arizona, California, Hawaii, Nevada, the Pacific Islands and tribal nations.
Issues: Air pollution continues to be a pressing issue for the region, which contains both Los Angeles and the San Joaquin Valley, two of the most polluted areas in the nation. Tackling those issues will involve addressing motor vehicle standards and retrofitting older, dirtier diesel engines, sources say. The region is also engaged in efforts to improve the quality of water supplies and is working with states and other federal agencies to restore damaged ecosystems.
Possible picks: Peter Sherman, former executive director of MoveOn.org; Jared Blumenfeld, former interim chief of the San Francisco Recreation and Park Department and director of the San Francisco Department of the Environment; Laura Yoshi, the acting Region 9 administrator; and Tim Carmichael, former president of the California Coalition for Clean

Air.

Region 10, Seattle

Territory: Alaska, Idaho, Oregon, Washington and native tribes.
Issues: Efforts to protect and restore watersheds, including the Puget Sound, Columbia River and the Coeur d'Alene Basin. The region is also focused on reducing sources of mercury contamination in water and is working with the area's 270 tribal communities to build environmental management capacity and to restore natural resources.
Possible picks: Dennis Hession, former mayor of Spokane, Wash.; state Sen. Phil Rockefeller (D), who represents Washington's 23rd District; and Michael Grady, a natural resource specialist in the habitat conservation division of the National Oceanic and Atmospheric Administration.

From: Jan Shubert
To: OSWER OEM POCD
Subject: Fw: Just fyi.: News Release - Public Health Emergency in Libby, Montana
Date: 06/18/2009 08:11 AM

In case you haven't heard -- interesting this came in through Region 7. Jan

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Date: 06/17/2009 02:03 PM

Subject: Just fyi.: News Release - Public Health Emergency in Libby, Montana

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----- Forwarded by Kenneth Buchholz/R7/USEPA/US on 06/17/2009 01:02 PM -----

David Bryan/R7/USEPA/US

06/17/2009 12:59 PM

To David Bryan/R7/USEPA/US@EPA, Robertw Jackson/R7/USEPA/US@EPA, buchholz.kenneth@epa.gov, Mary Peterson/SUPR/R7/USEPA/US@EPA, Cecilia Tapia/R7/USEPA/US@EPA, Hattie Thomas/R7/USEPA/US@EPA, William Rice/RGAD/R7/USEPA/US@EPA, Beckie Himes/R7/USEPA/US@EPA, Belinda Young/R7/USEPA/US@EPA, Debbie Kring/R7/USEPA/US@EPA, Dianna Whitaker/R7/USEPA/US@EPA, Fritz Hirter/R7/USEPA/US@EPA, Hattie Thomas/R7/USEPA/US@EPA, Kris Lancaster/R7/USEPA/US@EPA, Rich Hood/R7/USEPA/US@EPA, Martin Kessler/R7/USEPA/US@EPA, Christopher Whitley/R7/USEPA/US@EPA, LaTonya

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Subject News Release - Public Health Emergency in Libby, Montana

EPA Announces Public Health Emergency in Libby, Montana EPA to Move Aggressively on Cleanup and HHS to Assist Area Residents with Medical Care

Release date: 06/17/2009

Contact Information: EPA Press Office-202-564-1692 HHS Press Office-202-690-6343

WASHINGTON – U.S. Environmental Protection Agency Administrator Lisa P. Jackson today announced the agency has determined that a public health emergency exists at the Libby asbestos site in northwest Montana. Over the past years, hundreds of asbestos-related disease cases have been documented in this small community, which covers the towns of Libby and Troy. The announcement was made today at a joint press conference with Department of Health and Human Services Secretary Kathleen Sebelius and U.S. Sens. Max Baucus and Jon Tester.

This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that conditions at a site constitute a public health emergency. This determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos. Investigations performed by the Agency for Toxic Substance and Disease Registry have found the incidence of occurrence of asbestosis, a lung condition, in the Libby area staggeringly higher than the national average for the period from 1979-1998. EPA is working closely with the Department of Health and Human Services, which is making available a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents.

During her Senate confirmation hearing, Administrator Jackson committed to review the situation at the Libby asbestos site based on current site information, sound science and EPA's legal authorities. As a result of her review, the Administrator has decided that conditions at the site present a significant threat to public health and that

making a public health emergency determination is appropriate.

“This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long. We’re making a long-delayed commitment to the people of Libby and Troy. Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people,” said EPA Administrator Lisa P. Jackson. “We’re here to help create a long and prosperous future for this town.” She added, “Senator Max Baucus has been a tireless advocate for the people living in Libby and Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elected to the Senate to bring much needed support to these communities.”

“Senator Baucus and Senator Tester have powerfully brought the voices of the people of Libby and Troy to Washington so the nation could hear and understand what happened. They refused to give up on finding the best ways to help those who have suffered so much. Today’s announcement reflects our Administration’s concern for the residents of Lincoln County and our intention to act decisively to protect and improve their health and quality of life,’ said Secretary Sebelius. “The Department of Health and Human Services has been working closely with the EPA and the residents of Lincoln County for a number of years to conduct screenings and help provide access to care. Now, we have come together with Senator Baucus and Senator Tester, Administrator Jackson, and agencies across HHS, to offer a new grant to provide short-term medical assistance for screening, diagnostic and treatment services in a comprehensive and coordinated manner in partnership with local officials on the ground in Lincoln County. “

Sen. Max Baucus, a long-time advocate on this issue, consistently sought out a determination of a public health emergency in this region.

“This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day,” said Sen. Baucus. “Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need. Today is the day that after years of work we were able to succeed in getting this done. Yet, we won’t stop here. We will continue to push until Libby has a clean bill of health.”

“This is a long-overdue, common-sense decision that will go a long way for Libby and the thousands of folks who were poisoned there,” Sen. Tester said. “This decision will help make quality health care more accessible and it will open the door to get new resources on the ground. We still have a long way to do right by the folks in Libby. Working together with the Department of Health and Human Services and the Environmental Protection Agency, we’re making very good progress.”

Secretary Sebelius tasked two HHS agencies – the Health Resources and Services

Administration and the Centers for Disease Control and Prevention/Agency for Toxic Substances and Disease Registry – to help county residents. These two agencies will support a new grant to assist affected residents who need medical care. Local officials are currently putting together a grant proposal that will lay out options for provision of medical care that will work for the residents of Lincoln County. HHS anticipates that this grant can be awarded in August 2009.

The Libby asbestos site has been on the EPA's Superfund National Priorities List since 2002, and cleanup has taken place since 2000. EPA has made progress in helping to remove the threat of asbestos in the land and air, and with it, the increased risks of lung cancer, asbestosis, and other respiratory problems. While EPA's cleanup efforts have greatly reduced exposure, actual and potential releases of amphibole asbestos remain a significant threat to public health in that area.

The Libby asbestos site includes portions of the towns of Libby and Troy and an inactive vermiculite mine seven miles northeast of the town. Gold miners discovered vermiculite in Libby in 1881; in the 1920s the Zonolite Company formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990. It is estimated that the Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919 to 1990.

More information: http://www.epa.gov/libby

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From: Kevin Mould
To: Gilberto Irizarry
Subject: Fw: Just fyi.: News Release - Public Health Emergency in Libby, Montana
Date: 06/17/2009 02:11 PM

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Report oil, chemical, biological, and radiological releases 24/7 to the National Response Center at 800-424-8802 or at http://www.nrc.uscg.mil

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The Libby asbestos site has been on the EPA's Superfund National Priorities List since 2002, and cleanup has taken place since 2000. EPA has made progress in helping to remove the threat of asbestos in the land and air, and with it, the increased risks of lung cancer, asbestosis, and other respiratory problems. While EPA's cleanup efforts have greatly reduced exposure, actual and potential releases of amphibole asbestos remain a significant threat to public health in that area.

The Libby asbestos site includes portions of the towns of Libby and Troy and an inactive vermiculite mine seven miles northeast of the town. Gold miners discovered vermiculite in Libby in 1881; in the 1920s the Zonolite Company formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990. It is estimated that the Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919 to 1990.

More information: http://www.epa.gov/libby

David W. Bryan, APR
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From: Sonya Pennock
To: Sandy Fells; Lawrence Grandison; Russell Leclerc; Victor Ketellapper
Subject: Fw: Last Night's Meeting
Date: 06/23/2009 11:04 AM

FYI

Sonya Pennock
Office of Communications & Public Involvement
US/EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Phone: 303-312-6600

----- Forwarded by Sonya Pennock/OCP/R8/USEPA/US on 06/23/2009 09:02 AM -----

Ted Linnert/OCP/R8/USEPA/US

06/23/2009 08:39 AM

To Sonya Pennock/OCP/R8/USEPA/US@EPA
cc
Subject Last Night's Meeting

Hi Sonya,

The meeting went fine. It was surprisingly low key - I don't know if the local folk are numb, bewildered, or just used to being stigmatized by their government. The Vocal Minority was held in check (Gordon and Clinton weren't there). There were two TV cameras from local network affiliates and reps from all the print media. Our presenters did fine, the HHS dude hardly said a word, and I adjourned the meeting around 8:30.

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
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Denver, CO 80202-1129

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toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

From:	Peter Ornstein
To:	Michael Boydston; Matthew Cohn; Andy Lensink
Subject:	Fw: Latest Version of EPA Response to Libby Control
Date:	02/03/2009 09:06 AM
Attachments:	patten_libby.pdf Libby_Hall Response_Sept 2007.pdf

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fyi

****

Peter Ornstein, Deputy Regional Counsel
Office of Regional Counsel, EPA Region VIII
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Denver, Colorado 80202-1129
303-312-6854 (fax: 303-312-6859)
ornstein.peter@epa.gov

----- Forwarded by Peter Ornstein/RC/R8/USEPA/US on 02/03/2009 07:04 AM -----

Mary-Kay Lynch/DC/USEPA/US

02/03/2009 06:42 AM

To	Lee Tyner/DC/USEPA/US@EPA, John Michaud/DC/USEPA/US@EPA, Jennifer Lue/DC/USEPA/US@EPA, Peter Ornstein/RC/R8/USEPA/US@EPA
cc	
Subject	Fw: Fw: Latest Version of EPA Response to Libby Control

▼ Ellen Manges

----- Original Message -----
From: Ellen Manges
Sent: 02/03/2009 08:19 AM EST
To: James Woolford
Cc: Ellyn Fine; halstead.amanda@epa.gov; manges.ellen@epa.gov; Mary-Kay Lynch; southerland.elizabeth@epa.gov
Subject: Re: Fw: Latest Version of EPA Response to Libby Control

Here is the response to Black's letter. The second paragraph addresses the PHE but doesn't say anything about ATSDR.

patten_libby.pdf

We say a lot more about the PHE and ATSDR's position in this earlier response to Jana Hall.

Libby_Hall Response_Sept 2007.pdf

▼ James Woolford---02/02/2009 05:43:09 PM---Can someone confirm this went out? It clearly states it is ATSDR's action... James E. Woolford, Di

From: James Woolford/DC/USEPA/US
To: southerland.elizabeth@epa.gov, halstead.amanda@epa.gov, Mary-Kay Lynch/DC/USEPA/US@EPA
Cc: manges.ellen@epa.gov, Ellyn Fine/DC/USEPA/US@EPA
Date: 02/02/2009 05:43 PM
Subject: Fw: Latest Version of EPA Response to Libby Control

Can someone confirm this went out? It clearly states it is ATSDR's action...

James E. Woolford, Director
Office of Superfund Remediation &
Technology Innovation (OSRTI)
Office of Solid Waste and Emergency Response
US Environmental Protection Agency

Mailing Address:
1200 Pennsylvania Avenue, NW
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OSRTI Web Site: http://www.epa.gov/superfund

----- Forwarded by James Woolford/DC/USEPA/US on 02/02/2009 05:41 PM -----

From: Barnes Johnson/DC/USEPA/US
To: Stan Meiburg/R4/USEPA/US, gdi2@cdc.gov, Steve Jones/DC/USEPA/US@EPA
Cc: Doug Ammon/DC/USEPA/US, Jayne Michaud/DC/USEPA/US, Victoria Vanroden/DC/USEPA/US, Elizabeth Southerland/DC/USEPA/US, Phyllis Anderson/DC/USEPA/US, James Woolford/DC/USEPA/US
Date: 10/08/2008 04:19 PM
Subject: Latest Version of EPA Response to Libby Control

Note cc to Leavitt, reference to ATSDR/CERCLA 104(i), toxicity assessment collaborations and the MOU.

[attachment "LibbyBlackControl10.7.08.doc" deleted by Ellen Manges/DC/USEPA/US]

Barnes Johnson
Environmental Protection Agency
Office of Superfund Remediation
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1200 Pennsylvania Avenue, NW
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Washington, DC 20460
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(C) (b) (6)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 24 2007

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

Dr. Jana Hall
Medical Staff Vice-President
St. John's Lutheran Hospital
350 Louisiana Avenue
Libby, Montana 59923

Dear Dr. Hall:

Thank you for your August 3, 2007 letter. Administrator Stephen Johnson requested that I respond to your request. EPA recognizes the severity of the situation at the Libby, Montana Superfund site and is working hard to reduce the exposure of residents to asbestos contamination.

In your letter, you requested that EPA declare a Public Health Emergency at the Libby site. EPA determined that it was not necessary to declare a public health emergency for EPA to begin removing asbestos and lower exposure to asbestos throughout Libby. Under section 104(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), EPA may not respond to a release or threat of release of hazardous substances from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures, unless EPA determines that such a release or threat of a release from such products constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner. Based on this limitation, EPA considered whether or not it needed to declare a public health emergency in order to remove asbestos containing material from homes and structures in and around Libby. Ultimately, EPA determined that under the specific circumstances of the Libby site, our response authority under section 104 of CERCLA is broad enough to address releases or threats of releases from asbestos containing material found inside structures at Libby, as well as releases or threats of releases from other sources of asbestos at the Libby site.

Section 104(i) of CERCLA outlines the Agency for Toxic Substances and Disease Registry's (ATSDR) health related authorities, including medical care and testing authorities in cases of a public health emergency. In a letter of June 20, 2003 from Dr. Julie Gerberding, Administrator of the ATSDR, to the Libby Community Advisory Group (attached), Dr. Gerberding addressed the scope of ATSDR's authority under CERCLA and stated that a Public Health Emergency declaration under CERCLA would not change ATSDR's planned activities at Libby.

In your letter, you also note that you have concerns about cleanup levels and economic development in Libby. EPA continues to take expedited action to reduce risks to the citizens of Libby. To date, our actions have resulted in the removal of asbestos contamination from 917 residential and commercial properties and more than 480,000 cubic yards of contaminated soil have been removed.

To make sure that our cleanup actions are protective over the long term, EPA is conducting additional toxicity studies to determine the risks specific to the amphibole asbestos found in Libby. Based on the results of these studies, EPA will select a final cleanup plan for Libby residential and commercial properties, tentatively scheduled for 2011. As the final cleanup plan is developed, EPA will work with the community and adopt policies and procedures that will protect human health and ensure that the remedy will be protective over the long term.

I understand that the final cleanup plan is critical to the economic revitalization of Libby and EPA will work with the town to facilitate redevelopment of contaminated properties. While EPA does not undertake redevelopment work for communities, EPA does work with communities to ensure that cleanup plans are consistent with reasonably anticipated future land use. EPA plans to work with the Libby community in this regard.

EPA shares your concerns for the well being of the citizens of Libby. EPA will continue to work closely with the community, ATSDR, the State, and local agencies to complete the final cleanup and to facilitate redevelopment at cleanup sites in Libby. I remain confident that such collaboration will result in long-term public health protection in Libby. I thank you for your interest in this site. Questions about EPA's activities and responsibilities can also be directed to Carol Rushin, Assistant Regional Administrator in EPA's Denver office. She can be reached at (303) 312-6976.

Sincerely,

Susan Parker Bodine

Susan Parker Bodine
Assistant Administrator

Enclosure

cc: Robbie Roberts, Regional Administrator, Region 8
Kerry Clough, Deputy Regional Administrator, Region 8
Carol Rushin, Assistant Regional Administrator, Region 8

DEPARTMENT OF HEALTH & HUMAN SERVICES **Public Health Service**

Agency for Toxic Substances and Disease Registry
Atlanta, GA 30333

JUN 20 2003

Mr. Clinton Maynard
Libby Community Advisory Group
1116 Louisiana Avenue
Libby, Montana 59923

Dear Mr. Maynard:

Secretary Thompson has asked me to thank you for your letter and to respond directly to you regarding community health concerns associated with exposure to asbestos in Libby, Montana.

I understand the seriousness of your concerns. Libby continues to be one of the most important environmental public health sites in our nation. During the past 3-1/2 years, public health, healthcare, and mental health agencies of the Department of Health and Human Services (HHS) have worked closely with the community, the Environmental Protection Agency (EPA), and state and local agencies to halt exposure to vermiculite contaminated with tremolite asbestos and to build health capacity at the local level.

The Agency for Toxic Substances and Disease Registry (ATSDR) has also worked proactively with the Health Resources and Services Administration (HRSA) to support community initiatives intended to improve access to healthcare services in Libby. Through a HRSA grant, a federally landed health clinic has been established in Libby. In addition, Lincoln County was recently awarded funds through a HRSA Rural Health Outreach Grant to identify and resolve remaining health issues in Libby. Though these initiatives, HHS has demonstrated its ongoing and long-term commitment to improving the health of Libby residents.

In your letter, you state that the government's response measures thus far are insufficient and request that HHS declare a "Public Health Emergency" as referenced in sections 104(i)(1)(D) and (B) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. 9604(i)(1)(D) and (E). These sections of CERCLA were originally enacted to provide immediate healthcare assistance in the event of an emergency situation to supplement local emergency healthcare services which might be unable to meet critical short-term healthcare needs. U.S. Public Health Service hospitals referenced in section 104(i)(1)(E) of CERCLA, which were originally intended to provide such care in the case of an emergency, were decommissioned in the mid-1980s. HHS lacks the resources or the statutory authority to provide long-term healthcare services under CERCLA or any other existing federal legislation. However, EMS agencies, particularly ATSDR, have been able to provide appropriate public health services in Libby and at other Superfund sites nationally. EMS agencies will continue to provide critical public health support to the Libby community. A "Public Health Emergency" declaration under CERCLA will not change the agency's planned activities, nor will it make additional funds available to ATSDR or HHS under existing appropriations. Therefore, no such declaration is being made at this time.

During the past 3 years, considerable progress has been made towards halting exposure to tremolite asbestos and improving the health of Libby residents. HHS agencies will continue to use appropriate public health resources and work closely with all of the community groups and state, federal, and local agencies that are involved. I remain confident that such collaboration will facilitate sustainable, long-term public health improvements in Libby.

Please feel free to contact the HHS Region VIII Office in Denver, Colorado, at (303) 844-6163 if you, members of the Libby Community Advisory Group, or other residents have any questions regarding HHS' public health activities or responsibilities in Libby. Questions about ATSDR's activities and responsibilities can also be directed to Mr. Dan Strausbaugh, ATSDR Regional Representative assigned to Libby, at (406) 457-5007. Once again, thank you for your interest in this important public health matter.

Sincerely,

Julie Louise Gerberding, M.D., M.P.H.
Administrator

cc:
U.S. Congressional Delegation, State of Montana
Governor Judy Martz, State of Montana

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 10 2008

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

Mr. Bill Patten
Community Advisory Group Member
St. John's Lutheran Hospital, Inc.
350 Louisiana Avenue
Libby, Montana 59923

Dear Mr. Patten:

Thank you for your September 11, 2008 letter to Administrator Stephen L. Johnson expressing concerns about the Libby Asbestos site in Lincoln County, Montana. Administrator Johnson has asked me to respond on his behalf. I want to assure you that Libby has been, and will continue to be, one of the highest priorities of the Superfund program. The Administrator and I certainly share your concerns for the well-being of the citizens of Libby.

In your letter, you requested that the U.S. Environmental Protection Agency (EPA) declare a Public Health Emergency at the Libby site. As we have previously stated, EPA determined that it was not necessary to declare a public health emergency for EPA to remove Libby amphibole asbestos and lower exposure to Libby amphibole asbestos throughout Libby. EPA has removed vermiculite insulation that may result in additional exposure to Libby and Troy residents, as well as asbestos in other residential, commercial, and recreational areas. We continue to take aggressive response actions at targeted properties in Libby and Troy. The scope and timing of EPA's cleanup actions would not be different if a Public Health Emergency had been declared. The declaration of a Public Health Emergency would not have provided EPA with any additional funding, nor would it authorize EPA to provide health care services.

EPA and ATSDR have been working in collaboration to evaluate the public health consequences of community exposures to Libby amphibole asbestos and other similar fibers from Libby, Montana since 1999. After each had visited Libby, Administrator Johnson and Secretary Leavitt discussed their shared desire to find more opportunities to help the Libby community. That shared interest, in turn, led to the development of ATSDR's $8 million Libby Amphibole Health Risk Initiative that was announced in June. The ATSDR Libby Amphibole Health Risk Initiative will support longer-term public health activities and research that will allow the public health community to better understand and manage the adverse health effects associated with exposure to Libby amphibole asbestos.

EPA is also supporting the Center for Asbestos Related Disease (CARD) clinic in Libby to help the CARD remain a critical platform to support future health related studies such as those

proposed under the ATSDR Initiative. EPA provided data entry staff and a nationally-recognized physician to work at the clinic to track, collect, and report human exposure data in connection to the epidemiological studies. EPA expects to continue to fund the CARD for these efforts through the next year. We understand that the ATSDR Initiative program will have the requirement for continuing working relationships with community organizations such as the CARD and St. John's Lutheran Hospital. EPA will also continue its community involvement efforts to address community public health concerns to the maximum extent possible.

To select final remedies that will provide long-term protection at the Libby site, EPA will complete a baseline risk assessment that includes exposure data and toxicity information. To ensure that EPA has all the information it needs to support a baseline risk assessment for Libby, in January 2007, EPA convened a group of more than 30 scientists from EPA, the Agency for Toxic Substances and Disease Registry (ATSDR) and the National Toxicology Program to identify data gaps and recommend additional studies. Based on the recommendations developed from the January 2007 meeting, the Agency has identified and is implementing a comprehensive program ("Libby Toxicity Assessment Action Plan") of 12 studies to support the development of the Libby toxicity assessment and four studies that support important Libby exposure assessment analytical needs. These studies are expected to take two more years to complete.

To develop additional information about potential exposure to amphibole asbestos, EPA expanded the boundary area for the Libby Outdoor Ambient Air Sampling Program. This program has been completed and a final report summarizing the results will be finished by December 2008. EPA has also conducted a series of Indoor and Outdoor Activity Based Sampling (ABS) studies on residential properties. The Activity Based Sampling is designed to evaluate the effectiveness of EPA's current property cleanup program, and will also provide asbestos exposure data needed for a complete baseline risk assessment. The first phase of the data collection for the Libby ABS studies on residential properties has been completed and we expect a final report in 2009.

A schedule for Records of Decision (RODs) at Libby is largely dependent on progress made on the exposure assessment and toxicity assessment work. However, we anticipate that RODs may be completed in a shorter timeframe at some of the former processing areas. If exposure pathways have been completely addressed, EPA's tentative schedule will address seven site areas (operable units) between 2009 and 2011. In the meantime, response actions at the site will continue and exposure assessment work will be completed.

As of September 30, 2008, EPA conducted clean up actions at a total of 1059 properties, and removed 590,000 cubic yards of material. EPA has conducted emergency removal actions at the Libby High School, the Libby Middle School, the Libby Administration Building, and the Plummer Elementary School grounds. Removal actions were taken at two former vermiculite processing facilities. EPA also addressed asbestos contamination at the vermiculite mine road and disposal areas, and removed contaminated material from community ball fields and has conducted sampling of area residences. EPA is also conducting cleanup activities in Troy, Montana, including a removal action at Troy High School. Removal actions will continue as needed to address immediate risks before the final remedies are selected and carried out at Libby.

To determine the extent of contamination in Libby from amphibole asbestos, EPA established a program to inspect all properties. To date, EPA or the Montana Department of Environmental Quality have screened through the Contaminant Screening Study (CSS) more than 4000 properties in Libby and through the Troy Asbestos Property Evaluation (TAPE) plan to screen more than 1200 properties in Troy for the presence of asbestos-containing materials. EPA also has collected additional remedial investigation data from the Export Plant and the former Stimson Lumber Mill.

Ongoing Remedial Investigations have discovered that portions of riprap used to stabilize the banks of at least three local creeks were quarried from a syenite formation at the former vermiculite mine. Field inspections and sampling conducted in 2007 identified Libby amphibole asbestos-bearing rocks in Flower Creek, Granite Creek, and Callahan Creek. Removal work began on the three creeks in August 2008 and should be completed by the beginning of November 2008.

Beginning in October 2006, EPA implemented the Environmental Resource Specialist (ERS) program for the entire site. This program was set up to assist with unplanned and urgent exposures to vermiculite attic insulation and Libby amphibole asbestos. The ERS program provides a full-time service where property owners, firemen, and other affected personnel or citizens can obtain access to Libby amphibole asbestos expertise outside of the normal course of scheduled clean-up actions. To date, EPA has assisted with more than 170 calls requesting assistance. Through this program, EPA has: 1) directly assisted the Fire Department in understanding Libby amphibole asbestos which helped them successfully obtain a $250,000 grant for an additional set of turnout gear, a commercial washer and dryer, and a complete decontamination trailer; 2) provided 40 hour hazardous substance and 40 hour Asbestos Contractor/Supervisor training courses for local contractors and community members; and 3) excavated soils contaminated with Libby amphibole asbestos to prepare the area for the new City Pavilion being constructed on the site of the former Export Plant.

In 2008, EPA issued a $20,000 Brownfields Program grant to assist in redevelopment efforts for the Stimson Lumber Site. EPA is working in partnership with the Economic Development Authority, the Montana Department of Commerce and the citizens of Libby to revitalize the site. The goal of the project is to develop a strategy and market infrastructure that will make it easy for industry, businesses, and consumers to reduce the waste they generate, acquire and use recycled materials, and purchase products containing recycled materials. Potential projects at the site range from a co-generation facility, a small diameter Hew Saw mill, a pellet plant, the production of bio bricks, bio fuel production, and a wood to ethanol plant.

This summer, W.R. Grace paid EPA $250 million, the highest sum in the history of the Superfund program, to pay the Federal government for the costs of the investigation and cleanup of asbestos contamination in Libby. The settlement was approved by the Federal Court on June 2, 2008. The W.R. Grace Settlement money must be used for expenditures related only to cleanup the Libby Asbestos Superfund Site, such as paying for future cleanup work, helping with the Operations and Maintenance (O&M) of the remedy, and paying for future site-specific investigations.

EPA has made every effort to be as transparent and informative as possible in our ongoing investigations and response actions with the Libby community. EPA maintains an information office in the town of Libby which is open to the public, and maintains a hotline and responds immediately to emergency releases of Libby amphibole. EPA regularly meets with your Community Advisory Group and meeting notes are posted on the Libby website. EPA also meets regularly with a number of other community groups including county and city elected officials, Technical Assistance Grant recipients, the Asbestos Related Disease Network, the Montana State Department of Health and local public health providers.

I believe that the efforts I have outlined above demonstrate EPA's strong commitment to fulfilling EPA's cleanup mission on behalf of the citizens of Libby. EPA will continue to work with the Community Advisory Group and other Libby stakeholders to expeditiously complete the necessary cleanup work. Thank you for your strong interest in and support of this effort. If you have further questions, please contact me.

Sincerely,

Susan Parker Bodine
Assistant Administrator

cc: Howard Frumpkin, Director of the National Center for Environmental Health/ATSDR

From: Carol Campbell
To: tmorris@hrsa.gov
Subject: Fw: Libby Announcement
Date: 06/17/2009 03 00 PM

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you should be able to link to most of what you need from here- there is quite a bit from ATSDR

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 06/17/2009 12:58 PM -----

Dave Christenson/R8/USEPA/US

06/17/2009 12:54 PM

To Carol Campbell/R8/USEPA/US@EPA

cc Al Lange/EPR/R8/USEPA/US@EPA, Andrew Schmidt/R8/USEPA/US@EPA, Armando Saenz/EPR/R8/USEPA/US@EPA, Ayn Schmit/EPR/R8/USEPA/US@EPA, Barbara Benoy/EPR/R8/USEPA/US@EPA, Barbara Nelson/EPR/R8/USEPA/US@EPA, Barbara Thomas/R8/USEPA/US@EPA, Bernadette Gonzalez/R8/USEPA/US@EPA, Bert Garcia/EPR/R8/USEPA/US@EPA, Betty Pennock/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Bobbie Fernandez/R8/USEPA/US@EPA, Bonita Lavelle/EPR/R8/USEPA/US@EPA, Bradley Miller/EPR/R8/USEPA/US@EPA, Brent Truskowski/EPR/R8/USEPA/US@EPA, Brian Caruso/EPR/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Russell/EPR/R8/USEPA/US@EPA, Charles Partridge/R8/USEPA/US@EPA, Charlotte Schuster/EPR/R8/USEPA/US@EPA, Christina Progess/EPR/R8/USEPA/US@EPA, Christina Wilson/EPR/R8/USEPA/US@EPA, Cinna Vallejos/EPR/R8/USEPA/US@EPA, Connie Collins/R8/USEPA/US@EPA, Craig Myers/EPR/R8/USEPA/US@EPA, Curtis Kimbel/EPR/R8/USEPA/US@EPA, Dan Wall/EPR/R8/USEPA/US@EPA, Dana Allen/EPR/R8/USEPA/US@EPA, Daniel Heffernan/EPR/R8/USEPA/US@EPA, Darcy Campbell/EPR/R8/USEPA/US@EPA, Dave Christenson/EPR/R8/USEPA/US@EPA, Dave Moon/EPR/R8/USEPA/US@EPA, David Lennon/R8/USEPA/US@EPA, David Ostrander/EPR/R8/USEPA/US@EPA, David Rathke/EPR/R8/USEPA/US@EPA, David Romero/EPR/R8/USEPA/US@EPA, Deirdre Rothery/R8/USEPA/US@EPA, Delores Hutchens/EPR/R8/USEPA/US@EPA, Delores Soriano/R8/USEPA/US@EPA, Dianna Lim/EPR/R8/USEPA/US@EPA, Donald Goodrich/R8/USEPA/US@EPA, Duc Nguyen/EPR/R8/USEPA/US@EPA, Elisabeth Evans/R8/USEPA/US@EPA, Eric Steinhaus/EPR/R8/USEPA/US@EPA, Erna Waterman/P2/R8/USEPA/US@EPA, FRANCES COSTANZI/R8/USEPA/US@EPA, Frances MacDonald/R8/USEPA/US@EPA, Gary Kleeman/EPR/R8/USEPA/US@EPA, George Parrish/EPR/R8/USEPA/US@EPA, George Ritz/R8/USEPA/US@EPA, Gina Andrews/R8/USEPA/US, Glenn Ford/EPR/R8/USEPA/US@EPA, Greg Hargreaves/EPR/R8/USEPA/US@EPA, Gregory Oberley/EPR/R8/USEPA/US@EPA, Gwen Christiansen/R8/USEPA/US@EPA, Hays Griswold/EPR/R8/USEPA/US@EPA, Helen Dawson/R8/USEPA/US@EPA, Jack Whyte/R8/USEPA/US@EPA, James Hanley/EPR/R8/USEPA/US@EPA, James Ruppel/EPR/R8/USEPA/US@EPA, Jean MacKenzie/EPR/R8/USEPA/US@EPA, Jerry Blank/R8/USEPA/US@EPA, Jill Minter/EPR/R8/USEPA/US@EPA, Jim Berkley/EPR/R8/USEPA/US@EPA, Jim Kiefer/EPR/R8/USEPA/US@EPA, Jim Luey/EPR/R8/USEPA/US@EPA, Jim Peterson/R8/USEPA/US@EPA, Jodi Powell/EPR/R8/USEPA/US@EPA, Jody Ostendorf/R8/USEPA/US@EPA, Johanna Miller/EPR/R8/USEPA/US@EPA, John DiPentino/R8/USEPA/US@EPA, John Goodrick/R8/USEPA/US@EPA, John Marshall/EPR/R8/USEPA/US@EPA, John Wieber/R8/USEPA/US@EPA, Joni Sandoval/EPR/R8/USEPA/US@EPA, Joseph Byron/EPR/R8/USEPA/US@EPA, Joyce Ackerman/EPR/R8/USEPA/US@EPA, Joyel Dhieux/R8/USEPA/US@EPA, Judy Hansen/R8/USEPA/US@EPA, Judy Roos/R8/USEPA/US@EPA, Julia McCarthy/R8/USEPA/US@EPA, Julie Kinsey/R8/USEPA/US@EPA, Karen Hamilton/EPR/R8/USEPA/US@EPA, Karen Reed/EPR/R8/USEPA/US@EPA, Karl Hermann/R8/USEPA/US@EPA, Karren Johnson/EPR/R8/USEPA/US@EPA, Kathie Atencio/EPR/R8/USEPA/US@EPA, Kathleen Graham/R8/USEPA/US@EPA, Kathryn Hernandez/EPR/R8/USEPA/US@EPA, Ken Wangerud/EPR/R8/USEPA/US@EPA, Kerry Guy/EPR/R8/USEPA/US@EPA, Kris Jensen/EPR/R8/USEPA/US@EPA, Lareina Guenzel/R8/USEPA/US@EPA, Larry Svoboda/EPR/R8/USEPA/US@EPA, Laura Williams/EPR/R8/USEPA/US@EPA, Lewis Daniels/EPR/R8/USEPA/US@EPA, Linda Armer/EPR/R8/USEPA/US@EPA, Lisa Lloyd/EPR/R8/USEPA/US@EPA, Liz Rogers/R8/USEPA/US@EPA, Lourdes Deppmeier/R8/USEPA/US@EPA, Luke Chavez/EPR/R8/USEPA/US@EPA, Mandi Rodriguez/EPR/R8/USEPA/US@EPA, Maple Barnard/R8/USEPA/US@EPA, Marcella Hutchinson/EPR/R8/USEPA/US@EPA, Mario Robles/EPR/R8/USEPA/US@EPA, Mark Aguilar/EPR/R8/USEPA/US@EPA, Martin Hestmark/R8/USEPA/US@EPA, Martin Mccomb/EPR/R8/USEPA/US@EPA, Mary Goldade/R8/USEPA/US@EPA, Melanie Wasco/R8/USEPA/US@EPA, Melissa Payan/EPR/R8/USEPA/US@EPA, Michael Holmes/EPR/R8/USEPA/US@EPA, Mike Cirian/R8/USEPA/US@EPA, Mike Wireman/EPR/R8/USEPA/US@EPA, Mike Zimmerman/EPR/R8/USEPA/US@EPA, Mitra Jha/EPR/R8/USEPA/US@EPA, Molly Brodin/R8/USEPA/US@EPA, Nghia Pham/EPR/R8/USEPA/US@EPA, Pam Dougherty/EPR/R8/USEPA/US@EPA, Patricia Gamroth/R8/USEPA/US@EPA, Patricia Smith/EPR/R8/USEPA/US@EPA, Paul Peronard/EPR/R8/USEPA/US@EPA, Paula Cifka/EPR/R8/USEPA/US@EPA, Paula Schmittdiel/EPR/R8/USEPA/US@EPA, Peggy Crandell/R8/USEPA/US@EPA, Penney Trujillo/EPR/R8/USEPA/US@EPA, Peter Ismert/EPR/R8/USEPA/US@EPA, Peter Monahan/EPR/R8/USEPA/US@EPA, Peter Stevenson/EPR/R8/USEPA/US@EPA, Phillip Werner/R8/USEPA/US@EPA, Rebecca Thomas/EPR/R8/USEPA/US@EPA, Richard Clark/R8/USEPA/US@EPA, Rickie McCall/R8/USEPA/US@EPA, Rob Stites/EPR/R8/USEPA/US@EPA, Robert Edgar/EPR/R8/USEPA/US@EPA, Robin Coursen/R8/USEPA/US@EPA, Robyn Blackburn/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Sabrina Forrest/R8/USEPA/US@EPA, Sam Garcia/EPR/R8/USEPA/US@EPA, Sandra Bourgeois/EPR/R8/USEPA/US@EPA, Sandra Spence/EPR/R8/USEPA/US@EPA, Sarah Fowler/EPR/R8/USEPA/US@EPA, Sarah Hester/R8/USEPA/US@EPA, Stacey Eriksen/EPR/R8/USEPA/US@EPA, Stanley Christensen/EPR/R8/USEPA/US@EPA, Steven Bubnick/R8/USEPA/US@EPA, Steven Merritt/R8/USEPA/US@EPA, Steven Way/EPR/R8/USEPA/US@EPA, Susan Griffin/EPR/R8/USEPA/US@EPA, Ted Lanzano/EPR/R8/USEPA/US, Terry Anderson/EPR/R8/USEPA/US@EPA, Tien Nguyen/EPR/R8/USEPA/US@EPA, Timothy Rehder/EPR/R8/USEPA/US@EPA, Tom Johnson/EPR/R8/USEPA/US@EPA, Toney Ott/EPR/R8/USEPA/US@EPA, Tony Ranalli/R8/USEPA/US@EPA, Tony Selle/EPR/R8/USEPA/US@EPA, Tonya Fish/R8/USEPA/US@EPA, Vance.Sam@EPA.GOV, Vera Moritz/EPR/R8/USEPA/US@EPA, Vern Berry/EPR/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA, Wendy OBrien/EPR/R8/USEPA/US@EPA, Wes Wilson/EPR/R8/USEPA/US@EPA

Subject Re: Libby Announcement

History is what gets written down, these days what's on the internet. The EPA press release for the Public Health Emergency Declaration is here:
http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceeac8525735900400c27/0d16234d252c98f9852575d8005e63ac!OpenDocument

With the straight forward link <http://epa.gov/libby> now going to the Libby Superfund home page.

(In case you wanted to know more . . .)

▼ Carol Campbell/R8/USEPA/US

Carol Campbell/R8/USEPA/US
Sent by: Penney Trujillo

06/17/2009 11:34 AM

To Al Lange/EPR/R8/USEPA/US@EPA, Andrew Schmidt/R8/USEPA/US@EPA, Armando Saenz/EPR/R8/USEPA/US@EPA, Ayn Schmit/EPR/R8/USEPA/US@EPA, Barbara Benoy/EPR/R8/USEPA/US@EPA, Barbara Nelson/EPR/R8/USEPA/US@EPA, Barbara Thomas/R8/USEPA/US@EPA, Bernadette Gonzalez/R8/USEPA/US@EPA, Bert Garcia/EPR/R8/USEPA/US@EPA, Betty Pennock/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Bobbie Fernandez/R8/USEPA/US@EPA, Bonita Lavelle/EPR/R8/USEPA/US@EPA, Bradley Miller/EPR/R8/USEPA/US@EPA, Brent Truskowski/EPR/R8/USEPA/US@EPA, Brian Caruso/EPR/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Russell/EPR/R8/USEPA/US@EPA, Charles Partridge/R8/USEPA/US@EPA, Charlotte Schuster/EPR/R8/USEPA/US@EPA, Christina Progess/EPR/R8/USEPA/US@EPA, Christina Wilson/EPR/R8/USEPA/US@EPA, Cinna Vallejos/EPR/R8/USEPA/US@EPA, Connie Collins/R8/USEPA/US@EPA, Craig Myers/EPR/R8/USEPA/US@EPA, Curtis Kimbel/EPR/R8/USEPA/US@EPA, Dan Wall/EPR/R8/USEPA/US@EPA, Dana Allen/EPR/R8/USEPA/US@EPA, Daniel Heffernan/EPR/R8/USEPA/US@EPA, Darcy Campbell/EPR/R8/USEPA/US@EPA, Dave Christenson/EPR/R8/USEPA/US@EPA, Dave Moon/EPR/R8/USEPA/US@EPA, David Lennon/R8/USEPA/US@EPA, David Ostrander/EPR/R8/USEPA/US@EPA, David Rathke/EPR/R8/USEPA/US@EPA, David Romero/EPR/R8/USEPA/US@EPA, Deirdre Rothery/R8/USEPA/US@EPA, Delores Hutchens/EPR/R8/USEPA/US@EPA, Delores Soriano/R8/USEPA/US@EPA, Dianna Lim/EPR/R8/USEPA/US@EPA, Donald Goodrich/R8/USEPA/US@EPA, Duc Nguyen/EPR/R8/USEPA/US@EPA, Elisabeth Evans/R8/USEPA/US@EPA, Eric Steinhaus/EPR/R8/USEPA/US@EPA, Erna Waterman/P2/R8/USEPA/US@EPA, FRANCES COSTANZI/R8/USEPA/US@EPA, Frances MacDonald/R8/USEPA/US@EPA, Gary Kleeman/EPR/R8/USEPA/US@EPA, George Parrish/EPR/R8/USEPA/US@EPA, George Ritz/R8/USEPA/US@EPA, Gina Andrews/R8/USEPA/US, Glenn Ford/EPR/R8/USEPA/US@EPA, Greg Hargreaves/EPR/R8/USEPA/US@EPA, Gregory Oberley/EPR/R8/USEPA/US@EPA, Gwen Christiansen/R8/USEPA/US@EPA, Hays Griswold/EPR/R8/USEPA/US@EPA, Helen Dawson/R8/USEPA/US@EPA, Jack Whyte/R8/USEPA/US@EPA, James Hanley/EPR/R8/USEPA/US@EPA, James Ruppel/EPR/R8/USEPA/US@EPA, Jean MacKenzie/EPR/R8/USEPA/US@EPA, Jerry Blank/R8/USEPA/US@EPA, Jill Minter/EPR/R8/USEPA/US@EPA, Jim Berkley/EPR/R8/USEPA/US@EPA, Jim Kiefer/EPR/R8/USEPA/US@EPA, Jim Luey/EPR/R8/USEPA/US@EPA, Jim Peterson/R8/USEPA/US@EPA, Jodi Powell/EPR/R8/USEPA/US@EPA, Jody Ostendorf/R8/USEPA/US@EPA, Johanna Miller/EPR/R8/USEPA/US@EPA, John DiPentino/R8/USEPA/US@EPA, John Goodrick/R8/USEPA/US@EPA, John Marshall/EPR/R8/USEPA/US@EPA, John Wieber/R8/USEPA/US@EPA, Joni Sandoval/EPR/R8/USEPA/US@EPA, Joseph Byron/EPR/R8/USEPA/US@EPA, Joyce Ackerman/EPR/R8/USEPA/US@EPA, Joyel Dhieux/R8/USEPA/US@EPA, Judy Hansen/R8/USEPA/US@EPA, Judy Roos/R8/USEPA/US@EPA, Julia McCarthy/R8/USEPA/US@EPA, Julie Kinsey/R8/USEPA/US@EPA, Karen Hamilton/EPR/R8/USEPA/US@EPA, Karen Reed/EPR/R8/USEPA/US@EPA, Karl Hermann/R8/USEPA/US@EPA, Karren Johnson/EPR/R8/USEPA/US@EPA, Kathie Atencio/EPR/R8/USEPA/US@EPA, Kathleen Graham/R8/USEPA/US@EPA, Kathryn Hernandez/EPR/R8/USEPA/US@EPA, Ken Wangerud/EPR/R8/USEPA/US@EPA, Kerry Guy/EPR/R8/USEPA/US@EPA, Kris Jensen/EPR/R8/USEPA/US@EPA, Lareina Guenzel/R8/USEPA/US@EPA, Larry Svoboda/EPR/R8/USEPA/US@EPA, Laura Williams/EPR/R8/USEPA/US@EPA, Lewis Daniels/EPR/R8/USEPA/US@EPA, Linda Armer/EPR/R8/USEPA/US@EPA, Lisa Lloyd/EPR/R8/USEPA/US@EPA, Liz Rogers/R8/USEPA/US@EPA, Lourdes Deppmeier/R8/USEPA/US@EPA, Luke Chavez/EPR/R8/USEPA/US@EPA, Mandi Rodriguez/EPR/R8/USEPA/US@EPA, Maple Barnard/R8/USEPA/US@EPA, Marcella Hutchinson/EPR/R8/USEPA/US@EPA, Mario Robles/EPR/R8/USEPA/US@EPA, Mark Aguilar/EPR/R8/USEPA/US@EPA, Martin Hestmark/R8/USEPA/US@EPA, Martin Mccomb/EPR/R8/USEPA/US@EPA, Mary Goldade/R8/USEPA/US@EPA, Melanie Wasco/R8/USEPA/US@EPA, Melissa Payan/EPR/R8/USEPA/US@EPA, Michael Holmes/EPR/R8/USEPA/US@EPA, Mike Cirian/R8/USEPA/US@EPA, Mike Wireman/EPR/R8/USEPA/US@EPA, Mike Zimmerman/EPR/R8/USEPA/US@EPA, Mitra Jha/EPR/R8/USEPA/US@EPA, Molly Brodin/R8/USEPA/US@EPA, Nghia Pham/EPR/R8/USEPA/US@EPA, Pam Dougherty/EPR/R8/USEPA/US@EPA, Patricia Gamroth/R8/USEPA/US@EPA, Patricia Smith/EPR/R8/USEPA/US@EPA, Paul Peronard/EPR/R8/USEPA/US@EPA, Paula Cifka/EPR/R8/USEPA/US@EPA, Paula Schmittdiel/EPR/R8/USEPA/US@EPA, Peggy Crandell/R8/USEPA/US@EPA, Penney Trujillo/EPR/R8/USEPA/US@EPA, Peter Ismert/EPR/R8/USEPA/US@EPA, Peter Monahan/EPR/R8/USEPA/US@EPA, Peter Stevenson/EPR/R8/USEPA/US@EPA, Phillip Werner/R8/USEPA/US@EPA, Rebecca Thomas/EPR/R8/USEPA/US@EPA, Richard Clark/R8/USEPA/US@EPA, Rickie McCall/R8/USEPA/US@EPA, Rob Stites/EPR/R8/USEPA/US@EPA, Robert Edgar/EPR/R8/USEPA/US@EPA, Robin Coursen/R8/USEPA/US@EPA, Robyn Blackburn/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Sabrina Forrest/R8/USEPA/US@EPA, Sam Garcia/EPR/R8/USEPA/US@EPA, Sandra Bourgeois/EPR/R8/USEPA/US@EPA, Sandra Spence/EPR/R8/USEPA/US@EPA, Sarah Fowler/EPR/R8/USEPA/US@EPA, Sarah Hester/R8/USEPA/US@EPA, Stacey Eriksen/EPR/R8/USEPA/US@EPA, Stanley Christensen/EPR/R8/USEPA/US@EPA, Steven 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cc

Subject Libby Announcement

To All Staff

This is a historic day. The first Public Health Emergency ever declared by EPA will be announced today at 11:20 our time by Administrator Jackson. Health and Human Services will be providing Health Care to Libby citizens affected by asbestos. I want to personally thank all of the staff and managers in EPR that have been involved in this site for their hard work under often trying conditions. We will continue to move aggressively to clean up the Libby and Tryoy communities and protect the health of the people.

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

From: Carol Campbell
To: Sierra.Eddie@epamail.epa.gov; Ward.Robert@epamail.epa.gov
Cc: Sharon Kercher
Subject: Fw: Libby Announcement
Date: 06/17/2009 02:02 PM

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you may want to send something out too. cc
Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 06/17/2009 12:00 PM -----

Carol Campbell/R8/USEPA/US
Sent by: Penney Trujillo

06/17/2009 11:34 AM

To Al Lange/EPR/R8/USEPA/US@EPA, Andrew Schmidt/R8/USEPA/US@EPA, Armando Saenz/EPR/R8/USEPA/US@EPA, Ayn Schmit/EPR/R8/USEPA/US@EPA, Barbara Benoy/EPR/R8/USEPA/US@EPA, Barbara Nelson/EPR/R8/USEPA/US@EPA, Barbara Thomas/R8/USEPA/US@EPA, Bernadette Gonzalez/R8/USEPA/US@EPA, Bert Garcia/EPR/R8/USEPA/US@EPA, Betty Pennock/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Bobbie Fernandez/R8/USEPA/US@EPA, Bonita Lavelle/EPR/R8/USEPA/US@EPA, Bradley Miller/EPR/R8/USEPA/US@EPA, Brent Truskowski/EPR/R8/USEPA/US@EPA, Brian Caruso/EPR/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Russell/EPR/R8/USEPA/US@EPA, Charles Partridge/R8/USEPA/US@EPA, Charlotte Schuster/EPR/R8/USEPA/US@EPA, Christina Progess/EPR/R8/USEPA/US@EPA, Christina Wilson/EPR/R8/USEPA/US@EPA, Cinna Vallejos/EPR/R8/USEPA/US@EPA, Connie Collins/R8/USEPA/US@EPA, Craig Myers/EPR/R8/USEPA/US@EPA, Curtis Kimbel/EPR/R8/USEPA/US@EPA, Dan Wall/EPR/R8/USEPA/US@EPA, Dana Allen/EPR/R8/USEPA/US@EPA, Daniel Heffernan/EPR/R8/USEPA/US@EPA, Darcy Campbell/EPR/R8/USEPA/US@EPA, Dave Christenson/EPR/R8/USEPA/US@EPA, Dave Moon/EPR/R8/USEPA/US@EPA, David Lennon/R8/USEPA/US@EPA, David Ostrander/EPR/R8/USEPA/US@EPA, David Rathke/EPR/R8/USEPA/US@EPA, David Romero/EPR/R8/USEPA/US@EPA, Deirdre Rothery/R8/USEPA/US@EPA, Delores Hutchens/EPR/R8/USEPA/US@EPA, Delores Soriano/R8/USEPA/US@EPA, Dianna Lim/EPR/R8/USEPA/US@EPA, Donald Goodrich/R8/USEPA/US@EPA, Duc Nguyen/EPR/R8/USEPA/US@EPA, Elisabeth Evans/R8/USEPA/US@EPA, Eric Steinhaus/EPR/R8/USEPA/US@EPA, Erna Waterman/P2/R8/USEPA/US@EPA, FRANCES COSTANZI/R8/USEPA/US@EPA, Frances MacDonald/R8/USEPA/US@EPA, Gary Kleeman/EPR/R8/USEPA/US@EPA, George Parrish/EPR/R8/USEPA/US@EPA, George

Ritz/R8/USEPA/US@EPA, Gina
Andrews/R8/USEPA/US, Glenn
Ford/EPR/R8/USEPA/US@EPA, Greg
Hargreaves/EPR/R8/USEPA/US@EPA, Gregory
Oberley/EPR/R8/USEPA/US@EPA, Gwen
Christiansen/R8/USEPA/US@EPA, Hays
Griswold/EPR/R8/USEPA/US@EPA, Helen
Dawson/R8/USEPA/US@EPA, Jack
Whyte/R8/USEPA/US@EPA, James
Hanley/EPR/R8/USEPA/US@EPA, James
Ruppel/EPR/R8/USEPA/US@EPA, Jean
MacKenzie/EPR/R8/USEPA/US@EPA, Jerry
Blank/R8/USEPA/US@EPA, Jill
Minter/EPR/R8/USEPA/US@EPA, Jim
Berkley/EPR/R8/USEPA/US@EPA, Jim
Kiefer/EPR/R8/USEPA/US@EPA, Jim
Luey/EPR/R8/USEPA/US@EPA, Jim
Peterson/R8/USEPA/US@EPA, Jodi
Powell/EPR/R8/USEPA/US@EPA, Jody
Ostendorf/R8/USEPA/US@EPA, Johanna
Miller/EPR/R8/USEPA/US@EPA, John
DiPentino/R8/USEPA/US@EPA, John
Goodrick/R8/USEPA/US@EPA, John
Marshall/EPR/R8/USEPA/US@EPA, John
Wieber/R8/USEPA/US@EPA, Joni
Sandoval/EPR/R8/USEPA/US@EPA, Joseph
Byron/EPR/R8/USEPA/US@EPA, Joyce
Ackerman/EPR/R8/USEPA/US@EPA, Joyel
Dhieux/R8/USEPA/US@EPA, Judy
Hansen/R8/USEPA/US@EPA, Judy
Roos/R8/USEPA/US@EPA, Julia
McCarthy/R8/USEPA/US@EPA, Julie
Kinsey/R8/USEPA/US@EPA, Karen
Hamilton/EPR/R8/USEPA/US@EPA, Karen
Reed/EPR/R8/USEPA/US@EPA, Karl
Hermann/R8/USEPA/US@EPA, Karren
Johnson/EPR/R8/USEPA/US@EPA, Kathie
Atencio/EPR/R8/USEPA/US@EPA, Kathleen
Graham/R8/USEPA/US@EPA, Kathryn
Hernandez/EPR/R8/USEPA/US@EPA, Ken
Wangerud/EPR/R8/USEPA/US@EPA, Kerry
Guy/EPR/R8/USEPA/US@EPA, Kris
Jensen/EPR/R8/USEPA/US@EPA, Lareina
Guenzel/R8/USEPA/US@EPA, Larry
Svoboda/EPR/R8/USEPA/US@EPA, Laura
Williams/EPR/R8/USEPA/US@EPA, Lewis
Daniels/EPR/R8/USEPA/US@EPA, Linda
Armer/EPR/R8/USEPA/US@EPA, Lisa
Lloyd/EPR/R8/USEPA/US@EPA, Liz
Rogers/R8/USEPA/US@EPA, Lourdes
Deppmeier/R8/USEPA/US@EPA, Luke
Chavez/EPR/R8/USEPA/US@EPA, Mandi
Rodriguez/EPR/R8/USEPA/US@EPA, Maple
Barnard/R8/USEPA/US@EPA, Marcella
Hutchinson/EPR/R8/USEPA/US@EPA, Mario
Robles/EPR/R8/USEPA/US@EPA, Mark
Aguilar/EPR/R8/USEPA/US@EPA, Martin
Hestmark/R8/USEPA/US@EPA, Martin
Mccomb/EPR/R8/USEPA/US@EPA, Mary
Goldade/R8/USEPA/US@EPA, Melanie
Wasco/R8/USEPA/US@EPA, Melissa
Payan/EPR/R8/USEPA/US@EPA, Michael
Holmes/EPR/R8/USEPA/US@EPA, Mike
Cirian/R8/USEPA/US@EPA, Mike
Wireman/EPR/R8/USEPA/US@EPA, Mike
Zimmerman/EPR/R8/USEPA/US@EPA, Mitra
Jha/EPR/R8/USEPA/US@EPA, Molly
Brodin/R8/USEPA/US@EPA, Nghia
Pham/EPR/R8/USEPA/US@EPA, Pam
Dougherty/EPR/R8/USEPA/US@EPA, Patricia

Gamroth/R8/USEPA/US@EPA, Patricia
Smith/EPR/R8/USEPA/US@EPA, Paul
Peronard/EPR/R8/USEPA/US@EPA, Paula
Cifka/EPR/R8/USEPA/US@EPA, Paula
Schmittdiel/EPR/R8/USEPA/US@EPA, Peggy
Crandell/R8/USEPA/US@EPA, Penney
Trujillo/EPR/R8/USEPA/US@EPA, Peter
Ismert/EPR/R8/USEPA/US@EPA, Peter
Monahan/EPR/R8/USEPA/US@EPA, Peter
Stevenson/EPR/R8/USEPA/US@EPA, Phillip
Werner/R8/USEPA/US@EPA, Rebecca
Thomas/EPR/R8/USEPA/US@EPA, Richard
Clark/R8/USEPA/US@EPA, Rickie
McCall/R8/USEPA/US@EPA, Rob
Stites/EPR/R8/USEPA/US@EPA, Robert
Edgar/EPR/R8/USEPA/US@EPA, Robin
Coursen/R8/USEPA/US@EPA, Robyn
Blackburn/R8/USEPA/US@EPA, Russell
Leclerc/EPR/R8/USEPA/US@EPA, Sabrina
Forrest/R8/USEPA/US@EPA, Sam
Garcia/EPR/R8/USEPA/US@EPA, Sandra
Bourgeois/EPR/R8/USEPA/US@EPA, Sandra
Spence/EPR/R8/USEPA/US@EPA, Sarah
Fowler/EPR/R8/USEPA/US@EPA, Sarah
Hester/R8/USEPA/US@EPA, Stacey
Eriksen/EPR/R8/USEPA/US@EPA, Stanley
Christensen/EPR/R8/USEPA/US@EPA, Steven
Bubnick/R8/USEPA/US@EPA, Steven
Merritt/R8/USEPA/US@EPA, Steven
Way/EPR/R8/USEPA/US@EPA, Susan
Griffin/EPR/R8/USEPA/US@EPA, Ted
Lanzano/EPR/R8/USEPA/US, Terry
Anderson/EPR/R8/USEPA/US@EPA, Tien
Nguyen/EPR/R8/USEPA/US@EPA, Timothy
Rehder/EPR/R8/USEPA/US@EPA, Tom
Johnson/EPR/R8/USEPA/US@EPA, Toney
Ott/EPR/R8/USEPA/US@EPA, Tony
Ranalli/R8/USEPA/US@EPA, Tony
Selle/EPR/R8/USEPA/US@EPA, Tonya
Fish/R8/USEPA/US@EPA,
Vance.Sam@EPA.GOV@EPA, Vera
Moritz/EPR/R8/USEPA/US@EPA, Vern
Berry/EPR/R8/USEPA/US@EPA, Victor
Ketellapper/EPR/R8/USEPA/US@EPA, Wendy
OBrien/EPR/R8/USEPA/US@EPA, Wes
Wilson/EPR/R8/USEPA/US@EPA

cc

Subject Libby Announcement

To All Staff

This is a historic day. The first Public Health Emergency ever declared by EPA will be announced today at 11:20 our time by Administrator Jackson. Health and Human Services will be providing Health Care to Libby citizens affected by asbestos. I want to personally thank all of the staff and managers in EPR that have been involved in this site for their hard work under often trying conditions. We will continue to move aggressively to clean up the Libby and Troy communities and protect the health of the people.

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation

303-312-6340 (W)
303-312-6071(fax)

From:	James Woolford
To:	Ellyn Fine
Subject:	Fw: Libby Correspondence
Date:	02/02/2009 05:32 PM
Attachments:	Libby_Boxer Baucus Response to May 2007 Letter.pdf Libby_Boxer Response_June_2007.pdf Libby_Baucus Incoming_July 2007.pdf Libby_Baucus Response_Aug 2007.pdf Libby_Hall Incoming_August 2007.pdf Libby_Hall Response_Sept 2007.pdf Libby_Baucus Incoming_March 2008.pdf Libby_Baucus Outgoing_April 2008.pdf Libby_Baucus Incoming_April 2008.pdf Libby_Baucus Outgoing_May 2008.pdf Libby_Black Patten Incoming_Nov 2007.pdf

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James E. Woolford, Director
Office of Superfund Remediation &
Technology Innovation (OSRTI)
Office of Solid Waste and Emergency Response
US Environmental Protection Agency

Mailing Address:
1200 Pennsylvania Avenue, NW
Mail Code: 5201P
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Physical Address:
Room 5622
2777 Crystal Drive South (Potomac Yard South)
Arlington, VA 22202

Phone:
(O) 703 603-8960 (secretary)
(D) 703-603-8722
(F) 703 603-9146

OSRTI Web Site: http://www.epa.gov/superfund

----- Forwarded by James Woolford/DC/USEPA/US on 02/02/2009 05:32 PM -----

From:	Barnes Johnson/DC/USEPA/US
To:	Barry Breen/DC/USEPA/US, Fine.Ellyn@epamail.epa.gov, Ellen Manges/DC/USEPA/US, Elizabeth Southerland/DC/USEPA/US, Mary-Kay Lynch/DC/USEPA/US, Doug Ammon/DC/USEPA/US, Amy Hayden/DC/USEPA/US@EPA, Deitz.Randy@epamail.epa.gov
Cc:	Barnes Johnson/DC/USEPA/US, James Woolford/DC/USEPA/US, Clark.Sherri@epamail.epa.gov
Date:	09/02/2008 06:03 PM
Subject:	Libby Correspondence

FYI - with more time I could probably dig up the incomings but in the interest of time here are a few recent exchanges many if not all pertain to the issue of a public health emergency. I hope the file names are reasonably self explanatory. I think the Gerberding letter is an attachment to one of these.

Libby_Boxer Baucus Response to May 2007 Letter.pdf

Libby_Boxer Response_June_2007.pdf

Libby_Baucus Incoming_July 2007.pdf

Libby_Baucus Response_Aug 2007.pdf

Libby_Hall Incoming_August 2007.pdf

Libby_Hall Response_Sept 2007.pdf

Libby_Baucus Incoming_March 2008.pdf

Libby_Baucus Outgoing_April 2008.pdf

Libby_Baucus Incoming_April 2008.pdf

Libby_Baucus Outgoing_May 2008.pdf

Libby_Black Patten Incoming_Nov 2007.pdf

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Washington, DC 20460
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(C) (b) (6)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

The Honorable Barbara Boxer
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Chairman Boxer:

This letter supplements the U.S. Environmental Protection Agency's (EPA or Agency) interim response to your May 18, 2007 letter requesting additional information and documents related to the Committee on Environment and Public Works' April 5, 2007 field hearing in Libby, Montana. Specifically, your request focused on EPA's decision not to declare a public health emergency in Libby and the timing for conducting toxicological studies associated with asbestos contamination in Libby. This letter also supplements EPA's August 3, 2007 interim response to your letter of July 24, 2007 requesting information and documents related to the Libby, Montana Superfund site.

As you know, EPA is committed to cleaning up the asbestos contamination in Libby pursuant to its mission to protect human health and the environment. EPA respects your role as Chairman and appreciates your ongoing interest into this matter[1]. EPA sent an interim response on June 5, 2007 that answered the questions posed in your request and informed you that additional time would be needed to respond to your request for documents. EPA has since identified a large number of documents that are responsive to your request. Copies of these documents are enclosed.

For a number of the documents being provided to the Committee in this response, EPA has identified an important Executive Branch confidentiality interest because these documents reflect, in part, internal deliberations between Agency staff, attorneys, and policy makers regarding Superfund program management issues and EPA's response to the contamination in Libby. These documents also contain confidential attorney-client communications and work-product prepared for actual or anticipated litigation. EPA has previously determined a number of these documents to be responsive to discovery requests pursuant to litigation between EPA

[1] EPA also received requests dated July 12 and July 24, 2007 from Senator Max Baucus, requesting the same information and documents related to the Libby, Montana Superfund Site. EPA provided an interim response to Senator Baucus on August 3, 2007 and is providing him this response. At an August 6, 2007 meeting with Administrator Johnson and myself, Senator Baucus also asked EPA to provide additional information on related matters, and EPA is preparing separate responses to those questions.

and W.R. Grace; however, such documents were withheld from the opposing party and have not been made public. EPA is concerned about the chilling effect that would occur if Agency employees believed their frank and honest opinions and judgments regarding Superfund program matters would be disclosed. The inability of policy makers to obtain a broad range of advice and recommendations from staff would have a negative effect on the Agency's overall deliberative process and ultimately would impair the Agency's ability to properly execute its programs. EPA is also concerned that disclosure of such documents could undermine EPA's enforcement efforts and injure the Agency's ability to defend itself in litigation.

In order to identify specific documents in which EPA has a confidentiality interest, EPA copied the documents on paper with a watermark that reads "Internal Deliberative U.S. EPA Document" and the disclaimer that EPA has authorized disclosure only for oversight purposes. Through this accommodation, EPA does not intend to waive any confidentiality interests in these documents or similar documents in other circumstances. EPA respectfully requests that the Committee and staff protect the documents and the information contained in them from further dissemination. Specifically, should the Committee determine that further distribution of this confidential information is needed outside the Committee, we request that such need first be discussed with the Agency.

Should you have questions regarding this response, please contact me, or your staff may contact Amy Kover in the Office of Congressional and Intergovernmental Relations at (202) 564-0555.

Sincerely,

Susan Parker Bodine

Susan Parker Bodine
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

The Honorable Max Baucus
Chairman
Subcommittee on Transportation and Infrastructure
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Chairman Baucus:

This letter supplements the U.S. Environmental Protection Agency's (EPA or Agency) interim response to the May 18, 2007 letter requesting additional information and documents related to the Committee on Environment and Public Works' April 5, 2007 field hearing in Libby, Montana. Specifically, your request focused on EPA's decision not to declare a public health emergency in Libby and the timing for conducting toxicological studies associated with asbestos contamination in Libby. This letter also supplements EPA's August 3, 2007 interim response to your letters of July 12, and July 24, 2007 requesting the same information and documents related to the Libby, Montana Superfund Site.

As you know, EPA is committed to cleaning up the asbestos contamination in Libby pursuant to its mission to protect human health and the environment. EPA respects your role as Chairman and appreciates your ongoing interest into this matter[1]. EPA sent an interim response on June 5, 2007 that answered the questions posed in the request and indicated that additional time would be needed to respond to the request for documents. EPA has since identified a large number of documents that are responsive to your request. Copies of these documents are enclosed.

For a number of the documents being provided to the Committee in this response, EPA has identified an important Executive Branch confidentiality interest because these documents reflect, in part, internal deliberations between Agency staff, attorneys, and policy makers regarding Superfund program management issues and EPA's response to the contamination in Libby. These documents also contain confidential attorney-client

[1] At an August 6, 2007 meeting with Administrator Johnson and myself, you also asked EPA to provide additional information on related matters, and EPA is preparing separate responses to those questions.

communications and work-product prepared for actual or anticipated litigation. EPA has previously determined a number of these documents to be responsive to discovery requests pursuant to litigation between EPA and W.R. Grace; however, such documents were withheld from the opposing party and have not been made public. EPA is concerned about the chilling effect that would occur if Agency employees believed their frank and honest opinions and judgments regarding Superfund program matters would be disclosed. The inability of policy makers to obtain a broad range of advice and recommendations from staff would have a negative effect on the Agency's overall deliberative process and ultimately would impair the Agency's ability to properly execute its programs. EPA is also concerned that disclosure of such documents could undermine EPA's enforcement efforts and injure the Agency's ability to defend itself in litigation.

In order to identify specific documents in which EPA has a confidentiality interest, EPA copied the documents on paper with a watermark that reads "Internal Deliberative U.S. EPA Document" and the disclaimer that EPA has authorized disclosure only for oversight purposes. Through this accommodation, EPA does not intend to waive any confidentiality interests in these documents or similar documents in other circumstances. EPA respectfully requests that the Committee and staff protect the documents and the information contained in them from further dissemination. Specifically, should the Committee determine that further distribution of this confidential information is needed outside the Committee, we request that such need first be discussed with the Agency.

Should you have questions regarding this response, please contact me, or your staff may contact Amy Kover in the Office of Congressional and Intergovernmental Relations at (202) 564-0555.

Sincerely,

Susan Parker Bodine

Susan Parker Bodine
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

The Honorable Max Baucus
Chairman
Subcommittee on Transportation and Infrastructure
Committee on Environment and Public Works
United States Senate
Washington D.C. 20510

Dear Chairman Baucus:

This responds to your request, relayed during our August 6, 2007 visit to Libby, Montana, regarding the EPA designation of documents transmitted to you on August 3, 2007 as internal deliberative documents. As we discussed, a number of the submitted documents were transmitted on watermarked paper that should not have been designated as internal deliberative documents. Specifically, EPA has determined that it has previously waived a claim of privilege for the documents transmitted to you on August 3, 2007 other than the documents identified on the enclosed list.

The enclosed list of the documents, are documents for which EPA has not waived its confidentiality interests, and that EPA identified as having an important Executive Branch confidentiality interest because they reflected internal deliberations regarding Superfund program management issues. These documents were copied on paper with a watermark that reads "Internal Deliberative U.S. EPA Document" with the disclaimer that EPA has authorized disclosure only for oversight purposes. Through this accommodation, EPA did not intend to waive any confidentiality interests in these documents or similar documents in other circumstances. EPA respectfully requests that the Committee and staff continue to protect these documents and the information contained in them from further dissemination. Specifically, should the Committee determine that further distribution of this confidential information is needed outside the Committee, we request that such need first be discussed with the Agency. The documents that were transmitted on August 3, 2007 that do not appear on the enclosed list need not be treated as confidential EPA internal deliberative documents.

Should you have questions regarding this response, please contact me, or your staff may contact Amy Kover in the Office of Congressional and Intergovernmental Relations at (202) 564-0555.

Sincerely,

Susan Parker Bodine

Enclosure

LIST OF EPA CONFIDENTIAL DOCUMENTS

WRG-EPAHQ-P-007709
WRG-EPAHQ-P-007511 through 7516
WRG-EPAHQ-P-007340
WRG-EPAHQ-P-008476 through 8484
WRG-EPAHQ-P 007209 through 7237

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

The Honorable Max Baucus
Chairman
Subcommittee on Transportation and Infrastructure
Committee on Environment and Public Works
United States Senate
Washington D.C. 20510

Dear Chairman Baucus:

This responds to your request, relayed during our August 6, 2007 visit to Libby, Montana, for information concerning opportunities for EPA to accelerate the schedule for the baseline risk assessment for the Libby Superfund Site, potentially reducing the time for completion by half.

The Libby Amphibole Action Plan has been developed by EPA experts with consultation from the Agency for Toxic Substances and Disease Registry, the National Institute for Occupational Safety and Health, National Toxicology Program and the US Geological Survey. We have reduced administrative barriers, have assembled a highly qualified cross-agency research team, and are proceeding as rapidly as the science will allow, to produce a highly credible toxicity assessment to support the baseline risk assessment for the Libby site.

If we were to reduce by half the time to complete the baseline risk assessment, we would have to rely upon existing exposure data and existing epidemiologic information, of which only a small amount is specific to the amphibole material found in Libby. Adopting an accelerated schedule would preclude additional epidemiological analyses and the use of new data from laboratory animal studies, which require time to observe the adverse effects of asbestos. Such an approach would be inconsistent with EPA's commitment to you, the Libby community, and to EPA's Office of Inspector General, and is not supported by the Region 8 Libby project team. It is important that the Libby community have confidence in EPA's results.

Sound, defensible, science requires thorough planning and peer review. The current comprehensive plan meets these requirements. We have already committed to meet a very aggressive schedule. Additional funding or personnel resources would not help to accelerate the process.

In the meantime, removal actions in and around Libby will continue. EPA has focused on reducing exposures in Libby, and our efforts will not stop until the job is complete.

Should you have questions regarding this response, please contact me, or your staff may contact Amy Kover in EPA's Office of Congressional and Intergovernmental Relations at (202) 564-0555.

Sincerely,

Susan Parker Bodine
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

The Honorable Max Baucus
Chairman
Subcommittee on Transportation and Infrastructure
Committee on Environment and Public Works
United States Senate
Washington D.C. 20510

Dear Chairman Baucus:

This responds to your request, relayed during our August 6, 2007 visit to Libby, Montana, for information concerning interactions between the U.S. Environmental Protection Agency (EPA) and W.R. Grace. EPA's review has identified two meetings that Headquarters representatives held with W.R. Grace prior to the Agency's decision whether to declare a public health emergency. The meetings occurred on October 1, 2001 and January 31, 2002.

It is not unusual for EPA to meet with potentially responsible parties associated with a Superfund site. Through EPA's long standing "enforcement first" policy, financially viable responsible parties often perform Superfund site work. This helps conserve EPA's appropriated funding for work at "orphan" sites.

We have also identified a number of documents that concern these two meetings with W.R. Grace. These documents include briefing material provided by W.R. Grace, discussions about planning for the meetings, and internal communications between EPA staff, attorneys, and policy makers concerning EPA's activities in Libby. Copies of these documents are enclosed.

Concerning the documents transmitted with this letter, EPA has identified an important confidentiality interest for a number of the documents being provided to the Committee, because these documents reflect internal deliberations regarding Superfund program management issues and EPA's response to contamination in Libby. EPA is concerned about the chilling effect that would occur if Agency employees believed their frank and honest opinions and judgments regarding Superfund program matters would be disclosed. These documents also contain confidential attorney-client communications and work-product prepared for actual or anticipated litigation. The inability of policy makers to obtain a broad range of advice and recommendations from staff would have a negative effect on the Agency's overall deliberative process and ultimately would impair the Agency's ability to properly execute its programs. EPA is also concerned that

disclosure of such documents could undermine EPA's enforcement efforts and injure the Agency's ability to defend itself in litigation.

In order to identify specific documents in which EPA has a confidentiality interest, EPA copied the documents on paper with a watermark that reads Internal Deliberative U.S. EPA Document and the disclaimer that EPA has authorized disclosure only for oversight purposes. Through this accommodation, EPA does not intend to waive any confidentiality interests in these documents or similar documents in other circumstances. EPA requests that the Committee and staff protect the documents and the information contained in them from further dissemination. Specifically, should the Committee determine that further distribution of this confidential information is needed outside the Committee, we request that such need first be discussed with the Agency.

Should you have questions regarding this response, please contact me, or your staff may contact Amy Kover in the Office of Congressional and Intergovernmental Relations at (202) 564-0555.

Sincerely,

Susan Parker Bodine
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 5

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

The Honorable Barbara Boxer
Chairman
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Chairman Boxer:

Thank you for your May 18, 2007 letter regarding the U.S. Environmental Protection Agency's (EPA's) activities to address asbestos in Lincoln County, Montana, enclosing follow up questions from an April 5, 2007 Field Hearing in Libby, Montana.

While there is much to be done at Libby, I want to reiterate that EPA will not waver from our commitment to reduce the exposure of the residents to the asbestos fibers that now contaminate the town.

Your letter included five follow-up questions from Senator Baucus related to EPA's work at the Libby site. Enclosure 1 to this letter contains our responses to follow-up questions 2, 3 and 5 from Senator Baucus. Question 1 seeks records concerning whether EPA considered declaring a public health emergency at Libby. Question 4 seeks documents concerning whether EPA considered conducting toxicological studies of Libby asbestos. Because of the potentially large number of documents responsive to these requests and the need to search multiple EPA offices, EPA is unable to respond to these document requests at this time. Please be assured that EPA is working to respond to these requests as quickly as possible. We expect to provide a further response concerning Senator Baucus' request for documents by August 31, 2007.

During the hearing, Senator Baucus also asked EPA to provide the list of Libby residences planned for removal actions during 2007, as well as a monthly report on the status of toxicological work in support of the Libby cleanup. Enclosure 2 is a list of properties planned for removal actions during 2007. The owners and residents of properties on this list may have a personal privacy interest in protecting their addresses and other personal information from public disclosure. Although EPA provides clean up schedule information to affected property owners, it does not widely disseminate the information contained on the list in order to minimize the potential for harassment or invasion of privacy for those individuals. As such, EPA respectfully requests that Enclosure 2 not be included in the public record.

Out of 200 identified properties, EPA plans on completing removals at 160 properties in 2007. Having more properties identified in the clean up queue allows EPA to work around postponements, often at the owner's request, and also assists in planning work for the following year. Enclosure 3 is the first of the monthly reports requested by Senator Baucus. This, and future reports, will provide an update on each of the 16 projects we have initiated regarding the toxicity assessment and analytical methods for the Libby amphibole.

EPA welcomes your interest in the program and shares your concern for the people of Libby, Montana. I look forward to working with you as we progress in the removal action and work toward a final cleanup.

If you have further questions, please contact me or your staff may contact Amy Kover in EPA's Office of Congressional and Intergovernmental Relations, at (202) 564-0555.

Sincerely,

Susan Parker Bodine

Susan Parker Bodine
Assistant Administrator

Enclosures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 15 2007

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

The Honorable James M. Inhofe
Ranking Member
United States Senate
Committee on Environment and Public Works
Washington, D.C. 20510

Dear Senator Inhofe:

Thank you for your May 18, 2007 letter regarding the U.S. Environmental Protection Agency's (EPA's) activities to address asbestos in Lincoln County, Montana, enclosing follow up questions from an April 5, 2007 Field Hearing in Libby, Montana.

While there is much to be done at Libby, I want to reiterate that EPA will not waver from our commitment to reduce the exposure of the residents to the asbestos fibers that now contaminate the town.

Your letter included five follow-up questions from Senator Baucus related to EPA's work at the Libby site. Enclosure 1 to this letter contains our responses to follow-up questions 2, 3 and 5 from Senator Baucus. Question 1 seeks records concerning whether EPA considered declaring a public health emergency at Libby. Question 4 seeks documents concerning whether EPA considered conducting toxicological studies of Libby asbestos. Because of the potentially large number of documents responsive to these requests and the need to search multiple EPA offices, EPA is unable to respond to these document requests at this time. Please be assured that EPA is working to respond to these requests as quickly as possible. We expect to provide a further response concerning Senator Baucus' request for documents by August 31, 2007.

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EPA welcomes your interest in the program and shares your concern for the people of Libby, Montana. I look forward to working with you as we progress in the removal action and work toward a final cleanup.

If you have further questions, please contact me or your staff may contact Amy Kover in EPA's Office of Congressional and Intergovernmental Relations, at (202) 564-0555.

Sincerely,

Susan Parker Bodine
Assistant Administrator

Enclosures

Enclosure 1

Environment and Public Works Committee Hearing
April 5, 2007
Follow-Up Questions for Written Submission

Question 1

Medical care for people that live in Libby is a top priority. People have died in Libby as a result of exposure to asbestos, and people continue to suffer serious adverse health effects from past exposure. Moreover, the threat of continued illness is ever present, since EPA acknowledges that "[t]he Libby Asbestos Superfund site is considered Human Exposure Not Under Control because people can be expected to come into contact with" asbestos.

Superfund requires the federal government to "in cases of public health emergencies caused or believed to be caused by exposure to toxic substances, provide medical care and testing to exposed individuals, including but not limited to tissue sampling, chromosomal testing where appropriate...or any other assistance appropriate under the circumstances [and that] exposed persons shall be eligible for admission to hospitals and other facilities and services operated or provided by the Public Health Service" (emphasis added).

News reports indicate that EPA was moving to declare a public health emergency in 2001, but that concerns raised by the Office of Management and Budget and W.R. Grace derailed the declaration. This raises grave concerns because of the federal government's commitment to care for innocent people who are suffering from exposure to asbestos.

Please provide all EPA records, including any memoranda, letters, email, meeting notes, telephone logs or other EPA records related to any EPA consideration of declaring a public health emergency at Libby, including but not limited to records that describe or relate to:

1. Any involvement of the Office of Management and Budget in the process of considering whether to declare a public health emergency in Libby,
2. Any involvement of any other federal agency in the process of considering whether to declare a public health emergency in Libby,
3. Any involvement of W.R. Grace, including any entity with any financial, corporate, or other business relationship to W.R. Grace, in the process of considering whether to declare a public health emergency in Libby, and
4. Any involvement of any law firm in the process of considering whether to declare a public health emergency in Libby.

Answer:

Because of the potentially large number of documents responsive to this request and the need to search multiple U.S. Environmental Protection Agency (EPA) offices, EPA is unable to respond to this document request at this time. We expect to provide a further response concerning this request for documents by August 31, 2007. However, the attached letter from Julie Gerberding, Administrator for the Agency of Toxic Substances and Disease Registry, is relevant to your request.

Question 2

List and describe all instances where EPA has declared a public health emergency related to the release of a hazardous substance. Please provide all EPA records, including any memoranda, letters, email, meeting notes, telephone logs or other EPA records related to any EPA decision to declare a public health emergency.

Answer:

Section 104 (a)(3) limits EPA's response authority for a release or threat of a release. There is an exception to the limitation related to public health emergencies. There are two provisions in CERCLA concerning public health emergencies:

1. Section 104(a)(4) authorizes EPA to respond to, among other things, releases from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures - if EPA determines that a release or threatened release constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner; and
2. Section 104(i) outlines the Agency for Toxic Substances and Disease Registry's (ATSDR) health related authorities under CERCLA. Section 104(i)(1)(D) outlines ATSDR's medical care and testing authorities under CERCLA in cases of a public health emergency.

EPA has never made a determination that a public health or environmental emergency exists to invoke CERCLA's exception to the limits on response under Section 104(a)(3).

Question 3

Please describe the process and criteria that EPA uses to determine whether to declare a public health emergency. Please include any draft, interim or final records that EPA may rely on to:

1. Undertake the process of determining whether to declare a public health emergency, and
2. Declare a public health emergency.

Answer:

The National Oil and Hazardous Substances Pollution Contingency Plan (NCP) provides the process that EPA uses for implementing CERCLA. Section 300.400(b) of the NCP implements CERCLA 104 (a)(4) which authorizes EPA to respond to releases from, among other things, products which are part of the structures of, and result in exposure within, residential building or community structures - if EPA determines that the release constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner. Response actions are selected under CERCLA section 104(a) and (c).

Please note that under Executive Order 12580, the authority under section 104(b) to investigate and gather information to determine whether illness, disease, or complaints thereof may be attributable to a release of a hazardous substance, pollutant or contaminant is delegated to the Secretary of Health and Human Services (HHS), not EPA. EPA consults closely with HHS and in particular the Agency for Toxic Substances and Disease Registry (ATSDR) on health related issues under CERCLA. There are provisions for health assessments and public health threat evaluations by ATSDR in the NCP (e.g., Section 300.410 "Removal Site Evaluation) and references to the role of HHS in addressing public health emergencies during response operations (Section 300.135(h)). In addition, NCP Section 300.175(b)(8)(i) includes a provision that describes ATSDR's role in preparedness planning and response.

Question 4

A 2003 report by ATSDR recommended the need for "toxicological investigations of the risks associated with low-level exposure to asbestos, especially Libby asbestos." According to the 2006 Inspector General report, EPA scientists requested the toxicity study, but EPA's budget office did not approve their request.

Please provide all EPA records, including any memoranda, letters, email, meeting notes, telephone logs or other EPA records related to any EPA consideration of conducting toxicological studies of Libby asbestos, including but not limited to records that describe or relate to:

1. Any involvement of the Office of Management and Budget in the process of considering whether to conduct toxicological studies of Libby asbestos
2. Any involvement of any other federal agency in the process of considering whether to conduct toxicological studies.
3. Any involvement of W.R. Grace, including any entity with any financial, corporate, or other business relationship to W.R. Grace, in the process of considering whether to conduct toxicological studies
4. Any involvement of any law firm in the process of considering whether to conduct toxicological studies

Answer:

Because of the potentially large number of documents responsive to this request and the need to search multiple U.S. Environmental Protection Agency (EPA) offices, EPA is unable to respond to this document request at this time. We expect to provide a further response concerning this request for documents by August 31, 2007.

Question 5

In a letter dated December 8th, 2006, EPA stated it would begin toxicological studies of Libby asbestos. Please provide me with EPA's operating plan and budget for the toxicity studies in FY2007 as the funding needs and timeline for fully completing all toxicity studies.

Answer:

To ensure that EPA has all the information it needs to support a baseline risk assessment for Libby, in January 2007, EPA convened a group of more than 30 scientists from EPA, the Agency for Toxic Substances and Disease Registry (ATSDR) and the National Toxicology Program to identify data gaps and recommend additional studies. The meeting was hosted by EPA's ORD National Health and Environmental Effects Research Laboratory (NHEERL) in Research Triangle Park, North Carolina. The scientists also considered information from the Libby Technical Assistance Group.

Based on the recommendations developed from the January 2007 meeting, the EPA has identified and is implementing a comprehensive program of 12 studies to support the Libby risk assessment. The description of these studies and a timeline for funding are attached. Detailed work plans are currently being developed and will include consultation with other agencies (e.g., the ATSDR, National Institute for Occupational Safety and Health (NIOSH), and the National Toxicology Program (NTP)) and external peer reviews.

The studies are anticipated to be completed by September 30, 2009; however, this date is tentative pending the completion of the detailed work plans. Results from the studies will be used to complete the baseline risk assessment, including the comprehensive toxicity assessment, by September 30, 2010.

The Office of Solid Waste and Emergency Response approved a budget of $2,649,250 in fiscal year 2007 for the Libby Action Plan. With recent adjustments due to detailed plans of several analytical studies, the actual fiscal year budget is $2,581,750 as of May 31, 2007. Additional funding is anticipated in fiscal years 2008 and 2009.

Enclosure 3 provides the status and anticipated funding needs for the various studies. EPA intends to provide monthly updates to this information, as requested by Senator Baucus during the field hearing.

Enclosure 2

List of Candidate Residences for 2007

Address	Type	Zoning
(b) (6)	Exterior	Residential
	Exterior	Residential
	Exterior	Residential
	Exterior	Residential
	Exterior	Residential
	Exterior	Residential
	Combo	Residential
	Exterior	Residential
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	Exterior	Residential
	Exterior	Residential
	Combo	Residential
	Interior	Residential
	Exterior	Residential
	Exterior	Residential
	Exterior	Residential
	Exterior	Residential
	Exterior	Residential
	Combo	Residential
	Exterior	Residential
	Exterior	Residential

As of May 1, 2007

Address	Type	Zoning
(b) (6)	Combo	Residential
	Combo	Residential
	Combo	Residential
	Exterior	Residential
	Exterior	Residential
	Exterior	Residential
	Exterior	Residential
	Combo	Residential
	Exterior	Residential
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	Exterior	Residential
	Combo	Residential

Address	Type	Zoning
(b) (6)	Combo	Residential
	Exterior	Residential
	Exterior	Residential
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	Combo	Residential
	Exterior	Residential
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	Exterior	Residential
	Exterior	Residential
	Combo	Residential
	Interior	Residential

Address	Type	Zoning
(b) (6)	Combo	Commercial
	Exterior	Residential
	Combo	Commercial
	Exterior	Residential
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	Combo	Residential
	Exterior	Residential
	Exterior	Residential
	Exterior	Residential
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	Exterior	Residential

Address	Type	Zoning
(b) (6)	Exterior	Residential
	Combo	Residential
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	Combo	Residential
	Exterior	Residential
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	Exterior	Residential
	Exterior	Residential
	Exterior	Residential
	Exterior	Residential
	Exterior	Residential
	Exterior	Residential
	Combo	Residential
	Exterior	Residential
	Exterior	Residential

TOTAL: 200

Exterior: yard Interior: inside structure

[1] Clean up design underway. Property added to the schedule.

FEMA Document Subject to Privilege Information Not for Disclosure

Enclosure 3

Status of Toxicity Assessment and Analytical Methods Support Studies for Libby Amphibole
May 2007

Toxicity Assessment Studies

EPA Region 8 Libby Amphibole Reference Concentration (RfC) Development—EPA is reviewing existing human and animal studies on the Libby amphibole for noncancer health effects. EPA has contacted two researchers to access new data (not yet published) for review and possible inclusion in RfC development.

NCEA Libby Amphibole Cancer Assessment—EPA is reviewing existing human and animal data regarding cancer effects of Libby amphibole. NIOSH has recently updated their epidemiologic cohort of the workers in Libby, Montana. EPA has contacted the NIOSH researchers and is pursuing a collaborative effort such that the most up-to-date mortality data can be used in the cancer assessment.

EPA Region8/USGS Preparation of Libby Testing Material—USGS will begin collection activities for the Libby amphibole material. It is anticipated that the collection will take two field trips to gather the material properly and then three months to prepare and characterize for use in the animal toxicity and analytical methods studies.

EPA Region 8 Characterization of Fiber Size Distribution in Libby Vermiculite—Plans are being developed to begin this study in this fiscal year.

NHEERL Dosimetry Model Development and Simulation Studies—The detailed project plan has been prepared and is currently in review by external peer reviewers.

NHEERL In vitro Dissolution Assays—The detailed project plan has been prepared and is currently in review by external peer reviewers.

NHEERL In Vitro Toxicity Endpoint—The detailed project plan has been prepared and is currently in review by external peer reviewers.

NHEERL Comparative Toxicology in Mice and Rats—The detailed project plan has been prepared and is currently in review by external peer reviewers.

NHEERL Inhalation Toxicology in Rats—The detailed project plan has been prepared and is currently in review by external peer reviewers.

EPA Region 8/NCEA New Epidemiologic Information from Libby Montana Cohort—Detailed project plans are under development. EPA is currently identifying existing data and ongoing studies from Libby Montana. EPA is working with ATSDR and NIOSH for additional collaboration in this endeavor.

NCEA/EPA Region 8 New Epidemiologic Information from Other Cohorts—Detailed project plans are under development. EPA is currently identifying possible study populations as well as identifying existing data and ongoing studies from other locations that received Libby materials. EPA is working with ATSDR and NIOSH for additional collaboration in this endeavor.

OSWER Interim Risk Methodology for Quantification of Cancer Risk from Inhalation—The Science Advisory Board is establishing an asbestos panel to provide technical advice on the proposed methodology to estimate potential cancer risk from inhalation exposure. On April 19, the Science Advisory Board posted on their website (http://www.epa.gov/sab/panels/asbestos_expert_panel.htm) an invitation for public comment on a "short list" of candidates for the asbestos panel, which will provide technical advice to the Agency on this draft methodology. The comment period closes on May 24, 2007. The panel is tentatively expected to meet in September 2007.

Analytical Methods Studies

EPA Region 8 Filter Verification Studies
The detailed project plan is under development and is currently in review by internal reviewers.

EPA Region 8 Low-Level Soil Method Development
Plans are being developed to begin this study in fiscal year 2008.

EPA Region 8 Comparison Direct & Indirect Preparations
Plans are being developed to begin this study in fiscal year 2008.

EPA Region 8 Ambient Air Collection Method Verification
Plans are being developed to begin this study in fiscal year 2008.

Acronyms
ATSDR- Agency for Toxic Substances and Disease Registry
NCEA – EPA National Center for Environmental Assessment
NHEERL – EPA National Health and Environmental Effects Research Laboratory
NIOSH- National Institute for Occupational Safety and Health
OSWER – EPA Office of Solid Waste and Emergency Response
USGS – US Geological Survey

	2007 Dollars	2008 Dollars	2009 Dollars	Total Dollars
TOXICITY ASSESSMENT SUPPORT STUDIES				
a. Region 8 Libby Amphibole RfC Development	25,000	-	75,000	100,000
b. NCEA Libby Amphibole Cancer Assessment	180,000	180,000	-	360,000
c. USGS Preparation of Libby Testing Material	150,000	150,000	-	300,000
d. Region 8 Fiber Size Distribution in Libby Vermiculite	90,000	-	-	90,000
e. NHEERL Dosimetry Model Development. Simulation Studies	135,000	75,000	-	210,000
f. NHEERL In Vitro Dissolution Assays	137,000	137,000	-	274,000
g. NHEERL In Vitro Toxicity Endpoints	247,500	247,500	-	495,000
h. NHEERL Comparative Toxicology in Mice and Rats	382,250	382,250	200,000	964,500
i. NHEERL Inhalation Toxicology in Rats	-	1,112,000	-	1,112,000
j. Region 8/NCEA New Epidemiologic Information from Libby Montana Cohort	335,000	180,000	180,000	695,000
k. NCEA New Epidemiologic Information from Other Cohorts	250,000	250,000	-	500,000
l. OSWER Interim Cancer Risk Methodology	-	-	-	-
TOTAL	**1,931,750**	**2,713,750**	**455,000**	**5,100,500**
ANALYTICAL METHODS STUDIES				
m. Region 8 Filter Verification Studies	650,000	-	-	650,000
n. Region 8 Low-Level Soil Method Development	-	230,000	-	230,000
o Region 8 Comparison Direct & Indirect Preparations	-	350,000	-	350,000
p. Region 8 Ambient Air Collection Method Verification	-	450,000	-	450,000
TOTAL	**650,000**	**1,030,000**	-	**1,680,000**
May 31, 2007 **GRAND TOTAL**	**2,581,750**	**3,743,750**	**455,000**	**6,780,500**

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Agency for Toxic Substances
and Disease Registry
Atlanta, GA 30333

JUN 20 2003

Mr. Clinton Maynard
Libby Community Advisory Group
1116 Louisiana Avenue
Libby, Montana 59923

Dear Mr. Maynard:

Secretary Thompson has asked me to thank you for your letter and to respond directly to you regarding community health concerns associated with exposure to asbestos in Libby, Montana.

I understand the seriousness of your concerns. Libby continues to be one of the most important environmental public health sites in our nation. During the past 3-1/2 years, public health, healthcare, and mental health agencies of the Department of Health and Human Services (HHS) have worked closely with the community, the Environmental Protection Agency (EPA), and state and local agencies to halt exposure to vermiculite contaminated with tremolite asbestos and to build health capacity at the local level.

The Agency for Toxic Substances and Disease Registry (ATSDR) has also worked proactively with the Health Resources and Services Administration (HRSA) to support community initiatives intended to improve access to healthcare services in Libby. Through a HRSA grant, a federally landed health clinic has been established in Libby. In addition, Lincoln County was recently awarded funds through a HRSA Rural Health Outreach Grant to identify and resolve remaining health issues in Libby. Though these initiatives, HHS has demonstrated its ongoing and long-term commitment to improving the health of Libby residents.

In your letter, you state that the government's response measures thus far are insufficient and request that HHS declare a "Public Health Emergency" as referenced in sections 104(i)(1)(D) and (B) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. 9604(i)(1)(D) and (E). These sections of CERCLA were originally enacted to provide immediate healthcare assistance in the event of an emergency situation to supplement local emergency healthcare services which might be unable to meet critical short-term healthcare needs. U.S. Public Health Service hospitals referenced in section 104(i)(1)(E) of CERCLA, which were originally intended to provide such care in the case of an emergency, were decommissioned in the mid-1980s. HHS lacks the resources or the statutory authority to provide long-term healthcare services under CERCLA or any other existing federal legislation. However, EMS agencies, particularly ATSDR, have been able to provide appropriate public health services in Libby and at other Superfund sites nationally. EMS agencies will continue to provide critical public health support to the Libby community: A "Public Health Emergency" declaration under CERCLA will not change the agency's planned activities, nor will it make additional funds available to ATSDR or HHS under existing appropriations. Therefore, no such declaration is being made at this time.

During the past 3 years, considerable progress has been made towards halting exposure to tremolite asbestos and improving the health of Libby residents. HHS agencies will continue to use appropriate public health resources and work closely with all of the community groups and state, federal, and local agencies that are involved. I remain confident that such collaboration will facilitate sustainable, long-term public health improvements in Libby.

Please feel free to contact the HHS Region VIII Office in Denver, Colorado, at (303) 844-6163 if you, members of the Libby Community Advisory Group, or other residents have any questions regarding HHS' public health activities or responsibilities in Libby. Questions about ATSDR's activities and responsibilities can also be directed to Mr. Dan Strausbaugh, ATSDR Regional Representative assigned to Libby, at (406) 457-5007. Once again, thank you for your interest in this important public health matter.

Sincerely,

Julie Louise Gerberding, M.D., M.P.H.
Administrator

cc.
U.S. Congressional Delegation, State of Montana
Governor Judy Martz, State of Montana

MAX BAUCUS
MONTANA

WASHINGTON, DC
(202) 224-2651

MONTANA TOLL FREE NUMBER
1-800-332-6106

INTERNET:
max@baucus.senate.gov
http://www.senate.gov/~baucus

United States Senate

WASHINGTON, DC 20510-2602

July 12, 2007

Mrs. Susan Parker Bodine
US Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460-0001

Dear Mrs. Bodine:

I would like to thank you again for attending the field hearing in Libby, Montana on April 5. The people of Libby and I appreciated the opportunity to bring attention to the effects of asbestos contamination on their community.

A letter to you from the Committee on Environment and Public Works contained five written questions from me regarding the EPA's work in Libby as part of the cleanup. I expected prompt, thorough answers to those questions. While I appreciate your replies to three of my questions, it is unacceptable that the remaining two questions go unanswered until August 31st.

I fully expect a response to the two unanswered questions prior to the end of this month. Please provide all EPA records related to EPA consideration of declaring a public health emergency at Libby, and all EPA records related to the EPA's consideration of running toxicology studies of Libby asbestos. I want to know who and what was involved in reaching the EPA's decisions on the public health emergency and toxicology studies. Records I am interested in include, but are not limited to, records describing or relating to the involvement of the Office of Management and Budget, other federal agencies, corporate interests including, but not limited to W.R. Grace, and law firms.

As I mentioned in the questions I sent to you, I am concerned about the process by which EPA considered declaring a health emergency for Libby residents, and for funding a series of toxicology studies. News reports indicate concerns voiced by the Office of Management and Budget, and W.R. Grace derailed an effort to declare a public health emergency in 2001. Similarly, a request by EPA scientists for toxicology studies, based on a 2003 report by the Agency of Toxic Studies and Disease Registry, was not approved by the budget office at the EPA. In both these situations, I am concerned that the best interests of the folks in Libby fell by the wayside.

BILLINGS (406) 657-6790 | BOZEMAN (406) 586-6104 | BUTTE (406) 782-8700 | GREAT FALLS (406) 761-1574 | HELENA (406) 449-5480 | KALISPELL (406) 756-1150 | MISSOULA (406) 329-3123

As you are aware, Libby is a unique site and has unique needs. The decades-long exposure to tremolite asbestos and other fibers has resulted in an unprecedented tragedy for the entire community. This is a personal issue for me, and I look forward to fighting for these Montanans and getting Libby all the help it needs.

With best personal regards, I am

Sincerely,

Max Baucus

MSB/ws

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG - 3 2007

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

The Honorable Max Baucus
Chairman
Subcommittee on Transportation and Infrastructure
Committee on Environment and Public Works
United States Senate
Washington D.C. 20510

Dear Chairman Baucus:

This responds to your letters of July 12, and July 24, 2007 regarding the Libby, Montana Superfund Site. Agency staff have completed review of numerous documents regarding EPA's response at the Libby site to identify documents responsive to your request. We are transmitting documents responsive to your request with this letter.

We are still collecting and reviewing other documents. We continue to work toward completing this effort and expect to provide you additional documents and to complete our effort no later than August 31, 2007.

In your July 24, 2007, letter you asked about documents made available to the St. Louis Post-Dispatch in response to a 2002 Freedom of Information Act (FOIA) request. It is my understanding that the FOIA request was handled by making available for inspection the Libby Administrative Record and publicly releasable documents from the Libby Asbestos Site file as well as publicly releasable documents from the W.R. Grace discovery documents. Out of this large volume of documents, EPA did not keep a record of what specific documents the reporter reviewed or may have copied.

For a number of the documents provided to the Committee, EPA has identified an important confidentiality interest because these documents reflect internal deliberations regarding Superfund program management issues. EPA is concerned about the chilling effect that would occur if Agency employees believed their frank and honest opinions and judgments regarding Superfund program matters would be disclosed. The inability of policy makers to obtain a broad range of advice and recommendations from staff would have a negative effect on the Agency's overall deliberative process and ultimately would impair the Agency's ability to properly execute its programs.

In order to identify specific documents in which EPA has a confidentiality interest, EPA copied the documents on paper with a watermark that reads "Internal Deliberative U.S. EPA Document" and the disclaimer that EPA has authorized disclosure only for oversight purposes. Through this accommodation, EPA does not intend to waive any confidentiality interests in these documents or similar documents in other circumstances. EPA respectfully requests that the Committee and staff protect the documents and the information contained in them from further dissemination. Specifically, should the Committee determine that further distribution of this confidential information is needed outside the Committee, we request that such need first be discussed with the Agency.

Again, thank you for your continued interest and support of EPA's response efforts in Libby, Montana. Should you have further questions, please contact me, or your staff may contact Amy Kover in the Office of Congressional and Intergovernmental Relations at (202) 564-0555.

Sincerely,

Susan Parker Bodine
Assistant Administrator

ST. JOHN'S
LUTHERAN HOSPITAL
Excellent Healthcare Close To Home

RECEIVED
2007 AUG 14 PM 1:02
OFFICE OF THE EXECUTIVE SECRETARIAT

August 3, 2007

Mr. Stephen Johnson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Mr. Johnson:

At the Medical Staff of the Whole meeting on Monday, the 30th of July, the Medical Staff of St. John's Lutheran Hospital unanimously voted to urge you to declare a Public Health Emergency for Libby and the surrounding areas affected by asbestosis contamination. We make this request in the context of three specific resource needs.

1. **Medical Care** – It is imperative that the resources be made available so those affected by asbestosis exposure receive the screening and healthcare services they need. The only viable alternative that assures that such services are properly funded is the creation of a Medical Trust Fund, governed at a local level. Immediate steps must be taken to establish such a Trust Fund.
2. **Safety** – In the midst of the diligent clean-up efforts being conducted by your Agency, no one can answer the question, "How clean is safe?" We believe the answer to this question is long overdue. It is essential that the necessary resources be allocated so that required toxicity studies can be completed without compromising any clean-up activity.
3. **Economic Development** – The current expenditures of the EPA clean-up efforts have a significant positive impact on the local economy. When the clean-up is completed, as we hope it will be in the foreseeable future, the sudden loss of these expenditures will cripple this community. The resources necessary to begin aggressively investing in local economic development activities must begin without delay.

As the healthcare providers for this special community, we have seen firsthand the ravages of asbestosis exposure and disease. Declaration of a Public Health Emergency will allow the necessary resources to flow to those affected by this horrible tragedy. In medical terms, please make this declaration STAT!

Sincerely,

Dr. Jana Hall
Medical Staff Vice-president

350 Louisiana Avenue • Libby, Montana 59923
(406) 293-0100 • FAX (406) 293-7931 • www.sjlh.org

ST. JOHN'S
LUTHERAN HOSPITAL
Excellent Healthcare Close To Home
350 Louisiana Avenue
Libby, Montana 59923

Address Service Requested

Mr. Stephen Johnson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 24 2007

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

Dr. Jana Hall
Medical Staff Vice-President
St. John's Lutheran Hospital
350 Louisiana Avenue
Libby, Montana 59923

Dear Dr. Hall:

Thank you for your August 3, 2007 letter. Administrator Stephen Johnson requested that I respond to your request. EPA recognizes the severity of the situation at the Libby, Montana Superfund site and is working hard to reduce the exposure of residents to asbestos contamination.

In your letter, you requested that EPA declare a Public Health Emergency at the Libby site. EPA determined that it was not necessary to declare a public health emergency for EPA to begin removing asbestos and lower exposure to asbestos throughout Libby. Under section 104(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), EPA may not respond to a release or threat of release of hazardous substances from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures, unless EPA determines that such a release or threat of a release from such products constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner. Based on this limitation, EPA considered whether or not it needed to declare a public health emergency in order to remove asbestos containing material from homes and structures in and around Libby. Ultimately, EPA determined that under the specific circumstances of the Libby site, our response authority under section 104 of CERCLA is broad enough to address releases or threats of releases from asbestos containing material found inside structures at Libby, as well as releases or threats of releases from other sources of asbestos at the Libby site.

Section 104(i) of CERCLA outlines the Agency for Toxic Substances and Disease Registry's (ATSDR) health related authorities, including medical care and testing authorities in cases of a public health emergency. In a letter of June 20, 2003 from Dr. Julie Gerberding, Administrator of the ATSDR, to the Libby Community Advisory Group (attached), Dr. Gerberding addressed the scope of ATSDR's authority under CERCLA and stated that a Public Health Emergency declaration under CERCLA would not change ATSDR's planned activities at Libby.

In your letter, you also note that you have concerns about cleanup levels and economic development in Libby. EPA continues to take expedited action to reduce risks to the citizens of Libby. To date, our actions have resulted in the removal of asbestos contamination from 917 residential and commercial properties and more than 480,000 cubic yards of contaminated soil have been removed.

To make sure that our cleanup actions are protective over the long term, EPA is conducting additional toxicity studies to determine the risks specific to the amphibole asbestos found in Libby. Based on the results of these studies, EPA will select a final cleanup plan for Libby residential and commercial properties, tentatively scheduled for 2011. As the final cleanup plan is developed, EPA will work with the community and adopt policies and procedures that will protect human health and ensure that the remedy will be protective over the long term.

I understand that the final cleanup plan is critical to the economic revitalization of Libby and EPA will work with the town to facilitate redevelopment of contaminated properties. While EPA does not undertake redevelopment work for communities, EPA does work with communities to ensure that cleanup plans are consistent with reasonably anticipated future land use. EPA plans to work with the Libby community in this regard.

EPA shares your concerns for the well being of the citizens of Libby. EPA will continue to work closely with the community, ATSDR, the State, and local agencies to complete the final cleanup and to facilitate redevelopment at cleanup sites in Libby. I remain confident that such collaboration will result in long-term public health protection in Libby. I thank you for your interest in this site. Questions about EPA's activities and responsibilities can also be directed to Carol Rushin, Assistant Regional Administrator in EPA's Denver office. She can be reached at (303) 312-6976.

Sincerely,

Susan Parker Bodine

Susan Parker Bodine
Assistant Administrator

Enclosure

cc: Robbie Roberts, Regional Administrator, Region 8
Kerry Clough, Deputy Regional Administrator, Region 8
Carol Rushin, Assistant Regional Administrator, Region 8

DEPARTMENT OF HEALTH & HUMAN SERVICES **Public Health Service**

Agency for Toxic Substances and Disease Registry
Atlanta, GA 30333

JUN 20 2003

Mr. Clinton Maynard
Libby Community Advisory Group
1116 Louisiana Avenue
Libby, Montana 59923

Dear Mr. Maynard:

Secretary Thompson has asked me to thank you for your letter and to respond directly to you regarding community health concerns associated with exposure to asbestos in Libby, Montana.

I understand the seriousness of your concerns. Libby continues to be one of the most important environmental public health sites in our nation. During the past 3-1/2 years, public health, healthcare, and mental health agencies of the Department of Health and Human Services (HHS) have worked closely with the community, the Environmental Protection Agency (EPA), and state and local agencies to halt exposure to vermiculite contaminated with tremolite asbestos and to build health capacity at the local level.

The Agency for Toxic Substances and Disease Registry (ATSDR) has also worked proactively with the Health Resources and Services Administration (HRSA) to support community initiatives intended to improve access to healthcare services in Libby. Through a HRSA grant, a federally landed health clinic has been established in Libby. In addition, Lincoln County was recently awarded funds through a HRSA Rural Health Outreach Grant to identify and resolve remaining health issues in Libby. Though these initiatives, HHS has demonstrated its ongoing and long-term commitment to improving the health of Libby residents.

In your letter, you state that the government's response measures thus far are insufficient and request that HHS declare a "Public Health Emergency" as referenced in sections 104(i)(1)(D) and (B) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, 42 U.S.C. 9604(i)(1)(D) and (E). These sections of CERCLA were originally enacted to provide immediate healthcare assistance in the event of an emergency situation to supplement local emergency healthcare services which might be unable to meet critical short-term healthcare needs. U.S. Public Health Service hospitals referenced in section 104(i)(1)(E) of CERCLA, which were originally intended to provide such care in the case of an emergency, were decommissioned in the mid-1980s. HHS lacks the resources or the statutory authority to provide long-term healthcare services under CERCLA or any other existing federal legislation. However, EMS agencies, particularly ATSDR, have been able to provide appropriate public health services in Libby and at other Superfund sites nationally. EMS agencies will continue to provide critical public health support to the Libby community. A "Public Health Emergency" declaration under CERCLA will not change the agency's planned activities, nor will it make additional funds available to ATSDR or HHS under existing appropriations. Therefore, no such declaration is being made at this time.

During the past 3 years, considerable progress has been made towards halting exposure to tremolite asbestos and improving the health of Libby residents. HHS agencies will continue to use appropriate public health resources and work closely with all of the community groups and state, federal, and local agencies that are involved. I remain confident that such collaboration will facilitate sustainable, long-term public health improvements in Libby.

Please feel free to contact the HHS Region VIII Office in Denver, Colorado, at (303) 844-6163 if you, members of the Libby Community Advisory Group, or other residents have any questions regarding HHS' public health activities or responsibilities in Libby. Questions about ATSDR's activities and responsibilities can also be directed to Mr. Dan Strausbaugh, ATSDR Regional Representative assigned to Libby, at (406) 457-5007. Once again, thank you for your interest in this important public health matter.

Sincerely,

Julie Louise Gerberding, M.D., M.P.H.
Administrator

cc:
U.S. Congressional Delegation, State of Montana
Governor Judy Martz, State of Montana

RECEIVED

2007 DEC 17 AM 10: 50

OFFICE OF THE
EXECUTIVE SECRETARIAT

November 19, 2007

Stephen Johnson
Administrator, U.S. Environmental Protection Agency
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Mail Code: 1101A
Washington, DC 20460

Honorable Administrator Johnson;

Thank you for your August 6, 2007 visit to Libby, Montana. The Libby Community Advisory Group (CAG) is appreciative of your efforts to hear the concerns of our community. Much of the discussion during the town meeting hosted by Senator Baucus centered on the topic of the declaration of a Public Health Emergency. As you could tell from the comments you received, the issue is of paramount importance to the citizens of Libby. It has risen to such a place of importance in our minds, not because of any potential constraints on EPA's authority to respond to our situation, but because we have come to believe Section 104(i)(l)(D) of CERCLA obligates ATSDR to:

> "In cases of public health emergencies, caused or believed to be caused by exposure to toxic substances, provide medical care and testing to exposed individuals…"

As you heard on August 6th, our medical situation has steadily worsened since the issue of a public health emergency first arose in 2002. This situation has been made worse since the incomes to pay for this care have, most unfortunately, steadily declined. There are currently over 1,700 patients seeking medical care and screening at the Center for Asbestos Related Disease (CARD) alone. W.R. Grace now routinely denies 50% of the claims filed for asbestos related medical services. The CARD clinic and St. John's Lutheran Hospital have borne the brunt of this impact financially and cannot afford to continue shouldering this burden.

The members of the CAG who attended the town meeting heard your message, to paraphrase, that a public health emergency will not likely solve our problem. Accepting this for the sake of argument, if not a public health emergency, then what? If this is not the tool for caring for the victims of asbestos exposure in Libby, please help us find an alternative.

During the August 6th meeting you committed to meet with Secretary Leavitt of the Department of Health and Human Services to seek such an answer. The undersigned members of the CAG implore you to fulfill this commitment. It is vital to the health of our community.

Thank you again for your concern. We look forward to your timely reply as this will be a primary topic at our meetings in the next few months.

Sincerely,
CAG members representing the Libby Area,

Dr. Brad Black
Lincoln County Health Officer

Eileen Carney
Montana State Board of Respiratory Care

Mike Giesey
Center for Asbestos Related Disease

Kenny Hays
Libby Senior Citizens

David Latham, Editor
The Montanian

K.W. Maki
Libby Public Schools

Bill Patten
St. Johns Lutheran Hospital

DC Orr
City of Libby resident

Gary D. Swenson
Libby Volunteer Fire Department

Leroy Thom
Former Grace Employee

Rita Windom
Lincoln County Commissioner

MAX BAUCUS
MONTANA

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United States Senate

WASHINGTON, DC 20510-2602

March 7, 2008

Mr. Stephen Johnson
Administrator
US Environmental Protection Agency
Ariel Rios Building, Mail Code 1101A
1200 Pennsylvania Avenue NW
Washington, D.C. 20460-0001

Dear Administrator Johnson:

I am writing in regard to the ongoing clean up concerns in Libby, Montana. Since the late 1990s, a drastic decrease in superfund cleanups completed has become evident. In 2004 dollars, EPA spent about $1.8 billion on the superfund program in 1993, but only $1.2 billion in 2004. This decrease in funding has resulted in fewer cleanups on the ground. From 1997 to 2000, EPA averaged 87 completed cleanups a year. In 2004, EPA completed only 40 cleanups. Last year only 24 cleanups were completed. This drastic slowdown in the pace of cleanups is unacceptable. Decreasing the superfund budget only prolongs human exposure to contaminants and endangers public health. Nowhere is this concern greater than in Libby.

The residents of Libby have suffered unprecedented tragedy from decades of exposure to tremolite asbestos and other dangerous fibers. The federal Agency for Toxic Substances and Disease Registry has concluded that between 1979 and 1998, asbestosis deaths in Libby were up to 80 times higher than expected, and lung cancer deaths up to 30 percent higher. Over 200 people have died in Libby due to asbestos related diseases. This is a national outrage, and the EPA must make sure it comes to an end by devoting a sufficient amount of funding to the toxicity studies and cleanup.

The EPA's 2008 work plan for cleanup in Libby includes $17 million for 160 properties and continuing assessment of Troy. $2 million of emergency removal funding is also included for the crucial cleanup of the vermiculite ore that is contaminating Flower Creek. This funding is critical, but more is needed.

BILLINGS (406) 657-6790 | BOZEMAN (406) 586-6104 | BUTTE (406) 782-8700 | GREAT FALLS (406) 761-1574 | HELENA (406) 449-5480 | KALISPELL (406) 756-1150 | MISSOULA (406) 329-3123

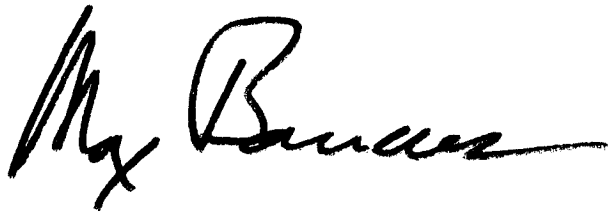
Highlighting this need is the recent news of the asbestos leak of tainted vermiculite from the wall of the Asa Wood Elementary School. Leaving asbestos behind in the walls of any building, especially a school, is simply unconscionable. Zonolite Attic Insulation is an extremely dangerous product, and it should be removed from all buildings in Libby. That is why I have been urging the EPA to declare a Public Health Emergency in Libby. Without this declaration, EPA lacks the clear authority and resources it needs to remove all of the Zonolite Attic Insulation from homes, schools and businesses in Libby.

I am also concerned by the contamination of the Cabinet View Country Club which has not been addressed by the EPA funding. 15,000 rounds of golf are played on this course every year, including many by the high school golf teams. The EPA has done test work on the fairways and greens and found that significant asbestos exposure exists. The golf course is a facility with extensive public use, and should be cleaned up without delay. I request that the necessary $2 million of emergency removal funds be promptly acquired to decontaminate the golf course.

The legacy of deadly pollution and corporate irresponsibility must come to an end. The citizens of Libby need to be safe in their homes, their classrooms and their outdoors. I appreciate your personal attention to this matter, and I look forward to working with you to get Libby a clean bill of health.

With best personal regards, I am

Sincerely,



MSB/PW

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 10 2008

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

The Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your letter of March 7, 2008, to Administrator Johnson expressing your concerns with the national Superfund program and specific concerns regarding the Libby Asbestos site in Lincoln County, Montana. Administrator Johnson asked me to respond on his behalf.

I want to assure you of our continuing commitment to clean up sites that pose risks to human health and the environment. The U.S. Environmental Protection Agency's (EPA's) appropriated funding levels for the Superfund program have remained steady over the past five fiscal years, between $1.2 and $1.3 billion dollars. Moreover, EPA supplements its annual appropriated funding with resources deobligated from prior fiscal year contracts, settlements with responsible parties, and state cost share contributions. There has not been a drastic decrease in Superfund cleanup work. Superfund construction work has remained relatively steady over the years; however, work is now concentrated on more costly, complex sites like Libby. Thus the reduction in construction completion outputs in a given year does not reflect a slow-down in the overall Superfund program.

I certainly share your concerns for the well-being of the citizens of Libby. EPA continues to be active in, and supportive of, clean up activities in the Libby community. Libby has been, and will continue to be one of the highest priorities of the Superfund Program. At this time, EPA is budgeting an estimated $27 million in FY 2008 for Libby, including $17 million to clean up residential and commercial properties, which includes six priority cleanups in Troy; $6.25 million for Libby risk assessment and remedial investigation/feasibility study work; $2.8 million to continue to evaluate the toxicity of Libby amphibole asbestos; and $1 million in emergency funding this year to address asbestos contamination in Flower Creek. We will also continue our work on exposure assessments and fully fund the screening of properties in Troy, which the State of Montana will implement through a cooperative agreement with EPA. In addition, the Agency will look for opportunities throughout the year to direct additional funding to the Libby site.

In your letter, you also raised concerns regarding EPA's response to the recent incident involving vermiculite insulation at Asa Wood Elementary School. EPA has the necessary response authority under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to address incidents like this one. EPA realizes that asbestos contained in vermiculite insulation may occasionally be released to the environment from building spaces as was the case at the Asa Wood Elementary School. EPA has sponsored and funded an outreach and education program to address this issue. Our program includes public information brochures, an office open to the public to help answer questions face-to-face, training programs for first responders and renovation contractors, monthly feedback and discussion with the Community Advisory Group, and on-call response personnel that are available to address asbestos releases of concern. In fact, thanks to our response capability, we were able to arrive at the Asa Wood Elementary School, secure and remove the potential asbestos release and patch the building to prevent an on-going release all within three hours.

Additionally, you raised concerns regarding the Cabinet View Country Club. As you know, this business recently expanded its golf course from nine to eighteen holes. EPA has assessed the risk of exposure to workers at the older part of the golf course and plans to do further analysis. EPA will continue dialogue with the Cabinet View Country Club stakeholders.

EPA's dedication of funding and resources clearly demonstrates its strong commitment to doing what is right for the citizens of Libby. We are continuing to place the highest priority on residential cleanup and will continue to work with the County Commissioners of Lincoln County, the state of Montana, and the Libby community to expeditiously complete the necessary work.

Again, thank you for your letter. If you have further questions, please contact me or your staff may call Amy Hayden, in EPA's Office of Congressional and Intergovernmental Relations, at (202) 564-0555.

Sincerely,

Susan Parker Bodine
Assistant Administrator

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MONTANA

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United States Senate

WASHINGTON, DC 20510-2602

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April 15, 2008

Mrs. Susan Parker Bodine
Assistant Administrator
US Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460-0001

Dear Administrator Parker Bodine:

Thank you for your letter dated April 10th, 2008, responding to my request for more funding for the cleanup in Libby. I would especially like to thank you for stating that "Libby has been and will continue to be one of the highest priorities of the Superfund Program." I am writing today to present you with an opportunity to align your actions with your words by devoting more funding this work period to the cleanup in Libby.

The community of Libby has suffered like no other Superfund site. Over 200 people have died from asbestos related diseases in Libby. While this is a tragedy of unprecedented scale, the greater tragedy will be if we allow another generation of people in Libby to be exposed to toxic tremolite asbestos. This need not be the case.

A March 17, 2008 report by the EPA Office of Inspector General identified roughly $8 million sitting in Superfund special accounts that could be immediately transferred to other projects. According to the Inspector General report, "had Region 8 more timely reclassified these special account funds, cleanup needs at the Libby Superfund site or at other sites that receive Trust Fund appropriations may have been met sooner."

The report goes on to state that EPA Region 8 staffers expressed their intention to transfer some of this funding to the cleanup in Libby. I encourage you to take immediate steps to ensure that some of this funding is used to address priority needs in Libby and Troy. Whether finally getting the cleanup at Asa Wood Elementary done right or cleaning up the Libby golf course, there are many needs that could be immediately addressed with this $8 million in unobligated funding. Please provide me with an accounting of how this $8 million in unobligated funding will be spent, including what projects in Libby will be funded.

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I appreciate your commitment to "look for opportunities throughout the year to direct additional funding to the Libby site." The $8 million in unobligated special accounts provides the perfect opportunity to make good on your commitment. I look forward to your response.

With best personal regards, I am

Sincerely,

MSB/cml

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 2 2 2008

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

The Honorable Max Baucus
United States Senate
Washington, D.C. 20510

Dear Senator Baucus:

Thank you for your April 15, 2008 letter expressing your concerns regarding the Libby Asbestos site in Lincoln County, Montana. I want to assure you that our efforts in Libby, Montana have been, and will continue to be, one of the highest priorities of the Superfund program.

In my letter to you of April 10, 2008, I explained that $6.25 million was being committed to Libby risk assessment and remedial investigation/feasibility studies in FY 2008. That total includes $2.8 million reclassified from the Portland Cement Special Account. EPA is planning to reclassify an additional $4 million in special account funding from the Portland Cement site to pay for work at Libby and Troy. At this time, we expect other funds remaining in the Special Account will be needed to complete the work at the Portland Cement site.

Please be assured that we are addressing priority needs in Libby and Troy. We are continuing to place the highest priority on residential cleanups and will continue to work with the County Commissioners of Lincoln County, the state of Montana, and the Libby community to expeditiously complete the necessary work. In addition, as a result of the incident at the Asa Wood Elementary School, EPA plans to conduct another interior and exterior visual inspection of the entire school building structure this summer to ensure that the material is effectively encapsulated in the cavities of concrete masonry blocks. We also plan to conduct sampling to verify that there are no releases to the air from the encapsulated material.

These decisions clearly demonstrate EPA's strong commitment to doing what is right for the citizens of Libby. Thank you for your strong interest in and support of this effort. If you have further questions, please contact me, or your staff may call Carolyn Levine in EPA's Office of Congressional and Intergovernmental Relations at (202) 564-1859.

Sincerely,

Susan Parker Bodine
Assistant Administrator

From: Mary-Kay Lynch
To: Jennifer Lue
Cc: John Michaud
Subject: Fw: Libby Meeting Schedule
Date: 07/29/2009 12:12 PM

I am on leave Monday. Jen are you available? John?
----- Forwarded by Mary-Kay Lynch/DC/USEPA/US on 07/29/2009 12:11 PM -----

From: Arvin Ganesan/DC/USEPA/US
To: "Mary-Kay Lynch" <Lynch.Mary-Kay@epamail.epa.gov>, "Elizabeth Southerland" <Southerland.Elizabeth@epamail.epa.gov>
Date: 07/29/2009 11:34 AM
Subject: Fw: Libby Meeting Schedule

Are you available at this time?

Sent from my Blackberry Wireless Device

----- Original Message -----
From: "Ransom, Catharine (Baucus)" [Catharine_Ransom@baucus.senate.gov]
Sent: 07/29/2009 11:32 AM AST
To: "'Dora.Hughes@hhs.gov'" <Dora.Hughes@hhs.gov>; Arvin Ganesan
Cc: "Wilkins, Paul (Baucus)" <Paul_Wilkins@baucus.senate.gov>
Subject: Re: Libby Meeting Schedule

215 works for me -- arvin?

----- Original Message -----
From: Hughes, Dora (HHS/IOS) <Dora.Hughes@hhs.gov>
To: Ransom, Catharine (Baucus); Ganesan.Arvin@epamail.epa.gov <Ganesan.Arvin@epamail.epa.gov>
Cc: Wilkins, Paul (Baucus)
Sent: Wed Jul 29 10:26:00 2009
Subject: RE: Libby Meeting Schedule

I have a standing meeting at 1pm on Mondays. I can do 11 or 2:15pm.

Dora L Hughes, MD, MPH, FACP
Counselor for Science & Public Health
Office of the Secretary, DHHS

-----Original Message-----
From: Ransom, Catharine (Baucus)
[mailto:Catharine_Ransom@baucus.senate.gov]
Sent: Wednesday, July 29, 2009 10:00 AM
To: 'Ganesan.Arvin@epamail.epa.gov'
Cc: Hughes, Dora (HHS/IOS); Wilkins, Paul (Baucus)
Subject: Libby Meeting Schedule

Here is how we'd like to proceed.

1) Let's meet Monday at 1:00 here in our office.
2) During the meeting, I would like to set up a regular schedule of meetings with EPA and HHS (ie, every two weeks) so that we have a plan going forward and can avoid this scheduling process each time we need to talk.
3) I would also like to lay out a schedule for the next 12 months of key milestones -- ie, start of health care, completion of activity-based

sampling, update of action memo, etc.... so that we're all on the same page in terms of when things are scheduled to occur.
4) We also have a couple of housekeeping items on the clean up to cover (ie, response to email from last week regarding status of ROD in OU-4?)
5) Our original request on the statute was to set up a joint meeting with EPA counsel and HHS counsel. My understanding was that you wanted to meet with each other first, which was fine. Regardless of the results of that meeting, we are still requesting a joint meeting with the appropriate staff from EPA and HHS counsel, next week. I can do this anytime, any day except Wednesday at 1:00 and Tuesday at 12:00. Let me know what works.

Thanks!

Catharine

-----Original Message-----
From: Ganesan.Arvin@epamail.epa.gov
[mailto:Ganesan.Arvin@epamail.epa.gov]
Sent: Wednesday, July 29, 2009 9:54 AM
To: Ransom, Catharine (Baucus)
Cc: Hughes, Dora (HHS/IOS)
Subject: RE: meeting

EPA is happy to speak about cleanup efforts and update you about what's happening on the ground, but i'm afraid that we won't be ready to do that til early next week because of scheduling issues. Does that work? However, regarding HHS interpretation of CERCLA, EPA doesn't have much to contribute, so I encourage that conversation to happen between you and HHS lawyers.

thanks.

ARVIN R. GANESAN
Deputy Associate Administrator
Congressional Affairs
Office of the Administrator
United States Environmental Protection Agency
Ganesan.Arvin@epa.gov
(p) 202.564.5200
(f) 202.501.1519

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| From: |
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|"Ransom, Catharine (Baucus)" <Catharine_Ransom@baucus.senate.gov>
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| To: |
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|Arvin Ganesan/DC/USEPA/US@EPA, "Hughes, Dora (HHS/IOS)"
<Dora.Hughes@hhs.gov>
|

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| Date: |
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|07/27/2009 06:04 PM
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| Subject: |
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  |RE: meeting
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I am actually pretty free on Thursday -- let me know what works -- thanks!

-----Original Message-----
From: Ganesan.Arvin@epamail.epa.gov [mailto:Ganesan.Arvin@epamail.epa.gov]
Sent: Monday, July 27, 2009 6:04 PM
To: Ransom, Catharine (Baucus); Hughes, Dora (HHS/IOS)
Subject: meeting

Catharine,
Got your email last week. Let's try to see if we can find some time this week. Dora's counsel is out of town, but will be back on WEds, so we're trying to identify times, ideally towards the end of the week. When are you available?

Thanks.

ARVIN R. GANESAN
Deputy Associate Administrator
Congressional Affairs
Office of the Administrator
United States Environmental Protection Agency
Ganesan.Arvin@epa.gov
(p) 202.564.5200
(f) 202.501.1519

From: Mary-Kay Lynch
To: Lee Tyner; John Michaud; Charles Openchowski; Earl Salo
Subject: Fw: Libby coverage
Date: 06/17/2009 07:58 PM

You should be very very proud of the work you did to make this happen.

▼ Adora Andy

----- Original Message -----
From: Adora Andy
Sent: 06/17/2009 06:53 PM EDT
To: Michael Moats; "Allyn Brooks-LaSure" <brooks-lasure.allyn@epa.gov>; "Seth Oster" <oster.seth@epa.gov>; Ellen Manges; Elizabeth Southerland; Mary-Kay Lynch; "Bob Sussman" <sussman.bob@epa.gov>; Mathy Stanislaus; "Arvin Ganesan" <ganesan.arvin@epa.gov>; campbell.carol@epa.gov; Betsy Shaw; thompson.diane@epa.gov; Richard Mylott; Enesta Jones; Roxanne Smith
Subject: Libby coverage

Please see below.

▼ Brendan Gilfillan

----- Original Message -----
From: Brendan Gilfillan
Sent: 06/17/2009 06:17 PM EDT
To: Adora Andy
Subject: coverage

EPA declares public health emergency in Montana town ravaged by asbestos

By MATTHEW DALY , Associated Press

WASHINGTON - The Obama administration said Wednesday it will pump an additional $130 million into a Montana town where asbestos contamination has been blamed for more than 200 deaths.

EPA Administrator Lisa Jackson said the agency for the first time has determined there is a public health emergency in a contaminated community, targeting Libby, Mont., for immediate federal attention.

Jackson's announcement will not result in an evacuation of Libby's 2,600 residents, but will require an extensive, home-by-home cleanup and better health protections for those with asbestos-related illnesses.

The EPA will invest at least $125 million over the next five years in the ongoing clean up. The Health and Human Services Department will spend an additional $6 million on medical assistance for residents suffering from asbestos-related illnesses.

The money is in addition to hundreds of millions of dollars the government and Maryland-based W.R. Grace & Co. have spent to clean up Libby, where asbestos contamination from a now-closed vermiculite mine has been cited in the deaths of more than 200 people and illnesses of thousands more.

Before the vermiculite mine was closed in 1990, miners carried asbestos home on their clothes. Vermiculite once covered school running tracks in Libby and some residents used vermiculite as mulch in their home gardens.

Jackson called Libby a "tragic public health situation" that has not received the recognition it deserves from the federal government for far too long.

"Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," said Jackson. "We're here to help create a long and prosperous future for this town."

Jackson said the announcement was the first time the EPA has made such a determination under authority of the 1980 Superfund law that requires the clean up of contaminated sites.

Sen. Max Baucus, D-Mont., called the emergency declaration a great day for Libby, which he said "had to wait year after year as the last administration failed to determine that a public health emergency exists."

The EPA had previously declared the area a Superfund site, but had not determined there was a public health emergency until

Wednesday.

Last fall, Baucus accused the Bush administration of orchestrating a "conspiracy" for not declaring an emergency in Libby. He charged that former EPA Administrator Christine Todd Whitman was prepared to declare an emergency in 2002 but was overruled by the Bush White House.

Baucus called the health announcement especially welcome, given what he called a disappointing verdict last month in a criminal case related to the asbestos contamination. W.R. Grace & Co. and three former executives were acquitted of federal charges that they knowingly allowed residents of the northwestern Montana town to be exposed to asbestos from its vermiculite mine.

A Grace spokesman did not return a telephone call Wednesday. The company has not denied that asbestos came from its mine, but has said it acted responsibly to clean up the contamination. It paid millions in medical bills for residents of Libby and agreed last year to pay $250 million to reimburse the EPA for cleanup efforts.

Sen. Jon Tester, D-Mont., called the emergency declaration long-overdue.

"We still have a long way to do right by the folks in Libby. Working together with the Department of Health and Human Services and the Environmental Protection Agency, we're making very good progress," Tester said.

Gayla Benefield of Libby, who suffers health effects from asbestos exposure and lost both parents to asbestos-related lung diseases, called the declaration a "a giant step forward" for improved medical care and clean up of the town.

"Right now the amount of money is relatively minimal, but overall the biggest thing is that it opens the door for future money to be available for medical care, research — the things we've needed, independent of W.R. Grace in terms of health care," she said.

Montana Gov. Brian Schweitzer hailed the declaration and said the designated funds will be used to make communities in northwestern Montana healthier.

EPA calls health emergency in Mont. mine town
USA Today
In the first such action of its kind, the Environmental Protection Agency has declared a public health emergency in the asbestos-contaminated town of Libby, Mont.

The declaration, by EPA Administrator Lisa Jackson, comes a month after W.R. Grace & Co. and three former executives were acquitted of federal criminal charges that they knowingly allowed Libby residents to be exposed to cancer-causing asbestos from its now-closed vermiculite mine. (The *Missoulian* has an archive of trial coverage.)

Asbestos has been cited in the deaths of more than 200 people and the illness of thousands more.

Under today's action, Libby will not be evacuated, the Associated Press writes. The EPA will spend $125 million during the next five years to conduct house-by-house cleanups and improve health protections for residents with asbestos-related illnesses.

Here's some of what the EPA said in its announcement:

> This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that conditions at a site constitute a public health emergency. This determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos. Investigations performed by the Agency for Toxic Substance and Disease Registry have found the incidence of occurrence of asbestosis, a lung condition, in the Libby area staggeringly higher than the national average for the period from 1979-1998. EPA is working closely with the Department of Health and Human Services, which is making available a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents.

Read the complete EPA news release here.

Grace, based in Columbia, Md., declared bankruptcy in 2001. At the time, it had been named in 110,000 asbestos-related lawsuits.

In April, Grace agreed to a $3 billion settlement to pay outstanding claims, allowing the company to exit bankruptcy with no more asbestos liability.

Asbestos cleanup 'emergency' declared in Montana town

A Montana town where asbestos contamination has been blamed for more than 200 deaths will get new cleanup and medical assistance from the Obama administration under a "public health emergency" declared Wednesday. The declaration is the first ever issued by the Environmental Protection Agency, which has been overseeing the cleanup of Libby, Montana, for 10 years.

The town was heavily contaminated with asbestos-laced dust that federal prosecutors said resulted in more than 200 deaths and 1,000 illnesses.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long," EPA Administrator Lisa Jackson said in a statement accompanying the declaration.

In May, a federal jury acquitted mine operator W.R. Grace and three of its former executives of criminal charges related to the contamination. During Jackson's confirmation hearing in January, Montana Sen. Max Baucus said the town's 12,000 residents had been "hung out to dry" and pressed Jackson to review the issue.

The Libby operation began producing vermiculite -- a mineral often used in insulation -- in 1919. But the vermiculite was contaminated with tremolite asbestos, a particularly toxic form of asbestos that has been linked to mesothelioma, a cancer that can attack the lining of the lungs, abdomen, or heart.Dust from the plant covered patches of grass, dusted the tops of cars and drifted through the air in a hazy cloud that became a part of residents' daily lives.

Grace operated the facility from 1963 until it closed in 1990. During the company's three-month trial, prosecutors argued that its executives knowingly released the substance and tried to hide the danger from the community.

The company did not deny that the asbestos came from its mine, but it said it acted responsibly to clean up the contamination. It paid millions in medical bills for residents of Libby and neighboring Troy, and agreed in 2008 to pay $250 million to reimburse the EPA for its cleanup efforts.

EPA Declares Libby a Public Health Emergency
Flathead Beacon (Western Montana)

The Environmental Protection Agency on Wednesday declared the asbestos contamination in Libby a public health emergency, the first time the EPA has made such a designation since the Superfund law was passed in 1980.

The declaration will result in renewed and extensive contamination cleanup, along with enhanced medical care to treat asbestos-related illness in Libby and Troy, EPA Administrator Lisa Jackson said. A public meeting in Libby scheduled for June 22 with EPA officials will offer more details on the breadth of the services to be offered.

“For years, Libby and Troy residents have been at higher risk for lung cancer,” Jackson said. “We determined that we needed to step up our efforts to help.”

Jackson made the announcement at a Washington D.C. press conference joined by Montana Sens. Max Baucus and Jon Tester, as well as Health and Human Services Secretary Kathleen Sebelius.

“This is a truly historic day,” Baucus said, “The U.S. government is doing what’s right for people who have been oppressed for so long.”

“I cannot emphasize too strongly just what a tragedy the situation is in Libby,” Baucus added. “It’s also a reminder – a reminder of how much more we have to do.”

Libby’s vermiculite mine, purchased in W.R. Grace & Co. in 1963 has resulted in one of the worst public health disasters in U.S. history, resulting in roughly 200 deaths and 2,000 sickened from asbestos-related diseases caused by the tremolite asbestos in the ore. Not only were the miners sickened or killed, but their families and even members of the community who did not work in the Grace mine fell victim to the contamination. The EPA declared Libby a Superfund site in 2002.

Sebelius praised the work the federal government has previously undertaken to aid Libby residents, including the establishment of the Center for Asbestos Related Disease, or CARD Clinic in Libby. The HHS department also plans to begin an $8-million, 8-year epidemiology study in Libby this year, though funding for that

grant was established last year and not related to the new declaration. But she said more is needed.

“Despite the past work, it simply was not enough,” Sebelius said. “We can no longer turn a blind eye.”

Baucus secured a $6 million grant last month, for the Lincoln County Health Department and other health agencies providing medical aid to asbestos victims. In Wednesday’s news conference, he called the grant “a good start,” but he and Jackson declined to give specifics on what the further costs of the emergency declaration might be, saying that the unique nature of tremolite asbestos, and how the human body reacts to such contamination, still requires a great deal of study. Jackson added that she did not believe additional cleanup acts outside of the Troy and Libby area are currently necessary.

In a later conference call with Montana reporters, an EPA official speaking on background said the emergency declaration gives agency workers conducting asbestos cleanups in the homes of Libby and Troy residents a firmer legal standing to carry out removals of vermiculite insulation.

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“The company, W.R. Grace, in my opinion, knew what it was doing,” Baucus said. “This declaration is the beginning of what needed to be done.”

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Tester characterized Libby as a small town of hard-working people who played by the rules, but no community could bear the strain on its own of such an enormous environmental disaster: “The system let Libby down,” Tester said. “The people of Libby want their future back.”

“This is a long overdue, common-sense decision,” he added. “We still have a long way to go to do the right thing for the people of Libby.”

Libby declared public health emergency
By Brad Fuqua, The Western News

Called a "truly historic day for the people of Libby" by U.S. Sen. Max Baucus, the Environmental Protection Agency on Wednesday announced that a public health emergency has been declared in the asbestos-affected area of Libby and Troy.

"This is the first time in American history that we've had this declaration and I cannot think of a more appropriate time and place," Baucus said.

EPA administrator Lisa Jackson announced the move during a press conference in Washington. She said the public health emergency would involve a re-evaluation of the situation on the ground.

"This declaration serves as a reminder of mismanagement of handling hazardous materials," Jackson said. "While EPA has been conducting cleanup in Libby for several years, we are re-committing to getting the job done right."

Baucus, a longtime advocate on the issue, worked on the public health emergency declaration for years.

"This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day," he said.

The Libby asbestos site includes portions of the towns of Libby and Troy and inactive vermiculite mine seven miles northeast of the town. Gold miners discovered vermiculite in Libby in 1881. In the 1920s, the Zonolite Co., formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990.

It is estimated that the Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919-90.

U.S. Health and Human Services Secretary Kathleen Sebelius and U.S. Sen. Jon Tester of Montana were also on hand at the press conference.

"Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need," Baucus said. "Today is the day that after years of work we were able to succeed in getting this done. Yet, we won't stop here.

We will continue to push until Libby has a clean bill of health."

For stories on the declaration of a public health emergency in Libby, see Friday's edition of The Western News or check back at this website on Thursday.

EPA declares public health emergency in Libby

KTVQ (CBS Montana)

U.S. Environmental Protection Agency Administrator Lisa P. Jackson has announced that the agency has determined that a public health emergency exists at the Libby asbestos site.

Hundreds of cases asbestos-related disease have been documented in the area which covers Libby and Troy.

Jackson made the announcement Wednesday morning during a joint press conference with Department of Health and Human Services Secretary Kathleen Sebelius and U.S. Senators Max Baucus and Jon Tester.

This marks the first time that the EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), that conditions at a site constitute a public health emergency.

According to the EPA, the "determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos".

Investigations performed in the area have found that the occurrence of asbestosis in the Libby area are "staggeringly higher than the national average for the period from 1979-1998" according to the EPA.

The agency says they will be working closely with the Department of Health and Human Services, which has been making a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents available.

During her Senate confirmation hearing, Jackson committed to review the situation at the Libby asbestos site and following the review, she decided that conditions at the site present a significant threat to public health and that making a public health emergency determination is appropriate.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long. We're making a long-delayed commitment to the people of Libby and Troy. Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," said Jackson.

"We're here to help create a long and prosperous future for this town." She added, "Senator Max Baucus has been a tireless advocate for the people living in Libby and Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elected to the Senate to bring much needed support to these communities."

Baucus has been a long-time advocate on this issue and has consistently sought out a determination of a public health emergency in this region.

"This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day," Baucus stated. "Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need. Today is the day that after years of work we were able to succeed in getting this done. Yet, we won't stop here. We will continue to push until Libby has a clean bill of health."

Tester added that "this is a long-overdue, common-sense decision that will go a long way for Libby and the thousands of folks who were poisoned there. This decision will help make quality health care more accessible and it will open the door to get new resources on the ground".

The Libby asbestos site has been on the EPA's Superfund National Priorities List since 2002, and cleanup has taken place there since 2000. While the EPA has made progress in helping to remove the threat of asbestos in the land and air the potential release of asbestos remains "a significant threat to public health in that area" according to the EPA.

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Subject:	Fw: Libby coverage
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Adora Andy/DC/USEPA/US

06/17/2009 04:53 PM

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cc

Subject Libby coverage

Please see below.
▼ Brendan Gilfillan

----- Original Message -----
From: Brendan Gilfillan
Sent: 06/17/2009 06:17 PM EDT
To: Adora Andy
Subject: coverage

EPA declares public health emergency in Montana town ravaged by asbestos

By MATTHEW DALY , Associated Press

WASHINGTON - The Obama administration said Wednesday it will pump an

additional $130 million into a Montana town where asbestos contamination has been blamed for more than 200 deaths.

EPA Administrator Lisa Jackson said the agency for the first time has determined there is a public health emergency in a contaminated community, targeting Libby, Mont., for immediate federal attention.

Jackson's announcement will not result in an evacuation of Libby's 2,600 residents, but will require an extensive, home-by-home cleanup and better health protections for those with asbestos-related illnesses.

The EPA will invest at least $125 million over the next five years in the ongoing clean up. The Health and Human Services Department will spend an additional $6 million on medical assistance for residents suffering from asbestos-related illnesses.

The money is in addition to hundreds of millions of dollars the government and Maryland-based W.R. Grace & Co. have spent to clean up Libby, where asbestos contamination from a now-closed vermiculite mine has been cited in the deaths of more than 200 people and illnesses of thousands more.

Before the vermiculite mine was closed in 1990, miners carried asbestos home on their clothes. Vermiculite once covered school running tracks in Libby and some residents used vermiculite as mulch in their home gardens.

Jackson called Libby a "tragic public health situation" that has not received the recognition it deserves from the federal government for far too long.

"Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," said Jackson. "We're here to help create a long and prosperous future for this town."

Jackson said the announcement was the first time the EPA has made such a determination under authority of the 1980 Superfund law that requires the clean up of contaminated sites.

Sen. Max Baucus, D-Mont., called the emergency declaration a great day for Libby, which he said "had to wait year after year as the last administration failed to determine that a public health emergency exists."

The EPA had previously declared the area a Superfund site, but had not determined there was a public health emergency until Wednesday.

Last fall, Baucus accused the Bush administration of orchestrating a "conspiracy" for not declaring an emergency in Libby. He charged that former EPA Administrator Christine Todd Whitman was prepared to declare an emergency in 2002 but was overruled by the Bush White House.

Baucus called the health announcement especially welcome, given what he called a disappointing verdict last month in a criminal case related to the asbestos contamination. W.R. Grace & Co. and three former executives were acquitted of federal charges that they knowingly allowed residents of the northwestern Montana town to be exposed to asbestos from its vermiculite mine.

A Grace spokesman did not return a telephone call Wednesday. The company has not denied that asbestos came from its mine, but has said it acted responsibly to clean up the contamination. It paid millions in medical bills for residents of Libby and agreed last year to pay $250 million to reimburse the EPA for cleanup efforts.

Sen. Jon Tester, D-Mont., called the emergency declaration long-overdue.

"We still have a long way to do right by the folks in Libby. Working together with the Department of Health and Human Services and the Environmental Protection Agency, we're making very good progress," Tester said.

Gayla Benefield of Libby, who suffers health effects from asbestos exposure and lost both parents to asbestos-related lung diseases, called the declaration a "a giant step forward" for improved medical care and clean up of the town.

"Right now the amount of money is relatively minimal, but overall the biggest thing is that it opens the door for future money to be available for medical care, research — the things we've needed, independent of W.R. Grace in terms of health care," she said.

Montana Gov. Brian Schweitzer hailed the declaration and said the designated funds will be used to make communities in northwestern Montana healthier.

EPA calls health emergency in Mont. mine town
USA Today
In the first such action of its kind, the Environmental Protection Agency has declared a public health emergency in the asbestos-contaminated town of Libby, Mont.

The declaration, by EPA Administrator Lisa Jackson, comes a month after W.R. Grace & Co. and three former executives were acquitted of federal criminal charges that they knowingly allowed Libby residents to be exposed to cancer-causing asbestos from its now-closed vermiculite mine. (The *Missoulian* has an archive of trial coverage.)

Asbestos has been cited in the deaths of more than 200 people and the illness of thousands more.

Under today's action, Libby will not be evacuated, the Associated Press writes. The EPA will spend $125 million during the next five years to conduct house-by-house cleanups and improve health protections for residents with asbestos-related illnesses.

Here's some of what the EPA said in its announcement:

> This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that conditions at a site constitute a public health emergency. This determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos. Investigations performed by the Agency for Toxic Substance and Disease Registry have found the incidence of occurrence of asbestosis, a lung condition, in the

Libby area staggeringly higher than the national average for the period from 1979-1998. EPA is working closely with the Department of Health and Human Services, which is making available a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents.

Read the complete EPA news release here.

Grace, based in Columbia, Md., declared bankruptcy in 2001. At the time, it had been named in 110,000 asbestos-related lawsuits.
In April, Grace agreed to a $3 billion settlement to pay outstanding claims, allowing the company to exit bankruptcy with no more asbestos liability.

Asbestos cleanup 'emergency' declared in Montana town

A Montana town where asbestos contamination has been blamed for more than 200 deaths will get new cleanup and medical assistance from the Obama administration under a "public health emergency" declared Wednesday. The declaration is the first ever issued by the Environmental Protection Agency, which has been overseeing the cleanup of Libby, Montana, for 10 years.

The town was heavily contaminated with asbestos-laced dust that federal prosecutors said resulted in more than 200 deaths and 1,000 illnesses.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long," EPA Administrator Lisa Jackson said in a statement accompanying the declaration.

In May, a federal jury acquitted mine operator W.R. Grace and three of its former executives of criminal charges related to the contamination. During Jackson's confirmation hearing in January, Montana Sen. Max Baucus said the town's 12,000 residents had been "hung out to dry" and pressed Jackson to review the issue.

The Libby operation began producing vermiculite -- a mineral often used in insulation -- in 1919. But the vermiculite was contaminated with tremolite asbestos, a particularly toxic form of asbestos that has been linked to mesothelioma, a cancer that can attack the lining of the lungs, abdomen, or heart.Dust from the plant covered patches of grass, dusted the tops of cars and drifted through the air in a hazy cloud that became a part of residents' daily lives.

Grace operated the facility from 1963 until it closed in 1990. During the

company's three-month trial, prosecutors argued that its executives knowingly released the substance and tried to hide the danger from the community.

The company did not deny that the asbestos came from its mine, but it said it acted responsibly to clean up the contamination. It paid millions in medical bills for residents of Libby and neighboring Troy, and agreed in 2008 to pay $250 million to reimburse the EPA for its cleanup efforts.

EPA Declares Libby a Public Health Emergency
Flathead Beacon (Western Montana)

The Environmental Protection Agency on Wednesday declared the asbestos contamination in Libby a public health emergency, the first time the EPA has made such a designation since the Superfund law was passed in 1980.

The declaration will result in renewed and extensive contamination cleanup, along with enhanced medical care to treat asbestos-related illness in Libby and Troy, EPA Administrator Lisa Jackson said. A public meeting in Libby scheduled for June 22 with EPA officials will offer more details on the breadth of the services to be offered.

“For years, Libby and Troy residents have been at higher risk for lung cancer,” Jackson said. “We determined that we needed to step up our efforts to help.”

Jackson made the announcement at a Washington D.C. press conference joined by Montana Sens. Max Baucus and Jon Tester, as well as Health and Human Services Secretary Kathleen Sebelius.

“This is a truly historic day,” Baucus said, “The U.S. government is doing what’s right for people who have been oppressed for so long.”

“I cannot emphasize too strongly just what a tragedy the situation is in Libby,” Baucus added. “It’s also a reminder – a reminder of how much more we have to do.”

Libby’s vermiculite mine, purchased in W.R. Grace & Co. in 1963 has resulted in one of the worst public health disasters in U.S. history, resulting in roughly 200 deaths and 2,000 sickened from asbestos-related diseases caused by the tremolite asbestos in the ore. Not only were the miners sickened or killed, but their families and even members of the community who did not work in the Grace mine fell victim to the contamination. The EPA declared Libby a Superfund site in 2002.

Sebelius praised the work the federal government has previously undertaken to aid Libby residents, including the establishment of the Center for Asbestos Related Disease, or CARD Clinic in Libby. The HHS department also plans to begin an $8-million, 8-year epidemiology study in Libby this year, though funding for that grant was established last year and

not related to the new declaration. But she said more is needed.

“Despite the past work, it simply was not enough,” Sebelius said. “We can no longer turn a blind eye.”

Baucus secured a $6 million grant last month, for the Lincoln County Health Department and other health agencies providing medical aid to asbestos victims. In Wednesday’s news conference, he called the grant “a good start,” but he and Jackson declined to give specifics on what the further costs of the emergency declaration might be, saying that the unique nature of tremolite asbestos, and how the human body reacts to such contamination, still requires a great deal of study. Jackson added that she did not believe additional cleanup acts outside of the Troy and Libby area are currently necessary.

In a later conference call with Montana reporters, an EPA official speaking on background said the emergency declaration gives agency workers conducting asbestos cleanups in the homes of Libby and Troy residents a firmer legal standing to carry out removals of vermiculite insulation.

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By Brad Fuqua, The Western News
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“This is the first time in American history that we’ve had this declaration and I cannot think of a more appropriate time and place,” Baucus said.

EPA administrator Lisa Jackson announced the move during a press conference in Washington. She said the public health emergency would involve a re-evaluation of the situation on the ground.

“This declaration serves as a reminder of mismanagement of handling hazardous materials,” Jackson said. “While EPA has been conducting cleanup in Libby for several years, we are re-committing to getting the job done right.”

Baucus, a longtime advocate on the issue, worked on the public health emergency declaration for years.

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It is estimated that the Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919-90.

U.S. Health and Human Services Secretary Kathleen Sebelius and U.S. Sen. Jon Tester of Montana were also on hand at the press conference.

“Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need,” Baucus said. “Today is the day that after years of work we were able to succeed in getting this done. Yet, we won’t stop here. We will continue to push until Libby has a clean bill of health.”

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EPA declares public health emergency in Libby

KTVQ (CBS Montana)

U.S. Environmental Protection Agency Administrator Lisa P. Jackson has announced that the agency has determined that a public health emergency exists at the Libby asbestos site.

Hundreds of cases asbestos-related disease have been documented in the area which covers Libby and Troy.

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that conditions at the site present a significant threat to public health and that making a public health emergency determination is appropriate.

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"We're here to help create a long and prosperous future for this town." She added, "Senator Max Baucus has been a tireless advocate for the people living in Libby and Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elected to the Senate to bring much needed support to these communities."

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bought the Zonolite mining operations. The mine closed in 1990.

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Subject: Fw: Libby-EPA Announces Public Health Emergency
Date: 06/17/2009 02:38 PM

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"How long a useful truth may be known and exist before it is generally receiv'd and practis'd on." Ben Franklin

----- Forwarded by Wendy OBrien/EPR/R8/USEPA/US on 06/17/2009 12:34 PM -----

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06/17/2009 11:50 AM

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<AndersonKA@cdm.com>, "Beaudoin, Kristopher"
<BeaudoinKR@cdm.com>, "Barnett, Frank"
<BarnettFC@cdm.com>, "Peltier, Carol"
<PeltierCA@cdm.com>, "Forkel, Matthew"
<ForkelMD@cdm.com>, "Hartman, Pamela"
<HartmanPM@cdm.com>, "Smith, Jennifer L."
<smithjl@cdm.com>, "Terry, Jeffery"
<TerryJL@cdm.com>, "Santos, Dominic"
<SantosD@cdm.com>

Subject Libby-EPA Announces Public Health Emergency

CONTACTS:
EPA Press Office-202-564-1692
HHS Press Office-202-690-6343

FOR IMMEDIATE RELEASE
June 17, 2009

EPA Announces Public Health Emergency in Libby, Montana

EPA to Move Aggressively on Cleanup and HHS to Assist Area Residents with Medical Care

WASHINGTON – U.S. Environmental Protection Agency Administrator Lisa P. Jackson today announced the agency has determined that a public health emergency exists at the Libby asbestos site in northwest Montana. Over the past years, hundreds of asbestos-related disease cases have been documented in this small community, which covers the towns of Libby and Troy. The announcement was made today at a joint press conference with Department of Health and Human Services

Secretary Kathleen Sebelius and U.S. Sens. Max Baucus and Jon Tester.

This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that conditions at a site constitute a public health emergency. This determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos. Investigations performed by the Agency for Toxic Substance and Disease Registry have found the incidence of occurrence of asbestosis, a lung condition, in the Libby area staggeringly higher than the national average for the period from 1979-1998. EPA is working closely with the Department of Health and Human Services, which is making available a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents.

During her Senate confirmation hearing, Administrator Jackson committed to review the situation at the Libby asbestos site based on current site information, sound science and EPA's legal authorities. As a result of her review, the Administrator has decided that conditions at the site present a significant threat to public health and that making a public health emergency determination is appropriate.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long. We're making a long-delayed commitment to the people of Libby and Troy. Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," said EPA Administrator Lisa P. Jackson. "We're here to help create a long and prosperous future for this town." She added, "Senator Max Baucus has been a tireless advocate for the people living in Libby and Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elected to the Senate to bring much needed support to these communities."

"Senator Baucus and Senator Tester have powerfully brought the voices of the people of Libby and Troy to Washington so the nation could hear and understand what happened. They refused to give up on finding the best ways to help those who have suffered so much. Today's announcement reflects our Administration's concern for the residents of Lincoln County and our intention to act decisively to protect and improve their health and quality of life,' said Secretary Sebelius. "The Department of Health and Human Services has been working closely with the EPA and the residents of Lincoln County for a number of years to conduct screenings and help provide access to care. Now, we have come together with Senator Baucus and Senator Tester, Administrator Jackson, and agencies across HHS, to offer a new grant to provide short-term medical assistance for screening, diagnostic and treatment services in a comprehensive and coordinated manner in partnership with local officials on the ground in Lincoln County. "

Sen. Max Baucus, a long-time advocate on this issue, consistently sought out a determination of a public health emergency in this region.

“This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day,” said Sen. Baucus. “Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need. Today is the day that after years of work we were able to succeed in getting this done. Yet, we won’t stop here. We will continue to push until Libby has a clean bill of health.”

“This is a long-overdue, common-sense decision that will go a long way for Libby and the thousands of folks who were poisoned there,” Sen. Tester said. “This decision will help make quality health care more accessible and it will open the door to get new resources on the ground. We still have a long way to do right by the folks in Libby. Working together with the Department of Health and Human Services and the Environmental Protection Agency, we’re making very good progress.”

Secretary Sebelius tasked two HHS agencies – the Health Resources and Services Administration and the Centers for Disease Control and Prevention/Agency for Toxic Substances and Disease Registry – to help county residents. These two agencies will support a new grant to assist affected residents who need medical care. Local officials are currently putting together a grant proposal that will lay out options for provision of medical care that will work for the residents of Lincoln County. HHS anticipates that this grant can be awarded in August 2009.

The Libby asbestos site has been on the EPA’s Superfund National Priorities List since 2002, and cleanup has taken place since 2000. EPA has made progress in helping to remove the threat of asbestos in the land and air, and with it, the increased risks of lung cancer, asbestosis, and other respiratory problems. While EPA’s cleanup efforts have greatly reduced exposure, actual and potential releases of amphibole asbestos remain a significant threat to public health in that area.

The Libby asbestos site includes portions of the towns of Libby and Troy and an inactive vermiculite mine seven miles northeast of the town. Gold miners discovered vermiculite in Libby in 1881; in the 1920s the Zonolite Company formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990. It is estimated that the Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919 to 1990.

More information: http://www.epa.gov/libby

R176

From: Matthew Cohn
To: Andy Lensink; Kelcey Land; Sharon Kercher
Subject: Fw: Libby
Date: 04/22/2009 09:48 AM

----- Forwarded by Matthew Cohn/R8/USEPA/US on 04/22/2009 07:47 AM -----

David Janik/R8/USEPA/US
04/22/2009 07:37 AM

To: Matthew Cohn, Paul Peronard, Michael Risner
cc:
Subject: Libby

The Inside Story - Tuesday, April 21, 2009
- Adjust Text Size +

Libby Litigation

Environmentalists are suing EPA for withholding a long-sought Inspector General (IG) report related to the agency's asbestos cleanup in Libby, MT -- a document that could help efforts to force the agency to issue a potentially precedent-setting emergency declaration that could trigger hundreds of cleanups nationwide.

In an April 21 complaint, Public Employees for Environmental Responsibility (PEER) says EPA violated the Freedom Of Information Act (FOIA) and the Administrative Procedure Act by failing to respond to the group's request for a 2006 report by IG investigator Cory Rumple regarding the safety and completeness of EPA's removal of asbestos-contaminated vermiculite in Libby.

EPA in 2007 denied PEER's initial request to release the document, arguing it was part of an active law enforcement investigation. EPA dropped that initial argument in a July 28, 2008 letter to PEER, but nonetheless argued releasing even a “summary of information and concerns of various EPA employees and private individuals on technical/scientific issues regarding EPA's residential cleanup program in Libby” would improperly reveal the agency's “deliberative process.” But the agency has not yet responded to a subsequent appeal from PEER, prompting the lawsuit.

In an April 21 statement, PEER Staff Counsel Christine Erickson noted that according to EPA's website, the agency this year “will transition from emergency Removal Activity to the Remedial Process” in Libby. “There is no record of EPA conducting a risk assessment on its own clean-up plan; the [IG] report explores the consequences of that omission.”

Sen. Max Baucus (D-MT) and environmentalists have long sought to have EPA declare

asbestos contamination from a mine in Libby an “emergency,” a move that could set a precedent triggering landmark nationwide residential cleanup actions for structural products and requiring financial assistance for victims' health care that the law typically bars.

But the Bush administration resisted the effort. And a recent EPA report concluded that inhalation of outdoor ambient air in and around Libby is no longer likely to be a significant cancer risk to area residents and workers, a finding that is drawing criticism from some activists. The agency is also prosecuting in criminal court W.R. Grace executives who allegedly withheld data on the Libby contamination.

Despite the recent agency actions, PEER officials say the lawsuit will be a test of the Obama administration's commitment to release documents under FOIA.

4212009_bloglibby

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P.O. Box 7167, Ben Franklin Station, Washington, DC 20044
DJ Janik
USEPA Region 8
1595 Wynkoop Street [ENF-L]
Denver, Colorado 80202-1129
303.312.6917 [FAX: 303.312.7202]
E-mail: janik.david@epa.gov "It's not enough to change the players. We've gotta change the game."Barack Obama.

From: Ted Linnert
To: Richard Mylott
Subject: Fw: Making the Connection
Date: 06/23/2009 06:04 PM

Hi Rich,

Thanks for the voice mail, let's do lunch (other than Steuben's on Thursday). Much to say about me almost getting kicked off the Libby site, the PHE, and my new car.

Also, (b) (6) during the last half of July, let's do it before then. And remember what it takes two to do.....

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
Denver, CO 80202-1129

(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

----- Forwarded by Ted Linnert/OCP/R8/USEPA/US on 06/23/2009 03:59 PM -----

"Kirk Johnson" <kjohn@nytimes.com>

06/23/2009 03:49 PM

To Ted Linnert/OCP/R8/USEPA/US@EPA
cc
Subject RE: Making the Connection

Ted,
Nice speaking with you as well.
Best,
Kirk

Kirk Johnson
Denver Bureau Chief
The New York Times
303-62
cell: (b) (6)

-----Original Message-----
From: Linnert.Ted@epamail.epa.gov [mailto:Linnert.Ted@epamail.epa.gov]
Sent: Tuesday, June 23, 2009 3:46 PM
To: kjohn@nytimes.com
Subject: Making the Connection

Hi John,

Nice speaking with you a few minutes ago. See you in Libby (or visit our new ultra-green building in Denver).

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
Denver, CO 80202-1129

(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

From:	Debbie Dietrich
Sent By:	Patrick Easter
To:	Gilberto Irizarry
Cc:	Debbie Dietrich
Subject:	Fw: Meeting today at 4:00
Date:	03/10/2009 01:36 PM

Patrick here. FYI.

----- Forwarded by Patrick Easter/DC/USEPA/US on 03/10/2009 01:34 PM -----

From:	Barry Breen/DC/USEPA/US
To:	Elizabeth Southerland/DC/USEPA/US, Debbie Dietrich/DC/USEPA/US@EPA, Barbara Hostage/DC/USEPA/US@EPA
Cc:	Kawana Cohen-Hopkins/DC/USEPA/US@EPA, Patrick Easter/DC/USEPA/US@EPA, Amanda Halstead/DC/USEPA/US@EPA, Carolyn McDonald/DC/USEPA/US@EPA, Ruby Capers/DC/USEPA/US@EPA, Faith Williams/DC/USEPA/US@EPA
Date:	03/10/2009 01:01 PM
Subject:	Meeting today at 4:00

(this is Ellyn...)

Per the voicemail I just left for Betsy, Debbie and Barbara...Besty/Debbie - he'd like you to attend with him. Barbara, he'd like for someone from your science policy staff. Please let me (Ellyn) know who can attend. Please meet Barry at Jim's office. Thanks, Ellyn

----- Forwarded by Ellyn Fine/DC/USEPA/US on 03/10/2009 12:52 PM -----

Asbestos

Tue
03/10/2009 4:00
PM - 5:00 PM

Barry Breen

Chair:	**Jim Jones/DC/USEPA/US**
Sent By:	**Joyce Crowley/DC/USEPA/US**

Location: 3130 EPA East

Barry Breen/DC/USEPA/US@EPA, Betsy Shaw/DC/USEPA/US@EPA, Brian Symmes/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Mary Hanley/DC/USEPA/US@EPA

From: Ted Linnert
To: Sonya Pennock
Subject: Fw: Missoulian: Health emergency declared in Libby - More aid expected after 'historic' announcement
Date: 06/23/2009 12:01 PM

I'm not even one of his constituents!

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
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(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

----- Forwarded by Ted Linnert/OCP/R8/USEPA/US on 06/23/2009 10:01 AM -----

"Mike Stiehl"
<mstiehl@(b) (6) [redacted]

06/18/2009 07:11 PM

Please respond to
"Mike Stiehl" <mstiehl@(b) (6) [redacted]

To: Ted Linnert/OCP/R8/USEPA/US@EPA
cc: John Dalton/OCP/R8/USEPA/US@EPA
Subject: Missoulian: Health emergency declared in Libby - More aid expected after 'historic' announcement

Every Luminary possible is taking credit for this Health Emergency decision.
http://www.missoulian.com/articles/2009/06/18/news/local/news02.txt
Montana Senators, Director Jackson and the Administration are all celebrating this first ever Declaration of Health Emergency. With the attendant funding.

BUT, these Luminaries don't acknowledge Ted Linnert, who has been on the ground, suffering the slings and arrows of Public Discontent, and who has given his Heart and Soul to Libby. So much of what you do is done behind the scenes, making the case for Libby.

Ted, thank you for your dedication to the lives of our People and our Planet. You have focused on the details that can help, and you dove right into the trenches. By my book, you are a huge success.

I think the EPA should honor you as Employee of the Year and name a building after you!

Mike Stiehl
County Commissioner Chairman,
Fremont County
Canon City, CO
(719) 276-7301
Home of the Lincoln Park/ Cotter Superfund site

P.S. Please forward as you please.

From: Tim Davis
To: Ted Linnert; Wendy Chipp
Subject: Fw: PHE-Trent
Date: 06/19/2009 11:13 AM

This is a very tame note by Terry Trent's standards!

----- Forwarded by Tim Davis/R8/USEPA/US on 06/19/2009 09:06 AM -----

Terry Trent
<ttrent1@ (b) (6)

06/18/2009 01:08 PM

To bw1814@ (b) (6) Ildunesland@ (b) (6) ttrent1@ (b) (6) ppeters@asbestoswatch.net, gerry@ (b) (6) psymrc@langate.gsu.edu, josiane.tetreault@mail.mcgill.ca, chris@ (b) (6) kimberly.faldetta@mail.mcgill.ca, tony.kovach@mail.mcgill.ca, mculley@gsu.edu, Lance.mcmahan@ (b) (6) victoria95762@ (b) (6) aqhoward@ (b) (6) ArtLanger@ (b) (6) billb@libby.org, tberget@libby.org, ABRAHAMJ@upstate.edu, christopherorman@ (b) (6) ardnet@libby.org, guthneck@ (b) (6) looney2@libby.org, beasley09@ (b) (6) lmnelson@ (b) (6) lcdeh@libby.org, minimary@ (b) (6) EkstromKL@cdm.com, glena.young@cityoflibby.com, tony.ward@umontana.edu, dtholen@ (b) (6) jchristi1970@ (b) (6) tanis@libbyasbestos.org, bgoodman@mt.gov, FRANCES COSTANZI/R8/USEPA/US@EPA, msimmons@mt.gov, robert.r.marriam@ (b) (6) berryl@karmanos.org, ldimmler@ (b) (6) MUNDYCAMP@ (b) (6) citytroy@troymt.net, dtbusby@ (b) (6) gaylab@ (b) (6) Tim Davis/R8/USEPA/US@EPA, Parkers257@ (b) (6) rwindom@libby.org, Kirby_Campbell-Rierson@baucus.senate.gov, kimberly@libbyasbestos.org, jpuffer@andromeda.rutgers.edu, mgermine@ (b) (6) brad@libbyasbestos.org

cc

Subject PHE

Today, after all these many years, the fruits of my efforts regarding Public Health Emergency, for Libby, which I had always planned as a wake up call for El Dorado County (and of course it was obvious from the start for Libby) and those other areas similarly situated, was announced on one local television news program in the Sacramento region. They connected the dots well enough that they actually showed some stock pictures of El Dorado County!! At this point I am terribly surprised when anyone connects dots.

So, the missing element from that one story? The fiber type. THE FIBER TYPE!! The information supposedly supplied to the public by our trusted health agencies that THIS FIBER IS 500 TO 770 TIMES MORE MESOTHELIOMAGENIC than what you commonly think of as "asbestos" and that it represents an EMERGENCY (whereas common "asbestos" does not). Even before we get to the knowledge that Tremolite exists in free fiber concentration at the surface that far exceeds Libby concentrations!! (95-99% pure long fiber tremolite with overall concentrations estimated at 10-15% bulk analysis). One must also consider that there are

"thousands" of "asbestos" deposits in California that do not represent Emergency, and it is to these deposits that EPA has spent ALL of the money they had allocated toward "asbestos".

Hmmmm. Is there anyone out there who no longer understands how Libby happened and why WR Grace was not entirely (or even one could say remotely) responsible? EPA are equal opportunity withholders of important information...they withhold it from the Corporations as much as they do from the people. How can anyone blame the Corporations?
Best regards,
Terry

From: Kawana Cohen-Hopkins
To: Gilberto Irizarry
Subject: Fw: Preparing for Administrator Jackson Briefing on Libby
Date: 02/02/2009 08:59 AM

Just wanted to make sure you saw this.

Kawana Cohen-Hopkins
Special Assistant
US Environmental Protection Agency
Office of Emergency Management
1200 Pennsylvania Ave NW
Rm 1448J ARN
Phone: 202-564-6635
Fax: 202-564-8222

----- Forwarded by Kawana Cohen-Hopkins/DC/USEPA/US on 02/02/2009 08:58 AM -----

Preparing for Administrator Jackson Briefing on Libby

Mon
02/02/2009 3:15
PM - 4:15 PM

Debbie Dietrich

Chair: **Barry Breen/DC/USEPA/US**

Sent By: **Ellyn Fine/DC/USEPA/US**

Location: 4144 EPA West

Amy Hayden/DC/USEPA/US@EPA, Barnes Johnson/DC/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carolyn Levine/DC/USEPA/US@EPA, Dana Tulis/DC/USEPA/US@EPA, Debbie Dietrich/DC/USEPA/US@EPA, Earl Salo/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US, Ellen Manges/DC/USEPA/US@EPA, Ellyn Fine/DC/USEPA/US@EPA, James Woolford/DC/USEPA/US@EPA, Jennifer Wilbur/DC/USEPA/US@EPA, John Michaud/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Randy Deitz/DC/USEPA/US@EPA, Renee Wynn/DC/USEPA/US@EPA

Optional: Carolyn McDonald/DC/USEPA/US, Faith Williams/DC/USEPA/US@EPA, Ruby Capers/DC/USEPA/US@EPA, Tracey Stewart/DC/USEPA/US@EPA

Call in # - (b) (6) -- access code (b) (6)

Ellyn Fine
202-566-2775

From: Michael Boydston
To: Peter Ornstein; Robert Ward
Subject: Fw: Process for Getting Libby Action Memo Signed Tomorrow
Date: 06/16/2009 07:19 PM

Michael Boydston
Associate Regional Counsel
EPA Region 8
1595 Wynkoop St.
Denver CO 80202
303.312.7103

----- Forwarded by Michael Boydston/R8/USEPA/US on 06/16/2009 05:18 PM -----

Ellen Manges/DC/USEPA/US

06/16/2009 05:16 PM

To: Andy Lensink/R8/USEPA/US@EPA, James Woolford/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Gilberto Irizarry/DC/USEPA/US@EPA, Kevin Mould/DC/USEPA/US@EPA, John Michaud/DC/USEPA/US@EPA, Betsaida Alcantara/DC/USEPA/US@EPA, Michael Boydston/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Debbie Dietrich/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Barry Breen/DC/USEPA/US@EPA, Ellyn Fine/DC/USEPA/US@EPA, Marta Montoro/DC/USEPA/US@EPA

cc:

Subject: Process for Getting Libby Action Memo Signed Tomorrow

Here is the process for getting the final Action Memo signed tomorrow. We will need to do this quickly in order to get it on the website by 1:20 for the press conference.

- The Administrator's Office will alert me when the Administrator signs the Determination and Findings of a PHE. It will probably be at about 12:00. I will call and email Andy Lensink to start the signature process.
- R-8 will pdf the AM signed by Carol Rushin and email it to: James Woolford, Elizabeth Southerland, Ellen Manges
- Jim Woolford will sign the AM, and have it pdf and emailed to: Barry Breen, Debbie Dietrich, Gilberto Irizarry, Kevin Mould and Ellen Manges.
- Barry (signing for Mathy) and Debbie (with Barry tomorrow) will sign and have it pdf and emailed to: Andy Lensink, Ellen Manges and John Michaud.
- Andy will email it to the appropriate R8 staff for posting on the website.

Andy will also send it to John Michaud, Ellen Manges and Betsaida Alcantara in OPA.

Thanks everyone for your cooperation in getting this done!

Ellen Manges

▼ Andy Lensink---06/16/2009 06:23:25 PM---Here it is. I'll be back in the office tomorrow at ~7:00 MDT/9:00 EDT to field whatever needs to be

From: Andy Lensink/R8/USEPA/US
To: Ellen Manges/DC/USEPA/US@EPA, John Michaud/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA
Cc: Russell Leclerc/EPR/R8/USEPA/US@EPA, Michael Boydston/R8/USEPA/US@EPA
Date: 06/16/2009 06:23 PM
Subject: latest draft of Action Memo Amendment

Here it is. I'll be back in the office tomorrow at ~7:00 MDT/9:00 EDT to field whatever needs to be fielded in order to get a final version for Carol Rushin to sign shortly after the PHE doc is signed. We understand the press conference is at about 1:20 EDT, so we're assuming the PHE doc will be signed shortly before that time.

[attachment "FINAL AM amendment- PHE- 6-16-09 4.07 pm.doc" deleted by Ellen Manges/DC/USEPA/US]

From: Mary-Kay Lynch
To: John Michaud
Subject: Fw: Q & A documents final review
Date: 06/09/2009 12:00 PM

----- Forwarded by Mary-Kay Lynch/DC/USEPA/US on 06/09/2009 12:00 PM -----

From: Betsaida Alcantara/DC/USEPA/US
To: Mary-Kay Lynch/DC/USEPA/US@EPA
Date: 06/08/2009 06:30 PM
Subject: Re: Q & A documents final review

---

got your message. got it! let's talk tomorrow. makes complete sense. (b) (6) (cell)

Betsaida Alcantara
Deputy Press Secretary | Office of Public Affairs
US Environmental Protection Agency
202-564-1692
alcantara.betsaida@epa.gov

▼ Mary-Kay Lynch---06/08/2009 03:31:42 PM---I am in a meeting as well. My number is 202 564-3162. I will likely not be back at my desk until 41

From: Mary-Kay Lynch/DC/USEPA/US
To: Betsaida Alcantara/DC/USEPA/US@EPA
Date: 06/08/2009 03:31 PM
Subject: Re: Q & A documents final review

I am in a meeting as well. My number is 202 564-3162. I will likely not be back at my desk until 415. I am thinking I can send the package to the Region 8 Communications Director and copy you. Otherwise you can send it to that person saying OGC requested it be sent and to send comments to you and me.

▼ Betsaida Alcantara

----- Original Message -----
From: Betsaida Alcantara
Sent: 06/08/2009 03:18 PM EDT
To: Mary-Kay Lynch
Subject: Re: Q & A documents final review

I'm not at my desk, in a mtg. Can you please send me your number so that I can call you when I'm done. Thank you

▼ Mary-Kay Lynch

----- Original Message -----
From: Mary-Kay Lynch
Sent: 06/08/2009 03:13 PM EDT
To: Betsaida Alcantara

Subject: Re: Q & A documents final review

What is your phone number? I have a question. Mk

▼ Betsaida Alcantara

----- Original Message -----
From: Betsaida Alcantara
Sent: 06/08/2009 02:31 PM EDT
To: Mary-Kay Lynch
Cc: Adora Andy
Subject: Fw: Q & A documents final review

Mary,
Can I share the Q &As and this info below with Region 8 Communications Director? We are going to ask them to draft the first version of the release.

Thanks,
Betsaida

----- Forwarded by Betsaida Alcantara/DC/USEPA/US on 06/08/2009 02:30 PM -----

From: John Michaud/DC/USEPA/US
To: Allyn Brooks-LaSure/DC/USEPA/US@EPA, Adora Andy/DC/USEPA/US@EPA, Betsaida Alcantara/DC/USEPA/US@EPA
Cc: Mary-Kay Lynch/DC/USEPA/US@EPA
Date: 06/05/2009 09:06 PM
Subject: Fw: Q & A documents final review

Allyn, Adora and Betsaida --

As discussed in the meeting with Bob Sussman today, below are several documents related to Libby and to vermiculite more generally. Also attached is a copy of the current draft of the Public Health Emergency finding.

Please let Mary Kay know if you have any questions about any of the materials. Also, these documents are still undergoing review and will likely be changed in some respects.

Thanks.

[attachment "Libby PHE 060509.doc" deleted by Mary-Kay Lynch/DC/USEPA/US]

John R. Michaud
Assistant General Counsel for RCRA
Solid Waste and Emergency Response Law Office
Office of General Counsel
U.S. EPA, Washington, D.C.
Mail Code: 2366A
tel: 202-564-5518
fax: 202-564-5531

email: michaud.john@epa.gov

----- Forwarded by John Michaud/DC/USEPA/US on 06/05/2009 08:41 PM -----

From: John Michaud/DC/USEPA/US

To: Andy Lensink/ENF/R8/USEPA/US@epa, Carol Campbell/R8/USEPA/US@epa, Charles Openchowski/DC/USEPA/US@epa, Earl Salo/DC/USEPA/US@epa, Elizabeth Southerland/DC/USEPA/US@epa, Ellen Manges/DC/USEPA/US@epa, Jennifer Lue/DC/USEPA/US@epa, Lee Tyner/DC/USEPA/US@epa, Mary-Kay Lynch/DC/USEPA/US@epa, Mike Gaydosh/R8/USEPA/US@epa, Phyllis Anderson/DC/USEPA/US@epa, Robert Ward/RC/R8/USEPA/US@epa, Russell Leclerc/EPR/R8/USEPA/US@epa, Peter Ornstein/RC/R8/USEPA/US@EPA

Cc: Bob Sussman/DC/USEPA/US@EPA, Barry Breen/DC/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Betsy Shaw/DC/USEPA/US@EPA, Brian Symmes/DC/USEPA/US@EPA, canavan.sheila@epa.gov, Priscilla Flattery/DC/USEPA/US@EPA

Date: 06/05/2009 04:35 PM

Subject: Q & A documents final review

All --

Attached are the following documents for a final review:

1. Internal Libby-specific Q & A (OGC)

2. Vermiculite brochure (clean and track changes versions) (OPPTS)

3. Vermiculite External Q & A (clean and track changes versions) (OPPTS)

You will also be asked to review a Q & A that OPPTS is developing for internal EPA use. As soon as I receive that document I will forward it to the group.

Please have comments on the attached documents back COB Tuesday (June 9). Comments on all documents should be sent to both Mary Kay Lynch and me. In addition, for the OPPTS documents please include Sheila Canavan and Priscilla Flattery on the responses.

Thanks for your help.

[attachment "libby Q&A 060509.doc" deleted by Mary-Kay Lynch/DC/USEPA/US]

[attachment "Vermiculite Message to the Public-Draft- 6-2-09.clean.doc" deleted by Mary-Kay Lynch/DC/USEPA/US]
[attachment "Vermiculite Message to the Public-Draft- 6-2-09.attempt to address comments.doc" deleted by Mary-Kay Lynch/DC/USEPA/US]
[attachment "Vermiculite Insulation External Q&A - clean.6-3-09.doc" deleted by Mary-Kay Lynch/DC/USEPA/US]
[attachment "Vermiculite Insulation External Q&A - attempt to address comments.6-3-09.doc" deleted by Mary-Kay Lynch/DC/USEPA/US]

John R. Michaud
Assistant General Counsel for RCRA
Solid Waste and Emergency Response Law Office
Office of General Counsel
U.S. EPA, Washington, D.C.
Mail Code: 2366A
tel: 202-564-5518
fax: 202-564-5531
email: michaud.john@epa.gov

From:	Elizabeth Southerland
To:	Betsy Shaw
Cc:	Mary-Kay Lynch; John Michaud; Lee Tyner
Subject:	Fw: Q&A regarding insulation cleanup at Libby
Date:	06/16/2009 03:56 PM

----- Forwarded by Elizabeth Southerland/DC/USEPA/US on 06/16/2009 03:56 PM -----

From:	Elizabeth Southerland/DC/USEPA/US
To:	"Ransom, Catharine (Baucus)" <Catharine_Ransom@baucus.senate.gov>
Cc:	Adora Andy/DC/USEPA/US@EPA, Arvin Ganesan/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Ellen Manges/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA
Date:	06/11/2009 03:52 PM
Subject:	RE: Q&A regarding insulation cleanup at Libby

Here's a response to your questions below.

The Asbestos Hazard Emergency Response Act (AHERA), a provision of the Toxic Substances Control Act, became law in 1986. (40 CFR 763.98) AHERA requires local education agencies to inspect their schools for asbestos-containing building material and prepare management plans to prevent or reduce asbestos hazards. EPA's Office of Air also has a NESHAPS regulation for asbestos, but that reg specifically excludes private residences, so EPA has looked to AHERA and the TSCA guidance on managing asbestos to guide our approach to indoor cleanup at Libby. The TSCA guidance is a July 1990 document entitled, "Managing Asbestos In Place: A Building Owner's Guide to Operations and Maintenance Programs for Asbestos-Containing Materials." That guidance states that EPA only requires asbestos removal in order to prevent significant public exposure to airborne asbestos fibers during building demolition or renovation activities. Demolition or renovation activities are the circumstances where EPA does not recommend in place management. The guidance further states that in place management does not mean "do nothing". It means having a program to ensure that the day-to-day management of the building is carried out in a manner that minimizes release of asbestos fibers into the air, and ensures that when asbestos fibers are released, either accidentally or intentionally, proper control and cleanup procedures are implemented. EPA's in place management at Libby involves cleaning the homes, providing HEPA vacuums and cleaning instructions for continued maintenance of the homes by the residents, and funding the Environmental Resource Specialist for cleanup of accidental or intentional releases.

In your draft paragraph below, you indicated you wanted to cite to some authority other than EPA that it is safer to leave asbestos in place than to remove it from contained areas. I was not able to find any other source of that than the EPA TSCA program findings I described above.

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I also want to provide you with more detail on what the indoor cleanup involves, so I am including those steps here. I know it is much more detail than you probably need, but it accurately reflects the indoor cleanup process that is going on now and will continue after the phe.

1. The attic and interior are inspected for visible vermiculite
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3. In living areas of the residence, if visible vermiculite is present, an interior cleaning is done with HEPA vacuums and wet wiping.
4. If visible vermiculite is not present, dust samples are collected.
5. If dust poses risk of concern, an interior cleaning is done with HEPA vacuums and wet wiping.
6. Aggressive clearance sampling is conducted to ensure cleanup was effective.
7. Once cleanup verified, homes are re-insulated to meet current residential insulation requirements.
8. HEPA vacuums are provided for residents' use whether or not their interiors needed cleaning. EPA provides new filters for those vacuums every 6 months.

Let me know if you have any other questions.

▼ "Ransom, Catharine (Baucus)" ---06/09/2009 07:51:59 PM---Thank you very much for doing this. I found the original email. I have passed on two HHS contacts t

From: "Ransom, Catharine (Baucus)" <Catharine_Ransom@baucus.senate.gov>
To: Elizabeth Southerland/DC/USEPA/US@EPA
Cc: Bob Sussman/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Arvin Ganesan/DC/USEPA/US@EPA, Adora Andy/DC/USEPA/US@EPA, Ellen Manges/DC/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA
Date: 06/09/2009 07:51 PM
Subject: RE: Q&A regarding insulation cleanup at Libby

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Also, I am not that familiar with the AHERA -- the answer below says that it generally recommends in place management. Are there circumstances where it doesn't recommend in place management that might be applicable here?

Thanks!

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open attics. However, Libby is a special case - that's why we're all here today. Even with the extra precautions that EPA is taking, it is still safer to leave asbestos in place than to remove it from contained areas, like from behind walls, where chances are very low that fibers will escape into the open air. We know that from years of research - not by the EPA, but by _____. If you have uncontained insulation, like in an open attic, the EPA will remove that as part of the clean-up plan.

Here are the three things you can expect from EPA when we clean-up your home now that a public health emergency has been declared:
1.
2.
3. "

-----Original Message-----
From: Southerland.Elizabeth@epamail.epa.gov
[mailto:Southerland.Elizabeth@epamail.epa.gov]
Sent: Tuesday, June 09, 2009 1:11 PM
To: Ransom, Catharine (Baucus)
Cc: Sussman.Bob@epamail.epa.gov; Lynch.Mary-Kay@epamail.epa.gov; Ganesan.Arvin@epamail.epa.gov; Andy.Adora@epamail.epa.gov; Manges.Ellen@epamail.epa.gov; Campbell.Carol@epamail.epa.gov
Subject: Q&A regarding insulation cleanup at Libby

Catharine, here is the justification for the approach we are taking to insulation cleanup at Libby and Troy. Please let me know if you have any questions or would like to discuss further. Have you gotten a contact name for HHS in Dora Hughes absence this week? I have asked Howard Frumkin, the Director of ATSDR, to find an HHS representative for the June 22 event in Libby, but he has not yet been able to identify someone. I was hoping the HHS contact could find someone for us as well as start work with us on the website issues we have. Thanks for your help.
----- Forwarded by Elizabeth Southerland/DC/USEPA/US on 06/09/2009 01:06 PM -----

Q. If there is a public health emergency, why is EPA planning to leave asbestos in the walls of homes?

A. EPA's response action will continue to focus on removing uncontained vermiculite insulation from commercial, public and residential homes/buildings in Libby and Troy, because people can come in contact with such material. For homes/buildings with vermiculite insulation contained within walls and ceilings, EPA follows the Asbestos Hazard Emergency Response Act (AHERA) which only requires removal of asbestos for renovation or demolition activities. AHERA generally recommends in place management of asbestos because of the risk of building damage and spread of contamination that can occur with removal actions.

Beginning in October 2006, EPA began providing a full-time service, entitled the Environmental Resource Specialist (ERS), to assist property owners, contractors, firemen, and other personnel involved in renovation, demolition or accidents which can expose them to vermiculite insulation in Libby and Troy. The ERS has a dedicated telephone line to take calls from the public and is always available during regular business hours. For situations which arise on nights and weekends, callers can leave a message, and the ERS will return their call within 48 hours. The ERS provides asbestos abatement assistance to owners during remodeling and demolition activities. The EPA will also provide advice about the safe handling of vermiculite; advice for contractors who run into asbestos or vermiculite; enforcement of any local ordinances enacted to regulate asbestos or vermiculite; and asbestos abatement and health and safety training for local contractors. As an example of the responsiveness of the ERS, in 2008 a wall of an elementary school in Libby was accidentally pierced by construction equipment and vermiculite insulation spilled onto the ground. The ERS had a cleanup crew working at the school within hours of being notified of the incident. After EPA's cleanup in Libby is completed, the ERS position will continue to be funded as one means of ensuring the permanence of the remediation.

From: Carol Campbell
To: Sonya Pennock
Subject: Fw: Q&A regarding insulation cleanup at Libby
Date: 06/11/2009 04:02 PM

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 06/11/2009 02:01 PM -----

Elizabeth Southerland/DC/USEPA/US

06/11/2009 01:52 PM

To "Ransom, Catharine (Baucus)" <Catharine_Ransom@baucus.senate.gov>

cc Adora Andy/DC/USEPA/US@EPA, Arvin Ganesan/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Ellen Manges/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA

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From:	Gilberto Irizarry
To:	James Woolford; Elizabeth Southerland
Cc:	Ellen Manges
Subject:	Fw: Signed Libby Action Memo
Date:	06/17/2009 01:21 PM
Attachments:	img-617131326-0001.pdf

Jim and Betsy:

FYI

Gilberto "Tito" Irizarry
Program Operations & Coordination Division, Director
Office of Emergency Management
US Environmental Protection Agency, Headquarters
Tel: (202) 564-7982
Mobile: (b) (6)
Fax: (202) 564-8333

----- Forwarded by Gilberto Irizarry/DC/USEPA/US on 06/17/2009 01:20 PM -----

Signed Libby Action Memo

Gilberto Irizarry to: Andy Lensink, Ellen Manges, John Michaud 06/17/2009 01:20 PM

Folks:

Attached is the signed Libby AM.

Though Barry's signature/approval includes the date, the AM needs a date stamped in the front page. We were unable to locate a date stamper here.

Thanks,

Gilberto "Tito" Irizarry
Program Operations & Coordination Division, Director
Office of Emergency Management
US Environmental Protection Agency, Headquarters
Tel: (202) 564-7982
Mobile: (b) (6)
Fax: (202) 564-8333

img-617131326-0001.pdf

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
http://www.epa.gov/region08

Ref: EPR-SR

ACTION MEMORANDUM AMENDMENT

SUBJECT: Action Memorandum Amendment Request: Approval of a Ceiling Increase for the Time-Critical Removal Action at the Libby Asbestos Site - Libby, Lincoln County, Montana

FROM: Carol Rushin
Acting Regional Administrator

THROUGH: James E. Woolford, Director
Office of Superfund Remediation and Technology Innovation

Deborah Y. Dietrich, Director
Office of Emergency Management

TO: Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

Re: Site ID#: BC
Category of Removal: Time-Critical, NPL, EPA Fund-Lead

I. INTRODUCTION

A. Purpose of this Amendment

The purpose of this Action Memorandum Amendment is to request and document your approval of a ceiling increase for the Libby Asbestos Site (Site or Libby) in Lincoln County, Montana. In addition, the actions covered by this Amendment will help address the contamination that resulted in EPA Administrator Lisa P. Jackson's Determination and Findings of Public Health Emergency at the Libby Site pursuant to CERCLA Section 104(a)(4). (See Attachment 1)

B. Summary of Action Memorandum Amendment

The initial Action Memorandum was signed May 23, 2000 and supported the initiation of the removal activity in Libby, Montana. This was followed by amendments in July, 2001; May,

2002; May, 2006; and June, 2006. These amendments raised the cost ceiling or expanded the scope of the cleanup. The most recent Action Memorandum Amendment signed September 24, 2008 addressed asbestos contamination in certain creeks in Libby. The currently proposed amendment will cover the site-wide ongoing commercial, public, and residential cleanups in Libby, as well as in the nearby Troy, Montana area. Note that an additional Amendment is being considered for later in 2009 that would address a particularly large cleanup within the Libby Site, the Cabinet View Country Club (CVCC) Golf Course.

II. SITE CONDITIONS AND BACKGROUND

A. Site Description

Vermiculite mining operations conducted in Libby, Montana between the 1920s and 1990 produced asbestos-contaminated vermiculite. The Libby mine produced up to 80% of the world's supply of vermiculite, which was used primarily for insulation and as a soil amendment. These products were produced by a high temperature process (exfoliation) that expands the raw ore. The milling process reportedly emitted up to 5,000 pounds of asbestos per day to the atmosphere. The vermiculite from the Libby mine was contaminated with a toxic and highly friable form of asbestos called **Tremolite-Actinolite Series Asbestos,** often called Libby Asbestos (LA). For many decades, the asbestos-contaminated vermiculite was utilized throughout town in many public places such as school tracks, public parks, and baseball fields. Vermiculite mine tailings were also placed at some of these locations. Vermiculite insulation was also used in residences, public buildings, and schools.

The Libby Site (also comprising the Troy area) is an especially large and complex site in which a hazardous contaminant, LA, is prevalent throughout the town and surrounding areas. The prior Action Memorandum and Amendments describe how asbestos-contaminated vermiculite came to be present in commercial and residential buildings as well as outdoor areas. They also describe the nature of the contaminant and the unique threat it poses in Libby given the multiple pathways of exposure.

The initial Action Memorandum and subsequent Amendments describe the vermiculite mine, vermiculite processing facilities, several contaminated properties, and the conditions found throughout the Libby Valley. The Libby Site appears unique in comparison to other mining or processing sites in that LA-containing mine wastes, as well as off-specification intermediates (largely un-exfoliated vermiculite concentrate) were made available, and hence, widely distributed, throughout southern Lincoln County for use as fill material and as a soil conditioner. Other asbestos-contaminated material was used as insulation. There are numerous exposure pathways, for residents as well as for workers. When the Site was listed on the National Priorities List (NPL), it included the nearby town of Troy. EPA's initial investigative efforts focused on the Libby area and then expanded to the Troy area in May 2007. Assessment work in Troy is being conducted by the Montana Department of Environmental Quality (MDEQ) through a

cooperative agreement funded by EPA. An interim data summary report on the assessments in Troy was released on May 27, 2009. MDEQ has indicated that 102 of the properties there are likely to require cleanup. This amendment includes activities to address contamination found in the Troy area as well as in Libby.

B. Other Actions to Date

To address this widespread contamination, EPA has been conducting cleanups of asbestos-contaminated soils and insulation throughout Libby (and also the neighboring community of Troy) since 1999 using its removal authorities under CERCLA Section 104. This Action Memorandum amends the May 15, 2006 (approved June 2, 2006) Action Memorandum Amendment that sets set forth the need and scope for additional property cleanups at the Site. While those time-critical cleanup activities are progressing, investigation efforts that began in May 2007 in the town of Troy indicate that a significant number of properties there also meet the current site removal criteria (see Administrative Record, Cleanup Criteria Memo, December 15, 2003). Prior to these investigations, EPA had conducted several small-scale responses in Troy as conditions warranted. The nature of the residential and commercial cleanups in Libby is shifting to larger and more difficult properties.

This Action Memorandum Amendment and prior Amendments each describe various activities at the Site and progress contemporaneous with their writing. Generally, activities in 2000 focused on the former W.R. Grace processing facilities (Export Plant, Screening Plant) that were large volume, obviously highly contaminated properties. In 2001, work continued at the processing areas and then expanded to include some large volume property cleanups containing extensive amounts of vermiculite mine waste (e.g., the High School and Middle School tracks and the Plummer Elementary ice rink). The distribution of LA-bearing mine waste throughout the community became apparent in 2001. Residential and commercial property cleanups began in 2002.

As EPA has reported in Site updates and in public meetings, EPA conducted activity-based sampling at residential and commercial properties in Libby in 2007 and 2008. *See Site update at http://www.epa.gov/region8/superfund/libby/cleanup.html.* The purpose of this sampling primarily is to assess the level of human exposure that may occur during particular activities, such as digging, raking, and mowing. The current activity-based sample collection effort has been completed, and an EPA contractor is preparing a report analyzing the results. Preliminary review of these results indicates that the current removal action level for asbestos in soil is likely to be revised to a lower concentration. To ensure that the data analysis and presentation are reliable, the report will undergo an internal agency quality assurance/quality control review. We expect that process to be completed and the report to be finalized this fall. Once the report has been finalized, it may be appropriate to revise the current action level that has been used by EPA at the Site. A change to the action level would be reflected in an appropriate decision document. EPA anticipates not being able to address properties with lower asbestos concentrations

immediately, given that there are several hundred properties already in the cleanup queue with higher concentrations. Currently EPA is cleaning up approximately 150 properties per year.

Below is a summary table (Table 1) of the work performed during the history of on-site Removal Actions, as well as a narrative synopsis of the work items:

Table 1: Work to Date Summary

	Large Projects	Commercial/ Residential	Soil (yds^3)	VAI* (yds^3)	Debris (yds^3)
2000	Screening Plant (SP), Export Plant(EP)	0	150,000	0	35,000
2001	SP, EP, Libby High School(LHS), Libby Middle School(LMS), Plummer Elementary, Seifke,	8	120,000	0	5,000
2002	SP, EP, LHS, LMS,	18	75,000	300	1,000
2003	Riverside Park Properties	157	40,000 15,000	2,200	250
2004	SP-Flyway Properties	170	30,000 16,000	2,300	125
2005	Properties	225	31,000	2,700	200
2006	Properties	216	26,000	3,100	175
2007	Properties	160	46,000	2,200	150
2008	Properties**	149	49,857	1,304	593
Total		**1,103**	**598,857**	**14,104**	**42,493**

*VAI: Vermiculite Attic Insulation.
** These totals do not include cleanup activities at Granite, Callahan or Flower Creeks.

C. Synopsis of Previous Actions

There are seven operable units (OUs) at the Site, as well as a sitewide support service, and two disposal units. Following is a description of the activities for each.

Export Plant (OU1): Under a Unilateral Order from EPA, W.R. Grace demolished and disposed of four buildings on the property and removed approximately 15,500 yds^3 of contaminated soil and 2500 yds^3 of debris from the property. Region 8 completed the remaining demolition and disposal in 2002. The lumber business formerly operating at this location was relocated by W.R. Grace in 2003 to a new location in Libby. This work is summarized in a Data Summary Report (CDM 2007) found in the Administrative Record.

(1) **Riverside Park and Boat Ramp:** This is an area adjacent to the former Export Plant along the Kootenai River. Although it was not part of the W.R. Grace operations, it is now included as part of OU1. In 2003, subsurface contamination was encountered during construction of a new park and boat ramp being built by the City of Libby. EPA halted construction and cleaned the parcel in late 2003. Approximately 15 acres of soil were excavated to an average depth of two feet. This resulted in the removal of approximately 40,000 yds^3 of contaminated soil. This work is summarized in a Data Summary Report (CDM 2007) found in the Administrative Record.

Screening Plant (OU2): This property consists of five distinct, contiguous parcels. In total, roughly 335,000 yds^3 of contaminated soil, and 30,000 yds^3 of debris were removed from the Screening Plant and taken to the mine for disposal. This work is summarized in a Data Summary Report (CDM 2007) found in the Administrative Record. The five parcels include:

(1) **Raintree Nursery**: Region 8 completed cleanup of this parcel in 2003. Approximately 17 acres were addressed, and 250,000 yds^3 of contaminated debris and soil were removed. Restoration of this parcel is complete.

(2) **North Side Parker Property:** Region 8 completed cleanup here in 2004, addressing approximately four additional acres. Approximately 18,000 yds^3 of contaminated soil were removed.

(3) **Flyway Property:** Region 8 completed approximately 1/4 of the cleanup of the Flyway parcel in 2002; W.R. Grace, pursuant to an Administrative Order on Consent with EPA. cleaned up the remainder of the parcel in 2004. In all, approximately sixteen acres were addressed, and approximately 30,000 yds^3 of soil were removed. EPA, working with the Montana Department of Transportation, capped a contaminated area on the Highway 37 right-of-way (ROW) along the Flyway in 2005.

(4) **KDC Bluffs Property**: Three areas of the KDC Bluffs parcel contained piles of waste vermiculite and debris. These were cleaned up by EPA in 2001 with approximately 15,000 yds^3 of soil removed. There remains a section of the KDC Bluffs that has been found to have levels of LA at <1% over two to three acres. At the time of the Removal Action these areas were unoccupied, and as such were left for future Remedial Actions. Recently, an out-of-state homeowner built a house on a portion of the property. Since the KDC Bluffs property now includes residential development, EPA proposes to address this property as part of OU4. If necessary, future residential properties on the KDC Bluffs area will be screened and cleaned up as part of OU4.

(5) **Wise Property:** This is a ¾ acre property between Raintree Nursery and the Flyway. Approximately 2000 yds^3 of LA-contaminated soil were removed in 2001. This property was used as an access point for the flyway cleanup, thus the restoration was not completed until 2005.

Mine/Rainy Creek Road (OU3): Rainy Creek Road is a US Forest Service access road to the Kootenai National Forest and the former vermiculite mine. Like the mine itself, Rainy Creek Road is highly contaminated with LA, and site access remains restricted. In actions conducted in 2001 and 2003, EPA paved the lower portion of the road starting from where it intersects Highway 37. A decontamination station has been in place on the road since 2000 to facilitate soil disposal at the former mine, as well as to clean other vehicles accessing the area. Soil disposal of OU4 and OU7 waste material continues at the mine. In 2007, EPA signed an Administrative Order on Consent (AOC) with W.R. Grace to conduct a Remedial Investigation/Feasibility Study (RI/FS) on OU3. Sampling activities began in September 2007 and continue in support of the planned 2012 RI/FS and Record of Decision (ROD).

Commercial, public and residential cleanups in Libby (OU4): Once the Libby Asbestos Site was placed on the NPL in October 2002, the EPA began as part of its RI to systematically inspect and sample parcels of land within the Site boundary. This information was also used to identify properties in need of time-critical Removal Actions. Removal actions were undertaken within homes and yards to reduce risk to property owners and mitigate the release or threat of release of LA into the environment. Any LA within homes may be dispersed to the environment through foot traffic, air currents, and cleaning and disposal. To date, EPA has identified 4,400 properties that needed inspections (see Contaminant Screening Study (CSS), CDM 2004 in the AR). This screening effort identified roughly 1600 properties which met the Site Removal Criteria described in the December 2003 Technical Memorandum. As of December 18, 2008, Removal Actions have been completed at 1,103 of the identified properties. It should be noted that the CSS also identified an additional 840 properties that had LA contamination, but did not meet the Site Removal Criteria.

(1) **Libby High School and Libby Middle School Tracks:** Cleanups were completed by 2001, and both tracks were restored in 2002. Work is complete.

(2) **Siefke Property:** This parcel was a highly contaminated, large residential property. A considerable volume of equipment and debris from the former vermiculite mine was located on the property. Cleanup was completed in 2002, and restoration was completed in 2003.

(3) **Johnson, Sanderson, Temple, Struck, Rice, Fuhlendorf, Spencer, and Westfall Properties:** These properties contained mine wastes with LA concentrations up to 10%. Cleanup and restoration activities were completed by 2003.

(4) **Champion Hall Road:** Vermiculite mine tailings had been used to make and/or repair portions of a gravel road leading into a subdivision. Cleanup was completed in 2003.

Former Stimson Lumber Mill (OU5): The former Stimson Lumber Mill contained vermiculite attic insulation (VAI) in a number of its buildings. Apart from EPA's actions, the Stimson

Lumber Company systematically removed all of its loose and accessible VAI in 2002 and 2003. Due to a downturn in the lumber market, most of the Mill operations closed in 2003, and a large portion of the 400 acre parcel was sold to the Kootenai Redevelopment Authority in 2004. The Redevelopment Authority has been, and is now actively seeking businesses to locate on the former Mill property. Investigations to date have found limited soil contamination in the former nursery area. This area was fenced in 2004. The only other area of this OU that presented an obvious need for response was the former Central Maintenance Building. EPA removed the dilapidated portion of the roof in 2005. This work is summarized in a Data Summary Report (CDM 2007) found in the Administrative Record.

Burlington Northern Santa Fe Rail Yard (OU6): The Burlington Northern Santa Fe (BNSF) Rail Yard is located adjacent to the former Export Plant and was used to facilitate rail shipments of vermiculite. OU6 is comprised of the rail yard, and the rail lines leading out of Libby. Pursuant to an AOC with EPA, BNSF began cleanup of the contaminated rail yard in 2003 but had to stop work due to complexities with soil removal below the tracks. Work resumed in 2004. Most of the tracks in the rail yard were removed to allow for cleanup underneath them. Although most of the contaminated soil was removed, some contamination was capped in place. Institutional controls for contamination left in place will be evaluated as part of the RI/FS and future ROD. EPA is negotiating with BNSF to conduct and complete the RI/FS for this OU.

Troy (OU7): Systematic investigations of properties in the Troy area began in May 2007. However, prior to these investigations EPA conducted several small scale responses in Troy as conditions warranted, the largest of which was the removal of VAI from the Troy High School. This particular action is discussed at length in the June 2006 Action Memorandum Amendment. The other actions included cleanup and disposal of VAI encountered unexpectedly by a property owner.

Environmental Resource Specialist (ERS) - (Site Wide): Over the last five years, EPA has responded to many unplanned, somewhat urgent exposures to VAI and LA. For example, three house fires occurred on properties containing VAI. Likewise, a new homeowner in Libby conducted home renovations and encountered VAI in the walls of his bathroom. As a result, exposed material contaminated a portion of the home and potentially caused a release of friable asbestos into the environment. The EPA has also received numerous calls from property owners who are planning a renovation and anticipate encountering LA-bearing materials. Clearly, in the latter case, the best course of action is to protect property owners by delineating and addressing potential LA contamination prior to renovation. The need for this function will likely continue beyond EPA's Response Actions at the Libby Site. Beginning in October 2006, EPA began providing a full-time service, entitled the Environmental Resource Specialist, to assist property owners, firemen, and other affected response personnel or citizens. In 2007, the ERS service received approximately 40 calls per month requesting assistance and averaged five small-scale responses per month. Calls to the ERS in 2007 also resulted in five large-scale cleanups.

Lincoln County Landfill Asbestos Cell: In 2003, EPA constructed an asbestos disposal cell at the Lincoln County Landfill to facilitate the disposal of VAI material and extend the construction season. To date, the EPA has placed over 20,000 yds^3 of VAI and LA-contaminated debris at this cell. Disposal operations are ongoing.

Disposal Area at the Mine Site: Asbestos-containing soils are disposed of at area 19 at the mine.

D. Current Actions

The Region plans on cleaning up between 100 and 150 properties and three additional creek segments in 2009. The Region is also planning to address the CVCC Golf Course in 2009 under a separate action memorandum amendment.

In 2007, EPA Region 8 initiated investigative efforts to continue to assess the on-going Removal Actions, as well as to provide the needed exposure assessments to support a baseline risk assessment. The Sampling and Analysis Plans for these investigations included a sampling and analysis plan for outdoor ambient air monitoring at OU4; a sampling and analysis plan for activity-based outdoor air exposures for OU4; and a sampling and analysis plan for activity-based indoor air exposures for OU4. As stated earlier, the report on the activity based sampling is planned to be issued this fall and may affect future activities.

In addition to conducting physical cleanups, EPA continues to provide guidance, training and assistance for Libby residents. Such actions include the ERS service; the development and publication of fact sheets for residents and local contractors who may encounter asbestos-contaminated vermiculite; asbestos abatement and health and safety training for local contractors; and public warnings for areas of contamination discovered in public areas. These actions are intended to address ongoing exposures.

MDEQ continued its assessment efforts in the Troy area in 2008. During the 2008 construction season severe conditions at six properties in Troy warranted immediate action by EPA. These actions were taken due to contamination well above the cleanup criteria set forth in the 2003 Technical Action Memorandum. Field investigations in Troy resumed in June 2009. EPA anticipates finding and cleaning up an additional 5 to 10 severely contaminated homes in the Troy area in 2009.

E. State, Local, and Other Authorities' Roles

As discussed earlier, MDEQ has taken the lead role for assessment in Troy (OU7). The Agency for Toxic Substances and Disease Registry (ATSDR); the United States Geological Survey (USGS); and the National Institute for Occupational Safety and Health (NIOSH) are active participants in site-wide studies. The USGS also continues to provide EPA with technical assistance regarding the mineralogy, morphology, and measurement of LA. Lincoln County and

the City of Libby are active in several local advisory groups and coordinate directly with EPA on many issues regarding the removal actions and remedial investigations. In addition to their lead role for assessment in Troy, MDEQ continues to serve as the support agency at operable units 1 through 6.

III. THE THREAT POSED BY ASBESTOS AT THE LIBBY SITE IS UNIQUE IN ITS SEVERITY AND SCOPE

In conducting this large-scale removal action at Libby, EPA has identified a combination of socioeconomic, atmospheric, and terrain-related factors that have resulted in widespread asbestos contamination, multiple pathways of human exposure to asbestos, and significant cumulative exposures. This combination of factors appears unique to the Libby Site and is one of the bases for the Administrator's Determination and Findings of Public Health Emergency.

A. Multiple Sources of Exposure

Residents of the Libby and Troy communities have been exposed to asbestos from various sources, including asbestos in vermiculite, vermiculite processing wastes, asbestos in uncontained vermiculite insulation, and vermiculite-containing soil. The vermiculite mine wastes, as well as off-specification intermediates (largely un-exfoliated vermiculite concentrate) were made available to the community and were widely distributed throughout southern Lincoln County. The community used this asbestos-containing material as a soil amendment in residential yards and as fill for their driveways, gardens, and public areas, including recreational fields. Many of the homeowners insulated their homes with the asbestos-containing vermiculite insulation. Children in the community had access to and played on waste vermiculite piles. These exposures are in addition to the significant exposures that occurred historically to vermiculite mine workers or association with them.

Soil in the Libby valley was additionally contaminated by the atmospheric deposition of asbestos released from the vermiculite processing facilities at the Libby Site, which were in close proximity to the homes there. Soil also may have been contaminated by atmospheric redistribution of asbestos from the community's transportation and uses of the vermiculite mine wastes. Atmospheric deposition also would have contributed asbestos to indoor dust in residences and commercial buildings. Asbestos released to air was likely concentrated by the unique topographical and meteorological situation at the Libby Site (US EPA 2008). The Site is in a narrow valley surrounded by mountains that are 4,000 feet higher. In winter this leads to persistent temperature inversions that concentrate atmospheric contaminants, including asbestos, in the valley.

B. Multiple Pathways of Exposure, and Types of People Exposed

The major source of health risk from asbestos is from the inhalation route of exposure. The historical, current and potential future environmental pathways to the inhalation route of exposure include the following:

1. Air in attic spaces and crawl spaces (resident, tradesperson)
2. Indoor air near breached walls (resident, tradesperson)
3. Indoor air where fibers are present in indoor dust (resident, tradesperson, commercial worker, student, teacher)
4. Outdoor air near highways and rail lines where asbestos material spillage occurred (tradesperson, resident)
5. Outdoor air near disturbed soil (resident, tradesperson, student, teacher, recreational visitor)
6. Outdoor ambient air (resident, commercial worker, tradesperson, student, teacher, recreational visitor).

Additional historical inhalation pathways included the following:

1. Vermiculite waste piles (children, resident, recreational visitor)
2. Association with vermiculite mine workers
3. Occupational exposure through employment at the mine.

C. Observed Health Effects in Libby

Exposure pathways similar to those described above have been noted at other sites where vermiculite was shipped, processed or handled, or where vermiculite insulation was used in homes and businesses. However, the Libby Site appears unique with respect to the multiplicity of exposure pathways and the cumulative exposures experienced by community members. Adverse health effects (described below) from asbestos exposure are already present and documented in the residents and community members at the Libby Site. Ongoing exposure may be expected to increase both the severity and incidence of observed health effects. Even in the absence of additional exposure, pulmonary and pleural health effects from asbestos exposure are known to continue to progress. (Rohs et al. 2008). Therefore, the incidence and severity of observed health effects may increase.

Several epidemiology studies have reported increased cancer mortality among workers exposed to the LA through the mining and milling of contaminated vermiculite. Compared to standardized national mortality rates, the most recent study (Sullivan, 2007) found statistically significant increased risks of cancer mortality. The workers had 70% higher risk of lung cancer mortality (n, the number of people, was 89), 1,410% higher risk of mortality from mesothelioma (n=2) and 2,230% higher risk of mortality from pleural cancer (n=4).

An ATSDR study of the Libby community found a high prevalence of pleural abnormalities and that the risk increased with age and length of residence in the Libby area. (Peipins et al. 2003) examined occupational, recreational, household, and other exposure pathways. The prevalence of pleural abnormalities increased with increasing number of exposure pathways, ranging from 6.7% for those who reported no apparent asbestos exposures to 34.6% for those who reported ≥ 12 pathways. Excluding former W.R. Grace workers but not those with work-related asbestos exposures, the investigators found 1,000 people with pleural abnormalities out of 6,303 (15.9%). For comparison, studies of groups with no substantive work-related asbestos exposures have found the prevalence of pleural abnormalities ranges from 0.2% among workers in North Carolina, to 2.3% among patients in New Jersey, to 4.6% among urban New Jersey residents.

Medical monitoring of Libby and Troy residents exposed to past releases of asbestos fibers or who may continue to be exposed to asbestos fibers in the community would allow early detection of disease and provide a better understanding of disease progression.

IV. THREATS TO PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT, AND STATUTORY AND REGULATORY AUTHORITIES

This Action Memorandum, prior Amendments and the Administrative Record describe in detail the threats to human health presented by exposure to LA. Despite considerable progress on cleanup, conditions in Libby still present significant threats to public health. In fact, on June 17, 2009, EPA Administrator Lisa P. Jackson issued a Determination and Findings of Public Health Emergency at the Libby Site pursuant to CERCLA Section 104(a)(4).

EPA has considered all of the factors described in Section 300.415(b)(2) of the National Contingency Plan (NCP), and has determined at least three of the factors continue to be present at the Libby Asbestos Site, including the area of Troy.

A. Threats to Public Health or Welfare:

(i). *Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants and contaminants*;

While EPA's actions have reduced LA-contaminated source materials (e.g., indoor dust, yard and garden soils, driveway materials, vermiculite insulation), these sources still exist throughout the community. This Action Memorandum Amendment and previous Amendments have described these conditions in detail. Previous investigations have shown that more than one-third of the approximately 4,400 properties in the Libby area contain varying levels of contaminated source materials, such as vermiculite insulation or contaminated soils. EPA studies in the Administrative Record (AR) have found that low levels of amphibole asbestos in soils can generate airborne fibers at or near the current OSHA Permissible Exposure Limit. These levels are significantly higher than those to which a residential population should be exposed. These

data are entirely consistent with investigations conducted by W.R. Grace concerning the handling of various vermiculite-bearing materials, which is reported in the Action Memorandum and subsequent Amendments and contained in the Site AR.

Investigations have clearly shown elevated levels of LA in the dust of residents' homes prior to cleanup (CDM, 2002, 2003a and 2003b; EPA Region 8, 2003). This dust contamination comes from several sources including, but not limited to: contaminated soil tracked into the homes; contamination that was picked up from the former vermiculite processing facilities and brought home on clothes and equipment; and releases of uncontained vermiculite insulation within homes. When disturbed, these LA-contaminated source materials may release LA fibers to indoor air resulting in complete exposure pathways. Actual exposure to these contaminated source materials may occur daily depending on the conditions and usage of the specific properties. Data contained in the reports in the Administrative Record indicate that activities performed by area residents and workers can result in elevated concentrations of respirable LA fibers in indoor air.

EPA has also determined that during a catastrophic event there is a significant threat of amphibole asbestos exposure from attics to the outside environment. In the last two years, there have been three house fires and one severe weather event involving homes containing VAI. In one of the fires, an explosion released VAI around the exterior of the home creating an exposure pathway to firefighters and passers-by. In the other two situations, flames breached the roofs and fibers were released to the atmosphere and surrounding properties. In the weather event, a microburst tore a roof off a home containing VAI, once again releasing visible vermiculite to the surrounding property.

LA fibers from the Libby mine site are hazardous to humans as evidenced by the abnormal occurrence of asbestos-related disease in area residents and workers. Workers and area residents exposed to asbestos fibers from the Libby mine site have been found to have increased mortality and morbidity from asbestos-related conditions, including asbestosis, pleural fibrosis, lung cancer, and mesothelioma. Asbestos-related lung diseases have also been observed in area residents with no direct occupational exposures, including family members of mine workers, and even in individuals with no known association with vermiculite mining or processing activities (Weis, 2001; ATSDR, 2003; Peipins et al., 2003; Miller, 2005; Whitehouse, 2008).

Past and current exposure to amphibole asbestos has had, and will continue to have, major adverse health impacts on Libby Site residents. Investigations performed by ATSDR have found an unusually high rate of cases of asbestos-related disease in this relatively small community. The death rate from asbestosis in Libby was at least 40 times that of the national average for the period from 1979-1998. The occurrences of disease are not limited to vermiculite-facility workers or their families, but are spread throughout the population. Medical care in Libby and Troy has historically been limited due to their isolated location and economic situation, thus reducing the chance of early detection and treatment of asbestos-related disease. (Montana Primary Care Health Professional Shortage Area List, 2001; Lincoln County Health Profile,

2002; U.S. Department of Health and Human Services, 2009). New diagnoses of ARD from past exposure to asbestos number two or three a month. A study in Libby of persons 18 years of age and older found that 1,186 of 6,668 participants (approximately 18% of those x-rayed) had abnormalities in the linings of their lungs (pleural abnormalities) (Peipins et al., 2003). The risk of pleural abnormalities increased with increasing age and increasing length of residence in the Libby area. The rate of pleural abnormalities found in groups within the United States who have no known asbestos exposures ranges from 0.2% to 2.3%.

The degree of asbestos contamination and the resulting medical impact is greater at Libby than that at other sites where vermiculite was shipped, processed or handled. There is documented widespread asbestos-related disease in Libby and Troy. An unfortunate convergence of factors has contributed to this situation:

1) There are multiple human exposure pathways in Libby and Troy;
2) Exposure has continued over a period of 60 or more years;
3) The vermiculite processing facilities were in very close proximity to the homes in Libby;
4) The meteorology of the area causes temperature inversions which trap air and asbestos carried by that air close to the ground;
5) The terrain further constrains contaminants within the steep walls of the valley, causing higher concentrations in localized areas;
6) The homes in these economically depressed communities are generally old, potentially leading to greater migration of contaminants into the living space from outdoors, attics and wall-spaces;
7) A high smoking rate among the people Libby and Troy increases the risk of asbestosis and lung cancer; and,
8) Medical care in Libby and Troy has historically been limited due to its isolated location and economic straits. Consequently, there was less chance of early detection for mesothelioma and appropriate care for asbestosis. That situation has recently changed with the CARD clinic.

There is an especially serious risk to tradesmen (electricians, craftsmen, etc.) in Libby and Troy due to the high number of homes impacted by LA. When working in homes in Libby and Troy, these individuals encounter multiple pathways of exposure including soil, air and indoor dust.

(ii). *High levels of hazardous substances or pollutants and contaminants in soils largely at or near the surface that may migrate.*

Soil contamination is prevalent throughout the Libby area. Region 8 has focused resources on cleaning up areas that were most highly contaminated, but many residential yards still contain measurable concentrations of LA at or near the surface (CDM, 2002, 2003a, 2003b). These soils, if unaddressed, can cause direct exposure when disturbed through normal activities and can contaminate the interiors of homes with LA-containing dust.

LA fibers from the Libby mine site are hazardous to humans as evidenced by the occurrence of asbestos-related disease in area residents and workers. Workers and area residents exposed to asbestos fibers from the Libby mine site have been found to have increased mortality and morbidity from asbestos-related conditions, including asbestosis, pleural fibrosis, lung cancer, and mesothelioma. Asbestos-related lung diseases have also been observed in area residents with no direct occupational exposures, including family members of mine workers, and even in those with no known association with the vermiculite mining or processing activities (Weis, 2001; ATSDR, 2003; Peipins et al., 2003; Miller, 2005; Whitehouse, 2008).

While most of the known larger contaminant sources and public areas (such as former vermiculite processing plants, schools, ball fields, and Riverside Park) have already been cleaned up, Region 8 recently discovered several additional contaminated "public" areas in Libby. These include the CVCC Golf Course, the ROW along Highway 37, the public compost pile at the county landfill and the creeks. Some of these properties presented immediate, unacceptable risks and were cleaned up quickly. For other properties, such as portions of the former Stimson Mill, the Highway 37 ROW, and the CVCC Golf Course, EPA has instituted interim containment measures such as fencing and/or issued public warnings. These properties are targeted for cleanup.

(iii). *The (lack) of availability of other appropriate Federal or state mechanisms to respond to the release.*

EPA believes that no person or local, state, or Federal agency is in the position, has the authority, or has the resources to independently and in a timely manner implement an effective response action to address the on-going threats presented at the Site. Other than CERCLA, there is no comprehensive Federal, state, or local program that provides both the authority and resources necessary to respond to a release of the scope presented in Libby at OUs 4 and 7. Under CERCLA as implemented by EPA under Executive Order 12580, EPA is the agency with the authority to address such releases.

B. Threats to the Environment

Work on an ecological risk assessment was initiated in September 2007. While currently no response actions are based on ecological impacts at the Site, this may change as data are collected. The Action Memorandum dated May 23, 2000 contains information about potential threats to the environment.

V. ENDANGERMENT DETERMINATION

The actual or threatened releases from this Site, if not addressed by continuation of the time-critical Removal Actions set forth in the original Action Memorandum and subsequent

Amendments, may present an imminent and substantial endangerment to public health or welfare or the environment. The original Action Memorandum for the Site, dated May 23, 2000 (EPA Region 8, 2000), as well as subsequent Amendments and the Administrative Record, describe in detail evidence of the toxicity associated with exposure to LA, the large number of human exposure pathways, the significantly elevated disease rate in Libby residents, and the variety of conditions present in and around Libby that could lead to continuing exposures.

Apart from this imminent and substantial endangerment, EPA Administrator Lisa P. Jackson found that the conditions in Libby associated with the release of amphibole asbestos from all sources, including VAI, present a public health emergency, pursuant to 42 U.S.C. § 9604(a)(4).

VI. EXEMPTION FROM STATUTORY LIMITS

The Libby Action Memorandum dated May 23, 2000 provided the documentation required to meet the NCP Section 300.415(b) criteria for a Removal Action. This Action Memorandum also provided EPA's determination regarding the applicability of CERCLA Section 104(c)(1)(A) [NCP Section 300.415(b)(5)(i)]. This provision allowed for using the emergency exemption from the $2 million and one year limits on removal actions. The two most recent site-wide Action Memorandum Amendments dated May 2006 and June 2006 expanded the scope of removal actions and raised the approved removal ceiling to $91,837,000. In addition, the recent August 2008 Action Memorandum for the Libby creeks raised the approved removal ceiling to $94,319,000[1]. It also found that conditions at the Site continued to satisfy the emergency exemption and met the CERCLA Section 104(c)(1)(C) [NCP Section 300.415(b)(5)(ii)] consistency exemption, which allows for a continued removal action over the cap when it is "otherwise appropriate and consistent with the remedial action to be taken." The conditions necessitating time critical removal action at the Libby Site still exist and continue to satisfy both the emergency and consistency exemptions from the statutory limits.

This Action Memorandum Amendment requests a ceiling increase under the already granted exemption from the statutory limits. This ceiling increase will support the continuation of the removal action originally authorized by the May 9, 2002, Action Memorandum Amendment, as amended by the two Action Memorandum Amendments from 2006 and the Action Memorandum Amendment signed in 2008. As discussed later in this Action Memorandum Amendment, this scope would now explicitly include properties in and around Troy, Montana (OU7), which meet the current Site Removal Criteria. An emergency exemption continues to be warranted to protect public health. Imminent and substantial risks to the public health of Libby residents continue to exist (Miller, 2005). Due to the prevalence of past and potential exposures, and the observed high rate of asbestos-related diseases, these risks are of an immediate and emergency nature. While conditions have improved considerably through EPA intervention, hundreds of properties

[1] The "Proposed Ceiling" of $94,319.000 listed in the Aug. 12, 2008 "Creeks" Action Memo was incorrectly calculated. The actual ceiling is $95,387,000.

meeting criteria set forth by EPA Region 8 for time-critical removal actions have yet to be addressed. Exposures to an already impacted population could potentially occur, and EPA is the only Agency with the resources to mitigate these conditions. In addition to meeting the criteria for an emergency condition, removal actions are also expected to be appropriate and consistent with future remedial actions, and thus continue to also meet the criteria for a consistency exemption from the $2 million and one year limits on removal actions as set forth in Section 300.415(b)(5)(ii) of the NCP. There are several reasons for this:

- LA, the contaminant of concern in Libby, is a mineral. There are no known viable treatment technologies that can diminish or reduce the toxicity of asbestos. To address exposures from asbestos, the most viable and commonly used physical cleanup options available are to remove it or to contain it. For time critical removal actions at the Site, Region 8 has used a combination of these approaches as appropriate.

- Because asbestos use was widespread in the past, the basic approach for asbestos abatement is well understood. There are a limited number of options available for cleanup. Most importantly, when asbestos is determined to be friable, the preferred mechanism to address potential exposures is to remove or contain the source.

- Investigations have shown that sources of LA, including, but not limited to, contaminated soil, vermiculite insulation, and vermiculite processing wastes are prevalent throughout Libby. Past and current investigations have clearly shown that, when disturbed, these sources can release LA to the air and have the potential to be released to the environment and contaminate indoor dust. This appears to be true even though LA concentrations in the source material are relatively low (Supplemental Quality Assurance Project Plan Report, EPA 2007). The primary objective of the removal actions is to remove or isolate these sources. Future site cleanups will continue to utilize removal and containment strategies.

- To ensure that Removal Actions are protective and consistent with future remedial actions, Region 8 has taken a conservative approach and adopted protocols that minimize the possibility of having to clean up a property twice. In general, EPA only begins a removal action when property conditions warrant a time-critical response. Furthermore, to reduce the likelihood of returning to a property, EPA also addresses lower levels of contamination found on the property. Initial post-cleanup sampling provided some validation of the efficacy and protectiveness of the cleanups (CDM, 2003c, 2004). This approach ensures that the worst risks are addressed first and that cleanups reduce the most prevalent exposure pathways, while the effort to determine what will be an effective final cleanup moves forward. The RI/FS for OU 4 and OU7 will evaluate current cleanup protocols as well as other options for cleanup.

VII. PROPOSED ACTIONS AND ESTIMATED COSTS

A. Proposed Action Description

The Action Memorandum Amendment from May 2002 sets forth the basic scope of the current set of Removal Actions at the Libby Asbestos Site. While the basic need for cleanup and the general nature of the proposed actions has not changed, EPA has discovered that (1) more properties require cleanup than originally anticipated and (2) the difficulty and cost of cleanup is higher than originally anticipated. Currently, approximately 1,000 unaddressed properties in the Libby area meet the Removal Criteria for the Site. In addition, first-year, full-scale investigations of properties in and around Troy, Montana indicate that 102 of the approximately 800 properties screened there also require cleanup. If the analysis of the activity based sampling results indicates that risks in Libby and Troy are higher than currently thought, as preliminary review of the results indicate, EPA will likely revise the current removal action level for asbestos in soil. Consequently, the total number of properties requiring cleanup may change. In addition, EPA will continue the Environmental Resource Specialist service for the entire site.

The data from the Supplemental Quality Assurance Project Plan report indicates a need to modify the current Removal Actions approach. Based on the December 15, 2003, document titled: "*LIBBY ASBESTOS SITE RESIDENTIAL/COMMERCIAL CLEANUP ACTION LEVEL AND CLEARANCE CRITERIA TECHNICAL MEMORANDUM,*" once a property has met the current removal triggers, all LA that is detectable by Polarized Light Microscopy (PLM) is removed from the surface. However, there are some properties where visible vermiculite was left in place because LA was not detected by PLM. For properties that meet the current removal triggers, it was proposed that EPA remove all levels of LA detected by PLM from the property surface as well as all visible vermiculite material. Consequently, beginning in October 2006, EPA increased the rigor of the visual inspections performed on properties (see Site-Specific Standard Operating Procedure for Semi-Quantitative Visual Estimation of Vermiculite in Soil, CDM 2006 in Site AR). It is hoped that this improved methodology will aid in the delineation of LA-bearing source materials. Also, beginning in October of 2006, EPA improved the methodology for collecting soil samples (going to 30-point composites instead of five-point composites). It is expected that combining these methods will provide EPA a much better field-usable tool for guiding its cleanups. This change in approach will be assessed by the Indoor and Outdoor ABS programs discussed earlier in this Action Memorandum Amendment.

Lastly, given the current state and planned future use, it is likely that additional Removal work will be required at OU1, OU2, OU5, and/or OU6.

B. Contribution to remedial performance

EPA finalized the listing for the Libby Site in October 2002. While cleanup at the Site continues to be conducted using removal authority, the Site was transitioned to the Region 8 Remedial

Program after final listing on the NPL. Information and experience gained during the removal actions are continually used to refine the cleanup action and to plan for future work. Likewise, as more information is learned about the nature of the contamination and the risks presented, adjustments to the cleanup approach will be made as necessary. It is expected that the cleanup approaches used during removal actions will be similar to, and consistent with, those used during remedial actions.

C. Description of alternative technologies

EPA attempts to employ the most appropriate technologies for addressing risks. At this time, there are no other known viable alternative technologies available for addressing asbestos.

D. EE/CA

No EE/CA is required.

E. Applicable or relevant and appropriate requirements

See the Federal and State Applicable or Relevant and Appropriate Requirements (ARARs) identified and/or discussed in the original Action Memorandum dated May 23, 2000. There have been no new Federal or State ARARs that would be applicable to this Site developed since that time.

F. Project Schedule

The total number of properties currently identified as requiring cleanup (based on the December 2003 memo) including those in and around Troy, is now estimated to be 2,050, with 1,103 of those being completed as of December 18, 2008. Since the cleanup of residential/commercial properties began in earnest in 2003 (see Table 1), over the last six construction seasons the number of properties EPA has cleaned annually has ranged from 150 to 225. While EPA has become more effective in conducting LA removals, as discussed earlier in this Action Memorandum Amendment, EPA has seen an increase in the number of large properties in the Libby area. Preliminary reviews of the properties in the Troy area suggest that there is a mix of large and small properties that meet the current OU4/OU7 cleanup criteria. For planning purposes it is assumed that approximately $25,000,000 in special account/settlement funds will be required annually to cleanup Libby Asbestos Site properties in 2009 through 2013.

It is worth noting that the exact total number of properties to be addressed in and around Libby and Troy may not be known until the publication of a final Record of Decision (ROD). A final ROD is planned for 2013. The final ROD will incorporate the results of the toxicity studies and exposure assessment.

G. Estimated Costs

This ceiling increase is designed to cover projected 2009 through 2013 removal action costs and removal action expenditures accrued since the initiation of the project. Removal expenditures to date at the Site are currently estimated to be $165,000,000. Total removal expenditures for 2009 through 2013 are estimated to be $125,000,000. While the nature of cleanup has not fundamentally changed, the May 2002 Action Memorandum Amendment underestimated the scope, complexity, and cost of cleanup, especially with regards to interior cleaning and the removal of VAI. Likewise the two 2006 Action Memorandum Amendments anticipated that a ROD would follow soon thereafter.

This Amendment provides only a basic, cumulative breakout of the removal ceiling documented in the June 2006 Action Memorandum Amendment and the proposed removal ceiling (Table 2).

Table 2. Proposed Removal Project Ceiling

Category	Current Ceiling	Proposed Increase	Proposed Ceiling
Extramural Costs			
Property Cleanups	$93,769,000	$194,613,000**	$288,382,000
Intramural Costs	$ 1,168,000	$ 13,215,000	$ 14,383,000
Subtotal	$94,937,000	$207,828,000	$302,765,000
Contingency	$ 450,000***	$ 30,276,500****	$ 30,726.5,000
TOTAL	**$95,387,000***	**$238,104,500**	**$333,491,500**

* Please note that the "Proposed Ceiling" of $94,319,000 listed in the Aug. 12, 2008 "Creeks" Action Memo was incorrectly calculated. The 2008 memo reflected an intramural "proposed ceiling" of $100,000 rather than the correct value of $1,168,000.

** $165,000,000 (Expenses to date) – 95,387,000 (current ceiling) + $125,000,000 (est. 2009 - 2013 costs) {$165,000,000 - $95,387,000 + $125,000,000 = $194,613,000}

*** Calculated utilizing a 20% contingency

**** Calculated utilizing a 10% contingency ($302,765,000 * 0.1 = $30,276,500)

As documented in the May 2006 Action Memorandum Amendment (and in previous Action Memorandum Amendments), the Libby Asbestos Site has major expenditures that do not count against this Site ceiling. Through May 2009, these expenditures totaled approximately $52,000,000. Please note that amounts are approximate. Also note that these estimates do not include prejudgment interest, indirect costs and potential enforcement and litigation costs (including Department of Justice costs), which are not counted against the removal ceiling.

VIII. EXPECTED CHANGE IN THE SITUATION SHOULD ACTION BE DELAYED OR NOT TAKEN

Delayed action will result in continued public exposure to unsafe amounts of Libby Amphibole asbestos. This will increase the risk to public health and continue to burden an already impacted community.

IX. OUTSTANDING POLICY ISSUES

The Determination and Findings of Public Health Emergency may create the impression to the public that all attic insulation of this type constitutes a health threat. EPA believes this to be unfounded. The Libby Site is unique, involving multiple pathways and sources of exposure, in addition to attic insulation (see Section III. THE THREAT POSED BY ASBSETOS AT THE LIBBY SITE IS UNIQUE IN ITS SEVERITY AND SCOPE).

X. ENFORCEMENT

A separate Enforcement Summary has been prepared by the Site Attorney.

XI. RECOMMENDATION

This decision document represents the selected removal action for the removal of Libby Amphibole asbestos sources from properties at the Libby Asbestos Site in Lincoln County, Montana. The proposed removal actions have been developed in accordance with CERCLA as amended and are consistent with the NCP. The decision is based on the Administrative Record for the Site. Conditions at the Site continue to meet the NCP [40 CFR § 300.415(b)] criteria for removal actions. The NCP [40 CFR § 300.415(b)(5)(i)] and [40 CFR § 300.415(b)(5)(ii)] criteria for exemptions from the statutory limits that have been previously documented continue to exist. I recommend your formal approval of the proposed removal action ceiling increase.

Barry Breen.

Approve: Principal Deputy Asst Adm. Date: 6/17/09

for Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

Disapprove: _____ Date: _____

Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

Attachment: Determination and Findings of Public Health Emergency

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* *

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FOR IMMEDIATE RELEASE
June 17, 2009

EPA Announces Public Health Emergency in Libby, Montana

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"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long. We're making a long-delayed commitment to the people of Libby and Troy. Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," said EPA Administrator Lisa P. Jackson. "We're here to help create a long and prosperous future for this town." She added, "Senator Max Baucus has been a tireless advocate for the people living in Libby and Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elec ted to the Senate to bring much needed support to these communities."

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More information: http://www.epa.gov/libby

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FOR IMMEDIATE RELEASE
June 17, 2009

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FOR IMMEDIATE RELEASE
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Subject: Fw: conference call Thurs June 18, 3:00 EDT, # 919-541-1596
Date: 06/17/2009 02:38 PM

We are planning to have a call tomorrow

Here is the agenda (let me know if you want to add anything.

Breaking news from the Program office -Public Health Emergency

Update on the Gantt charts and any clarifications that might be needed

Update on analytical, especially progress made on action items since May 21st. phone call.

Other?

MaryJane Selgrade, Ph.D.
Chief, Cardiopulmonary and Immunotoxicology Branch
Environmental Public Health Division
US Environmental Protection Agency
MD-B143-01
Research Triangle Park, NC 27711
Phone: 919-541-1821
FAX:919-541-4284
email Selgrade.MaryJane@EPA.Gov

----- Forwarded by MaryJane Selgrade/RTP/USEPA/US on 06/17/2009 02:25 PM -----

From: Jayne Michaud/DC/USEPA/US
To: MaryJane Selgrade/RTP/USEPA/US@EPA
Date: 06/17/2009 02:14 PM
Subject: Fw: Risk Communication Handbook out of ORD's NRML

HI MaryJane

Here is a good looking document that you may find useful to pass around. I am keeping my eyes open for risk communication courses, although I think you are aware of those offered by Anold Den or Alvin Chun.

Jayne

~~~~~~~~~~~~~
Jayne Michaud
~~~~~~~~~~~~~

Science Policy Branch
EPA Office of Superfund Remediation and Technology Innovation
----- Forwarded by Jayne Michaud/DC/USEPA/US on 06/17/2009 02:12 PM -----

From: Marian Olsen/R2/USEPA/US
To: Margaret McDonough/R1/USEPA/US@EPA, Jayne Michaud/DC/USEPA/US@EPA
Date: 06/17/2009 01:33 PM
Subject: Risk Communication Handbook out of ORD's NRML

Hi,

FYI. Attached is a link to the Risk Communication Workbook from the NRML.

Marian

http://www.epa.gov/nrmrl/pubs/625r05003/625r05003.pdf

From:	James Woolford
To:	Barry Breen; Debbie Dietrich; Gilberto Irizarry; Ellen Manges
Cc:	John Michaud; Carol Rushin; Carol Campbell; Mary-Kay Lynch; Ellen Manges
Subject:	Fw: libby AM
Date:	06/17/2009 12:55 PM
Attachments:	[Untitled].pdf

James E. Woolford, Director
Office of Superfund Remediation &
Technology Innovation (OSRTI)
Office of Solid Waste and Emergency Response
US Environmental Protection Agency

Mailing Address:
1200 Pennsylvania Avenue, NW
Mail Code: 5201P
Washington, DC 20460

Physical Address:
Room 5622
2777 Crystal Drive South (Potomac Yard South)
Arlington, VA 22202

Phone:
(O) 703 603-8960 (secretary)
(D) 703-603-8722
(F) 703 603-9146

OSRTI Web Site: http://www.epa.gov/superfund

----- Forwarded by James Woolford/DC/USEPA/US on 06/17/2009 12:54 PM -----

From: "EPA-CTS-PRINTER" <EPA-CTS-PRINTER@mintra01.rtp.epa.gov>
To: WOOLFORD.JAMES@EPA.GOV, <Woolford.james, >
Date: 06/17/2009 12:53 PM
Subject: libby

[Untitled].pdf

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
http://www.epa.gov/region08

Ref: EPR-SR

ACTION MEMORANDUM AMENDMENT

SUBJECT: Action Memorandum Amendment Request: Approval of a Ceiling Increase for the Time-Critical Removal Action at the Libby Asbestos Site - Libby, Lincoln County, Montana

FROM: Carol Rushin
Acting Regional Administrator

THROUGH: James E. Woolford, Director
Office of Superfund Remediation and Technology Innovation

Deborah Y. Dietrich, Director
Office of Emergency Management

TO: Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

Re: Site ID#: BC
Category of Removal: Time-Critical, NPL, EPA Fund-Lead

I. INTRODUCTION

(b) (5)

(b) (5)

II. SITE CONDITIONS AND BACKGROUND

(b) (5)

(b) (5)

[redacted]

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

(b) (5)

III. THE THREAT POSED BY ASBESTOS AT THE LIBBY SITE IS UNIQUE IN ITS SEVERITY AND SCOPE

(b) (5)

(b) (5)

(b) (5)

IV. THREATS TO PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT, AND STATUTORY AND REGULATORY AUTHORITIES

(b) (5)

(b) (5)

(b) (5)

[redacted]

(b) (5)

V. ENDANGERMENT DETERMINATION

(b) (5)

(b) (5)

VI. EXEMPTION FROM STATUTORY LIMITS

(b) (5)

(b) (5)

VII. PROPOSED ACTIONS AND ESTIMATED COSTS

(b) (5)

[redacted]

(b) (5)

(b) (5)

VIII. EXPECTED CHANGE IN THE SITUATION SHOULD ACTION BE DELAYED OR NOT TAKEN

(b) (5)

IX. OUTSTANDING POLICY ISSUES

(b) (5)

X. ENFORCEMENT

(b) (5)

XI. RECOMMENDATION

(b) (5)

(b) (5)

REFERENCES

(b) (5)

(b) (5)

[redacted]

Printed on Recycled Paper

From: Mathy Stanislaus
To: James Woolford; Betsy Southerland; Ellen Manges
Cc: Barry Breen
Subject: Fw: thanks and regrouping?
Date: 06/24/2009 05:20 PM

Please let me know who should attend this meeting - Thanks
----- Forwarded by Mathy Stanislaus/DC/USEPA/US on 06/24/2009 05:17 PM -----

From: Carolyn Levine/DC/USEPA/US
To: Arvin Ganesan/DC/USEPA/US@EPA
Cc: "Mathy Stanislaus" <Stanislaus.Mathy@epamail.epa.gov>
Date: 06/24/2009 03:47 PM
Subject: Re: Fw: thanks and regrouping?

I am available, but Dora is not available at any other time on Thursday, Catharine indicated it had to be before Friday... so should we do this today?

Carolyn Levine
U.S. EPA/Office of Congressional Affairs
(202) 564-1859
FAX: (202) 501-1550

▼ Arvin Ganesan---06/24/2009 03:20:54 PM---Mathy and Carolyn, Are you available to talk to baucus's staff on next steps with Libby? See below.

From: Arvin Ganesan/DC/USEPA/US
To: "Mathy Stanislaus" <Stanislaus.Mathy@epamail.epa.gov>
Cc: "Carolyn Levine" <Levine.Carolyn@epamail.epa.gov>
Date: 06/24/2009 03:20 PM
Subject: Fw: thanks and regrouping?

Mathy and Carolyn,
Are you available to talk to baucus's staff on next steps with Libby? See below.

Thanks.
Sent from my Blackberry Wireless Device

----- Original Message -----
From: "Ransom, Catharine (Baucus)" [Catharine_Ransom@baucus.senate.gov]
Sent: 06/24/2009 09:33 AM AST
To: Arvin Ganesan; "Hughes, Dora (HHS/IOS)" <Dora.Hughes@hhs.gov>
Cc: Bob Sussman
Subject: RE: thanks and regrouping?

Arvin,

Thought it might be helpful to send you some time windows. My windows on Thursday are anytime other than 130, 430, or 5. On Friday, I am available in the afternoon --

We do need to do this before Friday, so let me know if this works -- thanks!

Catharine

-----Original Message-----
From: Ganesan.Arvin@epamail.epa.gov [mailto:Ganesan.Arvin@epamail.epa.gov]
Sent: Tuesday, June 23, 2009 8:01 PM
To: Hughes, Dora (HHS/IOS)
Cc: Sussman.Bob@epamail.epa.gov; Ransom, Catharine (Baucus)
Subject: RE: thanks and regrouping?

I'm afraid that I can't make that time. Could we try to arrange a time
where we could bring Mathy Stanislaus (our new head of Superfund) into
this conversation? Catharine, is that OK with you?

ARVIN R. GANESAN
Deputy Associate Administrator
Congressional Affairs
Office of the Administrator
United States Environmental Protection Agency
Ganesan.Arvin@epa.gov
(p) 202.564.5200
(f) 202.501.1519

|---------->
| From: |
|---------->
>----------
|
"Hughes, Dora (HHS/IOS)"
<Dora.Hughes@hhs.gov> |
>----------
|
|---------->
| To: |
|---------->
>----------
|
"Ransom, Catharine (Baucus)" <Catharine_Ransom@baucus.senate.gov>, Arvin Ganesan/DC/USEPA/US@EPA, Bob
Sussman/DC/USEPA/US@EPA |
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| Date: |
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06/23/2009 04:21
PM
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|---------->
| Subject: |
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----------|
|RE: thanks and regrouping?
|
>----------
----------|

Good afternoon—

I could do 10-11:15 window only.

Dora L Hughes, MD, MPH, FACP
Counselor for Science & Public Health
Office of the Secretary, DHHS

From: Ransom, Catharine (Baucus) [
mailto:Catharine_Ransom@baucus.senate.gov]
Sent: Tuesday, June 23, 2009 4:06 PM
To: 'Ganesan.Arvin@epamail.epa.gov'; Hughes, Dora (HHS/IOS);
'Sussman.Bob@epa.gov'
Subject: thanks and regrouping?

Hi everyone,

I wanted to echo Ty's earlier thank you for everyone's hard work last week on the announcement of the public health emergency. It went very well.

I think we need to get together to get a report on Monday night's meeting and talk about next steps going forward. Does Thursday sometime between 10 and 1 work for you? Thanks!

Catharine

Catharine Cyr Ransom
Senior Climate and Environmental Advisor
Senator Max Baucus
511 Hart Senate Building
W s in t n, DC 20510-2602
(b)(6)
direct: (202)224-7286
fax: (202) 224-9412
catharine_ransom@baucus.senate.gov

From: Ted Linnert
To: Dan Strausbaugh
Subject: HHS $6M Grant for Libby
Date: 06/03/2009 06:12 PM

Hi Dan,

How's it going? Could you please send me a copy of the grant application packet that HHS/ATSDR sent to those groups in Libby? I'm writing the Communications Strategy on the pending Big Announcement and that material would be very helpful. Thanks!

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
Denver, CO 80202-1129

(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

From:	Betsaida Alcantara
To:	Ellen Manges
Subject:	Ignore my concern about fax quality copy or not! We won't need to worry about signed stuff going up on website. PHE and Action Memo can go up without signature
Date:	06/16/2009 07:17 PM

Meeting Update Request:

Calendar Entry

Subject:	Update on Libby / Dial-in Number: (b) (6) / Conference Code: (b) (6)
When	
Date:	Tuesday 06/30/2009
Time:	09:15 AM - 10:00 AM (0 hours 45 minutes)
Chair:	Mathy Stanislaus
Sent By:	Michael Broughton
Invitees	
Required (to):	Arvin Ganesan/DC/USEPA/US@EPA; Carolyn Levine/DC/USEPA/US@EPA; Elizabeth Southerland/DC/USEPA/US@EPA; Ellen Manges/DC/USEPA/US@EPA; Jennifer Lue/DC/USEPA/US@EPA; Mary-Kay Lynch/DC/USEPA/US@EPA
Optional (cc):	Ellyn Fine/DC/USEPA/US@EPA; wilbur.jennifer@epa.gov
Where	
Location:	EPA W 3146

To: Lee Tyner/DC/USEPA/US@EPA
cc:
bcc:

Subject: Invitation: Libby Action Memo - Public Health Emergency (Feb 24 04:00 PM EST in Dial In Number (b) (6)

Comments
Lee I have a meeting at 3:15 your time, so won't be able to attend. matt

To: Victor Ketellapper/EPR/R8/USEPA/US@EPA
cc:
bcc:

Subject: Invitation: Libby PHE Brief (Feb 4 12:00 PM MST in Platte River Room)

Comments
It appears that it is at 1:00. matt

Meeting Invitation:

Calendar Entry

Subject:	Libby Update
When	
Date:	Thursday 06/11/2009
Time:	10:00 AM - 11:00 AM (1 hour)
Chair:	John Michaud
Invitees	
Required (to):	Charles Openchowski/DC/USEPA/US@EPA; Earl Salo/DC/USEPA/US@EPA; Lee Tyner/DC/USEPA/US@EPA; Mary-Kay Lynch/DC/USEPA/US@EPA
Optional (cc):	
Where	
Location:	Mary Kay's 4th floor office

From:	Tim Davis
To:	Jeff Morin
Cc:	Russell Leclerc; Sonya Pennock; Ted Linnert
Subject:	Is there any way you can reschedule the Libby call for when Ted is available?
Date:	06/02/2009 05:43 PM

Hi Jeff,

I just talked to our news media folks (Wendy Chipp--the lead for Libby--and Rich Mylott), and they'd really prefer to have you talk to Ted Linnert, since he's the media-savvy Libby expert.

Russ, Sonya: what do you think? Sonya, I think you and Wendy are both at a meeting during Jeff's scheduled call at 1PM on Wednesday. Jeff just has some basic questions about Libby before talking with HHS. Jeff also might ask me to make a couple changes to the Libby Web site.

If it's not a big deal and is very generic, Victor should do fine. But Ted has years of experience handling tough questions and dealing with media, etc, and he's the go-to guy for Libby public relations.

If it's not a big ordeal, I can be on the call with you and Victor. But our news media folks prefer to have Ted and at least one of them on the call, if possible.

I'll leave it up to Sonya, Russ and Jeff - thanks!
--Tim

From:	Wendy Chipp
To:	
Bcc:	Sharon Kercher
Subject:	KTVQ TV: Grant helping Libby asbestos victims
Date:	05/22/2009 10:52 AM

Grant helping Libby asbestos victims (*KTVQ TV*)

Posted: May 21, 2009 06:54 PM EDT
Updated: May 21, 2009 07:00 PM EDT

A federal grant is on its way Libby to provide health care for people with asbestos-related illnesses.
Montana Senator Max Baucus says the $6 million grant from Health and Human Services could be the first step toward declaring a public health emergency in the asbestos-contaminated town.

The U.S. Environmental Protection Agency declared the area a Superfund site, but has not declared a public health emergency.

HHS is slated to announce the grant opportunity for the Lincoln County Health Department on Friday, and a consortium of at least three health care entities to provide screenings and health care services to people battling asbestos-related illnesses.

Baucus says he's been fighting hard for Libby residents and is pleased with this announcement.

"I've been so upset with WR Grace, so upset with prior administrations," Baucus said. "They've done some of the on the job cleanup but they didn't do the job in terms of medical care. This administration is finally going to do it."

Baucus added that if a public health emergency is declared, the Federal Government would be required to provide health care to Libby residents with asbestos-related disease.

Libby Action Memo - Public Health Emergency

Wed 02/25/2009 12:00 PM - 1:00 PM

Chair: **Lee Tyner/DC/USEPA/US**

Location: Dial In Number (b) (6)
Conference Code: (b) (6)

Required:	Andy Lensink/ENF/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Earl Salo/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Martin Hestmark/R8/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Matthew James Woolford/DC/USEPA/US@EPA, Jennifer Lue/DC/USEPA/US@EPA, John Michaud/DC/USEPA/US@EPA
Optional:	

Description

Personal Notes

Libby Action Memo - Public Health Emergency

Wed 02/25/2009 12:00 PM - 1:00 PM

Attendance is **required** for Jonathan Newton

Chair: **Lee Tyner/DC/USEPA/US**

Location: Dial In Number (b) (6)
Conference Code: (b) (6)

Required:	Andy Lensink/ENF/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Earl Salo/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Martin Hestmark/R8/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Matthew
Optional:	James Woolford/DC/USEPA/US@EPA, Jennifer Lue/DC/USEPA/US@EPA, John Michaud/DC/USEPA/US@EPA

Description

Personal Notes

Show Details

Libby Action Memo - Public Health Emergency
Dial In Number (b) (6)

Wed 02/25/2009 12:00 PM - 1:00 PM
Attendance is **delegated** for Jonathan Newton
No Location Information

Time zones:	This entry was created in a different time zone. The time in that time zone is: Wed 02/25/2009 10:00 AM MST - 11:00 AM MST

Description

From: Carol Campbell
Sent By: Penney Trujillo
To: Al Lange; Andrew Schmidt; Armando Saenz; Ayn Schmit; Barbara Benoy; Barbara Nelson; Barbara Thomas; Bernadette Gonzalez; Bert Garcia; Betty Pennock; Bill Murray; Bobbie Fernandez; Bonita Lavelle; Bradley Miller; Brent Truskowski; Brian Caruso; Carol Campbell; Carol Russell; Charles Partridge; Charlotte Schuster; Christina Progess; Christina Wilson; Cinna Vallejos; Connie Collins; Craig Myers; Curtis Kimbel; Dan Wall; Dana Allen; Daniel Heffernan; Darcy Campbell; Dave Christenson; Dave Moon; David Lennon; David Ostrander; David Rathke; David Romero; Deirdre Rothery; Delores Hutchens; Delores Soriano; Dianna Lim; Donald Goodrich; Duc Nguyen; Elisabeth Evans; Eric Steinhaus; Erna Waterman; FRANCES COSTANZI; Frances MacDonald; Gary Kleeman; George Parrish; George Ritz; Gina Andrews; Glenn Ford; Greg Hargreaves; Gregory Oberley; Gwen Christiansen; Hays Griswold; Helen Dawson; Jack Whyte; James Hanley; James Ruppel; Jean MacKenzie; Jerry Blank; Jill Minter; Jim Berkley; Jim Kiefer; Jim Luey; Jim Peterson; Jodi Powell; Jody Ostendorf; Johanna Miller; John DiPentino; John Goodrick; John Marshall; John Wieber; Joni Sandoval; Joseph Byron; Joyce Ackerman; Joyel Dhieux; Judy Hansen; Judy Roos; Julia McCarthy; Julie Kinsey; Karen Hamilton; Karen Reed; Karl Hermann; Karren Johnson; Kathie Atencio; Kathleen Graham; Kathryn Hernandez; Ken Wangerud; Kerry Guy; Kris Jensen; Lareina Guenzel; Larry Svoboda; Laura Williams; Lewis Daniels; Linda Armer; Lisa Lloyd; Liz Rogers; Lourdes Deppmeier; Luke Chavez; Mandi Rodriguez; Maple Barnard; Marcella Hutchinson; Mario Robles; Mark Aguilar; Martin Hestmark; Martin Mccomb; Mary Goldade; Melanie Wasco; Melissa Payan; Michael Holmes; Mike Cirian; Mike Wireman; Mike Zimmerman; Mitra Jha; Molly Brodin; Nghia Pham; Pam Dougherty; Patricia Gamroth; Patricia Smith; Paul Peronard; Paula Cifka; Paula Schmittdiel; Peggy Crandell; Penney Trujillo; Peter Ismert; Peter Monahan; Peter Stevenson; Phillip Werner; Rebecca Thomas; Richard Clark; Rickie McCall; Rob Stites; Robert Edgar; Robin Coursen; Robyn Blackburn; Russell Leclerc; Sabrina Forrest; Sam Garcia; Sandra Bourgeois; Sandra Spence; Sarah Fowler; Sarah Hester; Stacey Eriksen; Stanley Christensen; Steven Bubnick; Steven Merritt; Steven Way; Susan Griffin; Ted Lanzano; Terry Anderson; Tien Nguyen; Timothy Rehder; Tom Johnson; Toney Ott; Tony Ranalli; Tony Selle; Tonya Fish; Vance.Sam@EPA.GOV@EPA; Vera Moritz; Vern Berry; Victor Ketellapper; Wendy OBrien; Wes Wilson
Subject: Libby Announcement
Date: 06/17/2009 01:34 PM

To All Staff

This is a historic day. The first Public Health Emergency ever declared by EPA will be announced today at 11:20 our time by Administrator Jackson. Health and Human Services will be providing Health Care to Libby citizens affected by asbestos. I want to personally thank all of the staff and managers in EPR that have been involved in this site for their hard work under often trying conditions. We will continue to move aggressively to clean up the Libby and Tryoy communities and protect the health of the people.

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

From:	Eddie Sierra
To:	R8 All ECEJ
Cc:	campbell.carol@epamail.epa.gov
Subject:	Libby Asbestos Site
Date:	06/17/2009 02:56 PM

To All ECEJ Staff

This is a historic day. The first Public Health Emergency ever declared by EPA was announced today at 11:20 MDT at the Libby Asbestos Superfund in Montana site by EPA Administrator Lisa Jackson. The Department of Health and Human Services will be providing health care to Libby citizens affected by asbestos. I want to personally thank all of the staff and managers in ECEJ that have been involved in this site for their hard work under often trying conditions. We will continue to move aggressively to clean up the Libby and Troy communities and protect the health of the people.

Eddie A. Sierra
Acting Assistant Regional Administrator
USEPA Region 8
Office of Enforcement, Compliance,
and Environmental Justice
303-312-6051

From: Betsaida Alcantara
To: Elizabeth Southerland; Ellen Manges
Cc: Adora Andy; Mary-Kay Lynch
Subject: Libby Emergency Declaration
Date: 06/18/2009 02:03 PM

Betsy,
Below are questions from a reporter from "Asbestos Watch". They seem to be really in the weeds. Can you ladies give us some guidance? Feel free to call us.
----- Forwarded by Betsaida Alcantara/DC/USEPA/US on 06/18/2009 01:59 PM -----

From: Paul Peters <ppeters@asbestoswatch.net>
To: Betsaida Alcantara/DC/USEPA/US@EPA
Cc: ppeters@asbestoswatch.net, gerryhh@ (b) (6) Gordon Sullivan <gordsull@ (b) (6) Aubrey Miller <aubrey.miller@fda.hhs.gov>, Terry Trent <ttrent1@ (b) (6) Brad Black <brad@libbyasbestos.org>, barrett_kaiser@baucus.senate.gov, lpeters@asbestoswatch.net
Date: 06/18/2009 01:57 PM
Subject: Libby Emergency Declaration

Here is the list of questions I have about the emergency declaration that was declared in Libby, Montana on June 17. I believe that an on-record interview is needed to answer these questions:

Approximately how many people with asbestos-related disease can be served over the course of their illness by the $6 million that has been set aside for health in Libby?

What will the total expenditures for Libby be after this declaration?

How much of that is covered by the 2008 settlement with W.R. Grace & Company?

If the EPA had not settled with Grace in 2008, could the company have been made to pay for the declaration?

Does the EPA believe that Libby amphibole asbestos may be a contributing factor to the higher rates of asbestos-related disease seen in Libby?

If ongoing risk assessments determine that Libby amphibole is more toxic than previously acknowledged by the EPA, will homes cleaned in the past be revisited for further cleaning?

In the EPA's Action Memorandum Amendment on the Libby emergency declaration, it is stated that Polarized Light Microscopy and visual inspections for vermiculite will be used as the standard for determining if a property is clean. Yet in 1994, the EPA determined that Transmission Electron Microscopy is far greater at detecting asbestos fibers. Still, the Action Memorandum Amendment states that, "At this time there are no other viable alternative technologies available for addressing asbestos." Does the EPA now believe that TEM is more effective than PLM? Does a combination of PLM and visual inspections insure that exposures have been stopped?

In April of this year, the EPA declared that the ambient air in Libby is safe to breath, yet the EPA "Action Memorandum Amendment" on the emergency declaration partly blames topography and meteorology for the greater medical impact in Libby. If the air is clean, how can these be factors?

Paul Peters
Editor
Asbestos Watch
(406) 322-3961

www.asbestoswatch.net

Libby PHE Brief

Wed 02/04/2009 3:00 PM - 3:30 PM

Attendance is **required** for Jonathan Newton

Chair: **Victor Ketellapper/R8/USEPA/US**

Sent By: **Victor Ketellapper/EPR/R8/USEPA/US**

Location: Platte River Room

Required:	Andy Lensink/ENF/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Martin Hestmark/R8/USEPA/US@EPA, Matthew Cohn/R8/USEPA/US@EPA, Michael Boydston/R8/USEPA/US@EPA, Peter Ornstein/RC/R8/USEPA/US@EPA
Optional:	Penney Trujillo/EPR/R8/USEPA/US@EPA
Time zones:	This entry was created in a different time zone. The time in that time zone is: Wed 02/04/2009 1:00 PM MST - 1:30 PM MST

Description

Personal Notes

From: Victor Ketellapper
To: Carol Campbell
Subject: Libby PHE Brief
Date: 02/03/2009 02:45 PM

Can you make some time on Wed to discuss the options for declaration of a public health emergency with the lawyers? If so, when?

Victor Ketellapper, P.E.
USEPA
1595 Wynkoop St. (8EPR-B)
Denver, CO 80202

(303)312-6578

From: Ted Linnert
To: Sandy Fells
Subject: Libby PHE Docs
Date: 05/14/2009 11:30 AM

Hi Sandy,

I'm in Libby and can't access my F drive. As I recall, I gave you the latest version of a Comm Strat entitled something like "Declaration of Public Health Emergency - Revisited" for one of your congressional contacts. If you still have that electronically, would you please e-mail it to me (I am able to use Lotus Notes up here). I think that version I did for you was the most recent and it would be very helpful to have that this morning. Also, if you have any other Q&A docs, etc. on the PHE from that approximate time period, please send those as well.

Thanks!

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
Denver, CO 80202-1129

(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

From: Tim Davis
To: Wendy Dew; Sandy Fells; Richard Mylott; Laura Niles
Subject: Libby PHE video - look OK?
Date: 06/17/2009 03:37 PM

---

http://www.epa.gov/region8/superfund/libby/phe.html

From: Ted Linnert
To: Sonya Pennock
Subject: Libby PHE
Date: 03/16/2009 06:55 PM

I forgot to mention that your process questions are right on.

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
Denver, CO 80202-1129

(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

Libby RPM MTG

Mon 06/29/2009 3:00 PM - 5:00 PM

Attendance is **required** for Jonathan Newton

Chair: **Victor Ketellapper/R8/USEPA/US**

Location: Granite Room

Required:	Andy Lensink/R8/USEPA/US@EPA, Bonita Lavelle/R8/USEPA/US@EPA, clecours@mt.gov, Mike Cirian/R8/USEPA/US@EPA, Rebecca Thomas/EPR/R8/USEPA/US@EPA, rsloan@mt.gov, Russell Leclerc/R8/USEPA/US@EPA, Stanley
Time zones:	This entry was created in a different time zone. The time in that time zone is: Mon 06/29/2009 1:00 PM MDT - 3:00 PM MDT

Description

I hope you will all be able to attend this meeting. I feel it is important for us to regroup after the Public Health Emergency determination.

Agenda

1. PHE Determination
2. Updated site management plan
3. OU updates.
4. Other issues?

For those that cannot attend in person, please call in using the following conference call information:

Call in # (b) (6) Conference code (b) (6)

Personal Notes

From: Gilberto Irizarry
To: Dana Tulis
Subject: Libby Sites Fact Sheet
Date: 06/17/2009 11:35 AM

Dana:

I haven't seen comments/feedback from the Regions or anyone else on the Fact sheet forwarded last night. Have you ? If not, should we consider the one forwarded last night as Final and let everyone else know ?

Gilberto "Tito" Irizarry
Program Operations & Coordination Division, Director
Office of Emergency Management
US Environmental Protection Agency, Headquarters
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Show Details

Libby / HHS

Thu 07/09/2009 4:30 PM - 5:15 PM

Chair: **Mathy Stanislaus/DC/USEPA/US**
Sent By: **Michael Broughton/DC/USEPA/US**
Location: 3140 EPA West

Required:	Arvin Ganesan/DC/USEPA/US@EPA, Barry Breen/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA, Carolyn Levine/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Ellen Manges/DC/USEPA/US@EPA, Jennifer Antoinette Powell-Dickson/DC/USEPA/US@EPA, Carolyn McDonald/DC/USEPA/US@EPA,
Optional:	Ellyn Fine/DC/USEPA/US@EPA, Georgia Bednar/DC/USEPA/US@EPA, Jennifer Wilbur/DC/USEPA/US@EPA

Description

Personal Notes

From: Adora Andy
To: Michael Moats; Allyn Brooks-LaSure; Seth Oster; Manges.Ellen@epamail.epa.gov; Southerland.Elizabeth@epamail.epa.gov; Mary-Kay Lynch; Bob Sussman; Mathy Stanislaus; Arvin Ganesan; campbell.carol@epa.gov; Betsy Shaw; thompson.diane@epa.gov; Richard Mylott; Enesta Jones; Roxanne Smith
Subject: Libby coverage
Date: 06/17/2009 06:53 PM

Please see below.
▼ Brendan Gilfillan

----- Original Message -----
From: Brendan Gilfillan
Sent: 06/17/2009 06:17 PM EDT
To: Adora Andy
Subject: coverage

EPA declares public health emergency in Montana town ravaged by asbestos

By MATTHEW DALY , Associated Press

WASHINGTON - The Obama administration said Wednesday it will pump an additional $130 million into a Montana town where asbestos contamination has been blamed for more than 200 deaths.

EPA Administrator Lisa Jackson said the agency for the first time has determined there is a public health emergency in a contaminated community, targeting Libby, Mont., for immediate federal attention.

Jackson's announcement will not result in an evacuation of Libby's 2,600 residents, but will require an extensive, home-by-home cleanup and better health protections for those with asbestos-related illnesses.

The EPA will invest at least $125 million over the next five years in the ongoing clean up. The Health and Human Services Department will spend an additional $6 million on medical assistance for residents suffering from asbestos-related illnesses.

The money is in addition to hundreds of millions of dollars the

government and Maryland-based W.R. Grace & Co. have spent to clean up Libby, where asbestos contamination from a now-closed vermiculite mine has been cited in the deaths of more than 200 people and illnesses of thousands more.

Before the vermiculite mine was closed in 1990, miners carried asbestos home on their clothes. Vermiculite once covered school running tracks in Libby and some residents used vermiculite as mulch in their home gardens.

Jackson called Libby a "tragic public health situation" that has not received the recognition it deserves from the federal government for far too long.

"Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," said Jackson. "We're here to help create a long and prosperous future for this town."

Jackson said the announcement was the first time the EPA has made such a determination under authority of the 1980 Superfund law that requires the clean up of contaminated sites.

Sen. Max Baucus, D-Mont., called the emergency declaration a great day for Libby, which he said "had to wait year after year as the last administration failed to determine that a public health emergency exists."

The EPA had previously declared the area a Superfund site, but had not determined there was a public health emergency until Wednesday.

Last fall, Baucus accused the Bush administration of orchestrating a "conspiracy" for not declaring an emergency in Libby. He charged that former EPA Administrator Christine Todd Whitman was prepared to declare an emergency in 2002 but was overruled by the Bush White House.

Baucus called the health announcement especially welcome, given what he called a disappointing verdict last month in a criminal case related to the asbestos contamination. W.R. Grace & Co. and three former executives were acquitted of federal charges that they knowingly allowed residents of the northwestern Montana town to be exposed to asbestos from its vermiculite mine.

A Grace spokesman did not return a telephone call Wednesday. The company has not denied that asbestos came from its mine, but has said it acted responsibly to clean up the contamination. It paid millions in medical bills for residents of Libby and agreed last year to pay $250 million to reimburse the EPA for cleanup efforts.

Sen. Jon Tester, D-Mont., called the emergency declaration long-overdue.

"We still have a long way to do right by the folks in Libby. Working together with the Department of Health and Human Services and the Environmental Protection Agency, we're making very good progress," Tester said.

Gayla Benefield of Libby, who suffers health effects from asbestos exposure and lost both parents to asbestos-related lung diseases, called the declaration a "a giant step forward" for improved medical care and clean up of the town.

"Right now the amount of money is relatively minimal, but overall the biggest thing is that it opens the door for future money to be available for medical care, research — the things we've needed, independent of W.R. Grace in terms of health care," she said.

Montana Gov. Brian Schweitzer hailed the declaration and said the designated funds will be used to make communities in northwestern Montana healthier.

EPA calls health emergency in Mont. mine town
USA Today
In the first such action of its kind, the Environmental Protection Agency has declared a public health emergency in the asbestos-

contaminated town of Libby, Mont.

The declaration, by EPA Administrator Lisa Jackson, comes a month after W.R. Grace & Co. and three former executives were acquitted of federal criminal charges that they knowingly allowed Libby residents to be exposed to cancer-causing asbestos from its now-closed vermiculite mine. (The *Missoulian* has an archive of trial coverage.)

Asbestos has been cited in the deaths of more than 200 people and the illness of thousands more.

Under today's action, Libby will not be evacuated, the Associated Press writes. The EPA will spend $125 million during the next five years to conduct house-by-house cleanups and improve health protections for residents with asbestos-related illnesses.

Here's some of what the EPA said in its announcement:

> This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that conditions at a site constitute a public health emergency. This determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos. Investigations performed by the Agency for Toxic Substance and Disease Registry have found the incidence of occurrence of asbestosis, a lung condition, in the Libby area staggeringly higher than the national average for the period from 1979-1998. EPA is working closely with the Department of Health and Human Services, which is making available a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents.

Read the complete EPA news release here.

Grace, based in Columbia, Md., declared bankruptcy in 2001. At the time, it had been named in 110,000 asbestos-related lawsuits.

In April, Grace agreed to a $3 billion settlement to pay outstanding claims, allowing the company to exit bankruptcy with no more asbestos liability.

Asbestos cleanup 'emergency' declared in Montana town

A Montana town where asbestos contamination has been blamed for more than 200 deaths will get new cleanup and medical assistance from the Obama administration under a "public health emergency" declared Wednesday. The declaration is the first ever issued by the Environmental Protection Agency, which has been overseeing the cleanup of Libby, Montana, for 10 years.

The town was heavily contaminated with asbestos-laced dust that federal prosecutors said resulted in more than 200 deaths and 1,000 illnesses.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long," EPA Administrator Lisa Jackson said in a statement accompanying the declaration.

In May, a federal jury acquitted mine operator W.R. Grace and three of its former executives of criminal charges related to the contamination. During Jackson's confirmation hearing in January, Montana Sen. Max Baucus said the town's 12,000 residents had been "hung out to dry" and pressed Jackson to review the issue.

The Libby operation began producing vermiculite -- a mineral often used in insulation -- in 1919. But the vermiculite was contaminated with tremolite asbestos, a particularly toxic form of asbestos that has been linked to mesothelioma, a cancer that can attack the lining of the lungs, abdomen, or heart.Dust from the plant covered patches of grass, dusted the tops of cars and drifted through the air in a hazy cloud that became a part of residents' daily lives.

Grace operated the facility from 1963 until it closed in 1990. During the company's three-month trial, prosecutors argued that its executives knowingly released the substance and tried to hide the danger from the community.

The company did not deny that the asbestos came from its mine, but it said it acted responsibly to clean up the contamination. It paid millions in medical bills for residents of Libby and neighboring Troy, and agreed in 2008 to pay $250 million to reimburse the EPA for its cleanup efforts.

EPA Declares Libby a Public Health Emergency
Flathead Beacon (Western Montana)

The Environmental Protection Agency on Wednesday declared the

asbestos contamination in Libby a public health emergency, the first time the EPA has made such a designation since the Superfund law was passed in 1980.

The declaration will result in renewed and extensive contamination cleanup, along with enhanced medical care to treat asbestos-related illness in Libby and Troy, EPA Administrator Lisa Jackson said. A public meeting in Libby scheduled for June 22 with EPA officials will offer more details on the breadth of the services to be offered.

“For years, Libby and Troy residents have been at higher risk for lung cancer,” Jackson said. “We determined that we needed to step up our efforts to help.”

Jackson made the announcement at a Washington D.C. press conference joined by Montana Sens. Max Baucus and Jon Tester, as well as Health and Human Services Secretary Kathleen Sebelius.

“This is a truly historic day,” Baucus said, “The U.S. government is doing what’s right for people who have been oppressed for so long.”

“I cannot emphasize too strongly just what a tragedy the situation is in Libby,” Baucus added. “It’s also a reminder – a reminder of how much more we have to do.”

Libby’s vermiculite mine, purchased in W.R. Grace & Co. in 1963 has resulted in one of the worst public health disasters in U.S. history, resulting in roughly 200 deaths and 2,000 sickened from asbestos-related diseases caused by the tremolite asbestos in the ore. Not only were the miners sickened or killed, but their families and even members of the community who did not work in the Grace mine fell victim to the contamination. The EPA declared Libby a Superfund site in 2002.

Sebelius praised the work the federal government has previously undertaken to aid Libby residents, including the establishment of the Center for Asbestos Related Disease, or CARD Clinic in Libby. The HHS department also plans to begin an $8-million, 8-year epidemiology study in Libby this year, though funding for that grant was established last year and not related to the new declaration. But she said more is needed.

“Despite the past work, it simply was not enough,” Sebelius said. “We can no longer turn a blind eye.”

Baucus secured a $6 million grant last month, for the Lincoln County Health Department and other health agencies providing medical aid to asbestos victims. In Wednesday’s news conference, he called the grant “a good start,” but he and Jackson declined to give specifics on what the further costs of the emergency

declaration might be, saying that the unique nature of tremolite asbestos, and how the human body reacts to such contamination, still requires a great deal of study. Jackson added that she did not believe additional cleanup acts outside of the Troy and Libby area are currently necessary.

In a later conference call with Montana reporters, an EPA official speaking on background said the emergency declaration gives agency workers conducting asbestos cleanups in the homes of Libby and Troy residents a firmer legal standing to carry out removals of vermiculite insulation.

In May, a U.S. District Court jury in Missoula acquitted W.R. Grace & Co. and three former executives on charges that they knowingly exposed Libby residents to tremolite asbestos and then covered it up to continue making profits and avoid liability. Earlier this week, federal prosecutors moved to dismiss charges against the final Grace defendant in the case. Baucus said he disagreed with the outcome of the case.

“The company, W.R. Grace, in my opinion, knew what it was doing,” Baucus said. “This declaration is the beginning of what needed to be done.”

Under the administration of President George W. Bush, Baucus continually did battle with the EPA over Libby, and charged in a September 2008 report that the agency had conspired with the national Office of Management and Budget to block the declaration of a public health emergency in Libby due to the costs.

During Jackson’s confirmation hearing earlier this year, Baucus pressed her to declare a public health emergency in Libby.

Tester characterized Libby as a small town of hard-working people who played by the rules, but no community could bear the strain on its own of such an enormous environmental disaster: “The system let Libby down,” Tester said. “The people of Libby want their future back.”

“This is a long overdue, common-sense decision,” he added. “We still have a long way to go to do the right thing for the people of Libby.”

Libby declared public health emergency
By Brad Fuqua, The Western News

Called a “truly historic day for the people of Libby” by U.S. Sen. Max Baucus, the Environmental Protection Agency on Wednesday announced that a public health emergency has been declared in the asbestos-affected area of Libby and Troy.

“This is the first time in American history that we’ve had this declaration and I cannot think of a more appropriate time and place,” Baucus said.

EPA administrator Lisa Jackson announced the move during a press conference in Washington. She said the public health emergency would involve a re-evaluation of the situation on the ground.

“This declaration serves as a reminder of mismanagement of handling hazardous materials,” Jackson said. “While EPA has been conducting cleanup in Libby for several years, we are re-committing to getting the job done right.”

Baucus, a longtime advocate on the issue, worked on the public health emergency declaration for years.

“This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day,” he said.

The Libby asbestos site includes portions of the towns of Libby and Troy and inactive vermiculite mine seven miles northeast of the town. Gold miners discovered vermiculite in Libby in 1881. In the 1920s, the Zonolite Co., formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990.

It is estimated that the Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919-90.

U.S. Health and Human Services Secretary Kathleen Sebelius and U.S. Sen. Jon Tester of Montana were also on hand at the press conference.

“Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need,” Baucus said. “Today is the day that after years of work we were able to succeed in getting this done. Yet, we won’t stop here. We will continue to push until Libby has a clean bill of health.”

For stories on the declaration of a public health emergency in Libby, see Friday’s edition of The Western News or check back at this website on Thursday.

EPA declares public health emergency in Libby

KTVQ (CBS Montana)

U.S. Environmental Protection Agency Administrator Lisa P. Jackson has announced that the agency has determined that a public health emergency exists at the Libby asbestos site.

Hundreds of cases asbestos-related disease have been documented in the area which covers Libby and Troy.

Jackson made the announcement Wednesday morning during a joint press conference with Department of Health and Human Services Secretary Kathleen Sebelius and U.S. Senators Max Baucus and Jon Tester.

This marks the first time that the EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), that conditions at a site constitute a public health emergency.

According to the EPA, the "determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos".

Investigations performed in the area have found that the occurrence of asbestosis in the Libby area are "staggeringly higher than the national average for the period from 1979-1998" according to the EPA.

The agency says they will be working closely with the Department of Health and Human Services, which has been making a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents available.

During her Senate confirmation hearing, Jackson committed to review the situation at the Libby asbestos site and following the review, she decided that conditions at the site present a significant threat to public health and that making a public health emergency determination is appropriate.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long. We're making a long-delayed commitment to the people of Libby and Troy. Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," said Jackson.

"We're here to help create a long and prosperous future for this town." She added, "Senator Max Baucus has been a tireless advocate for the people living in Libby and Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elected to the Senate to bring much needed support to these communities."

Baucus has been a long-time advocate on this issue and has consistently sought out a determination of a public health emergency in this region.

"This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day," Baucus stated. "Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need. Today is the day that after years of work we were able to succeed in getting this done. Yet, we won't stop here. We will continue to push until Libby has a clean bill of health."

Tester added that "this is a long-overdue, common-sense decision that will go a long way for Libby and the thousands of folks who were poisoned there. This decision will help make quality health care more accessible and it will open the door to get new resources on the ground".

The Libby asbestos site has been on the EPA's Superfund National Priorities List since 2002, and cleanup has taken place there since 2000. While the EPA has made progress in helping to remove the threat of asbestos in the land and air the potential release of asbestos remains "a significant threat to public health in that area" according to the EPA.

The Libby asbestos site includes portions of the towns of Libby and Troy and an inactive vermiculite mine seven miles northeast of the

town. Gold miners discovered vermiculite in Libby in 1881; in the 1920s the Zonolite Company formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990.

From: Jeff Maurer
To: Ellen Manges
Subject: Libby information
Date: 06/08/2009 10:46 AM

Hi Ellen,

Every week, we send a report to the White House that includes items of interest for the following week. For this week's submission, we'll probably include information about the upcoming PHE announcement in Libby, Montana. Jen and Ellyn Fine said that you would be the person to go to about this: could you please send me a few sentences briefly describing what we're doing, why, and when? Thanks.

Also, do you know anything about Web content being generated in support of this announcement? Thanks - Jeff

Jeff Maurer
Environmental Protection Specialist
U.S. EPA - Washington DC
(202) 566-2871

From: Rodriguez-Newstrom, Linda
To: Rodriguez-Newstrom, Linda; Victor Ketellapper; Rebecca Thomas; Stanley Christensen; Mike Cirian; Ted Linnert; Mary Goldade; Bonita Lavelle; Martin Mccomb; Duc Nguyen; Wendy OBrien; Andy Lensink; Matthew Cohn; Michael Boydston; Paul Peronard; Paul Kudarauskas
Cc: Courtney.Zamora@dot.gov; Julie.Borgesi@dot.gov; Michelle.Heimgartner@dot.gov; Lammers, Paul; Montera, Jeff; Warren, Dee; Cook, Thomas; Crowell, Terry; Fox, Kimberly; Ekstrom, Karen; Kari, Patricia; Gilbert, Christy; McKenzie, Geoffrey; Raines, Nicholas; Fortner, Kevin \(INACTIVE\); Haugen, Phyllis; Miller, Ruby; Schauss, Paula; Tonner, Jessica; Roeske, Angela; Crites, Ann Marie; Wilson, Simon; Pisciotta, Dominic; Wall, Timothy; Repine, Karen; Repine, Damon; Dodge, Tracy; Vanderweel, Thomas; Karla Barnes; Vince Parker; Marilyn Smith; Catherine LeCours; Rode, Diane; Bein, Nicole; michelle.carlson@ (b) (6) Dunwell, Mary Ann; Wall, Timothy; Fox, Kimberly; Rennick, Robert; Ekstrom, Karen; Schroeder, David; Sandy Matheny; rjbrus@ (b) (6) kmartell@ (b) (6) Martell, Kari; Steve Newstrom; Joseph.Sposato@dot.gov; Kaspzyk, Robert; Anderson, Keeli; Beaudoin, Kristopher; Barnett, Frank; Peltier, Carol; Forkel, Matthew; Hartman, Pamela; Smith, Jennifer L.; Terry, Jeffery; Santos, Dominic
Subject: Libby-EPA Announces Public Health Emergency
Date: 06/17/2009 01:52 PM

CONTACTS:
EPA Press Office-202-564-1692
HHS Press Office-202-690-6343

FOR IMMEDIATE RELEASE
June 17, 2009

EPA Announces Public Health Emergency in Libby, Montana

EPA to Move Aggressively on Cleanup and HHS to Assist Area Residents with Medical Care

WASHINGTON – U.S. Environmental Protection Agency Administrator Lisa P. Jackson today announced the agency has determined that a public health emergency exists at the Libby asbestos site in northwest Montana. Over the past years, hundreds of asbestos-related disease cases have been documented in this small community, which covers the towns of Libby and Troy. The announcement was made today at a joint press conference with Department of Health and Human Services Secretary Kathleen Sebelius and U.S. Sens. Max Baucus and Jon Tester.

This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that conditions at a site constitute a public health emergency. This determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos. Investigations performed by the Agency for Toxic Substance and Disease Registry have found the incidence of occurrence of asbestosis, a lung condition, in the Libby area staggeringly higher than the national average for the period from 1979-1998. EPA is working closely with the Department of Health and Human Services, which is making available a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents.

During her Senate confirmation hearing, Administrator Jackson committed to review the situation at the Libby asbestos site based on current site information, sound science and EPA's legal authorities. As a result of her review, the Administrator has decided that conditions at the site present a significant threat to public health and that making a public health emergency determination is appropriate.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long. We're making a long-delayed commitment to the people of Libby and

Troy. Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," said EPA Administrator Lisa P. Jackson. "We're here to help create a long and prosperous future for this town." She added, "Senator Max Baucus has been a tireless advocate for the people living in Libby and Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elected to the Senate to bring much needed support to these communities."

"Senator Baucus and Senator Tester have powerfully brought the voices of the people of Libby and Troy to Washington so the nation could hear and understand what happened. They refused to give up on finding the best ways to help those who have suffered so much. Today's announcement reflects our Administration's concern for the residents of Lincoln County and our intention to act decisively to protect and improve their health and quality of life,' said Secretary Sebelius. "The Department of Health and Human Services has been working closely with the EPA and the residents of Lincoln County for a number of years to conduct screenings and help provide access to care. Now, we have come together with Senator Baucus and Senator Tester, Administrator Jackson, and agencies across HHS, to offer a new grant to provide short-term medical assistance for screening, diagnostic and treatment services in a comprehensive and coordinated manner in partnership with local officials on the ground in Lincoln County. "

Sen. Max Baucus, a long-time advocate on this issue, consistently sought out a determination of a public health emergency in this region.

"This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day," said Sen. Baucus. "Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need. Today is the day that after years of work we were able to succeed in getting this done. Yet, we won't stop here. We will continue to push until Libby has a clean bill of health."

"This is a long-overdue, common-sense decision that will go a long way for Libby and the thousands of folks who were poisoned there," Sen. Tester said. "This decision will help make quality health care more accessible and it will open the door to get new resources on the ground. We still have a long way to do right by the folks in Libby. Working together with the Department of Health and Human Services and the Environmental Protection Agency, we're making very good progress."

Secretary Sebelius tasked two HHS agencies – the Health Resources and Services Administration and the Centers for Disease Control and Prevention/Agency for Toxic Substances and Disease Registry – to help county residents. These two agencies will support a new grant to assist affected residents who need medical care. Local officials are currently putting together a grant proposal that will lay out options for provision of medical care that will work for the residents of Lincoln County. HHS anticipates that this grant can be awarded in August 2009.

The Libby asbestos site has been on the EPA's Superfund National Priorities List since 2002, and cleanup has taken place since 2000. EPA has made progress in helping to remove the threat of asbestos in the land and air, and with it, the increased risks of lung cancer, asbestosis, and other respiratory problems. While EPA's cleanup efforts have greatly reduced exposure, actual and potential releases of amphibole asbestos remain a significant threat to public health in that area.

The Libby asbestos site includes portions of the towns of Libby and Troy and an inactive vermiculite mine seven miles northeast of the town. Gold miners discovered vermiculite in Libby in 1881; in the 1920s the Zonolite Company formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990. It is estimated that the Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919 to 1990.

More information: http://www.epa.gov/libby

R176

From:	Rodriguez-Newstrom, Linda
To:	Rodriguez-Newstrom, Linda; Victor Ketellapper; Rebecca Thomas; Stanley Christensen; Mike Cirian; Ted Linnert; Mary Goldade; Bonita Lavelle; Martin Mccomb; Duc Nguyen; Wendy OBrien; Andy Lensink; Matthew Cohn; Michael Boydston; Paul Peronard; Paul Kudarauskas
Cc:	Courtney.Zamora@dot.gov; Julie.Borgesi@dot.gov; Michelle.Heimgartner@dot.gov; Lammers, Paul; Montera, Jeff; Warren, Dee; Cook, Thomas; Crowell, Terry; Fox, Kimberly; Ekstrom, Karen; Kari, Patricia; Gilbert, Christy; McKenzie, Geoffrey; Raines, Nicholas; Fortner, Kevin \(INACTIVE\); Haugen, Phyllis; Miller, Ruby; Schauss, Paula; Tonner, Jessica; Roeske, Angela; Crites, Ann Marie; Wilson, Simon; Pisciotta, Dominic; Wall, Timothy; Repine, Karen; Repine, Damon; Dodge, Tracy; Vanderweel, Thomas; Karla Barnes; Vince Parker; Marilyn Smith; Catherine LeCours; Rode, Diane; Bein, Nicole; michelle.carlson@ (b) (6) Dunwell, Mary Ann; Wall, Timothy; Fox, Kimberly; Rennick, Robert; Ekstrom, Karen; Schroeder, David; Sandy Matheny; rjbrus@ (b) (6) kmartell@ (b) (6) Martell, Kari; Steve Newstrom; Joseph.Sposato@dot.gov; Kaspzyk, Robert; Anderson, Keeli; Beaudoin, Kristopher; Barnett, Frank; Peltier, Carol; Forkel, Matthew; Hartman, Pamela; Smith, Jennifer L.; Terry, Jeffery; Santos, Dominic; Steve Newstrom
Subject:	Libby-Subject: Governor Schweitzer, MT DEQ, and MT DPHHS Lauds Public Health Emergency Declaration for Libby
Date:	06/17/2009 04:56 PM

FOR IMMEDIATE RELEASE
June 17, 2009

FOR MORE INFORMATION
Jayson O'Neill, Governor's Office
(406) 444-9844

Richard Opper, Director Montana Department of Environmental Quality
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Jon Ebelt, PIO Montana Department of Health and Human Services
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Governor Schweitzer, MT DEQ, and MT DPHHS Lauds Public Health Emergency Declaration for Libby

(Helena) – Governor Brian Schweitzer, the Montana Department of Environmental Quality (DEQ) and the Montana Department of Health and Human Services (DPHHS) praise the decision by the Obama Administration to declare Libby a public health emergency.

"At last Washington D.C. is fully recognizing the plight of the communities of Libby and Troy," said Governor Brian Schweitzer. "The designated funds will be used to make the communities healthier."

The declaration, nearly ten years in the making, was announced this morning in Washington D.C. during a joint news conference with the US Environmental Protection Agency (EPA), US Department of Health and Human Services and Senators Max Baucus and Jon Tester.

"Today's overdue announcement is the culmination of the tireless, dedicated work of Senator Baucus, year in and year out through much adversity," said DEQ Director Richard Opper. "It's also due to Senator Tester for throwing his support behind this important step for the people of Libby. And it's thanks to the new leadership and compassionate stewardship of EPA Administrator Jackson," says Opper.

Libby vermiculite is contaminated with an especially toxic form of naturally-occurring asbestos called tremolite-actinolite asbestiform mineral fibers. Many residents of Libby and nearby Troy worked at the WR Grace mine and brought the asbestos home on their clothes, exposing their families to the asbestos. According to the Center for Asbestos Related Disease in Libby, 227 community members have died from asbestos disease and more than 1800 people suffer from asbestos-related illness.

“This announcement is great news and is a step in the right direction in helping Libby residents meet their health care needs,” Montana DPHHS Director Anna Whiting Sorrell said.

An EPA Emergency Response Team went to Libby in 1999 and the area became a federal superfund site in 2002. The DEQ has been working with the EPA and other agencies to clean up the asbestos contamination left by the WR Grace Vermiculite Mine.

“Funding has been available to do removal and remediation. Many properties have been cleaned up in Libby and nearby Troy and there’s more work to do. This designation will open the door for more clean-up resources,” says Sandi Olsen, DEQ Remediation Division Administrator.

Before the mine closed in 1990, Libby produced about 80 percent of the world supply of vermiculite, which was used in building insulation and as a soil conditioner.
As of 2009, the former vermiculite processing plants and other highly contaminated public areas in Libby have been cleaned up. Cleanups have also been completed at more than 1100 residential and commercial properties.

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Jayson O'Neill
Deputy Communications Director
Governor Brian Schweitzer
406-444-9844
jaysononeill@mt.gov

From: Rodriguez-Newstrom, Linda
Sent: Wednesday, June 17, 2009 2:51 PM
To: Rodriguez-Newstrom, Linda; 'ketellapper.victor@epa.gov'; 'thomas.rebecca@epa.gov'; 'christensen.stanley@epa.gov'; 'Cirian.Mike@epamail.epa.gov'; 'Linnert.Ted@epamail.epa.gov'; 'goldade.mary@epa.gov'; 'Bonnie Lavelle'; 'mccomb.martin@epa.gov'; 'nguyen.duc@epamail.epa.gov'; 'OBrien.Wendy@epamail.epa.gov'; 'Lensink.Andy@epa.gov'; 'cohn.matthew@epa.gov'; 'Boydston.Michael@epamail.epa.gov'; 'peronard.paul@epa.gov'; 'kudarauskas.paul@epa.gov'
Cc: 'Courtney.Zamora@dot.gov'; 'Julie.Borgesi@dot.gov'; 'Michelle.Heimgartner@dot.gov'; Lammers, Paul; Montera, Jeff; Warren, Dee; Cook, Thomas; Crowell, Terry; Fox, Kimberly; Ekstrom, Karen; Kari, Patricia; Gilbert, Christy; McKenzie, Geoffrey; Raines, Nicholas; Fortner, Kevin (INACTIVE); Haugen, Phyllis; Miller, Ruby; Schauss, Paula; Tonner, Jessica; Roeske, Angela; Crites, Ann Marie; Wilson, Simon; Pisciotta, Dominic; Wall, Timothy; Repine, Karen; Repine, Damon; Dodge, Tracy; Vanderweel, Thomas; 'Karla Barnes'; 'Vince Parker'; 'Marilyn Smith'; 'Catherine LeCours'; Rode, Diane; Bein, Nicole;

'michelle.carlson@ (b) (6) 'Dunwell, Mary Ann'; Wall, Timothy; Fox, Kimberly; Rennick, Robert; Ekstrom, Karen; Schroeder, David; 'Sandy Matheny'; 'rjbrus@ (b) (6) 'Kari Martell (kmartell@ (b) (6) 'Martell, Kari'; 'Steve Newstrom'; 'Joseph.Sposato@dot.gov'; Kaspzyk, Robert; Anderson, Keeli; Beaudoin, Kristopher; Barnett, Frank; Peltier, Carol; Forkel, Matthew; Hartman, Pamela; Smith, Jennifer L.; Terry, Jeffery; Santos, Dominic
Subject: Libby-Missoulian 06162009

http://www.missoulian.com/articles/2009/06/17/bnews/br88.txt

fyi

Linda

From: Ted Linnert
To: Sandy Fells
Subject: PHE Docs
Date: 07/01/2009 12:21 PM

Hi Sandy,

Since you became R8's *de facto* clearinghouse for most of the Libby PHE communications, I was wondering if you'd mind e-mailing me a round of all the "final" versions of the main documents - during my travels I lost track. I want to make sure the Libby Site Team is working off the very latest versions (we'll be in Libby again for Meeting Week starting 7/6). I'd like to see the final Communications Strategy, the Q&A's (for web and media), the Action Memo, the final press release, and anything else you can think of (I think I have a copy of the Declaration itself).

I'm hoping you have such a grouping already organized and this won't be too onerous (in fact, you may have already sent this already, I'm just not sure what I have). Thanks!

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
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(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
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From: Peter Ornstein
To: John Michaud; Mary-Kay Lynch; Earl Salo; Lee Tyner
Subject: Photo Story: "Living and Dying in Libby"
Date: 06/18/2009 10:04 AM

FYI - I thought you might be interested in the photo story. Many thanks to all of you in getting the PHE out.

- Pete

****

Peter Ornstein, Deputy Regional Counsel
Office of Regional Counsel, EPA Region VIII
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----- Forwarded by Peter Ornstein/RC/R8/USEPA/US on 06/18/2009 08:02 AM -----

Jasmine LeDesma/RC/R8/USEPA/US

06/18/2009 06:45 AM

To: Peter Ornstein/RC/R8/USEPA/US@EPA, Kimi Matsumoto/RC/R8/USEPA/US@EPA, Jonah Staller/RC/R8/USEPA/US@EPA, David Schachterle/RC/R8/USEPA/US@EPA, Kathi Flavin/R8/USEPA/US@EPA, Michael Gleason/RC/R8/USEPA/US@EPA, Carol Leboo/RC/R8/USEPA/US@EPA, chin.lucita@epa.gov, Emma Garrison/R8/USEPA/US@EPA, Alan Curtis/R8/USEPA/US@EPA, Michael Boydston/R8/USEPA/US@EPA, Sara Laumann/RC/R8/USEPA/US@EPA, Bohan.Suzanne@epa.gov, Michelle Crozier-Haynes/R8/USEPA/US@EPA, Michael LeDesma/NEIC/USEPA/US@EPA, Charles Aschwanden/NEIC/USEPA/US@EPA, Bruce Bellin/NEIC/USEPA/US@EPA, covigner@(b) (6) epp.timothy@epa.gov, jennifersusanhale@(b) (6) "holly hartman" <holhartman@(b) (6) kirby-miles.leslie@epa.gov, Morgan.James@epa.gov, "charmaine nicholson" <stevecharm1@(b) (6) csaldenha@(b) (6) Tina Artemis/RC/R8/USEPA/US@EPA, nigeldtc@(b) (6)

cc:

Subject: "Living and Dying in Libby"

All,

If you're interested, take a look at photojournalist, Brian Plonka's photo story "Living and Dying in Libby". To advance to the next photo, place your cursor over the photo and the "Next" button will appear. The captions below each photograph succinctly explains the history of Libby's contamination with asbestos, and the current state of affairs (including EPA's continuing work there).

http://brianplonka.com/

Jasmine M. Le Desma
Associate Regional Counsel
US EPA Region 8,
1595 Wynkoop Street
Denver, CO 80202
303.312.6639
303.312.6859 (facsimile)

From:	Mike Cirian
To:	Carol Campbell
Cc:	Murray.Bill@epamail.epa.gov; Leclerc.Russell@epamail.epa.gov; Victor Ketellapper; Rebecca Thomas; Ted Linnert; Sandy Fells; Matthew Cohn; Helen Dawson; Andy Lensink
Subject:	Questions
Date:	06/18/2009 02:38 PM

Hello All,

Below are the questions I have been hearing around town and from others.

1. What will change with the PHE being declared? How is it different from what you have been doing?

2. What comes next in regards to the cleanups since the PHE was issued?

3. We were lead to believe the air was safe in Libby, now you have declared Libby as a dangerous place to live? (this is the perception we discussed)

4. How will this affect the real estate in Libby?

5. We visit Libby, We have a rental in Libby, We camp around Libby, is it safe for us to still do this?

6. What happens if other school districts refuse to bring students and sports events here in Libby due to the seriousness of this action?

I tried to capture these as they have been asked.

Thanks,
Mike

From: Ted Linnert
To: perquiaga@eaglesvoice.com
Cc: Dr. Brad Black; Catherine LeCours; Gerald Mueller; Gordon Sullivan; Gary Swenson; Eileeen Carney; Kathie Atencio; Mke Giesey; Mike Cirian; LeRoy Thom; David Latham; Phillip Erquiaga; Mayor Berget; recking@libby.k12.mt.us; Linda Newstrom; K.W. Maki; Trent Oelberg; Connie Welter" <welters@ (b) (6) murray.bill@epa.gov; leclerc.russell@epa.gov; evans.elisabeth@epa.gov; obrien.wendy@epa.gov; cirian.mike@epa.gov; goldade.mary@epa.gov; lavelle.bonita@epa.gov; thomas.rebecca@epa.gov; christensen.stanley@epa.gov; dawson.helen@epa.gov; lensink.andy@epa.gov; linnert.ted@epa.gov; Sonya Pennock; tberget@libby.org; mroos@travois.com; jkonzen@libby.org; glena.hook@cityoflibby.com; bpatt@ (b) (6) mcnoble@ (b) (6)
Subject: RE: Description of a CAG Meeting
Date: 02/05/2009 11:19 AM

Hi Phil,

I'm really surprised at how off the mark you are in your message below.

Gene Reckin is one of the very best high school teachers in Montana. He teaches an advanced science class composed of the brightest kids in the county, the very same kids who commented on the CAG. By bringing his students to the CAG meeting, Gene was encouraging critical thinking and the students' response to the meeting is an example of excellent critical thinking. The kids weren't commenting on the scientific topic of the meeting, they were commenting on the behavior of some folks in the audience and some members of the CAG Board, and apparently these people don't take criticism very well. The students' perception of the meeting was accurate and insightful.

By the way, I believe the students attended the meeting at which Kathie Atencio discussed the results of air sampling in the schools (that's why they were there), not the more recent meeting revolving around the Public Health Emergency. I am not sure of this because I was never aware before hand that Gene or some of his students would be attending a CAG meeting. I hate to squash yet another juicy conspiracy theory emanating from Libby's productive rumor mill, but the EPA doesn't have to do a thing to divide the community. The "Vocal Minority" within the community does a fine job of that all by itself and that's a shame.

I think there is a broader issue at stake here. What kind of message are you sending to the kids who attended the CAG meeting? They are citizens just like any of the others in the Ponderosa room that evening and they have every right to have their voices heard.

Ted Linnert
Office of Communication & Public Involvement

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▼ "Phillip Erquiaga" <perquiaga@eaglesvoice.com>

"Phillip Erquiaga"
<perquiaga@eaglesvoice.com>

02/04/2009 05:39 PM

Please respond to
<perquiaga@eaglesvoice.com>

To "Gerald Mueller" <gmueller@montana.com>, "David Latham" <news@montanian.com>, "Eileeen Carney" <jecarney@ (b) (6) "Gordon Sullivan" <gordsull@ (b) (6) "K.W. Maki" <sd4@libby.k12.mt.us>, "LeRoy Thom" <montmac@ (b) (6) "Dr. Brad Black" <brad@libbyasbestos.org>, "Connie Welter" <welters@ (b) (6) "Mke Giesey" <mgiesey_card@ (b) (6) "Catherine LeCours" <clecours@mt.gov>, Ted Linnert/OCP/R8/USEPA/US@EPA, Mike Cirian/EPR/R8/USEPA/US@EPA, "Trent Oelberg" <t.oelberg@ (b) (6) "Phillip Erquiaga" <perquiaga@eaglesvoice.com>, "Gary Swenson" <GS56B555@ (b) (6) Kathie Atencio/R8/USEPA/US@EPA, "Linda Newstrom" <Rodriguez-newstroml@cdm.com>, "Mayor Berget" <press@ (b) (6)

cc <recking@libby.k12.mt.us>

Subject RE: Description of a CAG Meeting

Gerald,

I WILL respond to this even though I'm sure there are some that would take offense.

In America's K-12 schools today there is a great lack in the teaching of "Critical Thinking." It would appear that Mr. Reckin is no different! I could not expect a High School Student to even begin to comprehend the complexities of the subject matter discussed at a CAG or LATAG meeting without a comprehensive study of, at least, one of the impacting elements; the political, economic, social, medical, psychological, or (of course) the science that surrounds this issue. Additionally, a teacher that expects a student to develop an opinion, using one word, on such a complex issue, is not a teacher that is teaching "Critical Thinking" nor a teacher that is doing his community, students, parents, or participants of these meetings justice.

Much of the meeting, that these students attended, revolved around the Senate hearing in Washington D.C. in which Senator Baucus presented testimony which shows EPA is not looking out for the best interest of Libby. The people who are engaged in the groups such as CAG and LATAG contribute great amounts of time, thought, study, discussion, and energy to look at ways in which the community can be assured of a bright and HEALTHY future.

The folks speaking may not be great orators, but speak with passion and commitment, and are knowledgeable to an extent far beyond most others! They may not be politicians, but care more than any politician! May not be scientists, but understand the science more than most scientists associated with this issue! Many have been dealing with this for 10 years, some are directly effected with ARD, some are dealing with cleanup issues on a personal level which has continued for close to a decade. The two gentlemen, Mel and Red, that read at the meeting fall into this category. If they have shown that they are not great orators, should we preclude them from speaking, even though they are great contributors to our community? I THINK NOT! The politicians are the orators and use this skill to sway our opinion. Most scientists, from my experience, are not, and are committed to finding and conveying the truth. I must add Carl Sagan was are great scientist AND a great orator! (The rare breed of scientist.)

To the point, and I encourage Mr. Reckin to show this and other such responses to his class, actually I challenge him to do so! If Mr. Reckin, who I believe is a science teacher, wishes to truly approach his students with this issue, then do it in a way in which the students learn, and are able to contribute to the discussion. Pick at least one element associated with the science, since this is a science class, and have a class module dedicated to that element. For example; What criteria does EPA use to TRIGGER a property for cleanup, what models are used to establish that criteria, what investigative and analytical tools are used to establish the meeting of that criteria, and are those tools working? This in itself is a complex issue that has been ever changing. Encourage leadership in his students by having the class choose one or more fellow classmate(s) to become active member(s) of CAG and LATAG, engaging in the discussions then reporting back to the class.

The list conveyed to CAG was as follows:
Hilarious, Ridiculous, Uncomfortable, Hostile, Incriminating, One sided, Accusatory, Rude, Impatient, Unorganized, Political debate, Frustrating to newcomers, Read – don’t read to people, Long, Make point – move on, EPA under attack, Intimidating (Period)

Now I suggest that Mr. Reckin go back to the students and have them elaborate on each of these comments. The simple question would be, why or how did you reach this conclusion? Have them go back and evaluate the specific elements of the meeting, to which they responded, using the "Scientific Method." Every one of these words I have used at one point, or more, after meetings; however, I always ask myself WHY. This is

a very
important question for me to ask if I'm to properly represent my community!

A final note directly to Mr. Reckin; I'm curious how this began! Did the EPA
encourage you to engage your class on this assignment? I hope you are
knowledgeable enough to understand what this community faces as to the
issues within the Libby Superfund Site! The EPA is, IN MY OPINION,
attempting to divide and conquer in our community. They wish to pit
community members against each other so we find it difficult, if not
impossible, to engage or oppose them. Mr. Reckin, were you used by the EPA
as a pawn to divide the community?

(b) (6) iaga

-----Original Message-----
From: Gerald Mueller [mailto:gmueller@montana.com]
Sent: Tuesday, February 03, 2009 1:36 PM
To: David Latham; Eileeen Carney; Gordon Sullivan; K.W. Maki; LeRoy
Thom; Dr. Brad Black; Connie Welter; Mke Giesey; Catherine LeCours; Ted
Linnert; Mike Cirian; Trent Oelberg; Phillip Erquiaga; Gary Swenson;
Kathleen M. Atencio; Linda Newstrom; Mayor Berget
Subject: Description of a CAG Meeting

Members of Gene Reckin’s high school class attended a recent CAG meeting.
They were asked to write down one word describing the meeting. Their
descriptions follow.

Hilarious
Ridiculous
Uncomfortable
Hostile
Incriminating
One sided
Accusatory
Rude
Impatient
Unorganized
Political debate
Frustrating to newcomers
Read – don’t read to people
Long
Make point – move on
EPA under attack
Intimidating

Gerald

From:	Ransom, Catharine (Baucus)
To:	Ellen Manges
Cc:	Betsy Shaw; Bob Sussman; Arvin Ganesan; Adora Andy; Mary-Kay Lynch; Wilkins, Paul (Baucus); Matsdorf, Tyler (Baucus)
Subject:	RE: Public Q&A on Vermiculite Insulation
Date:	06/15/2009 08:10 PM

Ellen,

Thank you. I have no questions or edits on the attached documents related to vermiculite insulation located outside of Libby -- have one edit to the Question/answer on this that I will pass on.

Betsy, I will give you a call tomorrow to walk through this -- will coordinate a time separately via email. I am most interested in how the Agency is going to push this information out on Wednesday as a result of the declaration of the public health emergency and what the exact plan is on distributing this information in a digestible format (ie, in Spanish/other languages) via home improvement stores, etc.

Thanks!

Catharine

-----Original Message-----
From: Manges.Ellen@epamail.epa.gov [mailto:Manges.Ellen@epamail.epa.gov]
Sent: Monday, June 15, 2009 1:05 PM
To: Ransom, Catharine (Baucus)
Cc: Shaw.Betsy@epamail.epa.gov; Sussman.Bob@epamail.epa.gov; Ganesan.Arvin@epamail.epa.gov; Andy.Adora@epamail.epa.gov; Lynch.Mary-Kay@epamail.epa.gov
Subject: Public Q&A on Vermiculite Insulation

Catharine -

Attached is our Q&A and brochure on vermiculite insulation. Betsy Shaw, the Acting Deputy Director of EPA's Office of Prevention, Pesticides and Toxic Substances is available to take your call to discuss further. Her number is 202/566-2163. Perhaps you can send her an email to arrange an
appropriate time to discuss this further. We have more Q&A coming for
you a little later.

Please call if you have any questions.

(See attached file: Vermiculite Insulation External Q&A - 6-15-09 rev.doc)(See attached file: vermiculite message to the public 6 11 09 w
pics.doc)

Ellen Manges
Senior Advisor
Office of Solid Waste and Emergency Response U.S. Environmental Protection Agency

(202) 566-0195

From: Ransom, Catharine (Baucus)
To: Elizabeth Southerland
Cc: Adora Andy; Arvin Ganesan; Bob Sussman; Ellen Manges; Mary-Kay Lynch; Matsdorf, Tyler (Baucus)
Subject: RE: Q&A for Libby re community meetings
Date: 06/16/2009 11:31 AM

FYI -- We are also going to add this question and answer -- is this OK with you?

Q. What does this announcement mean for the millions of homes in the US with Zonolite insulation? Are they included in the public health emergency?
A. No, those homes aren't included in the public health emergency. In Libby, the exposure to asbestos is so pervasive, occurring through multiple pathways, that it meets the threshold for a public health emergency. We know Libby is an extreme situation because of the occurrence of asbestos - related disease in Libby at 40 times the national average. This situation doesn't exist anywhere else in the country

-----Original Message-----
From: Southerland.Elizabeth@epamail.epa.gov [mailto:Southerland.Elizabeth@epamail.epa.gov]
Sent: Tuesday, June 16, 2009 11:05 AM
To: Ransom, Catharine (Baucus)
Cc: Andy.Adora@epamail.epa.gov; Ganesan.Arvin@epamail.epa.gov; Sussman.Bob@epamail.epa.gov; Manges.Ellen@epamail.epa.gov; Lynch.Mary-Kay@epamail.epa.gov; Matsdorf, Tyler (Baucus)
Subject: RE: Q&A for Libby re community meetings

Catharine, I want to recommend a change in your draft answer to a question about EPA attendance at community meetings. Region 8 has assured us that they still attend all those meetings in addition to having a full time staff person living in the community. They are also holding open meetings for the whole community to supplement the CAG and TAG meetings. In addition, the March 11, 2009 meeting notes of the Lincoln County Board of Commissioners document a discussion that Victor and Kirby of your office participated in regarding the ineffective nature of the CAG and the need for one governing body over the CAG and TAG. As a result of these facts, I suggest the following answer to a community involvement question from the press:

A. I was concerned when I heard that EPA had stopped attending community meetings, and I questioned them about that.
EPA has assured me that they are still attending CAG and TAG meetings and that they are also hosting public meetings open to the whole community.
It is also my understanding that the Lincoln County Board of Commissioners has directed their County Health Board to facilitate community discussions as a means to better inform citizens and develop an organized community voice because of the differing focuses of the CAG and TAG
The bottom line is that whatever the forum or the name of the organization, EPA must find a way to keep open communication lines between the agency and all Libby residents.
The Public Health Emergency is a big step forward and I'm confident a solution will be found
In fact, the Administrator has advised me that EPA and HHS are holding a public meeting together in Libby on June 22 to discuss the ongoing cleanup and the public health emergency with the community.

From: "Ransom, Catharine (Baucus)" <Catharine_Ransom@baucus.senate.gov>

To: Ellen Manges/DC/USEPA/US@EPA

Cc: Bob Sussman/DC/USEPA/US@EPA, Arvin Ganesan/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Adora Andy/DC/USEPA/US@EPA, "Matsdorf, Tyler (Baucus)" <Tyler_Matsdorf@baucus.senate.gov>

Date: 06/15/2009 07:23 PM

Subject: RE: Q&A for Libby

Ellen/All,

Thank you for doing this. I apologize for being late (since 1230 was our idea, I realize), but here are talking points for Senator Baucus regarding the public health emergency and some thoughts on questions and answers for you to review. There may a few EPA - only discussions you'd like to have here on answers regarding the clean-up. We're glad to do that if you want to -- thanks!

Talk to you tomorrow at 1130 --

Catharine

Public Health Emergency Talking Points:

* This is truly an historic day.

* The people of Libby have waited nearly 10 years for this.

* A public health emergency means the folks in Libby will be able to get the medical care they need from the federal government.

* It means the shops and homes and parks in town will be cleaned up- once and for all.

* It means one day soon, parents will no longer have to worry about vermiculite in the walls of their children's school.

* The declaration of a public health emergency signifies a turning point for Libby.

* It signifies healing and moving forward.

* It is an acknowledgement that what happened in Libby was wrong, and a tragedy.

* Today's announcement also signifies a new day at EPA.

* This public health emergency is proof that EPA is making decisions based on sound science.

* I'd like to thank Administrator Lisa Jackson and Secretary Kathleen Sebelius for their commitment to helping people and families in Libby.

* I've been to Libby more than 20 times, and have seen firsthand the devastation the asbestos contamination has caused.

* Too many people have died as a result of the asbestos contamination, including my friend Les Skramsted.

* I made a promise to the people of Libby and to Les that I would do all I could to help.

* But it doesn't mean the work is finished- it means the work to get Libby back on track is just beginning.

* You can bet I'll be there every step of the way.

* We are going to help Libby build a bright future.

Possible Tough Questions:

Q. Max, EPA has stopped coming to Libby community and technical meetings, what is going on?

A.
* What is happening now is unacceptable.
* I'm very disappointed that the EPA has not been attending the community meetings anymore.
* That is why I have been working with the EPA to find a solution.
* The bottom line is that whatever the forum or the name of the organization, EPA must find a way to reopen the communication lines between the agency and all Libby residents.
* The Public Health Emergency is a big step forward and I'm confident a solution will be found.
* In fact, the Administrator has advised me that EPA and HHS are holding a public meeting together in Libby on June 22 to discuss the ongoing clean-up and the public health emergency with the community.

Q. What do you think of Senator Tester's new plan for the EPA in Libby?
A.
* I think it is great, we all need to be pulling to get the folks in Libby the resources they need and deserve.
* With both Jon and I holding the EPA's feet to the fire, I think we are going to see real progress.

Q. Are you going to bring Secretary Sebelius or Administrator Jackson to Libby?
A.
* I have asked them both to come to Montana.
* While nothing is set in stone, I want them to come meet folks face to face.

Q. How will this declaration of a public health emergency impact the WR Grace bankruptcy proceeding?

A.
* I have been closing watching the bankruptcy proceeding.
* My first and foremost priority is to ensure the people of Libby are taken care of.
* And that is what this Public Health Emergency will do - provide adequate clean-up by EPA and the healthcare the people of Libby are entitled to.

Q. Do you expect President Obama to take a different approach to Libby than President Bush?

A. Yes, absolutely. I think Lisa Jackson is a person of integrity and I'm pleased she was Obama's choice for EPA Administrator- it's a good sign. You can be sure I'll hold the Obama administration's feet to the fire as we move forward- to make sure these next four years are different.

The Bush Administration has a long history of ignoring scientist and underfunding important programs, such as this Superfund site. I do not expect more of the same from President Obama. I'm encouraged by the President commitment to science and to listening to the experts.

Q. What do you think of the WR Grace verdict?

A.
* I don't want to get involved with a criminal trial, but I can say is that what happened in Libby is wrong, it is an outrage, and it's a tragedy.
* What's important is moving forward and getting Libby a clean bill of health.
* The Public Health Emergency will really go a long way towards helping folks up there.

Q. Do you think PEER was right in their lawsuit against the Government?

A.
* I have continually pushed the EPA under the previous administration for more transparency.
* That's why last fall I conducted by own investigation and released a report detailing EPA's failure under the previous administration to declare a Public Health Emergency and to fund the toxicity studies necessary to determine how clean is clean.
* The release of this report so quickly indicates that this administration could be more open than the previous.

Q. What do you think about the Rumple Report?

A.
* I'm very concerned about a lot of the issues raised in this report.
* Last year, I held a hearing after going through more than 10,000 pages of documents from the EPA.
* The findings were outrageous.
* That is why I remain committed to making sure the clean up in Libby is done, and done right.

Q. What exactly is a public health emergency?
A. When EPA is conducting a clean-up of this magnitude, they have certain things they can and can't do. One of the things they can't do under the statute is remove products, like insulation, from buildings except in cases where there is a public health emergency. In Libby, the Agency determined that there was so much asbestos in so many places, that uncontained insulation had to be removed to be sure that people are safe. So, the Agency did its homework, concluded that a public health emergency does in fact exist. This will give them the ability to remove insulation without question about legal authority. And, it triggers a requirement to provide health screening and medical services.

Q. How will my clean-up be different than my neighbor's now that this public health emergency is declared?
A. Right now, there won't be a major change in the way clean-ups are conducted. In the fall, the EPA announced it will finish some activity - based sampling that evaluates potential asbestos exposure from different activities, like gardening. These results may show that additional clean-up is necessary.

Q. Where should I send my medical bills?
A. The Lincoln County Health Department is working quickly with others here in Libby to get a system to provide the medical services, hopefully as early as August 1. I worked with HHS to secure a short-term, $6M grant to pay for this, and we're working together on a longer term plan,

Q. Can I go to any doctor?
A. In the short term, there will be a few designated places you can go.

Q. Who decides who is eligible for health care and who is not?
A. People who meet certain residency requirements will be screened for asbestos-related disease, and medical professionals will determine if people have it. If you have it, you'll be eligible.

Q. You just announced $6 million -- that's not very much money. What's the long-term plan?
A. I am working hard with Secretary Sebelius on this, just like we worked to get the $6M.

Q. I read in the paper that I'll have to use my own insurance first. I don't have any insurance - what does that mean for me?
A. If you don't have insurance, your costs will be paid for.

-----Original Message-----
From: Manges.Ellen@epamail.epa.gov [mailto:Manges.Ellen@epamail.epa.gov]
Sent: Monday, June 15, 2009 4:03 PM
To: Ransom, Catharine (Baucus)
Cc: Sussman.Bob@epamail.epa.gov; Ganesan.Arvin@epamail.epa.gov; Lynch.Mary-Kay@epamail.epa.gov; Southerland.Elizabeth@epamail.epa.gov; Andy.Adora@epamail.epa.gov
Subject: Q&A for Libby

Catharine -

Here is the draft Q&A for the PHE. Let us know if you have any questions.

(See attached file: External Libby Q&A draft final 061509.doc)

Best Regards,

Ellen Manges
Senior Advisor
Office of Solid Waste and Emergency Response U.S. Environmental

Protection Agency
(202) 566-0195

From: Ransom, Catharine (Baucus)
To: Ellen Manges
Cc: Bob Sussman; Arvin Ganesan; Mary-Kay Lynch; Elizabeth Southerland; Adora Andy; Matsdorf, Tyler (Baucus)
Subject: RE: Q&A for Libby
Date: 06/15/2009 07:23 PM

Ellen/All,

Thank you for doing this. I apologize for being late (since 1230 was our idea, I realize), but here are talking points for Senator Baucus regarding the public health emergency and some thoughts on questions and answers for you to review. There may a few EPA - only discussions you'd like to have here on answers regarding the clean-up. We're glad to do that if you want to -- thanks!

Talk to you tomorrow at 1130 --

Catharine

Public Health Emergency Talking Points:

* This is truly an historic day.

* The people of Libby have waited nearly 10 years for this.

* A public health emergency means the folks in Libby will be able to get the medical care they need from the federal government.

* It means the shops and homes and parks in town will be cleaned up- once and for all.

* It means one day soon, parents will no longer have to worry about vermiculite in the walls of their children's school.

* The declaration of a public health emergency signifies a turning point for Libby.

* It signifies healing and moving forward.

* It is an acknowledgement that what happened in Libby was wrong, and a tragedy.

* Today's announcement also signifies a new day at EPA.

* This public health emergency is proof that EPA is making decisions based on sound science.

* I'd like to thank Administrator Lisa Jackson and Secretary Kathleen Sebelius for their commitment to helping people and families in Libby.

* I've been to Libby more than 20 times, and have seen firsthand the devastation the asbestos contamination has caused.

* Too many people have died as a result of the asbestos contamination, including my friend Les Skramsted.

* I made a promise to the people of Libby and to Les that I would do all I could to help.

* But it doesn't mean the work is finished- it means the work to get Libby back on track is just beginning.

* You can bet I'll be there every step of the way.

* We are going to help Libby build a bright future.

Possible Tough Questions:

Q. Max, EPA has stopped coming to Libby community and technical meetings, what is going on?

A.
* What is happening now is unacceptable.
* I'm very disappointed that the EPA has not been attending the community meetings anymore.
* That is why I have been working with the EPA to find a solution.
* The bottom line is that whatever the forum or the name of the organization, EPA must find a way to reopen the communication lines between the agency and all Libby residents.
* The Public Health Emergency is a big step forward and I'm confident a solution will be found.
* In fact, the Administrator has advised me that EPA and HHS are holding a public meeting together in Libby on June 22 to discuss the ongoing clean-up and the public health emergency with the community.

Q. What do you think of Senator Tester's new plan for the EPA in Libby?
A.
* I think it is great, we all need to be pulling to get the folks in Libby the resources they need and deserve.
* With both Jon and I holding the EPA's feet to the fire, I think we are going to see real progress.

Q. Are you going to bring Secretary Sebelius or Administrator Jackson to Libby?
A.
* I have asked them both to come to Montana.
* While nothing is set in stone, I want them to come meet folks face to face.

Q. How will this declaration of a public health emergency impact the WR Grace bankruptcy proceeding?

A.
* I have been closing watching the bankruptcy proceeding.
* My first and foremost priority is to ensure the people of Libby are taken care of.
* And that is what this Public Health Emergency will do - provide adequate clean-up by EPA and the healthcare the people of Libby are entitled to.

Q. Do you expect President Obama to take a different approach to Libby than President Bush?

A. Yes, absolutely. I think Lisa Jackson is a person of integrity and I'm pleased she was Obama's choice for EPA Administrator- it's a good sign. You can be sure I'll hold the Obama administration's feet to the fire as we move forward- to make sure these next four years are different.

The Bush Administration has a long history of ignoring scientist and underfunding important programs, such as this Superfund site. I do not expect more of the same from President Obama. I'm encouraged by the President commitment to science and to listening to the experts.

Q. What do you think of the WR Grace verdict?

A.
* I don't want to get involved with a criminal trial, but I can say is that what happened in Libby is wrong, it is an outrage, and it's a tragedy.
* What's important is moving forward and getting Libby a clean bill of health.
* The Public Health Emergency will really go a long way towards helping folks up there.

Q. Do you think PEER was right in their lawsuit against the Government?

A.
* I have continually pushed the EPA under the previous administration for more transparency.
* That's why last fall I conducted by own investigation and released a report detailing EPA's failure under the previous administration to declare a Public Health Emergency and to fund the toxicity studies necessary to determine how clean is clean.
* The release of this report so quickly indicates that this administration could be more open than the previous.

Q. What do you think about the Rumple Report?

A.
* I'm very concerned about a lot of the issues raised in this report.
* Last year, I held a hearing after going through more than 10,000 pages of documents from the EPA.
* The findings were outrageous.
* That is why I remain committed to making sure the clean up in Libby is done, and done right.

Q. What exactly is a public health emergency?
A. When EPA is conducting a clean-up of this magnitude, they have certain things they can and can't do. One of the things they can't do under the statute is remove products, like insulation, from buildings except in cases where there is a public health emergency. In Libby, the Agency determined that there was so much asbestos in so many places, that uncontained insulation had to be removed to be sure that people are safe. So, the Agency did its homework, concluded that a public health emergency does in fact exist. This will give them the ability to remove insulation without question about legal authority. And, it triggers a requirement to provide health screening and medical services.

Q. How will my clean-up be different than my neighbor's now that this public health emergency is declared?
A. Right now, there won't be a major change in the way clean-ups are conducted. In the fall, the EPA announced it will finish some activity - based sampling that evaluates potential asbestos exposure from different activities, like gardening. These results may show that additional clean-up is necessary.

Q. Where should I send my medical bills?
A. The Lincoln County Health Department is working quickly with others here in Libby to get a system to provide the medical services, hopefully as early as August 1. I worked with HHS to secure a short-term, $6M grant to pay for this, and we're working together on a longer term plan,

Q. Can I go to any doctor?
A. In the short term, there will be a few designated places you can go.

Q. Who decides who is eligible for health care and who is not?
A. People who meet certain residency requirements will be screened for asbestos-related disease, and medical professionals will determine if people have it. If you have it, you'll be eligible.

Q. You just announced $6 million -- that's not very much money. What's the long-term plan?
A. I am working hard with Secretary Sebelius on this, just like we worked to get the $6M.

Q. I read in the paper that I'll have to use my own insurance first. I don't have any insurance - what does that mean for me?
A. If you don't have insurance, your costs will be paid for.

-----Original Message-----
From: Manges.Ellen@epamail.epa.gov [mailto:Manges.Ellen@epamail.epa.gov]
Sent: Monday, June 15, 2009 4:03 PM
To: Ransom, Catharine (Baucus)
Cc: Sussman.Bob@epamail.epa.gov; Ganesan.Arvin@epamail.epa.gov; Lynch.Mary-Kay@epamail.epa.gov; Southerland.Elizabeth@epamail.epa.gov; Andy.Adora@epamail.epa.gov
Subject: Q&A for Libby

Catharine -

Here is the draft Q&A for the PHE. Let us know if you have any questions.

(See attached file: External Libby Q&A draft final 061509.doc)

Best Regards,

Ellen Manges
Senior Advisor
Office of Solid Waste and Emergency Response U.S. Environmental Protection Agency

(202) 566-0195

From: Ransom, Catharine (Baucus)
To: Elizabeth Southerland
Cc: Bob Sussman; Mary-Kay Lynch; Arvin Ganesan; Adora Andy; Ellen Manges; Carol Campbell
Subject: RE: Q&A regarding insulation cleanup at Libby
Date: 06/09/2009 07:51 PM

Thank you very much for doing this. I found the original email.

I have passed on two HHS contacts to Bob and Arvin, so I think we're set there.

With regard to answering this question about the clean-up -- we're thinking of something along these lines for your average person in Libby -- can you take a look and see if you can find something workable for you along these lines?

Also, I am not that familiar with the AHERA -- the answer below says that it generally recommends in place management. Are there circumstances where it doesn't recommend in place management that might be applicable here?

Thanks!

Catharine

"Normally, EPA wouldn't remove any asbestos from homes, even insulation in open attics. However, Libby is a special case - that's why we're all here today. Even with the extra precautions that EPA is taking, it is still safer to leave asbestos in place than to remove it from contained areas, like from behind walls, where chances are very low that fibers will escape into the open air. We know that from years of research - not by the EPA, but by _____. If you have uncontained insulation, like in an open attic, the EPA will remove that as part of the clean-up plan.

Here are the three things you can expect from EPA when we clean-up your home now that a public health emergency has been declared:
1.
2.
3. "

-----Original Message-----
From: Southerland.Elizabeth@epamail.epa.gov [mailto:Southerland.Elizabeth@epamail.epa.gov]
Sent: Tuesday, June 09, 2009 1:11 PM
To: Ransom, Catharine (Baucus)
Cc: Sussman.Bob@epamail.epa.gov; Lynch.Mary-Kay@epamail.epa.gov; Ganesan.Arvin@epamail.epa.gov; Andy.Adora@epamail.epa.gov; Manges.Ellen@epamail.epa.gov; Campbell.Carol@epamail.epa.gov
Subject: Q&A regarding insulation cleanup at Libby

Catharine, here is the justification for the approach we are taking to insulation cleanup at Libby and Troy. Please let me know if you have any questions or would like to discuss further. Have you gotten a contact name for HHS in Dora Hughes absence this week? I have asked Howard Frumkin, the Director of ATSDR, to find an HHS representative for the June 22 event in Libby, but he has not yet been able to identify someone. I was hoping the HHS contact could find someone for us as well as start work with us on the website issues we have. Thanks for your help.
----- Forwarded by Elizabeth Southerland/DC/USEPA/US on 06/09/2009 01:06 PM -----

Q. If there is a public health emergency, why is EPA planning to leave asbestos in the walls of homes?

A. EPA's response action will continue to focus on removing uncontained vermiculite insulation from commercial, public and residential homes/buildings in Libby and Troy, because people can come in contact with such material. For homes/buildings with vermiculite insulation contained within walls and ceilings, EPA follows the Asbestos Hazard Emergency Response Act (AHERA) which only requires removal of asbestos for renovation or demolition activities. AHERA generally recommends in place management of asbestos because of the risk of building damage and spread of contamination that can occur with removal actions.

Beginning in October 2006, EPA began providing a full-time service, entitled the Environmental Resource Specialist (ERS), to assist property owners, contractors, firemen, and other personnel involved in renovation, demolition or accidents which can expose them to vermiculite insulation in Libby and Troy. The ERS has a dedicated telephone line to take calls from the public and is always available during regular business hours. For situations which arise on nights and weekends, callers can leave a message, and the ERS will return their call within 48 hours. The ERS provides asbestos abatement assistance to owners during remodeling and demolition activities. The EPA will also provide advice about the safe handling of vermiculite; advice for contractors who run into asbestos or vermiculite; enforcement of any local ordinances enacted to regulate asbestos or vermiculite; and asbestos abatement and health and safety training for local contractors. As an example of the responsiveness of the ERS, in 2008 a wall of an elementary school in Libby was accidentally pierced by construction equipment and vermiculite insulation spilled onto the ground. The ERS had a cleanup crew working at the school within hours of being notified of the incident. After EPA's cleanup in Libby is completed, the ERS position will continue to be funded as one means of ensuring the permanence of the remediation.

From: Debbie Dietrich
To: Gilberto Irizarry
Subject: Re: pre-brief on Libby
Date: 02/02/2009 12:50 PM

Yes, I did see this. Thanks, Tito.

Debbie Dietrich, Director
Office of Emergency Management (5104A)
USEPA
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ph 202-564-8600
Fax 202-564-8211

▼ Gilberto Irizarry---02/02/2009 12:43:13 PM---Debbie: Did you see the draft below ? Dana T. forwarded to us last week. Not sure if there's a new

From: Gilberto Irizarry/DC/USEPA/US
To: Debbie Dietrich/DC/USEPA/US@EPA
Date: 02/02/2009 12:43 PM
Subject: Re: pre-brief on Libby

Debbie:

Did you see the draft below ? Dana T. forwarded to us last week. Not sure if there's a newer version.

Gilberto "Tito" Irizarry
Program Operations & Coordination Division, Director
Office of Emergency Management
US Environmental Protection Agency, Headquarters
Tel: (202) 564-7982
Mobile: (b) (6)
Fax: (202) 564-8333

----- Forwarded by Gilberto Irizarry/DC/USEPA/US on 02/02/2009 12:42 PM -----

From: Dana Tulis/DC/USEPA/US
To: Gilberto Irizarry/DC/USEPA/US@EPA
Cc: Debbie Dietrich/DC/USEPA/US@EPA
Date: 01/26/2009 07:07 PM
Subject: Fw: Libby PHE document

FYI only.

Dana S. Tulis
Deputy Director
Office of Emergency Management
Environmental Protection Agency
202-564-8600

----- Forwarded by Dana Tulis/DC/USEPA/US on 01/26/2009 07:07 PM -----

From: James Woolford/DC/USEPA/US
To: "Renee P Wynn" <wynn.renee@epa.gov>
Cc: "Ellen Manges" <manges.ellen@epa.gov>, Jennifer Wilbur/DC/USEPA/US@EPA, Debbie Dietrich/DC/USEPA/US@EPA, "Dana Tulis" <tulis.dana@epa.gov>, "Elisabeth Evans" <Evans.Elisabeth@epamail.epa.gov>, Martin Hestmark/R8/USEPA/US@EPA, "Amanda Halstead" <halstead.amanda@epa.gov>, "Tracey Stewart" <stewart.tracey@epa.gov>, "John Michaud" <michaud.john@epa.gov>, "Lee Tyner" <tyner.lee@epamail.epa.gov>, "Betsy Southerland" <southerland.elizabeth@epa.gov>
Date: 01/26/2009 05:43 PM
Subject: Fw: Libby PHE document

FYI. So you're in the loop.

Sent from my BlackBerry Wireless Handheld

▼ Elizabeth Southerland

----- Original Message -----
From: Elizabeth Southerland
Sent: 01/26/2009 04:49 PM EST
To: Barry Breen; Ellyn Fine
Cc: James Woolford; Barnes Johnson; Earl Salo; Carol Campbell; Matthew Cohn; Doug Ammon; Phyllis Anderson; John Michaud
Subject: Fw: Libby PHE document

Barry, attached below is a draft briefing for Lisa Jackson on the Libby Public Health Emergency issue. This draft incorporates comments from Region 8 and OGC but is still preliminary and open to refinement.

----- Forwarded by Elizabeth Southerland/DC/USEPA/US on 01/26/2009 04:46 PM -----

From: Valerie Hughes/DC/USEPA/US
To: Elizabeth Southerland/DC/USEPA/US@EPA
Date: 01/26/2009 04:43 PM
Subject: Libby PHE document

[attachment "Libby PHE.doc" deleted by Debbie Dietrich/DC/USEPA/US]

Have a Marvelous Day (S M I L E)

_____

Valerie A. Hughes
U.S. Environmental Protection Agency
OSRTI/RMD/HRB
1200 Pennsylvania Ave., NW, MC 5202P
Washington, DC 20460
703-347-8833 voicemail
703-603-9115 fax
hughes.valerie@epa.gov

From:	Ellen Manges
To:	Mary-Kay Lynch
Subject:	Re:
Date:	06/16/2009 01:31 AM

Got it. See you at 8:30
-----Mary-Kay Lynch/DC/USEPA/US wrote: -----

> To: lynch.mary-kay@epa.gov, Ellen Manges
> From: Mary-Kay Lynch/DC/USEPA/US
> Date: 06/16/2009 12:52AM
> Subject:
>
> Here are some 3 slides on the PHE. Please don't print out with the notes. Those are just for me. thanks. mk

[attachment "CERCLA Public Health Emergencyslides.mkl.pptx" removed by Ellen Manges/DC/USEPA/US]

From: Victor Ketellapper
To: Andy Lensink
Subject: Re: 3-5-09 draft of Libby action memo amendment (PHE)
Date: 03/09/2009 10:06 AM

Changes look good to me.

Victor Ketellapper, P.E.
USEPA
1595 Wynkoop St. (8EPR-B)
Denver, CO 80202

(303)312-6578

From: Ellen Manges
To: Ellyn Fine
Subject: Re: Briefing on Libby for Administrator Jackson next week (Wed/Thurs)
Date: 01/30/2009 02:36 PM

Ellyn:

The pre-brief should include: Jim/Barnes /Betsy and staff as needed, Mary Kay Lynch, John Michaud, Earl Salo, Carol Campbell and staff as needed (R8), Amy Hayden (OCIR), Debbie Dietrich and staff as needed, Randy, Renee, you, me.

I'm also checking with OSRTI to see if it makes sense to pull in OECA and OPPTS to the pre-brief. We should probably discuss that with Barry first thing on Monday.

I'll send you comments on the draft briefing paper separately.

▼ Ellyn Fine---01/30/2009 01:58:46 PM---All - I just got off the phone with the Administrator's office. It sounds like her folks are looking

From: Ellyn Fine/DC/USEPA/US
To: James Woolford/DC/USEPA/US@EPA
Cc: Carol Campbell/R8/USEPA/US@EPA, Debbie Dietrich/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, manges.ellen@epa.gov, Mary-Kay Lynch/DC/USEPA/US@EPA, michaud.john@epa.gov, tulis.dana@epa.gov, Barry Breen/DC/USEPA/US, Renee Wynn/DC/USEPA/US@EPA, Jennifer Wilbur/DC/USEPA/US@EPA, Randy Deitz/DC/USEPA/US@EPA
Date: 01/30/2009 01:58 PM
Subject: Briefing on Libby for Administrator Jackson next week (Wed/Thurs)

All - I just got off the phone with the Administrator's office. It sounds like her folks are looking at either Wednesday or Thursday for a "Libby" briefing. The Special Assistant who called me wasn't prepared to answer any questions about the focus of the briefing. I urged her to find out ASAP if it's to focus on the public health emergency issue or something else entirely.

I pass along anything else I hear. Thanks, Ellyn

Ellyn Krevitz Fine
U.S. Environmental Protection Agency
Office of Solid Waste and Emergency Response
p: 202-566-2775

▼ James Woolford---01/30/2009 01:18:18 PM---We have been. Betsy, et. al. are now working on a revision to what we sent earlier in a format that

From: James Woolford/DC/USEPA/US
To: Carol Campbell/R8/USEPA/US@EPA

Cc: Elizabeth Southerland/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, michaud.john@epa.gov, Debbie Dietrich/DC/USEPA/US@EPA, tulis.dana@epa.gov, manges.ellen@epa.gov, Ellyn Fine/DC/USEPA/US@EPA

Date: 01/30/2009 01:18 PM

Subject: Re: Fw: FYI -- Fw: Briefing on Libby for Administrator Jackson

---

We have been. Betsy, et. al. are now working on a revision to what we sent earlier in a format that seems to be favored. I know we have gotten comments both from OGC and Region 8.

FYI -- I will be on travel Feb 3 - 12. in California.

James E. Woolford, Director
Office of Superfund Remediation &
Technology Innovation (OSRTI)
Office of Solid Waste and Emergency Response
US Environmental Protection Agency

▼ Carol Campbell---01/30/2009 01:08:44 PM---so we may have less time than we thought to pull together the Libby briefing Carol L. Campbell, Ass

From: Carol Campbell/R8/USEPA/US

To: Woolford.James@epamail.epa.gov, Elizabeth Southerland/DC/USEPA/US@EPA

Date: 01/30/2009 01:08 PM

Subject: Fw: FYI -- Fw: Briefing on Libby for Administrator Jackson

---

so we may have less time than we thought to pull together the Libby briefing
Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 01/30/2009 11:07 AM -----

Martin Hestmark/R8/USEPA/US

01/30/2009 08:53 AM

To: Sandy Fells/OCP/R8/USEPA/US@EPA

cc: Andy Lensink/ENF/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Helen Dawson/EPR/R8/USEPA/US@EPA, Lawrence Grandison/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA, Steve Tuber/P2/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA

Subject: Re: FYI -- Fw: Briefing on Libby for Administrator Jackson

I know there is a start on the PHE briefing. I have not heard about a schedule.

▼ Sandy Fells/OCP/R8/USEPA/US

Sandy Fells/OCP/R8/USEPA/US

01/29/2009 03:58 PM

To: Carol Campbell/R8/USEPA/US@EPA

cc: Martin Hestmark/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA, Andy Lensink/ENF/R8/USEPA/US@EPA, Helen Dawson/EPR/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Steve Tuber/P2/R8/USEPA/US@EPA, Lawrence Grandison/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA

Subject: FYI -- Fw: Briefing on Libby for Administrator Jackson

Hi, Carol -- Anybody going back to DC in the next couple of weeks?

----- Forwarded by Sandy Fells/OCP/R8/USEPA/US on 01/29/2009 03:54 PM -----

Carolyn Levine/DC/USEPA/US

01/29/2009 03:12 PM

To: Amy Hayden/DC/USEPA/US@EPA, Sandy Fells/OCP/R8/USEPA/US@EPA, Randy Deitz/DC/USEPA/US@EPA, George Hull/DC/USEPA/US@EPA, Ellen Manges/DC/USEPA/US

cc:

Subject: Briefing on Libby for Administrator Jackson

While the Administrator's staff is still working on sorting out all the commitments made at the confirmation hearing, they did mention Libby as an issue that we should go ahead and start preparing for a briefing for the Administrator. There is no specific timing, but I would aim for the next 1-2 weeks. Can OSWER and R8 work together on briefing materials--- updated issue paper (there is at least one from the September Fed Facilities hearing), hearing testimony, etc. and Amy can coordinate for OCIR. Please give us an idea on suggested timing. Thanks!

Carolyn Levine

U.S. EPA/Office of Congressional Affairs
(202) 564-1859
FAX: (202) 501-1550

From: Katharine Gage
To: Ellen Manges
Cc: Adora Andy; Betsaida Alcantara; Bob Sussman; Marta Montoro; Mary-Kay Lynch; Veronica Burley
Subject: Re: Correction to PHE Finding Fw: Libby Briefing Memo for the Administrator
Date: 06/15/2009 06:04 PM

Thanks all- I've changed it out

▼ Ellen Manges---06/15/2009 06:03:28 PM---We found a large typo at the top of page 2 of the PHE finding. If possible, please use the attached

From: Ellen Manges/DC/USEPA/US
To: Betsaida Alcantara/DC/USEPA/US@EPA, Veronica Burley/DC/USEPA/US@EPA, Katharine Gage/DC/USEPA/US@EPA, Adora Andy/DC/USEPA/US@EPA, Marta Montoro/DC/USEPA/US@EPA
Cc: Mary-Kay Lynch/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA
Date: 06/15/2009 06:03 PM
Subject: Correction to PHE Finding Fw: Libby Briefing Memo for the Administrator

---

We found a large typo at the top of page 2 of the PHE finding. If possible, please use the attached version for the Administrator's book tonight. Thanks!

[attachment "Final PHE 61509 6 pm.doc" deleted by Katharine Gage/DC/USEPA/US]

Ellen Manges

----- Forwarded by Ellen Manges/DC/USEPA/US on 06/15/2009 05:54 PM -----

From: Betsaida Alcantara/DC/USEPA/US
To: Veronica Burley/DC/USEPA/US@EPA
Cc: Katharine Gage/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA, Ellen Manges/DC/USEPA/US@EPA, Allyn Brooks-LaSure/DC/USEPA/US@EPA, Adora Andy/DC/USEPA/US@EPA, Seth Oster/DC/USEPA/US@EPA
Date: 06/15/2009 04:07 PM
Subject: Libby Briefing Memo for the Administrator

Hello Veronica,
Please add this briefing memo to the Administrator's book.

Thank you,
Betsaida

From:	Debbie Dietrich
To:	Ellen Manges
Cc:	Ellen Manges; Barry Breen; Dana Tulis; Elizabeth Southerland; Ellyn Fine; James Woolford; Mathy Stanislaus
Subject:	Re: Declaration Re: Final draft Joint Press Release and Remarks
Date:	06/17/2009 08:43 AM

Ellen, we are at the COOP site and ready to go with the Action Memo. As Barry and I may be hard to track down, Tito will be leading the effort to get the Action Memo and our signatures. Tito's cell phone is (b) (6) if you need to contact him. Thanks!

Debbie Dietrich, Director
Office of Emergency Management (5104A)
USEPA
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Ph 202-564-8600
Fax 202-564-8211

-----Ellen Manges/DC/USEPA/US wrote: -----

> To: Ellen Manges/DC/USEPA/US@EPA
> From: Ellen Manges/DC/USEPA/US
> Date: 06/17/2009 07:42AM
> Cc: Barry Breen/DC/USEPA/US@EPA, Dana Tulis/DC/USEPA/US@EPA, Debbie Dietrich/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Ellyn Fine/DC/USEPA/US@EPA, James Woolford/DC/USEPA/US@EPA, Mathy Stanislaus/DC/USEPA/US@EPA
> Subject: Declaration Re: Final draft Joint Press Release and Remarks
>
> Here's the final declaration that I sent up to the Administrator's Office for signing which will be printed out on the Administrator's letterhead, along with the signed certification of the administrative record. She will probably sign it at about 12:00 at which point I'll start the signature process for the Action Memo. Hopefully we will have that up on the web by 1:20 or shortly thereafter.
>
> Ellen Manges---06/17/2009 07:25:21 AM---So you have them today - here is the final draft joint press release with HHS and the Administrator'
>
> From: Ellen Manges/DC/USEPA/US
>
> To: Mathy Stanislaus/DC/USEPA/US@EPA, Barry Breen/DC/USEPA/US@EPA, James Woolford/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Debbie Dietrich/DC/USEPA/US@EPA, Dana Tulis/DC/USEPA/US@EPA
>
> Cc: Ellyn Fine/DC/USEPA/US@EPA
>
> Date: 06/17/2009 07:25 AM
>
> Subject: Final draft Joint Press Release and Remarks
>
> ---

So you have them today - here is the final draft joint press release with HHS and the Administrator's remarks that went in to her book last night. I suppose there could be final edits based on her final review and I'll get around the final press release when it goes out. Also, here is the final Declaration and Findings of a Public Health Emergency. The title was the only significant change.

We are now working to put the final touches on public documents and background information for the website.

The press conference starts at 1:20. I'll keep you posted on the happenings here.

Ellen

[attachment "06-16-09 Draft Press Release FINAL version.doc" deleted by Ellen Manges/DC/USEPA/US] [attachment "20090617 Libby Remarks (FINAL).doc" deleted by Ellen Manges/DC/USEPA/US]

[attachment "Final PHE 6164.45pm.doc" removed by Debbie Dietrich/DC/USEPA/US]

From:	Marta Montoro
To:	Gilberto Irizarry
Cc:	Diane Thompson; James Howard
Subject:	Re: Document from Administrator - PHE
Date:	06/17/2009 11:03 AM

Thanks so much!

Marta E. Montoro
U.S. Environmental Protection Agency
Special Assistant
Office of the Administrator
1200 Pennsylvania Ave. NW (1101A)
Washington, D.C. 20460
Tel: (202) 564-4471
Fax: (202) 501-1428
Email: Montoro.Marta@epa.gov

THIS EMAIL IS INTERNAL AND DELIBERATIVE

From: Gilberto Irizarry
To: Marta Montoro
Cc: Diane Thompson
Subject: Re: Document from Administrator Jackson - Determination of Findings of PHE
Date: 06/17/2009 10:08 AM

Diane:

Marta, James and I just spoke on the phone. Understand that the Administrator will be returning to the COOP facility in a few minutes. James has the new version which only involves one edit to the last page (signature page). If the Administrator signs the updated version, we'll be glad to scan and forward back to Marta.

Tito

E-mail sent by Blackberry. Please excuse typos.

Gilberto "Tito" Irizarry
Director, Program Operations & Coordination Division
Office of Emergency Management
USEPA
(202) 564-7982

▼ Gilberto Irizarry

----- Original Message -----
From: Gilberto Irizarry
Sent: 06/17/2009 09:58 AM EDT
To: Marta Montoro
Cc: Diane Thompson
Subject: Re: Document from Administrator Jackson - Determination of Findings of PHE

Not sure Marta. The Administrator just left the COOP facility. Understand that she may be back later in the morning. If so, I'll be glad to assist in getting the document resigned. This version you sent is not on official letterhead. Can you set it up with letterhead ?

Tito

E-mail sent by Blackberry. Please excuse typos.

Gilberto "Tito" Irizarry
Director, Program Operations & Coordination Division
Office of Emergency Management
USEPA
(202) 564-7982

▼ Marta Montoro

----- Original Message -----
From: Marta Montoro
Sent: 06/17/2009 09:43 AM EDT
To: Gilberto Irizarry
Cc: Diane Thompson
Subject: Re: Document from Administrator Jackson - Determination of Findings of PHE

Hi Gilberto -

Thanks very much. However, OGC just came back with a change on the signature page. I'm very sorry - would it be possible for her to sign this version instead?

I'm sorry for the inconvenience.

[attachment "Final PHE.06.17.-09.doc" deleted by Gilberto Irizarry/DC/USEPA/US]

Marta E. Montoro
U.S. Environmental Protection Agency
Special Assistant
Office of the Administrator
1200 Pennsylvania Ave. NW (1101A)
Washington, D.C. 20460
Tel: (202) 564-4471
Fax: (202) 501-1428
Email: Montoro.Marta@epa.gov

THIS EMAIL IS INTERNAL AND DELIBERATIVE

▼ Gilberto Irizarry---06/17/2009 09:40:57 AM---Hi Marta: I'm at our COOP location with the Administrator and other staff. I've been asked to get t

From: Gilberto Irizarry/DC/USEPA/US
To: Marta Montoro/DC/USEPA/US@EPA
Cc: Diane Thompson/DC/USEPA/US@EPA
Date: 06/17/2009 09:40 AM
Subject: Document from Administrator Jackson - Determination of Findings of PHE

Hi Marta:

I'm at our COOP location with the Administrator and other staff. I've been asked to get the attached file send to you. Understand that you are expecting it.

Let me know if anything else is needed.

Regards,

Gilberto "Tito" Irizarry
Program Operations & Coordination Division, Director
Office of Emergency Management
US Environmental Protection Agency, Headquarters
Tel: (202) 564-7982
Mobile: (b) (6)
Fax: (202) 564-8333

[attachment "img-617093430-0001.pdf" deleted by Marta Montoro/DC/USEPA/US]

From: Gilberto Irizarry
To: Marta Montoro
Cc: Diane Thompson
Subject: Re: Document from Administrator Jackson - Determination of Findings of PHE
Date: 06/17/2009 09:58 AM

Not sure Marta. The Administrator just left the COOP facility. Understand that she may be back later in the morning. If so, I'll be glad to assist in getting the document resigned. This version you sent is not on official letterhead. Can you set it up with letterhead ?

Tito

E-mail sent by Blackberry. Please excuse typos.

Gilberto "Tito" Irizarry
Director, Program Operations & Coordination Division
Office of Emergency Management
USEPA
(202) 564-7982

▼ Marta Montoro

----- Original Message -----
From: Marta Montoro
Sent: 06/17/2009 09:43 AM EDT
To: Gilberto Irizarry
Cc: Diane Thompson
Subject: Re: Document from Administrator Jackson - Determination of Findings of PHE

Hi Gilberto -

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I'm sorry for the inconvenience.

[attachment "Final PHE.06.17.-09.doc" deleted by Gilberto Irizarry/DC/USEPA/US]

Marta E. Montoro
U.S. Environmental Protection Agency
Special Assistant
Office of the Administrator
1200 Pennsylvania Ave. NW (1101A)
Washington, D.C. 20460
Tel: (202) 564-4471
Fax: (202) 501-1428
Email: Montoro.Marta@epa.gov

THIS EMAIL IS INTERNAL AND DELIBERATIVE

▼ Gilberto Irizarry---06/17/2009 09:40:57 AM---Hi Marta: I'm at our COOP location with the Administrator and other staff. I've been asked to get t

From: Gilberto Irizarry/DC/USEPA/US
To: Marta Montoro/DC/USEPA/US@EPA
Cc: Diane Thompson/DC/USEPA/US@EPA
Date: 06/17/2009 09:40 AM
Subject: Document from Administrator Jackson - Determination of Findings of PHE

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Regards,

Gilberto "Tito" Irizarry
Program Operations & Coordination Division, Director
Office of Emergency Management
US Environmental Protection Agency, Headquarters
Tel: (202) 564-7982
Mobile: (b) (6)
Fax: (202) 564-8333

[attachment "img-617093430-0001.pdf" deleted by Marta Montoro/DC/USEPA/US]

From: Ellen Manges
To: Betsy Shaw
Subject: Re: Draft Documents
Date: 06/12/2009 03:01 PM

Please go ahead and send them to her. thanks.

▼ Betsy Shaw---06/12/2009 03:00:28 PM---Sorry Ellen -- Just sent you our revised external and internal Qs and As. Can you forward to Betsai

From: Betsy Shaw/DC/USEPA/US
To: Ellen Manges/DC/USEPA/US@EPA
Date: 06/12/2009 03:00 PM
Subject: Re: Draft Documents

Sorry Ellen -- Just sent you our revised external and internal Qs and As. Can you forward to Betsaida or should I?

▼ Ellen Manges---06/12/2009 02:54:43 PM---Here is the latest that I have - all draft. This also includes our internal Q&A.

From: Ellen Manges/DC/USEPA/US
To: Betsaida Alcantara/DC/USEPA/US@EPA
Cc: John Michaud/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA, Adora Andy/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Arvin Ganesan/DC/USEPA/US@EPA, Betsy Shaw/DC/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Mathy Stanislaus/DC/USEPA/US@EPA
Date: 06/12/2009 02:54 PM
Subject: Draft Documents

Here is the latest that I have - all draft. This also includes our internal Q&A.

[attachment "Libby PHE 060509.doc" deleted by Betsy Shaw/DC/USEPA/US] [attachment "libby Q&A 060509.doc" deleted by Betsy Shaw/DC/USEPA/US]
[attachment "Libby Site Background.6.11.09.cc.doc" deleted by Betsy Shaw/DC/USEPA/US] [attachment "Public Q & A.external.6.11.09.cc.doc" deleted by Betsy Shaw/DC/USEPA/US]
[attachment "Vermiculite Insulation Internal Q&A Draft 6-3-09 - addressing comments clean.doc" deleted by Betsy Shaw/DC/USEPA/US]
[attachment "Vermiculite Insulation External Q&A - 6-11-09 clean.doc" deleted by Betsy Shaw/DC/USEPA/US] [attachment "vermiculite message to the public 6 11 09 w pics.doc" deleted by Betsy Shaw/DC/USEPA/US]

▼ Betsaida Alcantara---06/12/2009 02:08:52 PM---Is it possible to get all the most updated documents that will be made public in one email? I've los

From: Betsaida Alcantara/DC/USEPA/US
To: Ellen Manges/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, John Michaud/DC/USEPA/US@EPA
Date: 06/12/2009 02:08 PM
Subject: hello

Is it possible to get all the most updated documents that will be made public in one email?

I've lost track of what's updated and what's not.

Thank you,
Betsaida Alcantara
Deputy Press Secretary | Office of Public Affairs
US Environmental Protection Agency
202-564-1692
alcantara.betsaida@epa.gov

From: Betsaida Alcantara
To: Ellen Manges
Subject: Re: Draft Documents
Date: 06/12/2009 03:21 PM

Ellen,
Do these correspond with what Betsy sent or are the docs that Betsy sent the most update vermiculite?

thanks

▼ Ellen Manges---06/12/2009 02:54:44 PM---Here is the latest that I have - all draft. This also includes our internal Q&A.

From: Ellen Manges/DC/USEPA/US
To: Betsaida Alcantara/DC/USEPA/US@EPA
Cc: John Michaud/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA, Adora Andy/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Arvin Ganesan/DC/USEPA/US@EPA, Betsy Shaw/DC/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Mathy Stanislaus/DC/USEPA/US@EPA
Date: 06/12/2009 02:54 PM
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Date: 06/12/2009 02:08 PM
Subject: hello

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Thank you,
Betsaida Alcantara
Deputy Press Secretary | Office of Public Affairs
US Environmental Protection Agency
202-564-1692
alcantara.betsaida@epa.gov

From: Betsaida Alcantara
To: Ellen Manges
Subject: Re: Draft Documents
Date: 06/12/2009 03:23 PM

---

nevermind, i crossed checked it! they are different. Thanks for sending these in one doc!

Betsaida Alcantara
Deputy Press Secretary | Office of Public Affairs
US Environmental Protection Agency
202-564-1692
alcantara.betsaida@epa.gov

▼ Ellen Manges---06/12/2009 02:54:44 PM---Here is the latest that I have - all draft. This also includes our internal Q&A.

From: Ellen Manges/DC/USEPA/US
To: Betsaida Alcantara/DC/USEPA/US@EPA
Cc: John Michaud/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA, Adora Andy/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Arvin Ganesan/DC/USEPA/US@EPA, Betsy Shaw/DC/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Mathy Stanislaus/DC/USEPA/US@EPA
Date: 06/12/2009 02:54 PM
Subject: Draft Documents

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[attachment "Libby PHE 060509.doc" deleted by Betsaida Alcantara/DC/USEPA/US] [attachment "libby Q&A 060509.doc" deleted by Betsaida Alcantara/DC/USEPA/US]
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Date: 06/12/2009 02:08 PM

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Thank you,
Betsaida Alcantara
Deputy Press Secretary | Office of Public Affairs
US Environmental Protection Agency
202-564-1692
alcantara.betsaida@epa.gov

From: Ellen Manges
To: Betsaida Alcantara
Subject: Re: Draft Documents
Date: 06/12/2009 03:24 PM

Betsy just sent the most recent vermiculite docs.

▼ Betsaida Alcantara---06/12/2009 03:21:15 PM---Ellen, Do these correspond with what Betsy sent or are the docs that Betsy sent the most update verm

From: Betsaida Alcantara/DC/USEPA/US
To: Ellen Manges/DC/USEPA/US@EPA
Date: 06/12/2009 03:21 PM
Subject: Re: Draft Documents

Ellen,
Do these correspond with what Betsy sent or are the docs that Betsy sent the most update vermiculite?

thanks

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From: Ellen Manges/DC/USEPA/US
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Cc: John Michaud/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA, Adora Andy/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Arvin Ganesan/DC/USEPA/US@EPA, Betsy Shaw/DC/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Mathy Stanislaus/DC/USEPA/US@EPA
Date: 06/12/2009 02:54 PM
Subject: Draft Documents

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Date: 06/12/2009 02:08 PM
Subject: hello

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Thank you,
Betsaida Alcantara
Deputy Press Secretary | Office of Public Affairs
US Environmental Protection Agency
202-564-1692
alcantara.betsaida@epa.gov

From: Carol Campbell
To: Penney Trujillo
Cc: Martin Hestmark; Bill Murray; Russell Leclerc; Michael Boydston
Subject: Re: Draft Documents
Date: 06/12/2009 05:16 PM

---

pls print. Rest fyi
Sent by EPA Wireless E-Mail Services
▼ Carol Rushin

----- Original Message -----
From: Carol Rushin
Sent: 06/12/2009 01:37 PM MDT
To: Carol Campbell; Victor Ketellapper; Michael Risner; Andy Lensink; Lawrence Grandison
Subject: Fw: Draft Documents

Let's hope these are the same.

Carol Rushin
Acting Regional Administrator
USEPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129
Phone: 303.312.6308
FAX: 303.312.6882

----- Forwarded by Carol Rushin/R8/USEPA/US on 06/12/2009 01:34 PM -----

Ellen Manges/DC/USEPA/US

06/12/2009 12:54 PM

To: Betsaida Alcantara/DC/USEPA/US@EPA

cc: John Michaud/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA, Adora Andy/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Arvin Ganesan/DC/USEPA/US@EPA, Betsy Shaw/DC/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Mathy Stanislaus/DC/USEPA/US@EPA

Subject: Draft Documents

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Date: 06/12/2009 02:08 PM
Subject: hello

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Thank you,
Betsaida Alcantara
Deputy Press Secretary | Office of Public Affairs
US Environmental Protection Agency
202-564-1692
alcantara.betsaida@epa.gov

From: Gilberto Irizarry
To: Ellen Manges; Debbie Dietrich; Dana Tulis
Subject: Re: Draft Slides for Libby Briefing for the Administrator
Date: 06/16/2009 07:27 AM

No comments from me. Looks good.

Thanks,

Tito

E-mail sent by Blackberry. Please excuse typos.

Gilberto "Tito" Irizarry
Director, Program Operations & Coordination Division
Office of Emergency Management
USEPA
(202) 564-7982

From: Ellen Manges
Sent: 06/16/2009 06:41 AM EDT
To: Debbie Dietrich; Dana Tulis; Gilberto Irizarry
Subject: Fw: Draft Slides for Libby Briefing for the Administrator

Forgot to copy you. Thanks for getting us the great information on kids of libby! Please check out the slide I put together and let me know if you have changes.
-----Forwarded by Ellen Manges/DC/USEPA/US on 06/16/2009 06:37AM -----

> To: Bob Sussman/DC/USEPA/US@EPA, Mathy Stanislaus/DC/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Betsy Shaw/DC/USEPA/US@EPA, Adora Andy/DC/USEPA/US@EPA, Betsaida Alcantara/DC/USEPA/US@EPA, James Woolford/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Barry Breen/DC/USEPA/US@EPA, Arvin Ganesan/DC/USEPA/US@EPA, Marta Montoro/DC/USEPA/US@EPA, Ellyn Fine/DC/USEPA/US@EPA, Ellen Manges/DC/USEPA/US@EPA
> From: Ellen Manges/DC/USEPA/US
> Date: 06/16/2009 05:46AM
> Subject: Draft Slides for Libby Briefing for the Administrator
>
> Here is a draft of the slides for today's briefing on Libby with the Administrator. Please send me any changes you may have.
> One info gap: Betsy, do we know the number of homes with vermiculite insulation?
> I will be reviewing this with Mathy at 8:30.
> Lead Speaking Assignments
> Slide 2, OPA
> Slides 3 -5, Mary Kay
> Slides 6-8, Mathy
> Slide 9, Betsy
> Slides 10-13, Mathy
> Slide 14, Region 8
> Ellen
> 566-0195

From: Sandy Fells
To: Richard Mylott
Cc: Bill Murray; Carol Campbell; Russell Leclerc; Wendy Chipp; Lawrence Grandison
Subject: Re: FYI -- Inaccuracy (EPA providing $333M under PHE) removed from Sen. Tester press release
Date: 06/17/2009 06:55 PM

Thanks for doggin' this, Rich -- Did you also notify Betsaida et al? Thanks!!

▼ Richard Mylott/R8/USEPA/US

Richard Mylott/R8/USEPA/US

06/17/2009 04:47 PM

To: Carol Campbell/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Sandy Fells/OCP/R8/USEPA/US@EPA, Wendy Chipp/OCP/R8/USEPA/US@EPA

cc:

Subject: FYI -- Inaccuracy (EPA providing $333M under PHE) removed from Sen. Tester press release

http://tester.senate.gov/Newsroom/pr_061709_libby.cfm

Richard Mylott
Public Affairs Specialist
Office of Communications and Public Involvement
U.S. Environmental Protection Agency, Region 8
Phone: 303-312-6654

From: Phyllis Anderson
To: Matthew Cohn
Subject: Re: FYI,summary of public statements on PHE and related issues
Date: 02/03/2009 01:00 PM

I don't see him in the directory.
I'm getting beaucoups comments from people peripherally involved, but haven't heard from you, who would have the most relevant issues. Do Carol's and Helen's comments constitute the regional comments?

▼ Matthew Cohn---02/03/2009 12:21:28 PM---Phyllis Please add Andy Lensink to your address list for Libby. thanks matt

From: Matthew Cohn/R8/USEPA/US
To: Phyllis Anderson/DC/USEPA/US@EPA
Date: 02/03/2009 12:21 PM
Subject: Re: FYI,summary of public statements on PHE and related issues

---

Phyllis Please add Andy Lensink to your address list for Libby. thanks matt

▼ Phyllis Anderson/DC/USEPA/US

Phyllis Anderson/DC/USEPA/US

02/03/2009 09:30 AM

To: James Woolford/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA, Helen Dawson/EPR/R8/USEPA/US@EPA, Doug Ammon/DC/USEPA/US@EPA, William Sette/DC/USEPA/US@EPA, Stiven Foster/DC/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Matthew Cohn/R8/USEPA/US@EPA, Gilberto Irizarry/DC/USEPA/US@EPA, Amanda Halstead <halstead.amanda@epa.gov>, Lee Tyner/DC/USEPA/US@EPA, Ellen Manges/DC/USEPA/US@EPA, Amy Hayden/DC/USEPA/US@EPA, Amanda Halstead/DC/USEPA/US@EPA, Ellyn Fine/DC/USEPA/US@EPA

cc

Subject: FYI,summary of public statements on PHE and related issues

I went through the correspondence, focusing of course on what we, EPA, have said about our role at Libby. Attached is a reverse chron. summary, with quotations that might be of use if you are wordsmithing

or otherwise preparing for the Administrator's briefing.

[attachment "EPA statements re PHE authority.doc" deleted by Phyllis Anderson/DC/USEPA/US]

From: James Woolford
To: Ellen Manges; Mathy Stanislaus; Barry Breen; Elizabeth Southerland; Debbie Dietrich; Dana Tulis
Cc: Ellyn Fine; James E Woolford
Subject: Re: Final draft Joint Press Release and Remarks
Date: 06/17/2009 07:31 AM

Thanks.

I see in the paper today that DOJ formally dropped the final criminal case yesterday vs WR Grace.

Sent from my BlackBerry Wireless Handheld
▼ Ellen Manges

----- Original Message -----
From: Ellen Manges
Sent: 06/17/2009 07:25 AM EDT
To: Mathy Stanislaus; Barry Breen; James Woolford; Elizabeth Southerland; Debbie Dietrich; Dana Tulis
Cc: Ellyn Fine
Subject: Final draft Joint Press Release and Remarks

So you have them today - here is the final draft joint press release with HHS and the Administrator's remarks that went in to her book last night. I suppose there could be final edits based on her final review and I'll get around the final press release when it goes out. Also, here is the final Declaration and Findings of a Public Health Emergency. The title was the only significant change.

We are now working to put the final touches on public documents and background information for the website.

The press conference starts at 1:20. I'll keep you posted on the happenings here.

Ellen

[attachment "06-16-09 Draft Press Release FINAL version.doc" deleted by James Woolford/DC/USEPA/US]
[attachment "20090617 Libby Remarks (FINAL).doc" deleted by James Woolford/DC/USEPA/US]

From: Ted Linnert
To: Rebecca Thomas
Cc: ketellapper.victor@epa.gov; Wendy Chipp; Sonya Pennock
Subject: Re: Fox News - Request for Interview
Date: 06/23/2009 06:13 PM

Hi All,

I told Kelly Burke from the same network essentially the same thing earlier today. At the time, I thought Victor was back in the office and told Kelly to call him. We've been reportered to death here in Libby the past two days.

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
Denver, CO 80202-1129

(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

▼ Rebecca Thomas/EPR/R8/USEPA/US

Rebecca Thomas/EPR/R8/USEPA/US

06/23/2009 04:08 PM

To: Wendy Chipp/OCP/R8/USEPA/US@EPA, ketellapper.victor@epa.gov
cc: Ted Linnert
Subject: Fox News - Request for Interview

Phone conversation with Faith Mangen, Fox News

(303) 861-0460 (direct line)
(b) (6) (cell phone)

Fox News is sending a team to Libby today, June 23rd. They have interviews arranged in Libby for the 24th. They would like to have the option of an on-camera interview with someone from the Denver EPA office to talk generally about the site and next steps. They would like to conduct this interview tomorrow, June 24th. I suggested that Victor Ketellapper would be the best spokesman for EPA. They understand that any questions regarding declaration of the Public Health Emergency are to be addressed by EPA staff in Washington, D.C.

I told Faith Mangen that, provided he has recovered and is back in the office, **Victor Ketellapper will call her tomorrow to arrange an interview**. In the event of Victor's continued absence, I could speak to a reporter, although my knowledge of the site is limited when it

comes to residential cleanups and the mine. Another option could be Carol Campbell who is returning to the office from Libby tomorrow morning.

Please let me know if you would like me to do anything further. Thanks!

U.S. EPA, Region 8
Rebecca Thomas (EPR-SR)
1595 Wynkoop
Denver, Colorado 80202-1129
(303) 312-6552

From:	James Woolford
To:	Martin Hestmark
Cc:	Barnes Johnson; Bill Murray; Carol Campbell; Helen Dawson; Victor Ketellapper; Carol Rushin; Steve Tuber; Ellyn Fine; manges.ellen@epa.gov; Mary-Kay Lynch
Subject:	Re: Fw: Briefing on Libby for Administrator Jackson next week (Wed/Thurs)
Date:	01/30/2009 03:38 PM

Things are a little frenetic here.

Phyllis Anderson is working on re-drafting the briefing materials for the Administrator. Barry provided a format he'd thought would be good to follow. Hopefully you will get revision by COB today.

Pre-brief for Barry is scheduled at 3;15 eastern on MONDAY. Region 8 and OGC will be there in addition to OSRTI, OEM and the OSWER IO. I know CC was invited. Did not see other Region 8 folks on the invite list. But certainly whoever you all need to have on the phone, please do.

****
Call in # - (b) (6) -- access code (b) (6)

Contact: Ellyn Fine
202-566-2775

****

Brief for the Administrator is still TBD - but will be either Wed. or Thur. we are told.

It will focus on the PHE issue.

James E. Woolford, Director
Office of Superfund Remediation &
Technology Innovation (OSRTI)
Office of Solid Waste and Emergency Response
US Environmental Protection Agency

▼ Martin Hestmark---01/30/2009 03:30:01 PM---Say Jim/Barnes - Is it possible we could have a prebrief and have you send us your briefing package

From:	Martin Hestmark/R8/USEPA/US
To:	James Woolford/DC/USEPA/US@EPA, Barnes Johnson/DC/USEPA/US@EPA
Cc:	Carol Campbell/R8/USEPA/US@EPA, "Helen Dawson" <Dawson.Helen@epamail.epa.gov>, "Victor Ketellapper" <Ketellapper.Victor@epamail.epa.gov>, "Carol Rushin" <Rushin.Carol@epamail.epa.gov>, Steve Tuber/P2/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA
Date:	01/30/2009 03:30 PM
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▼ Bill Murray/EPR/R8/USEPA/US

Bill Murray/EPR/R8/USEPA/US

01/30/2009 12:49 PM

To: Carol Campbell/R8/USEPA/US@EPA

cc: "Helen Dawson" <Dawson.Helen@epamail.epa.gov>, "Martin Hestmark" <Hestmark.Martin@epamail.epa.gov>, "Victor Ketellapper" <Ketellapper.Victor@epamail.epa.gov>, "Carol Rushin" <Rushin.Carol@epamail.epa.gov>, Steve Tuber/P2/R8/USEPA/US@EPA

Subject: Re: Fw: Briefing on Libby for Administrator Jackson next week (Wed/Thurs)

Carol: I'll be at the annual meeting with the USACE, but please let me know the time & call in number.

later, Bill . . .

▼ Carol Campbell/R8/USEPA/US

Carol Campbell/R8/USEPA/US

01/30/2009 12:21 PM

To: "Bill Murray" <Murray.Bill@epamail.epa.gov>, "Victor Ketellapper" <Ketellapper.Victor@epamail.epa.gov>, "Helen Dawson" <Dawson.Helen@epamail.epa.gov>, Steve Tuber/P2/R8/USEPA/US@EPA, "Carol Rushin" <Rushin.Carol@epamail.epa.gov>

cc: "Martin Hestmark" <Hestmark.Martin@epamail.epa.gov>

Subject: Fw: Briefing on Libby for Administrator Jackson next week (Wed/Thurs)

Bill and Martin check in with Jim and Ellen on this. Could we do a video conference

Sent by EPA Wireless E-Mail Services

▼ Ellyn Fine

----- Original Message -----

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To: James Woolford
Cc: Carol Campbell; Debbie Dietrich; Elizabeth Southerland; manges.ellen@epa.gov; Mary-Kay Lynch; michaud.john@epa.gov; tulis.dana@epa.gov; Barry Breen; Renee Wynn; Jennifer Wilbur; Randy Deitz
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I pass along anything else I hear. Thanks, Ellyn

Ellyn Krevitz Fine
U.S. Environmental Protection Agency
Office of Solid Waste and Emergency Response
p: 202-566-2775

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Office of Solid Waste and Emergency Response
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To: Woolford.James@epamail.epa.gov, Elizabeth Southerland/DC/USEPA/US@EPA
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Subject: Fw: FYI -- Fw: Briefing on Libby for Administrator Jackson

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Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 01/30/2009 11:07 AM -----

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01/30/2009 08:53 AM

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▼ Sandy Fells/OCP/R8/USEPA/US

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01/29/2009 03:58 PM

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Carolyn Levine/DC/USEPA/US

01/29/2009 03:12 PM

To: Amy Hayden/DC/USEPA/US@EPA, Sandy Fells/OCP/R8/USEPA/US@EPA, Randy Deitz/DC/USEPA/US@EPA, George Hull/DC/USEPA/US@EPA, Ellen Manges/DC/USEPA/US

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Carolyn Levine
U.S. EPA/Office of Congressional Affairs
(202) 564-1859
FAX: (202) 501-1550

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Subject: Re: Fw: Conference call with Jim Woolford on Libby- remaining items
Date: 01/29/2009 08:01 AM

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▼ Carol Campbell/R8/USEPA/US

Carol Campbell/R8/USEPA/US

01/28/2009 05:10 PM

To: Woolford.James@epamail.epa.gov, Phyllis Anderson/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Barnes Johnson/DC/USEPA/US@EPA

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Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 01/28/2009 05:03 PM -----

Penney Trujillo/EPR/R8/USEPA/US

01/28/2009 03:47 PM

To: Carol Campbell/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA

cc:

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Bottom line: I see it on Carol's calendar, but didn't speak to anyone in HQ office today. I'm out tomorrow. See you Friday

Thanks,

Penney Trujillo
Office Manager
Office of Ecosystems Protection & Remediation
Denver, CO
303.312.6691

From: Carol Campbell
To: Matthew Cohn
Subject: Re: Fw: Conference call with Jim Woolford on Libby- remaining items
Date: 01/29/2009 09:33 AM

Thanks
Sent by EPA Wireless E-Mail Services

▼ Matthew Cohn

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To:	Michael Boydston
Cc:	Woolford.James@epamail.epa.gov; Phyllis Anderson; Elizabeth Southerland; Barnes Johnson
Subject:	Re: Fw: Conference call with Jim Woolford on Libby- remaining items -- what day?
Date:	01/28/2009 07:25 PM

---

sorry tomorrow, 1/29. cc

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

▼ Michael Boydston/R8/USEPA/US

Michael Boydston/R8/USEPA/US	To	Carol Campbell/R8/USEPA/US@EPA
	cc	
01/28/2009 05:15 PM	Subject	Re: Fw: Conference call with Jim Woolford on Libby- remaining items -- what day?

Carol, what day is the call?

Michael Boydston
Associate Regional Counsel
EPA Region 8
1595 Wynkoop St.
Denver CO 80202
303.312.7103

▼ Carol Campbell/R8/USEPA/US

Carol Campbell/R8/USEPA/US	To	Woolford.James@epamail.epa.gov, Phyllis Anderson/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Barnes Johnson/DC/USEPA/US@EPA
01/28/2009 05:10 PM	cc	Victor Ketellapper/EPR/R8/USEPA/US@EPA, Leclerc.Russell@epamail.epa.gov, Dawson.Helen@epamail.epa.gov, Hestmark.Martin@epamail.epa.gov, Lensink.Andy@epamail.epa.gov, Murray.Bill@epamail.epa.gov, Ornstein.Peter@epamail.epa.gov, Michael Boydston/R8/USEPA/US@EPA, Cohn.Matthew@epamail.epa.gov
	Subject	Fw: Conference call with Jim Woolford on Libby- remaining items

Lets use my call in number for the call- (b) (6) (b) (6) 3 pm your time, 1 pm my time. I have set aside 2 hours- hopefully it won't be that long but I didn't think yesterday's meeting would last that long either. Agenda for the call is :

o Libby congressional briefings
o Administrator PHE briefing
o Administrator visit
o Housekeeping items such as how often to have Region/HQ calls, etc.

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 01/28/2009 05:03 PM -----

Penney Trujillo/EPR/R8/USEPA/US

01/28/2009 03:47 PM

To Carol Campbell/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA

cc

Subject Conference call with Jim Woolford

I called early this a.m. and left several message - - Phyllis Anderson called me back and said that most of HQ personnel were home due to severe weather conditions. I also left a message for Jim Woolford's secretary with no response. Phyllis said that a conference call should be done, not a video conference as requested by Victor's voicemail. They are having difficulties with video calls.

Bottom line: I see it on Carol's calendar, but didn't speak to anyone in HQ office today. I'm out tomorrow. See you Friday

Thanks,

Penney Trujillo
Office Manager
Office of Ecosystems Protection & Remediation
Denver, CO
303.312.6691

From: Matthew Cohn
To: Lee Tyner
Subject: Re: Fw: Declined: Libby Action Memo - Public Health Emergency
Date: 02/24/2009 11:12 AM

Thanks Lee, I will try to attend. matt

▼ Lee Tyner/DC/USEPA/US

Lee Tyner/DC/USEPA/US

02/24/2009 08:46 AM

To Matthew Cohn/R8/USEPA/US@EPA
cc
Subject Fw: Declined: Libby Action Memo - Public Health Emergency

The meeting has been rescheduled for noon EST on Wed., so maybe you will be able attend. Same call in number. Lee

----- Forwarded by Lee Tyner/DC/USEPA/US on 02/24/2009 10:44 AM -----

Declined: Libby Action Memo - Public Health Emergency

Tue
02/24/2009 4:00
PM - 4:45 PM

Location: Dial In Number (b) (6)
Conference Code: (b) (6)

Matthew Cohn has declined this meeting invitation

Lee I have a meeting at 3:15 your time, so won't be able to attend. matt

Required: Andy Lensink/ENF/R8/USEPA/US@EPA, Earl Salo/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Matthew Cohn/R8/USEPA/US@EPA, Michael Boydston/R8/USEPA/US@EPA, Peter Ornstein/RC/R8/USEPA/US@EPA

Optional: James Woolford/DC/USEPA/US@EPA, Jennifer Lue/DC/USEPA/US@EPA, John Michaud/DC/USEPA/US@EPA

From: Ellen Manges
To: Bill Murray
Cc: Carol Campbell
Subject: Re: Fw: Draft Desk Statement on Libby HHS Grant
Date: 05/21/2009 05:49 PM

Bill-

Apparently OPA briefed Wendy Chipp in R-8 on how to handle the press calls. Calls should be routed to OPA HQ Brendan Gilfillan: gilfillan.brendan@epa.gov or 202-564-2081.

Ellen

▼ Bill Murray---05/21/2009 04:40:17 PM---Ellen: I'm going to be the key contact in the region on issues related to this desk statement. We wo

From: Bill Murray/EPR/R8/USEPA/US
To: Ellen Manges/DC/USEPA/US@EPA
Date: 05/21/2009 04:40 PM
Subject: Fw: Draft Desk Statement on Libby HHS Grant

Ellen: I'm going to be the key contact in the region on issues related to this desk statement. We wondered: 1) is there a contact name/number at HHS? People will probably ask for that. 2) Is there a contact name/number at HQ regarding our assessment of the need for a PHE?

later, Bill . . .

----- Forwarded by Bill Murray/EPR/R8/USEPA/US on 05/21/2009 02:38 PM -----

Carol Campbell/R8/USEPA/US

05/21/2009 01:37 PM

To "Barry Breen" <Breen.Barry@epamail.epa.gov>
cc "Carol Rushin" <Rushin.Carol@epamail.epa.gov>, "Mike Gaydosh" <Gaydosh.Mike@epamail.epa.gov>, "Russell Leclerc" <Leclerc.Russell@epamail.epa.gov>, "Bill Murray" <Murray.Bill@epamail.epa.gov>, "Martin Hestmark" <Hestmark.Martin@epamail.epa.gov>
Subject Fw: Draft Desk Statement on Libby HHS Grant

This is ok. All use this if called.
Sent by EPA Wireless E-Mail Services

▼ Ellen Manges

----- Original Message -----
From: Ellen Manges
Sent: 05/21/2009 03:27 PM EDT
To: Carol Campbell; Martin Hestmark; Bill Murray
Subject: Draft Desk Statement on Libby HHS Grant

Here is a basic draft statement. Barry wanted to get a quick review from you before we send it up to the Administrator's office. We should take care of this ASAP.

[attachment "Libby Desk Statement.doc" deleted by Ellen Manges/DC/USEPA/US]

From: Ellen Manges
To: Bill Murray
Subject: Re: Fw: Draft Desk Statement on Libby HHS Grant
Date: 05/21/2009 05:08 PM

We are checking with OPA now. Should have an answer for you shortly.

▼ Bill Murray---05/21/2009 04:40:17 PM---Ellen: I'm going to be the key contact in the region on issues related to this desk statement. We wo

From: Bill Murray/EPR/R8/USEPA/US
To: Ellen Manges/DC/USEPA/US@EPA
Date: 05/21/2009 04:40 PM
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Carol Campbell/R8/USEPA/US

05/21/2009 01:37 PM

To "Barry Breen" <Breen.Barry@epamail.epa.gov>
cc "Carol Rushin" <Rushin.Carol@epamail.epa.gov>, "Mike Gaydosh" <Gaydosh.Mike@epamail.epa.gov>, "Russell Leclerc" <Leclerc.Russell@epamail.epa.gov>, "Bill Murray" <Murray.Bill@epamail.epa.gov>, "Martin Hestmark" <Hestmark.Martin@epamail.epa.gov>
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From: Ellen Manges
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[attachment "Libby Desk Statement.doc" deleted by Ellen Manges/DC/USEPA/US]

From:	James Woolford
To:	Carol Campbell
Cc:	Elizabeth Southerland; Mary-Kay Lynch; michaud.john@epa.gov; Debbie Dietrich; tulis.dana@epa.gov; manges.ellen@epa.gov; Ellyn Fine
Subject:	Re: Fw: FYI -- Fw: Briefing on Libby for Administrator Jackson
Date:	01/30/2009 01:18 PM

We have been. Betsy, et. al. are now working on a revision to what we sent earlier in a format that seems to be favored. I know we have gotten comments both from OGC and Region 8.

FYI -- I will be on travel Feb 3 - 12. in California.

James E. Woolford, Director
Office of Superfund Remediation &
Technology Innovation (OSRTI)
Office of Solid Waste and Emergency Response
US Environmental Protection Agency

▼ Carol Campbell---01/30/2009 01:08:44 PM---so we may have less time than we thought to pull together the Libby briefing Carol L. Campbell, Ass

From:	Carol Campbell/R8/USEPA/US
To:	Woolford.James@epamail.epa.gov, Elizabeth Southerland/DC/USEPA/US@EPA
Date:	01/30/2009 01:08 PM
Subject:	Fw: FYI -- Fw: Briefing on Libby for Administrator Jackson

---

so we may have less time than we thought to pull together the Libby briefing
Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 01/30/2009 11:07 AM -----

Martin Hestmark/R8/USEPA/US	To	Sandy Fells/OCP/R8/USEPA/US@EPA
01/30/2009 08:53 AM	cc	Andy Lensink/ENF/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Helen Dawson/EPR/R8/USEPA/US@EPA, Lawrence Grandison/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA, Steve Tuber/P2/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA
	Subject	Re: FYI -- Fw: Briefing on Libby for Administrator Jackson

I know there is a start on the PHE briefing. I have not heard about a schedule.
▼ Sandy Fells/OCP/R8/USEPA/US

Sandy Fells/OCP/R8/USEPA/US

01/29/2009 03:58 PM

To: Carol Campbell/R8/USEPA/US@EPA

cc: Martin Hestmark/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA, Andy Lensink/ENF/R8/USEPA/US@EPA, Helen Dawson/EPR/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Steve Tuber/P2/R8/USEPA/US@EPA, Lawrence Grandison/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA

Subject: FYI -- Fw: Briefing on Libby for Administrator Jackson

Hi, Carol -- Anybody going back to DC in the next couple of weeks?

----- Forwarded by Sandy Fells/OCP/R8/USEPA/US on 01/29/2009 03:54 PM -----

Carolyn Levine/DC/USEPA/US

01/29/2009 03:12 PM

To: Amy Hayden/DC/USEPA/US@EPA, Sandy Fells/OCP/R8/USEPA/US@EPA, Randy Deitz/DC/USEPA/US@EPA, George Hull/DC/USEPA/US@EPA, Ellen Manges/DC/USEPA/US

cc:

Subject: Briefing on Libby for Administrator Jackson

While the Administrator's staff is still working on sorting out all the commitments made at the confirmation hearing, they did mention Libby as an issue that we should go ahead and start preparing for a briefing for the Administrator. There is no specific timing, but I would aim for the next 1-2 weeks. Can OSWER and R8 work together on briefing materials--- updated issue paper (there is at least one from the September Fed Facilities hearing), hearing testimony, etc. and Amy can coordinate for OCIR. Please give us an idea on suggested timing. Thanks!

Carolyn Levine
U.S. EPA/Office of Congressional Affairs
(202) 564-1859
FAX: (202) 501-1550

From: Sheila Kelly
To: Gilberto Irizarry
Cc: Jan Shubert; OSWER OEM POCD@EPA
Subject: Re: Fw: Just fyi.: News Release - Public Health Emergency in Libby, Montana
Date: 06/18/2009 09:32 AM

It was the lead story on CNN.com last night

▼ Re: Fw: Just fyi.: News Release - Public Health Emergency in Libby, Montana

Re: Fw: Just fyi.: News Release - Public Health Emergency in Libby, Montana

Gilberto Irizarry to: Jan Shubert 06/18/2009 08:17 AM

Cc: OSWER OEM POCD

Jan:

You should have a note from me of yesterday afternoon.

Gilberto "Tito" Irizarry
Program Operations & Coordination Division, Director
Office of Emergency Management
US Environmental Protection Agency, Headquarters
Tel: (202) 564-7982
Mobile: (b) (6)
Fax: (202) 564-8333

▼ Jan Shubert---06/18/2009 08:11:24 AM---In case you haven't heard -- interesting this came in through Region 7. Jan Jan Shubert, L.C.S.W. T

From: Jan Shubert/DC/USEPA/US
To: OSWER OEM POCD
Date: 06/18/2009 08:11 AM
Subject: Fw: Just fyi.: News Release - Public Health Emergency in Libby, Montana

---

In case you haven't heard -- interesting this came in through Region 7. Jan

Jan Shubert, L.C.S.W.

Team Leader, Emergency Response Peer Support Team
Program Operations & Coordination Division
Office of Emergency Management
Mailcode 5104A
U.S. EPA
1200 Pennsylvania Ave., NW
Washington, DC 20460
P: 202-564-2527 F: 202-564-8333 C: (b) (6)

----- Forwarded by Jan Shubert/DC/USEPA/US on 06/18/2009 08:10 AM -----

From: Kenneth Buchholz/R7/USEPA/US

To: Mary Peterson/SUPR/R7/USEPA/US@EPA, James Johnson/R7/USEPA/US@EPA, Adam Ruiz/R7/USEPA/US@EPA, Pamela Houston/R7/USEPA/US@EPA, Rickey Roberts/R7/USEPA/US@EPA, ferguson.doug@epa.gov, davis.joe@epa.gov, Roy Crossland/R7/USEPA/US@EPA, Todd Campbell/R7/USEPA/US@EPA, fisher.susan@epa.gov, mitchell.brian@epa.gov, tutorino.john@epa.gov, schademann.randy@epa.gov, kroone.janice@epa.gov, curry.timothy@epa.gov, Kevin Larson/SUPR/R7/USEPA/US@EPA, quick.michelle@epa.gov, Ronald King/SUPR/R7/USEPA/US@EPA, shubert.jan@epa.gov, mould.kevin@epa.gov, Jason Heitman/R7/USEPA/US@EPA, williams.dave@epa.gov, MichaelB Davis/R7/USEPA/US@EPA, drennen.michele@epa.gov, bernard-drakey.jamie@epa.gov, frey.john@epa.gov, hayes.scott@epa.gov, Katy Miley/SUPR/R7/USEPA/US@EPA, nold.eric@epa.gov, Jeffrey Weatherford/SUPR/R7/USEPA/US@EPA, lininger.don@epa.gov, Manuel Schmaedick/SUPR/R7/USEPA/US@EPA, smith.heath@epa.gov, doherty.paul@epa.gov, Teghtmeyer.Todd@epamail.epa.gov@EPA, Paul Roemerman/SUPR/R7/USEPA/US@EPA, Joe Ricard/R7/USEPA/US@EPA, silver.jim@epa.gov, Anna Baldwin/R7/USEPA/US@EPA, Megan Brunkhorst/R7/USEPA/US@EPA

Date: 06/17/2009 02:03 PM

Subject: Just fyi.: News Release - Public Health Emergency in Libby, Montana

---

----- Forwarded by Kenneth Buchholz/R7/USEPA/US on 06/17/2009 01:02 PM -----

David Bryan/R7/USEPA/US

06/17/2009 12:59 PM

To: David Bryan/R7/USEPA/US@EPA, Robertw Jackson/R7/USEPA/US@EPA, buchholz.kenneth@epa.gov, Mary Peterson/SUPR/R7/USEPA/US@EPA, Cecilia Tapia/R7/USEPA/US@EPA, Hattie Thomas/R7/USEPA/US@EPA, William Rice/RGAD/R7/USEPA/US@EPA, Beckie Himes/R7/USEPA/US@EPA, Belinda Young/R7/USEPA/US@EPA, Debbie Kring/R7/USEPA/US@EPA, Dianna Whitaker/R7/USEPA/US@EPA, Fritz Hirter/R7/USEPA/US@EPA, Hattie Thomas/R7/USEPA/US@EPA, Kris Lancaster/R7/USEPA/US@EPA, Rich Hood/R7/USEPA/US@EPA, Martin Kessler/R7/USEPA/US@EPA, Christopher Whitley/R7/USEPA/US@EPA, LaTonya Sanders/R7/USEPA/US@EPA, Janette Lambert/R7/USEPA/US@EPA, Sarah Hatch/R7/USEPA/US@EPA

cc

Subject: News Release - Public Health Emergency in Libby, Montana

EPA Announces Public Health Emergency in Libby, Montana EPA to Move Aggressively on Cleanup and HHS to Assist Area Residents with Medical Care

Release date: 06/17/2009

Contact Information: EPA Press Office-202-564-1692 HHS Press Office-202-690-6343

WASHINGTON – U.S. Environmental Protection Agency Administrator Lisa P. Jackson today announced the agency has determined that a public health emergency exists at the Libby asbestos site in northwest Montana. Over the past years, hundreds of asbestos-related disease cases have been documented in this small community, which covers the towns of Libby and Troy. The announcement was made today at a joint press conference with Department of Health and Human Services Secretary Kathleen Sebelius and U.S. Sens. Max Baucus and Jon Tester.

This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that conditions at a site constitute a public health emergency. This determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos. Investigations performed by the Agency for Toxic Substance and Disease Registry have found the incidence of occurrence of asbestosis, a lung condition, in the Libby area staggeringly higher than the national average for the period from 1979-1998. EPA is working closely with the Department of Health and Human Services, which is making available a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents.

During her Senate confirmation hearing, Administrator Jackson committed to review the situation at the Libby asbestos site based on current site information, sound science and EPA's legal authorities. As a result of her review, the Administrator has decided that conditions at the site present a significant threat to public health and that making a public health emergency determination is appropriate.

“This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long. We’re making a long-delayed commitment to the people of Libby and Troy. Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people,” said EPA Administrator Lisa P. Jackson. “We’re here to help create a long and prosperous future for this town.” She added, “Senator Max Baucus has been a tireless advocate for the people living in Libby and Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elected to the Senate to bring much needed support to these communities.”

“Senator Baucus and Senator Tester have powerfully brought the voices of the people of Libby and Troy to Washington so the nation could hear and understand what happened. They refused to give up on finding the best ways to help those who have suffered so much. Today’s announcement reflects our Administration’s concern for the residents of Lincoln County and our intention to act decisively to protect and improve their health and quality of life,’ said Secretary Sebelius. “The Department of Health and Human Services has been working closely with the EPA and the residents of Lincoln County for a number of years to conduct screenings and help provide access to care. Now, we have come together with Senator Baucus and Senator Tester, Administrator Jackson, and agencies across HHS, to offer a new grant to provide short-term medical assistance for screening, diagnostic and treatment services in a comprehensive and coordinated manner in partnership with local officials on the ground in Lincoln County. “

Sen. Max Baucus, a long-time advocate on this issue, consistently sought out a determination of a public health emergency in this region.

“This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day,” said Sen. Baucus. “Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need. Today is the day that after years of work we were able to succeed in getting this done. Yet, we won’t stop here. We will continue to push until Libby has a clean bill of health.”

“This is a long-overdue, common-sense decision that will go a long way for Libby and the thousands of folks who were poisoned there,” Sen. Tester said. “This decision will help make quality health care more accessible and it will open the door to get new resources on the ground. We still have a long way to do right by the folks in Libby. Working

together with the Department of Health and Human Services and the Environmental Protection Agency, we're making very good progress."

Secretary Sebelius tasked two HHS agencies – the Health Resources and Services Administration and the Centers for Disease Control and Prevention/Agency for Toxic Substances and Disease Registry – to help county residents. These two agencies will support a new grant to assist affected residents who need medical care. Local officials are currently putting together a grant proposal that will lay out options for provision of medical care that will work for the residents of Lincoln County. HHS anticipates that this grant can be awarded in August 2009.

The Libby asbestos site has been on the EPA's Superfund National Priorities List since 2002, and cleanup has taken place since 2000. EPA has made progress in helping to remove the threat of asbestos in the land and air, and with it, the increased risks of lung cancer, asbestosis, and other respiratory problems. While EPA's cleanup efforts have greatly reduced exposure, actual and potential releases of amphibole asbestos remain a significant threat to public health in that area.

The Libby asbestos site includes portions of the towns of Libby and Troy and an inactive vermiculite mine seven miles northeast of the town. Gold miners discovered vermiculite in Libby in 1881; in the 1920s the Zonolite Company formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990. It is estimated that the Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919 to 1990.

More information: http://www.epa.gov/libby

David W. Bryan, APR
Public Affairs Specialist
Office of Public Affairs
EPA Region 7
901 N. 5th Street
Kansas City, KS 66101
913.551.7433; Fax: 913.551.7066
bryan.david@epa.gov

From: Gilberto Irizarry
To: Jan Shubert
Cc: OSWER OEM POCD
Subject: Re: Fw: Just fyi.: News Release - Public Health Emergency in Libby, Montana
Date: 06/18/2009 08:17 AM

Jan:

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Gilberto "Tito" Irizarry
Program Operations & Coordination Division, Director
Office of Emergency Management
US Environmental Protection Agency, Headquarters
Tel: (202) 564-7982
Mobile: (b) (6)
Fax: (202) 564-8333

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Jan Shubert, L.C.S.W.
Team Leader, Emergency Response Peer Support Team
Program Operations & Coordination Division
Office of Emergency Management
Mailcode 5104A
U.S. EPA
1200 Pennsylvania Ave., NW
Washington, DC 20460
P: 202-564-2527 F: 202-564-8333 C: (b) (6)

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Roemerman/SUPR/R7/USEPA/US@EPA, Joe Ricard/R7/USEPA/US@EPA, silver.jim@epa.gov, Anna Baldwin/R7/USEPA/US@EPA, Megan Brunkhorst/R7/USEPA/US@EPA

Date: 06/17/2009 02:03 PM

Subject: Just fyi.: News Release - Public Health Emergency in Libby, Montana

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David Bryan/R7/USEPA/US

06/17/2009 12:59 PM

To: David Bryan/R7/USEPA/US@EPA, Robertw Jackson/R7/USEPA/US@EPA, buchholz.kenneth@epa.gov, Mary Peterson/SUPR/R7/USEPA/US@EPA, Cecilia Tapia/R7/USEPA/US@EPA, Hattie Thomas/R7/USEPA/US@EPA, William Rice/RGAD/R7/USEPA/US@EPA, Beckie Himes/R7/USEPA/US@EPA, Belinda Young/R7/USEPA/US@EPA, Debbie Kring/R7/USEPA/US@EPA, Dianna Whitaker/R7/USEPA/US@EPA, Fritz Hirter/R7/USEPA/US@EPA, Hattie Thomas/R7/USEPA/US@EPA, Kris Lancaster/R7/USEPA/US@EPA, Rich Hood/R7/USEPA/US@EPA, Martin Kessler/R7/USEPA/US@EPA, Christopher Whitley/R7/USEPA/US@EPA, LaTonya Sanders/R7/USEPA/US@EPA, Janette Lambert/R7/USEPA/US@EPA, Sarah Hatch/R7/USEPA/US@EPA

cc:

Subject: News Release - Public Health Emergency in Libby, Montana

EPA Announces Public Health Emergency in Libby, Montana EPA to Move Aggressively on Cleanup and HHS to Assist Area Residents with Medical Care

Release date: 06/17/2009

Contact Information: EPA Press Office-202-564-1692 HHS Press Office-202-690-6343

WASHINGTON – U.S. Environmental Protection Agency Administrator Lisa P. Jackson today announced the agency has determined that a public health emergency exists at the Libby asbestos site in northwest

Montana. Over the past years, hundreds of asbestos-related disease cases have been documented in this small community, which covers the towns of Libby and Troy. The announcement was made today at a joint press conference with Department of Health and Human Services Secretary Kathleen Sebelius and U.S. Sens. Max Baucus and Jon Tester.

This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that conditions at a site constitute a public health emergency. This determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos. Investigations performed by the Agency for Toxic Substance and Disease Registry have found the incidence of occurrence of asbestosis, a lung condition, in the Libby area staggeringly higher than the national average for the period from 1979-1998. EPA is working closely with the Department of Health and Human Services, which is making available a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents.

During her Senate confirmation hearing, Administrator Jackson committed to review the situation at the Libby asbestos site based on current site information, sound science and EPA's legal authorities. As a result of her review, the Administrator has decided that conditions at the site present a significant threat to public health and that making a public health emergency determination is appropriate.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long. We're making a long-delayed commitment to the people of Libby and Troy. Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," said EPA Administrator Lisa P. Jackson. "We're here to help create a long and prosperous future for this town." She added, "Senator Max Baucus has been a tireless advocate for the people living in Libby and Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elected to the Senate to bring much needed support to these communities."

"Senator Baucus and Senator Tester have powerfully brought the voices of the people of Libby and Troy to Washington so the nation could hear and understand what happened. They refused to give up on finding the best ways to help those who have suffered so much. Today's announcement reflects our Administration's concern for the residents of Lincoln County and our intention to act decisively to protect

and improve their health and quality of life,' said Secretary Sebelius. "The Department of Health and Human Services has been working closely with the EPA and the residents of Lincoln County for a number of years to conduct screenings and help provide access to care. Now, we have come together with Senator Baucus and Senator Tester, Administrator Jackson, and agencies across HHS, to offer a new grant to provide short-term medical assistance for screening, diagnostic and treatment services in a comprehensive and coordinated manner in partnership with local officials on the ground in Lincoln County. "

Sen. Max Baucus, a long-time advocate on this issue, consistently sought out a determination of a public health emergency in this region.

"This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day," said Sen. Baucus. "Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need. Today is the day that after years of work we were able to succeed in getting this done. Yet, we won't stop here. We will continue to push until Libby has a clean bill of health."

"This is a long-overdue, common-sense decision that will go a long way for Libby and the thousands of folks who were poisoned there," Sen. Tester said. "This decision will help make quality health care more accessible and it will open the door to get new resources on the ground. We still have a long way to do right by the folks in Libby. Working together with the Department of Health and Human Services and the Environmental Protection Agency, we're making very good progress."

Secretary Sebelius tasked two HHS agencies – the Health Resources and Services Administration and the Centers for Disease Control and Prevention/Agency for Toxic Substances and Disease Registry – to help county residents. These two agencies will support a new grant to assist affected residents who need medical care. Local officials are currently putting together a grant proposal that will lay out options for provision of medical care that will work for the residents of Lincoln County. HHS anticipates that this grant can be awarded in August 2009.

The Libby asbestos site has been on the EPA's Superfund National Priorities List since 2002, and cleanup has taken place since 2000. EPA has made progress in helping to remove the threat of asbestos in the land and air, and with it, the increased risks of lung cancer, asbestosis, and other respiratory problems. While EPA's cleanup efforts have greatly reduced exposure, actual and potential releases of amphibole asbestos remain a significant threat to public health in that area.

The Libby asbestos site includes portions of the towns of Libby and Troy and an inactive vermiculite mine seven miles northeast of the town. Gold miners discovered vermiculite in Libby in 1881; in the 1920s the Zonolite Company formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990. It is estimated that the Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919 to 1990.

More information: http://www.epa.gov/libby

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EPA Region 7
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From: Andy Lensink
To: Michael Boydston
Subject: Re: Fw: LIbby FOIA
Date: 08/17/2009 11:31 AM

Sure. I'm wide open this afternoon.

▼ Michael Boydston/R8/USEPA/US

Michael Boydston/R8/USEPA/US
08/17/2009 09:28 AM

To: Andy Lensink/R8/USEPA/US@EPA
cc:
Subject: Fw: LIbby FOIA

Andy -- Want to call Richard together to try to figure out where we are? I have some meetings this morning but could do it this afternoon.

Michael Boydston
Associate Regional Counsel
EPA Region 8
1595 Wynkoop St.
Denver CO 80202
303.312.7103

----- Forwarded by Michael Boydston/R8/USEPA/US on 08/17/2009 09:26 AM -----

Peter Ornstein/RC/R8/USEPA/US
08/17/2009 08:47 AM

To: Michael Boydston/R8/USEPA/US@EPA, Andy Lensink/R8/USEPA/US@EPA
cc:
Subject: Fw: LIbby FOIA

Do you guys think this narrows it at all?

****
Peter Ornstein, Deputy Regional Counsel
Office of Regional Counsel, EPA Region VIII
1595 Wynkoop Street [R8-ORC]
Denver, Colorado 80202-1129
303-312-6854 (fax: 303-312-6859)
ornstein.peter@epa.gov

----- Forwarded by Peter Ornstein/RC/R8/USEPA/US on 08/17/2009 08:48 AM -----

Richard Witt/DC/USEPA/US

To: Earl Salo/DC/USEPA/US@EPA, Jen

08/17/2009 08:44 AM

Lewis/DC/USEPA/US@EPA
cc Peter Ornstein/RC/R8/USEPA/US@EPA
Subject LIbby FOIA

The requester has further narrow the scope of the request to record related to the Libby PHE generated after January 20, 2009 that discuss "zonolite products or W.R. Grace Company." Could you take a look at your earlier estimates and let me know how, if at all, this would affect your assessment of the quantity of materials? Thanks.

From:	James Woolford
To:	Ellen Manges
Cc:	Amanda Halstead; Elizabeth Southerland; Ellyn Fine; Jennifer Wilbur; Meridith Sebring; Phyllis Anderson; Randy Deitz
Subject:	Re: Fw: Libby Fact Sheet - OGC
Date:	04/30/2009 05:20 PM

Thanks

When one looks at the "final" vs "final showing mark up" version in Word, there are some sentences that are missing words, etc. that need further editing. Ellen, can you relay this to OGC?

James E. Woolford, Director
Office of Superfund Remediation &
Technology Innovation (OSRTI)
Office of Solid Waste and Emergency Response
US Environmental Protection Agency

▼ Ellen Manges---04/30/2009 05:11:34 PM---It sounds like Libby facts sheets will be withheld from the Administrator's briefing book. However

From:	Ellen Manges/DC/USEPA/US
To:	Randy Deitz/DC/USEPA/US@EPA, Ellyn Fine/DC/USEPA/US@EPA, Jennifer Wilbur/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Phyllis Anderson/DC/USEPA/US@EPA, James Woolford/DC/USEPA/US@EPA
Cc:	Meridith Sebring/DC/USEPA/US@EPA, Amanda Halstead/DC/USEPA/US@EPA
Date:	04/30/2009 05:11 PM
Subject:	Fw: Libby Fact Sheet - OGC

It sounds like Libby facts sheets will be withheld from the Administrator's briefing book. However OCFO is still looking to finalize them - just in case.

I don't have a concern with any of OGC's comments.

Randy/Phyllis - Do you have a suggestion for addressing OGC's question on 104 (i) 1 E?

----- Forwarded by Ellen Manges/DC/USEPA/US on 04/30/2009 04:43 PM -----

From:	Meridith Sebring/DC/USEPA/US
To:	Ellen Manges/DC/USEPA/US@EPA
Date:	04/30/2009 09:28 AM
Subject:	Fw: Libby Fact Sheet - OGC

Hi Ellen,

Just wanted to run this by you. OGC provided comments to our Libby

fact sheet. Though, please note, these are still considered to be "pulled" until we hear otherwise. Give me a call if you have any questions.

Thanks!

~Meridith Sebring
OSWER Acquisition and Resources Management Staff
202-566-1909

----- Forwarded by Meridith Sebring/DC/USEPA/US on 04/30/2009 09:27 AM -----

From: LAURA RIPLEY/DC/USEPA/US
To: Glen Cuscino/DC/USEPA/US@EPA, Meridith Sebring/DC/USEPA/US@EPA
Date: 04/29/2009 07:21 PM
Subject: Fw: Libby Fact Sheet - OGC

I thought you should see OGC's comments. I'll try to take a crack at this but another set of eyes would be great.

Thanks,

Laura Ripley
Superfund Program Analyst, OCFO/OB
Trust Funds and Administration Analysis Staff
PH: 202-564-1582

----- Forwarded by LAURA RIPLEY/DC/USEPA/US on 04/29/2009 07:20 PM -----

From: Jacob Simmons/DC/USEPA/US
To: LAURA RIPLEY/DC/USEPA/US@EPA
Date: 04/29/2009 01:42 PM
Subject: Libby

Please see the attached Libby mark up below. The wallboard fact sheet is still outstanding.

[attachment "OGC Markup of Libby Factsheet.doc" deleted by James Woolford/DC/USEPA/US]

"May you always have in your arms the one who is in your heart."

Jacob D. Simmons, DBA
Resource Management Office, SBO
Office of General Counsel
Environmental Protection Agency
Ariel Rios North, RM 4312A
Office: 202-564-5187
Fax: 202-564-1773

▼ LAURA RIPLEY---04/29/2009 12:18:34 PM---Jacob: Thank you for providing me with an update. If you think you will pull it all together by tom

From: LAURA RIPLEY/DC/USEPA/US
To: Jacob Simmons/DC/USEPA/US@EPA
Date: 04/29/2009 12:18 PM
Subject: Re: OSWER Fact Sheets for your review

Jacob:

Thank you for providing me with an update. If you think you will pull it all together by tomorrow I think we will be okay. All the fact sheets should be final in the database on Friday. Although we have been told that there is a hold by OCIR on the Libby Fact Sheets, but we are trying to get those ready and reviewed by one and all so they are ready to go.

Laura Ripley
Superfund Program Analyst, OCFO/OB
Trust Funds and Administration Analysis Staff
PH: 202-564-1582

▼ Jacob Simmons---04/29/2009 11:49:14 AM---Laura, I have received some comments from the law offices but I am waiting on word from a few others

From: Jacob Simmons/DC/USEPA/US
To: LAURA RIPLEY/DC/USEPA/US@EPA
Date: 04/29/2009 11:49 AM
Subject: Re: OSWER Fact Sheets for your review

Laura, I have received some comments from the law offices but I am waiting on word from a few others. Would you like to have what is currently in my position?

"May you always have in your arms the one who is in your heart."

Jacob D. Simmons, DBA
Resource Management Office, SBO
Office of General Counsel
Environmental Protection Agency
Ariel Rios North, RM 4312A
Office: 202-564-5187
Fax: 202-564-1773

▼ LAURA RIPLEY---04/27/2009 04:41:17 PM---Jacob: OSWER has prepared these fact sheets for the Administrator's book and hearings. Would you pl

From: LAURA RIPLEY/DC/USEPA/US
To: Jacob Simmons/DC/USEPA/US@EPA
Cc: Mary Schollhamer/DC/USEPA/US@EPA, Glen Cuscino/DC/USEPA/US@EPA
Date: 04/27/2009 04:41 PM
Subject: OSWER Fact Sheets for your review

Jacob:

OSWER has prepared these fact sheets for the Administrator's book and hearings. Would you please let us know if OGC is okay with them as they are?

[attachment "chinese_wallboard.doc" deleted by Jacob Simmons/DC/USEPA/US]

[attachment "R-8 Libby PHE Rev1.doc" deleted by Jacob Simmons/DC/USEPA/US]

Thank you.

Laura Ripley
Superfund Program Analyst, OCFO/OB
Trust Funds and Administration Analysis Staff
PH: 202-564-1582

From: Carol Campbell
To: Mike Gaydosh
Subject: Re: Fw: Libby coverage
Date: 06/18/2009 10:50 AM

---

nope
Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

▼ Mike Gaydosh/R8/USEPA/US

Mike Gaydosh/R8/USEPA/US

06/18/2009 08:37 AM

To: Carol Campbell/R8/USEPA/US@EPA
cc: Sandy Fells/OCP/R8/USEPA/US@EPA, Wendy Dew/OCP/R8/USEPA/US@EPA
Subject: Re: Fw: Libby coverage

I saw an approx. 3 minute segment on the NBC nightly news last night. Did anybody see anything on ABC or CBS?

Andrew Michael Gaydosh
Acting Deputy Regional Administrator
USEPA Region VIII
(303)312-6773
gaydosh.mike@epa.gov

▼ Carol Campbell/R8/USEPA/US

Carol Campbell/R8/USEPA/US

06/18/2009 08:19 AM

To: Rushin.Carol@epamail.epa.gov, Gaydosh.Mike@epamail.epa.gov
cc: Leclerc.Russell@epamail.epa.gov, Murray.Bill@epamail.epa.gov, Elisabeth Evans, Dawson.Helen@epamail.epa.gov, Ketellapper.Victor@epamail.epa.gov
Subject: Fw: Libby coverage

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

----- Forwarded by Carol Campbell/R8/USEPA/US on 06/18/2009 08:17 AM -----

Adora Andy/DC/USEPA/US

06/17/2009 04:53 PM

To "Michael Moats" <Moats.Michael@epamail.epa.gov>, "Allyn Brooks-LaSure" <brooks-lasure.allyn@epa.gov>, "Seth Oster" <oster.seth@epa.gov>, Manges.Ellen@epamail.epa.gov, Southerland.Elizabeth@epamail.epa.gov, "Mary-Kay Lynch" <Lynch.Mary-Kay@epamail.epa.gov>, "Bob Sussman" <sussman.bob@epa.gov>, "Mathy Stanislaus" <Stanislaus.Mathy@epamail.epa.gov>, "Arvin Ganesan" <ganesan.arvin@epa.gov>, campbell.carol@epa.gov, "Betsy Shaw" <Shaw.Betsy@epamail.epa.gov>, thompson.diane@epa.gov, "Richard Mylott" <Mylott.Richard@epamail.epa.gov>, "Enesta Jones" <Jones.Enesta@epamail.epa.gov>, "Roxanne Smith" <Smith.Roxanne@epamail.epa.gov>

cc

Subject Libby coverage

Please see below.

▼ Brendan Gilfillan

----- Original Message -----
From: Brendan Gilfillan
Sent: 06/17/2009 06:17 PM EDT
To: Adora Andy
Subject: coverage

EPA declares public health emergency in Montana town ravaged by asbestos

By MATTHEW DALY , Associated Press

WASHINGTON - The Obama administration said Wednesday it will pump an additional $130 million into a Montana town where asbestos contamination has been blamed for more than 200 deaths.

EPA Administrator Lisa Jackson said the agency for the first time has determined there is a public health emergency in a contaminated community, targeting Libby, Mont., for immediate federal attention.

Jackson's announcement will not result in an evacuation of Libby's 2,600 residents, but will require an extensive, home-by-home cleanup and better health protections for those with asbestos-related illnesses.

The EPA will invest at least $125 million over the next five years in the ongoing clean up. The Health and Human Services Department will spend an additional $6 million on medical assistance for residents suffering from asbestos-related illnesses.

The money is in addition to hundreds of millions of dollars the government and Maryland-based W.R. Grace & Co. have spent to clean up Libby, where asbestos contamination from a now-closed vermiculite mine has been cited in the deaths of more than 200 people and illnesses of thousands more.

Before the vermiculite mine was closed in 1990, miners carried asbestos home on their clothes. Vermiculite once covered school running tracks in Libby and some residents used vermiculite as mulch in their home gardens.

Jackson called Libby a "tragic public health situation" that has not received the recognition it deserves from the federal government for far too long.

"Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," said Jackson. "We're here to help create a long and prosperous future for this town."

Jackson said the announcement was the first time the EPA has made such a determination under authority of the 1980 Superfund law that requires the clean up of contaminated sites.

Sen. Max Baucus, D-Mont., called the emergency declaration a great day for Libby, which he said "had to wait year after year as the last administration failed to determine that a public health emergency exists."

The EPA had previously declared the area a Superfund site, but had not determined there was a public health emergency until Wednesday.

Last fall, Baucus accused the Bush administration of orchestrating a "conspiracy" for not declaring an emergency in Libby. He charged that former EPA Administrator Christine Todd Whitman was prepared to declare an emergency in 2002 but was overruled by the Bush White House.

Baucus called the health announcement especially welcome, given what he called a disappointing verdict last month in a criminal case related to the asbestos contamination. W.R. Grace & Co. and three former executives were acquitted of federal charges that they knowingly allowed residents of the northwestern Montana town to be exposed to asbestos from its vermiculite mine.

A Grace spokesman did not return a telephone call Wednesday. The company has not denied that asbestos came from its mine, but has said it acted responsibly to clean up the contamination. It paid millions in medical bills for residents of Libby and agreed last year to pay $250 million to reimburse the EPA for cleanup efforts.

Sen. Jon Tester, D-Mont., called the emergency declaration long-overdue.

"We still have a long way to do right by the folks in Libby. Working together with the Department of Health and Human Services and the Environmental Protection Agency, we're making very good progress," Tester said.

Gayla Benefield of Libby, who suffers health effects from asbestos exposure and lost both parents to asbestos-related lung diseases, called the declaration a "a giant step forward" for improved medical care and clean up of the town.

"Right now the amount of money is relatively minimal, but overall the biggest thing is that it opens the door for future money to be available for medical care, research — the things we've needed, independent of W.R. Grace in terms of health care," she said.

Montana Gov. Brian Schweitzer hailed the declaration and said the

designated funds will be used to make communities in northwestern Montana healthier.

EPA calls health emergency in Mont. mine town
USA Today
In the first such action of its kind, the Environmental Protection Agency has declared a public health emergency in the asbestos-contaminated town of Libby, Mont.

The declaration, by EPA Administrator Lisa Jackson, comes a month after W.R. Grace & Co. and three former executives were acquitted of federal criminal charges that they knowingly allowed Libby residents to be exposed to cancer-causing asbestos from its now-closed vermiculite mine. (The *Missoulian* has an archive of trial coverage.)

Asbestos has been cited in the deaths of more than 200 people and the illness of thousands more.

Under today's action, Libby will not be evacuated, the Associated Press writes. The EPA will spend $125 million during the next five years to conduct house-by-house cleanups and improve health protections for residents with asbestos-related illnesses.

Here's some of what the EPA said in its announcement:

> This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that conditions at a site constitute a public health emergency. This determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos. Investigations performed by the Agency for Toxic Substance and Disease Registry have found the incidence of occurrence of asbestosis, a lung condition, in the Libby area staggeringly higher than the national average for the period from 1979-1998. EPA is working closely with the Department of Health and Human Services, which is making available a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents.

Read the complete EPA news release here.

Grace, based in Columbia, Md., declared bankruptcy in 2001. At the time, it

had been named in 110,000 asbestos-related lawsuits.
In April, Grace agreed to a $3 billion settlement to pay outstanding claims, allowing the company to exit bankruptcy with no more asbestos liability.

Asbestos cleanup 'emergency' declared in Montana town

A Montana town where asbestos contamination has been blamed for more than 200 deaths will get new cleanup and medical assistance from the Obama administration under a "public health emergency" declared Wednesday. The declaration is the first ever issued by the Environmental Protection Agency, which has been overseeing the cleanup of Libby, Montana, for 10 years.

The town was heavily contaminated with asbestos-laced dust that federal prosecutors said resulted in more than 200 deaths and 1,000 illnesses.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long," EPA Administrator Lisa Jackson said in a statement accompanying the declaration.

In May, a federal jury acquitted mine operator W.R. Grace and three of its former executives of criminal charges related to the contamination. During Jackson's confirmation hearing in January, Montana Sen. Max Baucus said the town's 12,000 residents had been "hung out to dry" and pressed Jackson to review the issue.

The Libby operation began producing vermiculite -- a mineral often used in insulation -- in 1919. But the vermiculite was contaminated with tremolite asbestos, a particularly toxic form of asbestos that has been linked to mesothelioma, a cancer that can attack the lining of the lungs, abdomen, or heart.Dust from the plant covered patches of grass, dusted the tops of cars and drifted through the air in a hazy cloud that became a part of residents' daily lives.

Grace operated the facility from 1963 until it closed in 1990. During the company's three-month trial, prosecutors argued that its executives knowingly released the substance and tried to hide the danger from the community.

The company did not deny that the asbestos came from its mine, but it said it acted responsibly to clean up the contamination. It paid millions in medical bills for residents of Libby and neighboring Troy, and agreed in 2008 to pay $250 million to reimburse the EPA for its cleanup efforts.

EPA Declares Libby a Public Health Emergency

Flathead Beacon (Western Montana)

The Environmental Protection Agency on Wednesday declared the asbestos contamination in Libby a public health emergency, the first time the EPA has made such a designation since the Superfund law was passed in 1980.

The declaration will result in renewed and extensive contamination cleanup, along with enhanced medical care to treat asbestos-related illness in Libby and Troy, EPA Administrator Lisa Jackson said. A public meeting in Libby scheduled for June 22 with EPA officials will offer more details on the breadth of the services to be offered.

“For years, Libby and Troy residents have been at higher risk for lung cancer,” Jackson said. “We determined that we needed to step up our efforts to help.”

Jackson made the announcement at a Washington D.C. press conference joined by Montana Sens. Max Baucus and Jon Tester, as well as Health and Human Services Secretary Kathleen Sebelius.

“This is a truly historic day,” Baucus said, “The U.S. government is doing what’s right for people who have been oppressed for so long.”

“I cannot emphasize too strongly just what a tragedy the situation is in Libby,” Baucus added. “It’s also a reminder – a reminder of how much more we have to do.”

Libby’s vermiculite mine, purchased in W.R. Grace & Co. in 1963 has resulted in one of the worst public health disasters in U.S. history, resulting in roughly 200 deaths and 2,000 sickened from asbestos-related diseases caused by the tremolite asbestos in the ore. Not only were the miners sickened or killed, but their families and even members of the community who did not work in the Grace mine fell victim to the contamination. The EPA declared Libby a Superfund site in 2002.

Sebelius praised the work the federal government has previously undertaken to aid Libby residents, including the establishment of the Center for Asbestos Related Disease, or CARD Clinic in Libby. The HHS department also plans to begin an $8-million, 8-year epidemiology study in Libby this year, though funding for that grant was established last year and not related to the new declaration. But she said more is needed.

“Despite the past work, it simply was not enough,” Sebelius said. “We can no longer turn a blind eye.”

Baucus secured a $6 million grant last month, for the Lincoln County Health Department and other health agencies providing medical aid to asbestos victims. In Wednesday’s news conference, he called the grant “a good start,” but he and Jackson declined to give specifics on what the further costs of the emergency declaration might be, saying that the unique nature of tremolite asbestos, and how the human body reacts to such

contamination, still requires a great deal of study. Jackson added that she did not believe additional cleanup acts outside of the Troy and Libby area are currently necessary.

In a later conference call with Montana reporters, an EPA official speaking on background said the emergency declaration gives agency workers conducting asbestos cleanups in the homes of Libby and Troy residents a firmer legal standing to carry out removals of vermiculite insulation.

In May, a U.S. District Court jury in Missoula acquitted W.R. Grace & Co. and three former executives on charges that they knowingly exposed Libby residents to tremolite asbestos and then covered it up to continue making profits and avoid liability. Earlier this week, federal prosecutors moved to dismiss charges against the final Grace defendant in the case. Baucus said he disagreed with the outcome of the case.

“The company, W.R. Grace, in my opinion, knew what it was doing,” Baucus said. “This declaration is the beginning of what needed to be done.”

Under the administration of President George W. Bush, Baucus continually did battle with the EPA over Libby, and charged in a September 2008 report that the agency had conspired with the national Office of Management and Budget to block the declaration of a public health emergency in Libby due to the costs.

During Jackson’s confirmation hearing earlier this year, Baucus pressed her to declare a public health emergency in Libby.

Tester characterized Libby as a small town of hard-working people who played by the rules, but no community could bear the strain on its own of such an enormous environmental disaster: “The system let Libby down,” Tester said. “The people of Libby want their future back.”

“This is a long overdue, common-sense decision,” he added. “We still have a long way to go to do the right thing for the people of Libby.”

Libby declared public health emergency
By Brad Fuqua, The Western News
Called a “truly historic day for the people of Libby” by U.S. Sen. Max Baucus, the Environmental Protection Agency on Wednesday announced that a public health emergency has been declared in the asbestos-affected area of Libby and Troy.

“This is the first time in American history that we’ve had this declaration and I cannot think of a more appropriate time and place,” Baucus said.

EPA administrator Lisa Jackson announced the move during a press conference in Washington. She said the public health emergency would involve a re-evaluation of the situation on the ground.

“This declaration serves as a reminder of mismanagement of handling

hazardous materials," Jackson said. "While EPA has been conducting cleanup in Libby for several years, we are re-committing to getting the job done right."

Baucus, a longtime advocate on the issue, worked on the public health emergency declaration for years.

"This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day," he said.

The Libby asbestos site includes portions of the towns of Libby and Troy and inactive vermiculite mine seven miles northeast of the town. Gold miners discovered vermiculite in Libby in 1881. In the 1920s, the Zonolite Co., formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990.

It is estimated that the Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919-90.

U.S. Health and Human Services Secretary Kathleen Sebelius and U.S. Sen. Jon Tester of Montana were also on hand at the press conference.

"Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need," Baucus said. "Today is the day that after years of work we were able to succeed in getting this done. Yet, we won't stop here. We will continue to push until Libby has a clean bill of health."

For stories on the declaration of a public health emergency in Libby, see Friday's edition of The Western News or check back at this website on Thursday.

EPA declares public health emergency in Libby

KTVQ (CBS Montana)

U.S. Environmental Protection Agency Administrator Lisa P. Jackson has

announced that the agency has determined that a public health emergency exists at the Libby asbestos site.

Hundreds of cases asbestos-related disease have been documented in the area which covers Libby and Troy.

Jackson made the announcement Wednesday morning during a joint press conference with Department of Health and Human Services Secretary Kathleen Sebelius and U.S. Senators Max Baucus and Jon Tester.

This marks the first time that the EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), that conditions at a site constitute a public health emergency.

According to the EPA, the "determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos".

Investigations performed in the area have found that the occurrence of asbestosis in the Libby area are "staggeringly higher than the national average for the period from 1979-1998" according to the EPA.

The agency says they will be working closely with the Department of Health and Human Services, which has been making a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents available.

During her Senate confirmation hearing, Jackson committed to review the situation at the Libby asbestos site and following the review, she decided that conditions at the site present a significant threat to public health and that making a public health emergency determination is appropriate.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long. We're making a long-delayed commitment to the people of Libby and Troy. Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," said Jackson.

"We're here to help create a long and prosperous future for this town." She added, "Senator Max Baucus has been a tireless advocate for the people living in Libby and Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elected to the Senate to bring much needed support to these communities."

Baucus has been a long-time advocate on this issue and has consistently sought out a determination of a public health emergency in this region.

"This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day," Baucus stated. "Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need. Today is the day that after years of work we were able to succeed in getting this done. Yet, we won't stop here. We will continue to push until Libby has a clean bill of health."

Tester added that "this is a long-overdue, common-sense decision that will go a long way for Libby and the thousands of folks who were poisoned there. This decision will help make quality health care more accessible and it will open the door to get new resources on the ground".

The Libby asbestos site has been on the EPA's Superfund National Priorities List since 2002, and cleanup has taken place there since 2000. While the EPA has made progress in helping to remove the threat of asbestos in the land and air the potential release of asbestos remains "a significant threat to public health in that area" according to the EPA.

The Libby asbestos site includes portions of the towns of Libby and Troy and an inactive vermiculite mine seven miles northeast of the town. Gold miners discovered vermiculite in Libby in 1881; in the 1920s the Zonolite Company formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990.

From: Charles Openchowski
To: Michael Boydston
Cc: Earl Salo; Peter Ornstein
Subject: Re: Fw: Libby info
Date: 04/24/2009 01:01 PM

---

sure, no problem --

▼ Michael Boydston---04/24/2009 12:21:35 PM---Earl and Charles -- Pete's in a meeting that's running long. Can we call you both at 1:30 your time

From: Michael Boydston/R8/USEPA/US
To: Charles Openchowski/DC/USEPA/US@EPA, Earl Salo/DC/USEPA/US@EPA
Cc: Peter Ornstein/RC/R8/USEPA/US@EPA
Date: 04/24/2009 12:21 PM
Subject: Re: Fw: Libby info

Earl and Charles --

Pete's in a meeting that's running long. Can we call you both at 1:30 your time?

Michael Boydston
Associate Regional Counsel
EPA Region 8
1595 Wynkoop St.
Denver CO 80202
303.312.7103

From: Sonya Pennock
To: Ted Linnert
Subject: Re: Fw: Missoulian: Health emergency declared in Libby - More aid expected after 'historic' announcement
Date: 06/23/2009 12:20 PM

What a nice email! Well deserved too.

Sonya Pennock
Office of Communications & Public Involvement
US/EPA Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Phone: 303-312-6600

▼ Ted Linnert/OCP/R8/USEPA/US

Ted Linnert/OCP/R8/USEPA/US

06/23/2009 10:01 AM

To: Sonya Pennock/OCP/R8/USEPA/US@EPA
cc:
Subject: Fw: Missoulian: Health emergency declared in Libby - More aid expected after 'historic' announcement

I'm not even one of his constituents!

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
Denver, CO 80202-1129

(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

----- Forwarded by Ted Linnert/OCP/R8/USEPA/US on 06/23/2009 10:01 AM -----

"Mike Stiehl" <mstiehl@(b) (6) [redacted]

06/18/2009 07:11 PM

Please respond to
"Mike Stiehl" <mstiehl@(b) (6) [redacted]

To: Ted Linnert/OCP/R8/USEPA/US@EPA
cc: John Dalton/OCP/R8/USEPA/US@EPA
Subject: Missoulian: Health emergency declared in Libby - More aid expected after 'historic' announcement

Every Luminary possible is taking credit for this Health Emergency decision.
http://www.missoulian.com/articles/2009/06/18/news/local/news02.txt
Montana Senators, Director Jackson and the Administration are all celebrating this first ever Declaration of Health Emergency. With the attendant funding.

BUT, these Luminaries don't acknowledge Ted Linnert, who has been on the ground, suffering the slings and arrows of Public Discontent, and who has given his Heart and Soul to Libby. So much of what you do is done behind the scenes, making the case for Libby.

Ted, thank you for your dedication to the lives of our People and our Planet. You have focused on the details that can help, and you dove right into the trenches. By my book, you are a huge success.

I think the EPA should honor you as Employee of the Year and name a building after you!

Mike Stiehl
County Commissioner Chairman,
Fremont County
Canon City, CO
(719) 276-7301
Home of the Lincoln Park/ Cotter Superfund site

P.S. Please forward as you please.

From: Michael Boydston
To: Wendy OBrien
Cc: lensink.andy@epa.gov
Subject: Re: Fw: PHE supporting documentation
Date: 06/10/2009 04:52 PM

No problem! Thanks for all the great work.

Michael Boydston
Associate Regional Counsel
EPA Region 8
1595 Wynkoop St.
Denver CO 80202
303.312.7103

▼ Wendy OBrien/EPR/R8/USEPA/US

Wendy OBrien/EPR/R8/USEPA/US

06/10/2009 02:17 PM

To boydston.michael@epa.gov
cc lensink.andy@epa.gov
Subject Fw: PHE supporting documentation

here you go! I sent it to andy and carol yesterday, as per andy's instruction. sorry that i did not include you in that as well....

Wendy Pott O'Brien, DVM, PhD
Toxicologist, Ecosystems Protection and Remediation
U.S. EPA Region 8 (8EPR-PS)
1595 Wynkoop Street
Denver, CO 80202 1129

Telephone: (303) 312-6712
FAX: (303) 312-7151

"How long a useful truth may be known and exist before it is generally receiv'd and practis'd on." Ben Franklin

-----Forwarded by Wendy OBrien/EPR/R8/USEPA/US on 06/10/2009 02:15PM -----

To: Andy Lensink/R8/USEPA/US@EPA
From: Wendy OBrien/EPR/R8/USEPA/US
Date: 06/09/2009 05:37PM
cc: Carol Campbell/R8/USEPA/US@EPA
Subject: PHE supporting documentation

Hi Andy,

Here is the specific information requested for the PHE (my additions are in blue text). Please feel free to call me if you have any questions or need further information.

wo

Wendy Pott O'Brien, DVM, PhD
Toxicologist, Ecosystems Protection and Remediation
U.S. EPA Region 8 (8EPR-PS)
1595 Wynkoop Street
Denver, CO 80202 1129

Telephone: (303) 312-6712
FAX: (303) 312-7151

"How long a useful truth may be known and exist before it is generally receiv'd and practis'd on." Ben Franklin

[attachment "Libby PHE 060509.record support.(wo 6-9-09)doc.doc" deleted by Michael Boydston/R8/USEPA/US]

From: Michael Boydston
To: Andy Lensink
Subject: Re: Fw: PHE supporting documentation
Date: 06/10/2009 04:53 PM

No worries. (And, excellent simile!)

Michael Boydston
Associate Regional Counsel
EPA Region 8
1595 Wynkoop St.
Denver CO 80202
303.312.7103
▼ Andy Lensink/R8/USEPA/US

Andy Lensink/R8/USEPA/US
06/10/2009 02:15 PM

To: Michael Boydston/R8/USEPA/US@EPA
cc:
Subject: Fw: PHE supporting documentation

Thought I'd sent this to to you but keeping track is like trying to build a house of cards in a hurricane . . .

----- Forwarded by Andy Lensink/R8/USEPA/US on 06/10/2009 02:14 PM -----

Wendy OBrien/EPR/R8/USEPA/US
06/09/2009 05:37 PM

To: Andy Lensink/R8/USEPA/US@EPA
cc: Carol Campbell/R8/USEPA/US@EPA
Subject: PHE supporting documentation

Hi Andy,

Here is the specific information requested for the PHE (my additions are in blue text). Please feel free to call me if you have any questions or need further information.

wo

[attachment "Libby PHE 060509.record support.(wo 6-9-09)doc.doc" deleted by Michael Boydston/R8/USEPA/US]

Wendy Pott O'Brien, DVM, PhD
Toxicologist, Ecosystems Protection and Remediation
U.S. EPA Region 8 (8EPR-PS)
1595 Wynkoop Street

Denver, CO 80202 1129

Telephone: (303) 312-6712
FAX: (303) 312-7151

"How long a useful truth may be known and exist before it is generally receiv'd and practis'd on." Ben Franklin

From: John Michaud
To: Earl Salo
Cc: Charles Openchowski; Lee Tyner; Sheryl Mason
Subject: Re: Fw: PHE supporting documentation
Date: 06/10/2009 10:58 AM

Let's meet in Mary Kay's SWERLO office.

Sheryl -- Can you unlock Mary Kay's office for us?

Thanks.

John R. Michaud
Assistant General Counsel for RCRA
Solid Waste and Emergency Response Law Office
Office of General Counsel
U.S. EPA, Washington, D.C.
Mail Code: 2366A
tel: 202-564-5518
fax: 202-564-5531
email: michaud.john@epa.gov

▼ Earl Salo---06/10/2009 10:57:12 AM---yes Earl Salo

From: Earl Salo/DC/USEPA/US
To: Lee Tyner/DC/USEPA/US@EPA
Cc: Charles Openchowski/DC/USEPA/US@EPA, John Michaud/DC/USEPA/US@EPA
Date: 06/10/2009 10:57 AM
Subject: Re: Fw: PHE supporting documentation

---

yes

Earl Salo
Assistant General Counsel for Superfund
Solid Waste and Emergency Response Law Office
Office of General Counsel (2366A)
USEPA
1200 Pennsylvania Ave., N.W.
Washington D.C. 20460
202-564-5504 Fax 202-564-5531

▼ Lee Tyner---06/10/2009 10:52:13 AM---yes

From: Lee Tyner/DC/USEPA/US
To: John Michaud/DC/USEPA/US@EPA
Cc: Charles Openchowski/DC/USEPA/US@EPA, Earl Salo/DC/USEPA/US@EPA
Date: 06/10/2009 10:52 AM
Subject: Re: Fw: PHE supporting documentation

---

yes

▼ John Michaud---06/10/2009 10:51:29 AM---Do you folks have a few minutes to meet now to divide up the source-checking exercise? John R. Mich

From: John Michaud/DC/USEPA/US
To: Lee Tyner/DC/USEPA/US@EPA, Charles Openchowski/DC/USEPA/US@EPA, Earl Salo/DC/USEPA/US@EPA
Date: 06/10/2009 10:51 AM
Subject: Fw: PHE supporting documentation

Do you folks have a few minutes to meet now to divide up the source-checking exercise?

John R. Michaud
Assistant General Counsel for RCRA
Solid Waste and Emergency Response Law Office
Office of General Counsel
U.S. EPA, Washington, D.C.
Mail Code: 2366A
tel: 202-564-5518
fax: 202-564-5531
email: michaud.john@epa.gov

----- Forwarded by John Michaud/DC/USEPA/US on 06/10/2009 10:50 AM -----

From: Andy Lensink/R8/USEPA/US
To: John Michaud/DC/USEPA/US@EPA, Lee Tyner/DC/USEPA/US@EPA, Charles Openchowski/DC/USEPA/US@EPA
Date: 06/10/2009 10:26 AM
Subject: Fw: PHE supporting documentation

PHE document with support.

----- Forwarded by Andy Lensink/R8/USEPA/US on 06/10/2009 08:26 AM -----

Wendy OBrien/EPR/R8/USEPA/US

06/09/2009 05:37 PM

To Andy Lensink/R8/USEPA/US@EPA
cc Carol Campbell/R8/USEPA/US@EPA
Subject PHE supporting documentation

Hi Andy,

Here is the specific information requested for the PHE (my additions are in blue text). Please feel free to call me if you have any questions or need further information.

wo

[attachment "Libby PHE 060509.record support.(wo 6-9-09)doc.doc" deleted by Earl Salo/DC/USEPA/US]

Wendy Pott O'Brien, DVM, PhD
Toxicologist, Ecosystems Protection and Remediation
U.S. EPA Region 8 (8EPR-PS)
1595 Wynkoop Street
Denver, CO 80202 1129

Telephone: (303) 312-6712
FAX: (303) 312-7151

"How long a useful truth may be known and exist before it is generally receiv'd and practis'd on." Ben Franklin

From: Wendy OBrien
To: Michael Boydston
Subject: Re: Fw: PHE supporting documentation
Date: 06/10/2009 04:54 PM

---

happy to help.
wo

Wendy Pott O'Brien, DVM, PhD
Toxicologist, Ecosystems Protection and Remediation
U.S. EPA Region 8 (8EPR-PS)
1595 Wynkoop Street
Denver, CO 80202 1129

Telephone: (303) 312-6712
FAX: (303) 312-7151

"How long a useful truth may be known and exist before it is generally receiv'd and practis'd on." Ben Franklin

From:	James Woolford
To:	Gilberto Irizarry
Cc:	Elizabeth Southerland; Ellen Manges; Phyllis Anderson; Doug Ammon; Carol Campbell
Subject:	Re: Fw: Signed Libby Action Memo
Date:	06/17/2009 01:23 PM
Attachments:	img-617131326-0001.pdf

Thanks

James E. Woolford, Director
Office of Superfund Remediation &
Technology Innovation (OSRTI)
Office of Solid Waste and Emergency Response
US Environmental Protection Agency

▼ Gilberto Irizarry---06/17/2009 01:21:32 PM---Jim and Betsy: FYI Gilberto "Tito" Irizarry

From:	Gilberto Irizarry/DC/USEPA/US
To:	James Woolford/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA
Cc:	Ellen Manges/DC/USEPA/US@EPA
Date:	06/17/2009 01:21 PM
Subject:	Fw: Signed Libby Action Memo

Jim and Betsy:

FYI

Gilberto "Tito" Irizarry
Program Operations & Coordination Division, Director
Office of Emergency Management
US Environmental Protection Agency, Headquarters
Tel: (202) 564-7982
Mobile: (b) (6)
Fax: (202) 564-8333

----- Forwarded by Gilberto Irizarry/DC/USEPA/US on 06/17/2009 01:20 PM -----

Signed Libby Action Memo

Gilberto Irizarry to: Andy Lensink, Ellen Manges, John Michaud 06/17/2009 01:20 PM

Folks:

Attached is the signed Libby AM.

Though Barry's signature/approval includes the date, the AM needs a date stamped in the front page. We were unable to locate a date stamper here.

Thanks,

Gilberto "Tito" Irizarry
Program Operations & Coordination Division, Director
Office of Emergency Management
US Environmental Protection Agency, Headquarters
Tel: (202) 564-7982
Mobile: (b) (6)
Fax: (202) 564-8333

img-617131326-0001.pdf

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
http://www.epa.gov/region08

Ref: EPR-SR

ACTION MEMORANDUM AMENDMENT

SUBJECT: Action Memorandum Amendment Request: Approval of a Ceiling Increase for the Time-Critical Removal Action at the Libby Asbestos Site - Libby, Lincoln County, Montana

FROM: Carol Rushin
Acting Regional Administrator

THROUGH: James E. Woolford, Director
Office of Superfund Remediation and Technology Innovation

Deborah Y. Dietrich, Director
Office of Emergency Management

TO: Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

Re: Site ID#: BC
Category of Removal: Time-Critical, NPL, EPA Fund-Lead

I. INTRODUCTION

A. Purpose of this Amendment

The purpose of this Action Memorandum Amendment is to request and document your approval of a ceiling increase for the Libby Asbestos Site (Site or Libby) in Lincoln County, Montana. In addition, the actions covered by this Amendment will help address the contamination that resulted in EPA Administrator Lisa P. Jackson's Determination and Findings of Public Health Emergency at the Libby Site pursuant to CERCLA Section 104(a)(4). (See Attachment 1)

B. Summary of Action Memorandum Amendment

The initial Action Memorandum was signed May 23, 2000 and supported the initiation of the removal activity in Libby, Montana. This was followed by amendments in July, 2001; May,

2002; May, 2006; and June, 2006. These amendments raised the cost ceiling or expanded the scope of the cleanup. The most recent Action Memorandum Amendment signed September 24, 2008 addressed asbestos contamination in certain creeks in Libby. The currently proposed amendment will cover the site-wide ongoing commercial, public, and residential cleanups in Libby, as well as in the nearby Troy, Montana area. Note that an additional Amendment is being considered for later in 2009 that would address a particularly large cleanup within the Libby Site, the Cabinet View Country Club (CVCC) Golf Course.

II. SITE CONDITIONS AND BACKGROUND

A. Site Description

Vermiculite mining operations conducted in Libby, Montana between the 1920s and 1990 produced asbestos-contaminated vermiculite. The Libby mine produced up to 80% of the world's supply of vermiculite, which was used primarily for insulation and as a soil amendment. These products were produced by a high temperature process (exfoliation) that expands the raw ore. The milling process reportedly emitted up to 5,000 pounds of asbestos per day to the atmosphere. The vermiculite from the Libby mine was contaminated with a toxic and highly friable form of asbestos called **Tremolite-Actinolite Series Asbestos,** often called Libby Asbestos (LA). For many decades, the asbestos-contaminated vermiculite was utilized throughout town in many public places such as school tracks, public parks, and baseball fields. Vermiculite mine tailings were also placed at some of these locations. Vermiculite insulation was also used in residences, public buildings, and schools.

The Libby Site (also comprising the Troy area) is an especially large and complex site in which a hazardous contaminant, LA, is prevalent throughout the town and surrounding areas. The prior Action Memorandum and Amendments describe how asbestos-contaminated vermiculite came to be present in commercial and residential buildings as well as outdoor areas. They also describe the nature of the contaminant and the unique threat it poses in Libby given the multiple pathways of exposure.

The initial Action Memorandum and subsequent Amendments describe the vermiculite mine, vermiculite processing facilities, several contaminated properties, and the conditions found throughout the Libby Valley. The Libby Site appears unique in comparison to other mining or processing sites in that LA-containing mine wastes, as well as off-specification intermediates (largely un-exfoliated vermiculite concentrate) were made available, and hence, widely distributed, throughout southern Lincoln County for use as fill material and as a soil conditioner. Other asbestos-contaminated material was used as insulation. There are numerous exposure pathways, for residents as well as for workers. When the Site was listed on the National Priorities List (NPL), it included the nearby town of Troy. EPA's initial investigative efforts focused on the Libby area and then expanded to the Troy area in May 2007. Assessment work in Troy is being conducted by the Montana Department of Environmental Quality (MDEQ) through a

cooperative agreement funded by EPA. An interim data summary report on the assessments in Troy was released on May 27, 2009. MDEQ has indicated that 102 of the properties there are likely to require cleanup. This amendment includes activities to address contamination found in the Troy area as well as in Libby.

B. Other Actions to Date

To address this widespread contamination, EPA has been conducting cleanups of asbestos-contaminated soils and insulation throughout Libby (and also the neighboring community of Troy) since 1999 using its removal authorities under CERCLA Section 104. This Action Memorandum amends the May 15, 2006 (approved June 2, 2006) Action Memorandum Amendment that sets set forth the need and scope for additional property cleanups at the Site. While those time-critical cleanup activities are progressing, investigation efforts that began in May 2007 in the town of Troy indicate that a significant number of properties there also meet the current site removal criteria (see Administrative Record, Cleanup Criteria Memo, December 15, 2003). Prior to these investigations, EPA had conducted several small-scale responses in Troy as conditions warranted. The nature of the residential and commercial cleanups in Libby is shifting to larger and more difficult properties.

This Action Memorandum Amendment and prior Amendments each describe various activities at the Site and progress contemporaneous with their writing. Generally, activities in 2000 focused on the former W.R. Grace processing facilities (Export Plant, Screening Plant) that were large volume, obviously highly contaminated properties. In 2001, work continued at the processing areas and then expanded to include some large volume property cleanups containing extensive amounts of vermiculite mine waste (e.g., the High School and Middle School tracks and the Plummer Elementary ice rink). The distribution of LA-bearing mine waste throughout the community became apparent in 2001. Residential and commercial property cleanups began in 2002.

As EPA has reported in Site updates and in public meetings, EPA conducted activity-based sampling at residential and commercial properties in Libby in 2007 and 2008. *See Site update at http://www.epa.gov/region8/superfund/libby/cleanup.html.* The purpose of this sampling primarily is to assess the level of human exposure that may occur during particular activities, such as digging, raking, and mowing. The current activity-based sample collection effort has been completed, and an EPA contractor is preparing a report analyzing the results. Preliminary review of these results indicates that the current removal action level for asbestos in soil is likely to be revised to a lower concentration. To ensure that the data analysis and presentation are reliable, the report will undergo an internal agency quality assurance/quality control review. We expect that process to be completed and the report to be finalized this fall. Once the report has been finalized, it may be appropriate to revise the current action level that has been used by EPA at the Site. A change to the action level would be reflected in an appropriate decision document. EPA anticipates not being able to address properties with lower asbestos concentrations

immediately, given that there are several hundred properties already in the cleanup queue with higher concentrations. Currently EPA is cleaning up approximately 150 properties per year.

Below is a summary table (Table 1) of the work performed during the history of on-site Removal Actions, as well as a narrative synopsis of the work items:

Table 1: Work to Date Summary

	Large Projects	Commercial/ Residential	Soil (yds^3)	VAI* (yds^3)	Debris (yds^3)
2000	Screening Plant (SP), Export Plant(EP)	0	150,000	0	35,000
2001	SP, EP, Libby High School(LHS), Libby Middle School(LMS), Plummer Elementary, Seifke,	8	120,000	0	5,000
2002	SP, EP, LHS, LMS,	18	75,000	300	1,000
2003	Riverside Park Properties	157	40,000 15,000	2,200	250
2004	SP-Flyway Properties	170	30,000 16,000	2,300	125
2005	Properties	225	31,000	2,700	200
2006	Properties	216	26,000	3,100	175
2007	Properties	160	46,000	2,200	150
2008	Properties**	149	49,857	1,304	593
Total		**1,103**	**598,857**	**14,104**	**42,493**

*VAI: Vermiculite Attic Insulation.
** These totals do not include cleanup activities at Granite, Callahan or Flower Creeks.

C. Synopsis of Previous Actions

There are seven operable units (OUs) at the Site, as well as a sitewide support service, and two disposal units. Following is a description of the activities for each.

Export Plant (OU1): Under a Unilateral Order from EPA, W.R. Grace demolished and disposed of four buildings on the property and removed approximately 15,500 yds^3 of contaminated soil and 2500 yds^3 of debris from the property. Region 8 completed the remaining demolition and disposal in 2002. The lumber business formerly operating at this location was relocated by W.R. Grace in 2003 to a new location in Libby. This work is summarized in a Data Summary Report (CDM 2007) found in the Administrative Record.

(1) **Riverside Park and Boat Ramp:** This is an area adjacent to the former Export Plant along the Kootenai River. Although it was not part of the W.R. Grace operations, it is now included as part of OU1. In 2003, subsurface contamination was encountered during construction of a new park and boat ramp being built by the City of Libby. EPA halted construction and cleaned the parcel in late 2003. Approximately 15 acres of soil were excavated to an average depth of two feet. This resulted in the removal of approximately 40,000 yds^3 of contaminated soil. This work is summarized in a Data Summary Report (CDM 2007) found in the Administrative Record.

Screening Plant (OU2): This property consists of five distinct, contiguous parcels. In total, roughly 335,000 yds^3 of contaminated soil, and 30,000 yds^3 of debris were removed from the Screening Plant and taken to the mine for disposal. This work is summarized in a Data Summary Report (CDM 2007) found in the Administrative Record. The five parcels include:

(1) **Raintree Nursery**: Region 8 completed cleanup of this parcel in 2003. Approximately 17 acres were addressed, and 250,000 yds^3 of contaminated debris and soil were removed. Restoration of this parcel is complete.

(2) **North Side Parker Property:** Region 8 completed cleanup here in 2004, addressing approximately four additional acres. Approximately 18,000 yds^3 of contaminated soil were removed.

(3) **Flyway Property:** Region 8 completed approximately 1/4 of the cleanup of the Flyway parcel in 2002; W.R. Grace, pursuant to an Administrative Order on Consent with EPA. cleaned up the remainder of the parcel in 2004. In all, approximately sixteen acres were addressed, and approximately 30,000 yds^3 of soil were removed. EPA, working with the Montana Department of Transportation, capped a contaminated area on the Highway 37 right-of-way (ROW) along the Flyway in 2005.

(4) **KDC Bluffs Property**: Three areas of the KDC Bluffs parcel contained piles of waste vermiculite and debris. These were cleaned up by EPA in 2001 with approximately 15,000 yds^3 of soil removed. There remains a section of the KDC Bluffs that has been found to have levels of LA at <1% over two to three acres. At the time of the Removal Action these areas were unoccupied, and as such were left for future Remedial Actions. Recently, an out-of-state homeowner built a house on a portion of the property. Since the KDC Bluffs property now includes residential development, EPA proposes to address this property as part of OU4. If necessary, future residential properties on the KDC Bluffs area will be screened and cleaned up as part of OU4.

(5) **Wise Property:** This is a ¾ acre property between Raintree Nursery and the Flyway. Approximately 2000 yds^3 of LA-contaminated soil were removed in 2001. This property was used as an access point for the flyway cleanup, thus the restoration was not completed until 2005.

Mine/Rainy Creek Road (OU3): Rainy Creek Road is a US Forest Service access road to the Kootenai National Forest and the former vermiculite mine. Like the mine itself, Rainy Creek Road is highly contaminated with LA, and site access remains restricted. In actions conducted in 2001 and 2003, EPA paved the lower portion of the road starting from where it intersects Highway 37. A decontamination station has been in place on the road since 2000 to facilitate soil disposal at the former mine, as well as to clean other vehicles accessing the area. Soil disposal of OU4 and OU7 waste material continues at the mine. In 2007, EPA signed an Administrative Order on Consent (AOC) with W.R. Grace to conduct a Remedial Investigation/Feasibility Study (RI/FS) on OU3. Sampling activities began in September 2007 and continue in support of the planned 2012 RI/FS and Record of Decision (ROD).

Commercial, public and residential cleanups in Libby (OU4): Once the Libby Asbestos Site was placed on the NPL in October 2002, the EPA began as part of its RI to systematically inspect and sample parcels of land within the Site boundary. This information was also used to identify properties in need of time-critical Removal Actions. Removal actions were undertaken within homes and yards to reduce risk to property owners and mitigate the release or threat of release of LA into the environment. Any LA within homes may be dispersed to the environment through foot traffic, air currents, and cleaning and disposal. To date, EPA has identified 4,400 properties that needed inspections (see Contaminant Screening Study (CSS), CDM 2004 in the AR). This screening effort identified roughly 1600 properties which met the Site Removal Criteria described in the December 2003 Technical Memorandum. As of December 18, 2008, Removal Actions have been completed at 1,103 of the identified properties. It should be noted that the CSS also identified an additional 840 properties that had LA contamination, but did not meet the Site Removal Criteria.

(1) **Libby High School and Libby Middle School Tracks:** Cleanups were completed by 2001, and both tracks were restored in 2002. Work is complete.

(2) **Siefke Property:** This parcel was a highly contaminated, large residential property. A considerable volume of equipment and debris from the former vermiculite mine was located on the property. Cleanup was completed in 2002, and restoration was completed in 2003.

(3) **Johnson, Sanderson, Temple, Struck, Rice, Fuhlendorf, Spencer, and Westfall Properties:** These properties contained mine wastes with LA concentrations up to 10%. Cleanup and restoration activities were completed by 2003.

(4) **Champion Hall Road:** Vermiculite mine tailings had been used to make and/or repair portions of a gravel road leading into a subdivision. Cleanup was completed in 2003.

Former Stimson Lumber Mill (OU5): The former Stimson Lumber Mill contained vermiculite attic insulation (VAI) in a number of its buildings. Apart from EPA's actions, the Stimson

Lumber Company systematically removed all of its loose and accessible VAI in 2002 and 2003. Due to a downturn in the lumber market, most of the Mill operations closed in 2003, and a large portion of the 400 acre parcel was sold to the Kootenai Redevelopment Authority in 2004. The Redevelopment Authority has been, and is now actively seeking businesses to locate on the former Mill property. Investigations to date have found limited soil contamination in the former nursery area. This area was fenced in 2004. The only other area of this OU that presented an obvious need for response was the former Central Maintenance Building. EPA removed the dilapidated portion of the roof in 2005. This work is summarized in a Data Summary Report (CDM 2007) found in the Administrative Record.

Burlington Northern Santa Fe Rail Yard (OU6): The Burlington Northern Santa Fe (BNSF) Rail Yard is located adjacent to the former Export Plant and was used to facilitate rail shipments of vermiculite. OU6 is comprised of the rail yard, and the rail lines leading out of Libby. Pursuant to an AOC with EPA, BNSF began cleanup of the contaminated rail yard in 2003 but had to stop work due to complexities with soil removal below the tracks. Work resumed in 2004. Most of the tracks in the rail yard were removed to allow for cleanup underneath them. Although most of the contaminated soil was removed, some contamination was capped in place. Institutional controls for contamination left in place will be evaluated as part of the RI/FS and future ROD. EPA is negotiating with BNSF to conduct and complete the RI/FS for this OU.

Troy (OU7): Systematic investigations of properties in the Troy area began in May 2007. However, prior to these investigations EPA conducted several small scale responses in Troy as conditions warranted, the largest of which was the removal of VAI from the Troy High School. This particular action is discussed at length in the June 2006 Action Memorandum Amendment. The other actions included cleanup and disposal of VAI encountered unexpectedly by a property owner.

Environmental Resource Specialist (ERS) - (Site Wide): Over the last five years, EPA has responded to many unplanned, somewhat urgent exposures to VAI and LA. For example, three house fires occurred on properties containing VAI. Likewise, a new homeowner in Libby conducted home renovations and encountered VAI in the walls of his bathroom. As a result, exposed material contaminated a portion of the home and potentially caused a release of friable asbestos into the environment. The EPA has also received numerous calls from property owners who are planning a renovation and anticipate encountering LA-bearing materials. Clearly, in the latter case, the best course of action is to protect property owners by delineating and addressing potential LA contamination prior to renovation. The need for this function will likely continue beyond EPA's Response Actions at the Libby Site. Beginning in October 2006, EPA began providing a full-time service, entitled the Environmental Resource Specialist, to assist property owners, firemen, and other affected response personnel or citizens. In 2007, the ERS service received approximately 40 calls per month requesting assistance and averaged five small-scale responses per month. Calls to the ERS in 2007 also resulted in five large-scale cleanups.

Lincoln County Landfill Asbestos Cell: In 2003, EPA constructed an asbestos disposal cell at the Lincoln County Landfill to facilitate the disposal of VAI material and extend the construction season. To date, the EPA has placed over 20,000 yds^3 of VAI and LA-contaminated debris at this cell. Disposal operations are ongoing.

Disposal Area at the Mine Site: Asbestos-containing soils are disposed of at area 19 at the mine.

D. Current Actions

The Region plans on cleaning up between 100 and 150 properties and three additional creek segments in 2009. The Region is also planning to address the CVCC Golf Course in 2009 under a separate action memorandum amendment.

In 2007, EPA Region 8 initiated investigative efforts to continue to assess the on-going Removal Actions, as well as to provide the needed exposure assessments to support a baseline risk assessment. The Sampling and Analysis Plans for these investigations included a sampling and analysis plan for outdoor ambient air monitoring at OU4; a sampling and analysis plan for activity-based outdoor air exposures for OU4; and a sampling and analysis plan for activity-based indoor air exposures for OU4. As stated earlier, the report on the activity based sampling is planned to be issued this fall and may affect future activities.

In addition to conducting physical cleanups, EPA continues to provide guidance, training and assistance for Libby residents. Such actions include the ERS service; the development and publication of fact sheets for residents and local contractors who may encounter asbestos-contaminated vermiculite; asbestos abatement and health and safety training for local contractors; and public warnings for areas of contamination discovered in public areas. These actions are intended to address ongoing exposures.

MDEQ continued its assessment efforts in the Troy area in 2008. During the 2008 construction season severe conditions at six properties in Troy warranted immediate action by EPA. These actions were taken due to contamination well above the cleanup criteria set forth in the 2003 Technical Action Memorandum. Field investigations in Troy resumed in June 2009. EPA anticipates finding and cleaning up an additional 5 to 10 severely contaminated homes in the Troy area in 2009.

E. State, Local, and Other Authorities' Roles

As discussed earlier, MDEQ has taken the lead role for assessment in Troy (OU7). The Agency for Toxic Substances and Disease Registry (ATSDR); the United States Geological Survey (USGS); and the National Institute for Occupational Safety and Health (NIOSH) are active participants in site-wide studies. The USGS also continues to provide EPA with technical assistance regarding the mineralogy, morphology, and measurement of LA. Lincoln County and

the City of Libby are active in several local advisory groups and coordinate directly with EPA on many issues regarding the removal actions and remedial investigations. In addition to their lead role for assessment in Troy, MDEQ continues to serve as the support agency at operable units 1 through 6.

III. THE THREAT POSED BY ASBESTOS AT THE LIBBY SITE IS UNIQUE IN ITS SEVERITY AND SCOPE

In conducting this large-scale removal action at Libby, EPA has identified a combination of socioeconomic, atmospheric, and terrain-related factors that have resulted in widespread asbestos contamination, multiple pathways of human exposure to asbestos, and significant cumulative exposures. This combination of factors appears unique to the Libby Site and is one of the bases for the Administrator's Determination and Findings of Public Health Emergency.

A. Multiple Sources of Exposure

Residents of the Libby and Troy communities have been exposed to asbestos from various sources, including asbestos in vermiculite, vermiculite processing wastes, asbestos in uncontained vermiculite insulation, and vermiculite-containing soil. The vermiculite mine wastes, as well as off-specification intermediates (largely un-exfoliated vermiculite concentrate) were made available to the community and were widely distributed throughout southern Lincoln County. The community used this asbestos-containing material as a soil amendment in residential yards and as fill for their driveways, gardens, and public areas, including recreational fields. Many of the homeowners insulated their homes with the asbestos-containing vermiculite insulation. Children in the community had access to and played on waste vermiculite piles. These exposures are in addition to the significant exposures that occurred historically to vermiculite mine workers or association with them.

Soil in the Libby valley was additionally contaminated by the atmospheric deposition of asbestos released from the vermiculite processing facilities at the Libby Site, which were in close proximity to the homes there. Soil also may have been contaminated by atmospheric redistribution of asbestos from the community's transportation and uses of the vermiculite mine wastes. Atmospheric deposition also would have contributed asbestos to indoor dust in residences and commercial buildings. Asbestos released to air was likely concentrated by the unique topographical and meteorological situation at the Libby Site (US EPA 2008). The Site is in a narrow valley surrounded by mountains that are 4,000 feet higher. In winter this leads to persistent temperature inversions that concentrate atmospheric contaminants, including asbestos, in the valley.

B. Multiple Pathways of Exposure, and Types of People Exposed

The major source of health risk from asbestos is from the inhalation route of exposure. The historical, current and potential future environmental pathways to the inhalation route of exposure include the following:

1. Air in attic spaces and crawl spaces (resident, tradesperson)
2. Indoor air near breached walls (resident, tradesperson)
3. Indoor air where fibers are present in indoor dust (resident, tradesperson, commercial worker, student, teacher)
4. Outdoor air near highways and rail lines where asbestos material spillage occurred (tradesperson, resident)
5. Outdoor air near disturbed soil (resident, tradesperson, student, teacher, recreational visitor)
6. Outdoor ambient air (resident, commercial worker, tradesperson, student, teacher, recreational visitor).

Additional historical inhalation pathways included the following:

1. Vermiculite waste piles (children, resident, recreational visitor)
2. Association with vermiculite mine workers
3. Occupational exposure through employment at the mine.

C. Observed Health Effects in Libby

Exposure pathways similar to those described above have been noted at other sites where vermiculite was shipped, processed or handled, or where vermiculite insulation was used in homes and businesses. However, the Libby Site appears unique with respect to the multiplicity of exposure pathways and the cumulative exposures experienced by community members. Adverse health effects (described below) from asbestos exposure are already present and documented in the residents and community members at the Libby Site. Ongoing exposure may be expected to increase both the severity and incidence of observed health effects. Even in the absence of additional exposure, pulmonary and pleural health effects from asbestos exposure are known to continue to progress. (Rohs et al. 2008). Therefore, the incidence and severity of observed health effects may increase.

Several epidemiology studies have reported increased cancer mortality among workers exposed to the LA through the mining and milling of contaminated vermiculite. Compared to standardized national mortality rates, the most recent study (Sullivan, 2007) found statistically significant increased risks of cancer mortality. The workers had 70% higher risk of lung cancer mortality (n, the number of people, was 89), 1,410% higher risk of mortality from mesothelioma (n=2) and 2,230% higher risk of mortality from pleural cancer (n=4).

An ATSDR study of the Libby community found a high prevalence of pleural abnormalities and that the risk increased with age and length of residence in the Libby area. (Peipins et al. 2003) examined occupational, recreational, household, and other exposure pathways. The prevalence of pleural abnormalities increased with increasing number of exposure pathways, ranging from 6.7% for those who reported no apparent asbestos exposures to 34.6% for those who reported ≥ 12 pathways. Excluding former W.R. Grace workers but not those with work-related asbestos exposures, the investigators found 1,000 people with pleural abnormalities out of 6,303 (15.9%). For comparison, studies of groups with no substantive work-related asbestos exposures have found the prevalence of pleural abnormalities ranges from 0.2% among workers in North Carolina, to 2.3% among patients in New Jersey, to 4.6% among urban New Jersey residents.

Medical monitoring of Libby and Troy residents exposed to past releases of asbestos fibers or who may continue to be exposed to asbestos fibers in the community would allow early detection of disease and provide a better understanding of disease progression.

IV. THREATS TO PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT, AND STATUTORY AND REGULATORY AUTHORITIES

This Action Memorandum, prior Amendments and the Administrative Record describe in detail the threats to human health presented by exposure to LA. Despite considerable progress on cleanup, conditions in Libby still present significant threats to public health. In fact, on June 17, 2009, EPA Administrator Lisa P. Jackson issued a Determination and Findings of Public Health Emergency at the Libby Site pursuant to CERCLA Section 104(a)(4).

EPA has considered all of the factors described in Section 300.415(b)(2) of the National Contingency Plan (NCP), and has determined at least three of the factors continue to be present at the Libby Asbestos Site, including the area of Troy.

A. Threats to Public Health or Welfare:

(i). *Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants and contaminants*;

While EPA's actions have reduced LA-contaminated source materials (e.g., indoor dust, yard and garden soils, driveway materials, vermiculite insulation), these sources still exist throughout the community. This Action Memorandum Amendment and previous Amendments have described these conditions in detail. Previous investigations have shown that more than one-third of the approximately 4,400 properties in the Libby area contain varying levels of contaminated source materials, such as vermiculite insulation or contaminated soils. EPA studies in the Administrative Record (AR) have found that low levels of amphibole asbestos in soils can generate airborne fibers at or near the current OSHA Permissible Exposure Limit. These levels are significantly higher than those to which a residential population should be exposed. These

data are entirely consistent with investigations conducted by W.R. Grace concerning the handling of various vermiculite-bearing materials, which is reported in the Action Memorandum and subsequent Amendments and contained in the Site AR.

Investigations have clearly shown elevated levels of LA in the dust of residents' homes prior to cleanup (CDM, 2002, 2003a and 2003b; EPA Region 8, 2003). This dust contamination comes from several sources including, but not limited to: contaminated soil tracked into the homes; contamination that was picked up from the former vermiculite processing facilities and brought home on clothes and equipment; and releases of uncontained vermiculite insulation within homes. When disturbed, these LA-contaminated source materials may release LA fibers to indoor air resulting in complete exposure pathways. Actual exposure to these contaminated source materials may occur daily depending on the conditions and usage of the specific properties. Data contained in the reports in the Administrative Record indicate that activities performed by area residents and workers can result in elevated concentrations of respirable LA fibers in indoor air.

EPA has also determined that during a catastrophic event there is a significant threat of amphibole asbestos exposure from attics to the outside environment. In the last two years, there have been three house fires and one severe weather event involving homes containing VAI. In one of the fires, an explosion released VAI around the exterior of the home creating an exposure pathway to firefighters and passers-by. In the other two situations, flames breached the roofs and fibers were released to the atmosphere and surrounding properties. In the weather event, a microburst tore a roof off a home containing VAI, once again releasing visible vermiculite to the surrounding property.

LA fibers from the Libby mine site are hazardous to humans as evidenced by the abnormal occurrence of asbestos-related disease in area residents and workers. Workers and area residents exposed to asbestos fibers from the Libby mine site have been found to have increased mortality and morbidity from asbestos-related conditions, including asbestosis, pleural fibrosis, lung cancer, and mesothelioma. Asbestos-related lung diseases have also been observed in area residents with no direct occupational exposures, including family members of mine workers, and even in individuals with no known association with vermiculite mining or processing activities (Weis, 2001; ATSDR, 2003; Peipins et al., 2003; Miller, 2005; Whitehouse, 2008).

Past and current exposure to amphibole asbestos has had, and will continue to have, major adverse health impacts on Libby Site residents. Investigations performed by ATSDR have found an unusually high rate of cases of asbestos-related disease in this relatively small community. The death rate from asbestosis in Libby was at least 40 times that of the national average for the period from 1979-1998. The occurrences of disease are not limited to vermiculite-facility workers or their families, but are spread throughout the population. Medical care in Libby and Troy has historically been limited due to their isolated location and economic situation, thus reducing the chance of early detection and treatment of asbestos-related disease. (Montana Primary Care Health Professional Shortage Area List, 2001; Lincoln County Health Profile,

2002; U.S. Department of Health and Human Services, 2009). New diagnoses of ARD from past exposure to asbestos number two or three a month. A study in Libby of persons 18 years of age and older found that 1,186 of 6,668 participants (approximately 18% of those x-rayed) had abnormalities in the linings of their lungs (pleural abnormalities) (Peipins et al., 2003). The risk of pleural abnormalities increased with increasing age and increasing length of residence in the Libby area. The rate of pleural abnormalities found in groups within the United States who have no known asbestos exposures ranges from 0.2% to 2.3%.

The degree of asbestos contamination and the resulting medical impact is greater at Libby than that at other sites where vermiculite was shipped, processed or handled. There is documented widespread asbestos-related disease in Libby and Troy. An unfortunate convergence of factors has contributed to this situation:

1) There are multiple human exposure pathways in Libby and Troy;
2) Exposure has continued over a period of 60 or more years;
3) The vermiculite processing facilities were in very close proximity to the homes in Libby;
4) The meteorology of the area causes temperature inversions which trap air and asbestos carried by that air close to the ground;
5) The terrain further constrains contaminants within the steep walls of the valley, causing higher concentrations in localized areas;
6) The homes in these economically depressed communities are generally old, potentially leading to greater migration of contaminants into the living space from outdoors, attics and wall-spaces;
7) A high smoking rate among the people Libby and Troy increases the risk of asbestosis and lung cancer; and,
8) Medical care in Libby and Troy has historically been limited due to its isolated location and economic straits. Consequently, there was less chance of early detection for mesothelioma and appropriate care for asbestosis. That situation has recently changed with the CARD clinic.

There is an especially serious risk to tradesmen (electricians, craftsmen, etc.) in Libby and Troy due to the high number of homes impacted by LA. When working in homes in Libby and Troy, these individuals encounter multiple pathways of exposure including soil, air and indoor dust.

(ii). *High levels of hazardous substances or pollutants and contaminants in soils largely at or near the surface that may migrate.*

Soil contamination is prevalent throughout the Libby area. Region 8 has focused resources on cleaning up areas that were most highly contaminated, but many residential yards still contain measurable concentrations of LA at or near the surface (CDM, 2002, 2003a, 2003b). These soils, if unaddressed, can cause direct exposure when disturbed through normal activities and can contaminate the interiors of homes with LA-containing dust.

LA fibers from the Libby mine site are hazardous to humans as evidenced by the occurrence of asbestos-related disease in area residents and workers. Workers and area residents exposed to asbestos fibers from the Libby mine site have been found to have increased mortality and morbidity from asbestos-related conditions, including asbestosis, pleural fibrosis, lung cancer, and mesothelioma. Asbestos-related lung diseases have also been observed in area residents with no direct occupational exposures, including family members of mine workers, and even in those with no known association with the vermiculite mining or processing activities (Weis, 2001; ATSDR, 2003; Peipins et al., 2003; Miller, 2005; Whitehouse, 2008).

While most of the known larger contaminant sources and public areas (such as former vermiculite processing plants, schools, ball fields, and Riverside Park) have already been cleaned up, Region 8 recently discovered several additional contaminated "public" areas in Libby. These include the CVCC Golf Course, the ROW along Highway 37, the public compost pile at the county landfill and the creeks. Some of these properties presented immediate, unacceptable risks and were cleaned up quickly. For other properties, such as portions of the former Stimson Mill, the Highway 37 ROW, and the CVCC Golf Course, EPA has instituted interim containment measures such as fencing and/or issued public warnings. These properties are targeted for cleanup.

(iii). *The (lack) of availability of other appropriate Federal or state mechanisms to respond to the release.*

EPA believes that no person or local, state, or Federal agency is in the position, has the authority, or has the resources to independently and in a timely manner implement an effective response action to address the on-going threats presented at the Site. Other than CERCLA, there is no comprehensive Federal, state, or local program that provides both the authority and resources necessary to respond to a release of the scope presented in Libby at OUs 4 and 7. Under CERCLA as implemented by EPA under Executive Order 12580, EPA is the agency with the authority to address such releases.

B. Threats to the Environment

Work on an ecological risk assessment was initiated in September 2007. While currently no response actions are based on ecological impacts at the Site, this may change as data are collected. The Action Memorandum dated May 23, 2000 contains information about potential threats to the environment.

V. ENDANGERMENT DETERMINATION

The actual or threatened releases from this Site, if not addressed by continuation of the time-critical Removal Actions set forth in the original Action Memorandum and subsequent

Amendments, may present an imminent and substantial endangerment to public health or welfare or the environment. The original Action Memorandum for the Site, dated May 23, 2000 (EPA Region 8, 2000), as well as subsequent Amendments and the Administrative Record, describe in detail evidence of the toxicity associated with exposure to LA, the large number of human exposure pathways, the significantly elevated disease rate in Libby residents, and the variety of conditions present in and around Libby that could lead to continuing exposures.

Apart from this imminent and substantial endangerment, EPA Administrator Lisa P. Jackson found that the conditions in Libby associated with the release of amphibole asbestos from all sources, including VAI, present a public health emergency, pursuant to 42 U.S.C. § 9604(a)(4).

VI. EXEMPTION FROM STATUTORY LIMITS

The Libby Action Memorandum dated May 23, 2000 provided the documentation required to meet the NCP Section 300.415(b) criteria for a Removal Action. This Action Memorandum also provided EPA's determination regarding the applicability of CERCLA Section 104(c)(1)(A) [NCP Section 300.415(b)(5)(i)]. This provision allowed for using the emergency exemption from the $2 million and one year limits on removal actions. The two most recent site-wide Action Memorandum Amendments dated May 2006 and June 2006 expanded the scope of removal actions and raised the approved removal ceiling to $91,837,000. In addition, the recent August 2008 Action Memorandum for the Libby creeks raised the approved removal ceiling to $94,319,000[1]. It also found that conditions at the Site continued to satisfy the emergency exemption and met the CERCLA Section 104(c)(1)(C) [NCP Section 300.415(b)(5)(ii)] consistency exemption, which allows for a continued removal action over the cap when it is "otherwise appropriate and consistent with the remedial action to be taken." The conditions necessitating time critical removal action at the Libby Site still exist and continue to satisfy both the emergency and consistency exemptions from the statutory limits.

This Action Memorandum Amendment requests a ceiling increase under the already granted exemption from the statutory limits. This ceiling increase will support the continuation of the removal action originally authorized by the May 9, 2002, Action Memorandum Amendment, as amended by the two Action Memorandum Amendments from 2006 and the Action Memorandum Amendment signed in 2008. As discussed later in this Action Memorandum Amendment, this scope would now explicitly include properties in and around Troy, Montana (OU7), which meet the current Site Removal Criteria. An emergency exemption continues to be warranted to protect public health. Imminent and substantial risks to the public health of Libby residents continue to exist (Miller, 2005). Due to the prevalence of past and potential exposures, and the observed high rate of asbestos-related diseases, these risks are of an immediate and emergency nature. While conditions have improved considerably through EPA intervention, hundreds of properties

[1] The "Proposed Ceiling" of $94,319.000 listed in the Aug. 12, 2008 "Creeks" Action Memo was incorrectly calculated. The actual ceiling is $95,387,000.

meeting criteria set forth by EPA Region 8 for time-critical removal actions have yet to be addressed. Exposures to an already impacted population could potentially occur, and EPA is the only Agency with the resources to mitigate these conditions. In addition to meeting the criteria for an emergency condition, removal actions are also expected to be appropriate and consistent with future remedial actions, and thus continue to also meet the criteria for a consistency exemption from the $2 million and one year limits on removal actions as set forth in Section 300.415(b)(5)(ii) of the NCP. There are several reasons for this:

- LA, the contaminant of concern in Libby, is a mineral. There are no known viable treatment technologies that can diminish or reduce the toxicity of asbestos. To address exposures from asbestos, the most viable and commonly used physical cleanup options available are to remove it or to contain it. For time critical removal actions at the Site, Region 8 has used a combination of these approaches as appropriate.

- Because asbestos use was widespread in the past, the basic approach for asbestos abatement is well understood. There are a limited number of options available for cleanup. Most importantly, when asbestos is determined to be friable, the preferred mechanism to address potential exposures is to remove or contain the source.

- Investigations have shown that sources of LA, including, but not limited to, contaminated soil, vermiculite insulation, and vermiculite processing wastes are prevalent throughout Libby. Past and current investigations have clearly shown that, when disturbed, these sources can release LA to the air and have the potential to be released to the environment and contaminate indoor dust. This appears to be true even though LA concentrations in the source material are relatively low (Supplemental Quality Assurance Project Plan Report, EPA 2007). The primary objective of the removal actions is to remove or isolate these sources. Future site cleanups will continue to utilize removal and containment strategies.

- To ensure that Removal Actions are protective and consistent with future remedial actions, Region 8 has taken a conservative approach and adopted protocols that minimize the possibility of having to clean up a property twice. In general, EPA only begins a removal action when property conditions warrant a time-critical response. Furthermore, to reduce the likelihood of returning to a property, EPA also addresses lower levels of contamination found on the property. Initial post-cleanup sampling provided some validation of the efficacy and protectiveness of the cleanups (CDM, 2003c, 2004). This approach ensures that the worst risks are addressed first and that cleanups reduce the most prevalent exposure pathways, while the effort to determine what will be an effective final cleanup moves forward. The RI/FS for OU 4 and OU7 will evaluate current cleanup protocols as well as other options for cleanup.

VII. PROPOSED ACTIONS AND ESTIMATED COSTS

A. Proposed Action Description

The Action Memorandum Amendment from May 2002 sets forth the basic scope of the current set of Removal Actions at the Libby Asbestos Site. While the basic need for cleanup and the general nature of the proposed actions has not changed, EPA has discovered that (1) more properties require cleanup than originally anticipated and (2) the difficulty and cost of cleanup is higher than originally anticipated. Currently, approximately 1,000 unaddressed properties in the Libby area meet the Removal Criteria for the Site. In addition, first-year, full-scale investigations of properties in and around Troy, Montana indicate that 102 of the approximately 800 properties screened there also require cleanup. If the analysis of the activity based sampling results indicates that risks in Libby and Troy are higher than currently thought, as preliminary review of the results indicate, EPA will likely revise the current removal action level for asbestos in soil. Consequently, the total number of properties requiring cleanup may change. In addition, EPA will continue the Environmental Resource Specialist service for the entire site.

The data from the Supplemental Quality Assurance Project Plan report indicates a need to modify the current Removal Actions approach. Based on the December 15, 2003, document titled: "*LIBBY ASBESTOS SITE RESIDENTIAL/COMMERCIAL CLEANUP ACTION LEVEL AND CLEARANCE CRITERIA TECHNICAL MEMORANDUM,*" once a property has met the current removal triggers, all LA that is detectable by Polarized Light Microscopy (PLM) is removed from the surface. However, there are some properties where visible vermiculite was left in place because LA was not detected by PLM. For properties that meet the current removal triggers, it was proposed that EPA remove all levels of LA detected by PLM from the property surface as well as all visible vermiculite material. Consequently, beginning in October 2006, EPA increased the rigor of the visual inspections performed on properties (see Site-Specific Standard Operating Procedure for Semi-Quantitative Visual Estimation of Vermiculite in Soil, CDM 2006 in Site AR). It is hoped that this improved methodology will aid in the delineation of LA-bearing source materials. Also, beginning in October of 2006, EPA improved the methodology for collecting soil samples (going to 30-point composites instead of five-point composites). It is expected that combining these methods will provide EPA a much better field-usable tool for guiding its cleanups. This change in approach will be assessed by the Indoor and Outdoor ABS programs discussed earlier in this Action Memorandum Amendment.

Lastly, given the current state and planned future use, it is likely that additional Removal work will be required at OU1, OU2, OU5, and/or OU6.

B. Contribution to remedial performance

EPA finalized the listing for the Libby Site in October 2002. While cleanup at the Site continues to be conducted using removal authority, the Site was transitioned to the Region 8 Remedial

Program after final listing on the NPL. Information and experience gained during the removal actions are continually used to refine the cleanup action and to plan for future work. Likewise, as more information is learned about the nature of the contamination and the risks presented, adjustments to the cleanup approach will be made as necessary. It is expected that the cleanup approaches used during removal actions will be similar to, and consistent with, those used during remedial actions.

C. Description of alternative technologies

EPA attempts to employ the most appropriate technologies for addressing risks. At this time, there are no other known viable alternative technologies available for addressing asbestos.

D. EE/CA

No EE/CA is required.

E. Applicable or relevant and appropriate requirements

See the Federal and State Applicable or Relevant and Appropriate Requirements (ARARs) identified and/or discussed in the original Action Memorandum dated May 23, 2000. There have been no new Federal or State ARARs that would be applicable to this Site developed since that time.

F. Project Schedule

The total number of properties currently identified as requiring cleanup (based on the December 2003 memo) including those in and around Troy, is now estimated to be 2,050, with 1,103 of those being completed as of December 18, 2008. Since the cleanup of residential/commercial properties began in earnest in 2003 (see Table 1), over the last six construction seasons the number of properties EPA has cleaned annually has ranged from 150 to 225. While EPA has become more effective in conducting LA removals, as discussed earlier in this Action Memorandum Amendment, EPA has seen an increase in the number of large properties in the Libby area. Preliminary reviews of the properties in the Troy area suggest that there is a mix of large and small properties that meet the current OU4/OU7 cleanup criteria. For planning purposes it is assumed that approximately $25,000,000 in special account/settlement funds will be required annually to cleanup Libby Asbestos Site properties in 2009 through 2013.

It is worth noting that the exact total number of properties to be addressed in and around Libby and Troy may not be known until the publication of a final Record of Decision (ROD). A final ROD is planned for 2013. The final ROD will incorporate the results of the toxicity studies and exposure assessment.

G. Estimated Costs

This ceiling increase is designed to cover projected 2009 through 2013 removal action costs and removal action expenditures accrued since the initiation of the project. Removal expenditures to date at the Site are currently estimated to be $165,000,000. Total removal expenditures for 2009 through 2013 are estimated to be $125,000,000. While the nature of cleanup has not fundamentally changed, the May 2002 Action Memorandum Amendment underestimated the scope, complexity, and cost of cleanup, especially with regards to interior cleaning and the removal of VAI. Likewise the two 2006 Action Memorandum Amendments anticipated that a ROD would follow soon thereafter.

This Amendment provides only a basic, cumulative breakout of the removal ceiling documented in the June 2006 Action Memorandum Amendment and the proposed removal ceiling (Table 2).

Table 2. Proposed Removal Project Ceiling

Category	Current Ceiling	Proposed Increase	Proposed Ceiling
Extramural Costs			
Property Cleanups	$93,769,000	$194,613,000**	$288,382,000
Intramural Costs	$ 1,168,000	$ 13,215,000	$ 14,383,000
Subtotal	$94,937,000	$207,828,000	$302,765,000
Contingency	$ 450,000***	$ 30,276,500****	$ 30,726.5,000
TOTAL	**$95,387,000***	**$238,104,500**	**$333,491,500**

* Please note that the "Proposed Ceiling" of $94,319,000 listed in the Aug. 12, 2008 "Creeks" Action Memo was incorrectly calculated. The 2008 memo reflected an intramural "proposed ceiling" of $100,000 rather than the correct value of $1,168,000.

** $165,000,000 (Expenses to date) – 95,387,000 (current ceiling) + $125,000,000 (est. 2009 - 2013 costs) {$165,000,000 - $95,387,000 + $125,000,000 = $194,613,000}

*** Calculated utilizing a 20% contingency

**** Calculated utilizing a 10% contingency ($302,765,000 * 0.1 = $30,276,500)

As documented in the May 2006 Action Memorandum Amendment (and in previous Action Memorandum Amendments), the Libby Asbestos Site has major expenditures that do not count against this Site ceiling. Through May 2009, these expenditures totaled approximately $52,000,000. Please note that amounts are approximate. Also note that these estimates do not include prejudgment interest, indirect costs and potential enforcement and litigation costs (including Department of Justice costs), which are not counted against the removal ceiling.

VIII. EXPECTED CHANGE IN THE SITUATION SHOULD ACTION BE DELAYED OR NOT TAKEN

Delayed action will result in continued public exposure to unsafe amounts of Libby Amphibole asbestos. This will increase the risk to public health and continue to burden an already impacted community.

IX. OUTSTANDING POLICY ISSUES

The Determination and Findings of Public Health Emergency may create the impression to the public that all attic insulation of this type constitutes a health threat. EPA believes this to be unfounded. The Libby Site is unique, involving multiple pathways and sources of exposure, in addition to attic insulation (see Section III. THE THREAT POSED BY ASBSETOS AT THE LIBBY SITE IS UNIQUE IN ITS SEVERITY AND SCOPE).

X. ENFORCEMENT

A separate Enforcement Summary has been prepared by the Site Attorney.

XI. RECOMMENDATION

This decision document represents the selected removal action for the removal of Libby Amphibole asbestos sources from properties at the Libby Asbestos Site in Lincoln County, Montana. The proposed removal actions have been developed in accordance with CERCLA as amended and are consistent with the NCP. The decision is based on the Administrative Record for the Site. Conditions at the Site continue to meet the NCP [40 CFR § 300.415(b)] criteria for removal actions. The NCP [40 CFR § 300.415(b)(5)(i)] and [40 CFR § 300.415(b)(5)(ii)] criteria for exemptions from the statutory limits that have been previously documented continue to exist. I recommend your formal approval of the proposed removal action ceiling increase.

Barry Breen.

Approve: Principal Deputy Asst Adm. Date: 6/17/09

for Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

Disapprove: _____ Date: _____

Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

Attachment: Determination and Findings of Public Health Emergency

REFERENCES

Agency for Toxic Substances and Disease Registry (2003) Public Health Assessment, Libby Asbestos NPL Site. OU4: Screening Plant, Export Plant, Town of Libby, and Affected Libby Valley Residential and Commercial Properties, Lincoln County, Montana. EPA Facility ID: MT0009083840, U.S. Department of Health and Human Services, Agency for Toxic Substances and Disease Registry, Division of Health Assessment and Consultation Superfund Site Assessment Branch.

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Whitehouse AC, Black CB, Heppe MS, Ruckdeschel J, Levin SM (2008) Environmental exposure to Libby asbestos and mesotheliomas. *American Journal of Industrial Medicine* 51:877-880.

Printed on Recycled Paper

From: Gilberto Irizarry
To: Ellen Manges
Subject: Re: Fw: Update on Sons of Libby Reassessment
Date: 05/28/2009 12:12 PM

Sure Ellen. I'm in meetings for the rest of the afternoon today and back in on a meeting tomorrow starting at 10:00 am. Can we talk first thing tomorrow morning ? Say 8:00 am ?

Thanks,

Gilberto "Tito" Irizarry
Program Operations & Coordination Division, Director
Office of Emergency Management
US Environmental Protection Agency, Headquarters
Tel: (202) 564-7982
Mobile: (b) (6)
Fax: (202) 564-8333

▼ Ellen Manges---05/28/2009 11:57:38 AM---------Original Message------ To: Gilberto irrizary

From: Ellen Manges/DC/USEPA/US
To: Gilberto irizarry
Date: 05/28/2009 11:57 AM
Subject: Fw: Update on Sons of Libby Reassessment

------Original Message------
To: Gilberto irrizary
Sent: May 28, 2009 11:24 AM
Subject: Update on Sons of Libby Reassessment

Hi Tito - Barry and I have a meeting with Bob Sussman at 11:30 tomorrow to discuss Libby issues - and Barry wants to be able to give him the status on the sons of libby reassessment. Barry said that Dana gave him a small write-up a few months ago but he wanted to know the latest. Can you get me more specifics on where we are on the reassessment? How many sites are done, how many remain, anticipated completion date, etc. He would like a short Q-A to talk from if possible. I'm in Phil at the DD meeting but will be in the office early tomorrow so can talk and help shape it up then. My cell is (b) (6) if you have time to discuss today. Let me know if you can get us something.

Thanks! - Ellen

Sent by EPA Wireless E-Mail Services.

From: Gilberto Irizarry
To: James Woolford
Cc: Barry Breen; Carol Campbell; Carol Rushin; Debbie Dietrich; Ellen Manges; John Michaud; Mary-Kay Lynch
Subject: Re: Fw: libby AM
Date: 06/17/2009 12:57 PM

Got it Jim. Printing out to bring to Barry and Debbie.

Gilberto "Tito" Irizarry
Program Operations & Coordination Division, Director
Office of Emergency Management
US Environmental Protection Agency, Headquarters
Tel: (202) 564-7982
Mobile: (b) (6)
Fax: (202) 564-8333

▼ James Woolford---06/17/2009 12:55:19 PM---James E. Woolford, Director Office of Superfund Remediation &

From: James Woolford/DC/USEPA/US
To: Barry Breen/DC/USEPA/US@EPA, Debbie Dietrich/DC/USEPA/US@EPA, Gilberto Irizarry/DC/USEPA/US@EPA, Ellen Manges/DC/USEPA/US@EPA
Cc: John Michaud/DC/USEPA/US@EPA, Carol Rushin/ENF/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Ellen Manges/DC/USEPA/US@EPA
Date: 06/17/2009 12:55 PM
Subject: Fw: libby AM

James E. Woolford, Director
Office of Superfund Remediation &
Technology Innovation (OSRTI)
Office of Solid Waste and Emergency Response
US Environmental Protection Agency

Mailing Address:
1200 Pennsylvania Avenue, NW
Mail Code: 5201P
Washington, DC 20460

Physical Address:
Room 5622
2777 Crystal Drive South (Potomac Yard South)
Arlington, VA 22202

Phone:
(O) 703 603-8960 (secretary)
(D) 703-603-8722
(F) 703 603-9146

OSRTI Web Site: http://www.epa.gov/superfund

----- Forwarded by James Woolford/DC/USEPA/US on 06/17/2009 12:54 PM -----

From: "EPA-CTS-PRINTER" <EPA-CTS-PRINTER@mintra01.rtp.epa.gov>
To: WOOLFORD.JAMES@EPA.GOV, <Woolford.james, >
Date: 06/17/2009 12:53 PM
Subject: libby

[attachment "[Untitled].pdf" deleted by Gilberto Irizarry/DC/USEPA/US]

From: James Woolford
To: Mathy Stanislaus
Cc: Barry Breen; Ellen Manges; Betsy Southerland
Subject: Re: Fw: thanks and regrouping?
Date: 06/24/2009 05:24 PM

My recommendation is Betsy.

James E. Woolford, Director
Office of Superfund Remediation &
Technology Innovation (OSRTI)
Office of Solid Waste and Emergency Response
US Environmental Protection Agency

▼ Mathy Stanislaus---06/24/2009 05:20:02 PM---Please let me know who should attend this meeting - Thanks ----- Forwarded by Mathy Stanislaus/DC/US

From: Mathy Stanislaus/DC/USEPA/US
To: James Woolford/DC/USEPA/US@EPA, Betsy Southerland <southerland elizabeth@epa.gov>, Ellen Manges/DC/USEPA/US@EPA
Cc: Barry Breen/DC/USEPA/US@EPA
Date: 06/24/2009 05:20 PM
Subject: Fw: thanks and regrouping?

Please let me know who should attend this meeting - Thanks
----- Forwarded by Mathy Stanislaus/DC/USEPA/US on 06/24/2009 05:17 PM -----

From: Carolyn Levine/DC/USEPA/US
To: Arvin Ganesan/DC/USEPA/US@EPA
Cc: "Mathy Stanislaus" <Stanislaus.Mathy@epamail.epa gov>
Date: 06/24/2009 03:47 PM
Subject: Re: Fw: thanks and regrouping?

I am available, but Dora is not available at any other time on Thursday, Catharine indicated it had to be before Friday... so should we do this today?

Carolyn Levine
U.S. EPA/Office of Congressional Affairs
(202) 564-1859
FAX: (202) 501-1550

▼ Arvin Ganesan---06/24/2009 03:20:54 PM---Mathy and Carolyn, Are you available to talk to baucus's staff on next steps with Libby? See below.

From: Arvin Ganesan/DC/USEPA/US
To: "Mathy Stanislaus" <Stanislaus.Mathy@epamail.epa gov>
Cc: "Carolyn Levine" <Levine.Carolyn@epamail.epa.gov>
Date: 06/24/2009 03:20 PM
Subject: Fw: thanks and regrouping?

Mathy and Carolyn,
Are you available to talk to baucus's staff on next steps with Libby? See below.

Thanks.
Sent from my Blackberry Wireless Device

----- Original Message -----
From: "Ransom, Catharine (Baucus)" [Catharine_Ransom@baucus.senate.gov]
Sent: 06/24/2009 09:33 AM AST
To: Arvin Ganesan; "Hughes, Dora (HHS/IOS)" <Dora.Hughes@hhs.gov>
Cc: Bob Sussman
Subject: RE: thanks and regrouping?

Arvin,

Thought it might be helpful to send you some time windows. My windows on Thursday are anytime other than 130, 430, or 5. On Friday, I am available in the afternoon --

We do need to do this before Friday, so let me know if this works -- thanks!

Catharine

-----Original Message-----
From: Ganesan.Arvin@epamail.epa.gov [mailto:Ganesan.Arvin@epamail.epa.gov]
Sent: Tuesday, June 23, 2009 8:01 PM
To: Hughes, Dora (HHS/IOS)
Cc: Sussman.Bob@epamail.epa.gov; Ransom, Catharine (Baucus)

Subject: RE: thanks and regrouping?

I'm afraid that I can't make that time. Could we try to arrange a time where we could bring Mathy Stanislaus (our new head of Superfund) into this conversation? Catharine, is that OK with you?

ARVIN R. GANESAN
Deputy Associate Administrator
Congressional Affairs
Office of the Administrator
United States Environmental Protection Agency
Ganesan.Arvin@epa.gov
(p) 202.564.5200
(f) 202.501.1519

|----------> | From: |
>----------|
|"Hughes, Dora (HHS/IOS)" <Dora.Hughes@hhs.gov> |
>----------|
|----------> | To: |
>----------|
|"Ransom, Catharine (Baucus)" <Catharine_Ransom@baucus.senate.gov>, Arvin Ganesan/DC/USEPA/US@EPA, Bob Sussman/DC/USEPA/US@EPA |
>----------|
|----------> | Date: |
>----------|
|06/23/2009 04:21 PM |
>----------|
|----------> | Subject: |
>----------|
|RE: thanks and regrouping? |
>----------|

Good afternoon—

I could do 10-11:15 window only.

Dora L Hughes, MD, MPH, FACP
Counselor for Science & Public Health
Office of the Secretary, DHHS

From: Ransom, Catharine (Baucus) [mailto:Catharine_Ransom@baucus.senate.gov]
Sent: Tuesday, June 23, 2009 4:06 PM
To: 'Ganesan.Arvin@epamail.epa.gov'; Hughes, Dora (HHS/IOS); 'Sussman.Bob@epa.gov'
Subject: thanks and regrouping?

Hi everyone,

I wanted to echo Ty's earlier thank you for everyone's hard work last week on the announcement of the public health emergency. It went very well.

I think we need to get together to get a report on Monday night's meeting and talk about next steps going forward. Does Thursday sometime between 10 and 1 work for you? Thanks!

Catharine

Catharine Cyr Ransom
Senior Climate and Environmental Advisor
Senator Max Baucus
511 Hart Senate Building
C 20510-2602
(b) (6)
direct: (202)224-7286
fax: (202) 224-9412
catharine_ransom@baucus.senate.gov

From: Dan Strausbaugh
To: Ted Linnert
Subject: Re: HHS $6M Grant for Libby
Date: 06/04/2009 10:46 AM

Ted,

You should be able to access the grant package from this website. Let me know if otherwise.....
Dan

https://apply07.grants.gov/apply/UpdateOffer?id=12261&is2006=false

▼ Ted Linnert/OCP/R8/USEPA/US

Ted Linnert/OCP/R8/USEPA/US

06/03/2009 04:12 PM

To Dan Strausbaugh/MO/R8/USEPA/US@EPA
cc
Subject HHS $6M Grant for Libby

Hi Dan,

How's it going? Could you please send me a copy of the grant application packet that HHS/ATSDR sent to those groups in Libby? I'm writing the Communications Strategy on the pending Big Announcement and that material would be very helpful. Thanks!

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
Denver, CO 80202-1129

(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

From: Ted Linnert
To: Jeff Morin
Subject: Re: Is there any way you can reschedule the Libby call for when Ted is available?
Date: 06/03/2009 04:22 PM

I'll do it. At this point it would be simpler. I didn't realize you only expect the call to last 10 minutes - I'll be fine.

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
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Denver, CO 80202-1129

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linnert.ted@epa.gov

▼ Jeff Morin/DC/USEPA/US

Jeff Morin/DC/USEPA/US

06/03/2009 01:56 PM

To: Ted Linnert/OCP/R8/USEPA/US@EPA
cc: Sonya Pennock/OCP/R8/USEPA/US@EPA, Tim Davis/R8/USEPA/US@EPA
Subject: Re: Is there any way you can reschedule the Libby call for when Ted is available?

You can't do 3 tomorrow?

Jeff Morin
w. 202-564-6553
c. (b) (6)
- - - - - - - - - - - - - - -
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Twitter news: http://twitter.com/usepanews
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- - - - - - - - - - - - - - -

▼ Ted Linnert---06/03/2009 03:53:26 PM---2pm EST (noon MST) on Thursday 6/4 would work for me. Ted Linnert Office of Communication & Public I

From: Ted Linnert/OCP/R8/USEPA/US
To: Jeff Morin/DC/USEPA/US@EPA
Cc: Sonya Pennock/OCP/R8/USEPA/US@EPA, Tim Davis/R8/USEPA/US@EPA
Date: 06/03/2009 03:53 PM
Subject: Re: Is there any way you can reschedule the Libby call for when Ted is available?

2pm EST (noon MST) on Thursday 6/4 would work for me.

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linnert.ted@epa.gov

▼ Jeff Morin/DC/USEPA/US

Jeff Morin/DC/USEPA/US

06/03/2009 10:46 AM

To Tim Davis/R8/USEPA/US@EPA
cc Sonya Pennock/OCP/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA
Subject Re: Is there any way you can reschedule the Libby call for when Ted is available?

Ted, can you join our conference call June 4 **Thursday** afternoon, perhaps 2 or 3 ET?

Jeff Morin
w. 202-564-6553
c. (b) (6)
- - - - - - - - - - - - - - -
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Twitter news: http://twitter.com/usepanews
Mobile: http://m.epa.gov
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▼ Tim Davis---06/03/2009 12:02:20 PM---Hi Jeff, Sonya (Ted's manager) is wondering if we can reschedule for 2PM MST, when Ted will be avail

From: Tim Davis/R8/USEPA/US
To: Jeff Morin/DC/USEPA/US@EPA
Cc: Sonya Pennock/OCP/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA
Date: 06/03/2009 12:02 PM
Subject: Re: Is there any way you can reschedule the Libby call for when Ted is available?

Hi Jeff,

Sonya (Ted's manager) is wondering if we can reschedule for 2PM MST, when Ted will be available. Oops - meant to hit "Send" hours ago - sorry. :)

▼ Jeff Morin/DC/USEPA/US

Jeff Morin/DC/USEPA/US

06/03/2009 05:27 AM

To: Tim Davis/R8/USEPA/US@EPA
cc: Russell Leclerc/EPR/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA
Subject: Re: Is there any way you can reschedule the Libby call for when Ted is available?

I suppose that depends on when Ted is available, as well as the HHS people.

Jeff Morin
w. 202-564-6553
c. (b) (6)
- - - - - - - - - - - - - -
Blog: http://blog.epa.gov
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News: http://www.epa.gov/newsroom
Twitter news: http://twitter.com/usepanews
Mobile: http://m.epa.gov
- - - - - - - - - - - - - -

▼ Tim Davis---06/02/2009 05:42:44 PM---Hi Jeff, I just talked to our news media folks (Wendy Chipp--the lead for Libby--and Rich Mylott), a

From: Tim Davis/R8/USEPA/US
To: Jeff Morin/DC/USEPA/US@EPA
Cc: Russell Leclerc/EPR/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA
Date: 06/02/2009 05:42 PM
Subject: Is there any way you can reschedule the Libby call for when Ted is available?

Hi Jeff,

I just talked to our news media folks (Wendy Chipp--the lead for Libby--and Rich Mylott), and they'd really prefer to have you talk to Ted Linnert, since he's the media-savvy Libby expert.

Russ, Sonya: what do you think? Sonya, I think you and Wendy are both at a meeting during Jeff's scheduled call at 1PM on Wednesday. Jeff just has some basic questions about Libby before talking with HHS. Jeff also might ask me to make a couple changes to the Libby Web site.

If it's not a big deal and is very generic, Victor should do fine. But Ted has years of experience handling tough questions and dealing with media, etc, and he's the go-to guy for Libby public relations.

If it's not a big ordeal, I can be on the call with you and Victor. But our news media folks prefer to have Ted and at least one of them on the call, if possible.

I'll leave it up to Sonya, Russ and Jeff - thanks!
--Tim

From:	Ted Linnert
To:	Jeff Morin
Cc:	Sonya Pennock; Tim Davis
Subject:	Re: Is there any way you can reschedule the Libby call for when Ted is available?
Date:	06/03/2009 03:54 PM

2pm EST (noon MST) on Thursday 6/4 would work for me.

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
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▼ Jeff Morin/DC/USEPA/US

Jeff Morin/DC/USEPA/US

06/03/2009 10:46 AM

To	Tim Davis/R8/USEPA/US@EPA
cc	Sonya Pennock/OCP/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA
Subject	Re: Is there any way you can reschedule the Libby call for when Ted is available?

Ted, can you join our conference call June 4 **Thursday** afternoon, perhaps 2 or 3 ET?

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w. 202-564-6553
c. (b) (6)
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Mobile: http://m.epa.gov
- - - - - - - - - - - - - - -

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From: Tim Davis/R8/USEPA/US
To: Jeff Morin/DC/USEPA/US@EPA
Cc: Sonya Pennock/OCP/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA
Date: 06/03/2009 12:02 PM
Subject: Re: Is there any way you can reschedule the Libby call for when Ted is available?

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▼ Jeff Morin/DC/USEPA/US

Jeff Morin/DC/USEPA/US

06/03/2009 05:27 AM

To: Tim Davis/R8/USEPA/US@EPA
cc: Russell Leclerc/EPR/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA
Subject: Re: Is there any way you can reschedule the Libby call for when Ted is available?

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Jeff Morin
w. 202-564-6553
c. (b) (6)
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Twitter news: http://twitter.com/usepanews
Mobile: http://m.epa.gov
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From: Tim Davis/R8/USEPA/US
To: Jeff Morin/DC/USEPA/US@EPA

Cc: Russell Leclerc/EPR/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA

Date: 06/02/2009 05:42 PM

Subject: Is there any way you can reschedule the Libby call for when Ted is available?

Hi Jeff,

I just talked to our news media folks (Wendy Chipp--the lead for Libby--and Rich Mylott), and they'd really prefer to have you talk to Ted Linnert, since he's the media-savvy Libby expert.

Russ, Sonya: what do you think? Sonya, I think you and Wendy are both at a meeting during Jeff's scheduled call at 1PM on Wednesday. Jeff just has some basic questions about Libby before talking with HHS. Jeff also might ask me to make a couple changes to the Libby Web site.

If it's not a big deal and is very generic, Victor should do fine. But Ted has years of experience handling tough questions and dealing with media, etc, and he's the go-to guy for Libby public relations.

If it's not a big ordeal, I can be on the call with you and Victor. But our news media folks prefer to have Ted and at least one of them on the call, if possible.

I'll leave it up to Sonya, Russ and Jeff - thanks!
--Tim

From: Carol Campbell
To: Russell Leclerc
Subject: Re: Libby Announcement
Date: 06/18/2009 09:36 AM

I did thank OCPI separately and then sent my note to Bob Ward and Eddie suggesting they do the same. Eddie sent out a similar note to mine. And thank you for all your work on the Action memo as well as the myriad other details as this went forward. We should start writing the PHE up for a gold in the fall.
Sent by EPA Wireless E-Mail Services

▼ Russell Leclerc

----- Original Message -----
From: Russell Leclerc
Sent: 06/18/2009 07:31 AM MDT
To: Carol Campbell
Subject: Re: Libby Announcement

Hi Carol,

Thank you for recognizing your EPR staff and managers. A big thanks should go to Andy Lensink, Sonya and Ted and many others outside of EPR.

I also want to thank you for your leadership and clear vision. Life is much easier for everyone involved when senior managers fight the fight for the Region.

Russ

▼ Carol Campbell/R8/USEPA/US

Carol Campbell/R8/USEPA/US
Sent by: Penney Trujillo

06/17/2009 11:34 AM

To Al Lange/EPR/R8/USEPA/US@EPA, Andrew Schmidt/R8/USEPA/US@EPA, Armando Saenz/EPR/R8/USEPA/US@EPA, Ayn Schmit/EPR/R8/USEPA/US@EPA, Barbara Benoy/EPR/R8/USEPA/US@EPA, Barbara Nelson/EPR/R8/USEPA/US@EPA, Barbara Thomas/R8/USEPA/US@EPA, Bernadette Gonzalez/R8/USEPA/US@EPA, Bert Garcia/EPR/R8/USEPA/US@EPA, Betty Pennock/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Bobbie Fernandez/R8/USEPA/US@EPA, Bonita Lavelle/EPR/R8/USEPA/US@EPA, Bradley Miller/EPR/R8/USEPA/US@EPA, Brent Truskowski/EPR/R8/USEPA/US@EPA, Brian Caruso/EPR/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Russell/EPR/R8/USEPA/US@EPA, Charles Partridge/R8/USEPA/US@EPA, Charlotte Schuster/EPR/R8/USEPA/US@EPA, Christina Progess/EPR/R8/USEPA/US@EPA, Christina Wilson/EPR/R8/USEPA/US@EPA, Cinna Vallejos/EPR/R8/USEPA/US@EPA, Connie Collins/R8/USEPA/US@EPA, Craig Myers/EPR/R8/USEPA/US@EPA, Curtis Kimbel/EPR/R8/USEPA/US@EPA, Dan

Wall/EPR/R8/USEPA/US@EPA, Dana
Allen/EPR/R8/USEPA/US@EPA, Daniel
Heffernan/EPR/R8/USEPA/US@EPA, Darcy
Campbell/EPR/R8/USEPA/US@EPA, Dave
Christenson/EPR/R8/USEPA/US@EPA, Dave
Moon/EPR/R8/USEPA/US@EPA, David
Lennon/R8/USEPA/US@EPA, David
Ostrander/EPR/R8/USEPA/US@EPA, David
Rathke/EPR/R8/USEPA/US@EPA, David
Romero/EPR/R8/USEPA/US@EPA, Deirdre
Rothery/R8/USEPA/US@EPA, Delores
Hutchens/EPR/R8/USEPA/US@EPA, Delores
Soriano/R8/USEPA/US@EPA, Dianna
Lim/EPR/R8/USEPA/US@EPA, Donald
Goodrich/R8/USEPA/US@EPA, Duc
Nguyen/EPR/R8/USEPA/US@EPA, Elisabeth
Evans/R8/USEPA/US@EPA, Eric
Steinhaus/EPR/R8/USEPA/US@EPA, Erna
Waterman/P2/R8/USEPA/US@EPA, FRANCES
COSTANZI/R8/USEPA/US@EPA, Frances
MacDonald/R8/USEPA/US@EPA, Gary
Kleeman/EPR/R8/USEPA/US@EPA, George
Parrish/EPR/R8/USEPA/US@EPA, George
Ritz/R8/USEPA/US@EPA, Gina
Andrews/R8/USEPA/US, Glenn
Ford/EPR/R8/USEPA/US@EPA, Greg
Hargreaves/EPR/R8/USEPA/US@EPA, Gregory
Oberley/EPR/R8/USEPA/US@EPA, Gwen
Christiansen/R8/USEPA/US@EPA, Hays
Griswold/EPR/R8/USEPA/US@EPA, Helen
Dawson/R8/USEPA/US@EPA, Jack
Whyte/R8/USEPA/US@EPA, James
Hanley/EPR/R8/USEPA/US@EPA, James
Ruppel/EPR/R8/USEPA/US@EPA, Jean
MacKenzie/EPR/R8/USEPA/US@EPA, Jerry
Blank/R8/USEPA/US@EPA, Jill
Minter/EPR/R8/USEPA/US@EPA, Jim
Berkley/EPR/R8/USEPA/US@EPA, Jim
Kiefer/EPR/R8/USEPA/US@EPA, Jim
Luey/EPR/R8/USEPA/US@EPA, Jim
Peterson/R8/USEPA/US@EPA, Jodi
Powell/EPR/R8/USEPA/US@EPA, Jody
Ostendorf/R8/USEPA/US@EPA, Johanna
Miller/EPR/R8/USEPA/US@EPA, John
DiPentino/R8/USEPA/US@EPA, John
Goodrick/R8/USEPA/US@EPA, John
Marshall/EPR/R8/USEPA/US@EPA, John
Wieber/R8/USEPA/US@EPA, Joni
Sandoval/EPR/R8/USEPA/US@EPA, Joseph
Byron/EPR/R8/USEPA/US@EPA, Joyce
Ackerman/EPR/R8/USEPA/US@EPA, Joyel
Dhieux/R8/USEPA/US@EPA, Judy
Hansen/R8/USEPA/US@EPA, Judy
Roos/R8/USEPA/US@EPA, Julia
McCarthy/R8/USEPA/US@EPA, Julie
Kinsey/R8/USEPA/US@EPA, Karen
Hamilton/EPR/R8/USEPA/US@EPA, Karen
Reed/EPR/R8/USEPA/US@EPA, Karl
Hermann/R8/USEPA/US@EPA, Karren
Johnson/EPR/R8/USEPA/US@EPA, Kathie
Atencio/EPR/R8/USEPA/US@EPA, Kathleen
Graham/R8/USEPA/US@EPA, Kathryn
Hernandez/EPR/R8/USEPA/US@EPA, Ken
Wangerud/EPR/R8/USEPA/US@EPA, Kerry
Guy/EPR/R8/USEPA/US@EPA, Kris
Jensen/EPR/R8/USEPA/US@EPA, Lareina
Guenzel/R8/USEPA/US@EPA, Larry
Svoboda/EPR/R8/USEPA/US@EPA, Laura
Williams/EPR/R8/USEPA/US@EPA, Lewis
Daniels/EPR/R8/USEPA/US@EPA, Linda

Armer/EPR/R8/USEPA/US@EPA, Lisa
Lloyd/EPR/R8/USEPA/US@EPA, Liz
Rogers/R8/USEPA/US@EPA, Lourdes
Deppmeier/R8/USEPA/US@EPA, Luke
Chavez/EPR/R8/USEPA/US@EPA, Mandi
Rodriguez/EPR/R8/USEPA/US@EPA, Maple
Barnard/R8/USEPA/US@EPA, Marcella
Hutchinson/EPR/R8/USEPA/US@EPA, Mario
Robles/EPR/R8/USEPA/US@EPA, Mark
Aguilar/EPR/R8/USEPA/US@EPA, Martin
Hestmark/R8/USEPA/US@EPA, Martin
Mccomb/EPR/R8/USEPA/US@EPA, Mary
Goldade/R8/USEPA/US@EPA, Melanie
Wasco/R8/USEPA/US@EPA, Melissa
Payan/EPR/R8/USEPA/US@EPA, Michael
Holmes/EPR/R8/USEPA/US@EPA, Mike
Cirian/R8/USEPA/US@EPA, Mike
Wireman/EPR/R8/USEPA/US@EPA, Mike
Zimmerman/EPR/R8/USEPA/US@EPA, Mitra
Jha/EPR/R8/USEPA/US@EPA, Molly
Brodin/R8/USEPA/US@EPA, Nghia
Pham/EPR/R8/USEPA/US@EPA, Pam
Dougherty/EPR/R8/USEPA/US@EPA, Patricia
Gamroth/R8/USEPA/US@EPA, Patricia
Smith/EPR/R8/USEPA/US@EPA, Paul
Peronard/EPR/R8/USEPA/US@EPA, Paula
Cifka/EPR/R8/USEPA/US@EPA, Paula
Schmittdiel/EPR/R8/USEPA/US@EPA, Peggy
Crandell/R8/USEPA/US@EPA, Penney
Trujillo/EPR/R8/USEPA/US@EPA, Peter
Ismert/EPR/R8/USEPA/US@EPA, Peter
Monahan/EPR/R8/USEPA/US@EPA, Peter
Stevenson/EPR/R8/USEPA/US@EPA, Phillip
Werner/R8/USEPA/US@EPA, Rebecca
Thomas/EPR/R8/USEPA/US@EPA, Richard
Clark/R8/USEPA/US@EPA, Rickie
McCall/R8/USEPA/US@EPA, Rob
Stites/EPR/R8/USEPA/US@EPA, Robert
Edgar/EPR/R8/USEPA/US@EPA, Robin
Coursen/R8/USEPA/US@EPA, Robyn
Blackburn/R8/USEPA/US@EPA, Russell
Leclerc/EPR/R8/USEPA/US@EPA, Sabrina
Forrest/R8/USEPA/US@EPA, Sam
Garcia/EPR/R8/USEPA/US@EPA, Sandra
Bourgeois/EPR/R8/USEPA/US@EPA, Sandra
Spence/EPR/R8/USEPA/US@EPA, Sarah
Fowler/EPR/R8/USEPA/US@EPA, Sarah
Hester/R8/USEPA/US@EPA, Stacey
Eriksen/EPR/R8/USEPA/US@EPA, Stanley
Christensen/EPR/R8/USEPA/US@EPA, Steven
Bubnick/R8/USEPA/US@EPA, Steven
Merritt/R8/USEPA/US@EPA, Steven
Way/EPR/R8/USEPA/US@EPA, Susan
Griffin/EPR/R8/USEPA/US@EPA, Ted
Lanzano/EPR/R8/USEPA/US, Terry
Anderson/EPR/R8/USEPA/US@EPA, Tien
Nguyen/EPR/R8/USEPA/US@EPA, Timothy
Rehder/EPR/R8/USEPA/US@EPA, Tom
Johnson/EPR/R8/USEPA/US@EPA, Toney
Ott/EPR/R8/USEPA/US@EPA, Tony
Ranalli/R8/USEPA/US@EPA, Tony
Selle/EPR/R8/USEPA/US@EPA, Tonya
Fish/R8/USEPA/US@EPA,
Vance.Sam@EPA.GOV@EPA, Vera
Moritz/EPR/R8/USEPA/US@EPA, Vern
Berry/EPR/R8/USEPA/US@EPA, Victor
Ketellapper/EPR/R8/USEPA/US@EPA, Wendy
OBrien/EPR/R8/USEPA/US@EPA, Wes
Wilson/EPR/R8/USEPA/US@EPA

cc

Subject Libby Announcement

To All Staff

This is a historic day. The first Public Health Emergency ever declared by EPA will be announced today at 11:20 our time by Administrator Jackson. Health and Human Services will be providing Health Care to Libby citizens affected by asbestos. I want to personally thank all of the staff and managers in EPR that have been involved in this site for their hard work under often trying conditions. We will continue to move aggressively to clean up the Libby and Tryoy communities and protect the health of the people.

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

From: Dave Christenson
To: Carol Campbell
Cc: Al Lange; Andrew Schmidt; Armando Saenz; Ayn Schmit; Barbara Benoy; Barbara Nelson; Barbara Thomas; Bernadette Gonzalez; Bert Garcia; Betty Pennock; Bill Murray; Bobbie Fernandez; Bonita Lavelle; Bradley Miller; Brent Truskowski; Brian Caruso; Carol Campbell; Carol Russell; Charles Partridge; Charlotte Schuster; Christina Progess; Christina Wilson; Cinna Vallejos; Connie Collins; Craig Myers; Curtis Kimbel; Dan Wall; Dana Allen; Daniel Heffernan; Darcy Campbell; Dave Christenson; Dave Moon; David Lennon; David Ostrander; David Rathke; David Romero; Deirdre Rothery; Delores Hutchens; Delores Soriano; Dianna Lim; Donald Goodrich; Duc Nguyen; Elisabeth Evans; Eric Steinhaus; Erna Waterman; FRANCES COSTANZI; Frances MacDonald; Gary Kleeman; George Parrish; George Ritz; Gina Andrews; Glenn Ford; Greg Hargreaves; Gregory Oberley; Gwen Christiansen; Hays Griswold; Helen Dawson; Jack Whyte; James Hanley; James Ruppel; Jean MacKenzie; Jerry Blank; Jill Minter; Jim Berkley; Jim Kiefer; Jim Luey; Jim Peterson; Jodi Powell; Jody Ostendorf; Johanna Miller; John DiPentino; John Goodrick; John Marshall; John Wieber; Joni Sandoval; Joseph Byron; Joyce Ackerman; Joyel Dhieux; Judy Hansen; Judy Roos; Julia McCarthy; Julie Kinsey; Karen Hamilton; Karen Reed; Karl Hermann; Karren Johnson; Kathie Atencio; Kathleen Graham; Kathryn Hernandez; Ken Wangerud; Kerry Guy; Kris Jensen; Lareina Guenzel; Larry Svoboda; Laura Williams; Lewis Daniels; Linda Armer; Lisa Lloyd; Liz Rogers; Lourdes Deppmeier; Luke Chavez; Mandi Rodriguez; Maple Barnard; Marcella Hutchinson; Mario Robles; Mark Aguilar; Martin Hestmark; Martin Mccomb; Mary Goldade; Melanie Wasco; Melissa Payan; Michael Holmes; Mike Cirian; Mike Wireman; Mike Zimmerman; Mitra Jha; Molly Brodin; Nghia Pham; Pam Dougherty; Patricia Gamroth; Patricia Smith; Paul Peronard; Paula Cifka; Paula Schmittdiel; Peggy Crandell; Penney Trujillo; Peter Ismert; Peter Monahan; Peter Stevenson; Phillip Werner; Rebecca Thomas; Richard Clark; Rickie McCall; Rob Stites; Robert Edgar; Robin Coursen; Robyn Blackburn; Russell Leclerc; Sabrina Forrest; Sam Garcia; Sandra Bourgeois; Sandra Spence; Sarah Fowler; Sarah Hester; Stacey Eriksen; Stanley Christensen; Steven Bubnick; Steven Merritt; Steven Way; Susan Griffin; Ted Lanzano; Terry Anderson; Tien Nguyen; Timothy Rehder; Tom Johnson; Toney Ott; Tony Ranalli; Tony Selle; Tonya Fish; Vance.Sam@EPA.GOV; Vera Moritz; Vern Berry; Victor Ketellapper; Wendy OBrien; Wes Wilson
Subject: Re: Libby Announcement
Date: 06/17/2009 02 54 PM

History is what gets written down, these days what's on the internet. The EPA press release for the Public Health Emergency Declaration is here:
http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceeac8525735900400c27/0d16234d252c98f9852575d8005e63ac!OpenDocument

With the straight forward link <http://epa.gov/libby> now going to the Libby Superfund home page.

(In case you wanted to know more . . .)

▼ Carol Campbell/R8/USEPA/US

Carol Campbell/R8/USEPA/US
Sent by: Penney Trujillo

06/17/2009 11:34 AM

To Al Lange/EPR/R8/USEPA/US@EPA, Andrew Schmidt/R8/USEPA/US@EPA, Armando Saenz/EPR/R8/USEPA/US@EPA, Ayn Schmit/EPR/R8/USEPA/US@EPA, Barbara Benoy/EPR/R8/USEPA/US@EPA, Barbara Nelson/EPR/R8/USEPA/US@EPA, Barbara Thomas/R8/USEPA/US@EPA, Bernadette Gonzalez/R8/USEPA/US@EPA, Bert Garcia/EPR/R8/USEPA/US@EPA, Betty Pennock/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Bobbie Fernandez/R8/USEPA/US@EPA, Bonita Lavelle/EPR/R8/USEPA/US@EPA, Bradley Miller/EPR/R8/USEPA/US@EPA, Brent Truskowski/EPR/R8/USEPA/US@EPA, Brian Caruso/EPR/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Carol Russell/EPR/R8/USEPA/US@EPA, Charles Partridge/R8/USEPA/US@EPA, Charlotte Schuster/EPR/R8/USEPA/US@EPA, Christina Progess/EPR/R8/USEPA/US@EPA, Christina Wilson/EPR/R8/USEPA/US@EPA, Cinna Vallejos/EPR/R8/USEPA/US@EPA, Connie Collins/R8/USEPA/US@EPA, Craig Myers/EPR/R8/USEPA/US@EPA, Curtis Kimbel/EPR/R8/USEPA/US@EPA, Dan Wall/EPR/R8/USEPA/US@EPA, Dana Allen/EPR/R8/USEPA/US@EPA, Daniel Heffernan/EPR/R8/USEPA/US@EPA, Darcy Campbell/EPR/R8/USEPA/US@EPA, Dave Christenson/EPR/R8/USEPA/US@EPA, Dave Moon/EPR/R8/USEPA/US@EPA, David Lennon/R8/USEPA/US@EPA, David Ostrander/EPR/R8/USEPA/US@EPA, David Rathke/EPR/R8/USEPA/US@EPA, David Romero/EPR/R8/USEPA/US@EPA, Deirdre Rothery/R8/USEPA/US@EPA, Delores Hutchens/EPR/R8/USEPA/US@EPA, Delores Soriano/R8/USEPA/US@EPA, Dianna Lim/EPR/R8/USEPA/US@EPA, Donald Goodrich/R8/USEPA/US@EPA, Duc Nguyen/EPR/R8/USEPA/US@EPA, Elisabeth Evans/R8/USEPA/US@EPA, Eric Steinhaus/EPR/R8/USEPA/US@EPA, Erna Waterman/P2/R8/USEPA/US@EPA, FRANCES COSTANZI/R8/USEPA/US@EPA, Frances MacDonald/R8/USEPA/US@EPA, Gary Kleeman/EPR/R8/USEPA/US@EPA, George Parrish/EPR/R8/USEPA/US@EPA, George Ritz/R8/USEPA/US@EPA, Gina Andrews/R8/USEPA/US, Glenn Ford/EPR/R8/USEPA/US@EPA, Greg Hargreaves/EPR/R8/USEPA/US@EPA, Gregory Oberley/EPR/R8/USEPA/US@EPA, Gwen Christiansen/R8/USEPA/US@EPA, Hays Griswold/EPR/R8/USEPA/US@EPA, Helen Dawson/R8/USEPA/US@EPA, Jack Whyte/R8/USEPA/US@EPA, James Hanley/EPR/R8/USEPA/US@EPA, James Ruppel/EPR/R8/USEPA/US@EPA, Jean MacKenzie/EPR/R8/USEPA/US@EPA, Jerry Blank/R8/USEPA/US@EPA, Jill Minter/EPR/R8/USEPA/US@EPA, Jim Berkley/EPR/R8/USEPA/US@EPA, Jim Kiefer/EPR/R8/USEPA/US@EPA, Jim Luey/EPR/R8/USEPA/US@EPA, Jim Peterson/R8/USEPA/US@EPA, Jodi Powell/EPR/R8/USEPA/US@EPA, Jody Ostendorf/R8/USEPA/US@EPA, Johanna Miller/EPR/R8/USEPA/US@EPA, John DiPentino/R8/USEPA/US@EPA, John Goodrick/R8/USEPA/US@EPA, John Marshall/EPR/R8/USEPA/US@EPA, John Wieber/R8/USEPA/US@EPA, Joni Sandoval/EPR/R8/USEPA/US@EPA, Joseph Byron/EPR/R8/USEPA/US@EPA, Joyce Ackerman/EPR/R8/USEPA/US@EPA, Joyel Dhieux/R8/USEPA/US@EPA, Judy Hansen/R8/USEPA/US@EPA, Judy Roos/R8/USEPA/US@EPA, Julia McCarthy/R8/USEPA/US@EPA, Julie Kinsey/R8/USEPA/US@EPA, Karen Hamilton/EPR/R8/USEPA/US@EPA, Karen Reed/EPR/R8/USEPA/US@EPA, Karl Hermann/R8/USEPA/US@EPA, Karren Johnson/EPR/R8/USEPA/US@EPA, Kathie Atencio/EPR/R8/USEPA/US@EPA, Kathleen Graham/R8/USEPA/US@EPA, Kathryn Hernandez/EPR/R8/USEPA/US@EPA, Ken Wangerud/EPR/R8/USEPA/US@EPA, Kerry Guy/EPR/R8/USEPA/US@EPA, Kris Jensen/EPR/R8/USEPA/US@EPA, Lareina Guenzel/R8/USEPA/US@EPA, Larry Svoboda/EPR/R8/USEPA/US@EPA, Laura Williams/EPR/R8/USEPA/US@EPA, Lewis Daniels/EPR/R8/USEPA/US@EPA, Linda Armer/EPR/R8/USEPA/US@EPA, Lisa Lloyd/EPR/R8/USEPA/US@EPA, Liz Rogers/R8/USEPA/US@EPA, Lourdes Deppmeier/R8/USEPA/US@EPA, Luke Chavez/EPR/R8/USEPA/US@EPA, Mandi Rodriguez/EPR/R8/USEPA/US@EPA, Maple Barnard/R8/USEPA/US@EPA, Marcella Hutchinson/EPR/R8/USEPA/US@EPA, Mario Robles/EPR/R8/USEPA/US@EPA, Mark Aguilar/EPR/R8/USEPA/US@EPA, Martin Hestmark/R8/USEPA/US@EPA, Martin Mccomb/EPR/R8/USEPA/US@EPA, Mary Goldade/R8/USEPA/US@EPA, Melanie Wasco/R8/USEPA/US@EPA, Melissa Payan/EPR/R8/USEPA/US@EPA, Michael Holmes/EPR/R8/USEPA/US@EPA, Mike Cirian/R8/USEPA/US@EPA, Mike Wireman/EPR/R8/USEPA/US@EPA, Mike Zimmerman/EPR/R8/USEPA/US@EPA, Mitra Jha/EPR/R8/USEPA/US@EPA, Molly Brodin/R8/USEPA/US@EPA, Nghia Pham/EPR/R8/USEPA/US@EPA, Pam Dougherty/EPR/R8/USEPA/US@EPA, Patricia Gamroth/R8/USEPA/US@EPA, Patricia Smith/EPR/R8/USEPA/US@EPA, Paul Peronard/EPR/R8/USEPA/US@EPA, Paula Cifka/EPR/R8/USEPA/US@EPA, Paula Schmittdiel/EPR/R8/USEPA/US@EPA, Peggy Crandell/R8/USEPA/US@EPA, Penney Trujillo/EPR/R8/USEPA/US@EPA, Peter Ismert/EPR/R8/USEPA/US@EPA, Peter Monahan/EPR/R8/USEPA/US@EPA, Peter Stevenson/EPR/R8/USEPA/US@EPA, Phillip Werner/R8/USEPA/US@EPA, Rebecca Thomas/EPR/R8/USEPA/US@EPA, Richard Clark/R8/USEPA/US@EPA, Rickie McCall/R8/USEPA/US@EPA, Rob Stites/EPR/R8/USEPA/US@EPA, Robert Edgar/EPR/R8/USEPA/US@EPA, Robin Coursen/R8/USEPA/US@EPA, Robyn Blackburn/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Sabrina Forrest/R8/USEPA/US@EPA, Sam Garcia/EPR/R8/USEPA/US@EPA, Sandra Bourgeois/EPR/R8/USEPA/US@EPA, Sandra Spence/EPR/R8/USEPA/US@EPA, Sarah Fowler/EPR/R8/USEPA/US@EPA, Sarah Hester/R8/USEPA/US@EPA, Stacey Eriksen/EPR/R8/USEPA/US@EPA, Stanley Christensen/EPR/R8/USEPA/US@EPA, Steven

Bubnick/R8/USEPA/US@EPA, Steven Merritt/R8/USEPA/US@EPA, Steven Way/EPR/R8/USEPA/US@EPA, Susan Griffin/EPR/R8/USEPA/US@EPA, Ted Lanzano/EPR/R8/USEPA/US, Terry Anderson/EPR/R8/USEPA/US@EPA, Tien Nguyen/EPR/R8/USEPA/US@EPA, Timothy Rehder/EPR/R8/USEPA/US@EPA, Tom Johnson/EPR/R8/USEPA/US@EPA, Toney Ott/EPR/R8/USEPA/US@EPA, Tony Ranalli/R8/USEPA/US@EPA, Tony Selle/EPR/R8/USEPA/US@EPA, Tonya Fish/R8/USEPA/US@EPA, Vance.Sam@EPA.GOV@EPA, Vera Moritz/EPR/R8/USEPA/US@EPA, Vern Berry/EPR/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA, Wendy OBrien/EPR/R8/USEPA/US@EPA, Wes Wilson/EPR/R8/USEPA/US@EPA

cc

Subject Libby Announcement

To All Staff

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Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

From: Betsaida Alcantara
To: Ellen Manges
Subject: Re: Libby Emergency Declaration
Date: 06/18/2009 02:34 PM

I'm not at my desk. Will call you soon.

▼ Ellen Manges

----- Original Message -----
From: Ellen Manges
Sent: 06/18/2009 02:30 PM EDT
To: Betsaida Alcantara
Subject: Re: Libby Emergency Declaration

Can you send your number? I'll call you

Sent by EPA Wireless E-Mail Services.

▼ Betsaida Alcantara

----- Original Message -----
From: Betsaida Alcantara
Sent: 06/18/2009 02:03 PM EDT
To: Elizabeth Southerland; Ellen Manges
Cc: Adora Andy; Mary-Kay Lynch
Subject: Libby Emergency Declaration

Betsy,
Below are questions from a reporter from "Asbestos Watch". They seem to be really in the weeds. Can you ladies give us some guidance? Feel free to call us.

----- Forwarded by Betsaida Alcantara/DC/USEPA/US on 06/18/2009 01:59 PM -----

From: Paul Peters <ppeters@asbestoswatch.net>
To: Betsaida Alcantara/DC/USEPA/US@EPA
Cc: ppeters@asbestoswatch.net, gerryhh@(b) (6) Gordon Sullivan <gordsull@(b) (6) Aubrey Miller <aubrey.miller@fda.hhs.gov>, Terry Trent <ttrent1@(b) (6) Brad Black <brad@libbyasbestos.org>, barrett_kaiser@baucus.senate.gov, lpeters@asbestoswatch.net
Date: 06/18/2009 01:57 PM
Subject: Libby Emergency Declaration

Here is the list of questions I have about the emergency declaration
that was declared in Libby, Montana on June 17. I believe that an on-
record interview is needed to answer these questions:

Approximately how many people with asbestos-related disease can be
served over the course of their illness by the $6 million that has
been set aside for health in Libby?

What will the total expenditures for Libby be after this declaration?

How much of that is covered by the 2008 settlement with W.R. Grace &
Company?

If the EPA had not settled with Grace in 2008, could the company have been made to pay for the declaration?

Does the EPA believe that Libby amphibole asbestos may be a contributing factor to the higher rates of asbestos-related disease seen in Libby?

If ongoing risk assessments determine that Libby amphibole is more toxic than previously acknowledged by the EPA, will homes cleaned in the past be revisited for further cleaning?

In the EPA's Action Memorandum Amendment on the Libby emergency

declaration, it is stated that Polarized Light Microscopy and visual inspections for vermiculite will be used as the standard for determining if a property is clean. Yet in 1994, the EPA determined that Transmission Electron Microscopy is far greater at detecting asbestos fibers. Still, the Action Memorandum Amendment states that, "At this time there are no other viable alternative technologies available for addressing asbestos." Does the EPA now believe that TEM is more effective than PLM? Does a combination of PLM and visual inspections insure that exposures have been stopped?

In April of this year, the EPA declared that the ambient air in Libby is safe to breath, yet the EPA "Action Memorandum Amendment" on the emergency declaration partly blames topography and meteorology for the greater medical impact in Libby. If the air is clean, how can these be factors?

Paul Peters
Editor
Asbestos Watch
(406) 322-3961
www.asbestoswatch.net

From: Carol Campbell
To: Victor Ketellapper
Subject: Re: Libby PHE Brief
Date: 02/03/2009 07:40 PM

9:30-10:30, 12-1, 4:30-5.
Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

▼ Victor Ketellapper/EPR/R8/USEPA/US

Victor Ketellapper/EPR/R8/USEPA/US

02/03/2009 12:45 PM

To Carol Campbell/R8/USEPA/US@EPA
cc
Subject Libby PHE Brief

Can you make some time on Wed to discuss the options for declaration of a public health emergency with the lawyers? If so, when?

Victor Ketellapper, P.E.
USEPA
1595 Wynkoop St. (8EPR-B)
Denver, CO 80202

(303)312-6578

From: Ted Linnert
To: Sandy Fells
Subject: Re: Libby PHE Docs
Date: 05/14/2009 11:57 AM

Thanks Sandy,

I think I have what I need for the time being. More later.....

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
Denver, CO 80202-1129

(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

▼ Sandy Fells/OCP/R8/USEPA/US

Sandy Fells/OCP/R8/USEPA/US

05/14/2009 09:40 AM

To Ted Linnert/OCP/R8/USEPA/US@EPA
cc
Subject Re: Libby PHE Docs

Hi, Ted -- I just sent you three messages with Libby PHE "stuff". Please let me know if they are not what you need. Thanks!

▼ Ted Linnert/OCP/R8/USEPA/US

Ted Linnert/OCP/R8/USEPA/US

05/14/2009 09:30 AM

To Sandy Fells/OCP/R8/USEPA/US@EPA
cc
Subject Libby PHE Docs

Hi Sandy,

I'm in Libby and can't access my F drive. As I recall, I gave you the latest version of a Comm Strat entitled something like "Declaration of Public Health Emergency - Revisited" for one of your congressional contacts. If you still have that electronically, would you please e-mail it to me (I am able to use Lotus Notes up

here). I think that version I did for you was the most recent and it would be very helpful to have that this morning. Also, if you have any other Q&A docs, etc. on the PHE from that approximate time period, please send those as well.

Thanks!

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
Denver, CO 80202-1129

(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

From: Sandy Fells
To: Ted Linnert
Subject: Re: Libby PHE Docs
Date: 05/14/2009 11:40 AM

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▼ Ted Linnert/OCP/R8/USEPA/US

Ted Linnert/OCP/R8/USEPA/US

05/14/2009 09:30 AM

To Sandy Fells/OCP/R8/USEPA/US@EPA
cc
Subject Libby PHE Docs

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Thanks!

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
Denver, CO 80202-1129

(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

From: Elizabeth Southerland
To: Carol Campbell
Cc: Cohn.Matthew@epamail.epa.gov; Gaydosh.Mike@epamail.epa.gov; Manges.Ellen@epamail.epa.gov; Mary-Kay Lynch; Michael Risner; Rushin.Carol@epamail.epa.gov; Ward.Robert@epamail.epa.gov; Woolford.James@epamail.epa.gov
Subject: Re: Libby PHE
Date: 06/24/2009 02:36 PM

All of you in Region 8 did such a fantastic job with so many late nights and multiple rewrites of every single document! It was a pleasure working with you. I believe right now Fox News is interviewing Lisa Jackson on camera on the Libby phe and is planning to film at Libby tomorrow. I got the call from Fox because of a referral from Region 8.

▼ Carol Campbell---06/24/2009 01:07:38 PM---Now that the dust has settled somewhat, I just wanted to thank all of you for your hard work in maki

From: Carol Campbell/R8/USEPA/US
To: Southerland.Elizabeth@epamail.epa.gov, Woolford.James@epamail.epa.gov, Manges.Ellen@epamail.epa.gov, Mary-Kay Lynch/DC/USEPA/US@EPA
Cc: Ward.Robert@epamail.epa.gov, Cohn.Matthew@epamail.epa.gov, Michael Risner/R8/USEPA/US@EPA, Rushin.Carol@epamail.epa.gov, Gaydosh.Mike@epamail.epa.gov
Date: 06/24/2009 01:07 PM
Subject: Libby PHE

Now that the dust has settled somewhat, I just wanted to thank all of you for your hard work in making this happen. The public meeting in Libby on Monday night went fairly well as did the tour with Tester and Baucus's staff. I will be hosting a small party tomorrow afternoon here at the Wynkoop Brewery for Denver staff past and present, and hope to be able to do the same thing for each of you next time I am in DC. Thanks again. cc

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

From: Sandy Fells
To: Mike Cirian
Cc: Andy Lensink; Carol Campbell; Helen Dawson; Leclerc.Russell@epamail.epa.gov; Matthew Cohn; Murray.Bill@epamail.epa.gov; Rebecca Thomas; Ted Linnert; Victor Ketellapper; Sonya Pennock; Lawrence Grandison
Subject: Re: Libby Questions
Date: 06/18/2009 03:19 PM

Thanks, Mike -- Have you been able to respond, based on the messages and the Qs and As already prepared?

I have also heard from a woman named [redacted] (b) (6) who was born in Libby and moved to North Dakota when she was 18. [redacted] (b) (6)

Also, I have heard from a "yard remediation contractor," Dale Warner, who is looking for contract work in Libby. His number is [redacted] (b) (6) Mike, would you want to call him? or should someone else? Please let me know.

▼ Mike Cirian/R8/USEPA/US

Mike Cirian/R8/USEPA/US

06/18/2009 12:38 PM

To: Carol Campbell/R8/USEPA/US@EPA

cc: Murray.Bill@epamail.epa.gov, Leclerc.Russell@epamail.epa.gov, Victor Ketellapper/EPR/R8/USEPA/US@EPA, Rebecca Thomas/EPR/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA, Sandy Fells/OCP/R8/USEPA/US@EPA, Matthew Cohn/R8/USEPA/US@EPA, Helen Dawson/R8/USEPA/US@EPA, Andy Lensink/R8/USEPA/US@EPA

Subject: Questions

Hello All,

Below are the questions I have been hearing around town and from others.

1. What will change with the PHE being declared? How is it different from what you have been doing?

2. What comes next in regards to the cleanups since the PHE was issued?

3. We were lead to believe the air was safe in Libby, now you have declared Libby as a dangerous place to live? (this is the perception we discussed)

4. How will this affect the real estate in Libby?

5. We visit Libby, We have a rental in Libby, We camp around Libby, is it safe for us to still do this?

6. What happens if other school districts refuse to bring students and sports events here in Libby due to the seriousness of this action?

I tried to capture these as they have been asked.

Thanks,
Mike

From:	Ted Linnert
To:	Tim Davis
Subject:	Re: Libby R8 contact for Jeff Morin in HQ - important to respond before call with HHS on Wednesday
Date:	06/01/2009 07:16 PM

Hey Tim,

I still don't know who this person is.

By the way, Russ LeClerc is the Unit Leader for the Libby RPMs now.

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
Denver, CO 80202-1129

(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

▼ Tim Davis/R8/USEPA/US

Tim Davis/R8/USEPA/US	To	Jeff Morin/DC/USEPA/US@EPA
06/01/2009 02:48 PM	cc	Ted Linnert/OCP/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Kathie Atencio/R8/USEPA/US@EPA, Wendy Dew/OCP/R8/USEPA/US@EPA, Wendy Chipp/OCP/R8/USEPA/US@EPA, Richard Mylott/R8/USEPA/US@EPA
	Subject	Libby R8 contact for Jeff Morin in HQ - important to respond before call with HHS on Wednesday

Hi Jeff,

I should have copied you when I e-mailed those other folks - sorry! I'd talk to Ted Linnert (303-312-6119) or Victor Ketellapper (6309).

There's also the management: Sonya Pennock (for the CIC's) and Bill Murray and Kathie Atencio (for the RPM's).

Thanks,
Tim

▼ Jeff Morin/DC/USEPA/US

Jeff Morin/DC/USEPA/US

06/01/2009 02:39 PM

To Wendy Dew/OCP/R8/USEPA/US@EPA
cc Tim Davis/R8/USEPA/US@EPA
Subject Re: ISO SF person about Libby

Hi - could you let me know who's the person? I'd like to keep this moving if I could.

I have a meeting with the folks from HHS on Wednesday.

Jeff Morin
w. 202-564-6553
c. (b) (6)
- - - - - - - - - - - - - -
Blog: http://blog.epa.gov
Twitter blog: http://twitter.com/greenversations
News: http://www.epa.gov/newsroom
Twitter news: http://twitter.com/usepanews
Mobile: http://m.epa.gov
- - - - - - - - - - - - - -

▼ Wendy Dew---06/01/2009 01:09:51 PM---I have sent your email to our Libby folks, they will be in touch with you..Thanks! Wendy Dew Region

From: Wendy Dew/OCP/R8/USEPA/US
To: Jeff Morin/DC/USEPA/US@EPA
Cc: Tim Davis/R8/USEPA/US@EPA
Date: 06/01/2009 01:09 PM
Subject: Re: ISO SF person about Libby

I have sent your email to our Libby folks, they will be in touch with you..Thanks!

Wendy Dew
Region 8 (CO, ND, SD, MT, UT, WY)
Environmental Education and Outreach Coordinator
1595 Wynkoop Street, 8OC
Denver CO 80202-1129
dew.wendy@epa.gov
303-312-6605 office
(b) (6) cell
http://www.epa.gov/region8/ee

▼ Jeff Morin/DC/USEPA/US

Jeff Morin/DC/USEPA/US

06/01/2009 11:06 AM

To: Wendy Dew/OCP/R8/USEPA/US@EPA, Tim Davis/R8/USEPA/US@EPA

cc:

Subject: ISO SF person about Libby

Hi - do you know of someone in R8 in the SF program who's familiar with how EPA Superfund is approaching Libby?

My workgroup-ette would benefit from a short briefing from someon in R8 SF about how SF works particularly in regard to Libby. Possibly also in understanding the town of Libby itself, general tone or attitudes Libby residents.

Thanks.

Jeff Morin
w. 202-564-6553
c. (b) (6)
- - - - - - - - - - - - - - -
Blog: http://blog.epa.gov
Twitter blog: http://twitter.com/greenversations
News: http://www.epa.gov/newsroom
Twitter news: http://twitter.com/usepanews
Mobile: http://m.epa.gov
- - - - - - - - - - - - - - -

From: Marta Montoro
To: Katharine Gage
Cc: Ellen Manges; Ellyn Fine; Robert Goulding
Subject: Re: Libby doc to be signed
Date: 06/16/2009 02:30 PM

My understanding is that it needs to be signed tomorrow AM for timing purposes - I am trying to let Diane know. I'm happy to print it on letterhead, we'll just need concurrence to make sure it's been reviewed/signed off thru the OSWER IO. I also have left a msg for Brian Hope of OEX letting him know about the timing, and to make sure we get a copy in the Agency's Correspondence Mgmt System for the record.

Thanks,
Marta

Marta E. Montoro
U.S. Environmental Protection Agency
Special Assistant
Office of the Administrator
1200 Pennsylvania Ave. NW (1101A)
Washington, D.C. 20460
Tel: (202) 564-4471
Fax: (202) 501-1428
Email: Montoro.Marta@epa.gov

THIS EMAIL IS INTERNAL AND DELIBERATIVE

▼ Katharine Gage---06/16/2009 02:22:25 PM---Marta, when do you think you can get the final for the admin's signature? And it can only be signed

From: Katharine Gage/DC/USEPA/US
To: Ellen Manges/DC/USEPA/US@EPA
Cc: Ellen Manges/DC/USEPA/US@EPA, Ellyn Fine/DC/USEPA/US@EPA, Marta Montoro/DC/USEPA/US@EPA, Robert Goulding/DC/USEPA/US@EPA
Date: 06/16/2009 02:22 PM
Subject: Re: Libby doc to be signed

Marta,
when do you think you can get the final for the admin's signature? And it can only be signed tomorrow before noon, or as soon as it is ready today?

▼ Ellen Manges---06/16/2009 01:48:45 PM---Okay - By 2:30 I am supposed to have a final version that be ready for the Administrator's letterhe

From: Ellen Manges/DC/USEPA/US
To: Ellen Manges/DC/USEPA/US@EPA, Katharine Gage/DC/USEPA/US@EPA
Cc: Robert Goulding/DC/USEPA/US@EPA, Marta Montoro/DC/USEPA/US@EPA, Ellyn Fine/DC/USEPA/US@EPA
Date: 06/16/2009 01:48 PM

Subject: Re: Libby doc to be signed

Okay - By 2:30 I am supposed to have a final version that be ready for the Administrator's letterhead. I will also have the administrative record certification signed by Mathy Stanislaus and Carol Rushin - for the Administrator to review before signing the PHE Finding. Marta - should I just send electronic to you and you will print on Administrator's letterhead and get to the right hands?

Sent by EPA Wireless E-Mail Services.

▼ Ellen Manges

----- Original Message -----
From: Ellen Manges
Sent: 06/16/2009 08:04 AM EDT
To: Katharine Gage
Cc: "Robert Goulding" <Goulding.Robert@epamail.epa.gov, Marta Montoro/DC/USEPA/US, Ellyn Fine/DC/USEPA/US,>
Subject: Re: Libby doc to be signed

Thanks Katharine. I need to check, but we should be able to get it to you this morning. Marta agreed to see it through what ever steps are necessary.

Ellen

▼ Katharine Gage---06/16/2009 07:41:02 AM---Ellen, I just mistakenly deleted your email off my blackberry, but how early can it be ready tomorr

From: Katharine Gage/DC/USEPA/US
To: "Robert Goulding" <Goulding.Robert@epamail.epa.gov>, "Ellen Manges" <Manges.Ellen@epamail.epa.gov>
Date: 06/16/2009 07:41 AM
Subject: Libby doc to be signed

Ellen, I just mistakenly deleted your email off my blackberry, but how early can it be ready tomorrow? This is an issue as she will be leaving for the COOP exercise directly from her home early and not returning until after noon. We will make it work, but let us know when/where the doc will become available so we can think it through.

Thanks,
Kate

From: Ellen Manges
To: Ellen Manges; Katharine Gage
Cc: Robert Goulding; Marta Montoro; Ellyn Fine
Subject: Re: Libby doc to be signed
Date: 06/16/2009 01:48 PM

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Sent by EPA Wireless E-Mail Services.

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To: Katharine Gage
Cc: "Robert Goulding" <Goulding.Robert@epamail.epa.gov, Marta Montoro/DC/USEPA/US, Ellyn Fine/DC/USEPA/US,>
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To: "Robert Goulding" <Goulding.Robert@epamail.epa.gov>, "Ellen Manges" <Manges.Ellen@epamail.epa.gov>
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Subject: Libby doc to be signed

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Thanks,
Kate

From:	Ted Linnert
To:	Victor Ketellapper
Cc:	Bill Murray; Carol Campbell; Mike Cirian; Russell Leclerc; Sonya Pennock
Subject:	Re: Montana House Bill 414 for Libby Health Care Cost
Date:	02/25/2009 10:16 AM
Attachments:	HB0414.pdf HB414info.doc

Hi Everybody,

No minutes of the hearing have been published yet, but if you're having trouble sleeping you can listen to the proceedings by clicking:

http://legtalk.mt.gov/ramgen/Archives/Minutes/2009/House/APH/090212APH rm.

You may need some free downloadable software to run the audio file. All the stats on the progress of the bill from the Montana State Website are contained in the following document:

HB414info.doc

The text of the bill itself is at the very end of this message trail.

Ted Linnert
Office of Communication & Public Involvement

U.S. Environmental Protection Agency, Region 8 - OC
1595 Wynkoop Street
Denver, CO 80202-1129

(303) 312-6119 / fax (303) 312-7110
toll free: 1-800-227-8917 x6119
linnert.ted@epa.gov

▼ Victor Ketellapper/EPR/R8/USEPA/US

Victor Ketellapper/EPR/R8/USEPA/US

02/13/2009 11:28 AM

To: Russell Leclerc/EPR/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA, Carol Campbell/R8/USEPA/US@EPA, Mike Cirian/EPR/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA

cc:

Subject: Montana House Bill 414 for Libby Health Care Cost

I thought that the hearings on Feb 12 relating to Montana House Bill 414 to supplement health care costs related to asbestos exposure in Libby would help shed some light on health care needs of the community as related to declaring a PHE. The attached article and the draft bill concerning this issue. I have not seen any articles on the hearing or hearing transcripts. Ted, could you follow up on this?

Victor Ketellapper, P.E.
USEPA
1595 Wynkoop St. (8EPR-B)
Denver, CO 80202

(303)312-6578

Story:
Bennett submits funding request

Fleeting funding for asbestos-related agencies in Libby, which supplement health-

care costs related to the hazardous fibers, has prompted freshman Rep. Jerry Bennett, (R-HD1) to sponsor an appropriations bill.

Submitted last Friday, House Bill 414 requests $3.25 million for "counties that have experienced a proliferation of tremolite asbestos-related diseases for asbestos-related disease programs that supplement health care plans and provide screenings."

For more of this story, click on or type the URL below:

http://www.thewesternnews.com/articles/2009/02/03/news/doc4988bd49ed399433161374.txt

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HB0414.pdf

Bill Draft Number: LC2163
Bill Type - Number: HB 414
Short Title: Appropriation for grants to counties with asbestos diseases
Primary Sponsor: Gerald Bennett

Bill Actions - **Current Bill Progress:** In First House Committee--Nontabled

Bill Action Count: 17

Action - Most Recent First	Date	Votes Yes	Votes No	Committee
(H) Hearing	02/12/2009			(H) Appropriations
(H) Hearing Canceled	02/03/2009			(H) Appropriations
(C) Introduced Bill Text Available Electronically	01/31/2009			
(H) First Reading	01/31/2009			
(H) Referred to Committee	01/31/2009			(H) Appropriations
(H) Introduced	01/31/2009			
(C) Draft Delivered to Requester	01/28/2009			
(C) Draft Ready for Delivery	01/21/2009			
(C) Draft in Assembly/Executive Director Review	01/19/2009			
(C) Draft in Final Drafter Review	01/19/2009			
(C) Bill Draft Text Available Electronically	01/19/2009			
(C) Draft in Input/Proofing	01/19/2009			
(C) Draft to Drafter - Edit Review [JLN]	01/19/2009			
(C) Draft in Edit	01/19/2009			
(C) Draft in Legal Review	01/17/2009			
(C) Draft to Requester for Review	01/15/2009			
(C) Draft Request Received	01/15/2009			

Sponsor, etc.

Sponsor, etc.	Last Name/Organization	First Name	Mi
Requester	Bennett	Gerald	
Drafter	Jackson	Lisa Mecklenberg	
Primary Sponsor	Bennett	Gerald	

Subjects

Description	Revenue/Approp.	Vote Majority Req.	Subject Code
Appropriations (see also: State Finance)	Appropriation	Simple	APP
Rule Making		Simple	RUL
County Finance (see also: Local Finance)		Simple	CTYF
Health (see also: Health Care Services; Safety)		Simple	HLTH

Additional Bill Information

Fiscal Note Needed: No
Preintroduction Required: N
Session Law Ch. Number:
DEADLINE
Category: Appropriation Bills
Transmittal Date: 03/26/2009
Return (with 2nd house amendments) Date: 04/14/2009

Section Effective Dates

No Records returned

HOUSE BILL NO. 414

INTRODUCED BY G. BENNETT

A BILL FOR AN ACT ENTITLED: "AN ACT APPROPRIATING MONEY FROM THE GENERAL FUND TO THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES FOR GRANTS TO COUNTY HEALTH BOARDS IN COUNTIES THAT HAVE EXPERIENCED A PROLIFERATION OF TREMOLITE ASBESTOS-RELATED DISEASES FOR ASBESTOS-RELATED DISEASE PROGRAMS THAT SUPPLEMENT HEALTH CARE PLANS AND PROVIDE SCREENING; AND PROVIDING AN EFFECTIVE DATE."

WHEREAS, ongoing litigation with W.R. Grace & Company and delays at the federal level in approving asbestos-related legislation put future funding for programs that assist those exposed to asbestos in jeopardy; and

WHEREAS, programs providing annual screening benefits to individuals exposed to asbestos and supplementing the health care needs of individuals diagnosed with asbestos-related diseases have limited funding.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Appropriation.** (1) There is appropriated $1.75 million for the 2010 fiscal year and $1.5 million for the 2011 fiscal year from the general fund to the department of public health and human services. The money may be used only for grants to county health boards or their designees in counties that have experienced a proliferation of tremolite asbestos-related diseases for programs that pay certain costs associated with annual screenings for asbestos-related diseases and that assist individuals who have a positive result as determined by a qualified physician for asbestos-related diseases and who have medical needs that are not fully covered by a governmental, group, or individual health care plan.

(2) At the end of the 2010 fiscal year, the department shall prepare a report outlining the number of participants assisted through the grant program, the amount of funding needed by each participant, and the estimated funding needed to pay the future costs of participants. If the report is not received by the children, families, health, and human services interim committee, pursuant to 5-5-225, by June 30, 2010, the fiscal year 2011 appropriation is void.

NEW SECTION. **Section 2. Effective date.** [This act] is effective July 1, 2009.

- END -

From: Andy Lensink
To: Ellen Manges
Cc: John Michaud; Mary-Kay Lynch
Subject: Re: New AR CERT and RECOMMENDATION MEMO
Date: 06/16/2009 04:09 PM
Attachments: Final Recommendation, Cert of Index for PHE.pdf

Ellen:

Here you go.

Andy

Final Recommendation, Cert of Index for PHE.pdf

▼ Ellen Manges/DC/USEPA/US

Ellen Manges/DC/USEPA/US

06/16/2009 01:42 PM

To: John Michaud/DC/USEPA/US@EPA
cc: Andy Lensink/R8/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA
Subject: Re: New AR CERT and RECOMMENDATION MEMO

Okay. Just got it signed.

Andy - As soon as you have it signed, please pdf and send it back to me ASAP. It needs to be included in the package that goes to the Administrator for signing the Findings. They are both in the pdf. Thanks! - Ellen

[attachment "Final Certification.pdf" deleted by Andy Lensink/R8/USEPA/US]

▼ John Michaud---06/16/2009 03:18:50 PM---Ellen -- Are you meeting with Mathy now?

From: John Michaud/DC/USEPA/US
To: Ellen Manges/DC/USEPA/US@EPA
Cc: Mary-Kay Lynch/DC/USEPA/US@EPA, Andy Lensink/R8/USEPA/US@EPA
Date: 06/16/2009 03:18 PM
Subject: New AR CERT and RECOMMENDATION MEMO

Ellen --

Are you meeting with Mathy now?

I'm finished with the edits to the two documents and am attaching them for printing out and signature. Once Mathy has signed you would have to pdf the documents and send them to the Region.

Let me know if you have any questions.

I'm still double-checking the edits on the PHE itself.

Thanks.

[attachment "final certification of AR PHE 6-16-09 3.15 pm.doc" deleted by Ellen Manges/DC/USEPA/US] [attachment "FINAL PHE cover memo 6-15-09 3.14pm.doc" deleted by Ellen Manges/DC/USEPA/US]

John R. Michaud
Assistant General Counsel for RCRA
Solid Waste and Emergency Response Law Office
Office of General Counsel
U.S. EPA, Washington, D.C.
Mail Code: 2366A
tel: 202-564-5518
fax: 202-564-5531
email: michaud.john@epa.gov

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
http://www.epa.gov/region08

Ref: 8RA

RECOMMENDATION CONCERNING DETERMINATION AND FINDINGS OF PUBLIC HEALTH EMERGENCY

SUBJECT: Public Health Emergency at the Libby Asbestos Site - Libby, Lincoln County, Montana

FROM: for Carol Rushin 6/16/09
Acting Regional Administrator

Mathy V. Stanislaus 6/16/09
Assistant Administrator
Office of Solid Waste and Emergency Response

TO: Lisa Jackson
Administrator

Re: Site ID#: BC

Professional staff have reviewed the Administrative Record compiled for the Determination and Findings of Public Health Emergency at the Libby Asbestos National Priorities List Site and have informed us that the Administrative Record supports the determination and findings. Therefore, based on the Administrative Record and on the advice and recommendations we have received, we recommend that you determine that a Public Health Emergency exists under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, at the Libby Asbestos National Priorities List Site.

Printed on Recycled Paper

CERTIFICATION OF INDEX OF DOCUMENTS IN THE ADMINISTRATIVE RECORD FOR THE DETERMINATION AND FINDINGS OF PUBLIC HEALTH EMERGENCY FOR THE LIBBY ASBESTOS SITE IN LINCOLN COUNTY, MONTANA

This certification identifies documents considered or relied on for the Determination and Findings of Public Health Emergency under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, for the Libby Asbestos Site in Montana, Site/Spill ID # 08-BC. The documents are in the Administrative Record for the Site. The attached index lists the documents considered or relied on for the Public Health Emergency Determination and Findings.

By the United States Environmental Protection Agency:

In witness whereof, I have subscribed my name this 16 day of June, 2009 in Washington, D.C.

Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

In witness whereof, I have subscribed my name this 16th day of June, 2009 in Denver, Colorado.

For Carol Rushin
Acting Regional Administrator
EPA Region 8

INDEX OF DOCUMENTS IN THE ADMINISTRATIVE RECORD FOR THE DETRMINATION AND FINDINGS OF PUBLIC HEALTH EMERGENCY AT THE LIBBY ASBESTOS SITE

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From: Andy Lensink
To: Ellen Manges
Subject: Re: New AR CERT and RECOMMENDATION MEMO
Date: 06/16/2009 03:51 PM

Ellen:

Got it. We'll have it signed ASAP and back to you soon.

Andy

▼ Ellen Manges/DC/USEPA/US

Ellen Manges/DC/USEPA/US

06/16/2009 01:42 PM

To: John Michaud/DC/USEPA/US@EPA
cc: Andy Lensink/R8/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA
Subject: Re: New AR CERT and RECOMMENDATION MEMO

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John R. Michaud
Assistant General Counsel for RCRA
Solid Waste and Emergency Response Law Office
Office of General Counsel
U.S. EPA, Washington, D.C.
Mail Code: 2366A
tel: 202-564-5518
fax: 202-564-5531
email: michaud.john@epa.gov

From:	James Woolford
To:	Ellen Manges
Cc:	Barry Breen; Elizabeth Southerland; Ellyn Fine; Mathy Stanislaus
Subject:	Re: PHE Webpage Language Review for Superfund
Date:	06/17/2009 11:17 AM

---

to be clear.

Not till after 1:20 though.

James E. Woolford, Director
Office of Superfund Remediation &
Technology Innovation (OSRTI)

From:	Russell Leclerc
To:	Sandy Fells
Cc:	Bill Murray; Carol Campbell; Carol Rushin; Laura Niles; Lawrence Grandison; Libby Faulk; Martin Hestmark; Mike Cirian; Mike Shanahan; Richard Mylott; Ted Linnert; Victor Ketellapper; Wendy Chipp; Wendy Dew
Subject:	Re: Pictures and Maps of Libby requested by OPA -- Please forward to Betsaida. Thanks, Russ
Date:	06/16/2009 11:58 AM
Attachments:	General Libby Pictures 0609.ppt

General Libby Pictures 0609.ppt

▼ Sandy Fells/OCP/R8/USEPA/US

Sandy Fells/OCP/R8/USEPA/US

06/16/2009 09:04 AM

To	Carol Campbell/R8/USEPA/US@EPA, Martin Hestmark/R8/USEPA/US@EPA, Bill Murray/EPR/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Mike Cirian/R8/USEPA/US@EPA, Libby Faulk/OCP/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA
cc	Lawrence Grandison/R8/USEPA/US@EPA, Carol Rushin/R8/USEPA/US@EPA, Mike Shanahan/R8/USEPA/US@EPA, Wendy Chipp/OCP/R8/USEPA/US@EPA, Richard Mylott/R8/USEPA/US@EPA, Laura Niles/R4/USEPA/US@EPA, Wendy Dew/OCP/R8/USEPA/US@EPA
Subject	Pictures and Maps of Libby requested by OPA

All -- Betsaida Alcantara in OPA called this morning asking if we could send her pictures or maps of Libby that she could blow up for the Administrator's news conference tomorrow. Who/where would be the best place to get these? Are the ones from the website sufficient? Thanks!!

Indoor ABS

Activity Based Sampling

Paul Peronard, EPA

Vermiculite Attic Insulation (VAI)

Insulation made from Libby ore

Residential/Commercial

OU 4

Paul Peronard, EPA

The Mine

OU 3

Bonnie Lavelle, EPA

Libby Amphibole (LA)

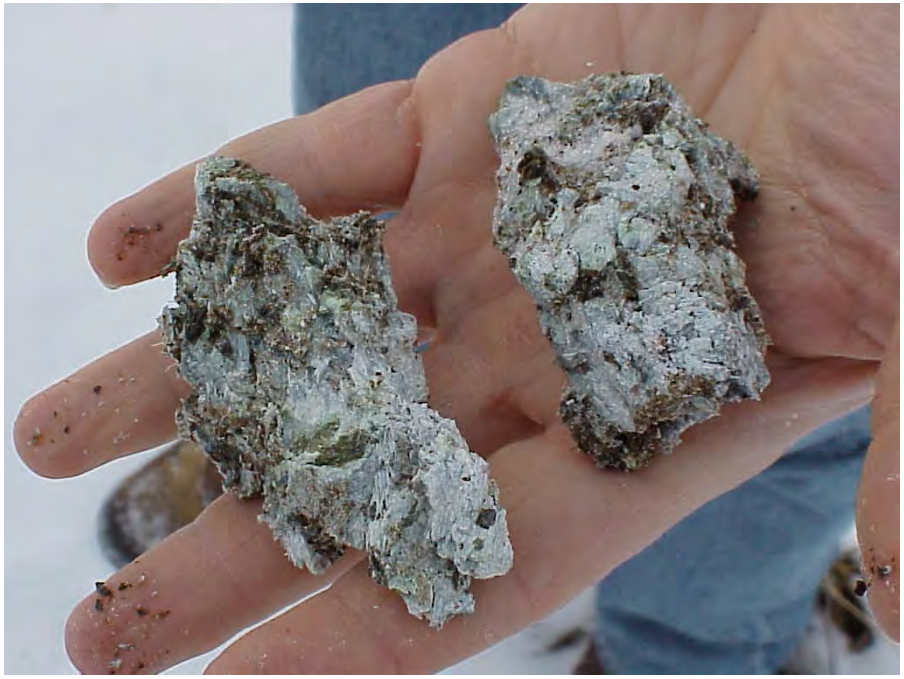
Vermiculite Mining

Zonolite Mine

- Raw ore surface mined (up to 100% LA)
- LA in all vermiculite ore mined

Vermiculite

Raw Asbestos Ore



1928 USGS report described the mine as an amphibole deposit contaminated by biotite (vermiculite).

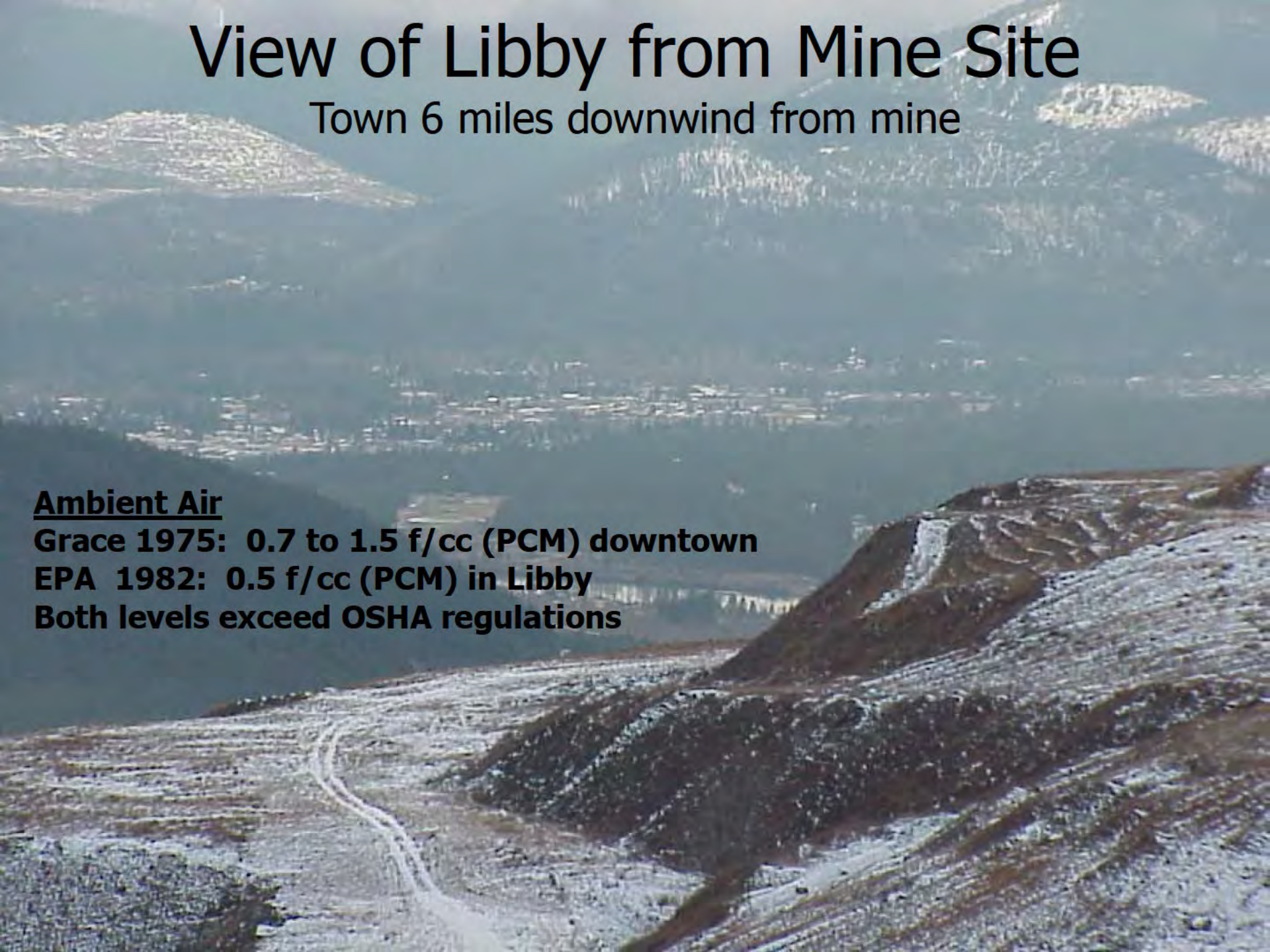
Vermiculite Ore

Libby Amphibole (LA)

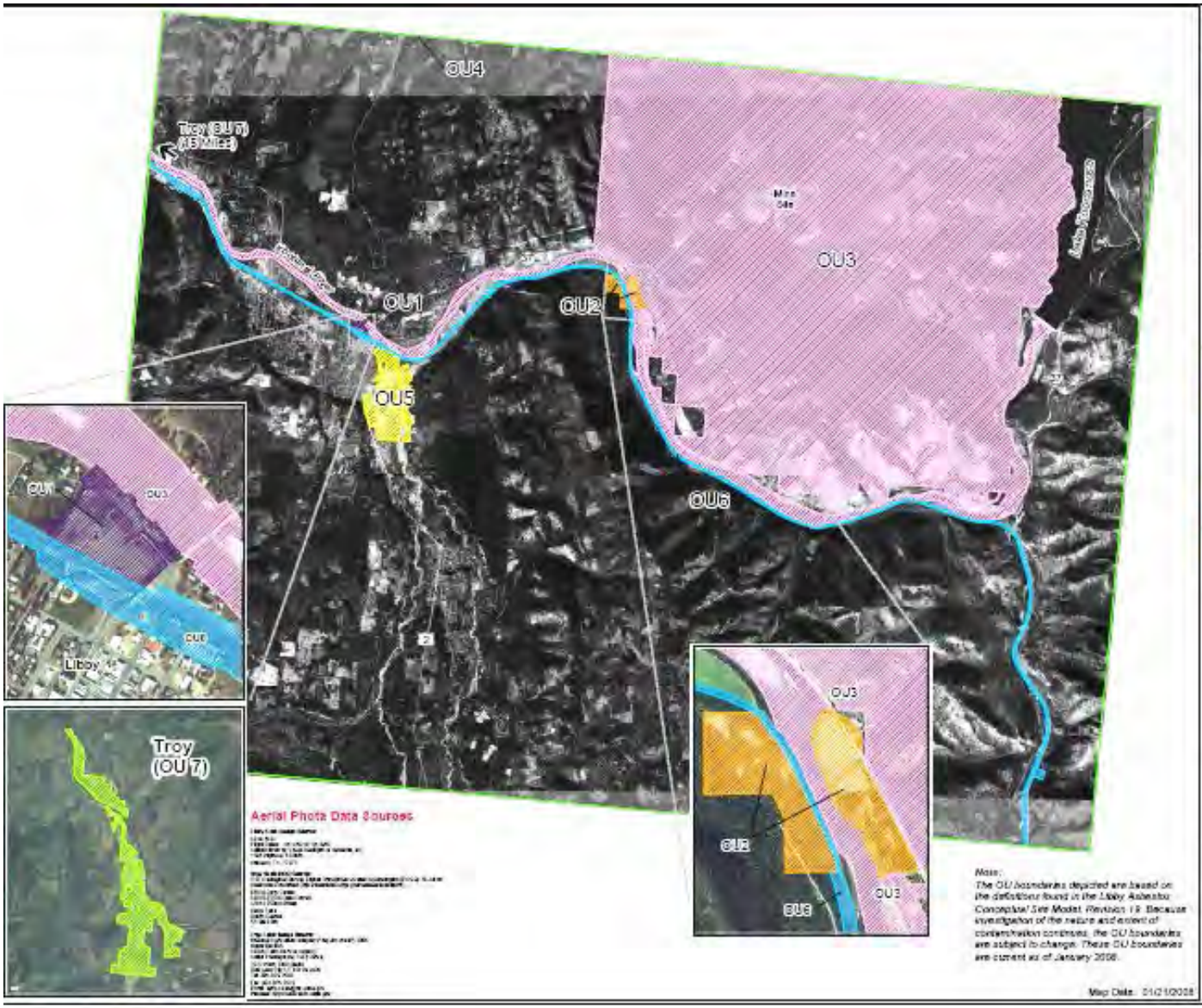
Coarse Tailings
Disposal Area
Tailings
Impoundment
Mined Areas
Former Mill
Area
Lower Pond
Mined Areas
Waste Rock Piles
Waste Rock Piles

View of Libby from Mine Site

Town 6 miles downwind from mine



<u>Ambient Air</u>
Grace 1975: 0.7 to 1.5 f/cc (PCM) downtown
EPA 1982: 0.5 f/cc (PCM) in Libby
Both levels exceed OSHA regulations



Legend

- OU1 - Former Export Plant
- OU2 - Former Screening Plant, Flyway Property, Highway 37 right-of-way adjacent to the Screening Plant, and the KDC Bluffs
- OU3 - Mine site area, Kootenai River, Rainy Creek and Rainy Creek Road
- OU4 - Residential, Commercial, Industrial Properties including Schools and Parks
- OU5 - Former Stimson Lumber Mill
- OU6 - BNSF Railyard, Tracks, and Right-of-way
- OU7 - Troy

N
W E
S

Miles
0 1 2 4

Figure 1-3

Operable Unit (OU) Boundaries
Libby Asbestos Site
Libby, Montana

CDM

Libby, Montana

- Located in northwest Montana
- Area population: 10,000 (City 2,500)
- Area homes: 2,000 (400 City Homes)

From:	Russell Leclerc
To:	Wendy OBrien; Paul Peronard; hernandez.kathryn@epa.gov; costanzi.frances@epa.gov
Cc:	Andy Lensink; Bob Benson; Bonita Lavelle; Chris Poulet; Dan Wall; Helen Dawson; Kelcey Land; Martin Mccomb; Mary Goldade; Mike Cirian; Rebecca Thomas; Sonya Pennock; Stanley Christensen; Ted Linnert; Tony Selle; Victor Ketellapper
Subject:	Re: Press Conference today at 11:20 am -- Public Health Emergency Announcement -- can be seen in the Yellowstone Room (4th floor)
Date:	06/17/2009 01:10 PM

Please join us for the Press Conference in the Yellowstone Room (4th floor) at 11:20AM if you're interested.

Please keep in mind that Carol Campbell will handle all press inquiries.

Thanks,

Russ

▼ Wendy OBrien/EPR/R8/USEPA/US

Wendy OBrien/EPR/R8/USEPA/US

06/17/2009 08:44 AM

To	Andy Lensink/R8/USEPA/US@EPA, Bob Benson/R8/USEPA/US@EPA, Bonita Lavelle/EPR/R8/USEPA/US@EPA, Chris Poulet/R8/USEPA/US@EPA, Dan Wall/EPR/R8/USEPA/US@EPA, Helen Dawson/R8/USEPA/US@EPA, Kelcey Land/ENF/R8/USEPA/US@EPA, Martin Mccomb/EPR/R8/USEPA/US@EPA, Mary Goldade/R8/USEPA/US@EPA, Mike Cirian/R8/USEPA/US@EPA, Rebecca Thomas/EPR/R8/USEPA/US@EPA, Russell Leclerc/EPR/R8/USEPA/US@EPA, Sonya Pennock/OCP/R8/USEPA/US@EPA, Stanley Christensen/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA, Tony Selle/EPR/R8/USEPA/US@EPA, Victor Ketellapper/EPR/R8/USEPA/US@EPA
cc	
Subject	Press Conference today at 11:20 am

Hi All,

You might be interested in attending the broadcast of an EPA press conference related to Libby, today at 11:20 am in the Yellowstone Room.

Is it related to a) a sighting of Sasquatch
b) discovery of a new cosmic vortex with sufficient energy to fuel 11 billion households for 13.7 years
c) the grand opening of Marty's new hipster clothing/surf shop ("Marty's Party Hearty Palace")
d) a and c above
e) a and b above

f) c and e above
g) none of the above

Come to the Yellowstone Room at 11:20 to find out the answer!

wo

Wendy Pott O'Brien, DVM, PhD
Toxicologist, Ecosystems Protection and Remediation
U.S. EPA Region 8 (8EPR-PS)
1595 Wynkoop Street
Denver, CO 80202 1129

Telephone: (303) 312-6712
FAX: (303) 312-7151

"How long a useful truth may be known and exist before it is generally receiv'd and practis'd on." Ben Franklin

From: James Woolford
To: Ellen Manges; Andy Lensink; Elizabeth Southerland; Gilberto Irizarry; Kevin Mould; John Michaud; Betsaida Alcantara; Michael Boydston; Russell Leclerc; Carol Rushin; Carol Campbell; Debbie Dietrich; Mary-Kay Lynch; Barry Breen; Ellyn Fine; Marta Montoro; Amanda Halstead; Phyllis Anderson
Subject: Re: Process for Getting Libby Action Memo Signed Tomorrow
Date: 06/16/2009 08:43 PM

Thanks Ellen.

Got it. I'll be waiting.

Sent from my BlackBerry Wireless Handheld
▼ Ellen Manges

----- Original Message -----
From: Ellen Manges
Sent: 06/16/2009 07:16 PM EDT
To: Andy Lensink; James Woolford; Elizabeth Southerland; Gilberto Irizarry; Kevin Mould; John Michaud; Betsaida Alcantara; Michael Boydston; Russell Leclerc; Carol Rushin; Carol Campbell; Debbie Dietrich; Mary-Kay Lynch; Barry Breen; Ellyn Fine; Marta Montoro
Subject: Process for Getting Libby Action Memo Signed Tomorrow

Here is the process for getting the final Action Memo signed tomorrow. We will need to do this quickly in order to get it on the website by 1:20 for the press conference.

- The Administrator's Office will alert me when the Administrator signs the Determination and Findings of a PHE. It will probably be at about 12:00. I will call and email Andy Lensink to start the signature process.
- R-8 will pdf the AM signed by Carol Rushin and email it to: James Woolford, Elizabeth Southerland, Ellen Manges
- Jim Woolford will sign the AM, and have it pdf and emailed to: Barry Breen, Debbie Dietrich, Gilberto Irizarry, Kevin Mould and Ellen Manges.
- Barry (signing for Mathy) and Debbie (with Barry tomorrow) will sign and have it pdf and emailed to: Andy Lensink, Ellen Manges and John Michaud.
- Andy will email it to the appropriate R8 staff for posting on the website. Andy will also send it to John Michaud, Ellen Manges and Betsaida Alcantara in OPA.

Thanks everyone for your cooperation in getting this done!

Ellen Manges

▼ Andy Lensink---06/16/2009 06:23:25 PM---Here it is. I'll be back in the office tomorrow at ~7:00 MDT/9:00 EDT to field whatever needs to be

From: Andy Lensink/R8/USEPA/US

To: Ellen Manges/DC/USEPA/US@EPA, John Michaud/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA

Cc: Russell Leclerc/EPR/R8/USEPA/US@EPA, Michael Boydston/R8/USEPA/US@EPA

Date: 06/16/2009 06:23 PM

Subject: latest draft of Action Memo Amendment

Here it is. I'll be back in the office tomorrow at ~7:00 MDT/9:00 EDT to field whatever needs to be fielded in order to get a final version for Carol Rushin to sign shortly after the PHE doc is signed. We understand the press conference is at about 1:20 EDT, so we're assuming the PHE doc will be signed shortly before that time.

[attachment "FINAL AM amendment- PHE- 6-16-09 4.07 pm.doc" deleted by Ellen Manges/DC/USEPA/US]

From: Ransom, Catharine (Baucus)
To: Elizabeth Southerland
Cc: Adora Andy; Arvin Ganesan; Bob Sussman; Ellen Manges; Mary-Kay Lynch; Matsdorf, Tyler (Baucus)
Subject: Re: Q&A for Libby re community meetings
Date: 06/16/2009 11:19 AM

Thanks -- will do.

----- Original Message -----
From: Southerland.Elizabeth@epamail.epa.gov <Southerland.Elizabeth@epamail.epa.gov>
To: Ransom, Catharine (Baucus)
Cc: Andy.Adora@epamail.epa.gov <Andy.Adora@epamail.epa.gov>; Ganesan.Arvin@epamail.epa.gov <Ganesan.Arvin@epamail.epa.gov>; Sussman.Bob@epamail.epa.gov <Sussman.Bob@epamail.epa.gov>; Manges.Ellen@epamail.epa.gov <Manges.Ellen@epamail.epa.gov>; Lynch.Mary-Kay@epamail.epa.gov <Lynch.Mary-Kay@epamail.epa.gov>; Matsdorf, Tyler (Baucus)
Sent: Tue Jun 16 11:05:22 2009
Subject: RE: Q&A for Libby re community meetings

Catharine, I want to recommend a change in your draft answer to a question about EPA attendance at community meetings. Region 8 has assured us that they still attend all those meetings in addition to having a full time staff person living in the community. They are also holding open meetings for the whole community to supplement the CAG and TAG meetings. In addition, the March 11, 2009 meeting notes of the Lincoln County Board of Commissioners document a discussion that Victor and Kirby of your office participated in regarding the ineffective nature of the CAG and the need for one governing body over the CAG and TAG. As a result of these facts, I suggest the following answer to a community involvement question from the press:

A. I was concerned when I heard that EPA had stopped attending community meetings, and I questioned them about that.
EPA has assured me that they are still attending CAG and TAG meetings and that they are also hosting public meetings open to the whole community.
It is also my understanding that the Lincoln County Board of Commissioners has directed their County Health Board to facilitate community discussions as a means to better inform citizens and develop an organized community voice because of the differing focuses of the CAG and TAG
The bottom line is that whatever the forum or the name of the organization, EPA must find a way to keep open communication lines between the agency and all Libby residents.
The Public Health Emergency is a big step forward and I'm confident a solution will be found
In fact, the Administrator has advised me that EPA and HHS are holding a public meeting together in Libby on June 22 to discuss the ongoing cleanup and the public health emergency with the community.

From: "Ransom, Catharine (Baucus)" <Catharine_Ransom@baucus.senate.gov>

To: Ellen Manges/DC/USEPA/US@EPA

Cc: Bob Sussman/DC/USEPA/US@EPA, Arvin Ganesan/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Adora Andy/DC/USEPA/US@EPA, "Matsdorf, Tyler (Baucus)" <Tyler_Matsdorf@baucus.senate.gov>

Date: 06/15/2009 07:23 PM

Subject: RE: Q&A for Libby

Ellen/All,

Thank you for doing this. I apologize for being late (since 1230 was our idea, I realize), but here are talking points for Senator Baucus regarding the public health emergency and some thoughts on questions and answers for you to review. There may a few EPA - only discussions you'd like to have here on answers regarding the clean-up. We're glad to do that if you want to -- thanks!

Talk to you tomorrow at 1130 --

Catharine

Public Health Emergency Talking Points:

* This is truly an historic day.

* The people of Libby have waited nearly 10 years for this.

* A public health emergency means the folks in Libby will be able to get the medical care they need from the federal government.

* It means the shops and homes and parks in town will be cleaned up- once and for all.

* It means one day soon, parents will no longer have to worry about vermiculite in the walls of their children's school.

* The declaration of a public health emergency signifies a turning point for Libby.

* It signifies healing and moving forward.

* It is an acknowledgement that what happened in Libby was wrong, and a tragedy.

* Today's announcement also signifies a new day at EPA.

* This public health emergency is proof that EPA is making decisions based on sound science.

* I'd like to thank Administrator Lisa Jackson and Secretary Kathleen Sebelius for their commitment to helping people and families in Libby.

* I've been to Libby more than 20 times, and have seen firsthand the devastation the asbestos contamination has caused.

* Too many people have died as a result of the asbestos contamination, including my friend Les Skramsted.

* I made a promise to the people of Libby and to Les that I would do all I could to help.

* But it doesn't mean the work is finished- it means the work to get Libby back on track is just beginning.

* You can bet I'll be there every step of the way.

* We are going to help Libby build a bright future.

Possible Tough Questions:

Q. Max, EPA has stopped coming to Libby community and technical meetings, what is going on?

A.
* What is happening now is unacceptable.
* I'm very disappointed that the EPA has not been attending the community meetings anymore.
* That is why I have been working with the EPA to find a solution.
* The bottom line is that whatever the forum or the name of the organization, EPA must find a way to reopen the communication lines between the agency and all Libby residents.
* The Public Health Emergency is a big step forward and I'm confident a solution will be found.
* In fact, the Administrator has advised me that EPA and HHS are holding a public meeting together in Libby on June 22 to discuss the ongoing clean-up and the public health emergency with the community.

Q. What do you think of Senator Tester's new plan for the EPA in Libby?
A.
* I think it is great, we all need to be pulling to get the folks in Libby the resources they need and deserve.
* With both Jon and I holding the EPA's feet to the fire, I think we are going to see real progress.

Q. Are you going to bring Secretary Sebelius or Administrator Jackson to Libby?
A.
* I have asked them both to come to Montana.
* While nothing is set in stone, I want them to come meet folks face to face.

Q. How will this declaration of a public health emergency impact the WR Grace bankruptcy proceeding?

A.
* I have been closing watching the bankruptcy proceeding.
* My first and foremost priority is to ensure the people of Libby are taken care of.
* And that is what this Public Health Emergency will do - provide adequate clean-up by EPA and the healthcare the people of Libby are entitled to.

Q. Do you expect President Obama to take a different approach to Libby than President Bush?

A. Yes, absolutely. I think Lisa Jackson is a person of integrity and I'm pleased she was Obama's choice for EPA Administrator- it's a good sign. You can be sure I'll hold the Obama administration's feet to the fire as we move forward- to make sure these next four years are different.

The Bush Administration has a long history of ignoring scientist and underfunding important programs, such as this Superfund site. I do not expect more of the same from President Obama. I'm encouraged by the President commitment to science and to listening to the experts.

Q. What do you think of the WR Grace verdict?

A.
* I don't want to get involved with a criminal trial, but I can say is that what happened in Libby is wrong, it is an outrage, and it's a tragedy.
* What's important is moving forward and getting Libby a clean

bill of health.
* The Public Health Emergency will really go a long way towards helping folks up there.

Q. Do you think PEER was right in their lawsuit against the Government?

A.
* I have continually pushed the EPA under the previous administration for more transparency.
* That's why last fall I conducted by own investigation and released a report detailing EPA's failure under the previous administration to declare a Public Health Emergency and to fund the toxicity studies necessary to determine how clean is clean.
* The release of this report so quickly indicates that this administration could be more open than the previous.

Q. What do you think about the Rumple Report?

A.
* I'm very concerned about a lot of the issues raised in this report.
* Last year, I held a hearing after going through more than 10,000 pages of documents from the EPA.
* The findings were outrageous.
* That is why I remain committed to making sure the clean up in Libby is done, and done right.

Q. What exactly is a public health emergency?
A. When EPA is conducting a clean-up of this magnitude, they have certain things they can and can't do. One of the things they can't do under the statute is remove products, like insulation, from buildings except in cases where there is a public health emergency. In Libby, the Agency determined that there was so much asbestos in so many places, that uncontained insulation had to be removed to be sure that people are safe. So, the Agency did its homework, concluded that a public health emergency does in fact exist. This will give them the ability to remove insulation without question about legal authority. And, it triggers a requirement to provide health screening and medical services.

Q. How will my clean-up be different than my neighbor's now that this public health emergency is declared?
A. Right now, there won't be a major change in the way clean-ups are conducted. In the fall, the EPA announced it will finish some activity - based sampling that evaluates potential asbestos exposure from different activities, like gardening. These results may show that additional clean-up is necessary.

Q. Where should I send my medical bills?
A. The Lincoln County Health Department is working quickly with others here in Libby to get a system to provide the medical services, hopefully as early as August 1. I worked with HHS to secure a short-term, $6M grant to pay for this, and we're working together on a longer term plan,

Q. Can I go to any doctor?
A. In the short term, there will be a few designated places you can go.

Q. Who decides who is eligible for health care and who is not?
A. People who meet certain residency requirements will be screened for asbestos-related disease, and medical professionals will determine if people have it. If you have it, you'll be eligible.

Q. You just announced $6 million -- that's not very much money. What's the long-term plan?
A. I am working hard with Secretary Sebelius on this, just like we worked to get the $6M.

Q. I read in the paper that I'll have to use my own insurance first. I don't have any insurance - what does that mean for me?
A. If you don't have insurance, your costs will be paid for.

-----Original Message-----
From: Manges.Ellen@epamail.epa.gov [mailto:Manges.Ellen@epamail.epa.gov]
Sent: Monday, June 15, 2009 4:03 PM
To: Ransom, Catharine (Baucus)
Cc: Sussman.Bob@epamail.epa.gov; Ganesan.Arvin@epamail.epa.gov; Lynch.Mary-Kay@epamail.epa.gov; Southerland.Elizabeth@epamail.epa.gov; Andy.Adora@epamail.epa.gov
Subject: Q&A for Libby

Catharine -

Here is the draft Q&A for the PHE. Let us know if you have any questions.

(See attached file: External Libby Q&A draft final 061509.doc)

Best Regards,

Ellen Manges
Senior Advisor
Office of Solid Waste and Emergency Response U.S. Environmental Protection Agency

(202) 566-0195

From:	Mike Cirian
To:	
Cc:	Andy Lensink; Carol Campbell; Helen Dawson; Leclerc.Russell@epamail.epa.gov; Matthew Cohn; Murray.Bill@epamail.epa.gov; Rebecca Thomas; Sandy Fells; Ted Linnert; Victor Ketellapper
Subject:	Re: Questions
Date:	06/18/2009 07:39 PM

I just receive a message/complaint from one of the realtors that they lost sales due to the EPA declaration. See Question 4. below.

just wanted to keep you informed.
Mike

▼ Mike Cirian/R8/USEPA/US

Mike Cirian/R8/USEPA/US

06/18/2009 12:38 PM

To Carol Campbell/R8/USEPA/US@EPA

cc Murray.Bill@epamail.epa.gov, Leclerc.Russell@epamail.epa.gov, Victor Ketellapper/EPR/R8/USEPA/US@EPA, Rebecca Thomas/EPR/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA, Sandy Fells/OCP/R8/USEPA/US@EPA, Matthew Cohn/R8/USEPA/US@EPA, Helen Dawson/R8/USEPA/US@EPA, Andy Lensink/R8/USEPA/US@EPA

Subject Questions

Hello All,

Below are the questions I have been hearing around town and from others.

1. What will change with the PHE being declared? How is it different from what you have been doing?

2. What comes next in regards to the cleanups since the PHE was issued?

3. We were lead to believe the air was safe in Libby, now you have declared Libby as a dangerous place to live? (this is the perception we discussed)

4. How will this affect the real estate in Libby?

5. We visit Libby, We have a rental in Libby, We camp around Libby, is it safe for us to still do this?

6. What happens if other school districts refuse to bring students and sports events here in Libby due to the seriousness of this action?

I tried to capture these as they have been asked.

Thanks,
Mike

From:	Sandy Fells
To:	Carol Campbell
Cc:	Grandison.Lawrence@epamail.epa.gov; Richard Mylott; Sonya Pennock; Ted Linnert; Tim Davis; Wendy Chipp; Wendy Dew
Subject:	Re: Thanks for all your hard work on Libby
Date:	06/17/2009 06:20 PM

Thanks, Carol ! You were extremely accessible and responsive, which helped immensely!!

▼ Carol Campbell/R8/USEPA/US

Carol Campbell/R8/USEPA/US

06/17/2009 02:11 PM

To	Sandy Fells/OCP/R8/USEPA/US@EPA, Wendy Chipp/OCP/R8/USEPA/US@EPA, Richard Mylott/R8/USEPA/US@EPA, Wendy Dew/OCP/R8/USEPA/US@EPA, Grandison.Lawrence@epamail.epa.gov, Sonya Pennock/OCP/R8/USEPA/US@EPA, Ted Linnert/OCP/R8/USEPA/US@EPA, Tim Davis/R8/USEPA/US@EPA
cc	
Subject	Thanks for all your hard work on Libby

I really appreciate all of the work each of you did as we were getting ready for the PHE declaration today. Time was short, things were changing by the minute and yet you all managed to draft a press release, get a communication strategy developed,and get a quality web site up and running in a very short period of time. Thanks again. If I forgot anyone, please send it on. cc

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

From: Charles Openchowski
To: Erin Perkins
Subject: Re: here you are!!!!
Date: 06/17/2009 04:18 PM

---

thanks, Erin!! it works --

▼ Erin Perkins---06/17/2009 03:41:08 PM---
http://www.epa.gov/region8/superfund/libby/phe.html

From: Erin Perkins/RC/R8/USEPA/US
To: Charles Openchowski/DC/USEPA/US@EPA, Lee Tyner/DC/USEPA/US@EPA
Date: 06/17/2009 03:41 PM
Subject: here you are!!!!

---

http://www.epa.gov/region8/superfund/libby/phe.html

From: Victor Ketellapper
To: Kelly Black
Subject: Re: wow!
Date: 06/24/2009 02:24 PM

Kelly,

Good to hear from you, Now you know why I have been so busy the last several months. I am hoping the politicians will focus on other issues now, leaving me with time to address site issues.

Basically, work does proceed with the Public Health Emergency. It does help justify our work in addressing vermiculite insulation contaminated with vermiculite. Also, for the community, it provides health care resources from HHS.

If you have experienced personnel in asbestos human health risk assessments, I would be interested in seeing their resume.

Victor Ketellapper, P.E.
USEPA
1595 Wynkoop St. (8EPR-B)
Denver, CO 80202

(303)312-6578

▼ Kelly Black <kblack@neptuneinc.org>

Kelly Black
<kblack@neptuneinc.org>

06/17/2009 02:31 PM

To Victor Ketellapper/EPR/R8/USEPA/US@EPA
cc
Subject wow!

Victor,

I'm at a conference with Ann Vega today and just saw the EPA proclamation. Wow!!! That is a really big deal! How will it impact your work in Libby? Last time I talked to you, you said you had a good group of project managers supporting you -- I hope that system works well enough to get you through the more intense efforts and publicity (did you know it could get more intense?). Not to quite market our skills, but if we can help you with prioritizing/decision support, risk assessment, or statistics, let me know. In the meantime, I hope you're taking nice slow breaths and that you can enjoy the upside of all of this new attention on the site!

Kelly
- -

Kelly Black
Neptune and Company, Inc.
8550 West 14th Ave., Suite 100
Lakewood, CO 80215
720-746-1803
720-746-1605 (fax)

From:	Mary Grady
To:	OGC SWERLO; Gautam Srinivasan; Byron Brown; Clarence Featherson; Christina Skaar; Ann Stephanos; Beth Burchard; Bill Palmer; Brenda Mosley; Brian Dyer; Cari Shiffman; Carl Eichenwald; Christine McCulloch; Craig Haas; Dean Ziegel; Diana Saenz; Don Lott; Geraldine Gardner; JamesA Thompson; John Prats; Kathryn Caballero; Kathy Clark; Kenneth Schefski; Khial Cherry; Leslie Oif; Mark Garvey; Marlyn Aguilar; Mary Andrews; Mary McDonnell; Michael Bellot; Monajoi Jones; Munsel Norris; Natalie Johnson; Pete Raack; Randy Morris; Rosemarie Kelley; Shirin Venus; Stephanie Brown; Sylvia Curtis; Tom Charlton; Tony Baney; Tony Ellis; Van Housman; Vishnu Katari; Yolaanda Walker; Yvette Hellyer; Bethany Russell; David Yogi; Adam Kushner
Subject:	SWERLO News for April 30, 2009
Date:	04/30/2009 10:49 AM
Attachments:	Westlaw_Document_14_30_32.doc Westlaw_Document_14_32_33.doc Westlaw_Document_14_35_07.doc

SWERLO News for April 30, 2009

BNA, Inc.

Daily Environment REPORT

HIGHLIGHTS

Jackson Outlines Progress in Distributing Economic Stimulus Funding

EPA Administrator Jackson tells a congressional hearing that the agency so far has distributed $1.8 billion of the $7.2 billion it received in economic stimulus funds. She says most of the money, $6 billion, was allocated for the clean water and drinking water revolving fund programs, and so far $1.2 billion has been distributed. More »

Brownfields:
California Unveils Vapor Intrusion Guidance To Prevent VOCs From Entering Buildings
LOS ANGELES—The California Department of Toxic Substances Control released new guidance April 28 to help regulators, environmental consultants, developers, and others prevent volatile organic gases at contaminated sites from seeping into homes and other buildings.

Enforcement:
Company to Pay Massachusetts $225,000 To Settle Charges of Waste Permit Violations
BOSTON—A Massachusetts waste management company will pay a $225,000 civil penalty to settle claims that it repeatedly transported hazardous waste without the proper permits in violation of the state's hazardous waste management law, under an agreement with the state signed April 27 (Massachusetts v. Western Mass Environmental, Mass. Super. Ct., No. 09-1964, 4/27/09).

Hazmat Transport:
Coast Guard Proposes to Harmonize Its LNG Rules With FERC Regulations
A proposed rule published April 28 would harmonize Coast Guard rules for operators of waterfront facilities handling liquefied gas with rules established by the Federal Energy Regulatory Commission (74 Fed. Reg. 19,158).

Insurance:
Fifth Circuit Says Pollution Exclusion Bars Carbon Monoxide Exposure Claims
A personal injury lawsuit in which a woman claims her child was harmed by carbon monoxide emitted from a furnace clearly triggers a commercial insurance policy's absolute pollution exclusion under Texas law, a federal appeals court held April 22 (Nautilus Insurance Co. v. Country Oaks Apartments Ltd., 5th Cir., No. 08-50652, 4/22/09).

Superfund:
Inspector General Calls for Better Controls For Cost Recovery in Superfund Program
Following a review of cost recovery accounts for Environmental Protection Agency removal actions, the Office of the Inspector General reported April 27 that internal controls need to improve to increase recovery of costs from responsible parties.

Toxic Substances:
Magistrate Says Class Action Proposal Should Proceed Despite CERCLA Work
A proposed class action in Ohio over alleged contamination from an automobile-part making plant should be allowed to proceed even though federal regulators are currently engaged in superfund-related activities involving the contamination, a federal magistrate recommended April 22 (First Property Group Ltd. v. Behr Dayton Thermal Products, S.D. Ohio, No. 08-329, 4/22/09).

INSIDEEPA.COM
an online news service from the publishers of Inside EPA

Inside EPA **Weekly Report**, 5/1/09
http://www.insideepa.com/secure/epa_nletters.asp?NLN=INSIDEEPA&ACTION=current

Environmentalists Quash Private Concerns To Publicly Laud Obama
As President Obama marks his 100th day in office, environmentalists are publicly praising his administration despite growing private concerns that the administration is not moving quickly enough to address climate change, the scope of the Clean Water Act and chemicals management, while also raising concerns about some nominees.

IG Identifies EPA Stimulus Funds Management As Key Challenge In FY09
EPA's Office of Inspector General (IG) is warning that EPA faces significant new financial and programmatic challenges as it awards and oversees economic stimulus funding in the ongoing fiscal year 2009, especially in ensuring the agency has properly trained staff to prevent the fraud, waste and abuse of federal funds.

http://www.greenwire.com

SENATE: Boxer adds longtime Republican aide to EPW Committee staff (04/30/2009)

Darren Samuelsohn, E&E senior reporter

Senate Environment and Public Works Chairwoman Barbara Boxer (D-Calif.) has hired a top Senate Republican aide to work on global warming and energy issues.

Jessica Holliday, a legislative assistant since 2005 to Sen. Lamar Alexander (R-Tenn.), will cross party lines beginning next month to serve as the committee's senior counsel.

Holliday also served for eight years as Republican counsel to the House Energy and Commerce Committee, where she held the lead role on the acid rain provisions in the 1990 Clean Air Act amendments. Off Capitol Hill, she directed the Partnership for Climate Action, a joint venture between industry and the Environmental Defense Fund. And she also worked in the private sector for Air Products & Chemicals Inc. and Peabody Holding Co. Inc.

Holliday has a bachelor of arts degree in international relations from the University of Maine and a law degree from the Marshall-Wythe School of Law at the College of William and Mary.

REGULATIONS: 'Jury is still out' after Obama's first 100 days (04/29/2009)

Robin Bravender, E&E reporter

Within its first 100 days, the Obama administration moved to scuttle last-minute Bush-era rules and revamp the White House's role in federal rulemaking, but advocacy groups say President Obama must go further to boost transparency and roll back deregulatory practices.

During Obama's first weeks in office, the administration ordered a halt to all of President George W. Bush's pending last-minute regulations and tossed out a Bush executive order that had strengthened the White House's role in federal rulemaking.

"In most instances, the administration has moved away from a presumption of government secrecy to one of

government openness, and Obama has scrapped some of the most damaging revisions of the regulatory process that Bush and his team imposed on the nation," said Gary Bass, executive director of OMB Watch.

"Overall, President Obama has set a positive tone on key regulatory components, such as transparency, scientific integrity, rolling back harmful deregulatory practices and appointing well qualified people to top positions at major regulatory agencies," according to an OMB Watch **report** released yesterday.

But Bass said some concerns remain about how the Obama administration plans to proceed with its overhaul of the regulatory reform process, especially given the recent controversial nomination of Cass Sunstein to lead the White House office that oversees agency regulation (*E&ENews PM*, April 20).

Sunstein, a friend of Obama and a well-known constitutional lawyer, has been nominated to head the Office of Information and Regulatory Affairs, or OIRA, the branch of the White House Office of Management and Budget responsible for reviewing draft regulations and assessing their costs and benefits. Sunstein is known as a strong proponent of cost-benefit analysis, which has some observers concerned that the White House will continue the Bush administration's legacy of wielding heavy influence over agency rulemaking.

Sunstein's appointment generated the most lively debate over these issues in decades, said Rena Steinzor, president of the Center for Progressive Reform. "I'm hoping he heard the message in all that and is going to adopt a moderate posture," she said.

Steinzor added, "I think the jury is still out on what will happen with regulatory reform in general."

Judgment will likely come once Sunstein gets to work as OIRA head and the administration issues its plans for revising the regulatory review process, experts say.

Jerry Ellig, a senior research fellow at the Mercatus Center at George Mason University, said that he does not expect the new administration to make sweeping changes to the regulatory review process.

"Back during the Clinton administration, the OIRA process was characterized as more of a consultative process than a gatekeeper process," Ellig said, a stance that the Obama administration may adopt. However, he added, "I don't really know how OIRA can avoid serving as something of a gatekeeper if it's going to do the job that the president wants it to do."

Quick action on climate change

Ellig noted that many observers have been surprised by the dearth of major rules from federal agencies during Obama's first 100 days.

"I think what most people expected is that there was a big pent-up demand for regulation and that one of the first things we would see out of an Obama administration is a whole lot of regulation very rapidly," he said. "The surprise is that the big expansion of what the government is doing has been on the spending side, rather than on the regulatory side."

But Matt Madia, a regulatory policy analyst at OMB Watch, said it would take time for the administration to roll out major regulations, given the extensive rulemaking process and the time it will take to fill vacant agency slots.

In some areas, like climate change, "there are indications that they are going to be as aggressive as people expected," he said.

U.S. EPA proposed a rule last month that requires industries to report their greenhouse gas emissions, and the agency released a proposed finding April 17 that greenhouse gases threaten public health and welfare, a move that is expected

to trigger a host of regulations limiting carbon dioxide and other emissions.

Click here to read the OMB Watch report.

SUPERFUND: Spurred by lawsuit, EPA's IG releases report on Mont. cleanup (04/29/2009)

Sara Goodman, E&E reporter

EPA's inspector general released a report yesterday detailing the agency's cleanup of asbestos contamination in Libby, Mont., following a lawsuit filed last week by a government watchdog group.

Citing President Obama's directive giving government attorneys more leeway in releasing agency materials, the inspector general said the widespread interest in the report warranted its being made public.

Public Employees for Environmental Responsibility (PEER) filed the lawsuit, saying the report provides valuable public information about the cleanup of contamination from a vermiculite mine.

At issue for PEER: a 2006 memo by a "special agent" within the inspector general's office, Cory Rumple, who was tasked with investigating charges that EPA failed to properly address cleanup standards and allegations of contractor misconduct.

About 200 Libby residents have died and hundreds more have been sickened by exposure to asbestos both in the mine and through mine waste, which was used to build sports fields.

In a letter accompanying the report, Rumple said his memo -- nicknamed the "Rumple report" -- was an internal document intended to determine whether an official report was warranted.

Following agency procedure, the inspector general issued a public report in 2006 that verified facts in the memo, Rumple said. That report found EPA had failed to finish a toxicity assessment for amphibole asbestos and that the agency's scientists were often at odds with agency policy regarding cleanup efforts and potential health effects.

The inspector general also began a two-year criminal investigation into the Libby cleanup that ended with the determination that no criminal activity had occurred.

Jeff Ruch, PEER's executive director, said the release of the Rumple memo failed to answer questions about the cleanup.

"It raises more questions than answers," Ruch said. "I think it should prompt further review about not only the disconnect on this particular project, but also the disconnect between scientists and the agency."

Ruch said he continues to be concerned about the inspector general's decision to keep the memo private for so long, despite Freedom of Information Act requests by PEER. This raises the question of whether the inspector general properly oversaw EPA efforts.

"They had no basis for shielding information about the cleanup activities going on, and how they [the activities] deviated from agency policy," Ruch said. "This has far more detail and specifics than the 2006 [public] report, and I think the reaction from the people in Libby is going to prove that this adds to the sum total of knowledge by putting that information out there that wasn't public before."

Click here to read the "Rumple report."

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NEW OPINIONS

Slip Copy, 2009 WL 1108463 (D.Colo.)
Only the Westlaw citation is currently available.

United States District Court,

D. Colorado.
The BOARD OF COUNTY COMMISSIONERS OF the COUNTY OF LA PLATA, COLORADO,
Plaintiff,
v.
BROWN GROUP RETAIL, INC., Plummer Precision Optics Co., Blue Jaunte Company,
Inc., and Plummer Precision Optics Western Division, Inc., Defendants.
Civil No. 08-cv-00855-LTB.
April 24, 2009.

ORDER

LEWIS T. BABCOCK, District Judge.
*1 This environmental contamination case is before me on Plaintiff, La Plata County's, Motion to Dismiss Counterclaims of Defendant Brown Group Retail [**Docket # 82**], and Defendant, Brown Group Retail, Inc.'s ("Brown Group"), Response [**Docket # 90**]. Oral argument would not materially assist the determination of this motion. After consideration of the motion, the papers, and the case file, and for the reasons stated below, I GRANT in part and DENY in part Plaintiff's Motion to Dismiss Counterclaims of Defendant Brown Group Retail [**Docket # 82**].

I. BACKGROUND

The following relevant facts are alleged in the Second Amended Complaint [**Docket # 49**]. In 1983, Plaintiff--a county in Colorado--purchased a parcel of land ("the property") previously owned by Brown Group. Beginning in 1975, Brown Group had operated a rifle scope manufacturing facility ("the facility") on the property. Toxic solvents used in the manufacturing process were spilled and leaked onto the floor of the facility and were flushed down the drains of the facility. The plumbing beneath the facility leaked solvents into the surrounding soil and contaminated the groundwater. The spills and leaks continued up until Plaintiff purchased the property in 1983. The property currently houses a detention center.

Westlaw_Document_14_30_32.doc

Slip Copy, 2009 WL 1098701 (N.D.Ill.)
Only the Westlaw citation is currently available.

United States District Court,

N.D. Illinois,
Eastern Division.
Bobby GILES, individually, and as Special Administrator of the Estate of Jannie
Giles, Deceased, Plaintiffs,
v.
CHICAGO DRUM, INC., et al., Defendants.
Ronald Jones Jr., Special Administrator for the Estate of Kejuan Dickens,
Deceased, et al., Plaintiffs,
v.
Chicago Drum, Inc., et al., Defendants.
Mary E. Tuff, as Special Administrator for the Estate of Douglas Tuff,
Deceased, et al., Plaintiffs,
v.
Chicago Drum, Inc., et al., Defendants.
Nos. 08 C 4654, 08 C 4657, 08 C 4660.
April 22, 2009.

MEMORANDUM OPINION AND ORDER

PEBECCA R. PALLMEYER, District Judge.
*1 Plaintiffs in these cases are 77 Illinois residents who lived or worked near the Acme Barrel Drum Reconditioning Facility on Chicago's near west side. Acme Barrel was engaged in the business of cleaning and reconditioning used industrial containers that had contained hazardous or toxic chemicals or waste products. The cleaning process involved incineration or flushing with a caustic solution; the drums were then painted and sold to industrial manufacturers for reuse. Plaintiffs in these cases claim that Acme operated as an unlicensed hazardous waste disposal facility in violation of local, state, and federal environmental laws and that Plaintiff suffered harm from the resulting contamination. The Defendants are Acme's owners and operators and the industrial customers.
The cases have been pending in the Circuit Court of Cook County since May 2003, when the first of three cases now consolidated here was filed as a class action. A second class action was filed a month later, and a subset of the plaintiffs in the first complaint filed a third case in April 2007. Then in May 2007, the state court dismissed Plaintiff's class allegations, leaving seventy-seven individual claims for relief.
These claims presumably would have remained in state court were it not for the filing of Plaintiffs' Sixth Amended Complaint on August 1, 2008. In that complaint, Plaintiffs alleged for the first time claims of civil conspiracy. Plaintiffs allege generally that Defendants conspired to unlawfully process hazardous wastes, in violation of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* and the Illinois Environmental Protection Act ("ILEPA"), 415 ILCS 5/20 *et seq.* Two weeks after the filing of the Sixth Amended Complaint, Defendants removed the case to federal court. They contend this court has federal question jurisdiction because the complaint presents a federal conspiracy claim which implicates "significant federal issues" as contemplated in *Grable & Sons Metal Prods., Inc. v. Darue Engineering and Mfg.*, 545 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005).

Westlaw_Document_14_32_33.doc

Slip Copy, 2009 WL 1033860 (N.D.Cal.)
Only the Westlaw citation is currently available.

United States District Court,

N.D. California.
WALNUT CREEK MANOR, LLC, Plaintiff,
v.
MAYHEW CENTER, LLC; and Dean Dunivan, Defendants.
Mayhew Center, LLC; and Dean Dunivan, Cross-Claimants,
v.
Walnut Creek Manor, LLC, Cross-Defendant.
No. C 07-05664 CW.
April 16, 2009.
ORDER GRANTING IN PART WALNUT CREEK MANOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART MAYHEW CENTER'S AND DUNIVAN'S MOTION FOR PARTIAL SUMMARY JUDGMENT

CLAUDIA WILKEN, District Judge.
*1 This case presents competing claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Plaintiff Walnut Creek Manor (WCM) filed a motion for partial summary judgment. Defendants Mayhew Center (MC) and Dean Dunivan oppose the motion and filed a cross-motion for partial summary judgment. The motions were heard on March 19, 2009. Having considered all of the parties' papers and argument on the motions, the Court hereby grants Plaintiff's motion in part and grants Defendants' motion in part.
BACKGROUND
This case involves a dispute between two adjacent landowners, Walnut Creek Manor (WCM) and Mayhew Center (MC), over the source of soil and groundwater contaminated by tetrachlorethylene (PCE). In operation since 1964, WCM is a seniors-only residential apartment complex with approximately 420 units. Eberle Decl. ¶¶ 4-5. Before that time, the site was a walnut orchard. *Id.* Bordering WCM to the east, lies MC, which was first developed in the 1970s as part of an industrial development district and has since been occupied by a variety of known and unknown commercial and light industrial entities. Kelly Decl., Exh. L at 10-11. In the 1970s and 1980s, at least one tenant at MC, Etch-Tek, was in a business involving the manufacturing of printed circuit or wiring boards and plating. *Id.* During the time Etch-Tek operated at MC, solvent use, including PCE, was prevalent in the printed circuit board manufacturing industry.

Westlaw_Document_14_35_07.doc

Only the Westlaw citation is currently available.

United States District Court,
D. Colorado.
The BOARD OF COUNTY COMMISSIONERS OF the COUNTY OF LA PLATA, COLORADO,
Plaintiff,
v.
BROWN GROUP RETAIL, INC., Plummer Precision Optics Co., Blue Jaunte Company, Inc., and Plummer Precision Optics Western Division, Inc., Defendants.
Civil No. 08-cv-00855-LTB.

April 24, 2009.

Ann M. Rhodes, Asimakis D. Iatridis, Josh Adam Marks, Michael B. Arnold, Berg Hill Greenleaf & Ruscitti, LLP, Boulder, CO, for Plaintiff.

Gail L. Wurtzler, Robert Winston Lawrence, Davis Graham & Stubbs, LLP, Denver, CO, Ann M. Rhodes, Asimakis D. Iatridis, Josh Adam Marks, Michael B. Arnold, Berg Hill Greenleaf & Ruscitti, LLP, Boulder, CO, for Defendants.

ORDER

LEWIS T. BABCOCK, District Judge.

***1** This environmental contamination case is before me on Plaintiff, La Plata County's, Motion to Dismiss Counterclaims of Defendant Brown Group Retail [**Docket # 82**], and Defendant, Brown Group Retail, Inc.'s ("Brown Group"), Response [**Docket # 90**]. Oral argument would not materially assist the determination of this motion. After consideration of the motion, the papers, and the case file, and for the reasons stated below, I GRANT in part and DENY in part Plaintiff's Motion to Dismiss Counterclaims of Defendant Brown Group Retail [**Docket # 82**].

I. BACKGROUND

The following relevant facts are alleged in the Second Amended Complaint [**Docket # 49**]. In 1983, Plaintiff--a county in Colorado--purchased a parcel of land ("the property") previously owned by Brown Group. Beginning in 1975, Brown Group had operated a rifle scope manufacturing facility ("the facility") on the property. Toxic solvents used in the manufacturing process were spilled and leaked onto the floor of the facility and were flushed down the drains of the facility. The plumbing beneath the facility leaked solvents into the surrounding soil and contaminated the groundwater. The spills and leaks continued up until Plaintiff purchased the property in 1983. The property currently houses a detention center.

Plaintiff sampled the soil and groundwater at the property, as well as the surrounding area. Plaintiff's tests showed levels of toxic solvents in the soil and groundwater that exceed government standards for the protection of human health and the environment. The toxic plume extends into otherwise-potable groundwater supplies and reaches the Animas River, which is a source of drinking water. Fumes from the solvents escape the surface of the property into the detention center. Brown Group has not taken steps to abate or contain the contamination.

Plaintiff filed its Second Amended Complaint on December 18, 2008, alleging seven claims for relief: (1) Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") cost recovery; (2) unjust enrichment; (3) negligence and negligence *per se;* (4) abnormally dangerous activity (strict liability); (5) declaratory relief; (6) Resource Conservation and Recovery Act ("RCRA") relief for ongoing contamination; and (7) RCRA relief for prior contamination while Brown Group was the owner and/or operator of the property and the facility. On February 18, 2009, I dismissed Plaintiff's claims for negligence *per se,* abnormally dangerous activity, and ongoing contamination under 42 U.S.C. § 6972(a)(1)(A). [**Docket # 71**].

On March 4, 2009, Brown Group filed its answer to Plaintiff's Second Amended Complaint [**Docket # 76**]. Within its answer, Brown Group asserted four counterclaims against Plaintiff: (1) CERCLA cost recovery under 42 U.S.C. § 9607(a); (2) CERCLA contribution under 42 U.S.C. § 9613(f)(1); (3) CERCLA declaratory relief under 42 U.S.C. § 9613(g)(2); and (4) RCRA relief for ongoing contamination under 42 U .S.C. § 6972(a)(1)(A). Plaintiff now moves to dismiss Brown Group's counterclaims for failure to state a

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claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6); and for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1).

II. STANDARDS OF REVIEW

A. Fed.R.Civ.P. 12(b)(1)

***2** As courts of limited jurisdiction, federal courts may only adjudicate cases that the Constitution and Congress have granted them the authority to hear. *See Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994). Accordingly, Rule 12(b)(1) directs a court to dismiss a complaint whenever it appears the court lacks jurisdiction over the subject matter. *See* Fed. R. Civ. P . 12(b)(1) and 12(h)(3). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See Basso v. Utah Power & Light Co.,* 495 F.2d 906, 909 (10th Cir.1974). When a party challenges the facts upon which subject matter jurisdiction depends, a district court may not presume the truthfulness of the complaint's factual allegations, but has discretion to consider affidavits and other evidence to resolve disputed jurisdictional facts. *See Holt v. United States,* 46 F.3d 1000, 1003 (10th Cir.1995).

B. Fed.R.Civ.P. 12(b)(6)

Granting a motion to dismiss is a harsh remedy which must be exercised with caution to protect the liberal rules of pleading and the interests of justice. *See Cayman Exploration Corp. v. United Gas Pipe Line Co.,* 873 F.2d 1357, 1359 (10th Cir.1989). Thus, the Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim. *Id.* Nonetheless, a claim "may be dismissed either because it asserts a legal theory not cognizable as a matter of law or because the claim fails to allege sufficient facts to support a cognizable legal claim ." *Golan v. Ashcroft,* 310 F.Supp.2d 1215, 1217 (D.Colo.2004).

When considering a motion to dismiss for failure to state a claim upon which relief can be granted, a district court must accept as true all factual allegations in the complaint. *See Erickson v. Pardus,* 127 S.Ct. 2197, 2200 (2007). While the factual allegations need not be pleaded in great detail, they must be sufficiently precise to raise a right to relief above the speculative level. *See Bell Atl. Corp. v. Twombly,* 127 S.Ct. 1955, 1964-65, 1969 (2007) (abrogating the rule of *Conley v. Gibson,* 355 U.S. 41, 44-45 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"); *Kay v. Bemis,* 500 F.3d 1214, 1218 (10th Cir.2007).

A district court should dismiss the complaint if the plaintiff fails to proffer "enough facts to state a claim to relief that is plausible on its face." *See Twombly,* 127 S.Ct. at 1974; *see also Kay,* 500 F.3d at 1218. "Plausible" in this context refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.' " *See Robbins v. Oklahoma,* 519 F.3d 1242, 1247 (10th Cir.2008) (quoting *Twombly,* 127 S.Ct. at 1974). "Plausibility," however, does not refer to the likelihood that the allegations can be proven or even that the allegations are true. *See id.*

***3** "The determination of whether a complaint contains enough allegations of fact to state a claim to relief that is plausible on its face is dependent on the context of the claim raised." *Mink v. Knox,* 566 F.Supp.2d 1217, 1221 (D.Colo.2008); *see also Robbins,* 519 F.3d at 1248. The "mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *Ridge at Red Hawk, L.L.C. v. Schneider,* 493 F.3d 1174, 1177 (10th Cir.2007) (emphasis in original). Accordingly, "within the context of the claim alleged, the complaint must contain enough specific allegations of fact to show that if all the alleged facts--and only the alleged facts--are believed to be true, the plaintiff has a claim for relief." *Knox,* 566 F.Supp.2d at 1222; *see Twombly,* 127 S.Ct. at 1965; *Robbins,* 519 F.3d at 1247-48.

III. ANALYSIS

A. CERCLA Cost Recovery--42 U.S.C. § 9607(a)

Plaintiff argues Brown Group's CERCLA cost recovery counterclaim should be dismissed because Brown Group failed to adequately allege Plaintiff was an "operator" of a hazardous substance disposal facility and because Brown Group failed to allege it has incurred "response costs" under CERCLA. I disagree on both points.

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1. Whether Plaintiff is alleged to be an "operator"

As relevant to the issues presented in this motion, CERCLA allows cost recovery against "the owner and operator" of a hazardous substance disposal facility. *See* 42 U.S.C. § 9607(a)(1). While apparently conceding it is the owner of a hazardous substance disposal facility, Plaintiff argues Brown Group does not allege facts sufficient to show Plaintiff is an "operator" for purposes of the CERCLA statute. The Supreme Court defines "operator" under CERCLA as one who "manage[s], direct[s], or conduct[s] operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *See United States v. Bestfoods*, 524 U.S. 61, 66-67 (1998). Plaintiff argues Brown Group alleges only that Plaintiff operates a detention center on the property, and does not allege Plaintiff managed, conducted, or directed operations specifically related to pollution. Thus, according to Plaintiff, Brown Group fails to allege Plaintiff is both an "owner *and* operator"--a status Plaintiff argues is necessary for suit.

It is well-established in this Circuit, however, that the term "owner and operator" in Section 9607(a)(1) is interpreted in the disjunctive. *See, e.g, Morrison Enters. v. McShares, Inc.*, 302 F .3d 1127, 1133 (10th Cir.2002) (finding "the landowner of the property in questions is 'an owner and operator of ... a facility' " under Section 9607(a)(1)); *FMC Corp. v. Aero Indus., Inc.*, 998 F.2d 842, 846 (10th Cir.1993) ("Section 9607(a)(1) defines a responsible party as any owner or operator of a facility."); *Broderick Inv. Co. v. Hartford Acc. & Indem. Co.*, 954 F.2d 601, 604 n. 2 (10th Cir.1992) (noting "the owner or operator of a facility [is] a party potentially responsible for environmental response costs associated with the cleanup of that facility" under Section 9607(a)(1)).

***4** Moreover, this Court previously held the facts alleged show Plaintiff is "the owner and operator of an alleged hazardous waste site" for purposes of RCRA. *See* February 18, 2009, Order, p. 23 [**Docket # 71**]. As the definition of "operator" under RCRA is substantially the same as the definition under CERCLA, a finding that Plaintiff meets the former is sufficient to show Plaintiff meets the latter. *See United States v. Power Engineering Co.*, 125 F.Supp.2d 1050, 1070-71 (D.Colo.2000) ("Although these tests have been devised to determine whether an individual or an entity is an 'operator' under the Comprehensive Environmental Response Compensation and Liability Act, there is no reason not to apply them to the 'operator' inquiry under the RCRA given the similarity of the definitions in both statutes."). Accordingly, Brown Group has adequately alleged Plaintiff is "the owner and operator" of a hazardous substance disposal facility under Section 9607(a)(1).

2. Whether Brown Group alleged "response costs"

CERCLA provides that a person may recover any necessary response costs incurred consistent with a national recovery plan. *See Young v. United States*, 394 F.3d 858, 863 (10th Cir.2005) (citing 42 U.S.C. § 9607(a)(4)(B)). Addressing this element, Brown Group's first counterclaim states: "Brown Group has incurred, and will continue to incur in the future, necessary response costs to, among other things, investigate and evaluate the alleged contamination in a manner consistent with the National Contingency Plan, 40 C.F.R. Part 300 *et seq.*" Plaintiff argues Brown Group's statement is conclusory and unsupported by factual averments sufficient to show that if all the alleged facts--and only the alleged facts--are believed to be true, Brown Group has a claim for relief. *See Bd. of County Comm'rs of County of La Plata, Colorado v. Brown Group Retail, Inc.*, 598 F.Supp.2d 1185, 1192 (D.Colo.2009). I disagree.

Under Tenth Circuit authority, investigative costs consistent with a National Recovery Plan are recoverable under CERCLA. *See Young*, 394 F.3d at 863. While Brown Group will bear the ultimate burden of showing "some nexus between the alleged response cost and an actual effort to respond to the environmental contamination," it is sufficient at this stage of the litigation that Brown Group has pleaded a recoverable cost. *See id.* at 864. Although Plaintiff argues Brown Group incurred the costs only as a response to the litigation-- costs that are not recoverable under CERCLA, *see id.* at 863--this is a factual argument that should not be resolved in the context of a Rule 12(b)(6) motion. *See Erickson*, 127 S.Ct. at 2200.

Accordingly, Brown Group has adequately alleged a CERCLA cost recovery claim under 42 U.S.C. § 9607(a).

B. CERCLA Contribution--42 U.S.C. § 9613(f)(1)--and Declaratory Relief--42 U.S.C. § 9613(g)(2)

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Plaintiff argues Brown Group's CERCLA contribution and declaratory relief counterclaims must be dismissed if Brown Group's CERCLA cost recovery claim is dismissed. As held above, however, Brown Group adequately alleges a CERCLA cost recovery claim. Accordingly, Plaintiff's motion to dismiss these counterclaims is denied.

C. RCRA Section 6972(a)(1)(A)

***5** Plaintiff argues Brown Group's RCRA counterclaim should be dismissed for lack of subject matter jurisdiction because Brown Group failed to comply with RCRA's mandatory notice requirements. While it is unsettled whether the RCRA notice requirements are procedural or jurisdictional, there is no doubt that compliance with the notice requirements "is a mandatory, not optional, condition precedent for suit," and dismissal is the only remedy for failure to comply. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 26 (1989). Although notice of Brown Group's counterclaim appears somewhat superfluous in the context of this case, "a district court may not disregard these requirements at its discretion." *See id.* at 31. Dismissal without prejudice is therefore appropriate. *See id.* at 32.

IV. CONCLUSION

Accordingly, IT IS ORDERED that Plaintiff's Motion to Dismiss Counterclaims of Defendant Brown Group Retail [**Docket # 82**] is GRANTED in part and DENIED in part as follows:

1. Brown Group's Fourth Counterclaim is DISMISSED WITHOUT PREJUDICE;

2. In all other respects, Plaintiff's motion is DENIED.

Each party shall bear its own costs.

Slip Copy, 2009 WL 1108463 (D.Colo.)

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Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
Bobby GILES, individually, and as Special Administrator of the Estate of Jannie
Giles, Deceased, Plaintiffs,
v.
CHICAGO DRUM, INC., et al., Defendants.
Ronald Jones Jr., Special Administrator for the Estate of Kejuan Dickens,
Deceased, et al., Plaintiffs,
v.
Chicago Drum, Inc., et al., Defendants.
Mary E. Tuff, as Special Administrator for the Estate of Douglas Tuff,
Deceased, et al., Plaintiffs,
v.
Chicago Drum, Inc., et al., Defendants.
Nos. 08 C 4654, 08 C 4657, 08 C 4660.

April 22, 2009.

Michael Allen Knobloch, Eric Scott Havens, Fraterrigo, Beranek, Feiereisel & Kasbohm, Louis C. Cairo, Goldberg Weisman Cairo, Chicago, IL, for Bobby Giles, individually, and as Special Administrator of the Estate of Jannie Giles, Deceased.

Catherine Jeanne Osuilleabhain, Douglas Bennett Sanders, J. Patrick Herald, Jessica Mitchell Wicha, Michael Colin McCutcheon, Baker & Mckenzie LLP, Chicago, IL, for Chicago Drum, Inc.

MEMORANDUM OPINION AND ORDER

PEBECCA R. PALLMEYER, District Judge.

***1** Plaintiffs in these cases are 77 Illinois residents who lived or worked near the Acme Barrel Drum Reconditioning Facility on Chicago's near west side. Acme Barrel was engaged in the business of cleaning and reconditioning used industrial containers that had contained hazardous or toxic chemicals or waste products. The cleaning process involved incineration or flushing with a caustic solution; the drums were then painted and sold to industrial manufacturers for reuse. Plaintiffs in these cases claim that Acme operated as an unlicensed hazardous waste disposal facility in violation of local, state, and federal environmental laws and that Plaintiff suffered harm from the resulting contamination. The Defendants are Acme's owners and operators and the industrial customers.

The cases have been pending in the Circuit Court of Cook County since May 2003, when the first of three cases now consolidated here was filed as a class action. A second class action was filed a month later, and a subset of the plaintiffs in the first complaint filed a third case in April 2007. Then in May 2007, the state court dismissed Plaintiff's class allegations, leaving seventy-seven individual claims for relief.

These claims presumably would have remained in state court were it not for the filing of Plaintiffs' Sixth Amended Complaint on August 1, 2008. In that complaint, Plaintiffs alleged for the first time claims of civil conspiracy. Plaintiffs allege generally that Defendants conspired to unlawfully process hazardous wastes, in violation of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq.* and the Illinois Environmental Protection Act ("ILEPA"), 415 ILCS 5/20 *et seq.* Two weeks after the filing of the Sixth Amended Complaint, Defendants removed the case to federal court. They contend this court has federal question jurisdiction because the complaint presents a federal conspiracy claim which implicates "significant federal issues" as contemplated in *Grable & Sons Metal Prods., Inc. v. Darue Engineering and Mfg.*, 545 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005).

Plaintiffs have moved for an order remanding the case. They cite cases in which citizens have brought state law tort claims against plant operators who released hazardous substances into the soil, air or groundwater. Courts have uniformly held that a reference to federal environmental statutes, including RCRA, in plaintiffs' negligence claims is insufficient to confer federal question jurisdiction. *See Mulcahey v. Columbia Organic Chemicals Co.*, 29 F.3d 148 (4th Cir.1994); *Polcha v. A T & T Nassau Metals Corp.*, 837 F.Supp. 94 (M.D.Pa.1993) (remanding state law negligence claim to state court, noting that RCRA creates no private cause of action for damages).

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Defendants urge that Plaintiffs' conspiracy allegations, and the Supreme Court's decision in *Grable & Sons*, change the landscape on this issue. In *Grable & Sons*, the Court acknowledged that federal question jurisdiction ordinarily requires a cause of action created by federal law. In addition, however, the Court carved out a narrow class of state law claims that "necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." 545 U.S. at 314. For the reasons explained here, the court concludes the rationale of *Grable & Sons* does not support the exercise of federal jurisdiction in the circumstances of these cases, and orders them remanded to state court.

DISCUSSION

***2** A case arises under federal law if it appears on the face of the plaintiff's complaint either that a federal law creates the cause of action or, that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. *See* 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3562 (2d Ed.1984 & Supp.2008); citing *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); *see also* ERWIN CHEMERINKSY, FEDERAL JURISDICTION § 5.2 (5th Ed.). Removal is appropriate only if the suit could originally have been filed in federal court. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). Courts generally disfavor removal, and recognize that the "removal statute should be construed narrowly and against removal." *Illinois v. Kerr-McGee Chem. Corp.*, 677 F.2d 571 (7th Cir.1982).

Grable & Sons recognized federal jurisdiction over state quiet title action.

Because RCRA does not create a private cause of action for conspiracy, Defendants necessarily assert that resolution of Plaintiffs' state conspiracy claim implicates a substantial federal interest. They cite *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005). *Grable* held that the appropriate inquiry for determining whether a complaint raises a substantial question of federal law is whether "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314. Thus, after *Grable*, federal question jurisdiction over a state action will exist where (1) there is a substantial and disputed federal issue, and (2) the exercise of federal jurisdiction will not upset the balance of labor between state and federal courts.

In *Grable*, the IRS had seized plaintiff's property and given notice of its sale to the defendant only by certified mail. Plaintiff brought a quiet title action in state court, arguing that defendant's title was invalid because federal law requires IRS to give notice by personal service. *Id.* at 310-11. The Court concluded that the case warranted federal jurisdiction in part because the federal statute was not only "actually in dispute" but was also "the only legal or factual issue contested in the case." *Id.* at 315. The court also noted the federal government's interest in vindicating its own administrative action: "The Government has a strong interest in 'prompt and certain collection of delinquent taxes,' and the ability of the IRS to satisfy its claims from the property of delinquents requires clear terms of notice to allow buyers ... to satisfy themselves that the [Internal Revenue] Service has ... good title." *Id.* at 315 (citations omitted). Finally, the court emphasized the rarity of this kind of case and the ultimately "microscopic effect" the exercise of federal jurisdiction would have on the "federal-state division of labor." *Id.*

***3** Significantly, *Grable* distinguished, but did not overrule, the Court's earlier holding in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986). In *Merrell Dow*, consumers had sued a drug manufacturer in state court, alleging that the drug caused birth defects. The drug manufacturer removed the case to federal court based in part on plaintiffs' allegations that the manufacturer's violation of the federal Food, Drug and Cosmetic Act constituted negligence. The Sixth Circuit concluded that removal was improper. Affirming that conclusion, the Supreme Court noted that Congress declined to create a private right of action for the alleged FDC Act violation; under those circumstances, plaintiffs' allegation of an FDC Act violation as an element of their state tort claim was insufficient to support federal jurisdiction. 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed.2d 650. Seizing upon this rationale, the

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plaintiff in *Grable & Sons* noted that federal law also does not provide a right of action for quiet title. The Court was unpersuaded; it noted that the absence of a private cause of action in *Merrell Dow* was important but not determinative of whether a state-law claim could ever trigger federal jurisdiction. Rather, the absence of a federal private cause of action was relevant insofar as granting federal jurisdiction would have resulted in "a potentially enormous shift of traditionally state cases into federal court," an outcome Congress could have sanctioned (but did not) by creating a private right to sue. 545 U.S. at 319. Allowing federal-question jurisdiction with respect to Grable's claims, by contrast, would have comparatively little impact on the federal case load, as state title cases rarely raise actually disputed matters of federal law. *Id.* at 315.

The *Grable* standard for exercise of federal jurisdiction is stringently applied.

A year later, the Supreme Court distinguished *Grable* in *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006). In that case, Empire Healthchoice, the health insurer for federal employees, sued to recover health insurance benefits it had paid; the insurance beneficiary had recovered damages for his injuries in a state court tort action, but then refused to reimburse the employer as required by the terms of the insurance agreement. The insurer's claim arose under state contract law, but the insurer noted that the Federal Employees Health Benefits Act ("FEHBA") vested federal district courts with original jurisdiction to hear suits challenging the denial of benefits, and the FEHBA was a necessary element of the insurer's claim. The Court, however, rejected any analogy to *Grable*, emphasizing "the special and small category" to which it belonged. *Id.* at 699. The Court noted, first, that the meaning of the federal tax provision in *Grable* was the only contested issue in that case. Further, *Grable* "presented a nearly pure issue of law, one that could be settled once and for all and thereafter would govern numerous tax cases." *Id.* at 700-01 (quotations and citations omitted). Empire's reimbursement claim, on the other hand, was "fact-bound and situation-specific," with the parties haggling over the existence of overcharges and duplicative charges by the insurer. *Id.* at 701. Also in contrast to *Grable*, the claim in *Empire HealthChoice* was not triggered "by the action of any federal department, agency, or service, but by the settlement of a personal-injury action launched in state court." *Id.* at 700. The ultimate issue was not a discrete matter of federal law, but rather the share of the settlement owed to Empire under the insurance contract. *Id.* The Court saw no reason why the state court was not competent to apply whatever federal law was required to resolve the amount of the insurer's reimbursement claim.

***4** Lower courts have been divided in their application of *Grable*, with some construing its holding narrowly in light of *Merrell Dow* and *Empire Healthchoice* and others upholding federal question jurisdiction in circumstances where a federal statute is an element of a state claim but does not itself create a private cause of action. *See* 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3262 nn. 75-76 (2d Ed. Supp.2008). As discussed below, the Seventh Circuit has adopted a narrow interpretation of *Grable.* In fact, not a single case in this Circuit to date has upheld federal-question jurisdiction over a state law claim under the *Grable* rationale.

The only Seventh Circuit case directly addressing *Grable* involved a personal injury action arising from injuries sustained in a plane crash. *Bennett v. Southwest Airlines Co.*, 484 F.3d 907 (7th Cir.2007). The defendants--the airline, the aircraft manufacturer, and the City of Chicago-- removed the case to federal court on the theory that federal aviation standards governed the defendants' conduct. Citing *Empire Healthchoice*, the Court of Appeals noted that the case did not involve an actually disputed matter of federal law, but rather "a fact-specific application of rules that come from both federal and state law...." *Id.* at 910. The circumstances of the case were so unique that "a search for a 'uniform federal rule' to govern such a situation would be a hunt for a will-o'-the-wisp." *Id.* at 912. Taking a page from *Merrell Dow*, the court inferred congressional intent to limit federal jurisdiction from on 28 U.S.C. § 1369, which created a federal cause of action where a single air crash results in at least 75 fatalities and there is minimal diversity. These provisions, the Seventh Circuit reasoned, reflected "a conscious legislative choice" not to open the federal courts to every aviation case. *Id.* at 911. True, some of the applicable standards of care were furnished by FAA regulations; but the fact "[t]hat some standards of care used in tort litigation come from federal law

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does not make the tort claim one 'arising under' federal law." *Id.* at 912; *see also Vivas v. Boeing Co.,* 486 F.Supp.2d 726, 729-31 (N.D.Ill.2007) (anticipating *Bennett* in declining to find federal-question jurisdiction in aviation case on grounds that federal law was not disputed, and exercising jurisdiction would upset the " 'congressionally approved balance of federal and state judicial responsibilities.' " (quoting *Grable,* 545 U.S. at 314)).

District courts in the Seventh Circuit have been similarly conservative in their application of *Grable,* particularly where federal law is merely the source of a duty under state law. *Fuller v. BNSF Ry. Co.,* 472 F.Supp.2d 1088, 1094 (S.D.Ill.2007) (rejecting federal question jurisdiction where plaintiff's complaint cited a "a lone federal regulation as an element of a state-law tort claim"). In *Atanus v. S & C Elec. Co.,* 454 F.Supp.2d 753 (N.D.Ill.2006), plaintiff held two jobs until an investigation of his workers' compensation claim against one employer resulted in a second employer's discovery that he had been leaving work early. Plaintiff brought an action for tortious interference and civil conspiracy against both of his former employers, alleging that the first employer's disclosure of his personnel information to the second employer violated federal regulations. Defendants removed the case to federal court, but the district court remanded it. The court observed that to prove his conspiracy claim, plaintiff must establish an agreement to commit tortious conduct; though identified in the complaint, the violation of a federal regulation was not in itself a tort. Put another way, plaintiffs' claim did not turn on the violation of a federal law, but rather on the existence of some unlawful act in furtherance of the conspiracy--in this case, tortious interference with employment relations. *Id.* at 756-67. The relevant inquiry was whether defendants' conduct in sharing plaintiff's employment records constituted tortious interference. *Id.* That defendants may also have violated a federal regulation prohibiting the disclosure of sensitive information was immaterial to the success of the state conspiracy claim. *See also Lancaster v. Astellas Pharma, Inc.,* No. 08-cv-0133-MJR, 2008 WL 4378441, at *4 (S.D.Ill. Sept.23, 2008) (noting "the mere fact that a state court may have to reference federal regulations in determining the outcome of a claim is not sufficient by itself to create a substantial federal question under *Grable"*); *Wagner v. Wisconsin Auto Title Loans, Inc.,* 584 F.Supp.2d 1123, 1125 (E.D.Wis. Sept.15, 2008) (incorporation of federal regulation though state statute insufficient to create disputed issue of federal law where alleged conduct, if true, would indisputably violate federal statute); *Orbitz, LLC v. Worldspan, L .P.,* 425 F.Supp.2d 929 (N.D.Ill.2006) (declining to exercise federal question jurisdiction where plaintiffs' claim under the Illinois Consumer Fraud and Deceptive Business Practices Act alleged violation of federal regulations but resolution of claim turned on showing of deceptive conduct).

***5** District courts have also routinely weighed the importance of the federal-state balance in rejecting federal question jurisdiction. In *Kuntz v. Illinois Central R. Co.,* 469 F.Supp.2d 586 (S.D.Ill.2007), an injured motorist filed a state court negligence action against the railroad. The railroad removed the case to federal court, but the court remanded it. The court found no substantial and disputed federal issue, and noted that the Federal Railroad Safety Act (FRSA) did not provide a private right of action, the claims arose under state law, and no claims required interpretation of the FRSA. Recognizing federal jurisdiction in these circumstances would, in the court's view, be "highly disruptive of the proper division of labor between federal courts and state courts," given the interrelatedness of state safety regulations and the FRSA. *Id.* at 598. Other cases analyzing *Grable* have come to similar conclusions regarding the balance of federal and state interests. *Homecomings Financial, LLC v. Patterson,* No. 08-cv-0455-DFH-WTL, 2008 WL 2003092, at *2 (S.D.Ind. July 21, 2008) (noting that recognizing federal-question jurisdiction on the basis of a federal Truth in Lending Act defense "would pose an even more serious risk of upsetting the federal-state balance than was posed by *Empire Healthchoice, Bennett,* or *Merrell Dow"); McCormick v. Excel Corp.,* 413 F.Supp.2d 967, 969-70 (E.D.Wis.2006) (in state tort claims brought by consumers of contaminated meat, violation of a standard in the Federal Meat Inspection Act did not present an "overriding federal interest" where Congress did not create a federal cause of action and where the claimed "substantial" issue--the meaning of "adulterated" under the Act--had already been resolved by the state appellate court at an earlier stage of the litigation.)

Even those courts faced with a disputed issue of federal law have concluded that the issue is not so substantial as to warrant the exercise of federal jurisdiction, or that such exercise would disrupt the federal-state division of labor. In *Samuel Trading, LLC v.*

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The Diversified Group, Inc., 420 F.Supp.2d 885 (N.D.Ill.2006), where plaintiff businesses brought state claims against their tax advisors, the court acknowledged that plaintiffs' allegation that "defendants incorrectly interpreted the [federal] tax law" presented an actually disputed issue of federal law. *Id.* at 889-90. The issue was not substantial, however, because "it appear[ed] only in an alternate argument for relief." *Id.* "If a claim can be supported independently by both state and federal law theories, 'federal question jurisdiction does not attach because federal law is not a necessary element of the claim.' " *Id.* at 891 (quoting *Rains v. Criterion Sys., Inc.,* 80 F.3d 339, 346 (9th Cir.1996)). Because each of plaintiffs' claims presented at least one theory for relief that did not require interpretation of federal law, the court remanded the case to state court. *Id.; see also Collins v. Pontikes,* 447 F.Supp.2d 895, 899-902 (N.D.Ill.2006) (remand appropriate where plaintiffs' ability to prevail did not rest solely on disputed issue of federal law); *cf. Blankenship v. Bridgestone Americas Holding, Inc.,* 467 F.Supp.2d 886 (C.D.Ill.2006) (no federal-question jurisdiction where interpretation of federal law pertaining to alleged violations of OSHA standards and to rights conferred by collective bargaining agreements, though relevant, was not necessary to resolve plaintiffs' state tort claims against their employer for fraudulent concealment, intentional misrepresentation, and battery).

***6** In *State of Wisconsin v. Abbott Labs.,* 390 F.Supp.2d 815, 822 (W.D.Wis.2005), the court found both a disputed and substantial issue of federal law where plaintiffs' state law claims for unjust enrichment, antitrust, fraud, and false advertising were all founded on the defendants' alleged overstatement of wholesale drug prices. The meaning of "average wholesale price" in the Medicare statute was disputed and essential to the resolution of plaintiffs' claim. *Id.* at 823. Nonetheless, the court held that plaintiffs' claim failed the second prong of the *Grable* test: The federal interest did not predominate because the disputed issue was of equal significance to both state and federal governments. Although Medicare is a federal program, "states play the primary role in apportioning Medicaid benefits within the broad parameters set by federal law." *Id.* at 823. Additionally, the court found significant the absence of a private right of action under the Medicare statute to recover for overpayments as well as Congress's decision not to preempt "the states' use of consumer protection statutes to police medical billing practices." *Id.* Second, the court observed that the case was "one of many that have been filed by states across the country" asserting similar violations, and shifting all these actions to federal court "would work a significant disruption in the division of labor between federal and state courts." *Id.* at 823-24.

The *Grable* rationale does not support the exercise of federal jurisdiction in this case.

These precedents counsel against the exercise of federal jurisdiction over Plaintiffs' state law conspiracy claim. In order to establish such a claim under Illinois law, a plaintiff must allege "(1) a combination of two or more persons, (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means, (3) in the furtherance of which one of the conspirators committed an overt tortious or unlawful act." *Fritz v. Johnston,* 209 Ill.2d 302, 317, 282 Ill.Dec. 837, 807 N.E.2d 461, 470 (2004). Plaintiffs here allege that Defendants 3M Company and Acme, a company that refurbishes industrial drums, conspired to process heavy drums containing hazardous waste in violation of RCRA and the Illinois Environmental Protection Act (ILEPA), 415 ILCS 5/20, *et seq,* and that the negligent handling of these drums caused Plaintiffs' injuries. Defendant 3M Company was one of several companies that shipped drums containing hazardous waste to Acme for processing. Acme allegedly was not licensed to accept or process these drums, as required by RCRA and ILEPA. Further, Acme allegedly accepted drums from 3M Company without appropriate records and without charging 3M Company for processing, again in violation of RCRA and ILEPA. (Count XVII §§ 1-17, Pl. Giles's 2d Amd. Compl. at 89.) A federal law, the RCRA, is thus an element of Plaintiffs' state conspiracy claims.

***7** At first blush, it appears from the face of the complaint that Plaintiffs have stated an alternative basis for the resolution of their claim-- conspiracy to violate provisions of ILEPA. As noted, some authority concludes that remand is appropriate where plaintiff makes an alternative argument for relief that does not require the interpretation of a federal statute. *See Samuel Trading,* 420 F.Supp.2d 885. As Defendant 3M Company notes, however, ILEPA was not in effect for at least part of the period covered by Plaintiffs' conspiracy claims. (Def.'s Opp. at 8.) [FN1] Thus, the court will presume that concerted action in violation of

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RCRA is the only basis for Plaintiffs' conspiracy claims before January 30, 1986. [FN2]

FN1. Plaintiffs claim that the alleged conspiracy began in the early 1970s and continued until 2002 (Count XVII § 2, Pl. Giles's 2d Amd. Compl. at 87), but the EPA did not approve Illinois' state environmental program until January 31, 1986. 40 C.F.R. Part 271, 51 Fed.Reg. 3778 (Jan. 30, 1986).

FN2. 3M Company further argues that even after becoming effective, the ILEPA, because approved by the EPA and subject to certain minimally restrictive requirements, has "the legal effect of federal law." (Def.'s Opp. at 8.) The cases Defendant cites in support of this argument, however, involve granting state-approved programs the same legal effect as RCRA for the purpose of bringing suit *in federal court.* In other words, these cases hold that provisions of state programs approved by the EPA are recognized at federal law, for example, for the purpose of bringing a citizen suit under the RCRA for violations of analogous provisions of a state program. They do not, as Defendant urges, make "[f]ederal case law the only basis for interpreting or applying [EPA-approved] rules." (Def.'s Opp. at 9.)

Defendant 3M Company contends, therefore, that Plaintiffs' case necessarily turns on the interpretation of a federal law. (Def.'s Opp. at 6-7.) In Illinois, a claim for civil conspiracy must allege at a minimum an agreement to engage in an unlawful act (or lawful act in an unlawful manner), and an act that both furthers the agreement and which is itself a tort. *See Scott v. Aldi, Inc.,* 301 Ill.App.3d 459, 462, 234 Ill.Dec. 665, 703 N.E.2d 526, 529 (1st Dist.1998) ("Once a defendant knowingly agrees with another to commit an unlawful act or a lawful act in an unlawful manner, that defendant may be held liable for any tortious act committed in furtherance of the conspiracy, whether such tortious act is intentional or negligent in nature." (citing *Adcock v. Brakegate, Ltd.,* 164 Ill.2d 54, 64, 206 Ill.Dec. 636, 645 N.E.2d 888, 894 (1994)).

As *Scott* and *Adcock* make clear, the act in furtherance of the conspiracy may be intentional or, as alleged here, negligent, but defendants cannot conspire to be negligent. Plaintiffs have alleged that Defendants in this case agreed to engage in processing hazardous waste, with customer Defendants shipping waste to Defendant Acme for processing. Citing only RCRA's policy of reducing "the present and future threat to human health and the environment," 42 U.S.C. § 6902(b), Plaintiffs urge that the processing of this waste violated provisions of both RCRA and ILEPA, provisions that, like the statutes in *Scott,* are "public safety statute[s], the violation of which is evidence of negligence." *Id.* at 463, 530. In other words, under Plaintiffs' theory, the processing of hazardous waste constitutes both the allegedly agreed-to unlawful conduct and the tortious act in furtherance of the agreement. It may, thus, indeed be necessary to resort to RCRA in deciding Plaintiffs' conspiracy claim.

The court nevertheless concludes that resolution of Plaintiffs' conspiracy claims does not require the interpretation of a substantial issue of federal law. The meaning of certain RCRA terms governing the lawfulness of Defendants' conduct--such terms as "hazardous waste," "empty" containers, and "disposal," for example--may well be hotly contested; but the application of these provisions to Defendants' conduct differs little from the kind of "fact-specific application of rules" that *Empire Healthchoice* and *Bennett* found not to merit federal question jurisdiction. 547 U.S. at 701, 484 F.3d at 910. Plaintiffs' claims do not hinge on the interpretation of a single federal statute, as in *Grable,* but rather involve fact-bound issues such as when and how the customer Defendants shipped waste materials to Acme, how Acme handled these materials, the levels of exposure experienced by individual Plaintiffs, and causation of their alleged injuries. In short, the conduct at issue in this case does not present the kind of "pure issue of law" present in *Grable* "that could be settled once and for all" with a decision by this court. *Empire Healthchoice,* 546 U.S. at 701. It does not belong to the "special and small" category of cases contemplated by *Grable.*

***8** Further, as in *Abbott Labs.,* even if the meaning of the federal statute at issue were both disputed and essential to Plaintiffs' claims, the court would conclude that the federal interest here is minimal. *Abbott Labs.,* 390 F.Supp.2d at 822 (meaning of "average wholesale price" in Medicare statute was disputed issue of federal law). First, while RCRA grants a private right of action to enforce its provisions, it does not contain a private right to recover damages for

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personal injuries. 42 U.S.C. § 6972(a). As recognized in *Grable* and *Bennett*, the absence of a private right of action is not dispositive, but its absence is significant, particularly where recognizing the availability of federal-question jurisdiction would shift a significant number of cases into federal court. Congress's decision to grant a private right of enforcement and its silence with respect to any other private cause of action allows for the inference that it intended to keep RCRA-based state law claims for conspiracy and negligence out of federal court. *See Bennett*, 484 F.3d at 911; *Abbott Labs.*, 390 F.Supp.2d at 823. In contrast to the situation in *Grable*, there is in this case no administrative agency action at issue. Finally, exercising "arising-under" jurisdiction in this case would open the federal courts to an entire category of cases that Congress chose to exclude by omitting a private cause of action for personal injury under RCRA.

CONCLUSION

Plaintiffs' motion for remand (36) [08 c 4660] is granted. All pending motions (66, 95, 96, 97 in 08 C 4654; 82, 111, 112, 113 in 08 C 4657; 79,112, 113, 114 in 08 C 4660) are terminated without prejudice. These cases are remanded to the Circuit Court of Cook County.

Slip Copy, 2009 WL 1098701 (N.D.Ill.)

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Only the Westlaw citation is currently available.

United States District Court,
N.D. California.
WALNUT CREEK MANOR, LLC, Plaintiff,
v.
MAYHEW CENTER, LLC; and Dean Dunivan, Defendants.
Mayhew Center, LLC; and Dean Dunivan,
Cross-Claimants,
v.
Walnut Creek Manor, LLC, Cross-Defendant.
No. C 07-05664 CW.

April 16, 2009.

Andrew Thomas Lloyd, Pacific Legal Foundation, Sacramento, CA, Christian Penn Foote, Brian Anthony Kelly, Duane Morris LLP, San Francisco, CA, for Plaintiff/Cross-Defendant.

Joseph Blaise Adams, Jeremy D. Huie, Bassi, Martini, Edlin & Blum, LLP, Jonathan Eric Meislin, San Francisco, CA, for Defendants.

Fred M. Blum, Bassi Martini Edlin & Blum LLP, San Francisco, CA, for Defendants/Cross-Claimants.

ORDER GRANTING IN PART WALNUT CREEK MANOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AND GRANTING IN PART MAYHEW CENTER'S AND DUNIVAN'S MOTION FOR PARTIAL SUMMARY
JUDGMENT

CLAUDIA WILKEN, District Judge.

***1** This case presents competing claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Plaintiff Walnut Creek Manor (WCM) filed a motion for partial summary judgment. Defendants Mayhew Center (MC) and Dean Dunivan oppose the motion and filed a cross-motion for partial summary judgment. The motions were heard on March 19, 2009. Having considered all of the parties' papers and argument on the motions, the Court hereby grants Plaintiff's motion in part and grants Defendants' motion in part.

BACKGROUND

This case involves a dispute between two adjacent landowners, Walnut Creek Manor (WCM) and Mayhew Center (MC), over the source of soil and groundwater contaminated by tetrachlorethylene (PCE). In operation since 1964, WCM is a seniors-only residential apartment complex with approximately 420 units. Eberle Decl. ¶¶ 4-5. Before that time, the site was a walnut orchard. *Id.* Bordering WCM to the east, lies MC, which was first developed in the 1970s as part of an industrial development district and has since been occupied by a variety of known and unknown commercial and light industrial entities. Kelly Decl., Exh. L at 10-11. In the 1970s and 1980s, at least one tenant at MC, Etch-Tek, was in a business involving the manufacturing of printed circuit or wiring boards and plating. *Id.* During the time Etch-Tek operated at MC, solvent use, including PCE, was prevalent in the printed circuit board manufacturing industry. Kelly Decl., Exh. K at 2. Kenneth Beard, an owner of Etch-Tek, stated that it did not use PCE or any solvents in its operation. K. Beard Dep. at 166:1-6.

In 1993, Dean Dunivan purchased the MC property out of foreclosure from the San Francisco Federal Bank. Dunivan Dep. at 25:4-12. Before Dunivan purchased the property, the bank commissioned an investigation of the site. The purpose of the report was to determine "whether absestos containing materials are present in the building and to indirectly assess the potential for other environmental concerns." Kelly Decl., Exh. H. The report concluded that asbestos was located in all buildings. *Id.* The report also noted that limited quantities of hazardous materials were present at the property, including: toners for copier machines; chemical developers for photography; lubricants and petroleum-based solvents stored at a print shop at 3321 Vincent; and adhesives stored on the roof. *Id.* "Direct evidence of hazardous materials release was not observed during our work." *Id.* The report contained the following caveat, "This inspection and report is limited in scope to the visual observations existing at the time of the inspection. No special tests were conducted on any building element with the exception of the asbestos sampling and no building

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elements were removed to reveal any suspected conditions that may be existing." *Id.* Before the purchase, Dunivan did not perform any soil or groundwater tests or hire any professionals, other than termite inspectors, to inspect the property. *Id.* at 34:1-15; 39:17-40:2.

***2** In 2004, Dunivan sought to refinance the MC property. Before committing to the refinance, the bank required a Phase I environmental review, which was performed by National Assessment Corporation (NAC). NAC noted that between 1973 and 1981, Etch-Tek received numerous violation notices from the city fire department regarding the improper storage of hazardous materials. Kelly Decl., Exh. I at 27. "However, there is no evidence that releases to soil or groundwater resulted from this storage. Additionally, specific reference to chlorinated solvents were not identified in Fire Department Records." *Id.* NAC recommended that "additional soil and groundwater data would be required in order to determine if former Property activities have contributed to soil and groundwater contamination at the Property and in the immediate vicinity." *Id* .

Dunivan then hired an environmental engineering company, Allwest Assoc., to review the NAC's conclusion that further testing was required. Dunivan Dep. at 122:11-15. Allwest reviewed the NAC report and environmental reports for the former Union Pacific Railroad Hookston Station site located to the northeast and east of MC. Allwest's report sought "to identify potential environmental impacts to the subject Mayhew Center property from off-site sources, and to determine whether past or present occupants of the Mayhew Center property may have environmentally impacted off-site properties." Kelly Decl., Exh. J at 1. The Allwest report concluded that "the potential source of PCE contamination of the groundwater would in all likelihood be the [sic] located well north of the Mayhew Center property, where the highest concentrations of PCE were detected." *Id.* at 5. The report made no mention of WCM, MC's neighbor to the west. The report ultimately concluded that further "subsurface investigation at the subject property is not warranted." *Id.*

In December, 2004, the California Regional Water Quality Control Board (Regional Board) ordered MC and WCM to submit a technical report proposing a site investigation work plan to assess the soil and groundwater quality at their respective properties and a time schedule to perform the investigation. Kelly Decl., Ex. V. To date, MC has not obtained any soil or groundwater samples pursuant to a work plan approved by the Regional Board. Dunivan Dep. at 144:9-14.

In contrast, on May 20, 2005, WCM submitted to the Regional Board a report that evaluated multiple soil and groundwater samples obtained from eight boreholes drilled to sixty foot depths below the ground surface on the WCM property and three boreholes drilled to sixty foot depths below the ground surface on the MC property near the boundary line between the properties. Eberle Decl., Exh. F at 10-11. The eight boreholes drilled on WCM property revealed no detectable concentration of PCE. *Id.* at 10-12. The samples obtained from all three boreholes drilled on the MC property contained detectable PCE contamination. *Id.* On July, 29, 2005, the Regional Board requested a follow-up subsurface investigation of the WCM property. Eberle Decl. ¶ 25. On December 16, 2005, WCM submitted a report that noted detectible PCE concentrations in the soil immediately adjacent to the WCM boudary with MC, but at concentrations lower on the WCM side of the property line than the concentrations found on the MC property. *Id.*, Ex. I at 4, 6-7. The report concluded that "analytical data from April and November 2005 soil samples suggest that the potential source is located near boring B7 on Mayhew Center." *Id.* at 6. The report also stated that the "soil data evaluated for their report suggest that Walnut Creek Manor is not a source of PCE contamination." *Id.*

***3** On December 14, 2006, the Regional Board requested that WCM provide further site history information and a work plan to perform a third soil and groundwater investigation. Eberle Decl. ¶¶ 30-31. On January 26, 2007, WCM submitted a site history and work plan, but the Regional Board rejected it. Eberle Decl., Exh. N. WCM is currently appealing that decision.

On April 3, 2008, WCM served a Rule 34 request to enter MC's property to conduct soil and groundwater testing to obtain further data. The testing found two sources of PCE on the MC property in shallow soil, "including a substantial source area located approximately 11 feet from the western property boundary with Walnut Creek Manor." Eberle Decl., Exh. O at

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13. The report, written by WCM's environmental expert Scott Warner, concluded that "this PCE-source area has substantially impacted the Walnut Creek Manor property." *Id.*

WCM has sued MC for (1) CERCLA cost recovery, (2) CERCLA contribution, (3) federal declaratory relief, (4) private nuisance, (5) public nuisance, (6) trespass, (7) negligence, (8) negligence per se, (9) strict liability, (10) indemnity pursuant to the Hazardous Substances Control Account Act, (11) indemnity under the Porter-Cologne Act and (12) equitable indemnity. MC has filed a cross claim for (1) CERCLA cost recovery, (2) CERCLA contribution, (3) federal declaratory relief, (4) public nuisance, (5) private nuisance, (6) negligence, (7) waste, (8) indemnity pursuant to the Hazardous Substance Control Account Act, (9) indemnity under the Porter-Cologne Act, (10) equitable indemnity and (11) attorneys' fees.

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Eisenberg v. Ins. Co. of N. Am.,* 815 F.2d 1285, 1288-89 (9th Cir.1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *Celotex,* 477 U.S. at 324; *Eisenberg,* 815 F.2d at 1289. The Court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Intel Corp. v. Hartford Accident & Indem. Co.,* 952 F.2d 1551, 1558 (9th Cir.1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of production by either of two methods:

> ***4** The moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial.

Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d 1099, 1106 (9th Cir.2000).

If the moving party discharges its burden by showing an absence of evidence to support an essential element of a claim or defense, it is not required to produce evidence showing the absence of a material fact on such issues, or to support its motion with evidence negating the non-moving party's claim. *Id.; see also Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 885, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990); *Bhan v. NME Hosps., Inc.,* 929 F.2d 1404, 1409 (9th Cir.1991). If the moving party shows an absence of evidence to support the non-moving party's case, the burden then shifts to the non-moving party to produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan,* 929 F.2d at 1409.

If the moving party discharges its burden by negating an essential element of the non-moving party's claim or defense, it must produce affirmative evidence of such negation. *Nissan,* 210 F.3d at 1105. If the moving party produces such evidence, the burden then shifts to the non-moving party to produce specific evidence to show that a dispute of material fact exists. *Id.*

If the moving party does not meet its initial burden of production by either method, the non-moving party is under no obligation to offer any evidence in support of its opposition. *Id* . This is true even though the non-moving party bears the ultimate burden of persuasion at trial. *Id.* at 1107.

Where the moving party bears the burden of proof on an issue at trial, it must, in order to discharge its burden of showing that no genuine issue of material fact remains, make a *prima facie* showing in support of its position on that issue. *UA Local 343 v. Nor-Cal Plumbing, Inc.,* 48 F.3d 1465, 1471 (9th Cir.1994). That is, the moving party must present evidence that,

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if uncontroverted at trial, would entitle it to prevail on that issue. *Id.* Once it has done so, the non-moving party must set forth specific facts controverting the moving party's *prima facie* case. *UA Local 343,* 48 F.3d at 1471. The non-moving party's "burden of contradicting [the moving party's] evidence is not negligible." *Id.* This standard does not change merely because resolution of the relevant issue is "highly fact specific." *Id.*

DISCUSSION

WCM seeks partial summary judgment against MC as to liability under CERCLA and as to its affirmative defenses, but does not move for summary judgment on MC's liability for the non-CERCLA causes of action. WCM also seeks summary judgment on MC's entire cross-claim. MC opposes WCM's motion and moves for partial summary judgment on all of the non-CERCLA causes of action in WCM's first amended complaint. MC does not move for summary judgment on its cross claims.

I. WCM's Claims Against MC

A. CERCLA

***5** CERCLA "generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed." *3550 Stevens Creek Assocs. v. Barclays Bank,* 915 F.2d 1355, 1357 (9th Cir.1990). To that end, CERCLA "authorizes private parties to institute civil actions to recover the costs involved in the cleanup of hazardous wastes from those responsible for their creation." *Id.*

> To prevail in a private cost recovery action, a plaintiff must establish that (1) the site on which the hazardous substances are contained is a "facility" under CERCLA's definition of that term, Section 101(9), 42 U.S.C. § 9601(9); (2) a "release" or "threatened release" of any "hazardous substance" from the facility has occurred, 42 U.S.C. § 9607(a)(4); (3) such "release" or "threatened release" has caused the plaintiff to incur response costs that were "necessary" and "consistent with the national contingency plan," 42 U.S.C. §§ 9607(a)(4) and (a)(4)(B); and (4) the defendant is within one of four classes of persons subject to the liability provisions of Section 107(a).

Stevens Creek, 915 F.2d at 1358. Title 42 U.S.C. § 9607(a) defines those four categories of potentially responsible parties (PRPs) as follows:

> (1) the owner and operator of a vessel or a facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance ....

The parties do not dispute that (1) MC is a facility as defined in § 9601(9)(B), (2) MC is a PRP because it owns and operate the MC property, 42 U.S.C. § 9607(a)(1) and (3) PCE exists on both the MC and WCM properties. However, the parties dispute the source of the release of PCE and whether that release caused either party to incur response costs that were necessary and consistent with the national contingency plan.

CERCLA defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22). WMC argues that the mere presence of a hazardous substance at MC's facility constitutes a "release" from that facility. *United States v. Honeywell Intern., Inc.,* 542 F.Supp.2d 1188, 1198 (E.D.Cal.2008); *United States v. Domenic Lombardi Realty, Inc.,* 204 F.Supp.2d 318, 330 (D.R.I.2002) ("a number of courts have held that the presence of hazardous material at a site is sufficient to constitute a 'release' for purposes of triggering CERCLA liability"); *Foster v. United States,* 992 F.Supp. 642, 651 (D.D.C.1996). The Ninth Circuit has not adopted this broad position. Further, none of the cases WCM cites concern adjacent landowners who each assert that the other party was the source of the release.

***6** WCM also argues that a release of PCE must have originated from MC because greater concentrations of

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PCE exist at the higher elevation MC property compared to the lower elevation WCM property. Eberle Decl., Ex. O. And WCM argues that MC caused a release when, without WCM's permission, it drilled a slant boring from MC property onto WMC property. WCM's expert, Scott Warner, opined that performing an "angled boring from MC to WCM through an area with PCE ... provides a continuing preferential pathway for contaminants, including PCE, to be transported from the higher elevation MC property to the lower elevation WCM property." Kelly Decl., Exh. L at 20. This evidence, independently and together, is sufficient to raise a dispute of fact as to the occurrence of a "release" as defined by § 9601(22). Warner's reports show that PCE has at least "escaped" or "leeched" from MC property onto WCM property.

MC counters that none of this evidence should be considered by the Court because it consists of unreliable and irrelevant scientific conclusions. MC argues that Warner's conclusions regarding MC as a possible source of PCE contamination were "premised on nothing more than his assumptions without any objective scientific support." Opposition at 10.

The test for admissibility of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), is whether the opinion the expert seeks to offer is relevant and reliable. This determination "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592. MC argues that Warner improperly used the process-of-elimination method to determine that the PCE present on the WCM property came from the MC property. Specifically, MC asserts that Warner improperly excluded WCM as a source of the contamination. MC claims it is just as likely that WCM was the source because (1) the asphalt at WCM was not impermeable to PCE, (2) many household ingredients which may have been used at WCM contain PCE and (3) vehicles were occasionally repaired on the WCM property and some products used in vehicle repair contain PCE. MC also faults Warner for making his conclusions without evidence that any of MC's former tenants used PCE.

The Court has reviewed Warner's expert reports and concludes that they are grounded in a defensible scientific methodology and based on extensive factual support. MC is correct that Warner's reports did not explicitly discuss the speculative factors mentioned above and why they did not compel the conclusion that PCE flowed from WCM to MC. However, Warner need not mention every speculative theory when describing his methodology. As Warner described, "the mere possibility or speculation that PCE may have been contained in unknown products and in unknown concentrations [on WCM property] is irrelevant when the subsurface data obtained and evaluated in conformance with professional standards does not support a PCE source from the Walnut Creek Manor property." Warner Reply Decl. ¶ 9.

***7** Warner performed extensive subsurface testing on both the MC and WCM properties, reviewed photographs of the areas, considered historical information for both MC and WCM properties that describes site use and assessed information provided in deposition testimony and previous environmental reports. The extensive soil testing uncovered evidence that (1) PCE has only been detected in the WCM soil along the MC property line, (2) PCE concentrations on the MC property are far greater than those on the WCM property in adjacent areas and (3) the WCM property is at a lower elevation than the MC property, but PCE in the soil at the MC property exists at elevations at and even above the ground surface level of the WCM property. Warner has demonstrated, with scientifically sound methodology, that a pathway existed for the movement of PCE from MC to WCM. [FN1]

FN1. MC also argues that the opinions of WCM's expert Joseph Odencrantz are inadmissible because (1) WCM did not provide MC with his expert report as required under Federal Rule of Civil Procedure 26 and (2) WCM claimed that Odencrantz's work product was privileged, refused to allow MC to depose him, but now offers his testimony. WCM does not contest these points in its reply brief. At the hearing on these motions, the parties agreed not to rely on Odencrantz's expert opinions.

MC also asks the Court to exclude Warner's testimony because he has submitted contradictory testimony. MC argues that in Warner's deposition, he

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testified that PCE contamination moved laterally over the surface of MC's land "into the unpaved area" and onto the WCM property; but in a later declaration, he stated that PCE moved through "the soil column and vadose zone pore space." Warner Decl. ¶ 7. These two statements are not contradictory. When analyzed in context, the two statements complement each other. There is nothing in the evidence to suggest that PCE cannot travel both horizontally across the surface of MC's land and through the soil.

MC argues that even if Warner's testimony is admissible, WCM has not established that a release of PCE came from MC and migrated to WCM. In *Castaic Lake Water Agency v. Whittaker Corp.,* 272 F.Supp.2d 1053, 1066 (C.D.Cal.2003), the court stated that

> in a two-site CERCLA case, the plaintiff meets its burden on summary judgment if it (a) identifies contaminant at its site, (b) identifies the same (or perhaps a chemically similar) contaminant at the defendant's site, and (c) provides evidence of a plausible migration pathway by which the contaminant could have traveled from the defendant's facility to the plaintiff's site. If the plaintiff meets this burden, the defendant must proffer evidence sufficient to create a genuine issue of fact as to its ability to disprove causation.

MC argues that there is a material factual dispute as to whether anyone at MC ever possessed PCE. Neither party has come forward with direct evidence that persons on MC's property used PCE. The circumstantial evidence of PCE use on MC's property consists of (1) WCM's environmental studies and (2) the fact that a company once located on MC's property, Etch-Tek, was in a business that typically used PCE, although the owner of Etch-Tek testified that he never used PCE.

Moreover, MC presents expert testimony that the source of PCE is WCM, not MC. MC's expert, Jan Schutze, states that "PCE concentrations consistently increased with depth, suggesting contamination from a lateral source or sources. Based on the currently available evidence, these up-gradient sources are on the WCM property." Schutze Decl., Exh. 1. MC argues that the PCE traveled through the groundwater along a down-gradient pathway. Opposition at 20. Schutze noted that maintenance shops and storage areas formerly located near where PCE was discovered on WCM's property could be the source of the contaminant. *Id.* Schutze also estimated that the quantity of PCE present in the soil amounts to one to two gallons, which "is typical for residential applications such as carpet or fabric cleaning, automotive parts cleaning and HVAC equipment servicing." *Id.*

***8** WCM counters that Schutze's conclusions are not supported by specific facts and moves to exclude his testimony under *Daubert.* MC presents no evidence that the groundwater beneath WMC is contaminated with PCE, let alone at concentrations significant enough to result in the substantially higher soil and groundwater contamination present on the MC property. However, the fact that the groundwater has not been tested on WCM's property does not mean that Schutze should not be heard to opine that the contamination travelled from WCM property via groundwater. Schutze reviewed soil and groundwater samples taken from the MC property and noted that the fact that PCE has been detected in the soil of the up-gradient WCM property as far as twenty feet west of the property line strongly suggests that the contaminant has reached the groundwater below and traveled to MC property. Schutze Reply Decl. ¶ 6. Schutze relied on the same facts as those relied upon by WCM's expert, Warner. It also appears that they use similar methodologies. The difference between them is their conclusions. The Court concludes that neither expert is excluded under *Daubert.* Both offer relevant and reliable opinions based on sound scientific methodologies. [FN2] Therefore, a triable issue of fact exists as to the source of the PCE contaminant. [FN3]

> FN2. In WCM' reply brief, it moves to exclude Christopher Vais' expert opinions because he testified that he is not an expert in issues concerning vertical or lateral movements of contaminants in soil. Vais Dep. at 43. MC does not dispute this and notes that Vais will not offer his opinions on this issue. Supp. Vais. Decl. ¶ 2. WCM also argues that Vais's opinions are unsupported by any credible evidence. However, like Schutze and Warner, Vais grounded his opinions in test data from both the MC and WCM properties. Vais's testimony about the source of PCE contamination is relevant and reliable and is admissible under *Daubert.*

> FN3. To the extent the Court relied upon evidence to which MC objected, the objec-

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tions are overruled. To the extent the Court did not rely on such evidence, MC's objections are overruled as moot.

B. Recoverable Remedial Costs

To prevail on its summary judgment motion on its CERCLA claims, WCM has the burden to prove that its response cost is both necessary and consistent with the national contingency plan. 42 U.S.C. § 9607(a)(4)(B); *Carson Harbor Village, Ltd. v. Unocal Corp.*, 287 F.Supp.2d 1118, 1153-54 (C.D.Cal.2003). MC argues that WCM fails to establish that it has any recoverable remedial costs because all of its costs are litigation costs.

MC relies primarily on *Key Tronic Corp. v. United States*, 511 U.S. 809, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994), and *Young v. United States*, 394 F.3d 858 (10th Cir.2005). In *Key Tronic*, the Supreme Court considered the extent to which private corporations that incurred cleanup costs under CERCLA could collect litigation-related attorneys' fees. The Court held that "some lawyers' work that is closely tied to the actual cleanup may constitute a necessary cost of response in and of itself." As an example, the Court noted that "tracking down other responsible solvent polluters" would be recoverable because such efforts "significantly benefitted the entire cleanup effort and served a statutory purpose apart from the reallocation of costs." *Key Tronic*, 511 U.S. at 820. However, pure litigation expenses, such as "legal services performed in connection with negotiations between Key Tronic and the EPA that culminated in the consent decree" are not recoverable because they "do not constitute 'necessary costs of response'." *Id.*

MC asserts that both of the experts WCM hired performed work solely to identify MC as the source of PCE for this litigation and not as part of any plan to clean up the contamination. However, as the Supreme Court explained, studies conducted in an effort to "track[ ] down other responsible solvent polluters" are recoverable under CERCLA. WCM's costs are preliminary efforts to investigate the site and the extent to which the site is polluted in order to make recommendations for future remediation action. That these studies also further WCM's current litigation is irrelevant.

***9** In *Young*, the plaintiffs purchased property "at a substantially reduced price, adjacent to a superfund cite." 394 F.3d at 860. They subsequently discovered hazardous substances on their property, but instead of taking action to contain or clean up those substances, they sued the federal government and the city government under CERCLA. *Id.* The court held that the plaintiffs' costs were not necessary to the containment and cleanup of hazardous releases on their property. *Id.* The court noted, "Recognized costs cannot be deemed 'necessary' to the containment and cleanup of hazardous releases absent some nexus between the alleged response cost and an actual effort to respond to environmental contamination." The court held that the plaintiffs' alleged response costs were not " 'necessary' to the containment or cleanup of hazardous releases because the costs were not tied in any manner to the actual cleanup of hazardous releases." The plaintiffs repeatedly testified that they did not intend to spend any money to clean up the contamination on their property.

Unlike the plaintiffs in *Young*, WCM has not testified that it does not intend to spend any money to clean up the contamination on its property. It seeks to recover response costs for work performed in order to assist with and help plan the eventual remediation and cleanup efforts. First Amended Complaint ¶ 33; Eberle Decl. ¶¶ 20, 21, 25, 29, 31-39; Warner Decl. ¶¶ 2-5. WCM has expressed no intention to abandon its property like the plaintiffs did in *Young*. Eberle Decl. ¶ 5-8. The Court concludes that the cost of the studies performed by WCM is a necessary response cost.

MC also argues that WCM's response costs are inconsistent with the national contingency plan (NCP) because (1) WCM's actions have not resulted in a CERCLA- quality cleanup, and (2) WCM's site investigation is insufficient.

The NCP provides that a private cleanup effort will be "considered 'consistent with the NCP' if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements [in 40 C.F.R. § 300.700(c)(5)-(6)], [FN4] and results in a CERCLA-quality cleanup." 40 C.F.R. § 300.700(c)(3)(I). A CERCLA-quality cleanup is (1) "protective of human health and the environment," (2) utilizes "permanent solutions and alternative treatment technologies or resource recovery technologies," (3) is cost-effective, and (4) is selected after "meaningful public participation." 55 Fed.Reg. 8793. "Immaterial

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or insubstantial deviations" from the NCP will not preclude a cost-recovery action. 40 C.F.R. § 300.700(c)(4).

FN4. These sections provide,
(5) The following provisions of this Part are potentially applicable to private party response actions:
(i) Section 300.150 (on worker health and safety);
(ii) Section 300.160 (on documentation and cost recovery);
(iii) Section 300.400(c)(1), (4), (5), and (7) (on determining the need for a Fund-financed action); (e) (on permit requirements) except that the permit waiver does not apply to private party response actions; and (g) (on identification of ARARs) except that applicable requirements of federal or state law may not be waived by a private party;
(iv) Section 300.405(b), (c), and (d) (on reports of releases to the NRC);
(v) Section 300.410 (on removal site evaluation) except paragraphs (f)(5) and (6);
(vi) Section 300.415 (on removal actions) except paragraphs (a) (2), (b)(2)(vii), (b)(5), and (g); and including § 300.415(j) with regard to meeting ARARs where practicable except that private party removal actions must always comply with the requirements of applicable law;
(vii) Section 300.420 (on remedial site evaluation);
(viii) Section 300.430 (on RI/FS and selection of remedy) except paragraph (f)(1)(ii)(C)(6) and that applicable requirements of federal or state law may not be waived by a private party; and
(ix) Section 300.435 (on RD/RA and operation and maintenance).
(6) Private parties undertaking response actions should provide an opportunity for public comment concerning the selection of the response action based on the provisions set out below, or based on substantially equivalent state and local requirements. The following provisions of this part regarding public participation are potentially applicable to private party response actions, with the exception of administrative record and information repository requirements stated therein:
(i) Section 300.155 (on public information and community relations);
(ii) Section 300.415(n) (on community relations during removal actions);
(iii) Section 300.430(c) (on community relations during RI/FS) except paragraph (c)(5);
(iv) Section 300.430(f)(2), (3), and (6) (on community relations during selection of remedy); and
(v) Section 300.435(c) (on community relations during RD/RA and operation and maintenance).

WCM does not claim that it has performed a CERCLA-quality cleanup or that its site investigation is sufficient as is. Rather, WCM argues that it does not have to perform these activities to be "consistent" with the NCP because all of its efforts thus far "will undoubtedly play a significant role in the election of a remediation effort." [FN5] Reply at 11. The clear language of the NCP reveals that a plaintiff cannot collect costs when it has performed some of the NCP requirements. By merely performing a few investigations of a hazardous site, WCM has not "substantially complied" with the entirety of the NCP. Moreover, because a CERCLA-quality cleanup has not even begun, WCM cannot carry its burden to show that its efforts have "result[ed] in a CERCLA-quality cleanup." WCM's response costs are not "consistent" with the NCP. However, the Court notes that these costs may be recoverable when the cleanup is completed and WCM shows that it substantially complied with the NCP.

FN5. WCM does not cite any Ninth Circuit cases to support this argument, and the out-of-circuit district court cases that WCM relies on are inapposite.

C. MC's Affirmative Defenses under CERCLA

***10** WCM moves for summary judgment on MC's claim that it is protected from liability under CERCLA by the third party defense. Section 9607(b)(3) states, "There shall be no liability" for a "person otherwise liable who can establish by a preponderance of the evidence that the release or threatened release and the damages resulting therefrom were caused solely by ... an act or omission of a third party ... if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous

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substance concerned ... and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." To invoke the defense, MC must also show that, at the time it acquired the property, it "did not know and had no reason to know that any hazardous substance" was disposed of on, in or at the facility. 42 U.S.C. § 9601(35)(A)(ii). To establish that it had no reason to know of the hazardous substance, MC must be able to show that before it purchased the facility it "carried out all appropriate inquiries ... into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices." *Id.* § 9601(35)(B)(i). MC must also have taken "reasonable steps to stop any continuing release; prevent any threatened future release; and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance." *Id.*

According to MC, the third party is WCM. As noted above, a triable issue of fact exists as to the source of the PCE release; therefore a triable issue of fact exists as to whether WCM is the "sole" cause of PCE contamination.

WCM asserts that MC does not have any evidence that MC took reasonable steps to stop any continuing release, prevent any threatened future release, or prevent or limit exposure of previously released PCE to carry its ultimate burden of persuasion at trial. The Court agrees.

Dunivan testified that he took no effort in this regard:

> Question: You are aware that there is PCE in the soil and in the groundwater beneath Mayhew Center property; is that correct?
> Dunivan: That's correct.
> Question: Have you taken any actions to cease or abate any movement of that PCE associated with its presence?
> Dunivan: Other than working with the [Regional] board? No.
> Question: What have you done working with the board to see that PCE no longer has migrated through soil or groundwater?
> Dunivan: Nothing.
> Question: Have you taken any steps to prevent or limit any human or environmental exposure to the PCE that's been detected at the Mayhew Center cite?
> Dunivan: No, I don't believe so.

Instead, MC bases its third party defense on the fact that, before Dunivan purchased the MC property out of foreclosure from the San Francisco Federal Bank, the bank commissioned an environmental assessment to determine the presence of any environmental contaminants. The assessment report noted the presence of asbestos in all of the buildings on the property, but did not mention PCE. However, the report stated that it did not purport to be a complete environmental review and did not even completely examine the current uses of the property, let alone any past uses of the property. Moreover, Dunivan knew of the limitations of the report, but did not take any action to fill those gaps. Therefore, the Court concludes that MC has failed to set forth evidence to support the elements of a third party defense. The Court grants summary adjudication for WCM on MC's affirmative defense under 42 U.S.C. § 9607(b)(3).

D. WCM's Motion for Summary Judgment on MC's claims

***11** WCM moves for summary judgment on MC's cross-claims. With respect to MC's CERCLA cross-claims, a triable issue of fact exists as to the source of the PCE contamination, as noted above. Notwithstanding this fact, WCM argues that MC's CERCLA cross-claims must be dismissed because MC has not produced any specific evidence that its response costs are necessary and consistent with the NCP. However, as the parties agreed at the hearing on these motions, the issues regarding response costs will be determined at a later date. The CERCLA issue currently before the Court is the source of PCE contamination. Therefore, the Court denies WCM summary judgment on MC's CERCLA cross-claims.

WCM also argues in the alternative that it is protected by the third party defense. WCM asserts that the presence of PCE on its property was caused solely by a third party, MC. *See* 42 U.S.C. § 9607(b)(3). However, a triable issue of fact exists as to whether MC is the "sole" cause of PCE contamination. Therefore, the Court denies summary adjudication for WCM on its affirmative defense.

With respect to MC's state law cross-claims, WCM tersely argues that none of them survive summary

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judgment because MC "provided no credible evidence that the PCE has migrated from the [WMC] property to the MC property." Reply at 19. WCM argues that without such evidence, MC cannot establish the causation or damages elements on its state law cross-claims. However, as noted above, MC has created a triable issue of fact as to the source of the PCE. Therefore, the Court denies WCM's motion for summary judgment on all of MC's state law cross-claims. [FN6]

FN6. At the hearing, the parties agreed to dismiss their respective causes of action for contribution under the Porter-Cologne Act.

E. MC's Motion for Summary Judgment on WCM's State Law Claims

MC similarly argues that none of WCM's state law claims survive summary judgment because WCM cannot prove causation for any of the claims. Because there is a triable issue of fact on this issue, the Court denies MC's summary judgment motion on this ground.

MC argues that WCM's claims for public and private nuisance and trespass do not survive summary judgment for additional reasons. Nuisance is defined as "anything which is injurious to health ... or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Cal. Civ.Code § 3479.

> Although the central idea of nuisance is the unreasonable invasion of this interest [in the use and enjoyment of property] and not the particular type of conduct subjecting the actor to liability, liability nevertheless depends on some sort of conduct that either directly and unreasonably interferes with it or creates a condition that does so. The invasion may be intentional and unreasonable. It may be unintentional but caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability. On any of these bases the defendant may be liable. On the other hand, the invasion may be intentional but reasonable; or it may be entirely accidental and not fall within any of the categories mentioned above. In these cases there is no liability.

***12** *Gdowski v. Louie,* 84 Cal.App.4th 1395, 1408, 101 Cal.Rptr.2d 609 (2000). "The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another. Such invasions are characterized as intentional torts, regardless of the actor's motivation." *Civic Western Corp. v. Zila Industries, Inc.,* 66 Cal.App.3d 1, 16, 135 Cal.Rptr. 915 (1977).

MC argues that it cannot be held liable for these causes of action absent a showing that it was an active participant in causing the PCE contamination. *Resolution Trust Corp. v. Rossmoor Corp.,* 34 Cal.App.4th 93, 99-100, 40 Cal.Rptr.2d 328 (1995). WCM has presented evidence that MC drilled a slant boring from the MC property to the WCM's property, which may have created a pathway for the migration of PCE onto WCM's property. The evidence of this action is sufficient to create a material dispute as to MC's liability for nuisance and trespass.

MC additionally asserts that WCM has plead only a continuing nuisance, not a permanent one. An important difference between the two is in the allowable damages. In a permanent nuisance case, "the law considers the wrong to be completed at the time of entry and allows recovery of damages for past, present, and future harm in a single action, generally the diminution in the property's value." *Starrh and Starrh Cotton Growers v. Aera Energy, LLC,* 153 Cal.App.4th 583, 592, 63 Cal.Rptr.3d 165 (2007). In a continuing nuisance case, "damages are assessed for present and past damages only; prospective damages are not awarded because the trespass may be discontinued or abated at some time, ending the harm." *Id.* Though WCM does not use the term "permanent nuisance" in its complaint, it seeks damages for "a decrease and diminution in the value" of WCM's property and damages "due to the stigma caused by the contamination of the surface and subsurface soil." FAC ¶ 50. Therefore, the Court finds that MC was on notice that WCM plead both continuing and permanent nuisance theories of liability.

MC next argues that WCM's continuing nuisance cause of action fails because WCM cannot prove damages for this claim. MC relies on *Mangini v. Aerojet Corp.,* 12 Cal.4th 1087, 51 Cal.Rptr.2d 272, 912 P.2d 1220 (1996). In that case, the court discussed the type of damages evidence a plaintiff must proffer to demonstrate that a nuisance is continuing and thus not subject to the three year statute of limitations applicable to permanent nuisances. The court held that, because the "plaintiffs had failed to present *any* substantial evidence that the contamination of their

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land as a result of defendant['s] ... practice of dumping and burning a toxic solvent was capable of being abated at a reasonable cost, the nuisance must be deemed permanent." *Id.* at 1090, 51 Cal.Rptr.2d 272, 912 P.2d 1220 (emphasis in original). Therefore, the court applied the three year statute of limitations reserved for a permanent nuisance and concluded that the plaintiff's nuisance claim was time-barred. *Id.* MC asserts that *Mangini* stands for the proposition that, to survive summary judgment, WCM must support its continuing nuisance claim with evidence that the contamination on WCM's site is reasonably abatable. However, the holding of *Mangini* does not apply outside of the statute of limitations context. The court specifically noted,

> ***13** We emphasize, however, that our ruling in this case is confined to the statute of limitations issue before us. We express no opinion on the question whether a plaintiff who has filed a timely nuisance action is required to prove that abatement can be accomplished at a 'reasonable cost' in order to be entitled to an injunction requiring the wrongdoing party to remedy the damage to the property.

Id. Because MC does not challenge the timeliness of WCM's nuisance action, WCM need not prove that abatement can be accomplished at a reasonable cost in order to pursue its continuing nuisance claim.

MC also argues that WCM's negligence claims fail because MC did not owe any duty to WCM. "No person is permitted by law to use his property in such a manner that damage to his neighbor is a foreseeable result." *Booska v. Patel*, 24 Cal.App.4th 1786, 1791, 30 Cal.Rptr.2d 241 (1994). Whatever rights MC has in the management of its own land, those rights are tempered by its duty to act reasonably. *Id* . Here, MC had a duty not to act in a way that would potentially release PCE onto WCM's property. Proffering evidence that MC drilled a slant boring from the MC property to the WCM property is one way WCM can prove a breach of that duty.

MC argues in the alternative that WCM's negligence claims fail because its damages are speculative. "Whatever the proper measure of damages may be, in a given case, the recovery therefor is still subject to the fundamental rule that damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery." *Frustuck v. City of Fairfax*, 212 Cal.App.2d 345, 367-68, 28 Cal.Rptr. 357 (1963). MC asserts that WCM has admitted that it cannot prove its damages. Warner Dep. 238:18-140:4. However, the deposition testimony on which MC relies does not state as much. In that testimony, WCM's expert stated that he could not determine exactly how much the PCE levels in the soil and groundwater have increased over time. He was only able to test current PCE levels. These statements do not show that WCM will not be able to prove its damages. Therefore, even though WCM has not specified the exact amount of damages it seeks, it has clearly established the fact of damages and has carried its burden to show that its damages are not speculative.

MC argues that WCM's claim for strict liability fails because no admissible evidence suggests that MC engaged in any reckless or ultrahazardous activities. MC relies on *Lussier v. San Lorenzo Valley Water Dist.*, 206 Cal.App.3d 92, 253 Cal.Rptr. 470 (1988). In that case, after a large storm, water overflowed from a creek on the plaintiff's land and damaged his house. *Id.* at 98, 253 Cal.Rptr. 470. The plaintiff sued the local water district based on strict liability, claiming that the flooding was caused by the district's failure to clear debris out of the creek. The court held that the defendant could not be strictly liable for damages that arose when a natural condition of the defendant's land interfered with the plaintiff's free use and enjoyment of his property. *Id.* at 101, 253 Cal.Rptr. 470. The court noted, "Obviously, owning land and letting nature take its course thereon is not reckless or ultrahazardous activity." *Id.* at 103 n. 7, 253 Cal.Rptr. 470. The facts of the present case are starkly different. PCE does not naturally occur on anybody's land. Further, WCM has presented evidence that MC released PCE onto WCM's property through slant boring. Therefore, MC has failed to meet its summary judgment burden on WCM's strict liability claim.

***14** MC moves for summary judgment on WCM's equitable indemnity claim because "most courts that have considered this issue have concluded that CERCLA provides an adequate remedy at law." *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 711-12 (6th Cir.2006). The Ninth Circuit is not among the "most courts" cited in *Reg'l Airport Auth.*

Section 9652(d) of CERCLA provides, "Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with

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respect to releases of hazardous substances or other pollutants or contaminants." MC does not present the Court with any state law that would bar an action for equitable indemnity under these circumstances. WCM only seeks equitable indemnity to the extent that equitable relief under CERCLA is not available. Therefore, the Court denies MC's summary judgment motion on this claim.

CONCLUSION

For the foregoing reasons, the Court grants in part WCM's motion for partial summary judgment (Docket No. 30), thereby adjudicating MC's third party affirmative defense under § 9601(b)(3) and its claim for contribution under the Porter-Cologne Act. The Court grants in part MC's motion for partial summary judgment (Docket No. 63), thereby adjudicating WCM's claim for contribution under the Porter-Cologne Act. All other claims survive these summary judgment motions.

IT IS SO ORDERED.

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From: Mary Grady
To: OGC SWERLO; Gautam Srinivasan; Byron Brown; Clarence Featherson; Christina Skaar
Subject: SWERLO News for February 19, 2009
Date: 02/19/2009 09:50 AM

SWERLO News for February 19, 2009

BNA, Inc.
Daily Environment REPORT

HIGHLIGHTS

EPA:
Jackson Appoints Sussman Senior Counsel; Was Deputy Administrator in Clinton EPA
Robert Sussman, a former deputy administrator of the Environmental Protection Agency during the Clinton administration, will serve as Administrator Lisa Jackson's senior policy counsel, Jackson announced in a memo to EPA staff Feb. 18.

Enforcement:
Fugitive in Storage Tank Fraud Case Back From India, U.S. Prosecutors Report
NEW YORK—An environmental consultant charged with defrauding New York State in a contract to remove underground storage tanks has been taken into custody upon returning from his native India, federal prosecutors said Feb. 18 (United States v. Kamdar, W.D.N.Y., No. 04-cr-156, surrender announced 2/18/09).

General Policy:
OMB Issues Guidance to Agencies On Disclosures Under Stimulus Bill
The White House Office of Management and Budget Feb. 18 issued guidance to executive branch agencies and departments on what information they should publicly disclose about government spending under the recently enacted economic stimulus plan.

Hazardous Waste:
Montana Court Holds Burlington Northern Responsible for $32.5 Million Site Cleanup
MISSOULA, Mont.—A Montana district judge ruled Feb. 12 that a party with a partial stake in a Montana superfund site can be held liable for remediation of the entire site—estimated to cost $32.5 million—in the first case ever tried under the 20-year-old state superfund law (Montana v. BNSF, Mont. Dist. Ct., No. BDV-2004-596, 2/12/09).

Solid Waste:
Scrap Industry Says Bills Aimed at Reducing Theft Unfairly Punish Legitimate Recyclers
Bills introduced in the House of Representatives and the Senate Feb. 11 to require metal recyclers to keep records of their transactions, in an attempt to prevent metal thefts, would place onerous requirements on scrap recyclers, the Institute of Scrap Recycling Industries (ISRI) said.

Superfund:
Scrap Metal Company to Pay $1.6 Million For Cleanup Costs at Site Near Troy, Ohio
CINCINNATI—A company responsible for hazardous waste cleanup at the United Scrap Lead superfund site near Troy, Ohio, has agreed to pay $1.6 million to reimburse federal cleanup costs, the U.S. Environmental Protection Agency's Region 5 office said Feb. 18 (United States v. Atlas-Lederer Co., S.D. Ohio, No. C-3-91-309, consent decree approved 1/23/09).

Superfund:
Third Circuit Says Agreement Requires Owner To Indemnify Seller for Pre-Sale Pollution
A federal appeals court affirmed Feb. 10 that a broadly written indemnity provision requires the current owner of an industrial property to compensate a former owner for superfund cleanup costs stemming from pre–sale, as well as post–sale, contamination (Pharmacia Corp. v. Motor Carrier Services Corp., 3d Cir., No. 07-3204, 2/10/09).

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http://www.insideepa.com/secure/epa_nletters.asp?NLN=INSIDEEPA&ACTION=current

EPA Places 'High Priority' On Completing Munitions Cleanup Guidance
EPA's waste office is placing a high priority on finalizing a controversial munitions cleanup policy following months of waiting for the White House Office of Management & Budget (OMB) to address objections raised

by the Defense Department over it. The renewed attention to the pending policy for former ranges may signal stepped-up scrutiny from EPA over munitions contamination matters -- considered a major cleanup liability for DOD.

EPA Study Highlights Impact Of Emission Controls On Coal Waste
An upcoming EPA study finding that nitrogen oxide (NOx) controls on power plants may boost the amount of toxic chemicals in coal waste is highlighting concerns that strict greenhouse gas (GHG) and other emission limits will increase the volume and toxicity of the waste, complicating regulators' task as they seek to determine how to regulate the waste.

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ASBESTOS: Cleanup costs keep rising for Libby, Mont. (02/18/2009)

A decade ago, people in Libby, Mont., thought $8 million in federal assistance was big money for an asbestos cleanup.

Today, $200 million later, the town still has not rid itself of the toxic tremolite asbestos caused by polluter W.R. Grace & Co. U.S. EPA has reached a record-setting Superfund settlement with the company worth $250 million for past and future remediation costs, but that does not include cleanup of Grace's toxic vermiculite mine and railroad sites.

"We're not done yet," said Mike Cirian, EPA's cleanup project manager.

Cleanup costs have amounted to $50,000 for every man, woman and child -- $80,000 if residents outside of city limits are excluded. City officials say the cleanup is still short of cash.

"We realized how big the problem really is and how big the cleanup is," said Dusti Thompson, director of the area's Chamber of Commerce. "That $8 million didn't go very far."

"There's never been enough money," said Mayor Doug Roll.

The majority of what EPA has spent on the cleanup has gone to air sampling, a critical part of asbestos remediation. The agency has done about 100,000 tests so far, each costing between $100 and $2,000 (Michael Jamison *Missoulian*, Feb. 17). -- **PT**

From:	Mary Grady
To:	OGC SWERLO; Gautam Srinivasan; Byron Brown; Clarence Featherson; Christina Skaar
Subject:	SWERLO News for February 20, 2009
Date:	02/20/2009 09:27 AM
Attachments:	Westlaw_Document_09_52_12.doc Westlaw_Document_10_39_14.doc Westlaw_Document_10_40_46.doc Westlaw_Document_10_42_35.doc Westlaw_Document_10_43_49.doc Westlaw_Document_10_44_30.doc

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SWERLO News for
February 20, 2009

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REPORT

HIGHLIGHTS

Oil Spills:
Medication, Communication Cited in 2007 Bay Spill
A 2007 incident in wh ch a cargo ship struck a bridge support tower in San Francisco Bay was the result of a combination of factors, including the pilot's degraded performance due to his use of prescription medications and the lack of predeparture communication between the pilot and the crew, the Nat onal Transportation Safety Board said during a meeting Feb. 18. In the incident, the Cosco Busan spilled more than 53,000 gallons of fuel oil into the water (220 DEN A-15, 11/15/07. NTSB ...

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ASBESTOS: Mine executives start trial today in deaths of 200 workers (02/19/2009)

Five former executives of a Montana vermiculite mine go to trial today on charges that they continued operations long after learning they were spreading asbestos-tainted dust into the air and downplayed health risks to workers and residents.

At least 200 deaths and thousands of illnesses are known to be related to the mine that closed in 1990 after three decades of operation by W.R. Grace & Company, which is also on trial. If convicted, the executives face as much as 15 years in prison on each of three counts of endangering Libby, Mont., through Clean Air Act violations, and lesser time on each of the other charges, plus fines that could amount to several million dollars. Conviction of Grace could mean fines of hundreds of millions.

Asbestos claims have usually remained in civil courts, but the current accusations of wire fraud, obstruction of justice, conspiracy and violations of the Clean Air Act landed it in criminal court.

Prosecutors say the company and its executives were aware of the health consequences of asbestos exposure for its workers in Libby -- a small town in the remote northwestern portion of the state -- as early as the 1970s but took only minimal safety precautions and eschewed more effective ones for fear of causing alarm.

Grace agreed in 2008 to spend $250 million for environmental cleanup of the town and has been paying medical bills for years. The company, which was driven into bankruptcy protection in 2001 by hundreds of millions of dollars in asbestos poisoning claims mostly unrelated to its Libby mine, reached tentative civil settlements last year to pay $3 billion to asbestos victims (Kirk Johnson, *New York Times*, Feb. 19). -- **PR**==========

Legal Times — Afternoon Update
February 19, 2009

D.C. Circuit Forces Obama to Move Quickly in Subpoena Case
By Joe Palazzolo

Despite the Justice Department's plea for more time, the U.S. Court of Appeals for the D.C. Circuit today gave the Obama administration one week to determine whether to press ahead with President George W. Bushs assertion that his former aides are absolutely immune to congressional subpoenas.

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NEW OPINIONS

Slip Copy, 2009 WL 323154 (3rd Cir.(N.J.))
Only the Westlaw citation is currently available.

This case was not selected for publication in the Federal Reporter.

United States Court of Appeals,

Third Circuit.
PHARMACIA CORPORATION f/k/a Monsanto Company
v.
MOTOR CARRIER SERVICES CORP.; CSX Intermodal, Inc.; CSX Corporation; G.O.D.,

Nos. 07-3204, 08-2553.
Argued Jan. 12, 2009.
Filed Feb. 10, 2009.

SLOVITER, Circuit Judge.

I.

*1 Pharmacia Corp. (formerly known as the Monsanto Company) manufactured chemicals at a facility on 28 acres of property abutting the Passaic River in Kearny, New Jersey (the "Kearny Site"), from 1956 to 1991. In December 1994, it sold the Kearny Site to Motor Carrier Services Corp., which owned a six-acre property located across the street, for approximately $5.5 million.
The purchase and sale agreement (the "Agreement") between the parties expressly addressed the division of responsibility between Pharmacia and Motor Carrier regarding environmental cleanup activities at the Kearny Site. Pharmacia was obligated to complete (as it did) certain remedial actions required by the New Jersey Department of Environmental Protection ("NJDEP") under a 1989 settlement as well as certain future activities related thereto. Under § 2.3 of the Agreement, Motor Carrier is responsible for
(i) any and all costs and expenses (including attorney's fees) of Clean-up [required under federal or state law] ... (ii) and any voluntarily incurred costs and expenses (including attorney's fees) to investigate, remediate, remove, treat, clean up or prevent the escape, in each case of any Substances present at or which migrate from the Kearny Site, the Plant or the Property at any time after the Effective Time.
App. at 2426.
The Agreement also provides that the party receiving notice or obtaining information that a proceeding regarding an environmental cleanup may be commenced against or by one of the parties "shall promptly provide written notice thereof to the other party." App. at 2451.
In January 1998, CSX Intermodal, Inc. ("Intermodal") acquired all the shares of Motor Carrier for approximately $14.5 million. Intermodal is a wholly-owned subsidiary of CSX Corp. ("CSX"). Prior to closing, Pharmacia requested assurance that Motor Carrier's net worth was at least $5 million. Intermodal responded by informing Pharmacia that it had purchased Motor Carrier and recognized that it was an "Affiliate" under the Agreement. As a result of the stock purchase transaction, Motor Carrier became a wholly-owned subsidiary of Intermodal.
In January 1995 (shortly after Pharmacia's sale of the Kearny Site to Motor Carrier), the United States Environmental Protection Agency ("EPA") informed Pharmacia that it was investigating environmental contamination in a six-mile stretch of the Passaic River near Newark, New Jersey. By letter dated April 1996, EPA notified Pharmacia of its potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Pharmacia responded by informing EPA that it would not participate in the remediation of the Passaic River "[b]ecause there was inadequate evidence tying the [Kearny] site to issues in the river." App. at 534.
In September 2003, EPA again contacted Pharmacia by letter regarding its potential liability under CERCLA for the Kearny Site. Later in September 2003, NJDEP issued an administrative directive that informed Pharmacia and Motor Carrier that they were potentially liable under state law for contamination of the Passaic River from the Kearny Site. In March 2004, EPA issued a final draft Administrative Order on Consent, under which the settling parties--which did not include Pharmacia until June 2005--agreed to reimburse EPA for certain costs associated with EPA's Remedial Investigation and Feasibility Study ("RI/FS") of the lower Passaic River. All the settling parties agreed to jointly fund $10 million of EPA's costs for the lower Passaic River RI/FS. In March 2004, Pharmacia's counsel then provided Motor Carrier with notice of an environmental claim based on EPA's action. Motor Carrier refused Pharmacia's request that it indemnify it for the costs of the EPA or NJDEP actions. Pharmacia filed this action in August 2004.

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Slip Copy, 2009 WL 331262 (S.D.N.Y.)
Only the Westlaw citation is currently available.

United States District Court,

S.D. New York.
CERAMICAS INDUSTRIALES, S.A. and Briggs Plumbing Products, Inc., Plaintiffs,
v.
METROPOLOITAN LIFE INSURANCE COMPANY, Defendant.
No. 08 Civ. 5114(BSJ)(DFE).
Feb. 11, 2009.

...[text omitted]

Plaintiffs seek to recover costs incurred as a result of investigating and responding to environmental liabilities, bringing suit against Defendant MetLife to enforce rights allegedly found in these contractual provisions and sections 107 and 113(f)(3) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9607 and 9613.
Defendant moves to dismiss. That motion is DENIED in part and GRANTED in part.

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--- F.Supp.2d ----, 2009 WL 331970 (D.Puerto Rico)
Only the Westlaw citation is currently available.

United States District Court,

D. Puerto Rico.
Carmen Elizabeth MARRERO HERNANDEZ, et al., Plaintiffs,
v.
ESSO STANDARD OIL CO. (PUERTO RICO), et al., Defendants.
Civil No. 03-1485 (GAG).
Feb. 10, 2009.

Background: Community residents brought action against service station and others alleging violations of state and federal environmental laws, including the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Service station moved for summary judgment.

Holdings: The District Court, Gustavo A. Gelpí, J., held that:
(1) citizen's suits brought under the CWA and RCRA were not barred by Environmental Quality Board's (EQB) previous administrative proceedings;
(2) fact issues existed as to whether service station's alleged violations of RCRA, the CWA, and CERCLA were continuous;
(3) fact issue existed as to whether site of service station presented an imminent and substantial endangerment under RCRA;
(4) fact issue existed as to whether river located in the interior of Puerto Rico constituted navigable waters under the CWA; and
(5) fact issue precluded determination on whether CERCLA's petroleum exclusion applied.

Motion denied.

Westlaw_Document_10_42_35.doc

Slip Copy, 2009 WL 347773 (S.D.Ohio)
Only the Westlaw citation is currently available.

United States District Court,

S.D. Ohio,
Western Division.
WASTE MANAGEMENT, INC.,
and
Waste Management of Ohio, Inc., Plaintiffs,
v.
DANIS INDUSTRIES CORPORATION, et al., Defendants.
No. 3:00cv256.
Feb. 10, 2009.

WALTER HERBERT RICE, District Judge.
*1 The genesis of this litigation is the 1983 sale by Defendant Danis Industries Corporation ("DIC") of some of its corporate subsidiaries to Plaintiff Waste Management, Inc., and its subsidiary, Plaintiff Waste Management of Ohio, Inc. Industrial Waste Disposal Co., Inc. ("IWD"), was one of the corporate subsidiaries transferred to Plaintiffs as part of that transaction. At the time, IWD owned a corporate subsidiary named North Sanitary Landfill, Inc., which had operated the North Sanitary or Valleycrest Landfill. Consequently, as a result of that transaction, the Plaintiffs became the indirect owners of the Valleycrest Landfill. Shortly after that

transaction, DIC agreed to indemnify the Plaintiffs for certain liabilities arising out of the operation of that Landfill by its subsidiaries. After that Landfill had been included on the National Priorities List ("NPL") (*see* 40 C.F.R. Pt. 300, App. B), the possibility that Plaintiffs would incur liabilities, as a result of environmental contamination at the Landfill, became real. Consequently, Plaintiffs invoked the indemnification agreement with DIC, causing multiple lawsuits between the parties concerning DIC's obligation to indemnify them. In December, 1997, the parties resolved their lawsuits by entering into a Settlement Agreement. Under that agreement, DIC agreed to indemnify Plaintiffs for any costs incurred to cleanup the Valleycrest Landfill.
In October, 1997, DIC and its corporate affiliates underwent corporate restructuring, which the Court has referred to as the "recapitalization/split-off transaction." [FN1] Prior to the consummation of that transaction, DIC had been a wholly owned subsidiary of Defendant The Danis Companies ("TDC"). In addition, Defendant Danis Building Construction Company ("DBCC") had been a wholly owned subsidiary of Danis Construction Company ("DCC"), which, in turn, was a wholly owned subsidiary of DIC. Under the recapitalization/split-off transaction, 10 of the 11 Class A shareholders of TDC redeemed their TDC shares and other securities for the collective payment of $26.5 million and the shares of DBCC, while the eleventh shareholder, Thomas Danis, ended up owning 80% of the shares of TDC. When the transaction was implemented, the assets of DBCC, as well as a portion of the sum of $26.5 million, had been removed from DIC, which, according to the Plaintiffs, left DIC without sufficient assets to satisfy its obligation to indemnify Plaintiffs.

Westlaw_Document_10_43_49.doc

Slip Copy, 2009 WL 348774 (S.D.Ind.)
Only the Westlaw citation is currently available.

United States District Court,

S.D. Indiana,
Indianapolis Division.
The MITCHEL GROUP, INC., Plaintiff,
v.
Lenoir E. ZAISER, et al., Defendants.
Cause No. 1:08-cv-629-WTL-TAB.
Feb. 3, 2009.

WILLIAM T. LAWRENCE, District Judge.
*1 This cause is before the Court on the motion to dismiss for lack of personal jurisdiction filed by Defendant McDermott, Inc. ("McDermott"), and the motion of Plaintiff The Mitchel Group, Inc. ("Mitchel") seeking to submit supplemental evidence in opposition to the motion to dismiss. Both motions are fully briefed and the Court, being duly advised, **GRANTS** Mitchel's motion and, having considered the supplemental evidence and McDermott's arguments with regard to it, **DENIES** McDermott's motion for the reasons set forth below.
This case arises out of the environmental contamination of a piece of property in Indianapolis, Indiana ("the Facility"). The details regarding the history of the use and ownership of the Facility are largely irrelevant to the instant motions. Suffice it to say that Mitchel is the current owner of the Facility and, *inter alia,* seeks in this action, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 et seq., to recover from the Defendants--most of whom are former owners or operators of the Facility or successors thereto--the costs it has incurred in remediating the hazardous substances that have contaminated the Facility.

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NEW ARTICLE

23 J. Envtl. L. & Litig. 401
Journal of Environmental Law and Litigation 2008

CAN YOU TRUST A TRUST? THE POTENTIAL CERCLA LIABILITY OF TRUSTEES AND BENEFICIARIES

Summer L. Nastich, Diane R. Smith

Introduction and Impetus

Some baby boomers, and those who will follow them, will face estate planning issues that no other generation has had to concern itself with: transfers, via trusts, of real property impacted by hazardous substances and the long liability reach of modern environmental laws. [FN1] These laws can transform the potential boon of real property held in trust for one's benefit into a nightmare of ongoing or potential litigation and liability. Those who advise on estate and environmental issues must therefore understand the risks involved in transferring or holding impacted property in trust and the types of structures and advance planning that will best benefit and protect those to whom the settlors [FN2] intend to gift. This Article addresses these issues, as well as many of the questions raised by the need to structure gifts of impacted real property in a manner that carries *403 out the settlor's intent without imposing additional personal liability on those gifted.
In particular, and with a focus on California law, this Article addresses the question of under what circumstances, if any, can trustees and/or beneficiaries be held liable as "owners?" This question is crucial because owners are strictly liable under the Superfund Law--the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). [FN3] Other questions addressed

in this Article include: If the beneficiary or trustee is potentially liable, is such liability personal or limited to trust assets? What steps can be taken to reduce or eliminate exposure of the trust assets and the beneficiary and/or trustee's own personal assets to clean-up liability? What potential defenses are available to trustees and beneficiaries?

CERCLA is a notoriously difficult statute to interpret, and most CERCLA cases and opinions are convoluted and complex. Many of the questions addressed here drift into uncharted waters with no appellate opinions directly on point. Our purpose, therefore, is to mark known shoals and sandbars, graph known or reasonably expected channels, explore safe harbors, and chart what now seems to be the optimum course, recognizing as we go that the current is swift, and we don't control the weather.

Westlaw_Document_09_52_12.doc

Only the Westlaw citation is currently available.

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)

United States Court of Appeals,
Third Circuit.
PHARMACIA CORPORATION f/k/a Monsanto Company
v.
MOTOR CARRIER SERVICES CORP.; CSX Intermodal, Inc.; CSX Corporation; G.O.D., Inc.; Riley Leasing Corp.
Motor Carrier Services Corp.; CSX Intermodal, Inc.; CSX Corporation,
Appellants.
Pharmacia Corporation, f/k/a Monsanto Company,
v.
Motor Carrier Services Corp.; CSX Intermodal, Inc.; CSX Corporation; G.O.D., Inc.; Riley Leasing Corp.,
Motor Carrier Services Corp.; CSX Intermodal, Inc.; CSX Corporation,
Appellants.
Nos. 07-3204, 08-2553.

Argued Jan. 12, 2009.
Filed Feb. 10, 2009.

On Appeal from the United States District Court for the District of New Jersey (D.C. No. 04-cv-03724), District Judge: Honorable Garrett E. Brown, Jr.

Roy T. Englert, Jr. (Argued), Robbins, Russell, Englert, Orseck & Untereiner, Washington, D.C., for Appellants.

John McGahren (Argued), Patton Boggs, Newark, N.J., for Appellee.

Before SLOVITER and BARRY, Circuit Judges, and POLLAK [FN*], District Judge.

FN* Hon. Louis H. Pollak, Senior Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION

SLOVITER, Circuit Judge.

I.

***1** Pharmacia Corp. (formerly known as the Monsanto Company) manufactured chemicals at a facility on 28 acres of property abutting the Passaic River in Kearny, New Jersey (the "Kearny Site"), from 1956 to 1991. In December 1994, it sold the Kearny Site to Motor Carrier Services Corp., which owned a six-acre property located across the street, for approximately $5.5 million.

The purchase and sale agreement (the "Agreement") between the parties expressly addressed the division of responsibility between Pharmacia and Motor Carrier regarding environmental cleanup activities at the Kearny Site. Pharmacia was obligated to complete (as it did) certain remedial actions required by the New Jersey Department of Environmental Protection ("NJDEP") under a 1989 settlement as well as certain future activities related thereto. Under § 2.3 of the Agreement, Motor Carrier is responsible for

> (i) any and all costs and expenses (including attorney's fees) of Clean-up [required under federal or state law] ... (ii) and any voluntarily incurred costs and expenses (including attorney's fees) to investigate, remediate, remove, treat, clean up or prevent the escape, in each case of any Substances present at or which migrate from the Kearny Site, the Plant or the Property at any time after the Effective Time.

App. at 2426.

The Agreement also provides that the party receiving notice or obtaining information that a proceeding regarding an environmental cleanup may be commenced against or by one of the parties "shall promptly provide written notice thereof to the other party." App. at 2451.

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In January 1998, CSX Intermodal, Inc. ("Intermodal") acquired all the shares of Motor Carrier for approximately $14.5 million. Intermodal is a wholly-owned subsidiary of CSX Corp. ("CSX"). Prior to closing, Pharmacia requested assurance that Motor Carrier's net worth was at least $5 million. Intermodal responded by informing Pharmacia that it had purchased Motor Carrier and recognized that it was an "Affiliate" under the Agreement. As a result of the stock purchase transaction, Motor Carrier became a wholly-owned subsidiary of Intermodal.

In January 1995 (shortly after Pharmacia's sale of the Kearny Site to Motor Carrier), the United States Environmental Protection Agency ("EPA") informed Pharmacia that it was investigating environmental contamination in a six-mile stretch of the Passaic River near Newark, New Jersey. By letter dated April 1996, EPA notified Pharmacia of its potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Pharmacia responded by informing EPA that it would not participate in the remediation of the Passaic River "[b]ecause there was inadequate evidence tying the [Kearny] site to issues in the river." App. at 534.

In September 2003, EPA again contacted Pharmacia by letter regarding its potential liability under CERCLA for the Kearny Site. Later in September 2003, NJDEP issued an administrative directive that informed Pharmacia and Motor Carrier that they were potentially liable under state law for contamination of the Passaic River from the Kearny Site. In March 2004, EPA issued a final draft Administrative Order on Consent, under which the settling parties--which did not include Pharmacia until June 2005--agreed to reimburse EPA for certain costs associated with EPA's Remedial Investigation and Feasibility Study ("RI/FS") of the lower Passaic River. All the settling parties agreed to jointly fund $10 million of EPA's costs for the lower Passaic River RI/FS. In March 2004, Pharmacia's counsel then provided Motor Carrier with notice of an environmental claim based on EPA's action. Motor Carrier refused Pharmacia's request that it indemnify it for the costs of the EPA or NJDEP actions. Pharmacia filed this action in August 2004.

II.

***2** Pharmacia sought summary judgment to pierce Motor Carrier's corporate veil, which the District Court granted in December 2006. As a result, it held Intermodal liable for Motor Carrier's liability under the Agreement. Following a bench trial, the District Court entered an order on June 22, 2007, holding that Motor Carrier, Intermodal, and CSX were required to indemnify Pharmacia under the Agreement "for any and all costs for which Pharmacia is or becomes liable to NJDEP and USEPA ... or any future action by NJDEP, USEPA or any other regulatory agency related to the remediation of the Lower Passaic River, and for future cleanup of the Kearny Site." App. at 103. The District Court also rejected Motor Carrier's late notice defense as to the costs of the EPA investigation.

In August 2007, the National Oceanic and Atmospheric Administration ("NOAA"), acting as the lead federal natural resources trustee under CERCLA, informed Pharmacia that it was potentially liable for natural resource damages to the lower Passaic River based on its former Kearny Site operations. Pharmacia notified Motor Carrier of the NOAA claim and sought indemnification under the Agreement and the District Court's June 22 order, but Motor Carrier refused.

On September 17, 2007, the District Court ordered Motor Carrier to pay Pharmacia approximately $448,430 in cleanup costs incurred up to that date. On January 9, 2008, the District Court ordered Motor Carrier to pay approximately $469,360 in attorneys' fees to Pharmacia, which represented the cost of Pharmacia's legal representation in the underlying government investigations. The District Court entered final judgment on May 19, 2008. [FN1]

FN1. The District Court had jurisdiction over Pharmacia's state law contract claims under 28 U.S.C. § 1332. Motor Carrier filed two appeals in this case, which we have consolidated. On July 20, 2007, Motor Carrier filed a notice of appeal as to the District Court's June 22, 2007 order resolving liability issues (No. 07-3204), and that appeal subsequently ripened when the District Court fully resolved the parties' claims on the merits. *See Cape May Greene, Inc. v. Warren,* 698 F.2d 179, 184-85 (3d Cir.1983). We have jurisdiction over No. 07-3204 pursuant to 28 U.S.C. § 1291.
Pharmacia argues the second notice of appeal

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(No. 08-2553), which stated it appealed the May 19, 2008 judgment, was untimely. It contends that the District Court's January 9, 2008 order was the relevant final judgment. The District Court's order entered on May 19, 2008 was entitled "Final Judgment," App. at 27A, and we see no reason not to take that designation at face value. We conclude that Motor Carrier's notice of appeal in No. 08-2553 was timely filed and that we therefore also have jurisdiction over that appeal pursuant to 28 U.S.C. § 1291.

III.

This is essentially a contract dispute. Because we conclude that the Agreement is not ambiguous, we review the District Court's interpretation de novo. Motor Carrier argues that it is responsible for the costs of cleanup activities only if the pollutants at issue migrated from the Kearny Site after the Agreement became effective (a condition it claims is not satisfied). It contends that § 2.3 (quoted earlier) makes it responsible only for government-ordered cleanup under § 2.3(i) and voluntary activities under § 2.3(ii), but "in each case" only for "Substances ... which migrate from the Kearny Site ... at any time after the Effective Time." App. at 2426. We reject that contention and instead agree with the District Court that under § 2.3(i) Motor Carrier must pay the cost of "Clean-up," which is defined in the Agreement to mean "investigatory, remedial and monitoring work mandated by the Requirements of Law or a Governmental Agency to investigate, remediate, remove, treat, clean-up, contain or prevent the escape of Substances on, within, generated by or emitted from [the Kearny Site]." App. at 2420. Nothing in that definition suggests a temporal limitation on Motor Carrier's liability for government-mandated cleanup. Thus, it follows that the "after the Effective Time" language in § 2.3 relied upon by Motor Carrier modifies only § 2.3(ii)--which, again, does not use the defined term "Clean-up"--and not § 2.3(i). [FN2]

FN2. Motor Carrier also contends that the District Court's interpretation renders the phrase "in each case" in § 2.3 meaningless. We disagree. The phrase "in each case" refers to the types of voluntary cleanup activities that immediately precede it in § 2.3(ii) and does not refer back to government-mandated "Clean-up" covered by § 2.3(i).

***3** Interpreting § 2.3 to impose responsibility on Motor Carrier for government-mandated cleanup activities is consistent with the remaining provisions in the Agreement. Section 2.5 governs Motor Carrier's indemnification obligation for cleanup activities. As relevant here, § 2.5(a) requires Motor Carrier to indemnify Pharmacia for "any Fine assessed from and after the Effective Time," whereas § 2.5(b) requires Motor Carrier to indemnify Pharmacia for "any costs of Clean-up of Substances" required under federal or state law "whether or not such Clean-up arises from or in connection with Substances dumped, buried, injected, deposited or disposed of by [Pharmacia]." App. at 2429. This broad language of § 2.5(b) clearly requires Motor Carrier to indemnify Pharmacia for government-mandated cleanup costs that "arise from" environmental harms caused by Pharmacia's former operations and includes no limitation based on when the pollutants at issue migrated from the Kearny Site. Similarly, §§ 2.2 and 2.4, which govern Pharmacia's obligations for cleanup, clearly limit Pharmacia's cleanup obligations to certain activities previously mandated by NJDEP.

Motor Carrier next contends that even if it must indemnify Pharmacia for costs associated with the EPA and NJDEP investigations, the District Court erred in holding it responsible for the costs of the NOAA investigation because NOAA seeks "compensatory damages for natural resource injury" as well as "costs of assessing injury to natural resources," neither of which is covered by the term "Clean-up" under the Agreement. Appellant's Supp. Br. at 13 (emphasis omitted). However, the NOAA action falls squarely within the broad definition of "Clean-up." The "primary purpose" of EPA-mandated cleanups under CERCLA "is to protect human health." *See* Natural Resource Damage Assessments, 51 Fed.Reg. 27,674, 27,681 (Aug. 1, 1986). In contrast, natural resource damage assessments involve, inter alia, remedial efforts, "such as habitat management or acquisition of an equivalent resource, [that] will be beyond the scope of the [EPA] response action." *Id.; see also* 43 C.F.R. § 11.93(a) (requiring completion of "Restoration Plan" that "shall describe how the monies [obtained by natural resources trustees] will be used to address natural resources, specifically what restoration, rehabilitation, replacement, or acquisition of the equivalent resources will occur.").

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In sum, the NOAA action falls squarely within the definition of "Clean-up" under the Agreement. The "assessment" for which NOAA sought funding in August 2007 is an "investigation" of the extent of natural resource damage caused by Pharmacia and the other potentially liable parties to the Passaic River. Moreover, any damages required to be paid following the assessment will be used for "remedial" activities, such as "restoration" or "rehabilitation" of the Passaic River.

IV.

Motor Carrier next challenges the District Court's finding that Pharmacia provided the notice required by the Agreement of the EPA investigation and that in any case Motor Carrier proved no prejudice, as required by *Pfizer, Inc. v. Employers Ins. of Wausau,* 712 A.2d 634, 644 (N.J.1998), and *Cooper v. Gov't Employees Ins. Co.,* 237 A.2d 870, 873-74 (N.J.1968). [FN3] We need not decide whether Pharmacia provided Motor Carrier with sufficient notice of EPA's April 1996 letter informing Pharmacia of its potential CERCLA liability for the Kearny Site, because we conclude that the District Court did not clearly err in finding that Motor Carrier was not prejudiced by any such late notice.

FN3. The New Jersey decision on which Motor Carrier relies, *Sneed v. Concord Ins. Co.,* 237 A.2d 289 (N.J.Super.Ct.App.Div.1967), did not create an exception to the general rule that an insurer must show prejudice to succeed on a late notice defense, but rather dealt with the distinct issue of estoppel where an insurer seeks to deny coverage after controlling the defense of the underlying claim for a substantial period after the insurer became aware of the basis for denying coverage. *See also Vornado, Inc. v. Liberty Mut. Ins. Co.,* 254 A.2d 325 (N.J.Super.Ct. Ch. Div.1969) (noting distinction between estoppel cases and late notice defense, and holding that insurer asserting late notice defense must prove prejudice).

***4** The District Court found that Motor Carrier failed to offer evidence that Pharmacia made any decisions in defense of the EPA investigation that were detrimental to Motor Carrier. Motor Carrier counters that if Pharmacia had properly provided notice of the April 1996 letter, it could have exercised its right under § 9.9 of the Agreement to take over the defense of the EPA action. It also argues that Pharmacia failed to present a report by its environmental consultant (Roux Associates) that suggested that Pharmacia's operations at the Kearny Site could not have contaminated the Passaic River. However, as Pharmacia notes, it had provided EPA with a similar report from Roux Associates even before EPA's April 1996 letter. More importantly, there is no indication that Motor Carrier "irretrievably lost" any rights or could have been more successful in defending EPA's investigation. EPA took no action against Pharmacia until September 2003, when it sent Pharmacia another letter regarding its potential CERCLA liability. Pharmacia formally notified Motor Carrier of EPA's issuance of a draft administrative order regarding the lower Passaic River in March 2004. Pharmacia did not enter into a settlement with EPA until June 2005. Thus, Motor Carrier could have exercised its right to take over the defense of the EPA investigation more than a year before any liability was imposed on Pharmacia. Because we cannot conclude that the District Court's finding of no prejudice was clearly erroneous, Motor Carrier was not entitled to a late notice defense.

V.

We turn to Motor Carrier's contention that the District Court erred in granting summary judgment to pierce its corporate veil, thereby holding Intermodal liable for Motor Carrier's indemnification obligations. We review the grant of summary judgment de novo. Under New Jersey law, the corporate veil of a subsidiary corporation may be pierced only where (1) "the parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent" and (2) "the parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law." *New Jersey Dep't of Envtl. Prot. v. Ventron Corp.,* 468 A.2d 150, 164 (N.J.1983).

The District Court summarized the relevant facts as to the first prong as follows: "Since the closing, in January 1998, neither the shareholders, officers nor directors of Motor Carrier have held a meeting as set forth in the company's by-laws. Moreover, Motor Carrier has not ... maintained a balance sheet, nor issued a financial report to Intermodal." App. at 69. Motor Carrier also "has no employees, and exists solely as a holding company for the Kearny [Site],"

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App. at 60, and Intermodal uses that property without a lease or payment. The totality of these circumstances suggests that the District Court correctly concluded that Intermodal dominated Motor Carrier.

***5** Motor Carrier argues that the District Court improperly concluded that it was undercapitalized. However, undercapitalization is merely one factor to be considered, and is not a requirement for piercing the corporate veil. Although Motor Carrier correctly notes that courts usually analyze capitalization at the inception of a corporation, that rule does not apply when "the corporation distinctly changes the nature or magnitude of its business." 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 41.33 (2008). Here, the nature of Motor Carrier's business changed significantly when it was purchased by Intermodal. Prior to that time, Motor Carrier received revenue of over $ 1 million from leasing the Kearny Site to third parties, whereas thereafter, Motor Carrier had no revenue at all. Moreover, given its lack of revenue and acknowledged responsibility under the Agreement for (at least some) environmental contamination at the Kearny Site, it is difficult to conclude that Motor Carrier's resources were reasonable "in relation to the nature of the business of the corporation and the risks attendant to such businesses." *Id.*

As to the second veil-piercing prong, we note a New Jersey appellate court decision that explained that, "the hallmarks of ... abuse [of the corporate form] are typically the engagement of the subsidiary in no independent business of its own but exclusively the performance of a service for the parent and, even more importantly, the undercapitalization of the subsidiary rendering it judgment-proof." *OTR Assocs. v. IBC Servs., Inc.,* 801 A.2d 407, 409-10 (N.J.Super.Ct.App.Div.2002). As Pharmacia stresses, both of these hallmarks are present here. Intermodal used Motor Carrier solely to hold the Kearny Site for its business (without payment), thereby shielding Intermodal from any potential liability arising out the environmental harms caused by Pharmacia's former operations. Moreover, Motor Carrier has pointed to no evidence that it has the resources necessary to meet those liabilities.

In sum, the District Court properly concluded that Motor Carrier's corporate veil should be pierced as a matter of law. Therefore, Intermodal is liable for Motor Carrier's obligations under the Agreement.

Although counsel for Motor Carrier assured this court at the oral argument that Intermodal has the resources to meet the indemnity obligation, we nonetheless examine the District Court's holding that CSX became an "Assurance Affiliate" upon completion of Intermodal's stock purchase of Motor Carrier in January 1998 because Motor Carrier's auditor valued Motor Carrier at only about $340,000 in October 1997.

Section 13.19 of the Agreement provides that, if at the end of any quarter the net worth of Motor Carrier falls below $5 million, then Motor Carrier must promptly notify Pharmacia and within fifteen days "cause Affiliates to become Assurance Affiliates by causing them (in a form satisfactory to [Pharmacia]) to become parties to this Agreement, to guaranty and/or to otherwise become liable for the obligations under the Agreement ... to the same extent as [Motor Carrier], in each case as [Pharmacia] may elect." App. at 2459-60.

***6** Even if Intermodal somehow became an Assurance Affiliate, nothing in § 13.19 provides that Intermodal's corporate parent, CSX, would automatically become an Assurance Affiliate as well. Section 13.19 provides that once an Assurance Affiliate is added, its net worth is considered part of Motor Carrier's net worth "for purposes of determining a need thereafter to add additional Assurance Affiliates ." App. at 2460. The District Court made no finding (and Pharmacia offers no evidence) that the combined net worth of Intermodal and Motor Carrier fails to exceed $5 million. Therefore, there is no basis upon which to conclude that CSX would be obligated to become an Assurance Affiliate.

In sum, the District Court erred in concluding that CSX became an Assurance Affiliate of Motor Carrier under the Agreement. Thus, CSX is not directly liable for Motor Carrier's indemnification obligations.

VI.

For the above-stated reasons, we will affirm the District Court's judgment that Motor Carrier and Intermodal are required to indemnify Pharmacia for costs incurred in response to the EPA, NJDEP, and NOAA investigations. We will reverse the District Court's judgment that CSX was responsible for those costs.

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United States District Court,
S.D. New York.
CERAMICAS INDUSTRIALES, S.A. and Briggs Plumbing Products, Inc., Plaintiffs,
v.
METROPOLOITAN LIFE INSURANCE COMPANY, Defendant.
No. 08 Civ. 5114(BSJ)(DFE).

Feb. 11, 2009.

Opinion & Order

BARBARA S. JONES, District Judge.

BACKGROUND [FN1]

FN1. The facts described are taken from Plaintiffs' Complaint and are assumed to be true for the purposes of this motion only.

***1** Plaintiff Briggs Plumbing, a Michigan corporation, is engaged in the manufacture of ceramic bathroom products. In 1997, Plaintiff Ceramicas Industriales, S.A. ("Ceramicas"), a Chilean company, purchased Briggs Plumbing Products, Inc. (including its manufacturing facilities in Illinois, Indiana, Tennessee, and Pennsylvania) from Briggs Holdings, Inc., a Delaware corporation. At that time, Defendant Metropolitan Life Insurance Company ("MetLife"), a New York corporation, owned a majority of the issued and outstanding stock of Briggs Holdings.

The sale of Briggs Plumbing to Ceramicas was effected by a Share Purchase Agreement dated August 18, 1997. The parties to the Agreement were Ceramicas (the "Buyer"), Briggs Holdings (the "Seller"), Briggs Plumbing (the "Company"), and MetLife.

Since the sale, state and federal environmental agencies have taken action against Briggs Plumbing with respect to the presence or release of pollutants or hazardous substances from certain of the properties transferred along with Briggs Plumbing in the Agreement.

Under section 3.20(c) of the Agreement, Briggs Holdings, along with Briggs Plumbing, state that

> (c) Except as set forth in Section 3.20 of the Disclosure Schedule, to the Knowledge of Seller and the Company, there are no past or present actions, activities, circumstances, conditions, events or incidents, including, without limitation, the release, emission, discharge or presence, or disposal of any Substance of Concern, that could form the basis of any Environmental Claim against the Company or Seller (or against any person or entity whose liability for any Environmental Claim the Company or Seller has retained or assumed either contractually or by operation of law) that could reasonably be expected to have a Material Adverse Effect. (Compl. Ex. 1 at 26-27).

Section 8.4 of the SPA, entitled "Indemnification," states, in pertinent part:

> (a) From and after the Closing, Seller shall indemnify and hold harmless Buyer and the Company ... from and against any liabilities, costs or expenses (including reasonable attorneys' fees), judgments, fines, losses, claims, damages and amounts paid in settlement (collectively, *"Damages"*) arising from or in connection with ... (ii) any inaccuracy in any representation or the breach of any warranty of Seller, Met Life or the Company contained in or made pursuant to Section 3.20 [Environmental Matters].

Section 8.4 later continues:

> (e) No action, claim or set off for Damages subject to indemnification under this Section 8.4 shall be brought or made ... (ii) with respect to claims for Damages resulting from a breach of any representation or warranty, after the date on which such representation or warranty shall terminate pursuant to Section 8.3 ... (Compl. Ex. 1 at 48-52).

Section Section 8.3 of the Purchase Agreement, entitled "Survival of Representations, Warranties and Covenants," states, in pertinent part:

> ***2** (a) ... (ii)[A]ll representations and warranties contained in Sections 3.14 and 3.20 shall survive the Closing and remain in full force and effect until sixty (60) days after expiration of the applicable

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statute of limitations (including any extensions thereof) ... (Compl. Ex. 1 at 48).

The presence or release of the pollutants or hazardous substances giving rise to the governmental agencies' actions were not disclosed in section 3.20 of the Purchase Agreement.

Plaintiffs seek to recover costs incurred as a result of investigating and responding to environmental liabilities, bringing suit against Defendant MetLife to enforce rights allegedly found in these contractual provisions and sections 107 and 113(f)(3) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9607 and 9613.

Defendant moves to dismiss. That motion is DENIED in part and GRANTED in part.

DISCUSSION

I. The Standard for Motions to Dismiss Under Fed.R.Civ.P. 12(b)(6)

A motion to dismiss may be granted only where it can be shown beyond doubt that the plaintiff can prove no set of facts to support his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). The issue, in deciding a 12(b)(6) motion, "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 378 (2d Cir.1995) (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 235-36 (1974)). It follows that "the office of a motion to dismiss is merely to assess the legal feasibility of a complaint, not to assay the weight of the evidence which might be offered in support thereof." *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.,* 375 F.3d 168, 176 (2d Cir.2004) (quoting *Geisler v.. Petrocelli,* 616 F.2d 636, 639 (2d Cir.1980)).

This Court "accept[s] as true all well-pleaded factual allegations in the Complaint and view[s] them in the light most favorable to Plaintiff[ ]." *See De Jesus v. Sears, Roebuck & Co.,* 87 F.3d 65, 69 (2d Cir.1996). Because the complaint relies on the terms of the Agreement, this Court also considers its relevant language. *See Broder v. Cablevision Systems Corp.,* 418 F.3d 187, 196 (2d Cir.2005). This Court is not limited to Plaintiffs' description of those terms, but "may look to the agreement itself" in assessing the sufficiency of the complaint. *Id.*

II. First Claim___Contractual Indemnification

Defendant moves to dismiss Plaintiffs' contractual indemnification claim, arguing that it is time-barred. The parties dispute whether the Agreement was intended to restrict Plaintiffs' ability to bring this claim, and, if so, what time limit the contractual language imposes in the instant matter.

"Under New York law, a written contract is to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language they have employed." *Terwilliger v. Terwilliger,* 206 F.3d 240, 245 (2d Cir.2000). *See also RJE Corp. v. Northville Indus. Corp.,* 329 F.3d 310, 314 (2d Cir.2003) ("Where a contract is clear and unambiguous on its face, the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence.") (internal quotation marks omitted). If a contract is unambiguous, then its proper construction is a question of law. *Metro. Life Ins. Co. v. RJR Nabisco, Inc.,* 906 F.2d 884, 889 (2d Cir.1990). However, "[w]here the intent of the parties is too ambiguous to be gleaned from the contract alone, the Court should receive evidence that might better clarify that intent." *Gitnik v. Home Depot U.S.A., Inc.,* No. 07 Civ. 1244, 2007 WL 2728358, at *2 (S.D.N.Y. Sept. 18, 2007) (internal quotation marks and citation omitted).

***3** At this time, it is unclear what limitations, if any, the parties intended to impose upon the right of indemnification by linking it to section 8.3 of the Agreement, which states that the representations and warranties concerning environmental liabilities at the sites, "shall survive the Closing and remain in full force and effect until sixty (60) days after expiration of the applicable statute of limitations"

Because the Court finds the contractual language ambiguous, the motion to dismiss Claim One is DENIED.

III. Claim Two___CERCLA

A. CERCLA section 107

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"CERCLA ... imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania v. Union Gas Co* ., 491 U.S. 1, 7 (1989). Despite its broad-ranging coverage, however, CERCLA liability is not limitless when it comes to parent-subsidiary relationships among corporations.

Section 107 of CERCLA extends liability derivatively___to those who "own [ ]" the polluting site___and directly___to those who "operate[ ]" the polluting site. *U.S. v. Bestfoods*, 524 U.S. 51, 64 (U.S.1998). Here, Plaintiffs have failed to allege a basis for finding either form of liability. With respect to section 107 of CERCLA, therefore, Plaintiffs' Second Cause of Action is DISMISSED with leave to amend.

i. Derivative Liability

CERCLA section 107 extends derivative liability to those who "own[ ]" the polluting site. However, under that section, a parent corporation may be held derivatively liable for its subsidiary's actions only when the corporate veil may be pierced. *Bestfoods*, 524 U.S. at 63-64.

In *Bestfoods*, the Supreme Court declined to resolve the issue of whether "in enforcing CERCLA's indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing." 524 U.S. at 64. Plaintiffs contend that federal common law should govern the Court's veilpiercing analysis, but argue that under either federal common law or New York state veil-piercing, a party may allege either 1) that a parent used its alter ego to commit a wrong, or 2) that a corporation dominated and disregarded its subsidiary's corporate form such that it was actually carrying on the subsidiary's business. (Opp'n 8). Defendant argues for the application of New York state law, which it says requires Plaintiffs to allege that 1) the parent misused the corporate form and 2) the parent did so for the purpose of committing a wrong. (Reply at 12).

In sum, the parties dispute whether Plaintiffs must allege domination of the subsidiary by its parent as well as wrongfulness, or simply domination. This Court need not resolve that question, as Plaintiffs have failed to plead domination, and therefore have not alleged a basis for piercing the corporate veil under either formulation.

In order to allege domination for purposes of piercing the corporate veil, a party must allege that "the owner exercised complete domination over the corporation with respect to the transaction at issue," *MAG Portfolio Consultant, GMBH v. Merlin Biomed Group LLC*, 268 F.3d 58, 63 (2d Cir.2001). To proceed under this "alter ego" theory, Plaintiffs must allege that "the owner exercised such control that the corporation has become a mere instrumentality of the owner, who is the real actor." *In re Vebeliunas*, 332 F.3d 85, 91-92 (2d Cir.2003); *Bangkok Crafts Corp. v. Capitolo Di San Pietro in Vaticano*, No 03-cv-0015, 2006 WL 1997628, at *13 (S.D.N.Y. July 18, 2006) (applying New York state law); *Status Intern. S.A. v. M & D Maritime Ltd.*, 994 F.Supp. 182, 186 (S.D.N.Y.1998) (applying federal common law).

***4** Plaintiffs' Complaint does not include allegations indicating that MetLife dominated Briggs Holdings. Instead, they develop this theory primarily in their Opposition to Defendant's Motion to Dismiss. There, Plaintiffs argue that "under the Agreement MetLife provided broad guarantees concerning indemnification for liability for a variety of future claims, including environmental claims arising at any of the subject property," and that "MetLife unconditionally and irrevocably guaranteed to Plaintiffs the full and punctual performance of obligations impose under the Agreement." (Opp'n at 11).

This Court takes note of *MAG Portfolio Consultant, GMBH v. Merlin Biomed Group LLC*, 268 F.3d 58 (2d Cir.2001) and agrees that the payment or guarantee of a corporation's debts should be considered in determining whether to pierce the corporate veil. That consideration, however, is only one of a long list of factors, which also includes: "(1) disregard of corporate formalities; (2) inadequate capitalization; (3) intermingling of funds; (4) overlap in ownership, officers, directors, and personnel; (5) common office space, address and telephone numbers of corporate entities; (6) the degree of discretion shown by the allegedly dominated corporation; (7) whether the dealings between the entities are at arms length; (8) whether the corporations are treated as independent profit centers; (9) payment or guarantee of the corporation's debts by the dominating entity, and (10) intermingling of property between the entities." *MAG Portfolio*, 268 F.3d at 63; *Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1053 (2d Cir.1997).

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Plaintiffs rely solely on bare descriptions of the contractual guarantees included in the Agreement. Nowhere in the Complaint is the Court provided with information that would lead it to infer that these provisions suggested domination to the point of the subsidiary acting as Met Life's "alter ego" or its "mere instrumentality." In order to pierce the veil between MetLife and Briggs Holdings and sustain a claim of derivative liability under section 107 of CERCLA, Plaintiffs must provide allegations from which the Court could infer a relationship rising to this level of domination.

Further, Plaintiffs propose a version of federal common law that would not require them to allege that MetLife's domination of Briggs Holdings was put to some wrongful purpose, but then assert that even if they were so required, the Complaint's allegations suffice. The Court disagrees. Plaintiffs' allegations are inadequate to support wrongful purpose.

Despite the theory put forward in their Opposition to Defendant's Motion, the Complaint itself fails to include allegations of MetLife's wrongful use of its control over Briggs Holdings. Plaintiffs argue that the "affirmative misrepresentations" made in the Purchase Agreement are sufficient for a finding of wrong, but do not allege any basis (even one far short of fraud, which Plaintiffs do not attempt to plead) for inferring any impropriety in the Agreement's inclusion of the guarantee provisions or the Environmental Schedule.

***5** Plaintiffs have therefore failed to plead derivative liability under CERCLA section 107.

ii. Direct Liability

Plaintiffs allegations further fail to state a claim of direct liability under CERCLA section 107. In addition to derivative liability based on ownership, section 107 also extends direct liability to those who "operated any facility at which such hazardous substances were disposed of." 42 U.S.C.A. § 9607.

The Supreme Court has clarified the meaning of "operated" for purposes of this section, stating that, "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." *Bestfoods*, 524 U.S. at 66-67. Plaintiffs must allege, that is, some connection between the parent's control and the facility itself.

The Complaint fails to provide any information concerning what role MetLife may have played in the operation of the sites. The contractual guarantees do not indicate involvement with the facility itself. Nor do the Complaint's general allegations characterizing MetLife and Briggs Holdings as parent and subsidiary suffice. "The question is not whether the parent operates the subsidiary, but rather whether it operates the facility, and that operation is evidenced by participation in the activities of the facility, not the subsidiary. Control of the subsidiary, if extensive enough, gives rise to indirect liability under piercing doctrine, not direct liability under the statutory language." *Bestfoods*, 524 U.S. at 68 (citing *Schiavone v. Pearce*, 79 F.3d 248, 254 (2d Cir.1996) ("Any liabilities [the parent] may have as an operator, then, stem directly from its control over the plant.").

Absent such allegations linking MetLife to the operation of the sites, Plaintiffs cannot maintain a claim for direct liability under section 107.

Therefore, with respect to Plaintiffs' theories under CERCLA section 107, the Second Cause of Action is DISMISSED with leave to amend.

B. Section 113 Claims

Plaintiffs claims under section 113(f)(3) of CERCLA are premature. That section provides that, "[a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph." 42 U.S.C.A. § 9613.

According to submissions, Plaintiffs are now engaged in settlement talks with state and federal environmental agencies, but have not yet resolved their liability. Prior to resolution, an action for contribution under section 113(f)(3) is inappropriate.

Further, the statute does not authorize a declaratory judgment to be brought under section 113(f)(3). Sec-

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tion 113(g)(2), which Plaintiffs rely on here, refers to declaratory judgments in "[a]ctions for recovery of costs," not in actions for contribution. Plaintiffs must resolve their liability before any action may be brought under section 113(f)(3).

***6** With respect to section 113 of CERCLA, therefore, Plaintiffs' Second Cause of Action is DISMISSED without prejudice.

CONCLUSION

For the reasons discussed above, the motion to dismiss the First Cause of Action is DENIED. With respect to section 107 of CERCLA, the Second Cause of Action is DISMISSED with leave to amend within thirty days of the date of this order. With respect to section 113 of CERCLA, the Second Cause of Action is DISMISSED without prejudice.

SO ORDERED:

Slip Copy, 2009 WL 331262 (S.D.N.Y.)

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United States District Court,
D. Puerto Rico.
Carmen Elizabeth MARRERO HERNANDEZ, et al., Plaintiffs,
v.
ESSO STANDARD OIL CO. (PUERTO RICO), et al., Defendants.
Civil No. 03-1485 (GAG).

Feb. 10, 2009.

Background: Community residents brought action against service station and others alleging violations of state and federal environmental laws, including the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Service station moved for summary judgment.

Holdings: The District Court, Gustavo A. Gelpí, J., held that:
(1) citizen's suits brought under the CWA and RCRA were not barred by Environmental Quality Board's (EQB) previous administrative proceedings;
(2) fact issues existed as to whether service station's alleged violations of RCRA, the CWA, and CERCLA were continuous;
(3) fact issue existed as to whether site of service station presented an imminent and substantial endangerment under RCRA;
(4) fact issue existed as to whether river located in the interior of Puerto Rico constituted navigable waters under the CWA; and
(5) fact issue precluded determination on whether CERCLA's petroleum exclusion applied.
Motion denied.

West Headnotes

[1] Environmental Law 226
149Ek226 Most Cited Cases
Community residents' citizen's suit against service station seeking significant civil penalties under the Clean Water Act (CWA) was not barred by the Puerto Rico Environmental Quality Board's (EQB) administrative proceedings against the service station, where the EQB was not authorized to assess the comparable penalty provisions contained in the applicable Puerto Rico statute. Clean Water Act, § 505(a), 33 U.S.C.A. § 1365(a); 33 U.S.C.A. § 1319(g)(6)(A); P.R. Laws Ann. tit. 12, § 1136.

[2] Environmental Law 460
149Ek460 Most Cited Cases
Private rights of action brought by community residents against service station under RCRA's citizen suit provisions were not barred by Puerto Rico Environmental Quality Board's (EQB) previous administrative actions against service station; language of statute precluding RCRA's citizen suit in certain situations did not afford any preclusive effect to a state administrative action. Resource Conservation and Recovery Act of 1976, §§ 2(a), 2(b)(1)(B), 42 U.S.C.A. §§ 6972(a), 6972(b)(1)(B).

[3] Administrative Law and Procedure 413
15Ak413 Most Cited Cases

[3] Statutes 219(1)
361k219(1) Most Cited Cases
Courts generally show great deference to the interpretation of applicable statutes and regulations given by the agency charged with the administration of a particular program, when such interpretations are reasonable and consistent with such statutes and regulations.

[4] Federal Civil Procedure 2498.3
170Ak2498.3 Most Cited Cases
Genuine issue of material fact existed as to whether service station's alleged violations of RCRA were continuous, precluding summary judgment in community residents' citizen suit. Resource Conservation and Recovery Act of 1976, § 2(a)(1)(A), 42 U.S.C.A. § 6972(a)(1)(A).

[5] Environmental Law 226
149Ek226 Most Cited Cases
Community residents met continuing violation requirement in bringing their citizen suit against service station under the Clean Water Act (CWA) by alleging

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service station failed to take remedial measures with respect to the contamination on service station site. Clean Water Act, § 505(a), 33 U.S.C.A. § 1365(a).

[6] Environmental Law 226
149Ek226 Most Cited Cases
Citizen-plaintiffs are not required to provide proof of allegations of continuous or intermittent violations under the Clean Water Act (CWA) to invoke federal court jurisdiction. Clean Water Act, § 505(a), 33 U.S.C.A. § 1365(a).

[7] Federal Civil Procedure 2498.3
170Ak2498.3 Most Cited Cases

[7] Federal Civil Procedure 2544
170Ak2544 Most Cited Cases
While defendants may challenge the truth of citizen-plaintiffs' allegations of continuing or intermittent violations under the Clean Water Act (CWA), via a motion for summary judgment, the burden of proof is upon the defendants; if defendants fail to show that plaintiffs' allegations are a sham, which raise no genuine issue of fact, after plaintiffs offer some evidence to support their allegations, the motion for summary judgment must be denied.

[8] Federal Civil Procedure 2498.3
170Ak2498.3 Most Cited Cases
Defendants' burden of proof in moving for summary judgment by challenging the truth of citizen-plaintiffs' allegations of continuing or intermittent violations under the Clean Water Act (CWA) is a heavy one; defendants must demonstrate that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. Clean Water Act, § 505(a), 33 U.S.C.A. § 1365(a).

[9] Environmental Law 461
149Ek461 Most Cited Cases
Community residents met continuing violation requirement in bringing their citizen suit against service station under CERCLA by alleging service station failed to take remedial measures with respect to the contamination on its site and seeking prospective relief in the form of testing and cleanup activities. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 310(a)(1), 42 U.S.C.A. § 9659(a)(1).

[10] Federal Civil Procedure 2498.3
170Ak2498.3 Most Cited Cases
Genuine issue of material fact existed as to whether site of service station presented an imminent and substantial endangerment, precluding summary judgment on community residents' RCRA claim. Resource Conservation and Recovery Act of 1976, § 2(a)(1)(B), 42 U.S.C.A. § 6972(a)(1)(B).

[11] Environmental Law 385
149Ek385 Most Cited Cases

[11] Environmental Law 460
149Ek460 Most Cited Cases
To successfully prosecute an imminent and substantial endangerment claim under RCRA, a plaintiff must demonstrate that (1) the defendant was or is a generator or transporter of solid or hazardous waste or owner or operator of a solid or hazardous waste treatment, storage, or disposal facility, (2) the defendant has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste, as defined by the RCRA, and (3) that the solid or hazardous waste in question may present an imminent and substantial endangerment to health or the environment. Resource Conservation and Recovery Act of 1976, § 2(a)(1)(B), 42 U.S.C.A. § 6972(a)(1)(B).

[12] Environmental Law 385
149Ek385 Most Cited Cases
A plaintiff bringing an imminent and substantial endangerment claim under RCRA need not establish an incontrovertible imminent and substantial harm to health and the environment; the existence of a potential harm to health and the environment is enough, when there is a reasonable prospect that a serious, near-term threat to human health or the environment exists. Resource Conservation and Recovery Act of 1976, § 2(a)(1)(B), 42 U.S.C.A. § 6972(a)(1)(B).

[13] Federal Civil Procedure 2498.3
170Ak2498.3 Most Cited Cases
Genuine issue of material fact existed as to whether river located in the interior of Puerto Rico constituted navigable waters under the Clean Water Act (CWA), precluding summary judgment in community residents' action against service station. Clean Water Act, § 502(7), 33 U.S.C.A. § 1362(7).

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[14] Federal Civil Procedure 2498.3
170Ak2498.3 Most Cited Cases
Genuine issue of material fact existed as to whether petroleum released from service station's corroded underground storage tanks (UST) contained corrosion products from the oxidation of steel in tank walls, precluding summary judgment on issue of whether CERCLA's petroleum exclusion applied in community residents' citizen suit against service station. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101(14), 42 U.S.C.A. § 9601(14).

[15] Environmental Law 440
149Ek440 Most Cited Cases
A petroleum product may be exempted from CERCLA even though certain of its indigenous components and certain additives added during the refining process have themselves been designated as hazardous substances within the meaning of CERCLA; however, hazardous substances which are added to petroleum or which
increase in concentration solely as a result of contamination of the petroleum during use are not part of the petroleum and thus are not excluded from CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101(14), 42 U.S.C.A. § 9601(14).

Jose A. Hernandez-Mayoral, Hernandez Mayoral Law Office, Manuel San-Juan-Demartino, Manuel San Juan Law Office, Juan H. Saavedra-Castro, Juan H. Saavedra Castro Law Office, Orlando Cabrera-Rodriguez, San Juan, PR, Hector M. Alvarado-Tizol, Carolina, PR, for Plaintiffs.

John F. Nevares, John F. Nevares & Assoc. PSC, San Juan, PR, PHV Lawrence P. Riff, PVH Jason Levin, Steptoe & Johnson LLP CA, PHV Mariana Aguilar, Los Angeles, CA, for Defendants.

OPINION AND ORDER

GUSTAVO A. GELPÍ, District Judge.

***1** Plaintiffs, past and present property owners and residents of La Vega Ward, Barranquitas, Puerto Rico, bring this action against Esso Standard Oil Co. (Puerto Rico) ("Esso") and others alleging violations of state and federal environmental laws. Esso has moved for summary judgment as to plaintiffs' federal claims under the Clean Water Act, 33 U.S.C. §§ 1251 et seq. ("CWA"), the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq. ("RCRA"), and the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 et seq ("CERCLA"). For the reasons stated herein, the court **DENIES** Esso's motion for summary judgment (Docket No. 905).

I. Standard of Review

Summary Judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "An issue is genuine if 'it may reasonably be resolved in favor of either party' at trial, and material if it 'possess[es] the capacity to sway the outcome of the litigation under the applicable law'." *Iverson v. City of Boston,* 452 F.3d 94, 98 (1st Cir.2006) (alteration in original) (citations omitted). The moving party bears the initial burden of demonstrating the lack of evidence to support the non-moving party's case. *Celotex,* 477 U.S. at 325. The nonmoving party must then "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). If the court finds that some genuine factual issue remains, the resolution of which could affect the outcome of the case, then the court must deny summary judgment. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party (here, the plaintiff) and give that party the benefit of any and all reasonable inferences. *Id.* at 255. Moreover, at the summary judgment stage, the court does not make credibility determinations or weigh the evidence. *Id.* Summary judgment may be appropriate, however, if the non-moving party's case rests merely upon "conclusory allegations, improbable inferences, and unsupported speculation." *Forestier Fradera v. Municipality of Mayaguez,* 440 F.3d 17, 21 (1st Cir.2006) (quoting *Benoit v. Technical Mfg. Corp.,* 331 F.3d 166, 173 (1st Cir.2003)).

II. Relevant Material Facts and Procedural

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Background

Consistent with the summary judgment standard, the court states the facts in the light most favorable to plaintiffs. *See Iverson*, 452 F.3d at 98. Additionally, in accordance with Local Rule 56, the court credits only facts properly supported by accurate record citations. *See* D.P.R. L.Civ.R 56(e). The court has disregarded all argument, conclusory allegations, speculation, and improbable inferences disguised as facts. *See Forestier Fradera,* 440 F.3d at 21; *Medina-Muñoz v. R.J. Reynolds Tabacco Co.,* 896 F.2d 5, 8 (1st Cir.1990).

***2** Esso owned and operated a service station in La Vega for over fifty years, from the facility's construction in the 1940s until it ceased its operations in 1998. During the station's operation, Esso installed four underground storage tanks ("USTs") to store and dispense gasoline and diesel fuel. Esso owned these USTs together with the piping thereto and supplied gasoline, diesel, and other products to the operators of the station. For sometime before December 1991 the USTs had been releasing their contents into the facility's soil and groundwater. Other releases occurred over time associated with the operation of the service station. The substances released included gasoline with BTEX components, diesel fuel, batteries, oil filters, and used oil. The releases to the environment caused contamination of the groundwater and soils within the footprint of the former station site and some of the contamination has migrated beyond that footprint.

Co-defendant Carlos Rodríguez ("Rodríguez"), lessee of Esso's USTs and operator of the station up to the time it ceased operations, complained on several occasions of product loss from the station. In 1991, Esso replaced the three USTs at the station, which, when removed, revealed signs of corrosion and perforations. Field screening results indicated the presence of aromatic hydrocarbons in the subsoil and in the excavated soil from the tank pits. According to the Puerto Rico Environmental Quality Board ("EQB") in 1989 the station was placed on the Leaking Underground Storage Tanks list ("LUST list"). Esso installed a monitoring well for the groundwater below the station to detect discharges from its USTs. The EQB reports that in April 1990 a broken diesel line was reported at the station and a month later the monitoring wells evinced the presence of hydrocarbons. Additional monitoring wells were installed at the station, which over the course of eighteen months, from May 1990 to November 1991, showed the presence of free petroleum products in the subsoil and groundwater. The gasoline had seeped through the soil, formed a plume in the groundwater and spread. According to the EQB, Esso never preformed the necessary tests to verify the integrity of the USTs, it never quantified the amount of product spilled, nor did it determine the vertical and horizontal extensions of the contamination. When in 1994 the EQB required Esso to submit technical reports as part of the Underground Storage Tank Control Program ("USTCP") describing the station's situation subsequent to the 1990 leak, Esso personnel complied, but indicating that only 1.6 gallons of free product had been recovered in 1991. After the USTCP studied the reports submitted by Esso, the EQB issued an order requiring Esso to carry out studies to determine the vertical and horizontal extent of the free or dissolved product in the affected area, in order to assess the magnitude of the leak and contamination. The EQB reports that Esso again failed to adequately comply with the order.

***3** Rodríguez continued to operate the station with the new tank system until 1998, when the Puerto Rico authorities ordered the station closed due to detected hydrocarbon odors. Between August 1998 and October 1999, the EQB issued three orders directing Esso to test the fuel storage system. These investigations revealed BTEX concentrations in various soil samples that ranged from 0.32 to 77.5 mg/kg; TPH (gasoline range) concentrations ranging from 24 to 5,200 mg/kg; and total lead results from non-detectable to 31.6 mg/kg. On-site contamination was detected in soil samples at depths just below the groundwater table, while off-site results showed detectable levels of petroleum hydrocarbons in some areas, primarily at the regional water table depth. Esso was ordered to characterize the plume, conduct geophysical tests, create a barrier between the station and the adjacent Piñonas River, and to submit a remediation plan for the contamination.

On May 21, 2001 the EQB issued a show cause order proposing a $76 million fine against Esso for its failure to notify the EQB upon initial discovery of the fuel leakage and its failure to timely investigate and remedy the harm. The EQB also required Esso to submit a corrective action or remediation plan. In September of 2002, the EQB initiated hearings on the proposed penalty and, after contentious debates and allegations

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of severe bias, Esso filed suit in federal court seeking a preliminary injunction to prevent the EQB from imposing the fine, on the ground that the proceedings were so plagued by conflict and bias that they violated Esso's due process rights. *See Esso Standard Oil Co. v. Cotto,* 389 F.3d 212 (1st Cir.2004). The case was dismissed, on jurisdictional grounds. However, after exhausting interlocutory relief through the Puerto Rico courts, Esso filed a renewed motion for preliminary injunction in the district court, which was granted. *Esso Standard Oil Co. v. López- Freytes,* Case No. 03-2319 (D.P.R. Mar. 11, 2005). The order required the EQB to immediately suspend all administrative hearings and proceedings against Esso related to the penalty provision of the order to show cause. It also enjoined the EQB from conducting hearings pursuant to the order, from issuing any judgments or resolutions, final or interlocutory, in the La Vega matter, and from instituting, conducting and/or prosecuting any administrative penalty proceedings against Esso based on or arising from those facts. The injunction became permanent in November 2006. *Esso Standard Oil Co. v. López-Freytes,* 467 F.Supp.2d 156 (D.P.R. Nov.7, 2006) (order granting summary judgment and permanent injunction), *aff'd,* 522 F.3d 136 (1st Cir.2008).

On April 18, 2006, Esso began drilling holes in the ground of the former service station at La Vega as part of its remediation activities. As a consequence, gasoline odors escaped from the site and several plaintiffs, including children, had to visit regional medical centers and hospitals for the treatment of dizzyness, nausea, shortness of breath, and headaches. Plaintiffs experts contend that dozens of La Vega residents are suffering respiratory, dermatological, and neuropsychological illnesses due to the presence of toxins at the service station and in the surrounding areas. These conditions, argue Plaintiffs, either developed as a result of the toxins present at the service station or have been aggravated by the same. Esso's experts, on the other hand, hold that exposure to the chemicals associated with former operations at the service station do not pose an appreciable risk of adverse health effects for people living near the site. They also state that the proposed remediation plan can be conducted without causing adverse health effects in the community.

***4** Several plaintiffs intervened in the EQB proceedings against Esso in May 2000, but later withdrew their intervention. On May 2, 2003 the original complaint in this case was filed (Docket No. 1), nearly one year after plaintiffs had sent notice to Esso, the EQB, and other interested parties of their intent to commence a civil action against Esso under the federal pollution statutes. Plaintiffs charge Esso with violations under CWA, RCRA and CERCLA, as well as violations to Puerto Rico nuissance and tort laws, claiming environmental damage as a result of the contamination and damages to their health and property. They seek declaratory and injunctive relief requiring Esso to fully comply with the local and federal regulatory clean-up requirements, the imposition of civil penalties for non-compliance with both state and federal environmental statutes, and the payment of costs and attorney's fees. On November 10, 2008, after a plethora of procedural events, defendant Esso filed a motion for summary judgment (Docket No. 905). Plaintiffs opposed Esso's motion (Docket No. 938), Esso replied (Docket No. 954), and plaintiffs sur-replied (Docket No. 962).

III. Discussion

Esso moves for summary judgment on various grounds: (a) the EQB's proceedings against Esso bar plaintiffs' claims brought under the citizen suit provisions of the CWA and the RCRA; (b) the RCRA claims are barred by the the applicability of the CWA; (c) the RCRA citizen suit enforcement action is barred by the doctrine of reverse preemption; (d) the mere presence of contamination at the site does not establish an ongoing violation, as required to establish a claim under the RCRA, the CWA, and CERCLA; (e) failure to show a reasonable prospect of serious threat to human health or the environment, as required to establish a claim under the RCRA imminent and substantial endangerment statute; (f) plaintiffs' claim does not identify the effluent standard that Esso is allegedly violating under the CWA; and (g) the CERCLA petroleum exclusion is applicable. The court addresses each averment separately.

A. Effect of the EQB's Proceedings on Plaintiffs' Citizen Suits Under CWA and RCRA

(i) Effect of the EQB Proceedings Upon the CWA Citizen's Suit

[1] Section 505 of the Clean Water Act states that, "[e]xcept as provided in [...] section 1319(g)(6) of

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this title, any citizen may commence a civil action on his own behalf(1) against any person [...] who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator [of the Environmental Protection Agency ("EPA")] or a State with respect to such a standard or limitation [...]" 33 U.S.C.A. § 1365(a). In turn, section 1319(g)(6) of title 33, which corresponds to section 309(g)(6) of the CWA, provides that "any violation--[...](ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, [...] shall not be the subject of a civil penalty action under [...] section 1365 of this title." 33 U.S.C.A. § 1319(g)(6)(A). Since plaintiffs' claims are based on the same discharge violations as the EQB's orders under state law, they are barred by section 309(g)(6) of the CWA if it is determined that the state is "diligently prosecuting" its action under "comparable" state law. *See North and South Rivers Watershed Ass'n, Inc. v. Town of Scituate,* 949 F.2d 552, 558 (1st Cir.1991).

***5** Defendants contend that plaintiffs' RCRA lawsuit, filed in May 2003, is a collateral attack on EQB's strategy for addressing the petroleum contamination in La Vega, outlined in the four administrative orders issued in 1998, 1999, and 2001. Plaintiffs argue that their claim is not barred because the administrative procedures followed by the EQB are not comparable to their civil action. This is because plaintiffs seek (and the court may impose) significant civil penalties on Esso arising from its violations of the CWA, yet the Court of Appeals for the First Circuit has permanently enjoined the EQB from seeking civil penalties against Esso for the events related to the La Vega service station spill. It is undisputed that in *Esso Standard Oil Co. v. López-Freytes,* 522 F.3d 136 (1st Cir.2008) the First Circuit affirmed the district court's ruling permanently enjoining several members and officials of the EQB from imposing a $76 million fine on Esso, proposed in a May 21, 2001 order to show cause. The permanent injunction also enjoined the defendants from "instituting, conducting and/or prosecuting any administrative penalty proceedings against Esso based on or arising from the facts and events described in said order to show cause." *López-Freytes,* 522 F.3d at 149. In *North and South Rivers,* 949 F.2d at 555, the First Circuit held that "[t]he bar against citizen's civil penalty suits only operates where the State has brought an action comparable to subsection 309(g)." In determining whether an administrative order, issued under Massachussetts's clean water provisions by the state's Department of Environmental Protection, could preclude a citizen's suit under the CWA, the First Circuit stated "[i]t is enough that the Massachusetts statutory scheme, under which the State is diligently proceeding, contains penalty assessment provisions comparable to the Federal Act, *that the State is authorized to assess those penalties,* and that the overall scheme of the two acts is aimed at correcting the same violations, thereby achieving the same goals." *North and South Rivers,* 949 F.2d at 556 (emphasis added).

In light of the holding in *López-Freytes,* it cannot be said that in the instant case the EQB "is authorized to assess" the comparable penalty provisions contained in the applicable Puerto Rico statute. *See* P.R. Laws Ann. tit. 12, § 1136. Thus, the court must conclude that plaintiffs' claim under section 505 of the CWA is not barred by the EQB's administrative proceedings. Moreover, the First Circuit's ruling in *López-Freytes,* affirming the district court's permanent injunction against the EQB for apparent bias and inability to afford Esso its due process rights, at the very least creates very serious doubt as to the EQB's capacity to fairly adjudicate matters related to the La Vega spill. Therefore, Defendant Esso's motion for summary judgment on this basis is denied.

(ii) Effect of the EQB Proceedings Upon the RCRA Citizen's Suits

***6** [2] Similar to the CWA, the RCRA also has a citizen suit provision. Section 7002 of the RCRA states:

> Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf--
> (1)(A) against any person [...] who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or
> (B) against any person, [...] and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; [...]

42 U.S.C.A. § 6972(a). Subsection (b), in turn, states

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certain conditions under which a Section 7002 RCRA citizen's suit is precluded. Regarding an action under subsection (a)(1)(A), otherwise known as a citizen's enforcement action, the RCRA provides that no action may be commenced by a private litigant "if the Administrator [of the EPA] or State has commenced and is diligently prosecuting *a civil or criminal action in a court of the United States or a State* to require compliance." 42 U.S.C.A. § 6972(b)(1)(B) (emphasis added). Likewise, actions under subsection (a)(1)(B) for an imminent and substantial endangerment are barred "if the State, in order to restrain or abate acts or conditions which may have contributed or are contributing to the activities which may present the alleged endangerment--(i) has commenced and is diligently prosecuting *an action* under subsection (a)(1)(B) of this section; (ii) is actually engaging in a removal action under section 104 of the [CERCLA] [42 U.S.C.A. § 9604]; or (iii) has incurred costs to initiate a Remedial Investigation and Feasibility Study under section 104 of the [CERCLA] [42 U.S.C.A. § 9604] and is diligently proceeding with a remedial action under that Act [42 U.S.C.A. § 9601 et seq.]." 42 U.S.C.A. § 6972(b)(2)(C) (emphasis added).

Defendant Esso contends that, as regards the imminent and substantial endangerment claim, dismissal is required pursuant to 42 U.S.C. § 6972(b)(2)(C)(i) because the word "action" as used in the RCRA statute does not connote a legal action in a court of law, but merely activities by the state to require remediation. Esso argues that the omission of the words "in a court" from this subsection, as opposed to subsection (b)(1)(B), shows that Congress decided to allow a more relaxed preclusionary rule for imminent hazard claims. The court is not persuaded by this argument. Under the clear language of 42 U.SC. § 6972(b)(1)(B), the only state action capable of precluding a citizen suit under subsection (a)(1)(A) is a "civil or criminal action in a court." This language does not afford any preclusive effect to a state administrative action. Although claims brought under subsection (a)(1)(B) are admittedly governed by less straightfoward preclusionary language, most courts that have analyzed 42 U.S.C. § 6972(b)(2)(C)(i) have held as a matter of course that state administrative "actions" are not covered by its terms. *See Kara Holding Corp. v. Getty Petroleum Marketing, Inc.,* 67 F.Supp.2d 302, 307 (S.D.N.Y.1999) (citing several cases in support of this proposition). These cases are not binding on this court. However, since the First Circuit has not expressed itself regarding this specific issue, they are considered here for their persuasive value. Accordingly, the court finds that the private rights of action brought by plaintiffs under RCRA's citizen suit provisions are not barred by the EQB's previous administrative actions. Therefore, Defendant Esso's motion for summary judgment on this basis is also denied.

B. The RCRA Claims Are Not Barred by the CWA

***7** In section 1004(27), the RCRA excludes from the definition of "solid waste" industrial discharges "which are point sources subject to permits under section 1342 of Title 33 [i.e., section 402 of the CWA]...." *See* 42 U.S.C. § 6903(27). Regulations promulgated under the CWA define "point source" as "any discernible, confined, and discrete conveyance, including, but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container [...] from which pollutants are or may be discharged." *See* 40 C.F.R. § 260.10 (1988). While this definition does seem to encompass the leakage of gasoline from Esso's USTs into the local groundwater, defendant Esso has not established that any discharges were made pursuant to and authorized by a permit under section 402 of the CWA, 33 U.S.C. § 1342. Thus, the court finds the exclusion contained in section 1004(27) of the RCRA to be inapplicable to this case. *See Water Keeper Alliance v. United States Department of Defense,* 152 F.Supp.2d 163, 169-70 (D.P.R.2001) (plaintiffs' RCRA claims were dismissed only to the extent that they relied on discharges of solid waste that were covered by defendants' section 402 permit); *see also Lutz v. Chromatex, Inc.,* 725 F.Supp. 258, 263 (M.D.Pa.1989) (citing *United States v. Allegan Metal Finishing Co.,* 696 F.Supp. 275, 280-281 (W.D.Mich.1988), *appeal dismissed,* 867 F.2d 611 (6th Cir.1989) ("It is clear that the exclusion enshrined in the definition of solid waste is for those actual discharges from point sources which are made pursuant to and authorized by a NPDES permit") (emphasis in original)). Defendant Esso's motion for summary judgment on this basis is, therefore, also denied.

C. The RCRA Private Rights Enforcement Action is Not Barred by the Doctrine of Reverse Preemption

Defendant Esso argues that because Puerto Rico's Underground Storage Tank Control Regulation

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("USTCR") was approved by the EPA "in lieu of" the federal program for USTs, if there is a violation of the Puerto Rico USTCR, it is a matter of state law that cannot be enforced through the RCRA. The court disagrees. The 1990 Puerto Rico USTCR was enacted by the EQB following the letter and spirit of the federal regulation published in 40 C.F.R. Part 280. To coordinate the federal/state efforts of protecting the public health and the environment, in March of 1997 the government of Puerto Rico and the EPA entered into a Memorandum of Agreement setting forth the roles, policies, responsibilities, and procedures for the sound management of the program by the EPA Region II and the EQB with respect to the USTCP for the Commonwealth of Puerto Rico. This was done pursuant to section 9004 of RCRA, 42 U.S.C. § 6991(c), as amended. Though the government of Puerto Rico, through the EQB, assumed primary responsibility for the implementation of the RCRA Underground Storage Tank Control Program within the territorial boundaries of Puerto Rico, the EPA retained authority to make certain that the law and regulation would be followed, including direct federal implementation in the event that Puerto Rico was unable or failed to act. *See Sanchez v. Esso Standard Oil de Puerto Rico, Inc.*, Civil No. 08-2151, slip op. (D.P.R. December 5, 2008).

***8** [3] As plaintiffs point out, the EPA itself takes the position that an RCRA citizen suit may be brought after a state has received authorization to operate its program in lieu of the federal program: "[u]nder RCRA, Section 7002, any person may commence a civil action on his own behalf against any government instrumentality or any person who is alleged to be in violation of permits, regulations, conditions, etc. [...] As a result, any person, whether in an authorized or unauthorized State, may sue to enforce compliance with statutory and regulatory standards." *Lutz v. Chromatex, Inc.*, 725 F.Supp. 258, 261 (M.D.Pa.1989) (quoting 45 Fed.Reg. 85016 (Dec. 24, 1980) (emphasis added); citing also 49 Fed.Reg. 48300 (Dec. 12, 1984)); *see also Sierra Club v. Chemical Handling Corp.*, 824 F.Supp. 195, 197 (D.Colo.1993) (holding that because Colorado's hazardous waste program was authorized by RCRA, it became effective pursuant to RCRA, and the citizen suit provision of section 6972(a)(1)(A) applies); *Murray v. Bath Iron Works Corp.*, 867 F.Supp. 33, 43 (D.Me.1994) (same); *College Park Holdings, LLC. v. Racetrac Petroleum, Inc.*, 239 F.Supp.2d 1334, 1346 (N.D.Ga.2002) (holding, as a mater of course, that Georgia's EPA-approved UST program is enforceable by a RCRA citizen suit). Courts generally show great deference to the interpretation of applicable statutes and regulations given by the agency charged with the administration of a particular program, when such interpretations are reasonable and consistent with such statutes and regulations. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945). What is more, the citizen suit provision of the RCRA states as follows:

> Any action under paragraph (a)(1) of this subsection *shall be brought in the district court* for the district in which the alleged violation occurred or the alleged endangerment may occur [...] *The district court shall have jurisdiction*, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

42 U.S.C. § 6972(a) (emphasis added). As pointed out by plaintiffs, other courts have interpreted that through this disposition the RCRA places exclusive jurisdiction in federal courts for suits brought pursuant to section 6972(a)(1). *See, e.g., Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1098 (8th Cir.1989). Given the statute's plain language, this court is persuaded by this interpretation and finds that plaintiffs' RCRA private rights enforcement action for violations of Puerto Rico's USTCR is properly before the court's jurisdiction. Defendant's motion for summary judgment on this basis is, therefore, denied.

D. The Ongoing Violation Requirement for Citizen's Suits Under RCRA, CWA, and CERCLA

(i) RCRA Enforcement Claim and the Ongoing Violation Requirement

***9** [4] Defendant Esso next argues that plaintiffs' RCRA citizen suit claim under 42 U.S.C. § 6972(a)(1)(A) must be dismissed because it is based upon alleged wholly past violations. Esso argues that

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if it failed to fully investigate, report, and remediate the La Vega site back in 1990 or 1991, when it first "learned" of the contamination, these are past violations under subsection 6972(a)(1)(A) of RCRA and cannot be prosecuted. In support of this argument, Esso cites *Gwaltney of Smithfield, LTD. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 & n. 2, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987) and cases interpreting its holding. In *Gwaltney,* the Supreme Court held that citizens' suits could not be maintained under the Clean Water Act for alleged wholly past violations of the Act. In construing the citizen's suit provision in the CWA, the *Gwaltney* court concluded:

> The most natural reading of "to be in violation" is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation-that is, a reasonable likelihood that a past polluter will continue to pollute in the future. Congress could have phrased its requirement in language that looked to the past ("to have violated"), but it did not choose this readily available option.

Id. at 57. In support of this conclusion, the Supreme Court noted that: (1) Congress used identical language in the citizen's suit provision of several other environmental statutes that authorized only prospective relief, *see id.;* (2) the pervasive use of the present tense throughout the Clean Water Act's citizen suit provision indicates the prospective orientation of the provision, *see id.* at 58-59; and (3) the legislative history of the Act indicates that citizen suits were intended to abate pollution and to enjoin continuous or intermittent violations, not to remedy wholly past violations. *See id.* at 61- 63.

In *Gwaltney,* the Supreme Court specifically mentioned RCRA as an environmental statute that authorizes only prospective relief. *See Gwaltney,* 484 U.S. at 57 n. 2. Though the First Circuit has not ruled on this matter, several courts have extended the *Gwaltney* holding [FN1] to RCRA's analogous citizen's suit provision, § 6972(a)(1)(A), requiring an allegation of either a continuous or intermittent violation. *See, e.g., Coburn v. Sun Chemical Corp.,* 1988 WL 120739 at *7-9, 28 Env't Rep.Cas. 1665, 1672-73 (E.D.Pa.1988); *Harris Bank Hinsdale, N.A. v. Suburban Lawn, Inc.,* 1992 WL 396295 at *2-3 (N.D.Ill. December 22, 1992); *Dydio v. Hesston Corp.,* 887 F.Supp. 1037, 1040 (N.D.Ill.1995); *Raymond K. Hoxsie Real Estate Trust v. Exxon Educ. Foundation,* 81 F.Supp.2d 359, 363 (D.R.I.2000); *College Park Holdings,* 239 F.Supp.2d at 1346. This court concurs. Section 6972(a)(1)(A) of RCRA contains the same "to be in violation" language as 33 U.S.C. § 1365(a)(1)(A). In addition, plaintiffs point to no legislative history or other evidence showing that Congress did not wish to limit the reach of § 6972(a)(1)(A) to continuous or intermittent violations.

***10** However, while this court finds that the reach of § 6972(a)(1)(A) is confined to allegations of continuous or intermittent violations, it also finds that plaintiffs have raised an issue of material fact as to whether or not Esso's violations are continuous. Plaintiffs argue that Esso has failed to take corrective action in connection with petroleum contamination resulting from leaking USTs and have brought forth evidence that there might be continued migration of the released contaminants. While there is no jurisprudence in the First Circuit regarding this issue, several courts have found that failure to take corrective action and comply with regulations in connection to a previous spill can constitute a continuous violation under § 6972(a)(1)(A). *See, e.g., Fallowfield Dev. Corp. v. Strunk,* 1990 WL 52745 at *10 (E.D.Pa.1990) ("If a person disposes of hazardous waste on a parcel of property, the hazardous waste remains in that property insidiously infecting the soil and groundwater aquifers. In other words, the violation continues until the proper disposal procedures are put into effect or the hazardous waste is cleaned up."); *Gache v. Town of Harrison, New York,* 813 F.Supp. 1037, 1041 (S.D.N.Y.1993) ("[I]mproperly discharged wastes which continue to exist unremediated represent a continuing violation of RCRA."); *City of Toledo v. Beazer Materials & Servs., Inc.,* 833 F.Supp. 646, 656 (N.D.Ohio 1993) ("[T]he disposal of wastes can constitute a continuing violation so long as no proper disposal procedures are put into effect or as long as the waste has not been cleaned up and the environmental effects remain remediable."); *Dydio,* 887 F.Supp. at 1040-46 (past owners of USTs have a continuing obligation to take corrective action following the confirmed release of a regulated substance; regardless of the timing of the leaks, defendant was violating RCRA and is liable under 42 U.S.C. § 6972(a)(1)(A) by failing to take corrective action as required by the regulations); *Raymond K. Hoxsie Real Estate Trust,* 81 F.Supp.2d at 363-65 (following *Dydio* and determining that owner's failure to adequately remediate a confirmed leak, regardless of when the leak took place, is a "current" violation of RCRA under 42 U.S.C. § 6972(a)(1)(A)); *California v. M & P Investments,* 308 F.Supp.2d 1137, 1146-48 (E.D.Cal.2003) (it is enough to constitute a continuous

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violation under RCRA that improperly discharged hazardous wastes "continue to exist unremediated" at the contamination site).

Because plaintiffs allege present conduct on the part of Esso, this Court cannot properly dismiss plaintiff's RCRA § 6972(a)(1)(A) claim on the ground that it is based on wholly past violations. Thus, Defendant Esso's motion for summary judgment on this ground is denied. Plaintiffs, of course, will have to prove at trial that Esso is actually violating RCRA or its regulations.

(ii) CWA Citizen's Suit and the Ongoing Violation Requirement

***11** [5][6][7][8] Esso further contends that a citizen's suit under the CWA is precluded by the Supreme Court's decision in *Gwaltney*, discussed *ante*, because plaintiffs have failed to allege a continuing violation. The unanimous holding of *Gwaltney* was that 33 U.S.C. § 1365(a), which authorizes private citizen suits for injunctive relief and/or civil penalties, does not confer federal jurisdiction over citizen suits for wholly past violations. *Id.* at 56-65. The Court went on to hold, however, that where citizen-plaintiffs make a "good-faith allegation of continuous or intermittent violations," federal jurisdiction will attach under 33 U.S.C. § 1365(a). *Id.* at 64-65. Citizen-plaintiffs are not required to provide proof of these allegations to invoke federal court jurisdiction. *Id.* While defendants may challenge the truth of plaintiffs' allegations of continuing or intermittent violations, via a motion for summary judgment, the burden of proof is upon the defendants. *Id.* at 66. If defendants fail to show that plaintiffs' allegations are a sham, which raise no genuine issue of fact, after plaintiffs offer some evidence to support their allegations, the motion for summary judgment must be denied. *Id.* Defendants' burden of proof is a heavy one. Defendants "must demonstrate that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id* .

In the instant case, defendant Esso argues that plaintiffs lack any specific allegations of an ongoing regulatory violation because the mere presence of contamination at the La Vega site and the possibility that the contamination will continue to flow into the adjecent Piñonas River is insufficient under 33 U.S.C. § 1365(a). To support its contention, Esso cites *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir.1986), where the First Circuit dismissed a citizen suit brought under the CWA because the alleged polluter had ceased operations by the time the suit was filed. Esso also cites cases in other circuits, that support its argument. *See, e.g., Hamker v. Diamond Shamrock Chem. Co.,* 756 F.2d 392, 297 (5th Cir.1985) (dismissing complaint because it "alleges only a single past discharge with continuing effects, not a continuing discharge"); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.,* 989 F.2d 1305, 1312-12 (2d Cir.1993) ("The present violation requirement of the Act would be completely undermined if a violation included the mere decomposition of pollutants."); *Brewer v. Ravan,* 680 F.Supp. 1176, 1183 (M.D.Tenn.1988) (dismissing citizen suit based on allegations made against a permanently closed manufacturing plant); *Friends of Santa Fe County v. LAC Minerals, Inc.,* 892 F.Supp. 1333, 1354 (D.N.M.1995) (finding no ongoing discharge from pile of waste rock on surface); *Wilson v. Amoco Corp.,* 33 F.Supp.2d 969, 975-76 (D.Wyo.1998) (concluding "that migration of residual contamination from previous releases does not constitute an ongoing discharge"), *factual background stated in* 989 F.Supp. 1159 (D.Wyo.1998); *Aiello v. Town of Brookhaven,* 136 F.Supp.2d 81, 120 (E.D.N.Y.2001) (holding CWA does not allow citizen suit against a past polluter "for the ongoing migrating leachate plume").

***12** This court is not so easily persuaded, however. *Pawtuxet Cove,* cited by defendant, is distinguishable from the case at bar. In *Pawtext Cove* the First Circuit decided that, because defendant had ceased operations under its permit at the time plaintiffs brought suit, there was no reasonable likelihood that the alleged infractions would continue. The case did not involve the allegation that migration, decomposition, and diffusion of pollutants into a waterway was sufficient to sustain a CWA citizen's suit, as in the present action. Here, plaintiffs rely on the theory that Esso is unlikely to adequately comply with previous orders issued by the EQB requiring Esso to remediate and contain the contamination present at the La Vega site. The fact that the Esso station at La Vega ceased its operations in 1998 does not change the prospective nature of plaintiffs' suit at the time it was brought. Moreover, in *Pawtuxet* the Court stated that it did not agree "with the reasoning which, apparently, led the Lousiana district court, following the *Hamker* decision, to dismiss a number of actions simply because no violations occurred on the dates the complaints were

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filed. A plaintiff who makes allegations warranting injunctive relief in good faith, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unatainable." *Pawtuxet,* 807 F.2d at 1094 (citing *Sierra Club v. Copolymer Rubber & Chemical Corp.,* 621 F.Supp. 1013, 1015 (M.D.La.1985). Thus, it cannot be said that the First Circuit has adopted a restrictive interpretation of the CWA citizen's suit provision. Furthermore, other courts have interpreted the CWA and *Gwaltney* expansively, holding that the continuing migration of pollutants from past discharges is sufficient to establish jurisdiction under 33 U.S.C. § 1365(a). *See North Carolina Wildlife Fed'n v. Woodbury,* 1989 WL 106517 at *2 (E.D.N.C.1989) (finding "it is not the physical act of discharging dredge wastes itself that leads to the injury giving rise to citizen standing, but the consequences of the discharge in terms of the lasting environmental degradation."); *Werlein v. United States,* 746 F.Supp. 887, 897 (D.Minn.1990) (holding pollutants from past discharges that are released over time by infiltration of contaminated soil is "ongoing pollution"), *class. cert. vacated by* 793 F.Supp. 898 (D.Minn.1992); *Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods, Inc.,* 962 F.Supp. 1312, 1322 (D.Or.1997) (holding "a discharge of pollutants is ongoing if the pollutants continue to reach navigable waters, even if the discharger is no longer adding pollutants to the point source itself").

Accordingly, the court concludes as reasonable plaintiffs' argument that the failure by Esso to take remedial measures should be treated as a continuing violation, since it is not the physical act of discharging toxic materials that gives rise to citizen standing under the CWA, but the consequences of the discharge in terms of lasting environmental damage and adverse health effects on the population. *See North Carolina Wildlife Fed'n,* 1989 WL 106517 at *2- 3 (adopting this argument). This position finds support in Justice Scalia's concurrence in *Gwaltney,* in which he was joined by Justices Stevens and O'Connor. According to the concurring Justices, the phrase in 33 U.S.C. § 1365(a) "to be in violation," unlike the phrase "to be violating" or "to have committed a violation," suggests "a state rather than an act-the opposite of a state of compliance. A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated. When a company has violated an effluent standard or limitation, it remains for purposes of [§ 1365(a)] 'in violation' of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation." *Gwaltney,* 484 U .S. at 69. Because the hazardous waste involved in this action remains a remediable threat to the environment and the health of the population at La Vega, this court is inclined to allow the citizen suit under 33 U.S.C. § 1365(a) to proceed. Therefore, defendant's motion for summary judgment on this ground is denied.

(iii) CERCLA Citizen's Suit and the Ongoing Violation Requirement

***13** [9] In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675. Under the Act, persons who are responsible for the release of hazardous substances may be liable for the costs of removing or remedying the contamination, the costs associated with damage to natural resources, and the costs to human health. *See id.* § 9607(a); *see also Dravo Corp. v. Zuber,* 13 F.3d 1222, 1225 (8th Cir.1994). A private citizen may bring a CERCLA action under 42 U.S.C.A. § 9659(a)(1) "against any person [...] who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter [...]." Though the First Circuit has not ruled on this matter, several courts have extended the *Gwaltney* holding, discussed *ante,* to CERCLA's analogous citizen's suit provision, requiring an allegation of either a continuous or intermittent violation. *See Lutz v. Chromatex, Inc.,* 718 F.Supp. 413, 420-22 (M.D.Pa.1989) (relying on, *Gwaltney* to hold that the citizens suit provision of CERCLA does not confer federal jurisdiction over actions based on wholly past violations); *Coalition for Health Concern v. LWD, Inc.,* 60 F.3d 1188, 1193 (6th Cir.1995) (citing *Lutz* and holding that alleged failure to comply with the notice provisions of CERCLA concerning the handling and release of hazardous materials into the environment is not a continuous or intermittent violation).

Defendant argues that the continuing or intermitent violation requirement has not been met by plaintiffs, for the same reasons as alleged under RCRA and CWA. Since the First Circuit has not ruled on this matter, the court adopts by analogy its interpretation of similar language in RCRA and CWA, discussed

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ante, and concludes that the "in violation" requirement of § 9659(a)(1) is met here because the contamination has not been remediated and plaintiffs, likewise, seek prospective relief in the form of testing and cleanup activities. This is consistent with other courts' expansive interpretation of CERCLA provisions. *See, e.g., Nurad, Inc. v. William E. Hooper & Sons Co.,* 966 F.2d 837, 844-846 (4th Cir.1992) (citing *United States v. Waste Ind., Inc.,* 734 F.2d 159, 164-65 (4th Cir.1984)) (analogizing CERCLA dispositions to RCRA; term "disposal" in CERCLA is not limited to active human conduct, but, rather, has a range of meanings, including reposing of hazardous waste and its subsequent movement through the environment). Defendant Esso's motion for summary judgment on this ground is, therefore, denied.

E. Plaintiff Has Established an RCRA Imminent and Substantial Endangerment Claim

[10][11][12] To successfully prosecute a claim under 42 U.S.C. § 6972(a)(1)(B), an RCRA plaintiff must demonstrate that (1) the defendant was or is a generator or transporter of solid or hazardous waste or owner or operator of a solid or hazardous waste treatment, storage, or disposal facility, (2) the defendant has contributed or is contributing to the handling, storage, treatment, transportation, or disposal of solid or hazardous waste, as defined by the RCRA, and (3) that the solid or hazardous waste in question "may present an imminent and substantial endangerment to health or the environment." *See* 42 U.S.C. § 6972(a)(1)(B). The First Circuit has held that the use of the word "may" in this subsection of the RCRA was inteded to make the provision expansive, in order to give the courts the tools to "eliminate any risks posed by toxic waste." *Maine People's Alliance and Natural Resources Defense Council v. Mallinckrodt, Inc.,* 471 F.3d 277, 287 (1st Cir.2006) (quoting S.Rep. no. 98-284, at 59 (1983)). Thus, the operative word in section 6972(a)(1)(B) is "may" and a plaintiff need not establish an incontrovertible "imminent and substantial" harm to health and the environment. The existence of a potential harm to health and the environment is enough, when "there is a reasonable prospect that a serious, near-term threat to human health or the environment exists." *Id.* at 279. Other courts have determined that passive migration at an inactive disposal site constitutes an imminent and substantial endangerment under the RCRA. *See United States v. Price,* 523 F.Supp. 1055, 1071 (D.N.J.1981), *aff'd,* 688 F.2d 204, 214 (3rd Cir.1982) (holding that 42 U.S.C. § 6972(a) authorizes relief restraining further leaking of waste from a landfill, and noting that it also authorizes a general cleanup of even dormant waste sites if necessary to cure a present threat to public health or the environment); *United States v. Conservation Chem. Co.,* 619 F.Supp. 162, 200 (D.Mo.1985) (disposal occurs when wastes migrate from their initial location).

***14** Viewing the facts in the light most favorable to the plaintiffs, the court finds that a material issue of fact exists concerning whether or not the La Vega site may currently present an imminent and substantial endangerment. Defendant Esso has presented evidence that the chemicals released at the site do not constitute such a threat, but this evidence has been controverted by plaintiffs. Accordingly, this issue must be reserved for trial.

F. Plaintiffs' CWA Claim Adequately Identifies the Effluent Standard That Esso is Allegedly Violating

[13] Defendant argues that plaintiff's claim does not identify the effluent standard or limitation that Esso is allegedly violating under CWA. The CWA provides that a civil action may be brought against anyone "alleged to be in violation of [...] an effluent standard or limitation of this chapter." *See* 33 USC 1365(a)(1). Effluent standard or limitation is defined as an "an unlawful act under subsection (a) of section 1311 of this title." *See* 33 U.S.C. § 1365(f)(1). In turn, 33 U.S.C. § 1311(a) provides that "the discharge of any pollutant by any person shall be unlawful." The term "the discharge of any pollutant" is defined as the "addition of any pollutant to navigable waters from a point source," 33 U.S.C. § 1362(12), while "navigable waters" is defined as "the waters of the United States, including the territorial seas," 33 U.S.C. § 1362(7). Congress intended the latter term to be given "the broadest constitutional interpretation ." *United States v. Rivera Torres,* 826 F.2d 151, 154 (1st Cir.1987) (quoting Conference Report on Section 2770, reprinted in 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972,* at 178) (holding that wetlands adjacent to navigable waters are included in the term "territorial waters"). Yet, it is unclear whether or not a river located in the interior of the island constitutes water in the territorial seas. *See United States v. Appalachian Electric Power Co.,* 311

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U.S. 377, 61 S.Ct. 291, 85 L.Ed. 243 (1941) (a body of water is "a navigable water of the United States" if (1) it presently, or (2) has been or was in the past, or (3) could be made in the future by reasonable improvements, susceptible for use in interstate or foreign commerce.), *but see Natural Resources Defense Council, Inc. v. Callaway,* 392 F.Supp. 685, 686 (D.C.D.C.1975) (holding that, as used in the CWA, the term "waters of the United States" is not limited to the traditional tests of navigability); *Rivera Torres,* 826 F.2d at 154-55 (citing several cases in support of assertion that "the CWA has been consistently applied by the courts to land and waters located in Puerto Rico"); *Commonwealth of Puerto Rico v. Alexander,* 438 F.Supp. 90, 94-96 (D.C.D.C.1977) (holding that the Federal Water Pollution Control Act Amendments of 1972 and certain regulations promulgated thereunder are applicable to nonnavigable waters of Puerto Rico, despite contention that such waters are areas of purely local concern and that federal regulation of such areas is inapplicable under the Puerto Rican Federal Relations Act).

***15** Plaintiffs' claim alleges that an indivisible plume of contaminants attributable to Rodríguez and Esso is flowing and discharging into the Piñonas Rivera from the Esso service station at La Vega and that, until the contamination is fully remediated, the discharge will continue. The court finds that, at a minimum, there is an issue of material fact as to whether the Piñonas River is navigable or not. Therefore, the court cannot enter summary judgment at this time and defendant Esso's motion on this basis is denied.

G. Applicability of the CERCLA Petroleum Exclusion

[14][15] Esso next argues that plaintiffs' CERCLA claim must be dismissed because the substance that leaked out of their USTs fall within CERCLA's petroleum exclusion, which states, in part: "The term ['hazardous substances'] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F)[...]." 42 U.S.C. § 9601(14). A petroleum product may be exempted from CERCLA " 'even though certain of its indigenous components and certain additives [added] during the refining process have themselves been designated as hazardous substances within the meaning of CERCLA.' " *Cose v. Getty Oil Co. .,* 4 F.3d 700, 704 (9th Cir.1993) (emphasis omitted) (quoting *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.,* 881 F.2d 801, 810 (9th Cir.1989)). However, "hazardous substances which are added to petroleum or which increase in concentration solely as a result of contamination of the petroleum during use are not part of the 'petroleum' and thus are not excluded from CERCLA." *Southern Pacific Transp. Co. v. California,* 790 F.Supp. 983, 986 (C.D.Cal.1991) (quoting EPA General Counsel, Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2) 5 (July 31, 1987); *see also Cose,* 4 F.3d at 704 (citing 50 Fed.Reg. 13,460 (Apr. 4, 1985)); *United States v. Alcan Aluminum Corp.,* 964 F.2d 252, 266 (3d Cir.1992); *United States v. Amtreco, Inc.,* 846 F.Supp. 1578, 1584-85 (M.D.Ga.1994).

Here, it is alleged by plaintiffs that because the petroleum product was released from corroded steel USTs, it constitutes hazardous waste that falls outside of the petroleum exclusion. Alternatively, plaintiffs contend that the petroleum products that leaked out of the USTs owned by Esso mixed and commingled with the hazardous substances and waste released, stored and discharged by co-defendant Rodríguez during the operation of the station, which included used oil. Plaintiffs contention is that the petroleum exclusion ceased to apply when Esso's non-hazardous petroleum plume and Rodríguez's hazardous substances and waste commingled. Because liability under environmental statues is, generally speaking, joint and several, plaintiffs argue Esso should be held liable "for the totality of the damage where, as here, the harm is indivisible." *Maine People's Alliance,* 471 F.3d at 298. Esso refutes this contention by arguing that joint and several liability is not a mechanism for imposing liability where it would not otherwise exist and asserts that Rodríguez is the party liable for discarding the hazardous wastes (batteries, oil fitlers, and used oil), which mixed with the petroleum in the soil and groundwater to create the indivisible plume of contaminants. Since it is undisputed that the product discarded by Esso was the refined petroleum contained in the damaged USTs, as discrete from any other hazardous substances discarded by the operators of the Esso service station at La Vega, the petroleum exclusion applies and it cannot be considered liable under CERCLA.

***16** The court first holds that plaintiff's alternative argument--that the commingled nature of the con-

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taminants makes the petroleum exclusion inapplicable is without merit, given that the source of Esso's potential liability is undisputedly separate from co-defendant Rodríguez's. [FN2] However, after reviewing the relevant facts and the case law presented by each party in their respective motions, the court concludes that an issue of material fact exists as to whether or not the petroleum released from Esso's corroded UST's contained corrosion products from the oxidation of steel in the tank walls. As pointed out by defendant Esso, *United States v. Western Processing Co., Inc.,* 761 F.Supp. 713 (W.D.Wash.1991), held that tank bottom sludge was covered by CERCLA because it contained "a rust-like scale of corrosion products from the oxidation of steel in the tank walls," which are "hazardous substances not normally found in refined petroleum fractions." *Id.* at 717. Though the present case does not deal with tank bottom *sludge,* it has been held that, where plaintiff proves that a release of a hazardous substance is *threatened,* defendant then has the burden of showing the petroleum exclusion applies. *See Jonshon v. James Langley Operating Company, Inc.,* 226 F.3d 957, 963, n. 3 & n. 4 (8th Cir.2000) (joining the Tenth Circuit's conclusion that "once plaintiffs have presented evidence to support their allegation of a release or threatened release, defendants bear the burden of showing the petroleum exclusion applies," and noting that threatened releases have been found to include a defendant's mere ownership of "corroding and deteriorating tanks," and); *Tosco Corp. v. Koch Indus., Inc.,* 216 F.3d 886, 896-97 (10th Cir.2000); *see also United States v. First City Nat'l Bank,* 386 U.S. 361, 366, 87 S.Ct. 1088, 18 L.Ed.2d 151 (1967) (noting general rule that party claiming benefit of exception to statutory prohibition bears burden of proof). In the present case Esso has not presented evidence to support its contention that the petroleum exclusion applies, given the undisputed fact that the petroleum it admits to releasing was contained in corroded steel USTs. This represents a threat that the substance released by Esso was hazardous under CERCLA and requires that Esso produce evidence to prove otherwise. Therefore, Esso's motion for summary judgment on this ground is denied.

IV. Conclusion

For the reasons discussed above, the court DENIES Esso's motion for summary judgment (Docket No. 905).

SO ORDERED.

FN1. In analyzing the *Gwaltney* holding, *infra,* the court notes that the decision does not state that the bar for "wholly past violations" applies to suits brought pursuant to § 6972(a)(1)(B), RCRA's imminent and substantial endangerment subsection. Rather, § 6972(a)(1)(B) "explicitly targets wholly past violations." *Gwaltney,* 484 U.S. at 57. The *Gwaltney* Court noted:

[T]he Solid Waste Disposal Act as amended in 1984 to authorize citizen suits against any "past or present" generator, transporter, owner, or operator of a treatment, storage, or disposal facility "who has contributed or who is contributing" to the "past or present" handling, storage, treatment, transportation, or disposal of certain hazardous waste. 42 U.S.C. § 6972(a)(1)(B) (1982 E.D., USPP. III). Prior to 1984, the Solid Waste Disposal Act contained language identical to that of § 501(a) of the Clean Water Act, authorizing citizens' suits against any person "alleged to be in violation" of waste disposal permits or standards. 42 U.S.C. § 6972(a)(1).

Id., 484 U.S. at 57. *Tanglewood East Homeowners v. Charles-Thomas, Inc.,* 849 F.2d 1568, 1575-76 (5th Cir.1988) also states that § 6972(a)(1)(B) provides for a claim for injunctive relief on either past or present conduct. Accordingly, any limitation on plaintiff's RCRA claim due to the prior nature of Esso's violations would apply only to § 6972(a)(1)(A), plaintiffs' enforcement action. Defendant Esso concedes as much. *See* Docket No. 905 at 20; Docket No. 954 at 10.

FN2. The court also rejects plaintiff's argument that Esso is judicially estopped from relying on the petroleum exclusion because of statements made in its CERCLA case against Rodríguez, Civil Case No. 01-2012. This argument was previously briefed by the parties to this case and dismissed by the court. *See* Docket Nos. 319, 331, 337.

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Western Division.
WASTE MANAGEMENT, INC.,
and
Waste Management of Ohio, Inc., Plaintiffs,
v.
DANIS INDUSTRIES CORPORATION, et al., Defendants.
No. 3:00cv256.

Feb. 10, 2009.

Edward F. Busch, Jennifer Fust-Rutherford, Kenneth A. Bohnert, Richard M. Sullivan, Conliffe Sandmann & Sullivan, Louisville, KY, for Plaintiffs.

Daniel R. Warncke, Earl K. Messer, Thomas Thomsen Terp, Taft Stettinius & Hollister, Cincinnati, OH, James Alan Dyer, Toby K. Henderson, Sebaly Shillito & Dyer, Dayton, OH, Charles W. Danis, Jr., Stonington, CT, Charles Rockwell Saxbe, Gerhardt A. Gosnell, II, Chester Willcox & Saxbe LLP, Karen S. Hockstad, Shumaker, Loop & Kendrick, LLP, Columbus, OH, for Defendants.

FINDINGS OF FACT; CONCLUSIONS OF LAW; OPINION; JUDGMENT TO BE ENTERED IN FAVOR
OF SOME DEFENDANTS AND AGAINST PLAINTIFFS, AND IN FAVOR OF PLAINTIFFS AND
AGAINST OTHER DEFENDANTS; TERMINATION ENTRY

WALTER HERBERT RICE, District Judge.

***1** The genesis of this litigation is the 1983 sale by Defendant Danis Industries Corporation ("DIC") of some of its corporate subsidiaries to Plaintiff Waste Management, Inc., and its subsidiary, Plaintiff Waste Management of Ohio, Inc. Industrial Waste Disposal Co., Inc. ("IWD"), was one of the corporate subsidiaries transferred to Plaintiffs as part of that transaction. At the time, IWD owned a corporate subsidiary named North Sanitary Landfill, Inc., which had operated the North Sanitary or Valleycrest Landfill. Consequently, as a result of that transaction, the Plaintiffs became the indirect owners of the Valleycrest Landfill. Shortly after that transaction, DIC agreed to indemnify the Plaintiffs for certain liabilities arising out of the operation of that Landfill by its subsidiaries. After that Landfill had been included on the National Priorities List ("NPL") (*see* 40 C.F.R. Pt. 300, App. B), the possibility that Plaintiffs would incur liabilities, as a result of environmental contamination at the Landfill, became real. Consequently, Plaintiffs invoked the indemnification agreement with DIC, causing multiple lawsuits between the parties concerning DIC's obligation to indemnify them. In December, 1997, the parties resolved their lawsuits by entering into a Settlement Agreement. Under that agreement, DIC agreed to indemnify Plaintiffs for any costs incurred to cleanup the Valleycrest Landfill.

In October, 1997, DIC and its corporate affiliates underwent corporate restructuring, which the Court has referred to as the "recapitalization/split-off transaction." [FN1] Prior to the consummation of that transaction, DIC had been a wholly owned subsidiary of Defendant The Danis Companies ("TDC"). In addition, Defendant Danis Building Construction Company ("DBCC") had been a wholly owned subsidiary of Danis Construction Company ("DCC"), which, in turn, was a wholly owned subsidiary of DIC. Under the recapitalization/split-off transaction, 10 of the 11 Class A shareholders of TDC redeemed their TDC shares and other securities for the collective payment of $26.5 million and the shares of DBCC, while the eleventh shareholder, Thomas Danis, ended up owning 80% of the shares of TDC. When the transaction was implemented, the assets of DBCC, as well as a portion of the sum of $26.5 million, had been removed from DIC, which, according to the Plaintiffs, left DIC without sufficient assets to satisfy its obligation to indemnify Plaintiffs.

FN1. Keeping with convention, the Court will continue to use that phrase to identify the restructuring.

Plaintiffs bring this litigation against DIC, TDC, John Danis, Richard Danis, Charles W. Danis, Amy Danis, Julie Danis, Benjamin Danis, Christopher Danis, Peter

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Danis, Maryanna Klatt, Susan Grossman, DBCC, Danis Environmental Industries, Inc. ("DEI"), [FN2] Diversified Environmental Management Company ("DEMCO"), [FN3] Gregory McCann ("McCann"), Thomas Danis and Richard Russell ("Russell"). In their First Amended Complaint (Doc. # 21), the Plaintiffs set forth twelve claims for relief. Before trial, this Court rendered a series of Decisions that some or all of the Defendants were entitled to summary judgment on many of those claims. *See* Docs. 236, 351, 352, 353, 357, 358, 363 and 369. In addition, the Court concluded that the Plaintiffs were entitled to summary judgment on part of their claim arising out of the Settlement Agreement against DIC and DEMCO. [FN4] *See* Docs. 141 and 236. As a result, the following claims remained to be resolved by a trial, to wit:

FN2. DEI was formerly known as Danis Heavy Construction Company.

FN3. Plaintiffs' First Amended Complaint also lists Danis Environmental Management Group as a Defendant. However, that pleading also alleges that DEMCO is also known as Danis Environmental Management Group. *See* Doc. # 21 at ¶ 3. Accordingly, the Court does not treat Danis Environmental Management Group as a Defendant, separate and distinct from DEMCO. In addition, it bears noting that DEMCO is the successor to DIC.

FN4. In its Decisions of March 18, 2003 (Doc. # 141), and February 24, 2004 (Doc. # 236), this Court concluded that, through January 14, 2003, Plaintiffs were entitled to recover $15,188,370.00, from DIC and DEMCO, since those Defendants were liable for breach of the Settlement Agreement with Plaintiffs, by failing to fund the parties' joint obligation to pay for the cleanup of the Valleycrest Landfill (part of Count 1).

***2** 1) whether Plaintiffs can recover any additional sum of damages from [DIC] and DEMCO, for the period subsequent to January 14, 2003, predicated upon the theory that they [DIC and DEMCO] have breached the Settlement Agreement by failing to pay the parties' joint obligation to pay for the cleanup of the Valleycrest Landfill (part of Count 1); 2) the request for declaratory judgment in Count 4 against [DIC] and DEMCO, predicated on the same theory; 3) the piercing the corporate veil claims against TDC, which are set forth in numerous claims in the Amended Complaint; 4) fraud and negligent misrepresentation claims against TDC, [DIC], DEI, DEMCO, Thomas Danis, Richard Russell and Gregory McCann, premised on the theory that [DIC] misrepresented its ability to meet its obligations when it executed the Amended Site Preparation Agreement (parts of Counts 8 and 9); 5) a claim against Thomas Danis and Gregory McCann, arising under § 1701.93 of the Ohio Revised Code, predicated upon the same allegations (part of Count 8); 6) the aspect of Count 10 against all Defendants, except Danis Building Construction Company ("DBCC"), predicated upon the theory that the transfer of various securities in exchange for cash and DBCC assets, as part of the recapitalization/split-off transaction, violated Plaintiffs' rights, under § 1336.04 of the Ohio Revised Code, as creditors of [DIC] under the Settlement Agreement; and 7) Count 12 as to TDC, [DIC], DEI, DEMCO, Thomas Danis, Richard Russell and Gregory McCann, to the extent that it is based upon the allegations in Count 8 relating to the Amended Site Preparation Agreement.

Doc. # 371 at 1-2 (footnote omitted).

Those remaining claims were tried, with this Court sitting as fact finder. [FN5] Before the trial, the parties filed voluminous trial briefs and have submitted extensive post-trial memoranda and proposed findings of fact and conclusions of law. *See* Docs. 377 through 379, 381, 481 through 484, 486 through 490, 493, 494, 501 and 502. [FN6] The Court now states its Findings of Fact separately from its Conclusions of Law.

FN5. That trial took all or part of 22 days and extended over a three-month period.

FN6. Plaintiffs have not filed separate proposed findings of fact and conclusions of law. Rather, they have filed their Post-Trial Reply Brief twice. *See* Docs. 493 and 494. On the docket sheet, Plaintiffs identified the second filing of that Brief (Doc. # 494) as proposed findings of fact and conclusions of law.

I. Findings of Fact

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A. The Parties

1. Plaintiff Waste Management, Inc. ("Waste Management"), is a corporation organized under the laws of Delaware with its principal place of business in Houston, Texas. Plaintiff Waste Management of Ohio, Inc. ("WMO"), is a wholly owned subsidiary of Waste Management.

2. Defendant Danis Industries Corporation ("DIC") was formed in 1971, to act as the parent corporation for all Danis related companies. [FN7] In 1989, The Danis Companies ("TDC") was formed. TDC became a holding company and the sole shareholder for several subsidiaries, including DIC. TDC's subsidiaries were generally grouped into three operating lines, to wit: real estate, construction and environmental. On October 13, 1997, [FN8] the primary entities involved in the real estate line of business were Danis Property Holding Company ("DPHC"), a non-operating wholly owned subsidiary of TDC, and Danis Properties Co., Inc. ("DPC"), a wholly owned subsidiary of DPHC. DPC, in turn, owned a number of subsidiaries, each of which had been established to own a single piece of property. On that date, the primary construction subsidiaries were Danis Building Construction Company ("DBCC") and Danis Heavy Construction Company ("DHCC"). DBCC was involved in general construction, while DHCC, which was later renamed Danis Environmental Industries ("DEI"), was involved in the construction of water and wastewater treatment plants. DBCC and DHCC were wholly owned subsidiaries of Danis Construction Company ("DCC"), which, in turn, was such a subsidiary of DIC. TDC's environmental line of business was conducted by its wholly owned subsidiary, Danis Environmental Management Company ("DEMCO"). Among other subsidiaries, DEMCO owned all of the shares of Danis Clarkco Landfill Company ("Clarkco"), which was in the business of developing a landfill on property that it owned in Clark County, Ohio.

FN7. A construction company founded by B.G. Danis, Sr., in 1911, was DIC's ultimate predecessor.

FN8. Since the recapitalization/split-off occurred on October 14, 1997, the Court recounts the structure of TDC and its subsidiaries on the previous day, to wit: October 13, 1997.

***3** 3. Defendants John Danis, Richard Danis, Charles Danis, Jr., Amy Danis and Julie Danis are children of Charles Danis, Sr. (collectively "Charles Danis family"). They were shareholders of TDC until the recapitalization/split-off transaction, at which time they became former shareholders of that corporate entity. Defendants Thomas Danis, Dr. Christopher Danis, Benjamin Danis III, Peter Danis, Maryanna Klatt and Susan Grossman are children of B.G. Danis, Jr. (collectively B.G. Danis, Jr., family"). [FN9] With the exception of Thomas Danis, they were shareholders of TDC until the recapitalization/split-off transaction, at which time they became former shareholders of that corporate entity. Thomas Danis was, before and after that transaction, a shareholder of TDC. The Court will refer to the members of the Charles Danis family and the members of the B.G. Danis, Jr., family, other than Thomas Danis, collectively as the "former shareholders."

FN9. Charles Danis Sr., and B.G. Danis, Jr., were the two sons of B.G. Danis, Sr., who had founded the original construction company to bear the Danis name. The members of the Charles Danis and B.G. Danis, Jr., families are grandchildren of B.G. Danis, Sr.

4. Thomas Danis began his career with DIC in the early 1970's. When TDC was created in 1989, he became its CEO and a member of its Board of Directors. He retained his position as CEO of TDC until May, 1993, when he resigned as a result of disputes with his siblings over his management of TDC and the direction of that corporate entity. He resigned as member of the Board of Directors in December, 1994, after having been told that he would not be reelected to that Board the following spring. As a result of the recapitalization/split-off transaction, on October 14, 1997, he became the owner of 80% of the shares of TDC, and, once again, its CEO and a member of its Board of Directors.

5. A number of the former shareholders held important positions with TDC and some of its subsidiaries before the recapitalization/split-off. John Danis was Senior Vice President and a member of the Board of Directors of TDC, as well as being COO of DCC and a member of the Board of Directors of DIC. Charles Danis, Jr., Peter Danis and Christopher Danis were also members of TDC's Board of Directors.

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[FN10] In addition, William Klatt, the husband of Defendant Maryanna Klatt, was a member of TDC's Board of Directors. Neither William Klatt nor any of the former shareholders, other than John Danis, was a director or officer of DIC, nor did any of them control that corporate entity. Richard Danis was Senior Vice President of TDC, until he retired from that position in 1992, although he remained a member of its Board of Directors at the time of the transaction.

FN10. Christopher Danis had been employed by TDC and its predecessor, DIC, but had retired before the events giving rise to this litigation occurred.

6. Defendant Richard Russell ("Russell") was initially hired by DIC in 1984, as its Vice President of Finance. In 1993, after Thomas Danis had resigned, Russell became the co-CEO of TDC, sharing that position with Glenn Schimpf. He retained that position until after the recapitalization/split-off transaction, when he became its President and Thomas Danis its CEO. He retained that position until 2003, when his employment with TDC ended. Russell was paid a bonus of $500,000 for his work on the recapitalization/split-off transaction.

***4** 7. Defendant Gregory McCann ("McCann") was employed by TDC as in-house counsel, beginning in the late 1980's. [FN11] In his capacity as such an employee, McCann was a central actor in the dispute with Plaintiffs concerning their demand that DIC indemnify them for the Valleycrest Landfill. In addition, McCann represented DIC on the Valleycrest Landfill Site Group ("VLSG"), a group established by a number of potentially responsible parties ("PRPs") to coordinate the remediation of that hazardous waste site. McCann was also intimately involved in the recapitalization/split-off transaction and was paid a $50,000 bonus for his endeavors on that transaction.

FN11. During his tenure at TDC, McCann's titles changed to General Counsel and Secretary, then to Vice President and General Counsel and finally to Senior Vice President and General Counsel. The alterations of his title did not change McCann's duties at TDC.

8. A number of Plaintiffs' employees were their primary actors involved in the events giving rise to this litigation. Mike Rogan ("Rogan") was Vice President of business services for Waste Management. In that position, Rogan managed Plaintiffs' environmental liabilities and real estate, among other duties. He was closely involved in negotiations with the Defendants concerning the Valleycrest Landfill and Plaintiffs' efforts to obtain Clarkco. James Forney ("Forney"), who manages closed waste sites for Plaintiffs for the Mideast region which includes Ohio, was intimately involved in negotiations concerning the Valleycrest Landfill with Defendants and the VLSG. Forney has significant experience in that field, having been so employed by Plaintiffs since 1998 and having formerly been employed by the Michigan Department of Natural Resources. Katie Moertl ("Moertl), in-house counsel for Plaintiffs, was intimately involved with the negotiations that led to the execution of the Settlement Agreement. James Logsdon ("Logsdon"), Waste Management's business development manager for this area, was involved with Rogan in Plaintiffs' efforts to purchase Clarkco.

B. Background and Ownership of the Valleycrest Landfill and Efforts to Clean up that Hazardous Waste Site

9. The Valleycrest Landfill is located on a 102-acre site owned by the Keystone Gravel Company ("Keystone"). From 1921 until the 1970's, Keystone operated a sand and gravel quarry on that site. Keystone leased part of the quarry to North Sanitary Landfill, Inc. ("NSL"), which operated it as the Valleycrest Landfill from 1966 through 1975. NSL accepted residential, commercial and industrial waste, including liquid waste in drums, for disposal at that facility. NSL was a subsidiary of Industrial Waste Disposal Co., Inc. ("IWD"). [FN12] IWD, in turn, was a subsidiary of DIC throughout the entire period that NSL accepted waste at the Valleycrest Landfill. The Valleycrest Landfill was placed on the NPL in 1994.

FN12. IWD was the primary hauler of waste to the Valleycrest Landfill.

10. In 1983, Waste Management purchased all of the outstanding shares of IWD from DIC. As a consequence, Waste Management became the indirect owner of NSL. As part of that transaction, DIC agreed to indemnify Plaintiffs for liabilities incurred as a result of the operation of the Valleycrest Landfill by NSL, prior to DIC's sale of IWD to Waste Management. In addition, DIC turned over to Plaintiffs all of

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its records relating to the waste streams disposed of at the Valleycrest Landfill. In 1989, NSL, which had changed its name to Pinnacle Road Landfill, Inc., and IWD were merged into WMO.

***5** 11. As a result of the Valleycrest Landfill being added to the NPL in 1994, Waste Management began an investigation of the conditions at the landfill. Given that Waste Management is the largest company in the world engaged in managing waste, it had extensive experience investigating and remediating closed landfill sites, including such sites as had been placed on the NPL. That experience is amply demonstrated by an examination of some of Waste Management's executives involved with the Valleycrest Landfill. For instance, Forney, its executive in overall charge of the cleanup Valleycrest Landfill, was in charge of Plaintiffs' closed landfill operations for the part of the nation that included Ohio. Rogan, who was also involved with Plaintiffs' efforts to acquire Clarkco, and, as a result, became involved with that hazardous waste site, was a highly experienced executive.

12. After the Valleycrest Landfill had been placed on the NPL, Rogan became aware of that superfund site, when Plaintiffs were notified by the Ohio EPA that they were considered to be PRPs for it.

13. As a result, Plaintiffs invoked the indemnification agreement which DIC had executed as part of its sale of IWD and its subsidiary NSL to Plaintiffs. Plaintiffs' invocation of the indemnification agreement was followed closely by lawsuits between the parties. Also flowing from the addition of the Valleycrest Landfill to the NPL, was the formation of the Valleycrest Landfill Site Group ("VLSG") by a number of PRPs for that hazardous waste site. Neither Plaintiffs nor DIC was initially a member of the VLSG. The members of the VLSG executed the Valleycrest Site Participation Agreement ("SPA"), to which neither Plaintiffs nor DIC was a party.

14. In December, 1997, the parties resolved their lawsuits by entering into a Settlement Agreement and Mutual Release for the Valleycrest Landfill Site ("Settlement Agreement"). As part of that agreement, Danis agreed to indemnify Plaintiffs. The indemnification provision, ¶ 4 of in the Settlement Agreement, provides:

> 4. *INDEMNIFICATION*. Subject to WASTE MANAGEMENT'S fulfillment of its obligations under this Agreement and except as specifically limited by Paragraph 9 entitled RESERVATION OF RIGHTS, [DIC] hereby agrees to defend, indemnify and hold harmless WASTE MANAGEMENT from or against any Covered Claim or Covered Claims released by [DIC] in Paragraph 3 herein. The indemnification shall continue in full force and effect for so long as [DIC] or any entity shall have any obligation or alleged liability in connection with the [Valleycrest Landfill]. [FN13]
>
> FN13. The term "Waste Management" is defined by the Settlement Agreement to include both Plaintiffs in this litigation.

Joint Exhibit 227 at 5. Paragraph 2b of the Settlement Agreement defines "covered claim" to mean "any Claim that may arise from or is in any way related to the [Valleycrest Landfill], including, without limitation of the foregoing, Claims concerning environmental pollution, remediation, failure to remediate, toxic torts, natural resource damages, bodily injury, property damage and/or contractual indemnity." *Id.* at 4. Among the Defendants, only DIC signed the Settlement Agreement, and it is the only Defendant liable on same. In exchange for DIC agreeing to indemnify Plaintiffs, it was paid $1.5 million. In August, 1997, Rogan had offered to settle the parties dispute, by capping DIC's exposure at some point between $7 and $8.5 million. Recital D of the Settlement Agreement provided that the parties recognized that certain information concerning the Valleycrest Landfill was not known with certainty: the toxicity of substances at the Landfill; whether any action would be required; the precise nature, scope and cost of the remedial and/or removal measures to be undertaken; and the ultimate amount of response costs.

***6** 15. In May, 1998, DIC and Plaintiffs became members of the VLSG when they entered into the First Amended Valleycrest Landfill Site Participation Agreement ("ASPA") with the other members of the VLSG. That Agreement was negotiated by McCann and Moertl, among others. Under that Agreement, Plaintiffs and DIC were jointly liable for 46% of the costs incurred to remediate the Valleycrest Landfill. However, during the fall of 1997, before Plaintiffs and DIC had executed the Settlement Agreement, Plaintiffs and DIC reached an agreement in principle with the VLSG concerning the terms of what would become the ASPA, including the joint liability of Plain-

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tiffs and DIC for 46% of the costs incurred to clean up the Valleycrest Landfill. When Plaintiffs and DIC executed the ASPA, their joint, past-due share of the costs incurred to remediate the Valleycrest Landfill was $900,000. As a result of the Settlement Agreement, DIC was obligated to pay the entire 46% of liability it shared with Plaintiffs, since the obligations imposed upon DIC and Plaintiffs by the ASPA were covered claims under that Agreement. Therefore, DIC paid the $900,000 that it and Plaintiffs jointly owed under the ASPA when they became members of the VLSG. In addition, DIC and the other parties signing the ASPA warranted that they had sufficient assets to fund their obligations thereunder. In particular, the financial warranty provides that "[e]ach Original and New Member warrants that it presently has, or has the ability to obtain in timely manner, sufficient funds to satisfy its obligations under this [ASPA]." Joint Exhibit 241 at 3. The second part of that two-pronged warranty relates to costs incurred in the future to cleanup of the Valleycrest Landfill, after the execution of that Agreement.

16. In 1998, DIC, Plaintiffs, the other members of the VLSG and a number of governmental entities executed the Government Entity Participation Agreement ("GEPA"). That agreement reaffirmed the obligations of DIC, Plaintiffs and other members of VLSG under the ASPA and added a number of governmental entities to the VLSG. It did not, however, impose new or additional obligations or burdens on DIC or Plaintiffs. By signing that Agreement, DIC and the other signatories warranted that they had sufficient assets to fund their obligations thereunder.

17. DIC has been in default of its obligations under the Settlement Agreement, since 1999, when it stopped paying its joint obligation with Plaintiffs under the ASPA. As a consequence, this Court awarded partial summary judgment to Plaintiffs, concluding that they were entitled to recover $15,188,370.00, from DIC and DEMCO, DIC's successor, through January 14, 2003, the date of the last payment made by the Plaintiffs.

C. Recapitalization/Split-Off Transaction

18. The recapitalization/split-off transaction was a leveraged buyout of TDC by Thomas Danis, which allowed him and his siblings to resolve their conflict which had been caused by combining family with business. That conflict had existed for many years before the that transaction occurred. The recapitalization/split-off transaction was but the last of a series of efforts to resolve the conflict by a sale of TDC to outsiders or insiders. The shareholders of TDC entered into the recapitalization/split-off transaction in order to resolve, for all time, the intra-family dispute among members of the B.G. Danis, Jr., family over the management and direction of that corporate entity and to separate business from family. The purpose of that transaction was not to isolate the former shareholders from DIC's environmental liabilities.

***7** 19. On October 14, 1997, the recapitalization/split-off transaction closed. As a result of that transaction, the former shareholders received cash payments in the sum of $26.6 million, which was comprised of the following payments, to wit: $1.6 million for their DIC debentures, $2.552 million for their preferred shares of DIC, $2.6 million for their preferred shares of DPHC and $19.9 million for their shares of TDC's common stock. In addition, six former shareholders received shares of DBCC, which was split off as a separate entity. [FN14] Moreover, one former shareholder, Benjamin Danis, received a contingent payment note in the sum of $478,429. On October 14th, DBCC was worth $6.9 million. As a result of that transaction, Thomas Danis owned 80% of the shares of TDC.

FN14. Charles, Richard, Amy, Julie and Christopher Danis each received a 5.4% interest in DBCC, while the remainder, 73%, went to John Danis who would run DBCC.

20. No former shareholder has served as an officer or director of TDC, DIC or any of their subsidiaries, direct or indirect, after the recapitalization/split-off transaction closed on October 14, 1997.

21. The recapitalization/split-off transaction was financed in part by $15 million supplied by a consortium of banks led by Fifth Third Bank. That financing had two components, a term loan in the amount of $8 million to TDC and a bond issue of $7 million by DCC, DIC's subsidiary. The bonds were issued by DCC as a convenience, because a previous bond issue was in place, allowing bonds to be issued quickly. Shortly after the transaction closed, the bonds were assigned to TDC. To obtain the $15 million from the Fifth Third, DIC and TDC's other subsidiaries were

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required to guarantee that debt. TDC has paid off the entire sum of $15 million that it obtained from Fifth Third Bank.

D. Other Findings

22. Given that DIC maintained its own financial records and those records were audited annually by a national accounting firm, which was overseen by an audit committee comprised of non-family board members, that DIC maintained a separate bank account and that it had a separate Board of Directors, TDC did not exercise such control over DIC that the latter had no separate mind, will or existence of its own. The recapitalization/split-off transaction does not demonstrate that TDC exercised such control over DIC.

23. TDC did not expressly or impliedly assume DIC's liability for the remediation of the Valleycrest Landfill.

24. The transfers made by DIC as part of the recapitalization/split-off transaction were not made with actual intent to hinder, delay or defraud TDC.

25. John Danis, alone among the former shareholders and relatives of former shareholders, was an insider of DIC.

26. Defendants did not conceal the recapitalization/split-off transaction from the Defendants, before Plaintiffs and DIC entered into the Settlement Agreement on December 31, 1997.

27. On October 14, 1997, after the recapitalization/split-off transaction closed, DIC's assets were valued at a minimum of $39.96 million. As debts, it had contingent environmental liabilities valued, on that date, at no more than $16 million. One of those contingent liabilities was for the Valleycrest Landfill. In October, 1997, the most reasonable estimate of DIC's liability for the cleanup of that Landfill was that it would not exceed $12 million, a sum that would be expected to be paid over a number of years. Its other contingent environmental liabilities were for the Tremont and Cardington Road Landfills. In October, 1997, the most reasonable estimate of DIC's liability for the cleanup of those Landfills did not exceed $4 million, a sum that would be expected to be paid over a number of years. Therefore, DIC's debts did not exceed its assets on October 14, 1997, when the recapitalization/split-off transaction occurred, or shortly thereafter, i.e., on December 31, 1997, when it executed the Settlement Agreement.

***8** 28. As a consequence of the recapitalization/split-off transaction, assets valued at $10.902 million were transferred out of DIC (DBCC which was worth $6.9 million and cash in the amount of $4.002 million), while it received DEMCO, which was then worth $17.36 million (a figure that is comprised of $19.76 million, the value of DEMCO's subsidiary Clarkco, less $2.4 million, a reasonable estimate in October, 1997, of the remaining costs to remediate the Cardington Road and Tremont Landfills, for which DEMCO was responsible). [FN15] Therefore, DIC received reasonably equivalent value for the assets it transferred as a result of the recapitalization/split-off transaction.

FN15. DIC was also required to guarantee the loan from Fifth Third Bank; however, that guarantee had no value.

29. DIC did not misrepresent the existence of any current fact, when it gave the financial warranty to the other signatories of the ASPA, by signing that Agreement.

30. The Plaintiffs did not rely upon the financial warranty, given by DIC when it signed the ASPA, in deciding whether to execute that Agreement. On the contrary, DIC's financial warranty played no role in Plaintiffs' decision in that regard.

II. Opinion

As is indicated above, the following claims remain to be resolved in this litigation, to wit:

1) whether Plaintiffs can recover any additional sum of damages from [DIC] and DEMCO, for the period subsequent to January 14, 2003, predicated upon the theory that they have breached the Settlement Agreement by failing to pay for the parties' joint obligation to pay for the cleanup of the Valleycrest Landfill (part of Count 1); 2) the request for declaratory judgment in Count 4 against [DIC] and DEMCO, predicated on the same theory; 3) the piercing the corporate veil claims against TDC, which are set forth in numerous claims in the

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> Amended Complaint; 4) fraud and negligent misrepresentation claims against TDC, [DIC], DEI, DEMCO, Thomas Danis, Richard Russell and Gregory McCann, premised on the theory that [DIC] misrepresented its ability to meet its obligations when it executed the Amended Site Preparation Agreement (parts of Counts 8 and 9); 5) a claim against Thomas Danis and Gregory McCann, arising under § 1701.93 of the Ohio Revised Code, predicated upon the same allegations (part of Count 8); 6) the aspect of Count 10 against all Defendants, except Danis Building Construction Company ("DBCC"), predicated upon the theory that the transfer of various securities in exchange for cash and DBCC assets, as part of the recapitalization/split-off transaction, violated Plaintiffs' rights, under § 1336.04 of the Ohio Revised Code, as creditors of [DIC] under the Settlement Agreement; and 7) Count 12 as to TDC, [DIC], DEI, DEMCO, Thomas Danis, Richard Russell and Gregory McCann, to the extent that it is based upon the allegations in Count 8 relating to the Amended Site Preparation Agreement.

Doc. # 371 at 1-2 (footnote omitted). [FN16] In their Post-trial Brief (Doc. # 484), the Plaintiffs have not addressed the first and second claims listed above. Accordingly, this Court concludes that the Plaintiffs have waived those claims. [FN17] As a means of analysis, the Court will initially address the Plaintiffs' claims against TDC, predicated on the theory that it is liable for the debts of DIC under a piercing the corporate veil theory, following which the Court will turn to Plaintiffs' claim that all Defendants, other than DBCC, are liable to it under § 1336.04(A) of the Ohio Revised Code, because the recapitalization/split-off transaction constituted a fraudulent conveyance. The Court will then rule on the other remaining claims in the above order, discussing the fourth and fifth listed claims together, as have the Plaintiffs in their Post-Trial Brief (Doc. # 484).

FN16. The seventh claim listed above is predicated upon a civil conspiracy theory.

FN17. In other words, this Court will not enter judgment in favor of Plaintiffs and against DIC and DEMCO in an amount greater than $15,188,370.00, plus prejudgment interest, which it has previously held they are entitled to recover.

A. Piercing the Corporate Veil

***9** In *Belvedere Condominium Owners Association v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 617 N.E.2d 1075 (1993), the Ohio Supreme Court set forth, in ¶ 3 of the syllabus, the elements of a claim whereby liability could be imposed on the owner of a corporation under a theory of piercing the corporate veil:

> 3. The corporate form may be disregarded and individual shareholders held liable for wrongs committed by the corporation when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, *and* (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

Id. at 275, 617 N.E.2d at 1077 (emphasis supplied). It is axiomatic that, under Ohio law, a parent corporation is not liable for the debts of its subsidiary, in the absence of proof that the subsidiary's corporate veil can be pierced under the three-part test established in *Belvedere. National City Bank v. The Plechaty Cos.*, 104 Ohio App.3d 109, 115, 661 N.E.2d 227, 230 (1995). Herein, the Plaintiffs argue that the corporate veil between TDC and its subsidiary, DIC, must be pierced, rendering the former responsible for paying DIC's share of the costs to remediate the Vallycrest Landfill. Above, this Court has found, as a matter of fact, that TDC did not exercise control over DIC which was so complete that the latter had no separate mind, will or existence of its own. Accordingly, the Court concludes that DIC's corporate veil cannot be pierced, without the necessity of addressing the other two prongs of the *Belvedere* test. Following is the reasoning which supports the Court's finding of fact. As a means of analysis, the Court will initially discuss the evidence which caused it to make that factual finding, following which it will explain why Plaintiffs' arguments to the contrary did not cause the Court to make the opposite finding.

Much evidence was introduced, supporting the proposition that TDC did not exercise control over DIC which was so complete that the latter had no separate mind, will, or existence of its own. For instance, every one of TDC's subsidiaries, including DIC, maintained its own financial records and those records were audited annually, along with TDC's

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financial records, by a national accounting firm. An audit committee met with the auditors, to plan and to oversee the annual audit. That committee was composed of non-family board members, and the members of that committee were actively engaged in their duties. In addition, DIC maintained a separate bank account. DIC had a separate Board of Directors, which conducted business through unanimous consent, as authorized by § 1701.54 of the Ohio Revised Code.

In arguing that the evidence demonstrates that TDC exercised such control over DIC that it had no separate mind, will or existence of its own, Plaintiffs focus on the recapitalization/split-off transaction. They contend that, for instance, DIC's transfer of a substantial asset, its indirect ownership of DBCC, [FN18] as part of that transaction, without receiving reasonably equivalent value, demonstrates that TDC exercised such control over it. Plaintiffs also point out that TDC borrowed $15 million in order to pay for the transaction, and that DIC and TDC's other subsidiaries and sub-subsidiaries were required to guarantee the loan to TDC.

FN18. Before the recapitalization/split-off transaction, DBCC was a subsidiary of DCC, which, in turn, was a subsidiary of DIC. As a result of that transaction, DBCC was split-off to John Danis and other former shareholders of TDC, in consideration, *inter alia*, for their shares of TDC.

***10** Accepting for present purposes that evidence that a parent corporation has stripped the assets of a subsidiary supports a finding that the parent has exercised sufficient control over the subsidiary in order the pierce the latter's corporate veil, this Court has found, for reasons set forth below in its discussion of Plaintiffs' fraudulent conveyance claim, that DIC received reasonably equivalent value for the assets it transferred as a part of the recapitalization/split-off transaction. Accordingly, the Court rejects the Plaintiffs' proposition that TDC exercised sufficient control over DIC to pierce the corporate veil of the latter, because DIC did not receive reasonably equivalent value. [FN19]

FN19. Plaintiffs contend that the control of TDC over DIC is further demonstrated by the absence of evidence that the latter's Board of Directors met to discuss the issue of whether the recapitalization/split-off transaction would in the best interests of DIC. In the absence of evidence to the contrary, this Court concludes that such discussions did not occur. Nevertheless, the absence of such meetings does not cause this Court to find that TDC exercised the requisite control. Section 1701.54 of the Ohio Revised Code expressly permits a board of directors to authorize corporate actions by way of written consent. DIC's Board of Directors utilized that method to approve the recapitalization/split-off transaction. Quite simply, unlike the Plaintiffs, this Court cannot infer nefariousness from acting in accordance with statutory authority.

Moreover, the cases cited by the Plaintiffs in support of their claim predicated upon piercing the corporate veil are factually distinguishable or otherwise inapposite. For instance, in *Carte Blanche (Singapore), Ltd. v. Diners Club Int., Inc.*, 758 F.Supp. 908, 917 (S.D.N.Y.1991), the court, in the course of applying New York law's equivalent of the second prong of the *Belvedere* test, held that "proof of a stripping of the assets of the subsidiary by the parent, motivated by a desire to render the subsidiary judgment proof, would constitute a fraud or wrong under [New York law]." *Id.* at 917 (internal quotation marks omitted). Herein, the evidence does not support the proposition that TDC stripped the assets of DIC in order to render it judgment proof. On the contrary, this Court has found that DIC received reasonably equivalent value for the assets it transferred as part of the recapitalization/split-off transaction. Plaintiffs cite *AT & T Global Information Solutions Co. v. Union Tank Car Co.*, 29 F. Supp. 2d 857 (S.D.Ohio 1988), for the proposition that "[w]hen the assets of a corporation are distributed to its shareholders leaving corporate debts unpaid, liability of the shareholders to a creditor, to the extent of the value of the assets received, is beyond question ... [and that any] such distribution of assets is deemed a fraud on creditors." *Id.* at 864 n. 8 (internal quotation marks and citation omitted). In *AT & T Global*, the plaintiffs, after entering into a consent decree with the EPA, agreeing to clean up a hazardous waste site located Granville, Ohio, initiated that litigation seeking to recover contribution under CERCLA from, among other entities, Vermont American Corporation. Plaintiffs contended that Vermont American was liable for the hazardous waste disposed of by its sub-subsidiary. In *AT & T Global*, Judge John

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Holschuh made the quoted statement in connection with explaining why it was not necessary to go through the formal process of piercing the corporate veil of Vermont American's subsidiary, which was dissolved and had nothing more than a paper existence before dissolution. *Id.* at 864. Herein, since the evidence would not support the finding that DIC is a dissolved corporation that had nothing more than a paper existence before dissolution, *AT & T Global* is distinguishable. In addition, the Plaintiffs have cited *Clinical Components, Inc. v. Leffler Industries, Inc.*, 119 WL 28 246 (Ohio App.1997), wherein the court reversed the grant of summary judgment in favor of the defendant on a piercing the corporate veil theory brought by plaintiff's receiver on behalf of its creditors. In particular, the court held that the evidence raised a genuine issue of material fact as to the first prong of the *Belvedere* test by virtue of the fact that the subsidiary had paid nearly $500,000 to the defendant for consulting services performed by five individuals, including two corporate insiders (the chairman of plaintiff's board and the owner of defendant's parent) who did not keep records of the services they had performed. There is no evidence of similar actions by insiders of DIC herein. Plaintiffs also cite *Danzinger v. Luse*, 103 Ohio St.3d 337, 815 N.E.2d 658 (2004), wherein the Ohio Supreme Court held, in the syllabus, that "[s]hareholders have a right at common law to inspect the records of a wholly owned subsidiary of the corporation in which they own stock when the parent corporation so controls and dominates the subsidiary that the separate corporate existence of the subsidiary should be disregarded." *Id.*, 815 N.E.2d at 659. The *Danzinger* court based its decision, in part, on the principle that courts should more readily grant a shareholder's request to inspect the books of a subsidiary of the corporation whose shares he owns, than they should impose liability upon a parent corporation for the obligations of its subsidiary. *Id.* at 340-41, 815 N.E.2d at 662. Since this litigation does not involve the request by a shareholder of TDC to inspect the books of DIC, *Danzinger* is inapposite.

***11** The Plaintiffs also argue that TDC is liable for DIC's debts, because TDC assumed those obligations. Without disputing the legal predicate that a corporation is liable for the debts of a subsidiary which it has assumed, this Court cannot agree with the Plaintiffs that the evidence supports the finding that TDC made such an assumption. This argument is based exclusively upon Plaintiffs' Exhibit 159, which is an email and memorandum which McSwiney, then General Counsel of TDC, sent on February 20, 2000, to Moertl, then employed by Plaintiffs as an in-house counsel. The purpose of that communication was for McSwiney to convince Moertl that DEMCO, DIC's successor, and TDC could not continue to fund the Settlement Agreement at the level that they had funded it in 1999. This Court does not find, based upon that Exhibit, that TDC expressly or impliedly assumed the liability of DIC and its successor DEMCO to pay the 46% share of the costs to remediate the Valleycrest Landfill, which DIC had agreed to bear. On the contrary, the clear purpose of McSwiney's communication was to convince Moertl and the Plaintiffs that DEMCO and TDC could not afford to contribute the sum the former was being called upon to pay, not a statement that TDC is taking it upon itself to assume the debts of DEMCO.

Based upon the foregoing, this Court concludes that the Plaintiffs have failed to establish their claim that DIC's corporate veil can be pierced or disregarded.

B. Fraudulent Conveyance

As indicated, the Plaintiffs contend that the recapitalization/split-off transaction constituted a fraudulent conveyance, in violation of § 1336.04(A) of the Ohio Revised Code, which provides:

> (A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor;
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:
> (a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;
> (b) The debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

As an initial matter, the term "debtor" is defined by § 1336.01(F), as "a person who is liable on a claim." DIC is the "debtor" under § 1336.04(A), since it had

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entered into the Settlement Agreement with the Plaintiffs, obligating itself to indemnify them. Above, this Court has concluded that TDC cannot be held liable for the debts of DIC under a piercing the corporate veil theory or because it (TDC) expressly or impliedly assumed liability for those debts. Therefore, TDC is not liable to the Plaintiffs and is not a "debtor" under the statute. Since § 1336.04 addresses only transfers made by debtors, the transfers made by TDC as part of the recapitalization/split-off transaction are of no moment to Plaintiffs' claims under that statutory provision.

***12** In their Post-Trial Brief, Plaintiffs contend that they have proved that the recapitalization/split-off transaction violated § 1336.04(A), because it was done with "actual intent to hinder, delay, or defraud any creditor of the debtor" (§ 1336.04(A)(1)); was made without DIC receiving a reasonably equivalent value in exchange for the transfer and when it "was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction" (§ 1336.04(A)(2)(a)); and was made without DIC receiving a reasonably equivalent value in exchange for the transfer and when it "intended to incur, or believed or reasonably should have believed that [it] would incur, debts beyond [its] ability to pay as they became due" (§ 1336.04(A)(2)(b)). *See* Doc. # 484 at 10. As a means of analysis, the Court will initially discuss the Plaintiffs' theory predicated upon § 1336.04(A)(1), before turning to their assertion that the transaction violated § 1336.04(A)(2), addressing its two subparts together.

1. Section 1336.04(A)(1)

Section 1336.04(B) contains a list of factors which a court may consider when determining whether the debtor, in this instance DIC, acted with "actual intent to hinder, delay, or defraud any creditor of the debtor" under § 1336.04(A)(1).

> (B) In determining actual intent under division (A)(1) of this section, consideration may be given to all relevant factors, including, but not limited to, the following:
> (1) Whether the transfer or obligation was to an insider;
> (2) Whether the debtor retained possession or control of the property transferred after the transfer;
> (3) Whether the transfer or obligation was disclosed or concealed;
> (4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;
> (5) Whether the transfer was of substantially all of the assets of the debtor;
> (6) Whether the debtor absconded;
> (7) Whether the debtor removed or concealed assets;
> (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
> (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;
> (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

Those eleven factors have been referred to as the "badges of fraud." *See e.g., Gevendon v. Ivey*, 172 Ohio App.3d 567, 581-82, 876 N.E.2d 604, 616 (2007). Of course, it is not necessary for a creditor to establish all eleven "badges of fraud," in order to prevail on a claim under § 1336.04(A)(1). *Id.* at 582, 876 N.E.2d at 616. Recently, the Sixth Circuit noted that, although the ultimate burden is upon the creditor to establish that a conveyance was fraudulent, "consideration of the relevant factors *may* give rise to an inference of fraudulent intent that shifts the burden to the defendant to show that the conveyance was made for fair consideration." *In re Fisher*, 992 So.2d 411, 2008 WL 4569945 (6th Cir.2008) at *5 (emphasis in the original). Herein, Plaintiffs argue that they have demonstrated the existence of six statutory badges of fraud and one of a non-statutory variety. *See* Doc. # 484 at 16-17. As a means of analysis, this Court will initially decide whether the evidence established any one or more of all of the alleged statutory or non-statutory badges of fraud, following which it will turn to the question of whether the Plaintiffs have proved, as a result, that the transfers by DIC were made with the actual intent to hinder, delay or defraud TDC.

***13** *First*, the Plaintiffs argue that many of the former shareholders were insiders. The term "insider" is defined by § 1336.01(G) of the Ohio Revised Code, which provides:

> (G) "Insider" includes all of the following:

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* * *

(2) If the debtor is a corporation, any of the following:
(a) A director of the debtor;
(b) An officer of the debtor;
(c) A person in control of the debtor;

* * *

(f) A relative of a general partner, director, officer, or person in control of the debtor.

* * *

(4) An affiliate, or an insider of an affiliate as if the affiliate were the debtor ....

Given that, among the former shareholders, only John Danis was a director, officer or person in control of DIC, the debtor herein, he alone is an insider of DIC, as that term is defined by § 1336.01(G) (2). [FN20] Nevertheless, the Plaintiffs contend that other former shareholders were insiders, because TDC and the subsidiaries of DIC are "affiliates" of DIC. That term is defined by § 1336.01(A) of the Ohio Revised Code, which provides in pertinent part:

FN20. The statute, § 1336.01(G)(2), defines insiders of the "debtor." Since the Plaintiffs have not established that TDC was a debtor, as a result of being obligated to indemnify them for the Valleycrest Landfill, this Court rejects their assertion that the status of a number of the former shareholders as officers of directors of TDC makes them insiders of the debtor.

(A) "Affiliate" means any of the following:

* * *

(2) A corporation twenty per cent or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds with power to vote, twenty per cent or more of the outstanding voting securities of the debtor ....

As an initial matter, since DIC did not own at least 20% of the shares of TDC, the latter is not an affiliate of DIC. [FN21] Thus, the fact that John Danis was Senior Vice President and a member of the Board of Directors of TDC, while Charles Danis, Jr., Peter Danis, Christopher Danis and William Klatt were members of TDC's Board of Directors, does not demonstrate that any one or more or all of them of them was an insider of DIC. However, in addition to being an insider because he was a member of DIC's Board of Directors, John Danis was also an insider of DIC by virtue of his position as COO of DCC, an affiliate of DIC, because that corporate entity owned more than 20% of the shares of DCC. Accordingly, this Court finds that John Danis, alone among the former shareholders and relatives of former shareholders, was an insider of DIC.

FN21. Although the opposite is true, DIC is an affiliate of TDC, that is of no consequence in this litigation, since TDC is not a debtor under § 1336.04(A).

Second, the Plaintiffs argue that they have established another badge of fraud by demonstrating that the Defendants failed to disclose the transfers that were made as a result of the recapitalization/split-off transaction, before the Plaintiffs and DIC entered into the Settlement Agreement on December 31, 1997. This Court cannot agree. On the contrary, it has found, as a matter of fact, that Defendants did not conceal that transaction from Plaintiffs. Rather, the Defendants revealed the essential details of the recapitalization/split-off to the Plaintiffs before Plaintiffs and DIC executed the Settlement Agreement. In support of the proposition that the Defendants failed to disclose the recapitalization/split-off transaction, Plaintiffs rely upon testimony from Moertl and Forney. [FN22] For instance, Moertl testified that McCann told her that Thomas Danis, rather than John Danis, would be in charge of negotiations between the parties concerning Clarkco and the Valleycrest Landfill, without telling her the details of the recapitalization/split-off transaction. Moertl testified that McCann told her that John Danis would no longer be involved in these matters, because he had taken over the building construction division. In addition, Forney testified that he was informed about a reorganization of TDC, but assumed it was just a name change. He denied that anyone had informed him that the reorganization had been a leveraged buyout of TDC that had removed assets from it. Notwithstanding that testimony, this Court has found that Defendants had disclosed the essential details of the recapitalization/split-off transaction before the Settlement Agreement was executed, rather than concealing same. For instance, on October 15, 1997, the day after the recapitalization/split-off transaction,

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Logsdon sent Forney, Rogan and others a copy of an article from the Dayton Daily News, which reported that Thomas Danis would be the majority shareholder of TDC, which would retain the real estate and water and wastewater construction units, along with Clarkco, and that John Danis would become the majority shareholder of DBCC. The article also indicated that the other Danis family members who had owned shares of TDC had sold them. Therefore, the day after the recapitalization/split-off transaction, Forney and Rogan had been furnished the essential details of that transaction, that Thomas Danis was heading TDC, that the other shareholders of the entity had sold their shares in it and that John Danis would be the majority shareholder and operate DBCC as an entity separate from TDC. The fact that the newspaper article did not disclose the amount paid to the former shareholders, or which of those individuals would participate in the ownership of DBCC along with John Danis, does not prevent this Court from finding that the recapitalization/split off transaction was disclosed to the Plaintiffs long before they executed the Settlement Agreement with DIC. Moreover, McCann testified that, before the Settlement Agreement was executed, he told Moertl that TDC was going to undergo a leveraged buyout, as a result of Thomas Danis coming back to the company and purchasing the interests of the other shareholders. [FN23] McCann also testified that he was at a meeting with Thomas Danis and Rogan, during which Thomas Danis told the latter the transaction had closed and that he owned the company, along with Clarkco. Indeed, Thomas Danis and Rogan ultimately negotiated the Settlement Agreement. In addition, Thomas Danis testified that he had told Rogan about the recapitalization/split-off transaction, shortly after it closed, in the following manner:

> FN22. Plaintiffs also rely on testimony from Rogan; however, he merely indicated that he did not remember whether anyone had mentioned the term leveraged buyout to describe what had happened to TDC or that the company had purchased the shares of 10 of its 11 shareholders. Rogan also testified that he would not deny it if someone said that he or she had so informed him (Rogan).
>
> FN23. Plaintiffs contend that McCann's testimony in that regard is not credible, since it is unlikely that a sophisticated and experienced corporate executive like McCann would ever voluntarily share sensitive internal financial information relating to his employer. This Court cannot agree, since McCann's testimony was internally consistent and reasonable. Moreover, it bears emphasis that none of Plaintiffs' employees entertained the serious belief that DIC's and their collective share of the cost of remediating the Valleycrest Landfill would approach its present scale. Therefore, it is reasonable to infer that the question of whether DIC would be able to pay the parties' joint obligation was not an important issue to Moertl, Rogan and Forney.

> ***14** My memory again is that I told him that, effectively, I'd done a leveraged buyout, that we were--we had separated the company apart. John Danis and other members were taking the building group. The rest of the family had been bought out with cash and that I was the majority shareholder of the remaining three units of the, quote, old Danis Industries.

Doc. # 508 at 87. Notably, Rogan did not contradict that testimony.

Third, Plaintiffs argue that another badge of fraud is established by the fact that DIC had been sued before it entered into the Settlement Agreement. DIC and Plaintiffs had been in a long-term dispute over the obligation of the former to indemnify the latter in accordance with the parties' agreement in 1983 that DIC would provide indemnification for liabilities arising out of the Valleycrest Landfill. Although it is indisputable that DIC and the Plaintiffs had been engaged in litigation concerning the liability of the former to indemnify the latter (*see Danis Industries Corporation v. WMX Technologies, Inc.*, Case No. 3:95cv042 (S.D.Ohio), [FN24] this Court does not consider that fact to constitute a badge of fraud in this litigation. *DIC* initiated that lawsuit, rather than being sued, in an effort to obtain a declaratory judgment concerning its obligation to indemnify Plaintiffs.

> FN24. After DIC had initiated that lawsuit, Plaintiffs filed suit in Hamilton County Common Pleas Court, seeking an order from that court, compelling DIC to arbitrate the dispute between the parties concerning DIC's obligation to indemnify them.

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Fourth, the Plaintiffs argue that another badge of fraud, established in this litigation, is that the consideration received by TDC and DIC was not reasonably equivalent to the value of the assets transferred by those corporate entities. As is indicated above, one of the badges of fraud, identified by § 1336.04(B)(8), is "[w]hether the value of the consideration received by the debtor was reasonably equivalent to the value of the assets transferred or the amount of the obligation incurred." This Court has found, as a matter of fact, that the value of the consideration received by DIC was reasonably equivalent to the value of the assets it transferred and the amount of the obligations it incurred. Based upon that finding of fact, the reasons in support of which are set forth below, in connection with the Plaintiffs' contention that the recapitalization/split-off transaction constituted a fraudulent transfer in violation of § 1336.04(A)(2), this Court rejects Plaintiffs' assertion that they have established this alleged badge of fraud.

Fifth, Plaintiffs also contend that DIC and TDC were insolvent at the time the transfers were made under the recapitalization/split-off transaction and when the Settlement Agreement was executed, or became insolvent shortly thereafter. Section 1336.04(B)(9) identifies one badge of fraud as being "[w]hether the *debtor* was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred." (emphasis added). Since TDC was not the debtor, it is not material whether it was insolvent on the day of the recapitalization/split-off transaction, when the Settlement Agreement was executed or shortly after either of those events. Accordingly, the Court limits its discussion to the question of whether DIC was insolvent or became insolvent shortly after the recapitalization/split-off transaction, to which it now turns.

***15** The Plaintiffs argue that DIC was either insolvent on October 14, 1997, the date of the recapitalization/split-off transaction, or became insolvent on December 31, 1997, when it signed the Settlement Agreement, under which it agreed to indemnify the Plaintiffs for any liability arising out of the Valleycrest Landfill. Section 1336.02(A)(1) provides that "[a] debtor is insolvent if the sum of the debts of the debtor is greater than all of the assets of the debtor at a fair valuation." The Court begins by determining the value of DIC's assets after the recapitalization/split-off transaction.

This Court need not engage in lengthy analysis of the value of DIC's assets after October 14, 1997, since Plaintiffs' expert, Nicholson, has opined that their value was $18.2 million. *See* Plaintiffs' Post-Trial Brief (Doc. # 484) at 45-46 (summarizing Nicholson's testimony). To reach that opinion, Nicholson concluded that Clarkco was valueless. *Id.* Below, however, this Court finds that the value of Clarkco in October, 1997 was $19.76 million. Therefore, accepting for present purposes Nicholson's valuation of DIC's assets, except for his valuation of Clarkco, this Court finds that the minimum value of DIC's assets was $37.96 million. [FN25]

> FN25. The Court stresses that this figure represents the *minimum* value of DIC's assets. Defendants have argued and presented evidence that would support a finding that those assets had a much greater value. However, since this Court finds below that DIC's debts were much less than $37.96 million, it is not necessary to decide whether DIC's assets were worth more than that in October, 1997.

Contingent environmental liabilities are the only debts of DIC upon which the parties have focused. In addition to the Valleycrest Landfill, the Court assumes for present purposes that DIC also became responsible for the environmental liabilities arising out of the Tremont and Cardington Road Landfills. Below, this Court finds that the most reasonable estimate of the future costs for those two Landfills is $4 million, pretax. As to the Valleycrest Landfill, this Court has found above that, in October, 1997, the most reasonable estimate of DIC's future share of the costs to remediate that hazardous waste site would not exceed $12 million, a sum that would be paid over many years. Thus, the most reasonable estimate of DIC's contingent environmental liabilities is, at most, $16 million, well below the value of its assets, $37.96 million. The Court now explains it factual finding.

Much evidence was introduced at trial concerning the most reasonable estimate of DIC's share of the future costs of remediating the Valleycrest Landfill. For instance, Gayle Koch ("Koch"), Defendants' environmental cost estimate expert, testified that such an estimate was $9.2 million. Although her testimony was persuasive and certainly supports this Court's factual finding, the Court does not base its finding on

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that testimony alone. Rather, this Court places primary reliance on an estimate of costs for the remediation of that Landfill conducted by Forney on October 24, 1997, 10 days after the recapitalization/split-off transaction was closed. Forney, who manages closed waste sites for Plaintiffs for the Mideast region which includes Ohio, gave a best case (i.e., least expensive), most likely (the mid-range) and worst case (most expensive) estimates, of total expenses to clean up the Landfill, of $15.102 million, $18.342 million and $ 23.742 million, respectively. [FN26] Forney assigned a 10% probability that the worst case would occur and a 90% probability that one of the other two would happen. Since Forney's estimate was for the total expense of remediating that hazardous waste site, it must be reduced to reflect the fact that DIC would not be called upon to pay that entire cost. Rather, as essentially being the successor to the operator of the Landfill, DIC would have been responsible for only about 50% of that sum, or about $12 million. [FN27] In other words, DIC would be required to pay less than $12 million, *if* Forney's worst case estimate for remediating the Valleycrest Landfill came to pass.

FN26. The Plaintiffs have admitted that Forney's October 24, 1997, estimates remained in effect on December 31, 1997, when the Plaintiffs and DIC executed the Settlement Agreement.

FN27. Finding that DIC would have been responsible for about 50% of the costs incurred to clean up the Valleycrest Landfill is supported by other evidence in the record. In November, 1997, Plaintiffs, DIC and the VLSG agreed that Plaintiffs and DIC would be jointly liable for 46% of the costs of remediating the Landfill. In February, 1997, Forney estimated that DIC would be responsible for between 41% and 51% of those costs.

***16** This Court finds Forney's estimate to be the most reasonable one to follow for a number of reasons. For instance, he did not engage in that exercise to use his estimates in litigation; rather, he prepared them for his employer to use in its business. Therefore, there is no risk that the estimates were colored by the need to convince an opposing party or the factfinder in a lawsuit. For that reason, this Court has declined to utilize the Hull Report, which was commissioned by litigation counsel for the Danis entities' use in settling their litigation with Travelers Insurance Company, over the obligation of the latter to indemnify DIC for the costs to remediate the Valleycrest Landfill. In addition, Forney was exceedingly well qualified to make his estimates, given his experience with Plaintiffs in managing closed waste sites. [FN28] Finally, Forney's estimates are supported by other irrefutable evidence. When he made those estimates in October, 1997, no one had suggested that the remedy for the Valleycrest Landfill would involve a barrel excavation and removal. On the contrary, the presumptive remedy for that Landfill was containment. In addition, Forney's estimates are fully supported by the fact that, in August, 1997, Plaintiffs had offered to settle their litigation with DIC over the latter's obligation to indemnify them, in exchange for DIC's agreement to pay for their joint share of the costs incurred to clean up the Landfill, up to an amount of between $7 and $8.5 million.

FN28. For that reason, the Court has declined to adopt the estimates given by John Danis that it could cost up to $50 or $100 million to clean up the Valleycrest Landfill, if a barrel removal were required. John Danis, by no stretch of the imagination, had equal experience with Forney in the costs of cleaning up hazardous landfills. In addition, since the records of the operation of the Valleycrest Landfill had been transferred to Waste Management in 1983, Forney had greater access to information as to the streams of waste that had been disposed of at that facility.

Accordingly, since the Court has found that DIC debts did not exceed its assets either on October 14, 1997, or on December 31, 1997, it concludes that it was not insolvent at the time of the transfer or shortly thereafter.

Sixth, the Plaintiffs contend that they have established another statutory badge of fraud, because the transfers were made shortly before DIC incurred a substantial debt through the execution of the Settlement Agreement. In this argument, Plaintiffs also mention TDC, a non-relevant entity since it was not the debtor. The relevant statutory provision, § 1336.04(B)(10), defines this badge of fraud as, "[w]hether the transfer occurred shortly before or shortly after a substantial

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debt was incurred." Although that statute is not expressly limited to the debtor incurring a substantial debt, this Court concludes that its only reasonable interpretation is limited to instances when the debtor has incurred such debt. Otherwise, this badge of fraud would apply to every allegedly fraudulent conveyance, since a substantial debt will always be incurred either shortly before or after a transfer. Herein, two and one-half months passed between the date of the transfer, the recapitalization/split-off transaction, and the incurrence of the debt, the execution of the Settlement Agreement. Moreover, Ohio courts have applied the badge of fraud described in § 1336.04(B)(10) in the context of the debtor incurring a debt. *See e.g., Fiyalko v. Howard,* 2001 WL 1479235 (Ohio App.2001); *Huntington Nat. Bank v. Ginn,* 1996 WL 736898 (Ohio App.1996); *Haul Transport of Va., Inc. v. Morgan,* 1995 WL 328995 (Ohio App.1995). Accordingly, this Court focuses solely on the question of whether DIC made transfers shortly before incurring a substantial debt as a result of executing the Settlement Agreement.

***17** Section 1336.04(B)(10) provides that a court may find a badge of fraud, if "the transfer occurred shortly before or shortly after a substantial debt was incurred." This Court cannot find that DIC transferred assets, in October, 1997, as part of the recapitalization/split-off transaction, either shortly before or shortly after it incurred a substantial debt. As indicated, Plaintiffs contend that DIC incurred such a debt when it signed the Settlement Agreement on December 31, 1997. By executing that Agreement, DIC agreed to indemnify Plaintiffs for the costs of remediating the Valleycrest Landfill. However, DIC had assumed that obligation more than 14 years earlier, when it agreed to indemnify Plaintiffs for environmental liabilities related to that Landfill, as part of the transaction whereby DIC sold IWD and NSL to Waste Management. Although "shortly after" is not defined by statute, 14 years does not come within any reasonable definition of that term.

Nevertheless, the focus of this argument by Plaintiffs is that DIC was stripped of assets, shortly before executing the Settlement Agreement by which it incurred the substantial obligation of indemnifying Plaintiffs for the cleanup of the Valleycrest Landfill. This Court rejects Plaintiffs' argument in that regard. For reasons set forth below, this Court finds that, although DIC transferred out assets valued at $10.902 million in October, 1997, as part of the recapitalization/split-off transaction, it received assets with the value of $17.36 million, at that time. A net gain of more than $6.45 million in the value of assets transferred into and out of it, as a result of one transaction, does not demonstrate that an entity has been stripped of its assets.

Moreover, to the extent that the Plaintiffs seek to have the Court draw an inference that the Defendants acted with the actual intent to hinder, delay or defraud them, by transferring assets from DIC, knowing that it faced an enormous liability for the Valleycrest Landfill, this Court declines to draw such an inference. While this Court agrees with the Plaintiffs that, before October, 1997, the Defendants were aware that DIC would be liable for a portion of the costs incurred to clean up that hazardous waste site, the Court has found that the amount of that liability was $12 million to be paid over an extended period of time. As is indicated above, Plaintiffs themselves have removed all doubt from this finding, given that, in August, 1997, they agreed to settle their lawsuits with DIC, concerning the latter's obligation to indemnify them for the Valleycrest Landfill, by capping DIC's obligation to pay for that clean-up at $7 to $8.5 million. Plaintiffs, who had obtained all of DIC's records pertaining to the operation of that Landfill in 1983, would not have made such an offer, if, in August, 1997, it was possible that the remedy of barrel removal would have been imposed, with its concomitant skyrocketing costs. Therefore, the Court declines to draw the requested inference. [FN29]

> FN29. As part of this argument, Plaintiffs have cited evidence in the record in which environmental liabilities were discussed and/or one or more of the Defendants said or was told that environmental obligations had to be managed or TDC had to get out of the waste business. None of that evidence has caused this Court to find the inference requested by the Plaintiffs. The Court has found that neither the former shareholders nor any other Defendant agreed to the recapitalization/split-off transaction, in order to shield the former shareholders' investment in TDC and its subsidiaries from DIC's liability for the Valleycrest Landfill.

***18** Accordingly, the Court concludes that the Plain-

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tiffs have not established this alleged badge of fraud.

Seventh, the Plaintiffs argue that events which occurred after the recapitalization/split-off transaction and various corporate actions demonstrate that DIC acted with actual intent to hinder, delay or defraud the Plaintiffs. For instance, the Plaintiffs point out that, during July, 1999, about 21 months after that transaction had occurred, Clarkco was transferred from DIC to a newly formed subsidiary of TDC. Plaintiffs point out that the stated consideration for that transfer was the payment of $300,000 in cash, and a note of $5,350,000. The following month, the remaining asset of DIC's subsidiary DCC (DHCC) was transferred to TDC in exchange for the latter's assumption of DCC's liabilities. Plaintiffs contend that, as a consequence of those transactions, DIC retained its environmental liability, while having its remaining, valuable assets stripped away. *See* Doc. # 484 at 72-73.

Accepting the Plaintiffs' premise that what DIC received in exchange for those assets ($300,000 in cash, a note for $5,350,000 and extinguishing DCC's liabilities) was appreciably less valuable that the assets which had been transferred from DIC, this Court cannot find that these transfers, occurring about 21 months after the recapitalization/split-off transaction occurred, support Plaintiffs' assertion that the purpose of the October, 1997, transaction was to hinder, delay or defraud the Plaintiffs or any other creditor of DIC. As an initial matter, it bears emphasis that the Plaintiffs' claim under § 1336.04(A) is predicated on the theory that the recapitalization/split-off transaction was a fraudulent conveyance. The Plaintiffs have not based that claim on the theory that the transactions occurring during July and August, 1999, constituted such conveyances. Rather, Plaintiffs rely on those transactions solely as circumstantial evidence in support of their theory that the October, 1997, transaction was a fraudulent conveyance. The evidence causes this Court to decline to draw that inference. Thomas Danis was the only shareholder of TDC, the parent of the debtor DIC, who retained that status after the recapitalization/split-off transaction. TDC's other shareholders at the time of the transaction, the former shareholders, did not participate in the transactions occurring during the summer of 1999, given that they were no longer involved with TDC, DIC or any related entity. According to Plaintiffs' theory, the former shareholders were the true beneficiaries of the alleged fraudulent conveyance in 1997, since they benefitted from the recapitalization/split-off transaction by having their shares of TDC and related entities redeemed in exchange for other assets. [FN30] Nevertheless, the Plaintiffs contend that, about 21 months after that transaction, Thomas Danis, who under Plaintiffs' theory had not benefitted from same, rather than the former shareholders, its beneficiaries, engaged in other transactions that demonstrate that, in October, 1997, he had acted with the intent to hinder, delay or defraud the Plaintiffs. While the purpose of the 1999 transactions may have been to prevent DIC's assets from being used to pay its and Plaintiffs' joint obligation for the remediation of the Valleycrest Landfill, [FN31] this Court cannot infer that they support Plaintiffs' theory that the recapitalization/split-off transaction occurred for that purpose.

FN30. The Plaintiffs are seeking to have those assets restored to TDC and DIC in this litigation, so that they can execute on them to pay for the portion of the costs to remediate the Valleycrest Landfill that DIC has not paid.

FN31. By 1999, the costs of remediation had increased greatly, because the remedy of an excavation and removal of barrels of hazardous waste had been imposed upon the VLSG.

***19** In support of their assertion that they have established the existence of a sufficient number of badges of fraud to presume fraud, Plaintiffs have cited *Cresho v. Cresho*, 97 Ohio App.3d 5, 646 N.E.2d 183 (1993), wherein the Ashtabula County Court of Appeals held that the trial court had erroneously entered judgment for the defendant, the plaintiff's ex-husband, in her fraudulent conveyance action, arising out of his post-divorce conveyance of real property to his mother. Since that litigation was predicated upon a version of § 1336.04 [FN32] which was repealed in September, 1990, long before the occurrence of the alleged fraudulent conveyance in this litigation, that decision is not particularly persuasive.

FN32. The version of § 1336.04 then in effect provided:
Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the

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> conveyance is made or the obligation is incurred without a fair consideration.
> 97 Ohio App.3d at 8-9, 646 N.E.2d 185.

In addition, the only badge of fraud established in this litigation is the fact that John Danis was an insider by virtue of being on the Board of Directors of DIC and the COO of DCC, an affiliate of DIC. The Plaintiffs have not cited, nor has research discovered any decision in which a court held that insider status of one of many participants in a transaction alleged to be fraudulent was sufficient to presume fraud and shift the burden of proof to the Defendants to prove that the transfer was not such. *See e.g., Stephens v. CTI Audio. Inc.*, 2004 WL 2914970 (Ohio App.2004) (noting that, after the creditor has established a sufficient badges of fraud to presume fraud, the burden of proof shifts to the debtor to prove that the transfer was not fraudulent); *Atlantic Veneer Corp. v. Robbins*, 2002 WL 31230338 (Ohio App.2002) (same). Even if this Court had concluded that the Plaintiffs had established a sufficient number of such badges, it would conclude the Defendants met their burden in that regard, based upon its finding of fact that the purpose of the recapitalization/split-off transaction was to resolve for all time the intra-family dispute between the members of the B.G. Danis, Jr., family, which was effecting their relationships with their cousins, the members of the Charles Danis family. The Court explains that finding of fact by reviewing those relationships.

For a number of years before the recapitalization/split-off transaction occurred on October 14, 1997, serious discord existed among many family shareholders in TDC, especially within the B.G. Danis, Jr., family. For instance, prior to the resignation of Thomas Danis from TDC in 1993, his sibling shareholders considered him to have been less than forthright with them and other shareholders with respect to corporate business and/or to have ignored their views on company business. Indeed, some of his sibling shareholders were of the opinion that he had lied to them. The Charles Danis family shareholders were aware of the intra-family conflict among their cousins. Their general perception was that Thomas Danis' siblings did not trust him and that his siblings suspected ulterior motives behind propositions he supported, all of which inappropriately affected their decision-making as shareholders. The intra-family dispute among the B.G. Danis, Jr., family and its affect on members of the Charles Danis family are demonstrated by the crisis that struck TDC in 1990 or 1991, concerning a dispute with its bonding company, Seaboard. Ultimately, Seaboard refused to write further bonds, which resulted in the construction subsidiaries of TDC no longer being able to bid on jobs which required bonds. The dispute was finally resolved, with, among other conditions, the shareholders being required to contribute an additional $5 million as capital. A number of shareholders thought that actions by Thomas Danis had caused the dispute with Seaboard and the need for shareholders to contribute additional capital, with two shareholders, Susan Grossman and Richard Danis, refusing to make their contributions. [FN33]

> FN33. As a result of those refusals, Thomas Danis paid the capital contribution owed by his sister, while John Danis contributed for his brother.

***20** In 1992, Thomas and John Danis unsuccessfully attempted to purchase the shares owned by their siblings. In 1993, an entity named Bristol Industries ("Bristol") offered to purchase 100% of the shares of TDC for $32 million. Consideration of that proposal was impaired by family disputes. For instance, Maryanna Klatt initially opposed the proposed transaction, although she ultimately supported the offer, because she concluded that it would be beneficial to separate business from family concerns. She was not, however, able to have a rational discussion concerning the merits of Bristol's offer with her brother, Thomas Danis. As a consequence, John Danis had to act as a go-between for his cousins. The high level of tension between Maryanna Klatt and her brother, which had developed during consideration of Bristol's offer, remained for some time thereafter. Ultimately, all shareholders of TDC approved the offer, except for Christopher Danis, who opposed it because he wanted to remain employed by TDC, and Susan Grossman, who opposed it for sentimental reasons related to the then recent death of her father, B.G. Danis, Jr. [FN34]

> FN34. The sale to Bristol did not go forward due to its concerns about, *inter alia*, the uncertainty of possible environmental liabilities of TDC and its subsidiaries.

After the proposed transaction with Bristol failed to close, Thomas Danis offered to buy all of the shares owned by his siblings and cousins, for an amount

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greater than that for which they had agreed to sell their shares to Bristol. Since that offer was rejected by four of his siblings and John Danis, it did not go forward. The rejection of Thomas Danis' offer had a significant negative impact on several of TDC's key employees, since they could not understand why the shareholders had accepted Bristol's offer, while rejecting the more generous offer from their brother or cousin.

In May, 1993, Thomas Danis resigned from his position as CEO of TDC. He decided to leave that position, because he had grown tired of the verbal abuse and criticism leveled at him by his siblings and because, as he explained at trial, he wanted to have Thanksgiving dinner without it turning into "a very unpleasant board meeting." Doc. # 507 at 159. In other words, he wanted to separate the family from the business. His departure had a negative impact on TDC, because he supplied the strategic vision for the direction of TDC, which the other shareholders had no choice but to ultimately accept. In his absence, while the shareholders had greater input into the direction of the company, no one shareholder was able to say that the company would move in a particular direction and cause the other shareholders to agree and to fall in line.

The departure of Thomas Danis from TDC negatively affected that entity in other regards. For instance, after he had left, a number of shareholders suggested that they proceed cautiously and adopt a no growth or slow growth policy. Such a policy had a negative impact on a number of the top managers of TDC, as well as its subsidiaries, because their compensation was partially based upon the growth of the company. Moreover, his departure did not resolve the tension among the shareholders. That tension was demonstrated by the heated discussion during a shareholders meeting between Christopher Danis, a member of the B.G. Danis, Jr., family, and a cousin about the discord in that family. As a consequence, the members of the family agreed to meet with Dr. Rick Day ("Day"), a psychologist, who, in November, 1995, met with the family members and interviewed them individually. In his report, Day indicated that most if not all of the members of that family indicated that business and family should be separated. He recommended that, in order to accomplish that goal, the shareholders retain a financial consultant to advise them as to the value of TDC. As a result, Arthur Andersen was ultimately retained to advise the shareholders. Arthur Andersen's activities were managed by Les Banwart ("Banwart"), an expert in counseling closely-held and family businesses. After meeting with the shareholders and key members of management, who were not shareholders, Banwart concluded that family strife was negatively affecting TDC and that the status quo was not an option. In addition, he recommended that the family take steps to reorganize TDC, a recommendation upon which the shareholders could not agree.

***21** In finding as a matter of fact that the purpose of the recapitalization/split-off transaction was to address family conflicts and to separate family from business, this Court rejects the Plaintiffs' assertion that the transaction occurred in spite of the family conflict, not because of it. While not challenging that dysfunction existed in the Danis family, Plaintiffs argue that those problems did not affect the performance of TDC. For instance, they point to evidence establishing that TDC's financial performance improved in 1995, 1996 and 1997, three of the years between Thomas Danis' departure from TDC and the occurrence of the recapitalization/split-off transaction. However, this Court is convinced by the evidence discussed above that the purpose of that transaction was as it has found. The Plaintiffs' argument ignores the fact that the individual shareholders of TDC agreed to the recapitalization/split-off transaction. They decided to sell their shares of TDC in order to separate family from business, not in order to improve the financial condition of TDC. [FN35]

FN35. Plaintiffs also argue that the former shareholders' fraudulent intent is shown by the fact that their agreement to sell their shares to Thomas Danis constituted an abrupt change in their posture of refusing to permit him to control the company. Plaintiffs argue that family discord and strife were the reasons why the former shareholders would not sell to Thomas Danis, rather than a reason for doing so. The Plaintiffs contend that this is evidence that the former shareholders were willing to sell out to their brother or cousin, Thomas, because they feared the environmental liabilities facing DIC. This Court does not agree. It bears emphasis that the recapitalization/split-off transaction occurred after Arthur Andersen had informed all shareholders of TDC that, due to family strife, the status quo was not an option. Moreover, to accept Plaintiffs' argument in

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> this regard, the Court would be compelled to conclude that Thomas Danis was willing to sacrifice his financial security, by retaining ownership of TDC, in order to ensure that of his siblings, with whom he had battled over company matters for a number of years.

Accordingly, this Court finds that the Defendants did not act with the actual intent to hinder, delay or defraud TDC. Therefore, Plaintiffs cannot prevail on their fraudulent conveyance claim predicated on § 1336.04(A)(1).

2. Section 1336.04(A)(2)

Under this statutory provision, a transfer is constructively fraudulent, if, among other requirements, the debtor does not receive reasonably equivalent value. For reasons which follow, this Court finds that DIC did receive reasonably equivalent value for the assets it transferred as part of the recapitalization/split-off transaction.

Herein, since DIC, rather than TDC, was the debtor, it does not matter whether TDC received reasonably equivalent value for the assets it transferred as a result of the recapitalization/split-off transaction. As to DIC, this Court has found, as a matter of fact above, that the consideration it (DIC) received as a result of the recapitalization/split-off transaction was reasonably equivalent to the value of the assets transferred as a result of that transaction. As a means of explaining that finding of fact, this Court initially sets forth the legal standards which govern its analysis.

In a case decided under § 1336.04(A)(2), the Sixth Circuit noted that, "[i]n assessing whether a challenged transfer is supported by reasonably equivalent value, courts generally compare the value of the property transferred with the value of that received in exchange for the transfer." *In re Fordu*, 201 F.3d 693, 707 (6th Cir.1999). In making that comparison, this Court, in accordance with the parties' assertions (*see e.g.*, Doc. # 484 at 22-23; Doc. # 488 at 12) and with *In re Fordu*, has "collapsed" the transaction and, therefore, has considered the net effect of all transfers both into and out of DIC. Thus, Plaintiffs' argument to the contrary notwithstanding, this Court has considered only the transfers by DIC, since it is the debtor. [FN36] *See In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479, 484 (4th Cir.1992) ("[P]roper focus is on the net effect of the transfers on the debtor's estate....") (cited with approval by the Sixth Circuit in *Fordu*, 201 F.3d at 707). As is suggested by the language utilized in § 1336.04(A)(2) (i.e., "reasonably equivalent value in exchange for the transfer or obligation"), "[f]air equivalence only requires that the value of the consideration be reasonably equivalent rather than exactly equivalent in value to the property transferred or obligation assumed." *In re O'Day Corp.*, 126 B.R. 370, 393 (Bankr.D.Mass.1991) (applying earlier version of Massachusetts' adaptation of the Uniform Fraudulent Conveyance Act).

> FN36. This Court rejects the Plaintiffs' assertion that liability can be imposed upon TDC, for DIC's liability under the Settlement Agreement, under theories of piercing the corporate veil and implied assumption of that liability. Consequently, the Court declines to follow Plaintiffs' suggestion that it collapse the entire recapitalization/split-off transaction, rather than merely collapsing the assets transferred into and out of DIC. Since this Court will consider only the assets transferred into and out of DIC, it need not attempt to value the assets that were transferred into and out of TDC.

***22** As part of the recapitalization/split-off transaction, DIC lost its subsidiary DBCC, which, based upon the statement in Plaintiffs' Post-Trial Brief (Doc. # 484 at 26), the Court has found was valued at $6.9 million in October, 1997. [FN37] In addition, DIC paid $1.45 million to redeem its debentures owned by some of the former shareholders and $2.552 million to redeem its preferred shares owned by such individuals. Thus, as a result of the recapitalization/split-off transaction, DIC transferred out assets valued at $10.902 million.

> FN37. Plaintiffs' statement concerning the $6.9 million value of DBCC was predicated upon testimony by Nicholson, which, in turn, was based entirely upon the value placed on of that entity by the participants of the recapitalization/split-off transaction as a result of their arms length negotiations. Defendants' expert witness, Gartrell, testified that DBCC was worth $8.924 million. It is axiomatic that under Ohio law the market value of property is the amount that a willing buyer would pay a willing seller for same. *See e.g., Chicago*

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> *Title Ins. Co. v. Huntington Nat'l Bank*, 87 Ohio St.3d 270, 274, 719 N.E.2d 955, 960 (1999).

To fund its role in the recapitalization/split-off transaction, TDC, inter alia, borrowed a total of $15 million from a syndicate headed by Fifth Third Bank. That sum was comprised of a term loan in the amount of $8 million to TDC and a bond issue of $7 million by DCC, DIC's subsidiary. The bonds were issued by DCC as a convenience, because a previous bond issue was in place, allowing bonds to be issued quickly. Shortly after the transaction closed, the bonds were assigned to TDC. [FN38] To obtain the $15 million from the Fifth Third, DIC and TDC's other direct and indirect subsidiaries were required to pledge their assets to guarantee that debt. [FN39] The question thus becomes what is the value of that guarantee. The Plaintiffs contend, based upon Nicholson's testimony, that it is the face value of the loan and bond issue, $15 million. The Defendants disagree. For reasons which follow, this Court agrees with Defendants that it would inappropriate to use the amount of the loan and bond issue, $15 million, to determine the value of the obligation assumed by DIC when it guaranteed that loan, and that, moreover, the guarantee had no value.

> FN38. Parenthetically, TDC has paid off the entire sum of $15 million that it obtained from Fifth Third Bank.

> FN39. Since TDC paid off those loans without DIC being called upon to honor its guarantee, the Court does not address the Plaintiffs' assertion (Doc. # 484 at 105) that the guarantee constituted a fraudulent conveyance, given that the Plaintiffs were not harmed as a result of the guarantee.

In *Matter of Xonics Photochemical, Inc.*, 841 F.2d 198 (7th Cir.1988), the Seventh Circuit discussed the appropriate manner of valuing a guarantee that a parent corporation requires its subsidiary to give to another or to the parent. The Sixth Circuit has followed *Xonics. See In re Oakes*, 1993 WL 339725 (6th Cir.1993). Therein, the Sixth Circuit explained the manner of valuing contingent liabilities, such as the guarantee of TDC's $8 million debt to Fifth Third Bank herein:

> Although contingent liabilities are included in determining whether a debtor is insolvent for preference purposes, they cannot be included at face value. *Matter of Xonics Photochemical, Inc.*, 841 F.2d 198, 200 (7th Cir.1988); *In re Sierra Steel, Inc.*, 96 B.R. 275 (Bankr.9th Cir.1989). To include contingent liabilities at full value would often render an entity insolvent as of the date the obligations were assumed, which would cause an "absurd" result. *Xonics*, 841 F.2d at 199. Instead, the "liability must be reduced to its present, or expected, value before a determination can be made whether the firm's assets exceed its liabilities." *Id.* "To determine a contingent liability, one must discount it by the probability that the contingency will occur and the liability will become real." *Sierra*, 96 B.R. at 279. To determine the value of a contingent liability, the court should multiply the total debt guaranteed by the probability that the debtor will be required to fulfill the guarantee. *Covey v. Commercial Nat'l Bank*, 960 F.2d 657, 659 (7th Cir.1992). Contingent liabilities are uncertain and frequently never become actual liabilities. *Xonics*, 841 F.2d at 200.

***23** *Id.* at *3. *See also, F.D.I.C. v. Bell*, 106 F.3d 258, 264 (8th Cir.1997) (applying *Xonics* in an action predicated on a state fraudulent conveyance statute). [FN40]

> FN40. The Seventh Circuit in *Xonics* and the Sixth Circuit in *Oakes* were both addressing the question of whether, under the Bankruptcy Code, a debtor's transfer could be set aside as fraudulent, in accordance with 11 U.S.C. § 547, because the debtor was insolvent at the time of the transfer. As did the Eighth Circuit in *Bell*, this Court deems it appropriate to utilize that authority in this state law, fraudulent conveyance action.

In accordance with *Oakes* and *Xonics*, this Court cannot accept Nicholson's testimony that the value of the guarantee is $15 million, the face value of the loan, since he did not engage in an analysis of the probability that DIC would be called upon to honor its guarantee. In addition, because there is no evidence that there was a 100% probability that DIC would be called upon to honor the entire amount of its guarantee, it rejects the proposition, raised by Plaintiffs in their Reply Brief (Doc. # 493 at 19-20), that DIC's guarantee should be valued at $15 million, the amount of the loan and bond issue. The Plaintiffs' premise is based on the nature of TDC as a holding company. According to Plaintiffs, TDC, as a holding company

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that generated no revenue on its own, was dependent on revenues generated by DIC to pay off the $15 million it (TDC) had obtained from Fifth Third Bank to fund the recapitalization/split-off transaction. The evidence, however, convinces this Court that DIC's earnings were not the only source of cash to pay off the $15 million. For instance, TDC could use revenue generated by DPHC, TDC's real estate subsidiary. In addition, TDC had in excess of $29 million in cash more than 75 days after that transaction. Another potential source of funds was the IPO being contemplated by Thomas Danis.

Moreover, even if the evidence caused this Court to agree with Plaintiffs that DIC was the only source of funds to pay off the $15 million, which it does not, it would reject Plaintiffs' assertion that such establishes a 100% probability that DIC would be called to honor its guarantee. Such a proposition ignores the reality of the holding company structure. Indeed, Nicholson, Plaintiffs' expert witness, acknowledged that, under such a structure, a subsidiary will routinely distribute to the holding company the portion its earnings which are not needed to support its continued operations. The funds so distributed become assets of the holding company. Thus, using the cash generated by the subsidiary, DIC, to pay off the debts of the parent company, the $15 million owed by TDC to Fifth Third Bank, is not the same as the subsidiary being required to honor its guarantee.

In contrast to the Plaintiffs' proposition that the value of DIC's guarantee is $15 million, the Defendants contend that it has no value. They base that assertion on testimony from Gartrell, their expert witness, who testified that the guarantee had no value because there were sufficient collective corporate assets to satisfy same. Based upon that testimony and in the absence of argument or evidence from the Plaintiffs of some other probability that DIC would be required to honor its guarantee, this Court finds that there was no probability of that happening and that, therefore, the guarantee had no value.

***24** In sum, the recapitalization/split-off transaction caused DIC to transfer assets valued at $10.902 million. Of course, in resolving the issue of reasonable equivalence, this Court must also consider the value of the assets that DIC received as a result of the recapitalization/split-off transaction. As part of that transaction, DEMCO, a former subsidiary of TDC, was transferred to DIC. [FN41] At that time, Clarkco was a wholly owned subsidiary of DEMCO. DEMCO was also responsible, with other PRPs, for the cleanup of the Tremont and Cardington Road Landfills. In addition, DEMCO would receive a share of the proceeds paid by the Travelers Insurance Company ("Travelers") to settle a dispute concerning its obligation to indemnify various Danis entities for their liability to contribute to the cost of cleaning up the Tremont, Cardington Road and Valleycrest Landfills. Above, this Court has found that DEMCO had a value of $17.36 million, when the shares of its stock were transferred to DIC. Since that amount exceeds the value of the assets transferred from DIC during the recapitalization/split-off transaction, DIC received reasonably equivalent value for the assets that it transferred as part of that transaction. Therefore, the Plaintiffs cannot prevail on their claim under § 1336.04(A)(2). The Court now sets forth its reasons for finding that DEMCO was worth $17.36 million, beginning by setting forth the value it attributes to Clarkco.

FN41. It will be remembered that this transaction occurred in October, 1997. DEMCO did not become the successor of DIC until early 2000.

As an introduction to setting forth its valuation of Clarkco, the Court will review some of the history of the efforts of that entity to develop a landfill on the real estate that it owned in Clark County, Ohio. [FN42] The property upon which the landfill would be sited sits atop two aquifers. The aquifers are separated from the landfill by a layer of till, an accumulation of stones, rocks, gravel and other debris deposited by a glacier. [FN43] Because of the location of the aquifers, a permit to construct a landfill, referred to as a permit to install ("PTI"), could be granted only upon a determination of "deemed acceptable." On February 7, 1996, the Director of the Ohio Environmental Protection Agency issued a PTI to Clarkco, determining that the location of the landfill above the aquifer was deemed acceptable. [FN44] At the time of the recapitalization/split-off, an appeal from the decision to grant that PTI was pending before the Ohio Environmental Review Appeals Commission ("ERAC"). In accordance with Ohio law, the ERAC conducted a *de novo* hearing on the matter and reached the opposite decision from that by the Director, [FN45] thus vacating the issuance of the PTI and remanding the

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matter. *CF/Water v. Schregardus*, 1998 WL 939721 (Ohio ERAC 1998). The ERAC reached that conclusion because of concerns raised over fractures in the layer of till. [FN46] The Franklin County Court of Appeals affirmed the decision of the ERAC. *CF/Water v. Danis Clarkco Landfill Co.*, 1999 WL 1126437 (Ohio App.1999). As is discussed below, Clarkco continued in its efforts to obtain a PTI for a landfill on its property, until 2002 or 2003, when those efforts were abandoned.

FN42. In order to construct the landfill, Clarkco was required to obtain approval from three levels of government, to wit: a permit to install from the Ohio Environmental Protection Agency; zoning approval from Clark County; and local rules. Local rules are the benefits that the operator of a landfill is expected to pay the community in which it is located.

FN43. The layer of till would prevent the movement of groundwater between the aquifers and the landfill.

FN44. Clarkco had applied for the PTI in 1992.

FN45. Although it conducts a *de novo* hearing, the ERAC merely decides whether the Director abused his discretion by awarding or by refusing to award a permit. *CF/Water v. Danis Clarkco Landfill Co.*, 1999 WL 1126437 (Ohio App.1999).

FN46. A "deemed acceptable" determination can be made only if the time of travel of water from the landfill to a public water supply is at least five years. 1998 WL 939721 at ¶ 26. In issuing the PTI, the Director determined that the time of travel was at least five years. The ERAC found that the existence of the fractures in the layer of till would affect the computations upon which the time of travel determination had been made. *Id.* at ¶ 34. The existence of the fractures also caused the ERAC to have concerns about the interconnection between the layer of till and the aquifers, as well as interconnection between the two aquifers. *Id.* at ¶ 39.

***25** The experts retained by Plaintiffs and Defendants, respectively Nicholson and Gartrell, both offered their opinions concerning the value of Clarkco. According to Nicholson, Clarkco was worth between $3 and $3.5 million, while Gartrell ascribed a value of $19.76 million. For reasons which follow, this Court finds that Gartrell's opinion of the value of that proposed landfill is persuasive, given that it is reasonable and is supported by other circumstantial evidence of value.

Gartrell began his valuation by examining the formal valuation study conducted by SCS Engineers ("SCS"), in September, 1995. [FN47] That study assigned a best, estimated mid-point value of $30 million, which Defendants' expert accepted as a starting point. Gartrell then discounted that amount to $25.77 million, in order to reflect that the income stream that would be generated by the landfill would not be realized for a number of years. Gartrell discounted that figure further to reflect the fact that Clarkco would be required to obtain three levels of approval, a PTI, zoning approval and local rules, before a landfill could be constructed. [FN48] He concluded that, in October, 1997, there was a 90% probability of obtaining the PTI, which had been issued, but was subject to a pending appeal. He based that conclusion on his research which indicated that no PTI, which had been issued in the past six years, had been revoked. His conclusion in that regard was supported by the testimony of Thomas and John Danis, both of whom testified that there was a 100% probability of retaining the PTI. He also assigned a 90% probability to zoning approval, which had been granted before October 14, 1997. As to local rules, Gartrell assigned only a 50% probability, testifying that this probability took into account that costs would be imposed on Clarkco to obtain the local rules. Gartrell then assigned equal weight to the three levels of approval and through his calculations concluded that the value of Clarkco in October, 1997, was $19.76 million. [FN49] This Court finds Gartrell's methodology to be reasonable and his application of that methodology to be fully supported by the record.

FN47. The parties stipulated that study into evidence as Joint Exhibit 71.

FN48. That reduction in the value of the proposed landfill by Gartrell was merely an application of *Xonics* and *Oakes.*

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FN49. He divided the sum of $25.77 million by three, to reflect the three levels of approval that were required. He then multiplied the thirds by, respectively, 90%, 90% and 50%. The sum of those three products is $19.76 million.

Moreover, Nicholson's valuation of $3 to $3.5 million lacks persuasive force, given that it is based solely on the book value of Clarkco at the time of the recapitalization/split-off transaction. That book value, in turn, was based upon the development costs of Clarkco incurred up to that date. That valuation is not persuasive, because it does not reflect the probability that a landfill would be opened on the Clarkco property, nor does it reflect the value of such a landfill.

In addition, the Court rejects the Plaintiffs' argument that the PTI for a landfill on Clarkco's property was doomed from its inception, because the existence of fractures in the layer of till would prevent its issuance. *See* Doc. # 484 at 85-87. This Court cannot agree with Plaintiffs. [FN50] There is no language in the decision by the ERAC indicating that, since fractures were documented by the logs of two of the 90 soil borings that Clarkco had conducted prior to submitting its application, the application for a PTI was doomed from its inception. On the contrary, the ERAC vacated the issuance of the PTI for further consideration and remanded the matter to conduct an appropriate investigation into the application for the PTI, in light of the undisputed presence of fractures in the till above the aquifer. Moreover, Clarkco did not abandon its efforts to obtain a PTI, after the ERAC decision. On the contrary, after the appellate court decision affirming the ERAC, Clarkco had additional soil borings and pump tests done to support a revised application, and an additional expert was hired, an academic with expertise in glacial geology, to study the fracture issue. It was only after interconnection between the two aquifers was discovered, in 2002 or 2003, that the application was abandoned. In addition, Plaintiffs' actions regarding the proposed landfill demonstrates that it was not doomed from the inception. Plaintiffs, led by Rogan, wanted to purchase the proposed landfill. Plaintiffs had access to the information concerning Clarkco's efforts to site a landfill on his property in Clark County, Ohio. Rogan, an experienced executive in the waste disposal industry, would not have wasted his time pursuing that landfill, if it had been doomed from its inception by two test borings conducted in 1991 and 1992.

FN50. Plaintiffs present two propositions in support of this argument, neither of which is persuasive. *First*, they contend that the evidence demonstrated that Ohio state agencies had denied eight of the fourteen applications for a PTI, with geological characteristics similar to those of the proposed Clarkco landfill. To support that assertion, Plaintiffs have cited trial testimony by McCann. Such testimony does not, however, appear on the page cited by the Plaintiffs. Moreover, even if the evidence supported Plaintiffs' assertion, the fact that eight out of fourteen applications were denied would not demonstrate that Clarkco's application for a PTI was doomed from its inception. *Second*, the Plaintiffs contend that the fractures were known to officials at Clarkco long before the recapitalization/split-off transaction. This Court does not agree. In its finding concerning the fractures, the ERAC wrote:

33. In fact, the evidence presented at the hearing established that the till is fractured. Specifically, boring logs C91-8D (drilled on June 25, 1991) and 92-15X (drilled on May 26, 1992) document the presence of fractures in the till, and a number of other logs document geologically descriptive terms suggestive of fractures. Danis' Hydrogeologic Report, submitted in April of 1993, contained all of this information; however, it appears the fractures were not noted until after the Director made his determination to grant the permit.

CF/Water, 1998 WL 939721 at ¶ 33. Moreover, the Plaintiffs failed to present evidence that Clarkco officials "noted" the information concerning fractures before the PTI had been issued. It would have been irrational for Clarkco to proceed with the application for the PTI, knowing that fractures existed and providing evidence of same to the Director, while not addressing their impact on the issuance of such a permit.

***26** Accordingly, this Court finds that the value of Clarkco, on October 14, 1997, was $19.76 million.

In addition, Defendants contend DEMCO had another

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major asset, its entitlement to a share of the settlement of the Travelers coverage dispute, as well as acknowledging that it had contingent liabilities arising out of the need to remediate the Tremont and Cardington Road Landfills. Defendants argue, based upon Gartrell's testimony, that the value of DEMCO's proportionate share of the settlement proceeds was $1.61 million. [FN51] This Court is unable to ascribe any value to DEMCO's proportionate share of the settlement proceeds, given that Russell testified that all of those proceeds had been pledged to Fifth Third Bank as collateral for the $15 million loan to TDC to finance the recapitalization/split-off transaction. As to DEMCO's liabilities, the cleanup of the Cardington Road and Tremont Landfills, this Court finds that, in October, 1997, a reasonable estimate of those costs was $2.4 million. The Court bases that finding on the testimony from Gartrell and Koch, which is reasonable and persuasive. Koch testified that, as of October, 1997, DEMCO's share of the future costs for the Cardington Road Landfill was $2.8 million. She based that estimate on the existence of a "record of decision" which had been issued for that hazardous waste site a number of years earlier, a reliable estimate of total costs of remediation, known costs incurred to date and DEMCO's share of those costs. As to Tremont, Koch estimated DEMCO's liability at $1.2 million, given that this hazardous waste site was not, in October, 1997, a superfund site, although there was expected to be continuing oversight and maintenance activities thereon. Gartrell applied a 40% tax rate to Koch's pre-tax estimates to reach a net tax effect of $1.7 million for Cardington Road and $.7 million for Tremont, a total of $2.4 million.

FN51. Those settlement proceeds covered the Tremont and Cardington Road Landfills, as well as the Valleycrest Landfill. Liability for the Valleycrest Landfill had always rested with DIC.

In sum, the Court finds that the value of DEMCO was $17.36 million ($19.76 million, the value of Clarkco, less $2.4 million, a reasonable estimate in October, 1997, of DEMCO's share of the remaining costs to remediate the Cardington Road and Tremont Landfills), when, in October, 1997, it was transferred to DIC as part of the recapitalization/split-off transaction. In other words, assets valued at $17.36 million were transferred to DIC as part of that transaction. Above, the Court has found that the value of the assets transferred from DIC was $10.902 million. [FN52] Consequently, this Court finds that DIC received reasonably equivalent value for the assets that it transferred as part of the recapitalization/split-off transaction.

FN52. Since the value of DEMCO exceeded the value of the assets transferred from DIC as part of the recapitalization/split-off transaction, this Court finds it unnecessary to address the parties' arguments as to whether value accrued to DIC by any of the following: its opportunity to participate in the "strategic option;" a capital contribution of $7 million by TDC; the redemption of its debentures; and the DBCC earn-out note of $1 million.

Since the Plaintiffs failed to prove that DIC did not to receive reasonably equivalent value, the Defendants are entitled to judgment on Plaintiffs' fraudulent conveyance theory predicated upon § 1336.04(A)(2). [FN53]

FN53. Given that the Court has found that DIC received reasonably equivalent value, it is not necessary to decide whether it "engaged or was about to engage in a business or a transaction for which [its] remaining assets [ ] were unreasonably small in relation to the business or transaction," as required by § 1336.04(A)(2)(a), or whether DIC was insolvent (i.e., whether it "intended to incur, or believed or reasonably should have believed that [it] would incur, debts beyond [its] ability to pay as they became due), as required by § 1336.04(A)(2)(b).

Accordingly, the Court concludes that the Defendants are entitled to judgment on each of the Plaintiffs' fraudulent conveyance theories. [FN54]

FN54. In their Post-Trial Brief, the Plaintiffs argue that proof that the recapitalization/split-off transaction was a fraudulent conveyance in violation of Ohio law necessarily means that the payment of bonuses to Russell, in the sum of $500,000, and McCann, in the sum of $50,000, for the work they performed on that transaction were also fraudulent conveyances. *See* Doc. # 484 at

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133. Since this Court has rejected the Plaintiffs' claim that the recapitalization/split-off transaction was a fraudulent conveyance, it cannot accept their derivative argument concerning Russell's and McCann's bonuses.

C. Fraud and Negligent Misrepresentation Claims Against TDC, DIC, Thomas Danis, Russell and McCann, Premised on the Theory That DIC Misrepresented its Ability to Meet its Obligations When it Executed the Amended Site Preparation Agreement and Claim Against Thomas Danis and McCann, Arising under § 1701.93 of the Ohio Revised Code

***27** With this theory of relief, the Plaintiffs seek to recover from TDC, DIC, Thomas Danis, Russell and McCann. [FN55] In their Post-Trial Brief, the Plaintiffs explain that these claims are predicated upon the warranty of financial resources made by DIC and the other parties to the ASPA, as a result of signing that Agreement. Plaintiffs contend that they were induced to sign that agreement and, therefore, jointly assume with DIC a collective 46% share of the cost of cleaning up the Valleycrest Landfill, by DIC's warranty. The Plaintiffs contend that as a result of what they refer to as the "asset drain" (Doc. # 484 at 122), DIC knew or should have known that it would not be able to pay its obligations under the ASPA. [FN56] In addition, the Plaintiffs point out that when DIC joined with Plaintiffs, other members of the VLSG and governmental entities to execute the GEPA, [FN57] in January, 1999, it once again warranted that had sufficient resources to fund its obligations thereunder. This Court concludes that Plaintiffs, by signing that Agreement, incurred no additional obligation, above and beyond those imposed upon them by the ASPA and that, therefore, the GEPA is of no consequence as to these claims, since the Plaintiffs were already jointly obligated with DIC to fund 46% of the costs of remediating the Valleycrest Landfill, as a result of signing the ASPA.

FN55. This claim was also initially asserted against DEMCO and DEI. DEMCO, as successor to DIC, is liable for the latter's tortious behavior. Since the Plaintiffs have not discussed DEI's liability in their Post-Trial Brief (Doc. # 484), the Court concludes that they have waived this claim against DEI.

FN56. In the portion of their Post-Trial Brief (Doc. # 484), discussing this theory of recovery, Plaintiffs also refer to the removal of assets from TDC as part of the recapitalization/split-off transaction. However, this Court has concluded above that the alleged removal of assets from TDC is of no matter on their fraudulent conveyance claim, since the holding company is not responsible for the obligations DIC assumed as a result of signing the Settlement Agreement. Therefore, the removal of assets from TDC has no relevance to the question of whether the Plaintiffs were induced to rely on the financial warranty given by DIC when it signed the ASPA.

FN57. As is indicated above, the GEPA is the Government Entity Participation Agreement. *See* Finding of Fact No. 16, at p. 14, *supra*.

Plaintiffs base this claim on theories of common law fraud, § 1701.93 of the Ohio Revised Code and common law negligent misrepresentation. As a means of analysis, the Court will initially set forth the legal standards which are applicable to claims set forth under those theories.

In *Williams v. Aetna Financial Co.,* 83 Ohio St.3d 464, 700 N.E.2d 859 (1998), the Ohio Supreme Court restated the elements of a claim of fraud:

> Fraud is
> (a) a representation or, where there is a duty to disclose, concealment of a fact,
> (b) which is material to the transaction at hand,
> (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
> (d) with the intent of misleading another into relying upon it,
> (e) justifiable reliance upon the representation or concealment, and
> (f) a resulting injury proximately caused by the reliance.

Id. at 475, 700 N.E.2d at 868 (internal quotation marks and citations omitted). *Accord Metz v. Am. Elec. Power Co., Inc.,* 2007 WL 1874246 (Ohio App.2007). Section 1701.93 provides:

> (A) No officer, director, employee, or agent of a corporation shall, either alone or with another or others, with intent to deceive:

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(1) Make, issue, deliver, publish, or send by mail or by any other means of communication any prospectus, report, circular, certificate, statement, balance sheet, exhibit, or document, respecting the shares, assets, liabilities, capital, business, dividends or distributions, earnings, or accounts of a corporation, that is false in any material respect, knowing the statement to be false;

***28** (2) Having charge of any books, minutes, records, or accounts of a corporation, make in them any entry that is false in any material respect, knowing the entry to be false, or remove, erase, alter, or cancel any entry in them, knowing that the entries resulting from them will be false.

(B) Whoever violates this section shall be personally liable, jointly and severally, with all other persons participating with the offender in any act of that type, to any person for any damage actually suffered and proximately resulting from the act.

(C) No action to enforce a liability under this section shall be brought after four years from the time of the act complained of.

(D) Remedies under this section are not exclusive of other remedies at common law or under other statutes.

Thus, § 1701.93 "prohibits officers, directors, or agents of corporations from making false statements about the assets and liabilities of a corporation." *Danis v. Great American Ins. Co.*, 159 Ohio App.3d 119, 823 N.E.2d 59, 69 (2004). In *Delman v. City of Cleveland Heights*, 41 Ohio St.3d 1, 534 N.E.2d 835 (1989), the Ohio Supreme Court restated the essential elements of a claim of negligent misrepresentation:

The elements of negligent misrepresentation are as follows: "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their *justifiable reliance* upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." (Emphasis added.) 3 Restatement of the Law 2d, Torts (1965) 126-127, Section 552(1), applied by this court in *Gutter v. Dow Jones, Inc.* (1986), 22 Ohio St.3d 286, 22 OBR 457, 490 N.E.2d 898, and *Haddon View Investment Co. v. Coopers & Lybrand* (1982), 70 Ohio St.2d 154, 24 O.O.3d 268, 436 N.E.2d 212.

Id. at 9-10, 534 N.E.2d 835, 534 N.E.2d at 837-38.

As an initial matter, TDC, DIC, Thomas Danis, Russell and McCann focus on the financial warranty provision of the ASPA, which provides that each member of the VLSG "warrants that it presently has, or has the ability to obtain in timely manner, sufficient funds to satisfy its obligations under this [ASPA]." According to those Defendants, to demonstrate that they misrepresented DIC's financial wherewithal, Plaintiffs were obligated to prove both that DIC did not presently have sufficient funds to satisfy its obligations under the ASPA and that it did not have the ability to obtain such funds in a timely manner. These Defendants argue that the second obligation imposed upon Plaintiffs relates to future events, and that predictions of future events are not actionable under the law of Ohio. This Court agrees with these Defendants that such predictions do not constitute actionable misrepresentations. *See e.g., Isaac v. Alabanza Corp.*, 2007 WL 901596 (Ohio App.2007) (holding that, since fraud may not be predicated upon representations concerning future events, glowing and positive presentation about company's future prospects is not actionable); *Tibbs v. National Homes Const. Corp.*, 52 Ohio App.2d 281, 286, 369 N.E.2d 1218, 1222 (1977) (stating that "[r]epresentations as to what will be performed or will take place in the future are regarded as predictions and are not fraudulent ..."). Accordingly, the Court turns to whether the warranty by DIC that it "has the ability to obtain in timely manner, sufficient funds to satisfy its obligations under this [ASPA]" is a prediction of future events.

***29** TDC, DIC, Thomas Danis, Russell and McCann argue that the second part of the warranty can be read sensibly, only as referring to DIC's ability to obtain funds in the future, which is when it would be required to make payments under the ASPA. In support of that proposition, these Defendants point to McCann's testimony to the effect that every member of the VLSG signing the ASPA warranted that it had currently had the funds or would be able to obtain those funds in the future, necessary to satisfy its obligations under that Agreement. *See* Doc. # 474 at 19, 24-25. These Defendants contend that the "obligation to make payments would necessarily arise in the future, as would DIC's ability to make such payments." Doc. # 481 at 36. In contrast, the Plaintiffs contend that the language used in § 3.3 of the ASPA belies the argument concerning future events, since that Agreement uses the present tense in providing that a member of the VLSG "has the ability to obtain in timely manner, sufficient funds to satisfy its obligations under this [ASPA]." This Court cannot agree with the Plaintiffs. The evi-

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dence presented at trial established that, when Plaintiffs and DIC executed the ASPA, their joint, 46% share of the cost of cleaning up the Valleycrest Landfill was $900,000. Defendants do not contend that DIC failed to pay that sum. The other sums that DIC and Plaintiffs have been jointly obligated to pay were incurred after the ASPA had been executed in May, 1998. In other words, DIC was warranting it's ability to obtain the sum necessary to pay its future obligations under the ASPA and predicting its future financial condition. Accordingly, this Court concludes that, since the second-prong of the financial warranty contained in the ASPA relates to the future financial condition representation, it is not actionable under any of the three theories which support this claim, since all require a false representation.

TDC, DIC, Thomas Danis, Russell and McCann also contend that the Plaintiffs cannot prevail on this claim, because they failed to prove that they justifiably relied on the financial warranty of DIC contained in the ASPA. This Court agrees. Forney and Moertl were the primary employees of Waste Management responsible for the Valleycrest Landfill. Although Forney testified extensively at trial, he did not state that he relied upon the financial warranty contained in the ASPA, when he authorized Moertl to execute the ASPA on behalf of Plaintiffs; nor did Moertl indicate in her trial testimony that she relied upon that warranty when she affixed her hand to the ASPA. [FN58] Moreover, Moertl executed that document on behalf of the Plaintiffs the day before McCann signed it as DIC's representative. In addition, Plaintiffs' assertion that they relied upon DIC's financial warranty in the ASPA before they executed that Agreement is contradicted by Moertl's testimony to the effect that Plaintiffs and DIC had agreed with the VLSG in principle in November, 1997, to the requirement that DIC and Plaintiffs be jointly responsible for 46% of the costs incurred to cleanup the Valleycrest Landfill, regardless of how they would allocate that share among themselves. Accordingly, this Court has found, as a matter of fact, that, before Plaintiffs executed the ASPA, they did not rely upon the financial warranty made by DIC, when it (DIC) signed that Agreement. In making that factual finding, this Court has rejected the Plaintiffs' assertion that such reliance is demonstrated by Forney's trial testimony that Plaintiffs would have considered a 15% to 20% allocation to be fair, if they had settled with the VLSG, without DIC. Forney based that testimony on his view that Plaintiffs' primary responsibility for the Valleycrest Landfill was as a transporter, which he thought deserved a 10% allocation, augmented by a "slice" of the operator's share, resulting in a 15% to 20% share. That testimony does not cause the Court to find that Plaintiffs relied upon DIC's financial warranty, because Forney did not explain why Plaintiffs would agree to be jointly responsible, with DIC, for 46% of the costs to clean up that hazardous waste site, long before DIC gave its warranty by signing the ASPA.

FN58. That Forney did not rely of the financial warranty is further supported by his testimony that he did not read the ASPA closely and could not recall what terms of that Agreement he had read, before authorizing Moertl to sign it on behalf of Plaintiffs.

***30** Based upon the foregoing, the Court concludes that the Plaintiffs are not entitled to recover on this claim.

D. Count 12 as to TDC, DIC, DEMCO, Thomas Danis, Russell and McCann, to the Extent That it Is Based upon the Allegations in Count 8 Relating to the Amended Site Preparation Agreement

With this claim, the Plaintiffs contend that these Defendants engaged in a civil conspiracy to defraud them. *See* Doc. # 484 at 133-135. In particular, they assert that "Defendants DIC, TDC, and the individual Defendants Tom Danis, Richard Russell and Gregory McCann jointly conspired to find a way to transfer assets from TDC so as to save the TDC shareholder's investment and deprive Waste Management's rights as a creditor." [FN59] *Id.* at 133, 369 N.E.2d 1218. The Plaintiffs argue that it was illegal for those Defendants to strip the assets from TDC, because it left it and DIC with insufficient assets to pay for DIC's obligation under the Settlement Agreement and the ASPA to pay their joint obligation with Plaintiffs to fund 46% of the cost of remediating the Valleycrest Landfill. The Court begins its analysis by reviewing the legal standards which govern a civil conspiracy claim under the common law of Ohio.

FN59. The Plaintiffs have not mentioned DEMCO in their Post-Trial Brief (Doc. # 484) as one the Defendants they seek to hold liable for this claim. Therefore, the Court concludes that the Plaintiffs have waived their civil conspiracy claim against DEMCO,

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the successor to DIC.

The Sixth Circuit has noted that civil conspiracy is defined under Ohio law as " 'a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages.' " *Aetna Casualty and Surety Co. v. Leahey Construction Co., Inc.,* 219 F.3d 519, 534 (6th Cir.2000) (quoting *Kenty v. Transamerica Premium Ins. Co.,* 72 Ohio St.3d 415, 419, 650 N.E.2d 863, 866 (1995)). *Accord, Williams v. Aetna Financial Co.,* 83 Ohio St.3d 464, 475, 700 N.E.2d 859, 868 (1998); *LeFort v. Century 21-Maitland Realty Co.,* 32 Ohio St.3d 121, 126, 512 N.E.2d 640, 645 (1987). Thus, the essential elements of a civil conspiracy claim are: " '(1) a malicious combination; (2) two or more persons; (3) injury to person or property; *and* (4) existence of an unlawful act independent from the actual conspiracy.' " *Aetna Casualty,* 219 F.3d at 534 (quoting *Universal Coach, Inc. v. New York City Transit Auth., Inc.,* 90 Ohio App.3d 284, 292, 629 N.E.2d 28, 33 (1993)) (emphasis added).

Plaintiffs have failed to establish the fourth element of their civil conspiracy claim. [FN60] As indicated above, the Plaintiffs contend that the alleged conspiracy underlying this claim harmed them by depleting TDC's assets. Given that this Court has concluded that TDC is not liable for DIC's obligation to the Plaintiffs, Thomas Danis, Russell and McCann cannot have committed an illegal act against the Plaintiffs, even assuming that they stripped TDC's assets. Moreover, to the extent that Plaintiffs base this claim on the removal of DBCC from DIC's subsidiary, DCC, as part of the recapitalization/split-off transaction, this Court rejects same, since it has concluded above that the transfer of assets from DIC did not constitute a fraudulent conveyance and that DIC received reasonably equivalent value for the assets it transferred in that transaction. Therefore, the Defendants have failed to prove that DIC, TDC, Thomas Danis, Russell and/or McCann committed an illegal act.

FN60. Thus, the Court will not analyze the first three such.

***31** Accordingly, the Court concludes that those Defendants and DEMCO are entitled to judgment on this claim.

III. Conclusions of Law

1. In an earlier Decision (Doc. # 233), this Court concluded that it can exercise supplemental jurisdiction over the Plaintiffs' claims against the Defendants, in accordance with 28 U.S.C. § 1367.

2. In order to impose liability on a parent corporation for its subsidiary's debts, under a claim of piercing the corporate veil theory, a plaintiff must prove, *inter alia,* that the parent's control over the subsidiary was so complete that the subsidiary had no separate mind, will or existence of its own. *Belvedere, supra.* Since this Court has found that TDC did not exercise such control over DIC, the Plaintiffs cannot recover from TDC for the debts of DIC, under that theory.

3. Given that this Court has found that the Defendants did not act with "actual intent to hinder, delay, or defraud" Plaintiffs, as creditors of DIC, Plaintiffs cannot prevail on the fraudulent conveyance theory predicated upon § 1336.04(A)(1) of the Ohio Revised Code.

4. Since the Court has found that DIC received reasonably equivalent value for the assets that it transferred as part of the recapitalization/split-off transaction, Plaintiffs cannot prevail on the fraudulent conveyance theory predicated upon § 1336.04(A)(2) of the Ohio Revised Code.

5. Since Plaintiffs failed to prove either a misrepresentation of a present fact or justifiable reliance, they cannot prevail on their theories of common law fraud, a violation of § 1701.93 of the Ohio Revised Code and common law negligent misrepresentation.

6. To prevail on a claim of civil conspiracy, the Plaintiff must prove, inter alia, the "existence of an unlawful act independent from the actual conspiracy." *Aetna Casualty,* 219 F.3d at 534 (internal quotation marks and citation marks omitted). Given that this Court has concluded that the Plaintiffs failed to prove the commission of such an illegal act, Plaintiffs cannot prevail on their civil conspiracy claim.

Judgment is to be entered in favor of Defendants, The Danis Companies, John Danis, Richard Danis, Charles W. Danis, Amy Danis, Julie Danis, Benjamin Danis,

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Christopher Danis, Peter Danis, Maryanna Klatt, Susan Grossman, Danis Building Construction Company, Danis Environmental Industries, Inc., Gregory McCann, Thomas Danis and Richard Russell and against Plaintiffs; and in favor of Plaintiffs and against Danis Industries Corporation and Diversified Environmental Management Company in the amount of $15,188,370.00, plus prejudgment interest at the rate of 10% per annum, in accordance with § 1343.03 of the Ohio Revised Code, to be computed in the manner set forth by the Court in Doc. # 236, at pages 16-17.

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Indiana,
Indianapolis Division.
The MITCHEL GROUP, INC., Plaintiff,
v.
Lenoir E. ZAISER, et al., Defendants.
Cause No. 1:08-cv-629-WTL-TAB.

Feb. 3, 2009.

Andrew M. McNeil, Lisa McKinney Goldner, Matthew T. Klein, Bose McKinney & Evans, LLP, Indianapolis, IN, for Plaintiff.

Heath E. Uppencamp, Vicki J. Wright, Krieg Devault LLP, Angela Pease Krahulik, Brent W. Huber, Fred R. Biesecker, Howard Walton Anderson, III, Ice Miller LLP, David L. Hatchett, Eric J. Essley, Hatchett & Hauck LLP, Bradley J. Schulz, Robert D. Zink, Goodin Abernathy LLP, Norman T. Funk, Hill Fulwider McDowell Funk & Matthews, Indianapolis, IN, H. Roderic Heard, Wildman Harrold Allen & Dixon, Chicago, IL, for Defendants.

ENTRY ON MCDERMOTT, INC.'S MOTION TO DISMISS

WILLIAM T. LAWRENCE, District Judge.

***1** This cause is before the Court on the motion to dismiss for lack of personal jurisdiction filed by Defendant McDermott, Inc. ("McDermott"), and the motion of Plaintiff The Mitchel Group, Inc. ("Mitchel") seeking to submit supplemental evidence in opposition to the motion to dismiss. Both motions are fully briefed and the Court, being duly advised, **GRANTS** Mitchel's motion and, having considered the supplemental evidence and McDermott's arguments with regard to it, **DENIES** McDermott's motion for the reasons set forth below.

This case arises out of the environmental contamination of a piece of property in Indianapolis, Indiana ("the Facility"). The details regarding the history of the use and ownership of the Facility are largely irrelevant to the instant motions. Suffice it to say that Mitchel is the current owner of the Facility and, *inter alia*, seeks in this action, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 et seq., to recover from the Defendants--most of whom are former owners or operators of the Facility or successors thereto--the costs it has incurred in remediating the hazardous substances that have contaminated the Facility.

In its motion to dismiss, McDermott asserts that this Court lacks personal jurisdiction over it. When a defendant challenges the Court's personal jurisdiction, the plaintiff bears the burden of demonstrating the existence of jurisdiction. *Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 548 (7th Cir.2004). Where, as here, a motion to dismiss is resolved without an evidentiary hearing, [FN1] the plaintiff's burden is satisfied if it makes a prima facie case of personal jurisdiction. *Purdue Research Foundation v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 782 (7th Cir.2003). "In evaluating whether the prima facie standard has been satisfied, the plaintiff is entitled to the resolution in its favor of all disputes concerning relevant facts presented in the record." *Id.* (citations omitted). The record with regard to personal jurisdiction must be considered in its entirety, and all reasonable inferences must be drawn in favor of the plaintiff. *Central States, Southeast and Southwest Areas Pension Fund v. Phencorp Reinsurance Co., Inc.*, 440 F.3d 870, 878 (7th Cir.2006).

FN1. Neither party has requested a hearing in this case.

Where, as here, there is no applicable federal statute providing for nationwide service of process, a federal district court may exercise personal jurisdiction over a defendant if a court of the state in which it sits would have such jurisdiction. Fed.R.Civ.P. 4(k)(1)(A). The Indiana long-arm statute, found at Indiana Trial Rule 4.4(A), provides for jurisdiction "on any basis not inconsistent with the Constitution of this state or the United States"; in other words, Indiana permits the exercise of personal jurisdiction to the full extent permitted by the Federal Due Process Clause. *LinkAmerica Corp. v. Albert*, 857 N.E.2d 961, 967 (Ind.2006).

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***2** There are two forms of personal jurisdiction that a court may exercise over a non-resident defendant, "general" and "specific" jurisdiction, *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984); inasmuch as Mitchel concedes the lack of general jurisdiction, only specific jurisdiction is at issue in this case. Specific jurisdiction is applicable when the basis of the suit "arises out of or is related to" the defendant's contacts with the forum state. *Jennings,* 383 F.3d at 549. "To establish specific jurisdiction under the familiar minimum contacts analysis, a plaintiff must show that the defendant has purposefully availed itself of the privilege of conducting activities within the forum state and that the exercise of personal jurisdiction over that defendant would comport with traditional notions of fair play and substantial justice." *Id.* (citations and internal quotation marks omitted).

As already noted, Mitchel alleges that most of the Defendants were at one time owners of the Facility or the successor-in-interest to one of the former owners. Its allegations with regard to McDermott, however, do not include an ownership interest in the Facility. Rather, Mitchel alleges that one of the previous owners, The Babcock & Wilcox Companies ("B & W") [FN2], is a wholly-owned subsidiary of McDermott. In actuality, the relationship between the two corporations is not that of parent and subsidiary; rather, both McDermott and B & W are subsidiaries of another corporation, McDermott International, Inc. *See* Affidavit of Robert Stumpf. Regardless, even if McDermott were the parent of B & W, that alone clearly would not be a sufficient basis for the exercise of personal jurisdiction over McDermott, *see Purdue Research Foundation,* 338 F.3d at 788 (jurisdictional contacts of subsidiary are not imputed to parent absent special circumstances), and Mitchel does not so argue. Rather, Mitchel alleges that McDermott's own involvement with the Facility during the time B & W owned it was such that McDermott is subject to being haled into court in Indiana in this case involving the Facility.

FN2. B & W, which is now known as Babcock & Wilcox Power Generation Group, Inc., has not been named as a defendant by Mitchel, presumably because it filed for bankruptcy in February 2000.

Specifically, in its amended complaint Mitchel alleges that McDermott

> operated the Facility and/or, in addition, actively participated in and exercised control over the waste management functions at the Facility, including, but not limited to:
> a. hiring one or more Indiana environmental consultants to perform environmental work at the Facility;
> b. paying the invoices of one or more Indiana environmental consultants who performed work at the Facility;
> c. directing one or more environmental consultants to perform environmental investigatory or remediation work at the Facility; and
> d. directing the Facility and/or training the Facility's employees regarding waste management policies and procedures.

Amended Complaint at ¶ 39. In support of these allegations, Mitchel has submitted numerous documents. The import of some of the documents is simply that third parties blurred the distinction between B & W and its affiliated company, McDermott, or that the two corporations shared a letterhead, and the Court finds those documents to be of minimal, if any, relevance. [FN3] However, other documents support Mitchel's assertion that McDermott played an active role in environmental matters at the Facility.

FN3. To the extent that Mitchel suggests that these documents demonstrate that McDermott and B & W failed to maintain corporate formalities such that they should be treated as one legal entity, that suggestion is without merit.

***3** First, Exhibit K is a Phase I environmental assessment of the Facility dated May 1996 which indicates on its face that it was prepared for McDermott; a July 1996 Phase II environmental assessment and an August 1996 Phase II-B environmental assessment also so indicate. *See* Exhibits L and M. Similarly, Exhibit R contains an April 1997 Health and Safety Plan for those investigating the environmental condition of the Facility; this document also indicates that it was prepared for McDermott. Exhibit S is an August 1997 technical memorandum regarding a soil investigation by a different environmental firm which also indicates that it was prepared for McDermott. In October 1997, a third environmental firm sent an environmental report to Jack Arnold of McDermott; the cover letter indicates that the firm had conducted

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demolition activities at the Facility and prepared a report regarding those activities for McDermott. *See* Exhibit T. Arnold was also the addressee of a November 1997 environmental report regarding soil sampling that was done following the demolition. *See* Exhibit U. Finally, Exhibits P, V and Y demonstrate that McDermott communicated directly with the Indiana Department of Environmental Management regarding the Facility.

McDermott argues that most of these documents can be explained by various third parties simply not understanding the distinction between parents and subsidiaries (or two subsidiaries of the same parent). That might be the case with regard to documents on which a third party has listed McDermott as the owner or operator of the Facility, but the documents discussed above show that the third parties were preparing their environmental reports for McDermott and sending them directly to McDermott. Viewing these documents [FN4] in the light most favorable to Mitchel, they support Mitchel's assertion that McDermott was directly involved in environmental matters at the Facility.

FN4. The Court notes that there are numerous documents contained in Mitchel's supplemental exhibits that are not discussed here because they fall into the same categories as the documents that are discussed and therefore are simply cumulative.

As McDermott points out, most of the documents discussed above were created after the Facility was no longer being operated by B & W and thus do not prove that McDermott directed or participated in operations at the Facility. However, some of the supplemental exhibits submitted by Mitchel demonstrate that McDermott's involvement in the environmental affairs of the Facility began in 1987, when B & W first acquired the Facility. *See* Supplemental Exhibit G (environmental survey by consulting company sent to McDermott's Manager of Corporate Safety and Health in January 1987; body of report suggests that McDermott was paying for the consultant's services); Supplemental Exhibit H (Waste Profile Record for Facility authored by McDermott Director of Corporate Environmental Affairs R.D. Hafner in 1989); Supplemental Exhibit T (1987 Hazardous Waste Program for the Facility prepared by McDermott's Corporate Health and Safety Department [FN5]); Supplemental Exhibit V (Waste Manifest Record indicating that McDermott tracked hazardous waste at the facility in 1987).

FN5. The document itself does not indicate that the author of the report was an employee of McDermott, but Mitchel so asserts and McDermott does not dispute the assertion.

***4** Citing *Central States,* McDermott argues that all of its involvement in the Facility constituted "a perfectly allowable sharing of corporate services" that does not lead to this Court having personal jurisdiction over it. However, in so arguing McDermott conflates the issue of whether it is subject to jurisdiction based upon its corporate affiliation with B & W and the issue of whether McDermott's involvement with the facility was such that it supports a finding of specific personal jurisdiction in this case. The holding in *Central States* was that "a corporate parent may provide administrative services for its subsidiary in the ordinary course of business without calling into question the separateness of the two entities for purposes of personal jurisdiction." 230 F.3d at 945.

> The basis for this proposition is much the same as for the more general principle that jurisdiction over a parent cannot be based merely on jurisdiction over a subsidiary. Parent corporations regularly provide certain services to their subsidiaries. Such parents do not expect that performing these activities may subject them to liability because of the actions of the subsidiaries. Thus, such standard services are not sufficient minimum contacts to support the exercise of jurisdiction.

Id. In *Central States,* the evidence demonstrated that the subsidiary had paid the parent for the consulting services of one of the parent's employees and that the actions in question by that employee were taken at the direction of the subsidiary, not the parent. *Id.* at 946. While it is certainly possible that such an arrangement existed in this case, there is no evidence to that effect. Rather, drawing all reasonable inferences in favor of Mitchel, the Court determines that Mitchel has made a prima facie showing that environmental matters at the Facility were handled by McDermott from the beginning of B & W's operation of the facility through and even after the end of it. [FN6] Therefore, Mitchel has made the requisite prima facie showing that McDermott "purposefully availed itself of the privilege of conducting activities" in Indiana and that exercising personal jurisdiction over McDermott in this case,

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which directly relates to those activities, "would comport with traditional notions of fair play and substantial justice." McDermott's motion to dismiss therefore is denied.

FN6. The Court recognizes that McDermott has submitted the affidavit of Ronald Hafner in which he states that he is "not aware of any active participation by McDermott in any waste management functions at the property" or "of McDermott exercising control over any acts that led to the alleged contamination of the Property." The conflict between this affidavit and the documents submitted by Mitchel must be resolved in favor of Mitchel at this stage of the proceedings.

This is only a preliminary determination, however. McDermott is entitled to have the issue of personal jurisdiction decided based upon an evidentiary hearing, not simply inferences drawn from documents. If McDermott wishes to request an evidentiary hearing, it shall so move **within 30 days of the date of this Entry.** If Mitchel believes it needs to conduct additional jurisdictional discovery prior to the hearing, it shall so move **within 15 days of the date of McDermott's motion.** The Court will then ask Magistrate Judge Baker to conduct a pretrial conference to establish an appropriate schedule for discovery and briefing prior to the hearing.

***5** SO ORDERED:

Slip Copy, 2009 WL 348774 (S.D.Ind.)

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Article

***401** CAN YOU TRUST A TRUST? THE POTENTIAL CERCLA LIABILITY OF TRUSTEES AND BENEFICIARIES

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Introduction and Impetus

Some baby boomers, and those who will follow them, will face estate planning issues that no other generation has had to concern itself with: transfers, via trusts, of real property impacted by hazardous substances and the long liability reach of modern environmental laws. [FN1] These laws can transform the potential boon of real property held in trust for one's benefit into a nightmare of ongoing or potential litigation and liability. Those who advise on estate and environmental issues must therefore understand the risks involved in transferring or holding impacted property in trust and the types of structures and advance planning that will best benefit and protect those to whom the settlors [FN2] intend to gift. This Article addresses these issues, as well as many of the questions raised by the need to structure gifts of impacted real property in a manner that carries ***403** out the settlor's intent without imposing additional personal liability on those gifted.

In particular, and with a focus on California law, this Article addresses the question of under what circumstances, if any, can trustees and/or beneficiaries be held liable as "owners?" This question is crucial because owners are strictly liable under the Superfund Law--the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). [FN3] Other questions addressed in this Article include: If the beneficiary or trustee is potentially liable, is such liability personal or limited to trust assets? What steps can be taken to reduce or eliminate exposure of the trust assets and the beneficiary and/or trustee's own personal assets to clean-up liability? What potential defenses are available to trustees and beneficiaries?

CERCLA is a notoriously difficult statute to interpret, and most CERCLA cases and opinions are convoluted and complex. Many of the questions addressed here drift into uncharted waters with no appellate opinions directly on point. Our purpose,

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therefore, is to mark known shoals and sandbars, graph known or reasonably expected channels, explore safe harbors, and chart what now seems to be the optimum course, recognizing as we go that the current is swift, and we don't control the weather.

II

The Quick-and-Dirty on Passing Off Dirty Property

A. Trustee Liability

As a general rule, trust law precludes holding trustees personally liable under CERCLA without malfeasance of some sort. There is, however, some authority for holding trustees personally liable if they engage in "misfeasance." [FN4] In the absence of either malfeasance or misfeasance, trustees are only liable as trustees and therefore are only liable to the extent that trust assets are available to indemnify them. They have no ***404** personal exposure, absent malfeasance or misfeasance. Trustees can take actions to protect themselves by prudently managing property and handling environmental issues in an attentive, well-advised manner.

B. Beneficiary Liability

No statutory protection exists to protect beneficiaries from liability under CERCLA. There is scant case law on the potential liability of beneficiaries where that liability is derived from their status as beneficiaries. Many unanswered legal questions exist, in particular, whether beneficiaries are owners and, therefore, potentially responsible parties (PRPs) under CERCLA, with all of the far reaching liability implications of that status. Based on current case law and statutory interpretation, there is more than just a reasonable argument that beneficiaries are owners under CERCLA because beneficiaries' possession of equitable title appears sufficient to establish owner liability. If they are owners, beneficiaries, absent a defense, will face potential personal liability for environmental conditions on real property held in trust for their benefit. Owners are also strictly liable for any actions of third parties, such as tenants, although those parties also remain liable.

Beneficiaries do have certain defenses to CERCLA liability, including the "inheritance or bequest defense," a subset of the "third-party defense." [FN5] However, the scope of the inheritance or bequest defense is uncertain. Further, as in all CERCLA cases, if beneficiaries are liable, CERCLA entitles them to contribution from other responsible parties, and there may be many other contractual rights and/or common law theories that may present an opportunity to recover damages. [FN6]

C. Caveats

It is important to note that owners of contaminated property must always clean up owned property that poses a threat to human health or the environment, regardless of whether or not they are liable under CERCLA, and that third parties have ***405** many rights not dependent upon CERCLA liability. For example, without obtaining a judgment under CERCLA, regulatory agencies may require cleanup through the issuance of orders containing stiff penalties for noncompliance, and adjacent and nearby property owners may bring an action for damages caused by migration regardless of CERCLA liability.

III

The Landscape of the Law and Some Historical Perspective

A. CERCLA in General

CERCLA imposes liability on covered persons and provides a mechanism for the recovery [FN7] or contribution [FN8] of response costs incurred in remediating properties impacted with hazardous substances. [FN9] CERCLA plaintiffs can include private individuals as well as state and/or federal entities. Covered persons that are potentially liable include all present owners and/or operators, [FN10] past owners and/or operators, [FN11] arrangers (also called "generators" or "disposers"), [FN12] and

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acceptors (also called "disposal facilities"). [FN13]

Operator, arranger, and acceptor liability turns on whether defendants performed certain acts, such as generating a waste containing a hazardous substance, that bring them within the defined class of covered persons. By comparison, potential liability for owners turns only on a defendant's status as an owner. Though CERCLA case law does nuance ownership liability in certain circumstances, such as where interim owners are considered innocent interim owners if they did not ***406** exacerbate contamination, it is never favorable to be a CERCLA owner without reasonable certainty of a defense.

B. The Law as Applied to Trustees

1. History and Overview of Trustee Liability Under CERCLA

a. Quadion Corp. v. Mache [FN14]

Quadion is the seminal case involving allegations of CERCLA liability leveled at a trustee. [FN15] The case is historically significant because it presented for the first time the possibility of naming trustees as defendants in CERCLA cases. [FN16] However, Quadion is unclear as to whether the plaintiffs sought to reach only the trust assets or whether they attempted to reach the trustee's personal assets. The case therefore sheds little light on the potential personal liability of trustees.

Two years after Quadion, and perhaps in light of it, commentators asked the Environmental Protection Agency (EPA) to exempt trustees from potential personal liability. The EPA refused. [FN17]

b. City of Phoenix v. Garbage Services Co. [FN18]

City of Phoenix brought the issue of trustee personal liability to a head by imposing personal liability on a bank trustee for contamination resulting from the use of trust property as a landfill. [FN19] This landfill property was ultimately owned by a testamentary trust. [FN20] The trustee, Valley National Bank, administered the trust, but not the site, and never involved itself ***407** in the landfill operations. [FN21] The City of Phoenix eventually condemned and remediated the site. [FN22] More than twenty years after the bank acquired the landfill, the City of Phoenix filed suit against the bank, seeking to recover its response costs pursuant to section 107 of CERCLA. [FN23] The bank argued that trustees were not owners for purposes of CERCLA. [FN24] Moreover, given the role of trustee, the bank argued that even if a trustee was an owner for CERCLA purposes, the trustee could not be held personally liable. [FN25] The court rejected both arguments. [FN26]

The court breezed by the first question, quickly ruling that trustees could be owners subject to CERCLA claims, [FN27] then turned to the more difficult question of trustee personal liability under CERCLA. [FN28] The court attempted to fashion a uniform federal rule that maintained both the congressional intent behind CERCLA (that is, to make anyone other than the taxpayers pay for cleaning up impacted sites) and general legal principles regarding personal liability for trustees. [FN29] After considering the Restatement of Torts [FN30] and other authority, the court announced the following rules:

(1) Where a trustee is held liable under subsection 107(a)(1) as the current owner of contaminated property, the trustee's liability is limited to the extent that the trust assets are sufficient to indemnify him.

***408** (2) Where a trustee is held liable under subsection 107(a)(2) [as the owner or operator of a facility at the time of disposal], but the trustee did not have the power to control the use of trust property, the trustee's liability is limited to the extent that the trust assets are sufficient to indemnify him.

(3) Where a trustee had the power to control the use of trust property, and knowingly allowed the property to be used for the disposal of hazardous substances, then the trustee is liable under subsection 107(a)(2) to the same extent that he would be liable if he held the property free of trust. [FN31]

Thus, the City of Phoenix rule allowed for personal CERCLA liability for malfeasant and misfeasant trustees. [FN32]

c. The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996

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City of Phoenix was a rallying cry for the banking lobby. Three years later, Congress passed the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, which eventually became section 107(n) of CERCLA. [FN33] Section 107(n)(1) proclaims that, in general, a fiduciary's liability "for the release or threatened release of a hazardous substance at, from, or in connection with a . . . facility held in a fiduciary capacity shall not exceed the assets held in the fiduciary capacity." [FN34] Section 107(n)(4) also provides fiduciaries a "safe harbor" from personal liability when they undertake certain activities that might otherwise raise the specter of CERCLA liability. [FN35]

It is critical to recognize that neither the limitation on liability nor the safe harbor provision applies if the fiduciary is negligent and that negligence "causes or contributes to the release or threatened release." [FN36] By its own terms, section 107(n) excludes fiduciaries from its protection where the fiduciary is liable under CERCLA as an individual--for example, as a generator--as ***409** opposed to only as a fiduciary. [FN37] The safe harbor provision also does not apply where a fiduciary acts in a manner other than as a fiduciary, such as acting as a beneficiary or benefiting as a result of that behavior. [FN38] The safe harbor is not safe where the individual or entity is both fiduciary and beneficiary and the fiduciary benefits in a manner that exceeds "customary or reasonable compensation[] and incidental benefits" [FN39] or acts in his or her own self-interest. [FN40] Section 107(n) also excludes certain classes of fiduciaries from the definition of "fiduciary" [FN41] and therefore from protection of the section. [FN42]

d. The First Interpretation of 107(n): Canadyne-Georgia Corp. v. NationsBank [FN43]

In Canadyne, the defendants included the bank trustee of the settlor's testamentary trust, as well as an inter vivos trust ***410** established for the benefit of the settlor's daughters. [FN44] When sued for response costs under CERCLA, the trustee bank moved to dismiss on the grounds that it was not a "person" for purposes of CERCLA liability and that section 107(n) excluded it from liability. [FN45] The district court dismissed the matter on the first grounds and failed to address the bank's section 107(n) argument. [FN46] On appeal, however, the U.S. Circuit Court of Appeals for the Eleventh Circuit determined that, as a general principle of Georgia law, trustees could be owners of real property and therefore subject to CERCLA liability. [FN47] However, without more than the mere fact of being a trustee, fiduciaries had no personal liability exposure and were only liable as trustees. [FN48]

Canadyne raised other questions, however, because the individual trustees in that case held an interest in the property other than the interest they held as trustees; the bank was also a lender. [FN49] As such, the Eleventh Circuit reached some aspects of the section 107(n) question regarding under what circumstances personal liability could be imposed on trustees with other roles. [FN50] While the section 107(n) inquiry in Canadyne was necessarily fact specific, the court did make some helpful legal generalizations. Specifically, the court rejected the contention that the combination of a lending relationship and a fiduciary duty would exclude an entity from section 107(n) protection. [FN51] Thus, a bank trustee who also acted as mortgagor, for example, is still able to assert section 107(n) as a defense to personal liability. [FN52] The court also refused to find the trustee negligent, within the meaning of the negligence exception in section 107(n)(3), based on the fiduciary's vicarious liability for acts of employees, [FN53] even though the partnership would be vicariously ***411** liable for the actions of its employees under general negligence principles. [FN54] Finally, the Eleventh Circuit refused to find negligence and apply the negligence exception to section 107(n) protection based on the fiduciary's failure to act. [FN55] The court reasoned that, because CERCLA is a strict liability statute, CERCLA does not impose a duty to prevent others from acting. [FN56] As such, a failure of the fiduciary to prevent the release of a hazardous substance could never support a negligence theory and therefore could never bring a fiduciary within the negligence exception in section 107(n)(3). [FN57] Thus, the defendant trustee was entitled to the protection of section 107(n).

e. California Health and Safety Code Section 25548

The California legislature, like Congress, also took action in 1996 and enacted California Health and Safety Code section 25548--the California law analogous to CERCLA section 107(n). [FN58] The stated intent of section 25548 is "to specify the type of lender and fiduciary conduct that will not incur liability for hazardous material contamination." [FN59] As such, section

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25548 provides exemptions and limitations to potential fiduciary liability under the environmental laws. [FN60] Thus, section 25548 ***412** residually identifies the universe of potential liability for fiduciaries. Specifically, section 25548 addresses the exceptions to and limitations on "the liability of trustees, executors, and other fiduciaries for hazardous material contamination involving property that is part of the fiduciary estate." [FN61]

Section 25548.3 eliminates personal liability for fiduciaries by confining their potential liability to the estate assets. [FN62] The caveats come in section 25548.5, which makes it clear that fiduciaries do not have blanket immunity from liability under the environmental laws. [FN63] The protection of the limitation of liability in section 25548.3 will not apply where (1) that liability results from the fiduciary's negligence or recklessness; [FN64] (2) the fiduciary conducts a removal or remedial action without providing proper notice to the appropriate agency; [FN65] (3) the potential liability results from acts outside the scope of the fiduciary duties; [FN66] (4) the fiduciary relationship is fraudulent in that its raison d'être is to avoid liability; [FN67] or (5) the fiduciary is also a beneficiary, or benefits from acting as fiduciary, in a manner over and above that considered customary or reasonable for a fiduciary. [FN68]

The courts have yet to interpret or apply section 25548 in an appellate decision. There is therefore little to guide parties and counsel with respect to when personal liability will, or will not, result under California law. It is likely that the example set by the federal courts in interpreting CERCLA section 107(n) would be highly persuasive. The federal courts, as discussed above, have held that trustees can have other roles and still be protected, that trustees won't be held liable where liability is solely vicarious, and that failure to prevent a release will not necessarily remove the trustee's protection. [FN69] California courts have, however, been mavericks in the past. As the law currently ***413** stands, fiduciaries who act exclusively as fiduciaries, act responsibly, and give sound guidance should be shielded from personal liability.

2. Trustee Ownership Status

State law answers the question of whether a trust is an owner of property under CERCLA. As noted above, owners are generally strictly, jointly, and severally liable for all contamination prior to or during their time of ownership, subject to certain defenses and nuances of case law, such as the "innocent landowner defense." [FN70]

Decisions in a number of states answer the question affirmatively. [FN71] Courts in other states, however, reached the opposite conclusion. [FN72] California courts have yet to rule on the exact question of whether trustees can be owners for CERCLA purposes. However, in Castlerock Estates, Inc. v. Estate of Markham, the Northern District of California addressed the closely related question of whether a conservator or executor of an estate could be liable as an owner under CERCLA. [FN73] The ***414** Castlerock court discussed the similarities between conservatorships and trusts and noted that

> since a conservator is bound by the laws of the state to seek a court order to sell or convey property, the legal title of a conservator is a lesser form of title than that possessed by a trustee. Conservators and executors hold title by reason of office in contrast to a trustee who holds title by deed. All acts done by a conservator or an executor vis-à-vis property require a court's approval except where additional powers are given by the instrument which created their office. On the other hand, a trustee holds legal title for benefit of beneficiaries who have equitable title. Generally powers of a trustee are greater and broader than those of an executor or conservator. Actions of a trustee require court approval in fewer instances. The trustee obtains written title by the very trust instrument itself.
>
> A stricter test for CERCLA liability should apply to conservators and executors because their title is much lesser than is the title held by trustees. [FN74]

From cases holding that an easement holder is not an owner for CERCLA purposes, some treatises extrapolate that CERCLA intended to exclude entities that hold anything less than a fee simple interest from liability. [FN75] This view, however, is contrary to the implications of Castlerock and cases addressing related contexts. [FN76] It seems far more likely that California courts ***415** will find trustees of impacted properties to be owners under CERCLA.

C. The Law as Applied to Beneficiaries

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Based on the statute itself and existing case law, CERCLA is merciless when it comes to beneficiaries. Future heirs and/or beneficiaries would therefore be well-advised to take steps to ensure that they will be able to satisfy the elements of the statutory defenses within CERCLA section 9607(b) once title vests in them. The elements of the third-party defense and the inheritance or bequest defense, a subdefense of the third-party defense, are discussed below. In addition, there may be other potential options for limiting liability--such as using a limited liability company (LLC) to receive and hold title--that are untested and therefore uncertain as to effectiveness. These are also discussed below.

1. Potential CERCLA Owner Liability and Statutory Defenses of Beneficiaries

Even if they are owners and therefore covered persons under CERCLA, beneficiaries can avoid liability if they can successfully assert one of the affirmative defenses in section 9607(b). [FN77] One such defense is the third-party defense. [FN78]

Successful assertion of the third-party defense requires a showing that the release or threatened release of a hazardous substance is attributable solely to the "act or omission of a third ***416** party other than . . . one whose act or omission occurs in connection with a contractual relationship." [FN79] Thus, if a contractual relationship exists between the covered person and the third party, the defense fails. CERCLA section 9601(35)(A) provides the definition of "contractual relationship" as used in the third-party defense. [FN80] In so doing, this section refines the third-party defense into three subdefenses, referred to here as the innocent landowner defense, [FN81] the government agency defense, [FN82] and the inheritance or bequest defense. [FN83]

a. The Third-Party Defense

Barring an act of war or God, establishment of the third-party defense is the first necessary step for any defendant hoping to find a refuge from liability within CERCLA itself. [FN84] In order to successfully assert the defense, the defendant must prove all of the following elements by a preponderance of the evidence:

1. The release or threatened release is attributable solely to the acts or omissions of a third party. [FN85]
2. The defendant "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." [FN86]
3. The defendant "took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." [FN87]
4. The act or omission did not occur in connection with a contractual relationship between the defendant and the third party. [FN88] ***417** In order to show the absence of a contractual relationship with the third party, the defendant must prove that any contract existing between the third party and the defendant at the time of the release or threatened release was something other than an instrument transferring interest in land. [FN89] By way of the limited examples in section 9601(35)(A), a contract that would defeat the defense "includes, but is not limited to, land contracts, deeds, easements, leases or other instruments transferring title or possession." [FN90]

If, however, the contract falls within this definition, the defendant can still avoid liability by satisfying the elements of one of the subdefenses within sections 9601(35)(A)(i)-(iii).

b. The Relevant Subdefenses to the Third-Party Defense

(i) The Innocent Landowner Defense

The availability of the innocent landowner defense depends on what a party knew or should have known before they took title to a property. [FN91] Successful assertion of this defense requires the defendant to show that, "[a]t the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility." [FN92] Would-be land purchasers cannot avoid liability by sticking their heads in the sand to avoid knowledge because those who seek protection must carry out inquiry sufficient to meet the rigorous due diligence requirements of "all appropriate inquiry." [FN93] If a purchaser can be proven to

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be an innocent landowner, they will have no liability under CERCLA as an owner.

***418** (ii) The Inheritance or Bequest Defense

The inheritance or bequest defense is available to a covered person who can satisfy all of the elements of the third-party defense described above, [FN94] except that the third party's act or omission occurred in connection with a contractual relationship. In such circumstances, past or present owners can still assert the inheritance or bequest defense as an affirmative defense to CERCLA liability if they satisfy all of the following elements and no other basis for liability applies:

1. The defendant acquired title to the property subsequent to the disposal or placement of the hazardous substance. [FN95]
2. The defendant acquired title to the property through inheritance or bequest. [FN96]
3. The defendant "provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility)." [FN97]
4. The defendant "is in compliance with any land use restrictions established or relied on in connection with the response action at a facility." [FN98]
5. The defendant "does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action." [FN99]

As such, the following questions are fundamental to the determination of the potential CERCLA liability for beneficiaries of trusts that include impacted real property:

1. Is a beneficiary, as holder of equitable title, an owner for CERCLA purposes?
2. ***419** Does the beneficiary satisfy the elements of the third-party defense except that a contractual relationship exists between the defendant and the third party?
3. Did the beneficiary take title through inheritance or bequest such that the inheritance or bequest defense might apply?
4. Does the beneficiary satisfy the elements of the innocent landowner defense such that this defense might apply if the inheritance or bequest defense fails?

With respect to beneficiary ownership for CERCLA purposes, creation of an express trust in California historically vested full title of trust property in the trustee or trustees. [FN100] The California legislature repealed this statute in 1986, so the modern rule now applies. [FN101] The modern rule holds that creation of a trust divides title such that the trustee or trustees take legal title, and the beneficiary or beneficiaries take equitable title. [FN102] For purposes of evaluating the potential CERCLA liability of a trust beneficiary based on his or her status as owner, the initial question is whether the equitable interest held by trust beneficiaries is sufficient to support liability.

The court in United States v. Wedzeb Enterprises, Inc. concluded that an equitable interest, no matter how small, is sufficient to support CERCLA owner liability. [FN103] A fire at the site at issue in Wedzeb resulted in PCB contamination of the property. [FN104] Approximately three months before the fire, one of the Wedzeb defendants entered into a contract to purchase the site. [FN105] The defendant argued that, at the time of the fire, he had paid less than ten percent of the purchase price, and the deed was still in escrow at the bank. [FN106] Therefore, the defendant argued that he was not an owner under CERCLA at the time of ***420** the fire. [FN107] The court rejected this argument outright, concluding that he was an owner for CERCLA purposes because, under Indiana law, equitable title passed to him when he signed the purchase and sale agreement. [FN108] Applying the reasoning of Wedzeb to trusts, beneficiaries would be owners under CERCLA the moment they take equitable title, which could occur when the trust is created, or, for testamentary trusts, at the time of the settlor's death. [FN109]

Since ownership status is based on state law, California's rules of ownership changes for purposes of reassessing real property values to determine tax liability may provide a useful analogy for CERCLA liability analysis. Those rules imply that beneficiaries may be liable as owners under CERCLA based on their equitable interest in real property. In Reilly v. San

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Francisco, [FN110] the issue was whether succession of an income beneficiary of a testamentary trust by another income beneficiary constituted a change in ownership. [FN111] While not a CERCLA case, Reilly may provide some guidance as to how courts will approach the ownership question for trust beneficiaries in CERCLA cases.

In Reilly, the settlor, Francis O'Reilly, established a testamentary trust in 1965 for his personal and real property. [FN112] Upon his death in 1966, his grandniece became the sole income beneficiary of the trust and was entitled to receive all of the net income derived from the trust for the remainder of her life. [FN113] Should she leave no heirs, a nephew would succeed her as sole income beneficiary for the remainder of his life. [FN114] The ***421** grandniece died in 2000 and had no heirs. [FN115] The nephew therefore became the new income beneficiary. [FN116] The City of San Francisco Assessor determined that the succession of income beneficiaries from the grandniece to the nephew constituted a one hundred percent change in property ownership and that the City correctly reassessed the subject property for purposes of taxation in accord with Proposition 13. [FN117] The nephew appealed the determination to the Assessment Appeals Board, which agreed with the Assessor. [FN118] Reilly then appealed to the state courts. [FN119] The California Court of Appeal for the First District agreed with the City. [FN120]

For present purposes, the usefulness of Reilly is not whether there was a change in ownership from the grandniece to the nephew, but whether they were owners of the real property to which they were only entitled the benefit of income. While all of the discussion in that case is about changes in ownership, [FN121] a logical analysis requires some conclusions about ownership itself. Specifically, in order to have a change in ownership, there must first be ownership by at least one entity prior to the change and ownership by at least one different entity subsequent to the change. Thus, in order to conclude that transfer of the beneficial, equitable interest from the grandniece to the nephew constituted a change in ownership, [FN122] the court must have determined initially that the grandniece, and then the nephew, actually (or at least legally) owned the property. As there are circumstances specified in the California Code of Regulations applicable to taxation in which no change in ownership occurs, despite the transfer of real property interests into a trust, [FN123] these instances support arguments for trust beneficiaries seeking to ***422** avoid CERCLA owner liability. These specific situations are displayed in Table 1 in the Appendix below.

With respect to whether title was acquired via inheritance or bequest, CERCLA defines neither "inheritance" nor "bequest." [FN124] CERCLA case law also provides no clear rules or definitions for what exactly constitutes an inheritance or bequest. Reasoning from the dictionary definitions of "inheritance," "bequest," and "devise," property taken through testamentary trusts or intestate succession would likely constitute inherited or bequeathed property, as the property interest transfers upon the death of the prior owner. [FN125] No federal court opinions addressing this issue of whether inter vivos trusts or lifetime gifts constitute an inheritance or bequest for purposes of the inheritance or bequest defense exist. [FN126] The only authority on point is Tamposi Family Investments, [FN127] an opinion of the Environmental Protection Agency Appeals Board.

In Tamposi, the Appeals Board rejected petitioner's argument that a gift from a father to a real estate investment partnership, in which his children were the exclusive partners, should qualify for the inheritance or bequest defense. [FN128] Citing Black's Law Dictionary definitions for "inheritance," "bequest," and "devise," the Appeals Board found that the text of CERCLA ***423** indicated that the inheritance or bequest defense was inapplicable to inter vivos transfers, as the defense only applied to transfers occurring upon death of the prior owner. [FN129] Since it is the sole authority on point and an analysis of CERCLA by an arm of the EPA itself, courts considering the issue in the future will likely find Tamposi highly persuasive and may defer to the agency's interpretation. [FN130] Thus, the best option for settlors wishing to protect beneficiaries from CERCLA liability during the lifetime of the settlor is to use testamentary trusts and devises in wills to transfer interests in impacted property. They should then provide bequests to beneficiaries that may enjoy limited liability status due to the form of business (such as an LLC not comprised of beneficiary members). Combining these steps with thoughtful timing of sales or distributions to occur after cleanup, or in an otherwise protective manner, are also optional protective measures. However, there is currently no authority as to what structures will be effective. The most important fact for beneficiaries to keep in mind is that the estate, and therefore any property in trust, will always be fully liable if the settlor was personally liable. The question is how to avoid or minimize the personal liability of the beneficiaries. This approach is entirely consistent with the settlor's intent and legal status: the settlor owned the property, the settlor was personally liable, and the settlor intended to give the beneficiary

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what he possessed during his life. [FN131]

***424** 2. Other Possible Tools for Limiting Liability

a. Change of Ownership Regulations May Eliminate "Unplanned" Ownership Transfers to Beneficiaries

The California Code of Regulations addresses taxation rules for changes in ownership in title 18, section 462. Section 462.160 pertains to trusts. Subsection (a) of section 462.160 provides the general rule that transfer of real property interests into trusts, by the settlor or anyone else, is a change in ownership; [FN132] subsection (b) provides instances excluded from this rule. [FN133] Subsection (c) provides the general rule that termination of a trust or any portion of a trust, constitutes a change in ownership, [FN134] and subsection (d) provides the exceptions to this second general rule. [FN135] These rules for exclusions and exceptions--for example, those transfers of interests that do not constitute changes in ownership--are complex and are therefore presented in the Appendix in tabular form in an attempt to simplify comparisons. [FN136] While untested in the courts, would-be settlors and/or beneficiaries may be able to use these rules as a guide for selecting trusts that will make CERCLA owner liability for the beneficiaries less likely, or at least delay such potential liability until such time as the property may be transferred with less or no risk.

b. Use of an LLC

It may be possible to structure a set of circumstances where the beneficiary is an LLC that receives title from the trustor during the trustor's lifetime and funds for remediation, if necessary, from the settlor at the time of trust creation. Parties who would otherwise be beneficiaries could be members of that LLC and be entitled to distribution of LLC assets upon an acceptable sale or other acceptable resolution of the environmental conditions at issue. Another potential structure would be for the LLC to have a manager that was itself a ***425** fiduciary. The most conservative approach would likely be to designate a third party as the sole member and manager of the LLC until distribution, avoiding a unity of interest among beneficiaries and the owner of the property. [FN137] This strategy is completely untested, however, and courts may conclude that such arrangements are ruses and pierce the veil of the LLC to hold the members personally liable.

However, so long as the trust remains liable, limiting the liability of the beneficiaries to the extent of trust assets, absent misfeasance or malfeasance, seems equitable and consistent with general legal principles. Without any judicial guidance, the answer to the question as to whether naming an LLC as a beneficiary and appointing a third-party trustee will in fact insulate the ultimate beneficiaries from personal liability, absent some sort of misconduct, is uncertain.

IV

Conclusion

The environmental laws, and CERCLA in particular, have incredibly long arms. CERCLA cares not for fault or blame but only for status of ownership of real property. This status exposed trustees to personal liability until 1996. The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, subsequently codified as CERCLA section 107(n), took much of the risk out of acting as a trustee where contaminated real estate is part of their fiduciary responsibility. But section 107(n) does not completely eliminate the potential for personal liability on the part of fiduciaries. Trustees face potential personal liability under the environmental laws but only in circumstances typically involving malfeasance. The general legal rules that delineate trustee liability apply to the environmental laws as well. That is, where a trustee acts responsibly in their fiduciary capacity as trustees, they have limited personal liability exposure. [FN138] Where trustees ***426** act as trustees and do so with integrity, both California and federal laws work to shield them from personal liability exposure. [FN139]

In California, this rule is codified as Health and Safety Code section 25548. Under CERCLA, the rule is codified as section 107(n). Both laws contain exceptions, however, and trustees should take care to avoid negligent, reckless, self-serving, and fraudulent acts, as well as acts that fall outside the scope of their fiduciary duties, because such behavior will nullify the protection of these laws.

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Beneficiaries have it tougher than trustees. Unlike fiduciaries, no law makes beneficiaries exempt from liability under the environmental laws. Beneficiaries will likely be owners under CERCLA of any real property held in trust for their benefit. Thus, where appropriate, beneficiaries face CERCLA liability as owners, at a minimum, and nothing in the case or statutory law indicates that potential liability of beneficiaries is limited to trust assets. However, beneficiaries of testamentary trusts or who otherwise obtain their beneficiary interest through inheritance or bequest may be able to assert the inheritance or bequest defense. Even if these defenses were found to be inadequate, equity militates in favor of limiting beneficiary liability to that liability that would attach to the trustor, absent another basis for liability on the part of the beneficiary.

The use of LLCs or other entities as owners remains mostly unexplored. However, CERCLA renders practically any act done for the purpose of limiting liability ineffective. [FN140] Setting up LLCs made up of parties that already have title, such as a trust or beneficiaries, will likely be ineffective as a means of limiting liability to the assets of that entity-- particularly where the entity, such as a trust-owned LLC, has no other function and simply holds title to contaminated property. LLCs contained inside a trust are also unlikely to function effectively as a means of containing exposure of the remainder of the trust assets and ***427** quite possibly the estate assets, especially where the trust was an owner prior to transfer to the LLC. All of the above structures seem likely to run against the grain of CERCLA's liability scheme, which intentionally leaves little room for liability-limiting devices with no other redeeming social value or function and which are comprised or controlled by those who seek to avoid liability.

Given the foregoing, it appears that the best overall strategy is to anticipate transfers in property, to attempt to structure such transfers to fall within the statutory defenses, and to preserve and pursue rights against other potentially responsible parties.

***428** Appendix

Table 1 Instances excluded from the general rule that the creation of a trust constitutes a change in ownership of the trust property [FN141]

Type of Trust Created [FN142]	Trustee or Trustees	Beneficiary or Beneficiaries	Change in Ownership?
Lifetime Irrevocable	Anyone	Settlor only	No [FN143]
Lifetime Irrevocable	Anyone	Settlor and others	Yes, unless another exclusion applies to the other beneficiary or beneficiaries [FN144]

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Lifetime Irrevocable	Anyone, but trustee has "sprinkle power" to distribute trust income or property among the beneficiaries	Anyone	Yes, unless another exclusion applies to the other beneficiary or beneficiaries [FN145]
Lifetime Twelve-Year Irrevocable Reversion Trusts	Anyone	Anyone, but the settlor retains a reversion and the beneficial interest of anyone other than the settlor does not exceed twelve years	No [FN146]
Lifetime Irrevocable Trust in which the trust propety includes	Anyone	Settlor only, or Settlor and others but	No, unless Revenue and Taxation Code section

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an ownership interest in a legal entity that holds an interest in real property		settlor retains a reversion such that the beneficial interest of any of other beneficiary does not exceed twelve years	61(1), 64(c), 64(d) applies [FN147]
Lifetime Revocable	Anyone	Anyone	No [FN148]
Lifetime Interspousal Revocable and Irrevocable	Spouse 1	Spouse 2	No [FN149]
Lifetime Interspousal	Spouse 1	Spouse 2 and others	Yes, unless another exclusion applies to the other beneficiary or beneficiaries [FN150]
Lifetime Parent-Child	Parent/Child	Child/Parent	No [FN151]

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Revocable and Irrevocable			
Lifetime Parent-Child Revocable and Irrevocable	Parent/Child	Child/Parent and others	Yes, unless another exclusion applies to the other beneficiary or beneficiaries [FN152]
Lifetime Grandparent-Grandchild Revocable and Irrevocable	Grandparent/Grandchild	Grandchild/Grandparent	No [FN153]
Lifetime Grandparent-Grandchild Revocable and Irrevocable	Grandparent/Grandchild	Grandchild/Grandparent and others	Yes, unless another exclusion applies to the other beneficiary or beneficiaries [FN154]
Proportional Interest	Anyone	Anyone, but the	No [FN155]

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Revocable and Irrevocable		proportional interest of the beneficiaries is the same before and after transfer of the property interest to the trust	
Other Trusts-Revocable and Irrevocable Transfers of Interest from One Trust to Another	Anyone	Anyone	No, so long as the transfer falls into one of the "non-change" categories described above [FN156]

***431** Table 2 Exceptions to the general rule that termination of a trust constitutes a change in ownership [FN157]

Type of Transfer Resulting from Trust Termination	Interest Held During Trust	Distribution at Trust Termination	Change in Ownership?
Prior Change in	Use or income	Holder of use or	No [FN158]

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Ownership		income benefit during life of trust	
Prior Change in Ownership	Remainder or reversionary interest only (i.e., no use or income benefit)	The remainder or reversionary interest becomes possessory	Yes, unless an exclusion applies [FN159]
Prior Change in Ownership	Remainder or reversionary interest and present beneficiary	The remainder or reversionary interest becomes possessory	No [FN160]
Revocable Where Settlor Revokes Trust	N/A	N/A	No [FN161]
Settlor Reversion Trusts	Reversion interest for no more than twelve years	Beneficiary's interest reverts to settlor	No [FN162]
Interspousal Trusts	Spouse 1	Spouse 2	No, so long as interspousal exclusion applies

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			[FN163]
Parent-Child or Grandparent-Grandchild	Child/Parent or Grandchild/Grandparent	Parent/Child or Grandparent/Grandchild	No, so long as either the parent-child or grandparent-grandchild exclusion applies [FN164]
Proportional Interests	Beneficiaries' interest in trust property	Trust property interest proportional to the interest held by the beneficiaries during the life of the trust	No [FN165]
Other Trusts	Interest in property in trust A	Interest in property in trust B	No, so long as an exception applies to the transfer [FN166]

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[FN1]. Note that we are careful here to avoid mentioning the inheritance of impacted property. For reasons discussed herein, specific rules may apply to property transferred through inheritance or bequest. While these transfers are important, and therefore discussed extensively, the main focus of this Article is the potential liability implications of lifetime transfers of property interests through trusts.

[FN2]. The terms "settlor" and "trustor" are synonymous and refer to the creator of a trust. These terms are used interchangeably throughout this Article.

[FN3]. 42 U.S.C. §§ 9601-9675 (2006). Congress amended CERCLA with the Superfund Amendments and Reauthorization Act of 1986 (SARA). These statutes are referred to collectively herein as CERCLA.

[FN4]. Malfeasance is the act of doing a bad thing. Misfeasance is failing to stop a bad thing from happening.

[FN5]. 42 U.S.C. § 9607(b)(3); see also id. § 9601(35)(A)(iii).

[FN6]. Id. § 113(f); see, e.g., Cal. Civ. Code § 3479 (West 1997) (defining nuisance).

[FN7]. Cost recovery actions are covered by CERCLA section 107 and are available to reimburse voluntarily incurred response costs. United States v. Atlantic Research Corp., 127 S. Ct. 2331, 2338 (2007).

[FN8]. Section 113(f) of CERCLA addresses contribution actions which are only available to responsible parties and only after these parties have been sued under section 106 or 107 or otherwise have resolved their liability with the government. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 162-63 (2004).

[FN9]. 42 U.S.C. § 9607(a) (defining covered persons).

[FN10]. Id. § 9607(a)(1).

[FN11]. Id. § 9607(a)(2).

[FN12]. Id. § 9607(a)(3).

[FN13]. Id. § 9607(a)(4).

[FN14]. Quadion Corp. v. Mache, 738 F. Supp. 270 (N.D. Ill. 1990).

[FN15]. See id. The government actually named an individual trustee as a defendant in the earlier case of United States v. Ottati & Goss, Inc., 630 F. Supp. 1361, 1365 (D.N.H. 1985). The court granted summary judgment in the individual's favor; the government did not appeal.

[FN16]. Quadion, 738 F. Supp. at 272-73.

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[FN17]. Lender Liability Under CERCLA, 40 C.F.R. pt. 300 (2008). The EPA failed to come right out and express what was likely the agency's primary concern: that if such an exception existed, unscrupulous polluters would simply create trusts, name themselves as trustees, and then thumb their noses at the regulators while violating every environmental law on the books.

[FN18]. City of Phoenix v. Garbage Servs. Co., 827 F. Supp. 600 (D. Ariz. 1993).

[FN19]. Id. at 607.

[FN20]. Id. at 601.

[FN21]. Id. at 602.

[FN22]. Id.

[FN23]. Id.

[FN24]. See id. at 601. Whether trustees fall into any of the other classes of potential CERCLA defendants is a more straightforward question. The analysis for operator, arranger, and disposer liability turns on questions of actions, not status, as owner liability does. Where a trustee acts as operator, arranger, or disposer under the CERCLA cases, the trustee will be a covered person under CERCLA. The issue then becomes whether the acts creating such liability are such that the protection afforded trustees by section 107(n) of CERCLA will not apply. See infra Parts III.B.1.c-e.

[FN25]. See City of Phoenix, 827 F. Supp. at 602.

[FN26]. Id. at 601, 604-05.

[FN27]. Id. at 605. This point is now settled law such that the answer to the "owner" question turns on governing state law. For a more detailed discussion of this rule, see infra Part III.B.2.

[FN28]. City of Phoenix, 827 F. Supp. at 602-07.

[FN29]. Id. at 603.

[FN30]. Id. (considering Restatement (Second) of Trusts §§ 264-265 (1959)).

[FN31]. Id. at 605.

[FN32]. Id. at 606-07.

[FN33]. Pub. L. No. 104-208, sec. 2501-2505, § 107, 110 stat. 3009-462 to 469 (codified as amended at 42 U.S.C. §§ 6991, 9601, 9607 (2006)).

[FN34]. 42 U.S.C. § 9607(n)(1) (including trustees in the list of covered fiduciaries).

[FN35]. Id. § 9607(n)(4).

[FN36]. Id. § 9607(n)(3).

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[FN37]. Id. § 9607(n)(2). Thus, if the trustee committed acts such that the trustee is an operator, arranger, or acceptor, the trustee could be liable in their individual capacity as operator, arranger, or acceptor, as opposed to their capacity as trustee.

[FN38]. Id. §§ 9607(n)(2), (7). Section 107(n)(7) uses "and" in subsection (B)(i), while the analogous California Health and Safety Code, section 25548.5, discussed at footnote 60, does not. No appellate opinion discusses this difference, but superficially, it appears that to maintain the protection afforded by state law one only has to satisfy the requirements of a single subsection of section 25548.5, while one would have to satisfy every subsection of CERCLA section 107(n)(7) in order to maintain the protection afforded under federal law.

[FN39]. 42 U.S.C. § 9607(n)(7)(B)(ii). This rule appears to apply even if receipt of the benefits would be legal under other applicable law.

[FN40]. Id. § 9607(n)(7).

[FN41]. Id. § 9607(n)(5).

[FN42]. Specifically, under CERCLA, a trustee is not a "fiduciary" for the purpose of the safe harbor provision where they are the trustee of a trust that engages in a business for profit, or is organized to engage in a business for profit, unless the reason for the trust was the facilitation of an estate plan or plans, due to the incapacity of the estate owner. Id. § 9607(n)(5)(A)(ii)(I). Also excluded are fiduciaries of trusts that would be considered fraudulent in that they were created specifically and intentionally to avoid liability. Id. § 9607(n)(5)(A)(ii)(II). Again, there are less than a handful of cases that interpret and/or apply CERCLA section 107(n). See, e.g., United States v. Newmont USA Ltd., 504 F. Supp. 2d 1050, 1057 (E.D. Wash. 2007) ("[Section 107(n)] limits a fiduciary's liability to the value of the trust assets ... but does not, as the United States suggests, require that the payment for potential liability be from the trust assets."); see also Canadyne-Georgia Corp. v. NationsBank, 183 F.3d 1269 (11th Cir. 1999); Briggs & Stratton Corp. v. Concrete Sales & Servs., 20 F. Supp. 2d 1356 (M.D. Ga. 1998); Norfolk Southern Ry. Co. v. Shulimson Bros., 1 F. Supp. 2d 553 (W.D.N.C. 1998).

[FN43]. Canadyne, 183 F.3d at 1269.

[FN44]. Id. at 1271.

[FN45]. Canadyne-Georgia Corp. v. NationsBank, 982 F. Supp. 886, 888 (M.D. Ga. 1997), rev'd, 183 F.3d 1269.

[FN46]. Id. at 891.

[FN47]. Canadyne, 183 F.3d at 1273-74.

[FN48]. Id. at 1274 n.7.

[FN49]. Id.

[FN50]. Id. at 1274.

[FN51]. See id. at 1275 n.9.

[FN52]. See id.

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[FN53]. Id. at 1275 n.10.

[FN54]. Id.

> [E]ven assuming arguendo that the Bank was a general partner, Canadyne must show the Bank itself negligently caused or contributed to the pollution. Just because under state partnership law a partnership and its partners may be vicariously liable for the negligence of any one partner or employee of the partnership does not mean every partner herself negligently caused the accident. Vicarious liability, or "imputed negligence," is not the same as saying negligence of a fiduciary caused or contributed to the release, as required under [section 107(n)].
> Id. (internal quotation and citation omitted).

[FN55]. Id. at 1275.

[FN56]. Id.

[FN57]. Id.

[FN58]. Hazardous Materials Liability of Lenders and Fiduciaries, ch. 6.96, 1996 Cal. Legis. Serv. 612 (West) (codified at Cal. Health & Safety Code § 25548 (West 1999)).

[FN59]. Cal. Health & Safety Code § 25548(b) (emphasis added) (defining fiduciary); see also Cal. Prob. Code §§ 83-84 (West 2002) (defining "trust company" and "trustee" respectively).

[FN60]. Cal. Health & Safety Code § 25548(b). Fiduciaries may endure exposure to liability for myriad sorts of things. However, in the interest of conciseness, hereinafter, wherever this Article refers to trustee or fiduciary liability or potential liability, such liability is confined to that which might result from suit or action pursuant to state or federal environmental laws and/or regulations.

[FN61]. Id. § 25548(a)(2).

[FN62]. Id. §§ 25548(a)-(b).

[FN63]. Id. §§ 25548.5(c)-(g).

[FN64]. Id. § 25548.5(c).

[FN65]. Id. § 25548.5(d).

[FN66]. Id. § 25548.5(e).

[FN67]. Id. § 25548.5(f).

[FN68]. Id. § 25548.5(g).

[FN69]. See supra Part III.B.1.d.

[FN70]. 36 Am. Jur. 2d Forfeitures and Penalties § 41 (2001). The innocent landowner defense basically provides that, if a party adequately investigates a property's condition prior to purchase and finds nothing, then that party is not liable if hazardous

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substances are later found to be present. It is important to remember, however, that regulatory agencies can still force a cleanup by the property owners, regardless of CERCLA liability and regardless of the source of contamination.

[FN71]. Quadion Corp. v. Mache, 738 F. Supp. 270, 273-74 (N.D. Ill. 1990) (finding that trustees are "persons" for purposes of CERCLA and can therefore be "owners" under the statute if they hold, or held, legal title to a facility or vessel); see also Briggs & Stratton Corp. v. Concrete Sales & Servs., 20 F. Supp. 2d 1356, 1367-68 (M.D. Ga. 1998) ("[A]bsent wrongdoing in their individual capacity the Trustees are not liable insofar as their personal assets are concerned but may be held liable in their fiduciary capacity to the extent of the assets held in the ... [t]rust."). The trustee defendants also attempted to assert the third-party defense in CERCLA section 9607(b)(3). Briggs & Stratton Corp., 20 F. Supp. 2d at 1368-69. The court rejected this argument given the factual history of the case, thereby implying that the defense may be viable in appropriate circumstances. Id. See also Cardington Road Site Coal. v. Snyder Props., Inc., No. C-3-88-632, 1994 WL 1631033, at *11 (S.D. Ohio 1994) (finding that trustees are "owners" under CERCLA).

[FN72]. United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1358-59 (N.D. Ill. 1992) (applying Illinois law to determine that the beneficiary of a trust is the owner for CERCLA purposes and therefore trustees cannot be liable).

[FN73]. Castlerock Estates, Inc. v. Estate of Markham, 871 F. Supp. 360, 364-66 (N.D. Cal. 1994).

[FN74]. Id. at 366. The court ultimately concluded that, with respect to executors and conservators, "bare legal title to real property" was insufficient to support CERCLA "ownership" liability. Id. at 364. Nevertheless, conservators and executors could still be liable as owners under CERCLA if sufficient "indicia of ownership" existed. Id. at 364. The language in Castlerock quoted above, however, makes clear that the test for "ownership" for conservators and executors is distinct from that of trustees. California courts have yet to articulate the specific test for CERCLA ownership to apply to trustees.

[FN75]. 8 Miller & Starr, Cal. Real Estate § 23:35 (3d ed. 2000).

> The term "owner," as used in CERCLA, was probably intended to refer only to the fee simple owner or owners, and not to other persons such as trustees, licensees, remaindermen, easement holders, or the like who might have some interest in the property.
>
> ... The owner of an easement on polluted property who has not contributed to the contamination is not liable for cleanup costs as an owner or an operator under CERCLA even though the easement owner was in a position to prevent the contamination. The owner of an easement merely holds the right to use the property of another, which is not a sufficient interest for the imposition of liability under CERCLA.
>
> Id.

[FN76]. See, e.g., City of Grass Valley v. Newmont Mining Corp., No. 2:04-CV-00149, 2007 WL 4287603, at *4 (E.D. Cal. 2007) (holding that ownership of the mineral estate was sufficient to impose liability as an owner under CERCLA); see also United States v. Newmont USA Ltd., 504 F. Supp. 2d 1050, 1061-69 (E.D. Wash. 2007) (concluding, without actually adopting the "indicia of ownership" test in Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364 (9th Cir. 1994), that the United States held sufficient indicia of ownership in an Indian reservation to be held an "owner" under CERCLA); Nestle USA Beverage Div., Inc. v. D.H. Overmyer Co., No. C-96-1207, 1998 WL 321450, at *4 (N.D. Cal. 1998) (concluding that a lessee was an owner under CERCLA). But see Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 328-29 (2d Cir. 2000) ("While the typical lessee should not be held liable as an owner, there may be circumstances when owner liability for a lessee would be appropriate.").

[FN77]. See 42 U.S.C. § 9607(b) (2006) (providing the "statutory" defenses to CERCLA liability).

[FN78]. Id. § 9607(b)(3). The other defenses are the "act of God" defense in section 9607(b)(1) and the "act of war" defense in section 9607(b)(2). The final defense is section 9607(b)(4), which allows for an amalgam of any of the other three defenses.

[FN79]. Id. § 9607(b)(3).

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[FN80]. Id. § 9601(35)(A).

[FN81]. See id. § 9601(35)(A)(i).

[FN82]. See id. § 9601(35)(A)(ii).

[FN83]. See id. § 9601(35)(A)(iii).

[FN84]. See id. § 9607(b).

[FN85]. Id. § 9607(b)(3).

[FN86]. Id.

[FN87]. Id.

[FN88]. See id.

[FN89]. Id. § 9601(35)(A).

[FN90]. Id.

[FN91]. Id. § 9601(35)(B). This section sets the standard for what a purchaser must do in order to assert the defense. The requirements of this inquiry are outside of this Article's trust-specific scope. Many cases and scholarly works interpret and analyze this section of CERCLA, however, and interested readers will not want for material on the subject.

[FN92]. Id. § 9601(35)(A)(i).

[FN93]. 40 C.F.R. § 312 (2008).

[FN94]. 42 U.S.C. § 9601(35)(A)(i).

[FN95]. Id.

[FN96]. Id. § 9601(35)(A)(iii).

[FN97]. Id. § 9601(35)(A).

[FN98]. Id.

[FN99]. Id.

[FN100]. Cal. Civ. Code § 863 (West 2007) (repealed 1986); see also George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 184 n.25 (2d rev. ed. 1979).

[FN101]. Cal. Civ. Code §§ 863-867 (repealed 1986); see also Bogert & Bogert supra note 100, § 183.

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[FN102]. Castlerock Estates, Inc. v. Estate of Markham, 871 F. Supp. 360, 366 (N.D. Cal. 1994).

[FN103]. United States v. Wedzeb Enters., Inc., 809 F. Supp. 646, 652 (S.D. Ind. 1992).

[FN104]. Id. at 649.

[FN105]. Id. at 649, 652.

[FN106]. Id. at 652.

[FN107]. Id.

[FN108]. Id.

[FN109]. This moment will vary depending upon the means of trust creation and the type of trust. For example, a settlor may lay the foundation for a testamentary trust when he properly executes his will. However, because testamentary trusts do not exist until death of the settlor, the beneficiary or beneficiaries of testamentary trusts do not actually acquire title until the trust comes into existence upon the settlor's death. In such cases, the beneficiaries may well be able to assert the inheritance or bequest defense. Perhaps this would not be so with irrevocable trusts created during the settlor's lifetime.

[FN110]. Reilly v. San Francisco, 48 Cal. Rptr. 3d 291, 291 (Ct. App. 2006).

[FN111]. Id. at 293.

[FN112]. Id.

[FN113]. Id.

[FN114]. Id.

[FN115]. Id.

[FN116]. Id. ("Reilly is not a beneficiary of the trust's principal.").

[FN117]. Id. at 294.

[FN118]. Id.

[FN119]. Id.

[FN120]. Id. at 303.

[FN121]. See id. at 296. ("The question presented here is whether there is a change in ownership when one trust beneficiary succeeds another.").

[FN122]. See id.

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[FN123]. Cal. Code Regs. tit. 18, § 462.160(b)(1)(A) (2008).

[FN124]. Black's Law Dictionary does, however, define "inheritance" as (1) "[p]roperty received from an ancestor under the laws of intestacy" or (2) "[p]roperty that a person receives by bequest or devise." Black's Law Dictionary 787 (7th ed. 1999). Black's defines "bequest" as (1) "[t]he act of giving property ... by will" or (2) "[p]roperty ... disposed of in a will." Id. at 152. Black's also defines "devise" as (1) "[t]he act of giving property ... by will," (2) "[t]he provision in a will containing such a gift," (3) "[p]roperty ... disposed of in a will," or (4) "[a] will disposing of real property." Id. at 463.

[FN125]. See id. at 152, 463, 787; see also Tamposi Family Invs., 6 E.A.D. 106, 125 (EPA 1995) (concluding that the use of the words "inheritance" and "bequest" evinces an intent to include only those transfers that occur upon death).

[FN126]. At first glance it appears that United States v. Pac. Hide & Fur Depot, Inc., 716 F. Supp. 1341 (D. Idaho 1989) addresses this precise question. This is not the case. In dicta, Pacific Hide concedes the point that an inter vivos, inter-familial transfer is a contractual relationship without any real discussion on the matter. Id. at 1347-48. By implication, Pacific Hide is therefore authority for the contention that inter vivos transfers fall outside the scope of inheritances or bequests, but this determination is not part of Pacific Hide's holding. Id. at 1348-49.

[FN127]. Tamposi Family Invs., 6 E.A.D. at 124-25.

[FN128]. Id.

[FN129]. Id.

[FN130]. Although extremely persuasive, the decision is not a perfect interpretation of CERCLA. Tamposi's primary flaw is on the issue of inquiry. The Appeals Board cites to the congressional comments on CERCLA as support for the contention that individuals who take impacted property by inheritance or bequest must still conduct "reasonable inquiry" into the contamination, even if they have no knowledge of the inheritance or bequest. Id. at 125. Perhaps this was the intent of certain individual members of Congress, but this failed to make its way into the text of the statue. Nevertheless, the presence of this language in Tamposi raises the possibility that some level of inquiry, albeit a very low level, will be required of owners who take title by inheritance or bequest.

[FN131]. Potential beneficiaries may be able to disclaim property placed in trust for their benefit. See, e.g., Cal. Prob. Code § 15309 (West 2002) ("A disclaimer or renunciation by a beneficiary of all or part of his or her interest under a trust shall not be considered a transfer under Section 15300 or 15301."). While an enticing theoretical solution, practically this is not a good option where the property value exceeds, or will exceed, the cost of remediation.

[FN132]. Cal. Code Regs. tit. 18, § 462.160(a) (2008).

[FN133]. Id. § 462.160(b); see also infra Appendix Table 1.

[FN134]. Cal. Code Regs. tit. 18, § 462.160(c) (stating general rule for termination).

[FN135]. Id. §§ 462.160(d)-(e) (discussing exceptions to changes in ownership and inapplicable trusts); see also infra Appendix Table 2.

[FN136]. See infra Appendix Tables 1, 2.

[FN137]. See, e.g., Minkoff v. Koppelman, No. B195081, 2008 WL 217565, at *1 (Cal. Ct. App. Jan. 28, 2008).

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[FN138]. See, e.g., Cal. Prob. Code § 18002 (West 1991). Trustees can be liable as trustees, meaning that liability for the trustees' actions may attach to the assets or corpus of the trust. Personal liability for the trustee as an individual will not attach, however, unless the trustee is personally liable as an individual. 60 Cal. Jur. 3d Trusts § 258 (1980).

[FN139]. Note that trust law allows for the inclusion of clauses limiting the liability of the trustee(s) to the beneficiaries. 76 Am. Jur. 2d Trusts § 336 (2005). Such clauses are not favored and must be written with sophistication in order for courts to uphold them. Additional research into this subject would be necessary in order to craft such a clause in any particular case.

[FN140]. See supra text accompanying note 42.

[FN141]. See discussion supra Part III.C.2.a.

[FN142]. Including revocable and irrevocable trusts.

[FN143]. Cal. Code Regs. tit. 18, § 462.160(b)(1)(A) (2008).

[FN144]. Id.

[FN145]. Id.

[FN146]. Id. § 462.160(b)(1)(B).

[FN147]. Id. § 462.160(b)(1)(C).

[FN148]. Id. § 462.160(b)(2).

[FN149]. Id. § 462.160(b)(3).

[FN150]. Id.

[FN151]. Id. § 462.160(b)(4).

[FN152]. Id.

[FN153]. Id.

[FN154]. Id.

[FN155]. Id. § 462.160(b)(5).

[FN156]. Id. § 462.160(b)(6).

[FN157]. See discussion supra Part III.C.2.a.

[FN158]. Cal. Code Regs. tit. 18, § 462.160(d)(1).

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[FN159]. Id.

[FN160]. Id.

[FN161]. Id. § 462.160(d)(2).

[FN162]. Id. § 462.160(d)(3).

[FN163]. Id. § 462.160(d)(4).

[FN164]. Id. § 462.160(d)(5).

[FN165]. Id. § 462.160(d)(6).

[FN166]. Id. § 462.160(d)(7).

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From:	Mary Grady
To:	OGC SWERLO; Byron Brown; Clarence Featherson; Christina Skaar; Ann Stephanos; Beth Burchard; Bill Palmer; Brenda Mosley; Brian Dyer; Cari Shiffman; Carl Eichenwald; Christine McCulloch; Craig Haas; Dean Ziegel; Diana Saenz; Don Lott; Geraldine Gardner; JamesA Thompson; John Prats; Kathryn Caballero; Kathy Clark; Kenneth Schefski; Khial Cherry; Leslie Oif; Mark Garvey; Marlyn Aguilar; Mary Andrews; Mary McDonnell; Michael Bellot; Monajoi Jones; Munsel Norris; Natalie Johnson; Pete Raack; Randy Morris; Rosemarie Kelley; Shirin Venus; Stephanie Brown; Sylvia Curtis; Tom Charlton; Tony Baney; Tony Ellis; Van Housman; Vishnu Katari; Yolaanda Walker; Yvette Hellyer; Bethany Russell; David Yogi; Adam Kushner; Skye Marshall
Subject:	SWERLO News for June 18, 2009
Date:	06/18/2009 09:57 AM
Attachments:	Westlaw_Document_15_23_30.doc Westlaw_Document_15_24_05.doc

SWERLO News for
June 18, 2009

BNA, Inc.
Daily Environment
REPORT

HIGHLIGHTS

EPA Declares Public Health Emergency at Site of Asbestos Contamination

EPA declares a public health emergency at a superfund site in Libby, Mont., committing the federal government to providing medical care for asbestos-related disease and to "move more aggressively" to complete cleanup of tremolite asbestos contamination that permeates the area. "This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act that conditions at a site constitute a public health emergency," EPA Administrator Jackson says at a news conference. The declaration also applies to Troy, about 18 miles west of Libby, where many residents were exposed to tremolite asbestos as a result of working in Libby. Jackson says conditions at Libby and Troy constitute "a unique public health tragedy." More »

Emergency Response:
TVA Inspector General Says Kingston Spill Showed Need for Better Response Training
RALEIGH, N.C.—The Tennessee Valley Authority needs to improve its emergency response training and communications, the authority's Office of Inspector General said in a June 12 report (No. 2008-12283-01).

Enforcement:
California Sues Target for Dumping Waste, Settles With Kmart Over Issue
LOS ANGELES—California Attorney General Edmund G. Brown Jr. and 20 local prosecutors filed a lawsuit June 15 accusing Target Corp. distribution centers and stores of illegally dumping hazardous waste and materials into local landfills (California v. Target Corp., Cal. Super. Ct., No. RG 09-457686, 6/15/09).

Enforcement:
Oregon Increases Maximum Pollution Penalties
PORTLAND, Ore.—Oregon Gov. Ted Kulongoski (D) June 16 signed a bill (S.B. 105a) that will increase the maximum administrative and criminal penalties for violations of pollution control laws from $10,000 to $25,000 per day. Under the bill, bilge water violations will be added to the list of penalties with a maximum of $25,000. The bill also increases the maximum penalty for negligently or intentionally spilling oil or hazardous materials into waters of the state or negligently cleaning ...

Hazardous Waste:
State-Issued 'No Further Remediation' Letter Does Not Bar RCRA Lawsuit, Court Rules
A property owner's receipt of a "no further remediation" letter from a state agency does not bar a citizen suit under the Resource Conservation and Recovery Act, a federal district court held June 9 (Snellback Properties LLC v. Aetna Development Corp., N.D. Ill., No. 08-7326, 6/9/09).

Hazmat Transport:
Delegates to U.N. Dangerous Goods Meeting To Work on Batteries, Training, Other Issues
Delegates to an upcoming United Nations meeting on the transportation of hazardous materials will take up issues ranging from training to battery shipments and electronic data, Department of Transportation representatives said at a public meeting June 17.

Insurance:
Pollution Exclusion Does Not Bar Claim Tied to Workplace Exposure to Aircraft Fuel
An Ohio appeals court held June 1 that an absolute pollution exclusion does not bar coverage related to an aircraft worker's alleged on-the-job exposure to airplane fuel because the exclusion applies only to traditional acts of environmental pollution under state law (Bosserman Aviation Equipment v. United States Liability Insurance Co., Ohio Ct. App., No. 5-09-05, 6/1/09).

Superfund:
First-Ever Health Emergency Declared by EPA At Montana Site of Asbestos Contamination
The Environmental Protection Agency declared a public health emergency June 17 at a superfund site in Libby, Mont., committing the federal government to providing medical care for asbestos-related disease and to "move more aggressively" to

complete cleanup of tremolite asbestos contamination that permeates the area.

INSIDEEPA.COM
an online news service from the publishers of Inside EPA

Inside EPA **Weekly Report**, 6/19/09
http://www.insideepa.com/secure/epa_nletters.asp?NLN=INSIDEEPA&ACTION=current

EPA Limiting Impacts Of Novel Emergency Declaration To Montana Site
EPA appears to be limiting the regulatory impacts of a precedent-setting declaration of a public health emergency under Superfund law to the areas immediately surrounding the infamous asbestos mine in Libby, MT, with EPA Administrator Lisa Jackson saying additional cleanups at sites that received asbestos-contaminated vermiculite from the mine are unnecessary "at this time."

The Inside Story

The Cost Of EPA Stimulus Money
Sen. Tom Coburn (R-OK), one of the Senate's leading budget hawks, is highlighting cost increases to EPA-funded water infrastructure projects stemming from labor-backed "Buy American" and Davis-Bacon wage requirements in the economic stimulus law.

Greenwire
TRACKING POLICY, POLITICS AND THE PRESS

http://www.greenwire.com

IOWA: The state's Environmental Protection Commission heard from Cedar Rapids-based Plains Justice yesterday on the potential public health risks associated with coal ash disposal in quarries and mines. The public interest law center urged the commission to require a standardized groundwater monitoring system, much like the system established in Wisconsin. Currently without a monitoring system, state researchers can't officially determine whether water is already contaminated. The cost of implementing such a system could be anywhere from $250,000 to $500,000 an acre, pushing opponents farther away from the proposal (Jason Hancock, Iowa *Independent*).

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NEW OPINIONS

Slip Copy, 2009 WL 1605136 (N.D.Ind.)
Only the Westlaw citation is currently available.

United States District Court,

N.D. Indiana,
Hammond Division.
The CITY OF GARY, Plaintiff,
v.
Paul SHAFER d/b/a Paul's Auto Yard, and Paul's Auto Yard, Inc., Defendants.
Cause No. 2:07-CV-56-PRC.
June 2, 2009.
OPINION AND ORDER

PAUL R. CHERRY, United States Magistrate Judge.
*1 This matter is before the Court on Defendants Paul Shafer and Paul's Auto Yard, Inc.'s Motion for Summary Judgment [DE 69], filed by Defendants on February 17, 2009, and a Defendants' Motion to Bar the Testimony of Plaintiff's Expert Jay Vandeven Pursuant to F.R.E. 702 and Daubert [DE 82], filed by Defendants on March 27, 2009. For the following reasons, the Court hereby **DENIES** the Defendants Paul Shafer and Paul's Auto Yard, Inc.'s Motion

for Summary Judgment [DE 69] and also **DENIES** the Defendants' Motion to Bar the Testimony of Plaintiff's Expert Jay Vandeven Pursuant to F.R.E. 702 and Daubert [DE 82].

PROCEDURAL BACKGROUND

On February 26, 2007, Plaintiff City of Gary filed its Complaint for Damages, alleging that Paul Shafer, doing business as Paul's Auto Yard, and Paul's Auto Yard, Inc. ("Defendants"), polluted a business lot located at 2124 Colfax Street, Gary, Indiana ("the Property"), in violation of sections 107 and 113 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"); Indiana's Environmental Legal Action Statute, Indiana Code § 13- 30-9-2; and the Gary Environmental Ordinance section 95.204. Plaintiff also alleged that Defendants are liable under Indiana nuisance law, codified at Indiana Code § 32-30-6-7, for: (i) releasing hazardous substances onto the Property; (ii) wrongfully injuring the City's Property; and (iii) interfering with the City's use and enjoyment of the Property.

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--- F.Supp.2d ----, 2009 WL 1033860 (N.D.Cal.)
Only the Westlaw citation is currently available.

United States District Court,

N.D. California.
WALNUT CREEK MANOR, LLC, Plaintiff,
v.
MAYHEW CENTER, LLC; and Dean Dunivan, Defendants.
Mayhew Center, LLC; and Dean Dunivan, Cross-Claimants,
v.
Walnut Creek Manor, LLC, Cross-Defendant.
No. C 07-05664 CW.
April 16, 2009.

ORDER GRANTING IN PART WALNUT CREEK MANOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART MAYHEW CENTER'S AND DUNIVAN'S MOTION FOR PARTIAL SUMMARY JUDGMENT

CLAUDIA WILKEN, District Judge.
*1 This case presents competing claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Plaintiff Walnut Creek Manor (WCM) filed a motion for partial summary judgment. Defendants Mayhew Center (MC) and Dean Dunivan oppose the motion and filed a cross-motion for partial summary judgment. The motions were heard on March 19, 2009. Having considered all of the parties' papers and argument on the motions, the Court hereby grants Plaintiff's motion in part and grants Defendants' motion in part.

Westlaw_Document_15_24_05.doc

Only the Westlaw citation is currently available.

United States District Court,
N.D. Indiana,
Hammond Division.
The CITY OF GARY, Plaintiff,
v.
Paul SHAFER d/b/a Paul's Auto Yard, and Paul's Auto Yard, Inc., Defendants.
Cause No. 2:07-CV-56-PRC.

June 2, 2009.

Michael O. Nelson, Jennifer C. Baker, Leah B. Silverthorn, Hunsucker Goodstein & Nelson PC, Indianapolis, IN, for Plaintiff.

Michael J. Maher, Jody E. Kahn, John P. Arranz, Swanson Martin & Bell LLP, Chicago, IL, Gregg D. Romaine, Fishers, IN, for Defendants.

OPINION AND ORDER

PAUL R. CHERRY, United States Magistrate Judge.

***1** This matter is before the Court on Defendants Paul Shafer and Paul's Auto Yard, Inc.'s Motion for Summary Judgment [DE 69], filed by Defendants on February 17, 2009, and a Defendants' Motion to Bar the Testimony of Plaintiff's Expert Jay Vandeven Pursuant to F.R.E. 702 and Daubert [DE 82], filed by Defendants on March 27, 2009. For the following reasons, the Court hereby **DENIES** the Defendants Paul Shafer and Paul's Auto Yard, Inc.'s Motion for Summary Judgment [DE 69] and also **DENIES** the Defendants' Motion to Bar the Testimony of Plaintiff's Expert Jay Vandeven Pursuant to F.R.E. 702 and Daubert [DE 82].

PROCEDURAL BACKGROUND

On February 26, 2007, Plaintiff City of Gary filed its Complaint for Damages, alleging that Paul Shafer, doing business as Paul's Auto Yard, and Paul's Auto Yard, Inc. ("Defendants"), polluted a business lot located at 2124 Colfax Street, Gary, Indiana ("the Property"), in violation of sections 107 and 113 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"); Indiana's Environmental Legal Action Statute, Indiana Code § 13-30-9-2; and the Gary Environmental Ordinance section 95.204. Plaintiff also alleged that Defendants are liable under Indiana nuisance law, codified at Indiana Code § 32-30-6-7, for: (i) releasing hazardous substances onto the Property; (ii) wrongfully injuring the City's Property; and (iii) interfering with the City's use and enjoyment of the Property.

Plaintiff also asserts that it is entitled to recover direct and consequential damages for the alleged nuisance. Plaintiff further contends that pursuant to CERCLA § 113 and Gary Environmental Ordinance section 95.204, it is entitled to contribution based on costs expended and those that will be expended in investigating and remediating the hazardous substances at the Property.

On April 30, 2007, Defendants filed their Answer to the Complaint, as well as a Motion for Partial Summary Judgment on Count Three of Plaintiff's Complaint (which alleges that the Defendants are liable to Plaintiff pursuant to Ordinance section 95.204) and Motions to Dismiss the City of Gary's Count Five nuisance and Count Six CERCLA § 113 claims, with supporting briefs.

On October 4, 2007, the Court issued an Opinion and Order granting Defendants' Motion for Partial Summary Judgment as to the claim under Ordinance section 95.204 and also issued an Opinion and Order granting the Motions to Dismiss Counts Five and Six of the Complaint. Accordingly, the claims remaining before the Court are the CERCLA § 107 claim (Count I), the Indiana Environmental Legal Action claim (Count II), and the claim for declaratory relief (Count IV).

On August 29, 2008, Plaintiff disclosed the expert report of Jay Vandeven, entitled Affidavit of Jay Vandeven. On October 31, 2008, Defendants disclosed two expert reports of Geoffrey A. Glanders. On December 1, 2008, Plaintiff disclosed the Rebuttal Expert Report of Jay Vandeven.

***2** On February 17, 2009, Defendants filed a Motion for Summary Judgment on the remaining claims and a

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memorandum in support. Plaintiff filed a response brief on March 23, 2009, with the Declaration of Jay Vandeven as an attachment, to which Defendants filed a reply brief on April 6, 2009.

On March 27, 2009, Defendants filed a Motion to Bar the Testimony of Plaintiff's Expert Jay Vandeven Pursuant to Federal Rule of Evidence 702 and Daubert along with a memorandum in support. Plaintiff filed a response brief in opposition on April 16, 2009, to which Defendants filed a reply brief on April 29, 2009.

On April 9, 2009, Defendants filed a Motion to Strike Reports of Plaintiff's Expert, seeking to strike the Rebuttal Expert Report and Declaration of Jay Vandeven. On May 13, 2009, the Court issued an Opinion and Order denying the Motion to Strike Reports of Plaintiff's Expert.

The parties filed forms of consent to have this case assigned to a United States Magistrate Judge to conduct all further proceedings and to order the entry of a final judgment in this case. Therefore, this Court has jurisdiction to decide this case pursuant to 28 U.S.C. § 636(c).

FACTS

The City of Gary is a political subdivision of the State of Indiana, located in Lake County. Defendants operated an automobile salvage and scrap yard at the Property from approximately 1980 until 1991.

The Property is a tract of land divided into two parcels with one parcel located on the west side of Colfax Street and the other located on the east side. The Property is located within the J-Pit redevelopment area, which includes residential, commercial, industrial, and undeveloped land. The J-Pit area is divided into five sections, with the west parcel being comprised of Section 2. Adjacent properties include the City of Gary Landfill to the north of the Property, and a former sand mine called the J-Pit.

From approximately 1950 until his death in 1978, LeRoy Shafer operated LeRoy's Auto Yard on the western parcel of the Property, exclusively on Section 2. LeRoy Shafer's operations involved selling approximately between 400 and 1,200 cars for scrap per year. According to Defendant Paul Shafer's March 13, 2008 deposition testimony, LeRoy Shafer's operations involved turning cars on their side and poking a hole in the gas tank and drive shaft to drain out gasoline prior to burning the cars. [FN1]

FN1. According to Defendants, based on the expert report of Geoffrey A. Glanders, during LeRoy's operations, batteries were left in cars and occasionally cracked and leaked on Section 2 land.

Once Defendants took over operations on the Property, they operated on Section 3 (east of Colfax Street) and on the eastern quarter of Section 2 (west of Colfax Street). Defendants' operations on the Property involved storage, recycling, and disposal of wrecked automobiles and automobile parts. Defendants' business records indicate that between approximately 10,000 and 25,000 cars per year were brought onto the Property during Defendants' operations. According to Defendants, they removed batteries and gasoline from vehicles immediately upon their arrival at the Property and then kept the batteries in a locked trailer with a metal floor, with the fluids being collected and stored in containers. According to Defendants, batteries were removed from the vehicles to prevent trespassers from driving the cars on the Property or from stealing the vehicles. Mr. Shafer testified at his deposition that these things happened often.

***3** In 1991, Defendants sold the Property to Waste Management of Indiana, LLC ("Waste Management"), and, as part of the sale, Defendants were required to level the Property. Waste Management did not conduct any business operations on the Property and sold it to Plaintiff in 1998.

Once Plaintiff received the Property, it conducted an environmental investigation to determine its condition. The investigation revealed lead and metals in the soil at levels that exceeded the Indiana Department of Environmental Management's ("IDEM") cleanup regulations. Plaintiff entered into Indiana's Voluntary Remediation Program and signed a Voluntary Remediation Agreement on February 15, 2002, and a revised version on July 29, 2008. Further site investigation activities in 2004, performed by Baker Environmental, Inc. ("Baker"), included a soil analysis that revealed levels of lead as high as 3,200 mg/kg, exceeding the IDEM cleanup regulations. Following the investigations, Plaintiff concluded that Defendants were responsible for contaminating the Property.

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ANALYSIS

A. Motion to Bar Expert Testimony of Mr. Vandeven

As a preliminary matter, in their reply brief, Defendants argue that Plaintiff cannot rely on Mr. Vandeven's Rebuttal Expert Report to support the admissibility of his testimony. Rather, Defendants seek to limit Plaintiff and the Court to a narrow review of the record consisting of solely the initial expert report and Mr. Vandeven's October 23, 2008 deposition testimony. In support, Defendants argue that rebuttal opinions are not part of Plaintiff's case in chief and cannot be used to determine if Mr. Vandeven's testimony is admissible.

However, in its May 13, 2009 Order on Defendants' Motion to Strike Reports of Plaintiff's Expert, this Court rejected similar arguments made by Defendants as being unsupported by case law. The Court found that the opinions expressed in the Rebuttal Expert Report did not constitute new opinions. Defendants have failed to offer any legal support that the Court may not review the rebuttal report as part of its inquiry into the admissibility of Mr. Vandeven's opinions. Therefore, the Court declines to limit itself to a narrow review of the record, as Defendants propose, for purposes of determining the admissibility of Mr. Vandeven's testimony. *See Wright v. Stern,* 450 F.Supp.2d 335, 361-62 (S.D.N.Y.2006) (reviewing rebuttal report, that reached the same conclusions as the expert's initial report, in determining whether to exclude the expert's testimony).

As part of the initial expert report of Jay Vandeven, entitled Affidavit of Jay Vandeven, Mr. Vandeven offered the two following opinions which Defendants now move to bar:

> 18. The contamination present on the Paul's Auto Yard site, namely lead, is attributable to and consistent with historical wrecking yard operations conducted on the property. Based on the records available and review of aerial photographs, the contamination of the eastern side of Colfax is related to Paul Shafer's operations between 1980 and 1991. There are no records available for Leroy Shafer's operations on the western side of Colfax. However, the records available for the years 1987 through 1991 indicate that operations were significantly greater during Paul Shafer's ownership and operation and, therefore, contamination on the western side of Colfax is also largely the result of Paul Shafer's operations.
>
> ***4** 19. An appropriate remedial option to address the impacted soils at the Paul's Auto Yard site, including a combination of excavation and capping, would cost approximately $5,000,000 ...

Pl.'s Mem. Opp. to Defs.' Mot. to Bar Test. Pl.'s Expert, Ex. 1, ¶¶ 18-19.

In the instant Motion, Defendants argue that the Court should bar the testimony of Mr. Vandeven related to causation (¶ 18) and damages (¶ 19). The Court addresses each in turn.

STANDARD

The admissibility of expert evidence is governed by Federal Rule of Evidence 702 as interpreted by *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and its progeny. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, *and* (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed.R.Evid. 702 (emphasis added). Here, Mr. Vandeven's qualifications in the field of environmental engineering are not at issue.

The admissibility of expert testimony--whether based on "scientific," "technical," or "other specialized" knowledge--is governed by the Supreme Court's general holding in *Daubert,* which requires the district court to exercise a "gatekeeping" function to ensure that such testimony is both reliable and relevant. *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 141, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *see generally Daubert,* 509 U.S. at 589-92; *see also Naeem v. McKesson Drug Co.,* 444 F.3d 593, 607 (7th Cir.2006). The fundamental purpose of this gate-keeping requirement "is to make certain that an expert, whether basing testimony on professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."

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Kumho Tire, 526 U.S. at 152. In considering *Daubert* and *Kumho Tire,* the Seventh Circuit has endorsed a two-step analysis for the district courts to use in evaluating expert testimony under Rule 702: first, the court must determine whether the expert's testimony is "reliable," and second, the court must determine whether the expert's testimony is "relevant." *See, e.g., United States v. Hall,* 165 F.3d 1095, 1101-02 (7th Cir.1999); *Cummins v. Lyle Industries,* 93 F.3d 362, 367 (7th Cir.1996); *Porter v. Whitehall Labs., Inc.,* 9 F.3d 607, 614-16 (7th Cir.1993); *accord Kumho Tire,* 526 U.S. at 141.

For an expert opinion to satisfy the reliability requirement, the expert must be qualified in the relevant field and the expert's opinion must be based on sound scientific or other relevant methodology. *Smith v. Ford Motor Co.,* 215 F.3d 713, 718 (7th Cir.2000). Generally, the expert witness must employ in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the witness's field. *Kumho,* 526 U.S. at 152. Specifically, a court may, but is not required to, consider a nonexclusive list of four factors in assessing reliability: (1) whether the expert's theories and techniques can be verified by the scientific method through testing; (2) whether the theories and techniques have been subjected to peer review and publication; (3) whether the theories and techniques have been evaluated for their potential rate of error; and (4) whether the theories and techniques have been generally accepted by the relevant scientific community. *Daubert,* 509 U.S. at 593-94. The advisory committee notes to Rule 702 provide additional factors, along with the *Daubert* list, for a court to consider, including, but not limited to, "[w]hether the expert has adequately accounted for obvious alternative explanations." Fed.R.Evid. 702 advisory committee notes (2000 Amendments) (citations omitted). In *Kumho Tire,* the Court articulated that strict adherence to the factors was not necessary; rather, the factors are examples of criteria that a trial court may use to determine whether the expert, in offering the opinion, acted as would an expert in the field. *Kumho Tire,* 526 U.S. at 151-52. As a result, "the *Daubert* framework is a flexible one that must be adapted to the particular circumstances of the case and the type of testimony being proffered." *Mihailovich v. Laatsch,* 359 F.3d 892, 919 (7th Cir.2004). Ultimately, the object of the court's Rule 702 reliability inquiry is to ensure that the opinions expressed by testifying experts "adhere to the same standards of intellectual rigor that are demanded in their professional work." *Rosen v. Ciba-Geigy Corp.,* 78 F.3d 316, 318 (7th Cir.1996).

***5** Finally, the Court notes that "[a] review of caselaw [sic] after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule." Fed.R.Evid. 702 advisory committee notes (2000 Amendments). Further, the District Court possesses "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire,* 526 U.S. at 152. Further, "the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination." *Comer v. American Elec. Power,* 63 F.Supp.2d 927, 933 (N.D.Ind.1999) (quoting *Kumho Tire,* 526 U .S. at 142 (citing *General Electric Co. v. Joiner,* 522 U.S. 136, 143, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997))).

1. Mr. Vandeven's opinion that Defendants contributed to the contamination on the Property

Defendants argue that Mr. Vandeven's opinion that Defendants contributed to the lead contamination at the Property should be barred because it is not reliable or relevant. The Court will address each argument in turn.

a. Reliability

In their memorandum in support of the Motion to Bar Mr. Vandeven's Testimony, Defendants argue that Mr. Vandeven's opinion is unreliable because his conclusion that Defendants contributed to the lead contamination on the Property is based solely upon a review of aerial photographs and counting automobiles [FN2] and constitutes a conclusion rather than a scientific opinion. In particular, Defendants argue that Mr. Vandeven failed to conduct an evaluation and investigation that would result in a reliable opinion because he: failed to identify a source of release (except for batteries); did not speak with any witnesses regarding LeRoy Shafer's operations [FN3] and flooding by the Gary Landfill; failed to consider the Landfill's history of flooding; ignored testimony of former employees and eyewitnesses that there were no signs of spills or releases during Defendants' operations; and ignored the fact that illegal dumping occurred on the Property after Defendants' operations, all resulting in Mr. Vandeven failing to consider and exclude the Gary

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Landfill, LeRoy Shafer, and illegal dumping as alternative sources of contamination.

FN2. In their reply brief, Defendants argue that at his October 23, 2008 deposition, when asked what he relied on in forming his opinion, Mr. Vandeven only identified aerial photographs and the deposition testimony of Defendant Paul Shafer.

FN3. Particularly, spills that occurred on the Property because of LeRoy's practice of puncturing gas tanks and batteries.

First, contrary to Defendants' assertions that Mr. Vandeven merely reviewed aerial photographs and counted cars in developing his opinion that Defendants' operations contributed to the lead contamination on the Property, Plaintiff argues that Mr. Vandeven's opinion was based on a review of several rounds of sampling results from the Property and surrounding properties, review of agency records/reports, environmental site assessments, EPA guidelines, deposition testimony, and Defendants' business records along with aerial photographs of the Property. Based on a review of these documents, Plaintiff argues, Mr. Vandeven developed his opinion. After reviewing the record, the Court finds that Mr. Vandeven's methodology is valid.

***6** While Defendants are correct that Mr. Vandeven identified at his October 23, 2008 deposition that he reviewed aerial photographs and the deposition of Mr. Shafer, the record does not support that Mr. Vandeven solely relied on these two sources of information. Rather, Mr. Vandeven testified at that same deposition that he reviewed other documents, including the Baker Phase II and Remedial Alternatives Work Plan and accounting records prior to the deposition. Further, in Mr. Vandeven's Rebuttal Expert Report, in support of his opinion that Defendants' operations contributed to the contamination, Mr. Vandeven largely discusses his review of: soil samples from the Property and surrounding properties, compiled by Baker during the Phase II Environmental Site Assessment, indicating that lead concentrations on the Property were of a magnitude higher than those found on surrounding properties; IDEM Inspection reports on the Property; deposition testimony; USEPA documents; Defendants' business records; and aerial photographs, among other documents. Accordingly, Defendants' assertion that Mr. Vandeven solely reviewed aerial photographs and counted automobiles is unsupported by the record. Defendants do not address, or challenge, Mr. Vandeven's review of the sources identified and discussed in the Rebuttal Expert Report. Nonetheless, the Court must still determine whether Mr. Vandeven's methodology is valid.

An expert's opinion should not be rejected as unreliable simply because the expert relied on the reports of others. *Walker v. Soo Line R. Co.,* 208 F.3d 581, 588 (7th Cir.2000). Rather, experts may rely on data and other information that is supplied by third parties. *Nutrasweet Co. v. X-L Eng'g Co.,* 227 F.3d 776, 789-90 (7th Cir.2000). "Analyzing data assembled by others is neither illicit nor unusual, even if the data were prepared for litigation by an interested party." *Southwire Co. v. J.P. Morgan Chase & Co. .,* 528 F.Supp.2d 908, 934 (W.D.Wis.2007). "Either 'hands-on testing' or 'review of experimental, statistical, or other scientific data generated by others in the field' may suffice as a reasonable methodology upon which to base an opinion." *Clark v. Takata Corp.,* 192 F.3d 750, 758 (7th Cir.1999). Therefore, Mr. Vandeven's review of sample analysis and agency reports, as well as review of aerial photographs, was a valid methodology that legitimately led to his conclusion that Defendants' operations were the likely source of lead contamination. [FN4] *See Nutrasweet,* 227 F.3d at 788 (finding review of aerial photographs in conjunction with other reliable methodology as reliable).

FN4. Further, Mr. Vandeven had extensive experience in working as an environmental engineer, has been involved in the study and remediation of hundreds of contaminated properties, and has managed the investigation and remediation of numerous CERCLA National Priorities Lists sites. Given his expertise in the field of environmental engineering, it was permissible for him to review the information provided to him by others in formulating his opinion. *See Southwire,* 528 F.Supp.2d at 934 (finding that an expert with extensive experience in his field permissibly assessed information provided by others in formulating his opinion).

Next, Defendants argue that Mr. Vandeven's opinion is unreliable because he failed to address or ignored

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certain evidence, resulting in his alleged failure to address and exclude the Gary Landfill, LeRoy Shafer's operations, and illegal dumping as alternative sources of contamination. In response, Plaintiff argues that Mr. Vandeven adequately accounted for alternative explanations. An expert's conclusion "should not be excluded because he or she has failed to rule out *every* possible alternative cause." *Troutner v. Marten Transp., LTD.,* No. 2:05-CV-40-PRC, 2006 WL 3523542, at *4 (N.D.Ind. Dec.5, 2006) (emphasis in original). Instead, so long as an expert offers some explanation why the alternative causes could not be the sole cause, the expert's failure to address alternative causes affects the weight the jury should give the evidence, not its admissibility. *Id.*

***7** After reviewing the record, the Court concludes that Mr. Vandeven "adequately accounted" for alternative explanations when concluding that Defendants' operations contributed to the lead contamination on the Property. First, in his Rebuttal Expert Report, Mr. Vandeven specifically addressed whether the Landfill was a possible source of lead contamination and concluded that there was a lack of evidence of source material and a pathway for transport of lead to the Property. In arriving at this conclusion, Mr. Vandeven evaluated surface water samples collected from the Landfill, groundwater conditions on the Property, soil data from the Property and surrounding areas, including areas affected by flooding and runoff from the Landfill, and the absence of conditions necessary for runoff from the Landfill to be a major source of lead contamination at the Property. Based on this information, Mr. Vandeven concluded that the Landfill could not be a significant source of lead at the Property. Therefore, the Court finds that Mr. Vandeven adequately accounted for the Landfill and explained why he excluded it as an alternative source of contamination.

Second, in his Rebuttal Expert Report, Mr. Vandeven addressed LeRoy Shafer's operations on the Property as a possible source of contamination. In particular, Mr. Vandeven noted that records supported that LeRoy Shafer operated exclusively on Section 2 of the Property, the size of the Property was four times larger during Defendant Paul Shafer's operations and included Section 3, and Defendant Paul Shafer's operations were more extensive than LeRoy's-processing approximately twenty times the number of cars that LeRoy did during his operation. Yet, the pattern of lead contamination across Section 2 and Section 3, where LeRoy did not operate, was consistent, even though operations on Section 2 occurred for twice as long as Paul Shafer's operations on Section 3. Accordingly, the record supports that Mr. Vandeven's opinion adequately accounted for LeRoy Shafer's operations as being an alternative source of contamination and adequately explained why he excluded this source.

Third, in the Rebuttal Expert Report, Mr. Vandeven addresses illegal dumping at the Property after 1993 and specifically discussed his opinion of the lack of evidence that any of the materials that may have been illegally dumped contained lead. Mr. Vandeven specifically provided that it did not appear that any of the illegally dumped materials were analyzed for their chemical composition and there was no evidence of those materials containing lead. Accordingly, Mr. Vandeven adequately accounted for the illegal dumping as a possible alternative source of contamination and discounted it. Therefore, Mr. Vandeven's opinion adequately accounted for the three alternative sources identified by Defendants and concluded that Defendants operations were likely the primary source of lead contamination.

Further, with regard to the evidence that Mr. Vandeven allegedly ignored or failed to take into account, "questions relating to the bases and sources of an expert's opinion affect only the weight to be assigned that opinion rather than its admissibility." *Loeffel Steel Prods., Inc., v. Delta Brands, Inc.,* 372 F.Supp.2d 1104, 1119 (N.D.Ill.2005). Although it does not relate to admissibility, the Court will nonetheless address Defendants' arguments. Defendants allege that Mr. Vandeven failed to identify a time of release and failed to provide a mechanism or source of release. However, Mr. Vandeven's opinion repeatedly identifies that the lead contamination occurred during Defendants' operations on the Property and identifies batteries, [FN5] leaded gasoline, and grading as sources of release. Further, Mr. Vandeven's alleged failure to consider testimony regarding the absence of spills/releases, speak with employees of LeRoy, [FN6] and whether Mr. Vandeven was unaware of flooding from the Landfill, numerous IDEM violations for the Landfill, runoff, and illegal disposal all go toward Mr. Vandeven's alleged failure to address and exclude alternative contamination sources. As already discussed, Mr. Vandeven adequately accounted for the

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Landfill, LeRoy's operations, and illegal disposal as potential sources of contamination and provided valid reasons for rejecting them.

FN5. Although Defendants argue that batteries could not be a source of release because they were removed from the vehicles upon arrival and were stored at a trailer, Mr. Vandeven identified evidence that he interpreted as indicating that batteries were left in the vehicles, as discussed more fully below in regard to the Motion for Summary Judgment.

FN6. Defendants also argue that Mr. Vandeven should have spoken with neighbors and former employees of LeRoy Shafer, especially since he testified at his October 23, 2008 deposition that speaking with witnesses, if they are available, is an accepted practice in his field. Nonetheless, an expert's decision to use one form of scientific methodology over another goes to the expert's credibility rather than the admissibility of his testimony. *Troutner,* 2006 WL 3523542 at *6.

***8** Accordingly, the Court finds that Mr. Vandeven's opinion regarding causation is sufficiently reliable to be admitted.

b. Relevancy

Next, the Court must determine whether Mr. Vandeven's opinion is relevant, i.e. whether it would assist the trier of fact in understanding the evidence or determining a fact in issue. Fed. R. Ev. 702. "Expert testimony does not assist the trier of fact when the jury is able to evaluate the same evidence and is capable of drawing its own conclusions without the introduction of a proffered expert's testimony." *Amakua Dev. LLC v. Warner,* No. 05 C 3082, 2007 WL 2028186, at *6 (N.D.Ill. July 10, 2007). Here, Defendants argue that Mr. Vandeven's testimony would not assist the trier of fact as he "has done nothing more than review aerial photographs and count the number of automobiles accepted by Defendants." Defs.' Mem. in Support of Mot. to Bar Test. of Pl.'s Expert, 18. However, as already discussed, the record supports that Mr. Vandeven engaged in a review of soil analysis, business records, and various other documents in arriving at his decision. Further, Mr. Vandeven's opinion that Defendants' operations are the primary source of lead contamination is relevant because it would assist the jury in determining whether Defendants caused the release of a hazardous substance (lead) on the Property. [FN7]

FN7. The Court notes that in Defendants' reply brief, they argue that Plaintiff claims that it need not establish causation between Defendants' operations and the contamination on the Property. However, Defendants are mistaken as Plaintiff does not make this argument, instead arguing that direct evidence of causation is not needed.

Accordingly, having determined that Mr. Vandeven's opinion regarding whether Defendants contributed to contamination on the Property is reliable and relevant, the Court concludes that this opinion/testimony may be admitted under *Daubert.*

2. Mr. Vandeven's opinion regarding the expected remedial technique and estimated future costs

Defendants next challenge Mr. Vandeven's opinion regarding the expected remediation and costs as failing to comply with the requirements of the National Contingency Plan ("NCP"). However, as discussed below in Section B(1)(d) of this Opinion and Order, because Plaintiff's Complaint seeks response costs incurred pursuant to investigating and assessing contamination on the Property, which do not need to comply with the requirements of the NCP that are cited by Defendants, rather than a specific amount of damages, whether Mr. Vandeven's testimony regarding expected costs complies with the NCP is irrelevant with regard to the admissibility of his opinion. Therefore, Defendants' argument that Mr. Vandeven's opinion must be barred based on failure to comply with the NCP must be rejected.

3. Conclusion

Based on the foregoing, the Court concludes that Mr. Vandeven's opinion is sufficiently reliable and relevant to be admitted and hereby denies the Defendants' Motion to Bar the Testimony of Plaintiff's Expert Jay Vandeven Pursuant to F.R.E. 702 and Daubert.

B. Defendants' Motion for Summary Judgment

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In support of their Motion for Summary Judgment, Defendants argue that Plaintiff has failed to present any evidence that Defendants contributed to the release of lead on the Property, requiring summary judgment on the CERCLA § 107 and the Environmental Legal Action claims, and the damages that Plaintiff seeks are not consistent with the NCP and are not recoverable. In response, Plaintiff argues that the record supports that Defendants contributed to lead contamination on the Property through the release of lead from cracked batteries, leaded gasoline spilled on the Property, and grading of contaminated soils. Further, Plaintiff contends that it incurred response costs that are recoverable under CERCLA.

SUMMARY JUDGMENT STANDARD

***9** The Federal Rules of Civil Procedure mandate that motions for summary judgment be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Rule 56(c) further requires the entry of summary judgment, after adequate time for discovery, against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "[S]ummary judgment is appropriate--in fact, is mandated--where there are no disputed issues of material fact and the movant must prevail as a matter of law. In other words, the record must reveal that no reasonable jury could find for the non-moving party." *Dempsey v. Atchison, Topeka, & Santa Fe Ry. Co.,* 16 F.3d 832, 836 (7th Cir.1994) (citations and quotation marks omitted).

A party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *See Celotex,* 477 U.S. at 323. The moving party may discharge its "initial responsibility" by simply " 'showing'-- that is, pointing out to the district court--that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. When the non-moving party would have the burden of proof at trial, the moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *See id.* at 323, 325; *Green v. Whiteco Indus., Inc.,* 17 F.3d 199, 201 n. 3 (7th Cir.1994); *Fitzpatrick v. Catholic Bishop of Chi.,* 916 F.2d 1254, 1256 (7th Cir.1990). However, the moving party, if it chooses, may support its motion for summary judgment with affidavits or other materials and thereby shift to the non-moving party the burden of showing that an issue of material fact exists. *See Kaszuk v. Bakery & Confectionery Union & Indus. Int'l Pension Fund,* 791 F.2d 548, 558 (7th Cir.1986); *Bowers v. DeVito,* 686 F.2d 616, 617 (7th Cir.1982).

Once a properly supported motion for summary judgment is made, the non-moving party cannot resist the motion and withstand summary judgment by merely resting on its pleadings. *See* Fed.R.Civ.P. 56(e)(2); *Donovan v. City of Milwaukee,* 17 F.3d 944, 947 (7th Cir.1994). Rule 56(e) establishes that the opposing party's "response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e)(2); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, to demonstrate a genuine issue of fact, the non-moving party must do more than raise some metaphysical doubt as to the material facts; the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

***10** In viewing the facts presented on a motion for summary judgment, a court must construe all facts in a light most favorable to the non-moving party and draw all legitimate inferences in favor of that party. *See Anderson,* 477 U.S. at 255; *NLFC, Inc. v. Devcom Mid-Am., Inc.,* 45 F.3d 231, 234 (7th Cir.1995); *Doe v. R.R. Donnelley & Sons Co.,* 42 F.3d 439, 443 (7th Cir.1994). A court's role is not to evaluate the weight of the evidence, to judge the credibility of witnesses, or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *See Anderson,* 477 U.S. at 249-50; *Doe,* 42 F.3d at 443.

1. Plaintiff's CERCLA § 107 claim

"Congress enacted CERCLA in 1980 to provide a

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comprehensive response to the release of hazardous substances into the environment ." *Am. Nat. Bank and Trust Co. of Chicago v. Harcros Chems., Inc.,* No. 95 C 3750, 1997 WL 281295, at *6 (N.D.Ill. May 20, 1997). CERCLA provides a mechanism "for clean up, compensation, and liability where there is a threat from hazardous substances." *Id.* "Congress pursued two purposes in enacting this legislation: first, to give the federal government the tools necessary to respond promptly and effectively to releases of hazardous substances and, second, to ensure that those responsible [for such releases] into the environment are liable for the cost of cleaning them up." *Id.* CERCLA imposes strict liability on responsible parties. *Id.*

CERCLA § 107(a) establishes liability and permits a cause of action to recover direct costs that a party incurs in cleaning up a contaminated site. *City of Martinsville v. Masterwear Corp.,* No. 1:04-cv-1994-RLY-WTL, 2006 WL 2710628, at *2 (S.D.Ind. Sept.20, 2006). To establish a prima facie CERCLA § 107(a) claim, a party must show that (1) the Site in question is a "facility", (2) a release [FN8] or threatened release of hazardous substances at or from the facility has occurred, (3) the release or threatened release has resulted in response costs being incurred consistent with the NCP, and (4) the Defendant is a "responsible party." [FN9] *Id.*

FN8. Under CERCLA, a "release" is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment ...." 42 U.S.C. § 9601(22). There is no quantitative requirement on the term "release." *Amoco Oil Co. v. Borden, Inc.,* 889 F.2d 664, 669 (5th Cir.1989).

FN9. A "responsible party" includes any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of. 42 U.S.C. § 9607(a)(2).
The term "disposal" means "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any [hazardous substance] into or on any land or water so that such [hazardous substance] or any constituent thereof may enter the environment ...." 42 U.S.C. § 9601(29); 42 U.S.C. § 6903(3).

Defendants do not dispute that the Property is a "facility" or that lead was released on the Property. Instead, Defendants argue that summary judgment must be granted on Plaintiff's CERCLA § 107(a) claim as Plaintiff has failed to show that a release of lead occurred on the Property during the Defendants' ownership and operations. Defendants further argue that Plaintiff may not recover the damages sought as such damages fail to comply with the NCP. In response, Plaintiff argues that it has shown that lead was released on the Property during Defendants' operations through the handling of cracked battery cases and leaded gasoline, as well as the movement of contaminated soil on the Property, and has incurred recoverable costs. The Court will evaluate each argument in turn.

a. Release of lead by cracked batteries handled during Defendants' operations

***11** Defendants argue that Plaintiff has failed to show that their operations caused or contributed to lead contamination on the Property. In particular, Defendants argue that even though Mr. Vandeven identified batteries as the sole mechanism for release of lead, batteries were removed from vehicles upon arrival to the Property and were stored in an enclosed trailer, and he testified at his October 23, 2008 deposition that he was unaware of Defendants' procedure regarding batteries or where they were kept. Accordingly, Defendants argue that lead contamination on the Property could not have resulted from Defendants' handling of batteries.

Nonetheless, while Defendant Paul Shafer testified at his March 13, 2008 deposition that Defendants took batteries out of vehicles when they first arrived on the Property to prevent people from driving them, he also testified that trespassers would engage in a demolition derby on the Property and that "to today they still do it," indicating that the vehicles still contained batteries while on the Property. Defs.' Mem. Support of Mot. Summ. J., Ex. C at 36:12. Further, Defendant Paul Shafer testified that Defendants would obtain cars that had been in an accident and batteries in some of the cars may have been cracked. Although Defendant Paul Shafer testified that most of the cars involved in accidents were not received by Defendants until 90 days after the accident, he did not indicate that this was an absolute rule. Defendant Paul Shafer also testified that

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trespassers would drive the cars through the fence or steal them and drive away, and admitted that batteries were kept in vehicles that Defendants used to transport parts on the Property. Defendant Paul Shafer's testimony indicates that batteries were left in the cars on the Property. Accordingly, based on the record, the Court concludes that Plaintiff has established a genuine issue of material fact as to whether lead was released onto the Property by cracked batteries, present in vehicles on the Property, and handled during Defendants' operations.

b. Release of lead by spilled leaded gasoline handled during Defendants' operations

Next, Defendants argue that lead contamination on the Property could not have occurred from a spill or release of leaded gasoline during Defendants' operations because gasoline was immediately removed from vehicles upon entering the Property. Further, Defendants argue that Mr. Vandeven discounted leaded gasoline as a source of contamination, thus precluding Plaintiff from now arguing to the contrary. Plaintiff relies on soil samples at the Property which indicate the presence of methyl tertiary-butyl ether (MTBE), a gasoline additive used after 1979, to support its claim that Defendants spilled leaded gasoline on the Property and it is a source of contamination. While a plaintiff can survive summary judgment by introducing circumstantial evidence that a defendant released a hazardous substance on the Property, it cannot rely on evidence that is speculative. *Acme Printing Ink Co. v. Menard, Inc.,* 891 F.Supp. 1289, 1296 (E.D.Wis.1995).

***12** At both of his depositions, Mr. Vandeven testified that batteries were the source of lead contamination. In fact, as Defendants correctly point out, at Mr. Vandeven's October 23, 2008 deposition, he specifically rejected gasoline as a cause of contamination of lead on Section 2 of the Property as he had seen no indication of contamination from leaded gasoline. Even in his December 30, 2008 deposition, Mr. Vandeven testified that batteries were the primary source of lead contamination on the Property.

However, even considering Plaintiff's argument that gasoline is a source of contamination, the evidence that it relies on is too speculative. While the presence of MTBE indicates that gasoline was spilled at the Property, it does not indicate the presence of *leaded* gasoline. As Defendants correctly point out, lead, not MTBE, is the contaminant of concern in the instant matter. "MTBE has been used in U.S. gasoline at low levels since 1979 to *replace lead* as an octane enhancer ...." U.S. Environmental Protection Agency, Methyl Tertiary Butyl Ether (MTBE), Gasoline, *available at* http://www.epa.gov/MTBE/gas htm (emphasis added). Because MTBE has been used as a *substitute* for lead, the presence of MTBE in the soil samples does not insinuate that the lead contamination came from leaded gasoline. Rather, this Court finds that Plaintiff's argument that the presence of MTBE, a substitute for lead, implies that lead contamination came from leaded gasoline "amount[s] to little more than speculation." [FN10] *Acme Printing Ink. Co.,* 891 F.Supp. at 1296.

FN10. Defendants also argue that Plaintiff ignores illegal dumping that occurred on the Property as a possible source of contamination. However, like Plaintiff's argument that LeRoy Shafer is a source of contamination, it is Defendants' burden to show that a third party was the "sole cause" of the release of lead contamination on the Property. *See Westfarm Assocs. Ltd. P'ship. v. Washington Suburban Sanitary Comm'n,* 66 F.3d 669, 682-83. Defendants' allegations that illegal dumping may have been responsible for the lead contamination at issue, unsupported by the record, is insufficient. *United States v. W.R. Grace & Co.-Conn.,* 280 F.Supp.2d 1135, 1147 (D.Mont.2002) (allegations of third party liability, unsupported by the record, are insufficient to establish third party defense).

Plaintiff also argues that leaded gasoline was still in heavy use throughout the 1980s, relying on the Declaration of Mr. Vandeven. [FN11] In support of this argument, Mr. Vandeven relies on a U.S. Environmental Protection Agency (EPA) Press Release indicating that lead use in gasoline during 1985 was significantly higher than projected in 1982, and estimated that lead use by 1988 would be 67% more than previously anticipated. *See* U.S. Environmental Protection Agency, Press Release: EPA Sets New Limits on Lead in Gasoline (March 4, 1985), *available at* http://www.epa .gov/history/topics/lead/01 htm. Further 16% of vehicles requiring gasoline, at that time, were being fueled with leaded gasoline. However, no

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evidence has been provided to the Court as to how many of those vehicles were used in Indiana, or that were brought onto Defendants' Property during their operations. Accordingly, Plaintiff's reliance on this evidence to establish that leaded gasoline caused contamination on the Property is too speculative and fails to raise a genuine issue of material fact.

FN11. In its Statement of Material Facts, Plaintiff argues that eyewitness testimony revealed that when gas was released from gas tanks, it sometimes leaked from the lines. However, the testimony that Plaintiff relies on indicates that this occurred at Paul's Portable Car Crusher, which is a different facility outside the Property at issue.

c. Contamination of the Property through grading activities

Plaintiff further argues that Defendants are liable under CERCLA for moving and spreading contaminated soil throughout the Property by leveling the Property prior to selling it, which Plaintiff argues constitutes "disposal" under CERCLA. In response, Defendants argue that Plaintiff is improperly raising a new argument as "leveling" was not identified as a cause of contamination in the initial expert report. [FN12] Further, Defendants argue that they cannot be held liable for disposal by grading or leveling because they did not operate the Property at the time that the contaminants were released on the Property, which, according to Defendants, occurred during LeRoy Shafer's operations.

FN12. The Court already denied this argument in its May 13, 2009 Order by finding that Mr. Vandeven's opinion regarding Defendants' leveling activities was not an improperly raised new argument.

***13** Under CERCLA, "disposal" includes dispersion of hazardous materials which exacerbates a pre-existing contamination on the property. *See Alcan-Toyo Am., Inc. v. N. Ill. Gas Co.,* 881 F.Supp. 342, 346 (N.D.Ill.1995); *Ganton Tech., Inc. v. Quadion Corp.,* 834 F.Supp. 1018, 1021-22 (N.D.Ill.1993) (*citing Kaiser Aluminum & Chemical Corp. v. Catellus Dev. Corp.,* 976 F.2d 1338 (9th Cir.1992)). "Disposal" is not limited to the initial introduction of contaminants into a site. *Ganton,* 834 F.Supp. at 1022.

Here, Defendant Paul Shafer testified at his March 13, 2008 deposition that while closing down the operations on the Property, Defendants had to level the Property to clean it prior to turning it over to the new owner. The record supports that Defendants' leveling activities resulted in areas of fill on Sections 2 and 3 of the Property. The record also supports that a majority of soils containing elevated lead concentrations on the Property are found within the areas of fill. As Plaintiff points out, Mr. Vandeven concluded that approximately 80% of soils between zero and two feet below the ground surface and 96% of soils between two and five feet below ground surface containing elevated levels of lead were located within the fill areas.

While Defendants argue that they did not own the Property at the time of release and cannot be held liable for disposal by leveling, Defendants misinterpret Plaintiff's allegations. The activity that Plaintiff claims are also responsible for "disposal" of lead on the Property is Defendants' leveling activities. The focus is on whether Defendants had control over the activity through which additional contamination took place-the leveling activities. Defendants do not dispute that they had control over the leveling activities while winding down operations on the Property. Thus, based on the foregoing evidence, the record supports that Defendants' leveling activities constituted a "disposal" under CERCLA.

However, the record also supports that no exacerbation of a pre-existing contamination occurred. Cases dealing with the issue of leveling/grading, in which the court found such activity to constitute "disposal" under CERCLA, involved leveling/grading that resulted in contamination of previously uncontaminated areas. *See Ganton,* 834 F.Supp. at 1021 (involving previously uncontaminated areas of the property that were contaminated by clean up operations); *Kaiser,* 976 F.2d at 1342 (involving spreading of tainted soil over uncontaminated portions of the property); *but see Alcan-Toyo,* 881 F.Supp. at 346 (finding that no exacerbation of pre-existing contamination took place where contaminated soil was covered to prevent migration and leaching into soil and the area where the contaminated soil was placed was already contaminated). Here, although Defendants have not raised this argument, Plaintiff has failed to argue that the fill areas were uncontaminated prior to Defendants' leveling of the Property and has not provided any evi-

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dence indicating what the lead levels were in the fill areas prior to Defendants' leveling. Nonetheless, because the record supports that a majority of soils containing elevated lead concentrations are found within areas of fill, the Court finds that a genuine issue of material fact exists as to whether leveling resulted in "disposal" of lead on the Property. *See U.S. v. CDMG Realty Co.,* 96 F.3d 706, 720 (3rd Cir.1996) (providing that "[a] factual dispute is genuine if the evidence is such that a reasonable factfinder could find in favor [of] the nonmoving party").

d. Response costs

***14** Finally, Defendants argue that Plaintiff cannot recover its response costs because it has failed to comply with the NCP's requirements. [FN13] In response, Plaintiff argues that it has incurred response costs that are recoverable under CERCLA. In particular, Plaintiff argues that it has substantially complied with the NCP and, because it has not chosen a remedial strategy and seeks a declaratory judgment, whether its response costs are consistent with the NCP need not be determined at this stage of the proceedings.

> FN13. In particular, Defendants argue that Plaintiff failed to conduct a remedial investigation/feasibility study, identify potential sources of contamination (particularly, the Gary Landfill), determine whether a removal or remediation action was necessary, and review proposed remedial alternatives and criteria under the NCP.
> In relation to Defendants' argument that Plaintiff failed to evaluate potential sources of contamination, as discussed in the portion of the instant Opinion and Order dealing with the Motion to Bar, the Court has already determined that Mr. Vandeven adequately identified and discounted other potential sources of contamination (namely, the Landfill, Leroy Shafer's operations, and illegal dumping).

The NCP is "a series of regulations promulgated by the EPA to establish 'procedures, criteria and responsibilities' for response actions conducted by both the government and private parties." *City of Martinsville,* 2006 WL 2710628 at *3. "The NCP is designed 'to assure that response actions are both cost effective and environmentally sound.' " *Id.* To recover response costs under CERCLA § 107, a plaintiff must show that it incurred the costs in compliance with the NCP. *PMC, Inc. v. Sherwin-Williams, Co.,* 151 F.3d 610, 616 (7th Cir.1998). In particular, "substantial compliance" with the NCP is a prerequisite to CERCLA recovery. *Norfolk Southern Ry. Co. v. Gee Co.,* 158 F.Supp.2d 878, 880 (N.D.Ill.2001). Costs sought to be recovered must be necessary and consistent with the NCP. *Soo Line R. Co. v. Tang Industries, Inc.,* 998 F.Supp. 889, 895 (N.D.Ill.1998).

Here, Plaintiff first argues that it substantially complied with the NCP because it has entered into Indiana's Voluntary Remediation Program ("VRP") to ensure a CERCLA-quality cleanup with the IDEM's assistance. The involvement of a state environmental agency in approving cleanup plans and monitoring remediation progress satisfies the requirement of consistency with the NCP. *Nutrasweet,* 227 F.3d at 791; *see Norfolk,* 158 F.Supp.2d at 883; *Sherwin-Williams Co. v. ARTRA Group, Inc.,* 125 F.Supp.2d 739, 752 (D.Md.2001). However, as Defendants argue, the IDEM's level of involvement in the instant matter is likely insufficient to indicate NCP compliance. Here, Plaintiff has admitted that no cleanup option has been chosen. Further, while Plaintiff has submitted its Remedial Alternatives Assessment to the IDEM, the record supports that it has yet to receive a response, has no final remedial plan, has not submitted such a remedial plan to the IDEM, and has not submitted its Phase II report to the IDEM. Accordingly, the level of state agency involvement in the instant matter is insufficient to indicate NCP compliance as in other cases. *See Norfolk Southern Ry. Co. v. Gee Co.,* No. 98 C 1619, 2002 WL 31163777, at *28 (N.D.Ill. Sept.30, 2002) (state agency received cleanup proposals and worked with plaintiff throughout cleanup process); *Sherwin- Williams,* 125 F.Supp.2d at 753 (response consistent with direction of state agency that was involved throughout the cleanup process); *Nutrasweet,* 227 F.2d at 791 (state agency approved cleanup and monitored progress of remediation).

***15** Nonetheless, Plaintiff may still recover its response costs if they are necessary and consistent with the NCP. *See Soo Line R. Co.,* 998 F.Supp. at 895. Here, Defendants argue that Plaintiff may not recover its sought costs because such costs are inconsistent with the NCP. Defendants assume, however, that

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Plaintiff is seeking between $5 million and $8 million in damages. Based on a review of the Complaint for Damages and briefs in this matter, the Court concludes that Defendants' assumption is incorrect.

Under the "Factual Allegations" section of Plaintiff's Complaint for Damages, Plaintiff alleges that:

> It is *estimated* by Baker Environmental, a consultant for the City, that the reasonable cost to remediate the Property, to a level acceptable to IDEM, is between $2.24 million and *$8.73 million, although further investigation is necessary to completely characterize the contamination of the Property to the satisfaction of IDEM, and allow for a final estimate to be developed.*

Pl.'s Compl. ¶ 48 (emphasis added). Further, in the Affidavit of Mr. Vandeven, he opines that an appropriate remedial option would cost approximately $5 million. Accordingly, Defendants assume that Plaintiff seeks to recover these damages in the instant action.

However, this portion of the Complaint for Damages expressly provides that the dollar figures identified are an estimate and further provides that "further investigation is necessary ... for a final estimate to be developed." *Id.* Further, Count One of the Complaint for Damages alleges that Plaintiff has incurred response costs and, in particular, costs associated with investigating and remediating lead on the Property. *See id.* at ¶¶ 51-52. Plaintiff also alleges that it "is entitled to recover its past response costs ...." *Id.* at ¶ 54. Furthermore, Count Four of the Complaint requests Declaratory Relief. Although Defendants are correct that Mr. Vandeven opined that $5 million would be the cost of remediation, and proposed a remedial action--excavation and capping, he also testified at his December 30, 2008 deposition that he was not recommending that Plaintiff implement his proposed remedy. Rather, Mr. Vandeven testified that he was just estimating what potential costs could be and what an appropriate remedy could be. Accordingly, the Court concludes that the language of the Complaint for Damages indicates that Plaintiff is seeking past response costs and a declaratory judgment for future response costs, and, based on the record, there is no indication that Plaintiff has adopted the estimated dollar figure provided by Mr. Vandeven or the proposed remedial action. Therefore, Plaintiff is not seeking to recover the specific amounts that Defendants allege.

Plaintiff's response brief to the instant Motion for Summary Judgment indicates that, with regard to past response costs, Plaintiff seeks to recover response costs incurred in investigating and assessing contamination on the Property. Where a plaintiff seeks costs incurred for initial site investigation and monitoring costs, a plaintiff is not required to show that the costs comply with the NCP. *Continental Title Co. v. Peoples Gas Light and Coke Co.,* No. 96 C 3257, 1999 WL 753933, at *3 (N.D.Ill. Sept.15, 1999). Rather, "these costs are recoverable irrespective of compliance with the requirements of the NCP." *Id.* "Furthermore, initial monitoring, assessment, and evaluation expenses are recoverable absent any subsequent recoverable costs." *Id.* Based on the damages being claimed in this matter, Plaintiff may recover these response costs regardless of consistency with the NCP. Further, such costs are necessary under the NCP as "[o]btaining preliminary information on the levels of hazardous substances in the surrounding soil and sediment seems a necessary step before any further action can be properly taken." *Id.* at n. 2 (quoting *Gache v. Town of Harrison, NY,* 813 F.Supp. 1036, 1046 (S.D.N.Y.1993)). Accordingly, to the extent that Plaintiff seeks to recover response costs associated with site investigation and assessment, the Court finds that a genuine issue of material fact exists as to whether Plaintiff's damages are recoverable.

***16** Further, Plaintiff argues that since it requests a declaratory judgment with regard to Defendants' liability for future response actions, the appropriate stage for contesting consistency with the NCP is during the damages phase of litigation. In response, Defendants argue that Plaintiff must demonstrate compliance with the NCP, based on the mistaken assumption that Plaintiff seeks between $5 million and $8 million in damages, and has failed to produce evidence of a release by Defendants. However, given that the Court has already determined that a genuine issue of material fact exists as to whether a release occurred during Defendants' operations (through the handling of batteries and leveling activities) and Plaintiff is not seeking the damages that Defendants allege, the Court need not address this issue as Plaintiff has complied with the NCP to the extent necessary to recover its requested response costs.

Additionally, under CERCLA, Plaintiff can obtain a declaratory judgment where it has incurred "some

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minimal level of expense associated with the alleged contamination, such as assessment or monitoring costs." *VME Americas, Inc. v. Hein-Werner Corp.*, 946 F.Supp. 683, 694 (E.D.Wis.1996). A declaratory judgment "is an appropriate remedy under CERCLA where it is not yet possible to determine the actual costs of the cleanup." *Bowen Eng'g v. Estate of Reeve*, 799 F.Supp. 467, 476 (D.N.J.1992). Here, no remedy has been selected. Accordingly, CERCLArelated cleanup costs are not currently determinable. Therefore, based on the record, Plaintiff's remedy would likely be a declaratory judgment as to Defendants' liability.

Accordingly, because the Court finds that genuine issues of material fact exist as to whether Defendants contributed to the lead contamination on the Property--through handling batteries and leveling-and whether Plaintiff's response costs are recoverable, the Court concludes that a genuine issue of material fact exists as to whether Plaintiff may establish a prima facie case under its CERCLA § 107 claim and summary judgment must be denied.

2. Plaintif's Indiana Environmental Legal Action claim

Defendants further argue that summary judgment must be granted on Plaintiff's Indiana Environmental Legal Action claim as Plaintiff has failed to provide any evidence that Defendants contributed to the contamination on the Property.

The Indiana Environmental Legal Action statute provides that:

> A person [FN14] may, regardless of whether the person caused or contributed to the release of a hazardous substance ... into the surface or subsurface soil ... that poses a risk to human health and the environment, bring an environmental legal action against a person that caused or contributed to the release to recover reasonable costs of a removal or remedial action involving the hazardous substances ....
>
> FN14. A city may pursue a claim under this statute. *Cooper Indus., LLC v. City of South Bend*, 899 N.E.2d 1274, 1284 (Ind.2009).

Ind.Code § 13-30-9-2. Under this statute, " 'caused or contributed' requires some involvement by the actor which produces a result." *City of Martinsville*, 2006 WL 2710628 at *4. Given that the Court has already determined that a genuine issue of material fact exists as to whether Defendants contributed to the contamination on the Property with regard to the CERCLA § 107 claim, summary judgment must be denied as to the Environmental Legal Action statute claim.

CONCLUSION

***17** Based on the foregoing, the Court hereby **DENIES** the Defendants Paul Shafer and Paul's Auto Yard, Inc.'s Motion for Summary Judgment [DE 69] and **DENIES** the Defendants' Motion to Bar the Testimony of Plaintiff's Expert Jay Vandeven Pursuant to F.R .E. 702 and Daubert [DE 82].

SO ORDERED.

Slip Copy, 2009 WL 1605136 (N.D.Ind.)

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Only the Westlaw citation is currently available.

United States District Court,
N.D. California.
WALNUT CREEK MANOR, LLC, Plaintiff,
v.
MAYHEW CENTER, LLC; and Dean Dunivan, Defendants.
Mayhew Center, LLC; and Dean Dunivan,
Cross-Claimants,
v.
Walnut Creek Manor, LLC, Cross-Defendant.
No. C 07-05664 CW.

April 16, 2009.

Andrew Thomas Lloyd, Pacific Legal Foundation, Sacramento, CA, Christian Penn Foote, Brian Anthony Kelly, Duane Morris LLP, San Francisco, CA, for Plaintiff/Cross-Defendant.

Joseph Blaise Adams, Jeremy D. Huie, Bassi, Martini, Edlin & Blum, LLP, Jonathan Eric Meislin, San Francisco, CA, for Defendants.

Fred M. Blum, Bassi Martini Edlin & Blum LLP, San Francisco, CA, for Defendants/Cross-Claimants.

ORDER GRANTING IN PART WALNUT CREEK MANOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AND GRANTING IN PART MAYHEW CENTER'S AND DUNIVAN'S MOTION FOR PARTIAL SUMMARY
JUDGMENT

CLAUDIA WILKEN, District Judge.

***1** This case presents competing claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Plaintiff Walnut Creek Manor (WCM) filed a motion for partial summary judgment. Defendants Mayhew Center (MC) and Dean Dunivan oppose the motion and filed a cross-motion for partial summary judgment. The motions were heard on March 19, 2009. Having considered all of the parties' papers and argument on the motions, the Court hereby grants Plaintiff's motion in part and grants Defendants' motion in part.

BACKGROUND

This case involves a dispute between two adjacent landowners, Walnut Creek Manor (WCM) and Mayhew Center (MC), over the source of soil and groundwater contaminated by tetrachlorethylene (PCE). In operation since 1964, WCM is a seniors-only residential apartment complex with approximately 420 units. Eberle Decl. ¶¶ 4-5. Before that time, the site was a walnut orchard. *Id.* Bordering WCM to the east, lies MC, which was first developed in the 1970s as part of an industrial development district and has since been occupied by a variety of known and unknown commercial and light industrial entities. Kelly Decl., Exh. L at 10-11. In the 1970s and 1980s, at least one tenant at MC, Etch-Tek, was in a business involving the manufacturing of printed circuit or wiring boards and plating. *Id.* During the time Etch-Tek operated at MC, solvent use, including PCE, was prevalent in the printed circuit board manufacturing industry. Kelly Decl., Exh. K at 2. Kenneth Beard, an owner of Etch-Tek, stated that it did not use PCE or any solvents in its operation. K. Beard Dep. at 166:1-6.

In 1993, Dean Dunivan purchased the MC property out of foreclosure from the San Francisco Federal Bank. Dunivan Dep. at 25:4-12. Before Dunivan purchased the property, the bank commissioned an investigation of the site. The purpose of the report was to determine "whether absestos containing materials are present in the building and to indirectly assess the potential for other environmental concerns." Kelly Decl., Exh. H. The report concluded that asbestos was located in all buildings. *Id.* The report also noted that limited quantities of hazardous materials were present at the property, including: toners for copier machines; chemical developers for photography; lubricants and petroleum-based solvents stored at a print shop at 3321 Vincent; and adhesives stored on the roof. *Id.* "Direct evidence of hazardous materials release was not observed during our work." *Id.* The report contained the following caveat, "This inspection and report is limited in scope to the visual observations existing at the time of the inspection. No special tests were conducted on any building element with the exception of the asbestos sampling and no building

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elements were removed to reveal any suspected conditions that may be existing." *Id.* Before the purchase, Dunivan did not perform any soil or groundwater tests or hire any professionals, other than termite inspectors, to inspect the property. *Id.* at 34:1-15; 39:17-40:2.

***2** In 2004, Dunivan sought to refinance the MC property. Before committing to the refinance, the bank required a Phase I environmental review, which was performed by National Assessment Corporation (NAC). NAC noted that between 1973 and 1981, Etch-Tek received numerous violation notices from the city fire department regarding the improper storage of hazardous materials. Kelly Decl., Exh. I at 27. "However, there is no evidence that releases to soil or groundwater resulted from this storage. Additionally, specific reference to chlorinated solvents were not identified in Fire Department Records." *Id.* NAC recommended that "additional soil and groundwater data would be required in order to determine if former Property activities have contributed to soil and groundwater contamination at the Property and in the immediate vicinity." *Id* .

Dunivan then hired an environmental engineering company, Allwest Assoc., to review the NAC's conclusion that further testing was required. Dunivan Dep. at 122:11-15. Allwest reviewed the NAC report and environmental reports for the former Union Pacific Railroad Hookston Station site located to the northeast and east of MC. Allwest's report sought "to identify potential environmental impacts to the subject Mayhew Center property from off-site sources, and to determine whether past or present occupants of the Mayhew Center property may have environmentally impacted off-site properties." Kelly Decl., Exh. J at 1. The Allwest report concluded that "the potential source of PCE contamination of the groundwater would in all likelihood be the [sic] located well north of the Mayhew Center property, where the highest concentrations of PCE were detected." *Id.* at 5. The report made no mention of WCM, MC's neighbor to the west. The report ultimately concluded that further "subsurface investigation at the subject property is not warranted." *Id.*

In December, 2004, the California Regional Water Quality Control Board (Regional Board) ordered MC and WCM to submit a technical report proposing a site investigation work plan to assess the soil and groundwater quality at their respective properties and a time schedule to perform the investigation. Kelly Decl., Ex. V. To date, MC has not obtained any soil or groundwater samples pursuant to a work plan approved by the Regional Board. Dunivan Dep. at 144:9-14.

In contrast, on May 20, 2005, WCM submitted to the Regional Board a report that evaluated multiple soil and groundwater samples obtained from eight boreholes drilled to sixty foot depths below the ground surface on the WCM property and three boreholes drilled to sixty foot depths below the ground surface on the MC property near the boundary line between the properties. Eberle Decl., Exh. F at 10-11. The eight boreholes drilled on WCM property revealed no detectable concentration of PCE. *Id.* at 10-12. The samples obtained from all three boreholes drilled on the MC property contained detectable PCE contamination. *Id.* On July, 29, 2005, the Regional Board requested a follow-up subsurface investigation of the WCM property. Eberle Decl. ¶ 25. On December 16, 2005, WCM submitted a report that noted detectible PCE concentrations in the soil immediately adjacent to the WCM boudary with MC, but at concentrations lower on the WCM side of the property line than the concentrations found on the MC property. *Id.*, Ex. I at 4, 6-7. The report concluded that "analytical data from April and November 2005 soil samples suggest that the potential source is located near boring B7 on Mayhew Center." *Id.* at 6. The report also stated that the "soil data evaluated for their report suggest that Walnut Creek Manor is not a source of PCE contamination." *Id.*

***3** On December 14, 2006, the Regional Board requested that WCM provide further site history information and a work plan to perform a third soil and groundwater investigation. Eberle Decl. ¶¶ 30-31. On January 26, 2007, WCM submitted a site history and work plan, but the Regional Board rejected it. Eberle Decl., Exh. N. WCM is currently appealing that decision.

On April 3, 2008, WCM served a Rule 34 request to enter MC's property to conduct soil and groundwater testing to obtain further data. The testing found two sources of PCE on the MC property in shallow soil, "including a substantial source area located approximately 11 feet from the western property boundary with Walnut Creek Manor." Eberle Decl., Exh. O at

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13. The report, written by WCM's environmental expert Scott Warner, concluded that "this PCE-source area has substantially impacted the Walnut Creek Manor property." *Id.*

WCM has sued MC for (1) CERCLA cost recovery, (2) CERCLA contribution, (3) federal declaratory relief, (4) private nuisance, (5) public nuisance, (6) trespass, (7) negligence, (8) negligence per se, (9) strict liability, (10) indemnity pursuant to the Hazardous Substances Control Account Act, (11) indemnity under the Porter-Cologne Act and (12) equitable indemnity. MC has filed a cross claim for (1) CERCLA cost recovery, (2) CERCLA contribution, (3) federal declaratory relief, (4) public nuisance, (5) private nuisance, (6) negligence, (7) waste, (8) indemnity pursuant to the Hazardous Substance Control Account Act, (9) indemnity under the Porter-Cologne Act, (10) equitable indemnity and (11) attorneys' fees.

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Eisenberg v. Ins. Co. of N. Am.,* 815 F.2d 1285, 1288-89 (9th Cir.1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the Court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. *Celotex,* 477 U.S. at 324; *Eisenberg,* 815 F.2d at 1289. The Court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Intel Corp. v. Hartford Accident & Indem. Co.,* 952 F.2d 1551, 1558 (9th Cir.1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify which facts are material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of production by either of two methods:

> ***4** The moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial.

Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d 1099, 1106 (9th Cir.2000).

If the moving party discharges its burden by showing an absence of evidence to support an essential element of a claim or defense, it is not required to produce evidence showing the absence of a material fact on such issues, or to support its motion with evidence negating the non-moving party's claim. *Id.; see also Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 885, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990); *Bhan v. NME Hosps., Inc.,* 929 F.2d 1404, 1409 (9th Cir.1991). If the moving party shows an absence of evidence to support the non-moving party's case, the burden then shifts to the non-moving party to produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan,* 929 F.2d at 1409.

If the moving party discharges its burden by negating an essential element of the non-moving party's claim or defense, it must produce affirmative evidence of such negation. *Nissan,* 210 F.3d at 1105. If the moving party produces such evidence, the burden then shifts to the non-moving party to produce specific evidence to show that a dispute of material fact exists. *Id.*

If the moving party does not meet its initial burden of production by either method, the non-moving party is under no obligation to offer any evidence in support of its opposition. *Id* . This is true even though the non-moving party bears the ultimate burden of persuasion at trial. *Id.* at 1107.

Where the moving party bears the burden of proof on an issue at trial, it must, in order to discharge its burden of showing that no genuine issue of material fact remains, make a *prima facie* showing in support of its position on that issue. *UA Local 343 v. Nor-Cal Plumbing, Inc.,* 48 F.3d 1465, 1471 (9th Cir.1994). That is, the moving party must present evidence that,

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if uncontroverted at trial, would entitle it to prevail on that issue. *Id.* Once it has done so, the non-moving party must set forth specific facts controverting the moving party's *prima facie* case. *UA Local 343,* 48 F.3d at 1471. The non-moving party's "burden of contradicting [the moving party's] evidence is not negligible." *Id.* This standard does not change merely because resolution of the relevant issue is "highly fact specific." *Id.*

DISCUSSION

WCM seeks partial summary judgment against MC as to liability under CERCLA and as to its affirmative defenses, but does not move for summary judgment on MC's liability for the non-CERCLA causes of action. WCM also seeks summary judgment on MC's entire cross-claim. MC opposes WCM's motion and moves for partial summary judgment on all of the non-CERCLA causes of action in WCM's first amended complaint. MC does not move for summary judgment on its cross claims.

I. WCM's Claims Against MC

A. CERCLA

***5** CERCLA "generally imposes strict liability on owners and operators of facilities at which hazardous substances were disposed." *3550 Stevens Creek Assocs. v. Barclays Bank,* 915 F.2d 1355, 1357 (9th Cir.1990). To that end, CERCLA "authorizes private parties to institute civil actions to recover the costs involved in the cleanup of hazardous wastes from those responsible for their creation." *Id.*

> To prevail in a private cost recovery action, a plaintiff must establish that (1) the site on which the hazardous substances are contained is a "facility" under CERCLA's definition of that term, Section 101(9), 42 U.S.C. § 9601(9); (2) a "release" or "threatened release" of any "hazardous substance" from the facility has occurred, 42 U.S.C. § 9607(a)(4); (3) such "release" or "threatened release" has caused the plaintiff to incur response costs that were "necessary" and "consistent with the national contingency plan," 42 U.S.C. §§ 9607(a)(4) and (a)(4)(B); and (4) the defendant is within one of four classes of persons subject to the liability provisions of Section 107(a).

Stevens Creek, 915 F.2d at 1358. Title 42 U.S.C. § 9607(a) defines those four categories of potentially responsible parties (PRPs) as follows:

> (1) the owner and operator of a vessel or a facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance ....

The parties do not dispute that (1) MC is a facility as defined in § 9601(9)(B), (2) MC is a PRP because it owns and operate the MC property, 42 U.S.C. § 9607(a)(1) and (3) PCE exists on both the MC and WCM properties. However, the parties dispute the source of the release of PCE and whether that release caused either party to incur response costs that were necessary and consistent with the national contingency plan.

CERCLA defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment." 42 U.S.C. § 9601(22). WMC argues that the mere presence of a hazardous substance at MC's facility constitutes a "release" from that facility. *United States v. Honeywell Intern., Inc.,* 542 F.Supp.2d 1188, 1198 (E.D.Cal.2008); *United States v. Domenic Lombardi Realty, Inc.,* 204 F.Supp.2d 318, 330 (D.R.I.2002) ("a number of courts have held that the presence of hazardous material at a site is sufficient to constitute a 'release' for purposes of triggering CERCLA liability"); *Foster v. United States,* 992 F.Supp. 642, 651 (D.D.C.1996). The Ninth Circuit has not adopted this broad position. Further, none of the cases WCM cites concern adjacent landowners who each assert that the other party was the source of the release.

***6** WCM also argues that a release of PCE must have originated from MC because greater concentrations of

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PCE exist at the higher elevation MC property compared to the lower elevation WCM property. Eberle Decl., Ex. O. And WCM argues that MC caused a release when, without WCM's permission, it drilled a slant boring from MC property onto WMC property. WCM's expert, Scott Warner, opined that performing an "angled boring from MC to WCM through an area with PCE ... provides a continuing preferential pathway for contaminants, including PCE, to be transported from the higher elevation MC property to the lower elevation WCM property." Kelly Decl., Exh. L at 20. This evidence, independently and together, is sufficient to raise a dispute of fact as to the occurrence of a "release" as defined by § 9601(22). Warner's reports show that PCE has at least "escaped" or "leeched" from MC property onto WCM property.

MC counters that none of this evidence should be considered by the Court because it consists of unreliable and irrelevant scientific conclusions. MC argues that Warner's conclusions regarding MC as a possible source of PCE contamination were "premised on nothing more than his assumptions without any objective scientific support." Opposition at 10.

The test for admissibility of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), is whether the opinion the expert seeks to offer is relevant and reliable. This determination "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592. MC argues that Warner improperly used the process-of-elimination method to determine that the PCE present on the WCM property came from the MC property. Specifically, MC asserts that Warner improperly excluded WCM as a source of the contamination. MC claims it is just as likely that WCM was the source because (1) the asphalt at WCM was not impermeable to PCE, (2) many household ingredients which may have been used at WCM contain PCE and (3) vehicles were occasionally repaired on the WCM property and some products used in vehicle repair contain PCE. MC also faults Warner for making his conclusions without evidence that any of MC's former tenants used PCE.

The Court has reviewed Warner's expert reports and concludes that they are grounded in a defensible scientific methodology and based on extensive factual support. MC is correct that Warner's reports did not explicitly discuss the speculative factors mentioned above and why they did not compel the conclusion that PCE flowed from WCM to MC. However, Warner need not mention every speculative theory when describing his methodology. As Warner described, "the mere possibility or speculation that PCE may have been contained in unknown products and in unknown concentrations [on WCM property] is irrelevant when the subsurface data obtained and evaluated in conformance with professional standards does not support a PCE source from the Walnut Creek Manor property." Warner Reply Decl. ¶ 9.

***7** Warner performed extensive subsurface testing on both the MC and WCM properties, reviewed photographs of the areas, considered historical information for both MC and WCM properties that describes site use and assessed information provided in deposition testimony and previous environmental reports. The extensive soil testing uncovered evidence that (1) PCE has only been detected in the WCM soil along the MC property line, (2) PCE concentrations on the MC property are far greater than those on the WCM property in adjacent areas and (3) the WCM property is at a lower elevation than the MC property, but PCE in the soil at the MC property exists at elevations at and even above the ground surface level of the WCM property. Warner has demonstrated, with scientifically sound methodology, that a pathway existed for the movement of PCE from MC to WCM. [FN1]

MC also asks the Court to exclude Warner's testimony because he has submitted contradictory testimony. MC argues that in Warner's deposition, he testified that PCE contamination moved laterally over the surface of MC's land "into the unpaved area" and onto the WCM property; but in a later declaration, he stated that PCE moved through "the soil column and vadose zone pore space." Warner Decl. ¶ 7. These two statements are not contradictory. When analyzed in context, the two statements complement each other. There is nothing in the evidence to suggest that PCE cannot travel both horizontally across the surface of MC's land and through the soil.

MC argues that even if Warner's testimony is admissible, WCM has not established that a release of PCE

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came from MC and migrated to WCM. In *Castaic Lake Water Agency v. Whittaker Corp.*, 272 F.Supp.2d 1053, 1066 (C.D.Cal.2003), the court stated that

> in a two-site CERCLA case, the plaintiff meets its burden on summary judgment if it (a) identifies contaminant at its site, (b) identifies the same (or perhaps a chemically similar) contaminant at the defendant's site, and (c) provides evidence of a plausible migration pathway by which the contaminant could have traveled from the defendant's facility to the plaintiff's site. If the plaintiff meets this burden, the defendant must proffer evidence sufficient to create a genuine issue of fact as to its ability to disprove causation.

MC argues that there is a material factual dispute as to whether anyone at MC ever possessed PCE. Neither party has come forward with direct evidence that persons on MC's property used PCE. The circumstantial evidence of PCE use on MC's property consists of (1) WCM's environmental studies and (2) the fact that a company once located on MC's property, Etch-Tek, was in a business that typically used PCE, although the owner of Etch-Tek testified that he never used PCE.

Moreover, MC presents expert testimony that the source of PCE is WCM, not MC. MC's expert, Jan Schutze, states that "PCE concentrations consistently increased with depth, suggesting contamination from a lateral source or sources. Based on the currently available evidence, these up-gradient sources are on the WCM property." Schutze Decl., Exh. 1. MC argues that the PCE traveled through the groundwater along a down-gradient pathway. Opposition at 20. Schutze noted that maintenance shops and storage areas formerly located near where PCE was discovered on WCM's property could be the source of the contaminant. *Id.* Schutze also estimated that the quantity of PCE present in the soil amounts to one to two gallons, which "is typical for residential applications such as carpet or fabric cleaning, automotive parts cleaning and HVAC equipment servicing." *Id.*

***8** WCM counters that Schutze's conclusions are not supported by specific facts and moves to exclude his testimony under *Daubert.* MC presents no evidence that the groundwater beneath WMC is contaminated with PCE, let alone at concentrations significant enough to result in the substantially higher soil and groundwater contamination present on the MC property. However, the fact that the groundwater has not been tested on WCM's property does not mean that Schutze should not be heard to opine that the contamination travelled from WCM property via groundwater. Schutze reviewed soil and groundwater samples taken from the MC property and noted that the fact that PCE has been detected in the soil of the up-gradient WCM property as far as twenty feet west of the property line strongly suggests that the contaminant has reached the groundwater below and traveled to MC property. Schutze Reply Decl. ¶ 6. Schutze relied on the same facts as those relied upon by WCM's expert, Warner. It also appears that they use similar methodologies. The difference between them is their conclusions. The Court concludes that neither expert is excluded under *Daubert.* Both offer relevant and reliable opinions based on sound scientific methodologies. [FN2] Therefore, a triable issue of fact exists as to the source of the PCE contaminant. [FN3]

B. Recoverable Remedial Costs

To prevail on its summary judgment motion on its CERCLA claims, WCM has the burden to prove that its response cost is both necessary and consistent with the national contingency plan. 42 U.S.C. § 9607(a)(4)(B); *Carson Harbor Village, Ltd. v. Unocal Corp.*, 287 F.Supp.2d 1118, 1153-54 (C.D.Cal.2003). MC argues that WCM fails to establish that it has any recoverable remedial costs because all of its costs are litigation costs.

MC relies primarily on *Key Tronic Corp. v. United States*, 511 U.S. 809, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994), and *Young v. United States*, 394 F.3d 858 (10th Cir.2005). In *Key Tronic*, the Supreme Court considered the extent to which private corporations that incurred cleanup costs under CERCLA could collect litigation-related attorneys' fees. The Court held that "some lawyers' work that is closely tied to the actual cleanup may constitute a necessary cost of response in and of itself." As an example, the Court noted that "tracking down other responsible solvent polluters" would be recoverable because such efforts "significantly benefitted the entire cleanup effort and served a statutory purpose apart from the reallocation of costs." *Key Tronic*, 511 U.S. at 820. However, pure litigation expenses, such as "legal services performed in connection with negotiations between Key Tronic and the EPA that culminated in the consent decree" are not recoverable because they "do not constitute 'nec-

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essary costs of response'." *Id.*

MC asserts that both of the experts WCM hired performed work solely to identify MC as the source of PCE for this litigation and not as part of any plan to clean up the contamination. However, as the Supreme Court explained, studies conducted in an effort to "track[ ] down other responsible solvent polluters" are recoverable under CERCLA. WCM's costs are preliminary efforts to investigate the site and the extent to which the site is polluted in order to make recommendations for future remediation action. That these studies also further WCM's current litigation is irrelevant.

***9** In *Young,* the plaintiffs purchased property "at a substantially reduced price, adjacent to a superfund cite." 394 F.3d at 860. They subsequently discovered hazardous substances on their property, but instead of taking action to contain or clean up those substances, they sued the federal government and the city government under CERCLA. *Id.* The court held that the plaintiffs' costs were not necessary to the containment and cleanup of hazardous releases on their property. *Id.* The court noted, "Recognized costs cannot be deemed 'necessary' to the containment and cleanup of hazardous releases absent some nexus between the alleged response cost and an actual effort to respond to environmental contamination." The court held that the plaintiffs' alleged response costs were not " 'necessary' to the containment or cleanup of hazardous releases because the costs were not tied in any manner to the actual cleanup of hazardous releases." The plaintiffs repeatedly testified that they did not intend to spend any money to clean up the contamination on their property.

Unlike the plaintiffs in *Young,* WCM has not testified that it does not intend to spend any money to clean up the contamination on its property. It seeks to recover response costs for work performed in order to assist with and help plan the eventual remediation and cleanup efforts. First Amended Complaint ¶ 33; Eberle Decl. ¶¶ 20, 21, 25, 29, 31-39; Warner Decl. ¶¶ 2-5. WCM has expressed no intention to abandon its property like the plaintiffs did in *Young*. Eberle Decl. ¶ 5-8. The Court concludes that the cost of the studies performed by WCM is a necessary response cost.

MC also argues that WCM's response costs are inconsistent with the national contingency plan (NCP) because (1) WCM's actions have not resulted in a CERCLA- quality cleanup, and (2) WCM's site investigation is insufficient.

The NCP provides that a private cleanup effort will be "considered 'consistent with the NCP' if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements [in 40 C.F.R. § 300.700(c)(5)-(6)], [FN4] and results in a CERCLA-quality cleanup." 40 C.F.R. § 300.700(c)(3)(I). A CERCLA-quality cleanup is (1) "protective of human health and the environment," (2) utilizes "permanent solutions and alternative treatment technologies or resource recovery technologies," (3) is cost-effective, and (4) is selected after "meaningful public participation." 55 Fed.Reg. 8793. "Immaterial or insubstantial deviations" from the NCP will not preclude a cost-recovery action. 40 C.F.R. § 300.700(c)(4).

WCM does not claim that it has performed a CERCLA-quality cleanup or that its site investigation is sufficient as is. Rather, WCM argues that it does not have to perform these activities to be "consistent" with the NCP because all of its efforts thus far "will undoubtedly play a significant role in the election of a remediation effort." [FN5] Reply at 11. The clear language of the NCP reveals that a plaintiff cannot collect costs when it has performed some of the NCP requirements. By merely performing a few investigations of a hazardous site, WCM has not "substantially complied" with the entirety of the NCP. Moreover, because a CERCLA-quality cleanup has not even begun, WCM cannot carry its burden to show that its efforts have "result[ed] in a CERCLA-quality cleanup." WCM's response costs are not "consistent" with the NCP. However, the Court notes that these costs may be recoverable when the cleanup is completed and WCM shows that it substantially complied with the NCP.

C. MC's Affirmative Defenses under CERCLA

***10** WCM moves for summary judgment on MC's claim that it is protected from liability under CERCLA by the third party defense. Section 9607(b)(3) states, "There shall be no liability" for a "person otherwise liable who can establish by a preponderance of the evidence that the release or threatened release and the damages resulting therefrom were caused solely by ... an act or omission of a third party ... if the defendant

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establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned ... and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." To invoke the defense, MC must also show that, at the time it acquired the property, it "did not know and had no reason to know that any hazardous substance" was disposed of on, in or at the facility. 42 U.S.C. § 9601(35)(A)(ii). To establish that it had no reason to know of the hazardous substance, MC must be able to show that before it purchased the facility it "carried out all appropriate inquiries ... into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices." *Id.* § 9601(35)(B)(i). MC must also have taken "reasonable steps to stop any continuing release; prevent any threatened future release; and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance." *Id.*

According to MC, the third party is WCM. As noted above, a triable issue of fact exists as to the source of the PCE release; therefore a triable issue of fact exists as to whether WCM is the "sole" cause of PCE contamination.

WCM asserts that MC does not have any evidence that MC took reasonable steps to stop any continuing release, prevent any threatened future release, or prevent or limit exposure of previously released PCE to carry its ultimate burden of persuasion at trial. The Court agrees.

Dunivan testified that he took no effort in this regard:

> Question: You are aware that there is PCE in the soil and in the groundwater beneath Mayhew Center property; is that correct?
> Dunivan: That's correct.
> Question: Have you taken any actions to cease or abate any movement of that PCE associated with its presence?
> Dunivan: Other than working with the [Regional] board? No.
> Question: What have you done working with the board to see that PCE no longer has migrated through soil or groundwater?
> Dunivan: Nothing.
> Question: Have you taken any steps to prevent or limit any human or environmental exposure to the PCE that's been detected at the Mayhew Center cite?
> Dunivan: No, I don't believe so.

Instead, MC bases its third party defense on the fact that, before Dunivan purchased the MC property out of foreclosure from the San Francisco Federal Bank, the bank commissioned an environmental assessment to determine the presence of any environmental contaminants. The assessment report noted the presence of asbestos in all of the buildings on the property, but did not mention PCE. However, the report stated that it did not purport to be a complete environmental review and did not even completely examine the current uses of the property, let alone any past uses of the property. Moreover, Dunivan knew of the limitations of the report, but did not take any action to fill those gaps. Therefore, the Court concludes that MC has failed to set forth evidence to support the elements of a third party defense. The Court grants summary adjudication for WCM on MC's affirmative defense under 42 U.S.C. § 9607(b)(3).

D. WCM's Motion for Summary Judgment on MC's claims

***11** WCM moves for summary judgment on MC's cross-claims. With respect to MC's CERCLA cross-claims, a triable issue of fact exists as to the source of the PCE contamination, as noted above. Notwithstanding this fact, WCM argues that MC's CERCLA cross-claims must be dismissed because MC has not produced any specific evidence that its response costs are necessary and consistent with the NCP. However, as the parties agreed at the hearing on these motions, the issues regarding response costs will be determined at a later date. The CERCLA issue currently before the Court is the source of PCE contamination. Therefore, the Court denies WCM summary judgment on MC's CERCLA cross-claims.

WCM also argues in the alternative that it is protected by the third party defense. WCM asserts that the presence of PCE on its property was caused solely by a third party, MC. *See* 42 U.S.C. § 9607(b)(3). However, a triable issue of fact exists as to whether MC is the "sole" cause of PCE contamination. Therefore, the Court denies summary adjudication for WCM on its affirmative defense.

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With respect to MC's state law cross-claims, WCM tersely argues that none of them survive summary judgment because MC "provided no credible evidence that the PCE has migrated from the [WMC] property to the MC property." Reply at 19. WCM argues that without such evidence, MC cannot establish the causation or damages elements on its state law cross-claims. However, as noted above, MC has created a triable issue of fact as to the source of the PCE. Therefore, the Court denies WCM's motion for summary judgment on all of MC's state law cross-claims. [FN6]

E. MC's Motion for Summary Judgment on WCM's State Law Claims

MC similarly argues that none of WCM's state law claims survive summary judgment because WCM cannot prove causation for any of the claims. Because there is a triable issue of fact on this issue, the Court denies MC's summary judgment motion on this ground.

MC argues that WCM's claims for public and private nuisance and trespass do not survive summary judgment for additional reasons. Nuisance is defined as "anything which is injurious to health ... or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Cal. Civ.Code § 3479.

> Although the central idea of nuisance is the unreasonable invasion of this interest [in the use and enjoyment of property] and not the particular type of conduct subjecting the actor to liability, liability nevertheless depends on some sort of conduct that either directly and unreasonably interferes with it or creates a condition that does so. The invasion may be intentional and unreasonable. It may be unintentional but caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability. On any of these bases the defendant may be liable. On the other hand, the invasion may be intentional but reasonable; or it may be entirely accidental and not fall within any of the categories mentioned above. In these cases there is no liability.

***12** *Gdowski v. Louie,* 84 Cal.App.4th 1395, 1408, 101 Cal.Rptr.2d 609 (2000). "The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another. Such invasions are characterized as intentional torts, regardless of the actor's motivation." *Civic Western Corp. v. Zila Industries, Inc.,* 66 Cal.App.3d 1, 16, 135 Cal.Rptr. 915 (1977).

MC argues that it cannot be held liable for these causes of action absent a showing that it was an active participant in causing the PCE contamination. *Resolution Trust Corp. v. Rossmoor Corp.,* 34 Cal.App.4th 93, 99-100, 40 Cal.Rptr.2d 328 (1995). WCM has presented evidence that MC drilled a slant boring from the MC property to the WCM's property, which may have created a pathway for the migration of PCE onto WCM's property. The evidence of this action is sufficient to create a material dispute as to MC's liability for nuisance and trespass.

MC additionally asserts that WCM has plead only a continuing nuisance, not a permanent one. An important difference between the two is in the allowable damages. In a permanent nuisance case, "the law considers the wrong to be completed at the time of entry and allows recovery of damages for past, present, and future harm in a single action, generally the diminution in the property's value." *Starrh and Starrh Cotton Growers v. Aera Energy, LLC,* 153 Cal.App.4th 583, 592, 63 Cal.Rptr.3d 165 (2007). In a continuing nuisance case, "damages are assessed for present and past damages only; prospective damages are not awarded because the trespass may be discontinued or abated at some time, ending the harm." *Id.* Though WCM does not use the term "permanent nuisance" in its complaint, it seeks damages for "a decrease and diminution in the value" of WCM's property and damages "due to the stigma caused by the contamination of the surface and subsurface soil." FAC ¶ 50. Therefore, the Court finds that MC was on notice that WCM plead both continuing and permanent nuisance theories of liability.

MC next argues that WCM's continuing nuisance cause of action fails because WCM cannot prove damages for this claim. MC relies on *Mangini v. Aerojet Corp.,* 12 Cal.4th 1087, 51 Cal.Rptr.2d 272, 912 P.2d 1220 (1996). In that case, the court discussed the type of damages evidence a plaintiff must proffer to demonstrate that a nuisance is continuing and thus not subject to the three year statute of limitations applicable to permanent nuisances. The court held that, because the "plaintiffs had failed to present *any* substantial evidence that the contamination of their land as a result of defendant['s] ... practice of dumping and burning a toxic solvent was capable of being

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abated at a reasonable cost, the nuisance must be deemed permanent." *Id.* at 1090, 51 Cal.Rptr.2d 272, 912 P.2d 1220 (emphasis in original). Therefore, the court applied the three year statute of limitations reserved for a permanent nuisance and concluded that the plaintiff's nuisance claim was time-barred. *Id.* MC asserts that *Mangini* stands for the proposition that, to survive summary judgment, WCM must support its continuing nuisance claim with evidence that the contamination on WCM's site is reasonably abatable. However, the holding of *Mangini* does not apply outside of the statute of limitations context. The court specifically noted,

> ***13** We emphasize, however, that our ruling in this case is confined to the statute of limitations issue before us. We express no opinion on the question whether a plaintiff who has filed a timely nuisance action is required to prove that abatement can be accomplished at a 'reasonable cost' in order to be entitled to an injunction requiring the wrongdoing party to remedy the damage to the property.

Id. Because MC does not challenge the timeliness of WCM's nuisance action, WCM need not prove that abatement can be accomplished at a reasonable cost in order to pursue its continuing nuisance claim.

MC also argues that WCM's negligence claims fail because MC did not owe any duty to WCM. "No person is permitted by law to use his property in such a manner that damage to his neighbor is a foreseeable result." *Booska v. Patel*, 24 Cal.App.4th 1786, 1791, 30 Cal.Rptr.2d 241 (1994). Whatever rights MC has in the management of its own land, those rights are tempered by its duty to act reasonably. *Id* . Here, MC had a duty not to act in a way that would potentially release PCE onto WCM's property. Proffering evidence that MC drilled a slant boring from the MC property to the WCM property is one way WCM can prove a breach of that duty.

MC argues in the alternative that WCM's negligence claims fail because its damages are speculative. "Whatever the proper measure of damages may be, in a given case, the recovery therefor is still subject to the fundamental rule that damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery." *Frustuck v. City of Fairfax*, 212 Cal.App.2d 345, 367-68, 28 Cal.Rptr. 357 (1963). MC asserts that WCM has admitted that it cannot prove its damages. Warner Dep. 238:18-140:4. However, the deposition testimony on which MC relies does not state as much. In that testimony, WCM's expert stated that he could not determine exactly how much the PCE levels in the soil and groundwater have increased over time. He was only able to test current PCE levels. These statements do not show that WCM will not be able to prove its damages. Therefore, even though WCM has not specified the exact amount of damages it seeks, it has clearly established the fact of damages and has carried its burden to show that its damages are not speculative.

MC argues that WCM's claim for strict liability fails because no admissible evidence suggests that MC engaged in any reckless or ultrahazardous activities. MC relies on *Lussier v. San Lorenzo Valley Water Dist.*, 206 Cal.App.3d 92, 253 Cal.Rptr. 470 (1988). In that case, after a large storm, water overflowed from a creek on the plaintiff's land and damaged his house. *Id.* at 98, 253 Cal.Rptr. 470. The plaintiff sued the local water district based on strict liability, claiming that the flooding was caused by the district's failure to clear debris out of the creek. The court held that the defendant could not be strictly liable for damages that arose when a natural condition of the defendant's land interfered with the plaintiff's free use and enjoyment of his property. *Id.* at 101, 253 Cal.Rptr. 470. The court noted, "Obviously, owning land and letting nature take its course thereon is not reckless or ultrahazardous activity." *Id.* at 103 n. 7, 253 Cal.Rptr. 470. The facts of the present case are starkly different. PCE does not naturally occur on anybody's land. Further, WCM has presented evidence that MC released PCE onto WCM's property through slant boring. Therefore, MC has failed to meet its summary judgment burden on WCM's strict liability claim.

***14** MC moves for summary judgment on WCM's equitable indemnity claim because "most courts that have considered this issue have concluded that CERCLA provides an adequate remedy at law." *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 711-12 (6th Cir.2006). The Ninth Circuit is not among the "most courts" cited in *Reg'l Airport Auth.*

Section 9652(d) of CERCLA provides, "Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." MC does not present the

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Court with any state law that would bar an action for equitable indemnity under these circumstances. WCM only seeks equitable indemnity to the extent that equitable relief under CERCLA is not available. Therefore, the Court denies MC's summary judgment motion on this claim.

CONCLUSION

For the foregoing reasons, the Court grants in part WCM's motion for partial summary judgment (Docket No. 30), thereby adjudicating MC's third party affirmative defense under § 9601(b)(3) and its claim for contribution under the Porter-Cologne Act. The Court grants in part MC's motion for partial summary judgment (Docket No. 63), thereby adjudicating WCM's claim for contribution under the Porter-Cologne Act. All other claims survive these summary judgment motions.

IT IS SO ORDERED.

FN1. MC also argues that the opinions of WCM's expert Joseph Odencrantz are inadmissible because (1) WCM did not provide MC with his expert report as required under Federal Rule of Civil Procedure 26 and (2) WCM claimed that Odencrantz's work product was privileged, refused to allow MC to depose him, but now offers his testimony. WCM does not contest these points in its reply brief. At the hearing on these motions, the parties agreed not to rely on Odencrantz's expert opinions.

FN2. In WCM' reply brief, it moves to exclude Christopher Vais' expert opinions because he testified that he is not an expert in issues concerning vertical or lateral movements of contaminants in soil. Vais Dep. at 43. MC does not dispute this and notes that Vais will not offer his opinions on this issue. Supp. Vais. Decl. ¶ 2. WCM also argues that Vais's opinions are unsupported by any credible evidence. However, like Schutze and Warner, Vais grounded his opinions in test data from both the MC and WCM properties. Vais's testimony about the source of PCE contamination is relevant and reliable and is admissible under *Daubert.*

FN3. To the extent the Court relied upon evidence to which MC objected, the objections are overruled. To the extent the Court did not rely on such evidence, MC's objections are overruled as moot.

FN4. These sections provide,
(5) The following provisions of this Part are potentially applicable to private party response actions:
(i) Section 300.150 (on worker health and safety);
(ii) Section 300.160 (on documentation and cost recovery);
(iii) Section 300.400(c)(1), (4), (5), and (7) (on determining the need for a Fund-financed action); (e) (on permit requirements) except that the permit waiver does not apply to private party response actions; and (g) (on identification of ARARs) except that applicable requirements of federal or state law may not be waived by a private party;
(iv) Section 300.405(b), (c), and (d) (on reports of releases to the NRC);
(v) Section 300.410 (on removal site evaluation) except paragraphs (f)(5) and (6);
(vi) Section 300.415 (on removal actions) except paragraphs (a) (2), (b)(2)(vii), (b)(5), and (g); and including § 300.415(j) with regard to meeting ARARs where practicable except that private party removal actions must always comply with the requirements of applicable law;
(vii) Section 300.420 (on remedial site evaluation);
(viii) Section 300.430 (on RI/FS and selection of remedy) except paragraph (f)(1)(ii)(C)(6) and that applicable requirements of federal or state law may not be waived by a private party; and (ix) Section 300.435 (on RD/RA and operation and maintenance).
(6) Private parties undertaking response actions should provide an opportunity for public comment concerning the selection of the response action based on the provisions set out below, or based on substantially equivalent state and local requirements. The following provisions of this part regarding public participation are potentially applicable to private party response actions, with the exception of administrative record and information repository requirements stated

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therein:
(i) Section 300.155 (on public information and community relations);
(ii) Section 300.415(n) (on community relations during removal actions);
(iii) Section 300.430(c) (on community relations during RI/FS) except paragraph (c)(5);
(iv) Section 300.430(f)(2), (3), and (6) (on community relations during selection of remedy); and
(v) Section 300.435(c) (on community relations during RD/RA and operation and maintenance).

FN5. WCM does not cite any Ninth Circuit cases to support this argument, and the out-of-circuit district court cases that WCM relies on are inapposite.

FN6. At the hearing, the parties agreed to dismiss their respective causes of action for contribution under the Porter-Cologne Act.

--- F.Supp.2d ----, 2009 WL 1033860 (N.D.Cal.)

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Date: 05/01/2009 10:00 AM

SWERLO News for May 1, 2009

BNA, Inc.
Daily Environment REPORT

HIGHLIGHTS

EPA:
Agency's Peer Review Process Adequate, Could Improve, Inspector General Finds
The Environmental Protection Agency's peer review selection process compares favorably to that used by other science-based organizations, but stronger measures are needed to define impartiality and address conflicts of interest, according to a report from the Office of the Inspector General released April 30.

EPA:
Barrasso Puts Hold on McCarthy Nomination, Seeks Answer on Scope of Climate Regulation
Sen. John Barrasso (R-Wyo.) has placed a hold on the nomination of Gina McCarthy to be assistant Environmental Protection Agency administrator for air and radiation, saying he wants more answers on how the EPA would administer Clean Air Act regulation of greenhouse gases.

Hazardous Waste:
West Virginia Regulators Say Bayer Lacked Permit for Tank Cited in Explosion
Bayer CropScience lacked the proper hazardous waste permit for a chemical tank that exploded and killed two workers at its plant in Institute, W.Va., Aug. 28, 2008, the West Virginia Department of Environmental Protection said in an April 24 letter to the company.

Solid Waste:
EPA Says Balance Needed Between Handling Of Coal Combustion Waste, Beneficial Reuse
The Environmental Protection Agency is working to strike a balance between requiring the safe handling of coal combustion waste and discouraging the beneficial reuse of coal ash, said an EPA official testifying before a congressional subcommittee April 30.

Superfund:
Inspector General Agrees to Release Report On Removal of Asbestos From Libby, Mont.
The Environmental Protection Agency released on April 28 an inspector general's report on an investigation of asbestos removal at the Libby, Mont., superfund site.

ANALYSIS & PERSPECTIVE

D.C. Circuit Decision Highlights Need to Reconsider Comments on Proposed Rules
By David B. Weinberg: The author of this article says the recent decision of the U.S. Court of Appeals for the D.C. Circuit in NRDC v. EPA shows it is time for lawyers to dust off a skill set that has not often been called-upon in the last decade or more —the ability to prepare comments on proposed rules. The court dismissed a challenge by the Natural Resources Defense Council to an Environmental Protection Agency air pollution rule, saying the environmental group did not raise the ...

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The Inside Story

EPW Staffing Switch

Days after former Republican Sen. Arlen Specter (D-PA) crossed the aisle and joined Democrats' ranks -- which could boost his standing on the environment committee where he is a member -- a GOP staffer on the panel is also switching to work with the majority.

Jessica Holliday, who was working on climate change issues for Republican Senate Environment & Public Works Committee (EPW) member Lamar Alexander (TN) is joining the majority Democratic staff of the panel, according to *The Hill*. She will continue to focus on global warming and energy issues in her new role, according to the article.

The Hill reports that Holliday "built a reputation for crossing the aisle to work with Democrats that preceded her decision to work for them."

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COURTS: Souter to retire from Supreme Court (05/01/2009)

Dan Berman, E&E reporter

Justice David Souter plans to retire from the Supreme Court at the end of June, according to media reports.

Souter's retirement gives President Obama his first chance to nominate a new member of the Supreme Court and will undoubtedly spark a heated political fight.

By the time Obama picks his nominee and confirmation hearings begin, Democrats may have 60 votes in the Senate. Sen. Arlen Specter's (D-Pa.) party switch this week made him the 59th Democrat, and the court case in the Minnesota contest that Al Franken leads could be resolved next month.

Specter's party switch also means Republicans must find a new ranking member of the Judiciary Committee, a position that suddenly will be in the center of the nomination battle. Sens. Jeff Sessions (R-Ala.) or Orrin Hatch (R-Utah) are reported to be the likely choices.

Souter was appointed by President George H.W. Bush and confirmed in October 1990. Although appointed by a Republican president, Souter was often a moderate voice on the court. He voted with the 5-4 majority in *Massachusetts v. EPA*, the April 2007 case that opened the door for U.S. EPA to regulate carbon dioxide emissions.

REGULATIONS: Experts argue for sound science in regulatory process (05/01/2009)

Sara Goodman, E&E reporter

As President Obama and Congress charge forward with plans to tweak the rulemaking process, the role of science needs to be clearly defined as an independent and integral part of decision-making, members of the House Science panel's Investigations and Oversight Subcommittee heard yesterday.

At issue is a behind-the-scenes agency that has become the most powerful regulatory office in the federal government -

- the White House Office of Management and Budget, according to subcommittee Chairman Brad Miller (D-N.C.). Under Executive Order 13422, issued by former President George W. Bush, OMB's regulatory review influence was greatly expanded to encompass issues ranging from worker safety to global warming.

Obama revoked the Bush order when he first took office and has begun exploring how OMB should interact with federal agencies when it reviews federal regulations. This ongoing process raises important questions that need to be answered as the administration and Congress decide what role the Office of Information and Regulatory Affairs (OIRA), which is part of OMB, should play in decision-making, Miller said.

"Coming up with the right answer to these questions could be the difference between a government that follows the law -- acting effectively and efficiently to protect the public's health and safety -- and one that cripples the ability of its own executive agencies to carry out the laws passed by Congress," Miller said.

Moving forward, the lawmakers are eyeing Obama's pick to head OIRA -- Cass Sunstein, a friend of Obama and a well-known constitutional lawyer. Sunstein's credentials have been heavily scrutinized since his expected nomination was reported in early January. Regulatory experts across the board have commended his academic credentials, but some watchdog groups and other observers have criticized stances Sunstein has taken in the past, particularly his strong support for the use of cost-benefit analysis in agency rulemaking (*E&ENews PM*, Jan. 8).

Miller said the panel will begin conversations with Sunstein on federal regulatory policy and will look at how to proceed with regulations in the face of scientific uncertainty, among other things.

"Therein lies a problem," said ranking member Paul Broun (R-Ga.). "What kind of regulatory policy do you put in place where on the one hand you have very ardent supporters of a scientific theory that isn't proven. ... How are we going to make policy where OIRA looks at all the factors?"

Witnesses said the most important factor was to make sure that science does not get caught up in political maneuvering. OIRA is composed mostly of economists who should not be making science-based decisions, said Rena Steinzor, professor at the University of Maryland Law School.

"OIRA is not competent to propose science policy in the regulatory arena and should abandon this role," Steinzor said.

In addition, said Wesley Warren with the Natural Resources Defense Council, sometimes regulators have to take action despite scientific uncertainty because the cost of inaction can outweigh any potential action.

Given that, the role of OIRA should not be to change the scientific findings of agencies that have done the groundwork for regulations, Warren said. Instead, it should facilitate questions about the findings among different agencies, ask questions about how the results were generated to ensure they follow acceptable standards, and support the agencies when they need additional resources to get the best science.

"They can't assess whether the science is sound -- that's not their job," added Rick Melberth, director of Federal Regulatory Policy for OMB Watch.

But Cary Coglianese, director of the University of Pennsylvania's Program on Regulation, cautioned that the role science plays in the decision-making process must be understood in context. This is because regulators have to weigh a variety of factors, such as effectiveness, efficiency and fairness. Furthermore, he said regulators should not hide decision-making behind the "cloak of science" because that misinforms the public about which factors were used to come up with any specific regulation.

"Science cannot do everything," Coglianese said. "Science describes; it does not prescribe. Regulatory agencies tend to blur that distinction."

COAL: House panel weighs pros, cons of new regs for power plant waste (05/01/2009)

Eric Bontrager, E&E reporter

New regulations for power plant waste could go a long way to protecting the environment but at the same time could discourage beneficial uses of the waste, experts told a House Transportation and Infrastructure panel yesterday.

Members of the Water Resources and Environment Subcommittee questioned whether classifying coal ash as hazardous waste would help guard against incidents like the one at the Tennessee Valley Authority's Kingston Fossil Plant last December, in which a retention pond collapsed and spilled 1.1 billion gallons of ash and sludge.

"As we learn more about these storage sites, it becomes clearer that there are some significant public safety, human health and ecological risks associated with many of them," said Chairwoman Eddie Bernice Johnson (D-Texas). "Even if these storage facilities do not rupture, they can threaten grave human health concerns."

Coal combustion waste, like coal ash, contains a variety of toxic metals like arsenic and mercury, but U.S. EPA determined in 2000 that the material should not be classified as hazardous waste under the Resource and Conservation Recovery Act, a definition that would have placed the waste under tougher environmental regulations.

Following the TVA spill, EPA Administrator Lisa Jackson announced earlier this year that the agency will propose regulations by the end of 2009 for the management of coal ash and determine whether to reclassify byproducts of coal combustion as hazardous waste.

"The TVA spill really served as a wakeup call for us," said Barry Breen, acting assistant administrator for EPA's Office of Solid Waste and Emergency Response.

He said part of that evaluation includes collecting assessments on existing wet storage ponds, adding that the agency will begin on-site evaluations next month to determine whether the new regulations should include structural requirements for ash ponds.

Classifying coal ash as hazardous waste is essential, according to Environmental Integrity Project director Eric Schaeffer, because the new designation would help mandate the best practices for managing coal ash, including increased monitoring of groundwater sources near coal ash storage areas to ensure they are not leaching toxic metals.

He noted that even the smallest amounts of metals found in coal ash can work through entire food chains if they contaminate water sources like lakes and streams.

"Whatever EPA decides to call coal ash at the end of the day, it still acts like coal ash," Schaeffer said.

Threat to recycling

But John McManus, vice president for American Electric Power, said reclassifying power plant waste as a hazardous substance could prevent reusing it for beneficial purposes like construction.

Noting that 13.7 million tons of ash were recycled for use in concrete and other materials in 2007, he warned that a reclassification would create a stigma that would discourage reuse of the coal byproduct, further adding to one of the largest waste streams in the United States.

"Beneficial use would essentially come to an end," McManus said, resulting in, among other things, an increase of more than 12 million tons of greenhouse gas emissions every year that would have otherwise been stored in the coal

ash.

Because the federal government lacks standards for regulating coal ash waste, some states have taken steps to produce their own regulations.

Shari Wilson, secretary of the Maryland Department of the Environment, said her state produces 2 million tons of coal ash every year due to coal-fired power.

Given that the amount of waste generated is expected to double by 2013, Wilson said the state finalized regulations last year to strengthen safeguards for the disposal of coal waste and use in mine reclamation and is currently working on an additional set of rules for recycling power plant waste.

Classifying coal ash as a hazardous waste, she warned, "may have the unintended consequence of discouraging beneficial reuse."

Wilson said that if EPA does move forward with managing coal ash under the Resource and Conservation Recovery Act, it should classify it as a nonhazardous industry waste, a designation that would still mandate protective measures like liners for ash ponds to prevent against leaking and groundwater monitoring but leave enforcement largely to the states.

EPA's Breen said that even if the agency were to classify coal ash as a hazardous waste, it would probably include provisions for its reuse.

CHEMICALS: Bayer lacked permit for tank that exploded in W.Va. (04/30/2009)

Bayer CropScience lacked the proper permit for a chemical tank at a West Virginia plant that blew up last August and killed two workers, the state Department of Environmental Protection said yesterday.

The tank, which was used to condense the chemical Methomyl, should have had a hazardous waste permit as required by the federal Resource Conservation and Recovery Act, said DEP Secretary Randy Huffman.

DEP Chief Inspector Mike Zeto wrote a letter to the company last week detailing the agency's findings.

"It does not appear that Bayer's RT tank is exempt from regulations under RCRA as a recycling process," Zeto wrote. "The tank is a fully regulated tank as defined under RCRA, therefore, future operation of this and similar tank(s) need to be to be properly managed under RCRA."

A Bayer spokesman said the company was reviewing the letter and would evaluate impact of the directions before starting similar operations in the future (Ken Ward Jr., *Charleston [W.Va.] Gazette*, April 29). -- **PT**

OKLAHOMA: A federal judge has returned to state court a class-action lawsuit filed by residents of Blackwell alleging people were hurt by a zinc smelter's pollution. Defendant companies such as Freeport-McMoRan Copper & Gold Inc., Phelps Dodge Corp. and others had moved the case to federal court, asserting jurisdiction under federal laws. They have asked U.S. District Judge Joe Heaton to reopen the case and stay the effect of his remand order pending an appeal (*Journal Record*).

From:	Mary Grady
To:	OGC SWERLO; Gautam Srinivasan; Byron Brown; Clarence Featherson; Christina Skaar; Ann Stephanos; Beth Burchard; Bill Palmer; Brenda Mosley; Brian Dyer; Cari Shiffman; Carl Eichenwald; Christine McCulloch; Craig Haas; Dean Ziegel; Diana Saenz; Don Lott; Geraldine Gardner; JamesA Thompson; John Prats; Kathryn Caballero; Kathy Clark; Kenneth Schefski; Khial Cherry; Leslie Oif; Mark Garvey; Marlyn Aguilar; Mary Andrews; Mary McDonnell; Michael Bellot; Monajoi Jones; Munsel Norris; Natalie Johnson; Pete Raack; Randy Morris; Rosemarie Kelley; Shirin Venus; Stephanie Brown; Sylvia Curtis; Tom Charlton; Tony Baney; Tony Ellis; Van Housman; Vishnu Katari; Yolaanda Walker; Yvette Hellyer; Bethany Russell; David Yogi; Adam Kushner
Subject:	SWERLO News for May 11, 2009
Date:	05/11/2009 09:36 AM

SWERLO News for May 11, 2009

BNA, Inc.

Daily Environment REPORT

HIGHLIGHTS

Brownfields:
EPA to Award Nearly $112 Million in Grants For Cleanup, Land-Revitalization Projects
The Environmental Protection Agency is awarding $111.9 million in grants to 252 applicants for new and ongoing cleanup and land-revitalization projects through its brownfields programs, EPA Administrator Lisa Jackson announced May 8.

Budget:
PHMSA Request Includes 8.7 Percent Jump To Meet Pipeline Incident-Reduction Target
The Department of Transportation's Pipeline and Hazardous Materials Safety Administration would receive $188 million in fiscal year 2010, up from $173 million in 2009, under President Obama's proposed budget sent to Congress May 7.

Hazardous Waste:
New Jersey Governor Signs Bill to Privatize Oversight of Cleanups in Bid to Ease Backlog
PHILADELPHIA—New Jersey Gov. Jon S. Corzine (D) May 7 signed legislation (A. 2962) aimed at hastening the cleanup of the state's nearly 20,000 hazardous waste sites by giving licensed private consultants authority to oversee and certify most projects, limiting the role of state environmental regulators.

Superfund:
Chemical Maker to Pay New Jersey $1.4 Million for Natural Resource Damage
PHILADELPHIA—Rohm & Haas Co. will pay New Jersey $1.4 million to resolve natural resource damage claims resulting from hazardous substance disposal at two federal superfund sites in Burlington County, N.J., under terms of a proposed settlement announced in the New Jersey Register May 4 (New Jersey Department of Environmental Protection v. Minnesota Mining & Manufacturing Co., N.J. Super.Ct. Law Div., No BUR-L-528-06, 5/4/09).

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EPA Vows Broad Review Of Science Policies Following Obama Integrity Memo
EPA Administrator Lisa Jackson is asking the agency's Science Policy Council (SPC) to conduct a sweeping review of the agency's science guidelines and policies and find areas to improve scientific integrity, following President Obama's recent memo calling for ways to improve scientific integrity in the executive branch.

State Efforts On Contamination Disclosure May Boost Federal Push
Several states are considering laws that would mandate that environmental site inspectors disclose any contamination they detect, which could potentially boost mounting calls from activists and other stakeholders for federal cleanup laws to also mandate full disclosure of contamination above safe levels.

The Inside Story

Cleanup Controversy Compromise?
Over the objections of activists, New Jersey Gov. Jon Corzine (D) has signed a bill allowing industry to self-certify some toxic waste cleanups but also issued an executive order aimed at providing “oversight,

accountability and transparency" to try and temper concerns about the new law.

Asbestos Crimes Acquittal
A jury has acquitted chemical and materials manufacturer W.R. Grace & Co. of criminal charges that the company knowingly exposed residents of Libby, MT, to asbestos, in a ruling that could serve to limit future environmental prosecutions by the Department of Justice (DOJ).

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NOMINATIONS: EPW panel to quiz Army Corps, EPA appointees (05/11/2009)

Katherine Boyle and Sara Goodman, E&E reporters

President Obama's pick to head the Army Corps of Engineers will testify before the Senate Environment and Public Works Committee tomorrow along with two nominees for top U.S. EPA posts.

Jo-Ellen Darcy, the Senate Finance Committee's senior environmental adviser, will be on familiar ground at the hearing. Previously, she served as senior policy adviser and deputy staff director for the committee. Darcy also was the executive director of the Great Lakes and Water Resources Planning Commission.

Eric Washburn, who was staff director of the environment committee during Darcy's tenure there, has called her an ideal candidate to be the Army's assistant secretary for civil works.

"She knows the corps inside and out, and she has a great environmental ethic, which I think the corps could certainly use more of at this point in its history," Washburn said. "I expect the corps under Jo-Ellen Darcy will be a greener corps, a more efficient corps, more responsive to the needs of constituents and members of Congress alike."

If confirmed, Darcy would be the second woman to hold the top civilian post. The first, Nancy Dorn, served under President George H.W. Bush.

Challenges facing Darcy include improving wetland regulation under the Clean Water Act Section 404 permitting program. Lawmakers are likely to ask questions about Darcy's plan for future regulation and enforcement.

Darcy also will face questions about the Supreme Court's fractured 2006 *Rapanos-Carabell* decision, which shortened the reach of federal wetland regulators. Democratic and Republican senators on the committee have been engaged in a battle over legislation that would address *Rapanos* by amending the Clean Water Act (*Greenwire*, April 1).

Water nominee

Obama's choice for EPA's top water post -- an official from Southern California's Metropolitan Water District -- also will testify before the committee.

Peter Silva, the senior policy adviser for the district, has worked on drinking water and wastewater issues for more than 30 years. He was previously vice chairman of the California Water Resources Control Board and has served as deputy director for San Diego's water utilities.

Former President Clinton appointed Silva to the Border Environment Cooperation Commission. He spent three years on

the commission and another three as the commission's deputy general manager in Ciudad Juárez, Mexico.

Silva also headed the San Diego International Boundary and Water Commission Office for four years and spent five years with the California Regional Water Quality Control Board in San Diego. He earned his bachelor's degree in civil environmental engineering from California State Polytechnic University at Pomona.

Among the challenges that Silva faces are addressing the gaps in wastewater treatment funding, curbing nutrients in runoff and treatment plant discharges, and addressing climate change (*Greenwire*, April 6).

Pesticides post

The committee will also hear from Steven Owens, a former Senate aide to Al Gore, who has been tapped to lead EPA's Office of Prevention, Pesticides and Toxic Substances.

If nominated, Owens, who has headed the Arizona Department of Environmental Quality for seven years, would be in charge of EPA's efforts to regulate pesticides and other chemicals and be tasked with finding ways to reduce or prevent pollution.

The pesticides and toxics office faces enormous challenges in assessing and regulating roughly 82,700 U.S. chemicals. The Government Accountability Office this year added EPA's risk assessment process for chemicals to its list of high-risk programs, highlighting the importance of EPA chemical monitoring.

Prior to his time in Arizona, Owens served as counsel to the House Science and Technology Committee's Investigations and Oversight Subcommittee from 1982 to 1984, before becoming chief counsel for then-Sen. Al Gore of Tennessee from 1985 until 1988.

Schedule: The hearing is tomorrow at 2:30 p m. in 406 Dirksen.

Witnesses: Jo-Ellen Darcy, the nominee for Army Corps of Engineers assistant secretary for civil works; Peter Silva, the nominee to head EPA's Office of Water; and Steven Owens, the nominee to head EPA's Office of Prevention, Pesticides and Toxic Substances.

NOMINATIONS: Obama's pick for 'regulatory czar' to face Senate panel (05/11/2009)

Robin Bravender, E&E reporter

Cass Sunstein, President Obama's nominee to serve as "regulatory czar," will likely face scrutiny over his support of the use of cost-benefit analysis and the role of the White House in agency rulemaking during his confirmation hearing tomorrow before the Senate Homeland Security and Governmental Affairs Committee.

If confirmed to head the Office of Information and Regulatory Affairs within the White House Office of Management and Budget, Sunstein would head a powerful department charged with reviewing agency regulations on everything ranging from climate change and public health rules to worker safety and education. Sunstein's name has also been floated as a potential pick to replace retiring Supreme Court Justice David Souter.

Sunstein's nomination has stirred controversy among regulatory experts and watchdog groups. While most agree that the 54-year-old Harvard law professor would bring impressive credentials to the OIRA post, many have questioned some of his controversial views on regulatory policy.

Sunstein's strong backing for cost-benefit analysis has some observers worried that the administration will pursue regulations that undermine public interests.

Rena Steinzor, president of the Center for Progressive Reform, said she hopes Sunstein will describe when he would consider alternatives to cost-benefit analysis during his confirmation hearing. "After a quarter century of cost-benefit analysis as the supreme measure of regulations, it's clear that it tilts the playing field toward corporate profit and away from health and safety," she wrote last week.

Sunstein has also been criticized for advocating what has been labeled the "senior death discount," a cost-benefit calculation that provides lower benefits calculations for the elderly and higher benefits calculations for children. "A program that saves young people produces more welfare than one that saves old people," Sunstein wrote in a 2003 paper.

The nominee argued that his assessment was a more ethical approach because the alternative method treats the remaining years of older people as worth far more than the years of younger people. John Graham, who served as Bush's OIRA administrator until 2006, was also an advocate of focusing on "life years" saved rather than calculating the number of individual lives saved, but the approach was highly unpopular with many public health and environmental groups.

Still, Sunstein has plenty of heavyweight supporters.

Last week, 67 academic regulatory experts, including Richard Revesz, dean of New York University School of Law, and Sally Katzen, the OIRA administrator under President Clinton, expressed their support for Sunstein in a letter to Sens. Joe Lieberman (I-Conn.) and Susan Collins (R-Maine), the chairman and ranking member of the Government Affairs panel.

The experts say Sunstein has rejected the "false proposition" that cost-benefit analysis is "fundamentally opposed to strong environmental, public health and safety regulation."

In a separate letter to the committee, Michael Livermore, executive director of NYU's Institute for Policy Integrity says: "On the most important question Sunstein has remained consistent and consistently correct: that the only appropriate use of cost-benefit analysis is to improve regulation, not serve as a 'thumb on the scale' against regulation."

Schedule: The hearing is tomorrow at 10 a m. in 342 Dirksen.

Witnesses: Office of Information and Regulatory Affairs administrator nominee Cass Sunstein.

EPA: Council to examine science policies, guidelines (05/08/2009)

Katherine Boyle, E&E reporter

U.S. EPA's science policy council will examine agency guidelines and policies to ensure scientific integrity in its decisions, Administrator Lisa Jackson told agency employees today.

Citing a March **memo** from President Obama vowing to restore scientific integrity at EPA following allegations of political manipulation during the Bush administration, Jackson said she plans to work with political appointees, career staff and unions to ensure scientific integrity is a compass for agency decisions.

Obama's memo directed his chief science adviser to develop a plan to ensure that the administration bases its policies on sound science, appoints science advisers based on credentials rather than politics and is transparent about scientific decisions (*Greenwire*, March 9).

Jackson's memo emphasized the need to ensure that political officials do not alter or suppress scientific or technological findings and conclusions.

"While the laws that EPA implements leave room for policy judgments, the scientific findings on which these judgments are based should be arrived at independently using well-established scientific methods, including peer review, to assure rigor, accuracy, and impartiality," Jackson wrote.

Jackson stressed the need for policymakers to respect the expertise of EPA's career scientists and independent advisers and highlighted the importance of a robust scientific debate and discussion within the agency. She also discussed the need for transparency in decision-making.

"Our regulatory decisions should include a full explanation of the science issues addressed by the agency, the data relevant to those issues, and the interpretations and judgments underlying the agency's scientific findings and conclusions," Jackson added.

Click here to view the memo.

OIL SPILLS: Anadarko pays $1M fine, $8M for Wyo. cleanup (05/08/2009)

Anadarko Petroleum will pay $1 million for Clean Water Act violations and another $8 million on environmental cleanup and spill prevention projects for oil spills in Johnson, Natrona and Park counties in Wyoming, U.S. EPA announced yesterday.

Most of the spills happened in the Salt Creek Field, a 100-year oilfield that Anadarko acquired in 2002 and has since injected with carbon dioxide for enhanced oil recovery. The company, along with subsidiaries Howell Corp. and Howell Petroleum Corp., discharged "harmful quantities of oil" more than 35 times between January 2003 and October 2008, according to EPA.

"We are pleased that Anadarko and its partners will make significant investments in monitoring and control measures that will ensure compliance with the Clean Water Act and minimize the likelihood and severity of future spills," Carol Rushin, EPA's acting regional administrator in Denver, said in a statement.

The company said it looks forward to working toward improving the environmental performance of the oilfield through measures that include a multi-phased integrity and mitigation plan for inspection, monitoring and data collection.

"We knew when we acquired the Salt Creek field we'd have to improve the environmental performance of it," said Anadarko spokesman John Christiansen. "We entered into cooperative negotiations with the United States to make this thing right" (Dustin Bleizeffer, Casper [Wyo.] *Star-Tribune*, May 8). **-- PT**

From:	Mary Grady
To:	OGC SWERLO; Gautam Srinivasan; Byron Brown; Clarence Featherson; Christina Skaar; Ann Stephanos; Beth Burchard; Bill Palmer; Brenda Mosley; Brian Dyer; Cari Shiffman; Carl Eichenwald; Christine McCulloch; Craig Haas; Dean Ziegel; Diana Saenz; Don Lott; Geraldine Gardner; JamesA Thompson; John Prats; Kathryn Caballero; Kathy Clark; Kenneth Schefski; Khial Cherry; Leslie Oif; Mark Garvey; Marlyn Aguilar; Mary Andrews; Mary McDonnell; Michael Bellot; Monajoi Jones; Munsel Norris; Natalie Johnson; Pete Raack; Randy Morris; Rosemarie Kelley; Shirin Venus; Stephanie Brown; Sylvia Curtis; Tom Charlton; Tony Baney; Tony Ellis; Van Housman; Vishnu Katari; Yolaanda Walker; Yvette Hellyer; Bethany Russell; David Yogi; Adam Kushner
Subject:	SWERLO News for May 14, 2009
Date:	05/14/2009 09:55 AM

SWERLO News for
May 14, 2009

BNA, Inc.
Daily Environment
REPORT

HIGHLIGHTS

Superfund:
Second Circuit Reinstates CERCLA Lawsuit, Finds Lower Court Erred in Barring Claim
A federal appeals court held May 5 that because of superfund's recent "evolving case law," a lower court erred when it refused to allow a potentially responsible party to add a cost recovery claim to its lawsuit against another party (New York State Electric & Gas Corp. v. FirstEnergy Corp., 2d Cir., No. 07-2581, 5/5/09).

Superfund:
United States Held Not Liable as 'Arranger' To Owner of PCB-Laden Navy Ship
The United States does not face superfund "arranger" liability for selling a PCB-laden U.S. Navy ship to a group that wanted to use it as a drug rehab center because the sale was motivated by charity rather than a desire to dispose of hazardous substances, a federal district court held April 29 (United States v. Potomac Navigation Inc., D. Md., No. 08-717, 4/29/09).

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nside EPA **Weekly Report**, 5/15/09
http://www.insideepa.com/secure/epa_nletters.asp?NLN=INSIDEEPA&ACTION=current

Obama Picks For Top EPA, DOE Cleanup Positions Draw Activists' Ire
President Barack Obama's just-confirmed EPA waste office chief and nominee for the Department of Energy's (DOE) top waste slot are drawing the ire of activists who fear that the candidates will not pursue sufficiently stringent cleanups at contaminated sites, and may even relax cleanup standards in favor of economic redevelopment.

The Inside Story

EPA's First AAs
The Senate has approved three key nominees to head EPA's enforcement, waste, and international affairs office amid lingering uncertainty about whether Democrats will force a vote on the stalled nomination of President Obama's pick to head the agency's air office.

Doctors Or Auditors?
Amid Republican criticism that EPA's proposed $10.5 billion fiscal year 2010 budget would lead to issuance of a wide range of new environmental regulations, Democrats are saying they should not be "auditors" focused on economics but rather "doctors" focused on public health benefits.

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SUPERFUND: Tester floats plan to clean up Libby site, provide health care (05/14/2009)

Katherine Boyle, E&E reporter

Montana Sen. Jon Tester (D) yesterday called on U.S. EPA and the Health and Human Services Department to collaborate on cleaning up a Superfund site in Libby, Mont., and provide health care for citizens affected by asbestos exposure.

Tester was backed by Senate Interior Appropriations Subcommittee Chairwoman Dianne Feinstein (D-Calif.), who suggested lawmakers put together report language for a bill requiring EPA and HHS to re-examine the plight of Libby citizens.

"Nearly 200 people have lost their lives to asbestos-related diseases," Tester told EPA Administrator Lisa Jackson during a hearing on the White House fiscal 2010 budget proposal. "Many more are sick. The town is struggling to meet health care needs. ... If you dovetail your efforts, I think we can make a giant step forward in meeting some of the challenges that occur in Libby."

Residents of Libby have suffered myriad health problems thanks to exposure to asbestos due to vermiculite mining by W.R. Grace & Co.

Sen. Max Baucus (D-Mont.) last fall revealed EPA had been ready to declare the site a public health emergency before the White House intervened. Baucus has asked Jackson to consider supporting a public health emergency declaration for the town (*E&E Daily*, Jan. 15).

"The problem is this has gone on year after year after year for a long time," Feinstein told Jackson. "I really think it needs to be addressed."

Tester also accused EPA officials of abandoning their commitment to community groups by failing to show up to meetings, saying the situation called for Jackson's attention. "I think that with some attention by people like you, Administrator Jackson, I think we can get a big bang for the buck," he said. "We can help make Libby whole again, and we can solve a huge problem that we have in one of the most beautiful places in the world."

Jackson acknowledged a number of problems have plagued the Libby cleanup. It "has not progressed as quickly as it should for the people of Libby," Jackson said. She noted she already promised Baucus she would visit the Superfund site.

Jackson also promised Tester that risk assessors would be available as needed in Libby. She said she had not yet met with Health and Human Services Secretary Kathleen Sebelius but noted EPA and HHS staff have been working together on Libby issues.

"We will continue that work and in doing so address your concerns about people falling through the cracks, either on the cleanup side or the health side," she said.

A federal jury last week cleared W.R. Grace executives of conspiring to hide the health risks of asbetsos in Libby (*E&ENews PM*, May 8).

"Last week the Justice Department failed in their criminal case against W.R. Grace, and the people in Libby and Montana are extremely frustrated," Tester told Jackson. "The situation in Libby is serious enough that it demands your personal attention. And immediate attention."

TVA

Subcommittee ranking member Lamar Alexander (R-Tenn.) quizzed Jackson about EPA's decision to become involved in the cleanup of a massive coal ash spill in Tennessee that occured last December. The Tennessee Valley Authority has estimated it could take $1 billion to clean up the spill, which contaminated about 300 acres.

"We have redoubled our commitment to the Tennessee Valley Authority cleanup, and we promise coal ash regulations by the end of this year," Jackson said. She praised state authorities for their handling of the spill and said EPA would partner with them.

She noted TVA would pay the oversight costs for the state and EPA.

"There is no new money now, but I do believe EPA's involvement ensures the cleanup will be done," Jackson said. "If we find funding is an issue, I would not hesitate to bring it to the attention of those at the White House."

EPA: Superfund law could fend off suits over TVA spill (05/13/2009)

U.S. EPA's use of Superfund law in the cleanup of a massive spill of coal fly-ash in Tennessee could help the Tennessee Valley Authority avoid a host of lawsuits seeking a more extensive review of the environmental implications of the cleanup effort.

EPA and TVA -- whose coal waste storage facility in Kingston, Tenn., spilled millions of cubic yards of fly-ash into the surrounding area in December -- agreed Monday that EPA would oversee the estimated $1 billion cleanup.

Plaintiffs were suing to force a more extensive review of how TVA planned to oversee the cleanup, but Superfund law prohibits legal challenges to federal cleanup.

The lead attorney for the plaintiffs, Peter Villari, said his clients approved of EPA's new role but were still concerned that TVA is playing a central part.

"Why would you ever put the fox in the henhouse? It makes no sense," he said (Scott Barker, *Knoxville News Sentinel*, May 13). -- **PR**

OHIO: The state Environmental Protection Agency found what it called an "abundance" of pollution from motor oil, antifreeze and transmission fluid at seven Columbus salvage yards. According to agency officials, these potential pollution sites are rarely checked and there is no program that specifies how often they should be checked (Spencer Hunt, *Columbus Dispatch*).

From:	Gilberto Irizarry
To:	Andy Lensink; Ellen Manges; John Michaud
Subject:	Signed Libby Action Memo
Date:	06/17/2009 01:20 PM
Importance:	High
Attachments:	img-617131326-0001.pdf

Folks:

Attached is the signed Libby AM.

Though Barry's signature/approval includes the date, the AM needs a date stamped in the front page. We were unable to locate a date stamper here.

Thanks,

Gilberto "Tito" Irizarry
Program Operations & Coordination Division, Director
Office of Emergency Management
US Environmental Protection Agency, Headquarters
Tel: (202) 564-7982
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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Ref: EPR-SR

ACTION MEMORANDUM AMENDMENT

SUBJECT: Action Memorandum Amendment Request: Approval of a Ceiling Increase for the Time-Critical Removal Action at the Libby Asbestos Site - Libby, Lincoln County, Montana

FROM: Carol Rushin
Acting Regional Administrator

THROUGH: James E. Woolford, Director
Office of Superfund Remediation and Technology Innovation

Deborah Y. Dietrich, Director
Office of Emergency Management

TO: Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

Re: Site ID#: BC
Category of Removal: Time-Critical, NPL, EPA Fund-Lead

I. INTRODUCTION

A. Purpose of this Amendment

The purpose of this Action Memorandum Amendment is to request and document your approval of a ceiling increase for the Libby Asbestos Site (Site or Libby) in Lincoln County, Montana. In addition, the actions covered by this Amendment will help address the contamination that resulted in EPA Administrator Lisa P. Jackson's Determination and Findings of Public Health Emergency at the Libby Site pursuant to CERCLA Section 104(a)(4). (See Attachment 1)

B. Summary of Action Memorandum Amendment

The initial Action Memorandum was signed May 23, 2000 and supported the initiation of the removal activity in Libby, Montana. This was followed by amendments in July, 2001; May,

2002; May, 2006; and June, 2006. These amendments raised the cost ceiling or expanded the scope of the cleanup. The most recent Action Memorandum Amendment signed September 24, 2008 addressed asbestos contamination in certain creeks in Libby. The currently proposed amendment will cover the site-wide ongoing commercial, public, and residential cleanups in Libby, as well as in the nearby Troy, Montana area. Note that an additional Amendment is being considered for later in 2009 that would address a particularly large cleanup within the Libby Site, the Cabinet View Country Club (CVCC) Golf Course.

II. SITE CONDITIONS AND BACKGROUND

A. Site Description

Vermiculite mining operations conducted in Libby, Montana between the 1920s and 1990 produced asbestos-contaminated vermiculite. The Libby mine produced up to 80% of the world's supply of vermiculite, which was used primarily for insulation and as a soil amendment. These products were produced by a high temperature process (exfoliation) that expands the raw ore. The milling process reportedly emitted up to 5,000 pounds of asbestos per day to the atmosphere. The vermiculite from the Libby mine was contaminated with a toxic and highly friable form of asbestos called **Tremolite-Actinolite Series Asbestos,** often called Libby Asbestos (LA). For many decades, the asbestos-contaminated vermiculite was utilized throughout town in many public places such as school tracks, public parks, and baseball fields. Vermiculite mine tailings were also placed at some of these locations. Vermiculite insulation was also used in residences, public buildings, and schools.

The Libby Site (also comprising the Troy area) is an especially large and complex site in which a hazardous contaminant, LA, is prevalent throughout the town and surrounding areas. The prior Action Memorandum and Amendments describe how asbestos-contaminated vermiculite came to be present in commercial and residential buildings as well as outdoor areas. They also describe the nature of the contaminant and the unique threat it poses in Libby given the multiple pathways of exposure.

The initial Action Memorandum and subsequent Amendments describe the vermiculite mine, vermiculite processing facilities, several contaminated properties, and the conditions found throughout the Libby Valley. The Libby Site appears unique in comparison to other mining or processing sites in that LA-containing mine wastes, as well as off-specification intermediates (largely un-exfoliated vermiculite concentrate) were made available, and hence, widely distributed, throughout southern Lincoln County for use as fill material and as a soil conditioner. Other asbestos-contaminated material was used as insulation. There are numerous exposure pathways, for residents as well as for workers. When the Site was listed on the National Priorities List (NPL), it included the nearby town of Troy. EPA's initial investigative efforts focused on the Libby area and then expanded to the Troy area in May 2007. Assessment work in Troy is being conducted by the Montana Department of Environmental Quality (MDEQ) through a

cooperative agreement funded by EPA. An interim data summary report on the assessments in Troy was released on May 27, 2009. MDEQ has indicated that 102 of the properties there are likely to require cleanup. This amendment includes activities to address contamination found in the Troy area as well as in Libby.

B. Other Actions to Date

To address this widespread contamination, EPA has been conducting cleanups of asbestos-contaminated soils and insulation throughout Libby (and also the neighboring community of Troy) since 1999 using its removal authorities under CERCLA Section 104. This Action Memorandum amends the May 15, 2006 (approved June 2, 2006) Action Memorandum Amendment that sets set forth the need and scope for additional property cleanups at the Site. While those time-critical cleanup activities are progressing, investigation efforts that began in May 2007 in the town of Troy indicate that a significant number of properties there also meet the current site removal criteria (see Administrative Record, Cleanup Criteria Memo, December 15, 2003). Prior to these investigations, EPA had conducted several small-scale responses in Troy as conditions warranted. The nature of the residential and commercial cleanups in Libby is shifting to larger and more difficult properties.

This Action Memorandum Amendment and prior Amendments each describe various activities at the Site and progress contemporaneous with their writing. Generally, activities in 2000 focused on the former W.R. Grace processing facilities (Export Plant, Screening Plant) that were large volume, obviously highly contaminated properties. In 2001, work continued at the processing areas and then expanded to include some large volume property cleanups containing extensive amounts of vermiculite mine waste (e.g., the High School and Middle School tracks and the Plummer Elementary ice rink). The distribution of LA-bearing mine waste throughout the community became apparent in 2001. Residential and commercial property cleanups began in 2002.

As EPA has reported in Site updates and in public meetings, EPA conducted activity-based sampling at residential and commercial properties in Libby in 2007 and 2008. *See Site update at http://www.epa.gov/region8/superfund/libby/cleanup.html.* The purpose of this sampling primarily is to assess the level of human exposure that may occur during particular activities, such as digging, raking, and mowing. The current activity-based sample collection effort has been completed, and an EPA contractor is preparing a report analyzing the results. Preliminary review of these results indicates that the current removal action level for asbestos in soil is likely to be revised to a lower concentration. To ensure that the data analysis and presentation are reliable, the report will undergo an internal agency quality assurance/quality control review. We expect that process to be completed and the report to be finalized this fall. Once the report has been finalized, it may be appropriate to revise the current action level that has been used by EPA at the Site. A change to the action level would be reflected in an appropriate decision document. EPA anticipates not being able to address properties with lower asbestos concentrations

immediately, given that there are several hundred properties already in the cleanup queue with higher concentrations. Currently EPA is cleaning up approximately 150 properties per year.

Below is a summary table (Table 1) of the work performed during the history of on-site Removal Actions, as well as a narrative synopsis of the work items:

Table 1: Work to Date Summary

	Large Projects	Commercial/ Residential	Soil (yds^3)	VAI* (yds^3)	Debris (yds^3)
2000	Screening Plant (SP), Export Plant(EP)	0	150,000	0	35,000
2001	SP, EP, Libby High School(LHS), Libby Middle School(LMS), Plummer Elementary, Seifke,	8	120,000	0	5,000
2002	SP, EP, LHS, LMS,	18	75,000	300	1,000
2003	Riverside Park Properties	157	40,000 15,000	2,200	250
2004	SP-Flyway Properties	170	30,000 16,000	2,300	125
2005	Properties	225	31,000	2,700	200
2006	Properties	216	26,000	3,100	175
2007	Properties	160	46,000	2,200	150
2008	Properties**	149	49,857	1,304	593
Total		**1,103**	**598,857**	**14,104**	**42,493**

*VAI: Vermiculite Attic Insulation.
** These totals do not include cleanup activities at Granite, Callahan or Flower Creeks.

C. Synopsis of Previous Actions

There are seven operable units (OUs) at the Site, as well as a sitewide support service, and two disposal units. Following is a description of the activities for each.

Export Plant (OU1): Under a Unilateral Order from EPA, W.R. Grace demolished and disposed of four buildings on the property and removed approximately 15,500 yds^3 of contaminated soil and 2500 yds^3 of debris from the property. Region 8 completed the remaining demolition and disposal in 2002. The lumber business formerly operating at this location was relocated by W.R. Grace in 2003 to a new location in Libby. This work is summarized in a Data Summary Report (CDM 2007) found in the Administrative Record.

(1) **Riverside Park and Boat Ramp:** This is an area adjacent to the former Export Plant along the Kootenai River. Although it was not part of the W.R. Grace operations, it is now included as part of OU1. In 2003, subsurface contamination was encountered during construction of a new park and boat ramp being built by the City of Libby. EPA halted construction and cleaned the parcel in late 2003. Approximately 15 acres of soil were excavated to an average depth of two feet. This resulted in the removal of approximately 40,000 yds^3 of contaminated soil. This work is summarized in a Data Summary Report (CDM 2007) found in the Administrative Record.

Screening Plant (OU2): This property consists of five distinct, contiguous parcels. In total, roughly 335,000 yds^3 of contaminated soil, and 30,000 yds^3 of debris were removed from the Screening Plant and taken to the mine for disposal. This work is summarized in a Data Summary Report (CDM 2007) found in the Administrative Record. The five parcels include:

(1) **Raintree Nursery**: Region 8 completed cleanup of this parcel in 2003. Approximately 17 acres were addressed, and 250,000 yds^3 of contaminated debris and soil were removed. Restoration of this parcel is complete.

(2) **North Side Parker Property:** Region 8 completed cleanup here in 2004, addressing approximately four additional acres. Approximately 18,000 yds^3 of contaminated soil were removed.

(3) **Flyway Property:** Region 8 completed approximately 1/4 of the cleanup of the Flyway parcel in 2002; W.R. Grace, pursuant to an Administrative Order on Consent with EPA. cleaned up the remainder of the parcel in 2004. In all, approximately sixteen acres were addressed, and approximately 30,000 yds^3 of soil were removed. EPA, working with the Montana Department of Transportation, capped a contaminated area on the Highway 37 right-of-way (ROW) along the Flyway in 2005.

(4) **KDC Bluffs Property**: Three areas of the KDC Bluffs parcel contained piles of waste vermiculite and debris. These were cleaned up by EPA in 2001 with approximately 15,000 yds^3 of soil removed. There remains a section of the KDC Bluffs that has been found to have levels of LA at <1% over two to three acres. At the time of the Removal Action these areas were unoccupied, and as such were left for future Remedial Actions. Recently, an out-of-state homeowner built a house on a portion of the property. Since the KDC Bluffs property now includes residential development, EPA proposes to address this property as part of OU4. If necessary, future residential properties on the KDC Bluffs area will be screened and cleaned up as part of OU4.

(5) **Wise Property:** This is a ¾ acre property between Raintree Nursery and the Flyway. Approximately 2000 yds^3 of LA-contaminated soil were removed in 2001. This property was used as an access point for the flyway cleanup, thus the restoration was not completed until 2005.

Mine/Rainy Creek Road (OU3): Rainy Creek Road is a US Forest Service access road to the Kootenai National Forest and the former vermiculite mine. Like the mine itself, Rainy Creek Road is highly contaminated with LA, and site access remains restricted. In actions conducted in 2001 and 2003, EPA paved the lower portion of the road starting from where it intersects Highway 37. A decontamination station has been in place on the road since 2000 to facilitate soil disposal at the former mine, as well as to clean other vehicles accessing the area. Soil disposal of OU4 and OU7 waste material continues at the mine. In 2007, EPA signed an Administrative Order on Consent (AOC) with W.R. Grace to conduct a Remedial Investigation/Feasibility Study (RI/FS) on OU3. Sampling activities began in September 2007 and continue in support of the planned 2012 RI/FS and Record of Decision (ROD).

Commercial, public and residential cleanups in Libby (OU4): Once the Libby Asbestos Site was placed on the NPL in October 2002, the EPA began as part of its RI to systematically inspect and sample parcels of land within the Site boundary. This information was also used to identify properties in need of time-critical Removal Actions. Removal actions were undertaken within homes and yards to reduce risk to property owners and mitigate the release or threat of release of LA into the environment. Any LA within homes may be dispersed to the environment through foot traffic, air currents, and cleaning and disposal. To date, EPA has identified 4,400 properties that needed inspections (see Contaminant Screening Study (CSS), CDM 2004 in the AR). This screening effort identified roughly 1600 properties which met the Site Removal Criteria described in the December 2003 Technical Memorandum. As of December 18, 2008, Removal Actions have been completed at 1,103 of the identified properties. It should be noted that the CSS also identified an additional 840 properties that had LA contamination, but did not meet the Site Removal Criteria.

(1) **Libby High School and Libby Middle School Tracks:** Cleanups were completed by 2001, and both tracks were restored in 2002. Work is complete.

(2) **Siefke Property:** This parcel was a highly contaminated, large residential property. A considerable volume of equipment and debris from the former vermiculite mine was located on the property. Cleanup was completed in 2002, and restoration was completed in 2003.

(3) **Johnson, Sanderson, Temple, Struck, Rice, Fuhlendorf, Spencer, and Westfall Properties:** These properties contained mine wastes with LA concentrations up to 10%. Cleanup and restoration activities were completed by 2003.

(4) **Champion Hall Road:** Vermiculite mine tailings had been used to make and/or repair portions of a gravel road leading into a subdivision. Cleanup was completed in 2003.

Former Stimson Lumber Mill (OU5): The former Stimson Lumber Mill contained vermiculite attic insulation (VAI) in a number of its buildings. Apart from EPA's actions, the Stimson

Lumber Company systematically removed all of its loose and accessible VAI in 2002 and 2003. Due to a downturn in the lumber market, most of the Mill operations closed in 2003, and a large portion of the 400 acre parcel was sold to the Kootenai Redevelopment Authority in 2004. The Redevelopment Authority has been, and is now actively seeking businesses to locate on the former Mill property. Investigations to date have found limited soil contamination in the former nursery area. This area was fenced in 2004. The only other area of this OU that presented an obvious need for response was the former Central Maintenance Building. EPA removed the dilapidated portion of the roof in 2005. This work is summarized in a Data Summary Report (CDM 2007) found in the Administrative Record.

Burlington Northern Santa Fe Rail Yard (OU6): The Burlington Northern Santa Fe (BNSF) Rail Yard is located adjacent to the former Export Plant and was used to facilitate rail shipments of vermiculite. OU6 is comprised of the rail yard, and the rail lines leading out of Libby. Pursuant to an AOC with EPA, BNSF began cleanup of the contaminated rail yard in 2003 but had to stop work due to complexities with soil removal below the tracks. Work resumed in 2004. Most of the tracks in the rail yard were removed to allow for cleanup underneath them. Although most of the contaminated soil was removed, some contamination was capped in place. Institutional controls for contamination left in place will be evaluated as part of the RI/FS and future ROD. EPA is negotiating with BNSF to conduct and complete the RI/FS for this OU.

Troy (OU7): Systematic investigations of properties in the Troy area began in May 2007. However, prior to these investigations EPA conducted several small scale responses in Troy as conditions warranted, the largest of which was the removal of VAI from the Troy High School. This particular action is discussed at length in the June 2006 Action Memorandum Amendment. The other actions included cleanup and disposal of VAI encountered unexpectedly by a property owner.

Environmental Resource Specialist (ERS) - (Site Wide): Over the last five years, EPA has responded to many unplanned, somewhat urgent exposures to VAI and LA. For example, three house fires occurred on properties containing VAI. Likewise, a new homeowner in Libby conducted home renovations and encountered VAI in the walls of his bathroom. As a result, exposed material contaminated a portion of the home and potentially caused a release of friable asbestos into the environment. The EPA has also received numerous calls from property owners who are planning a renovation and anticipate encountering LA-bearing materials. Clearly, in the latter case, the best course of action is to protect property owners by delineating and addressing potential LA contamination prior to renovation. The need for this function will likely continue beyond EPA's Response Actions at the Libby Site. Beginning in October 2006, EPA began providing a full-time service, entitled the Environmental Resource Specialist, to assist property owners, firemen, and other affected response personnel or citizens. In 2007, the ERS service received approximately 40 calls per month requesting assistance and averaged five small-scale responses per month. Calls to the ERS in 2007 also resulted in five large-scale cleanups.

Lincoln County Landfill Asbestos Cell: In 2003, EPA constructed an asbestos disposal cell at the Lincoln County Landfill to facilitate the disposal of VAI material and extend the construction season. To date, the EPA has placed over 20,000 yds^3 of VAI and LA-contaminated debris at this cell. Disposal operations are ongoing.

Disposal Area at the Mine Site: Asbestos-containing soils are disposed of at area 19 at the mine.

D. Current Actions

The Region plans on cleaning up between 100 and 150 properties and three additional creek segments in 2009. The Region is also planning to address the CVCC Golf Course in 2009 under a separate action memorandum amendment.

In 2007, EPA Region 8 initiated investigative efforts to continue to assess the on-going Removal Actions, as well as to provide the needed exposure assessments to support a baseline risk assessment. The Sampling and Analysis Plans for these investigations included a sampling and analysis plan for outdoor ambient air monitoring at OU4; a sampling and analysis plan for activity-based outdoor air exposures for OU4; and a sampling and analysis plan for activity-based indoor air exposures for OU4. As stated earlier, the report on the activity based sampling is planned to be issued this fall and may affect future activities.

In addition to conducting physical cleanups, EPA continues to provide guidance, training and assistance for Libby residents. Such actions include the ERS service; the development and publication of fact sheets for residents and local contractors who may encounter asbestos-contaminated vermiculite; asbestos abatement and health and safety training for local contractors; and public warnings for areas of contamination discovered in public areas. These actions are intended to address ongoing exposures.

MDEQ continued its assessment efforts in the Troy area in 2008. During the 2008 construction season severe conditions at six properties in Troy warranted immediate action by EPA. These actions were taken due to contamination well above the cleanup criteria set forth in the 2003 Technical Action Memorandum. Field investigations in Troy resumed in June 2009. EPA anticipates finding and cleaning up an additional 5 to 10 severely contaminated homes in the Troy area in 2009.

E. State, Local, and Other Authorities' Roles

As discussed earlier, MDEQ has taken the lead role for assessment in Troy (OU7). The Agency for Toxic Substances and Disease Registry (ATSDR); the United States Geological Survey (USGS); and the National Institute for Occupational Safety and Health (NIOSH) are active participants in site-wide studies. The USGS also continues to provide EPA with technical assistance regarding the mineralogy, morphology, and measurement of LA. Lincoln County and

the City of Libby are active in several local advisory groups and coordinate directly with EPA on many issues regarding the removal actions and remedial investigations. In addition to their lead role for assessment in Troy, MDEQ continues to serve as the support agency at operable units 1 through 6.

III. THE THREAT POSED BY ASBESTOS AT THE LIBBY SITE IS UNIQUE IN ITS SEVERITY AND SCOPE

In conducting this large-scale removal action at Libby, EPA has identified a combination of socioeconomic, atmospheric, and terrain-related factors that have resulted in widespread asbestos contamination, multiple pathways of human exposure to asbestos, and significant cumulative exposures. This combination of factors appears unique to the Libby Site and is one of the bases for the Administrator's Determination and Findings of Public Health Emergency.

A. Multiple Sources of Exposure

Residents of the Libby and Troy communities have been exposed to asbestos from various sources, including asbestos in vermiculite, vermiculite processing wastes, asbestos in uncontained vermiculite insulation, and vermiculite-containing soil. The vermiculite mine wastes, as well as off-specification intermediates (largely un-exfoliated vermiculite concentrate) were made available to the community and were widely distributed throughout southern Lincoln County. The community used this asbestos-containing material as a soil amendment in residential yards and as fill for their driveways, gardens, and public areas, including recreational fields. Many of the homeowners insulated their homes with the asbestos-containing vermiculite insulation. Children in the community had access to and played on waste vermiculite piles. These exposures are in addition to the significant exposures that occurred historically to vermiculite mine workers or association with them.

Soil in the Libby valley was additionally contaminated by the atmospheric deposition of asbestos released from the vermiculite processing facilities at the Libby Site, which were in close proximity to the homes there. Soil also may have been contaminated by atmospheric redistribution of asbestos from the community's transportation and uses of the vermiculite mine wastes. Atmospheric deposition also would have contributed asbestos to indoor dust in residences and commercial buildings. Asbestos released to air was likely concentrated by the unique topographical and meteorological situation at the Libby Site (US EPA 2008). The Site is in a narrow valley surrounded by mountains that are 4,000 feet higher. In winter this leads to persistent temperature inversions that concentrate atmospheric contaminants, including asbestos, in the valley.

B. Multiple Pathways of Exposure, and Types of People Exposed

The major source of health risk from asbestos is from the inhalation route of exposure. The historical, current and potential future environmental pathways to the inhalation route of exposure include the following:

1. Air in attic spaces and crawl spaces (resident, tradesperson)
2. Indoor air near breached walls (resident, tradesperson)
3. Indoor air where fibers are present in indoor dust (resident, tradesperson, commercial worker, student, teacher)
4. Outdoor air near highways and rail lines where asbestos material spillage occurred (tradesperson, resident)
5. Outdoor air near disturbed soil (resident, tradesperson, student, teacher, recreational visitor)
6. Outdoor ambient air (resident, commercial worker, tradesperson, student, teacher, recreational visitor).

Additional historical inhalation pathways included the following:

1. Vermiculite waste piles (children, resident, recreational visitor)
2. Association with vermiculite mine workers
3. Occupational exposure through employment at the mine.

C. Observed Health Effects in Libby

Exposure pathways similar to those described above have been noted at other sites where vermiculite was shipped, processed or handled, or where vermiculite insulation was used in homes and businesses. However, the Libby Site appears unique with respect to the multiplicity of exposure pathways and the cumulative exposures experienced by community members. Adverse health effects (described below) from asbestos exposure are already present and documented in the residents and community members at the Libby Site. Ongoing exposure may be expected to increase both the severity and incidence of observed health effects. Even in the absence of additional exposure, pulmonary and pleural health effects from asbestos exposure are known to continue to progress. (Rohs et al. 2008). Therefore, the incidence and severity of observed health effects may increase.

Several epidemiology studies have reported increased cancer mortality among workers exposed to the LA through the mining and milling of contaminated vermiculite. Compared to standardized national mortality rates, the most recent study (Sullivan, 2007) found statistically significant increased risks of cancer mortality. The workers had 70% higher risk of lung cancer mortality (n, the number of people, was 89), 1,410% higher risk of mortality from mesothelioma (n=2) and 2,230% higher risk of mortality from pleural cancer (n=4).

An ATSDR study of the Libby community found a high prevalence of pleural abnormalities and that the risk increased with age and length of residence in the Libby area. (Peipins et al. 2003) examined occupational, recreational, household, and other exposure pathways. The prevalence of pleural abnormalities increased with increasing number of exposure pathways, ranging from 6.7% for those who reported no apparent asbestos exposures to 34.6% for those who reported ≥ 12 pathways. Excluding former W.R. Grace workers but not those with work-related asbestos exposures, the investigators found 1,000 people with pleural abnormalities out of 6,303 (15.9%). For comparison, studies of groups with no substantive work-related asbestos exposures have found the prevalence of pleural abnormalities ranges from 0.2% among workers in North Carolina, to 2.3% among patients in New Jersey, to 4.6% among urban New Jersey residents.

Medical monitoring of Libby and Troy residents exposed to past releases of asbestos fibers or who may continue to be exposed to asbestos fibers in the community would allow early detection of disease and provide a better understanding of disease progression.

IV. THREATS TO PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT, AND STATUTORY AND REGULATORY AUTHORITIES

This Action Memorandum, prior Amendments and the Administrative Record describe in detail the threats to human health presented by exposure to LA. Despite considerable progress on cleanup, conditions in Libby still present significant threats to public health. In fact, on June 17, 2009, EPA Administrator Lisa P. Jackson issued a Determination and Findings of Public Health Emergency at the Libby Site pursuant to CERCLA Section 104(a)(4).

EPA has considered all of the factors described in Section 300.415(b)(2) of the National Contingency Plan (NCP), and has determined at least three of the factors continue to be present at the Libby Asbestos Site, including the area of Troy.

A. Threats to Public Health or Welfare:

(i). *Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants and contaminants*;

While EPA's actions have reduced LA-contaminated source materials (e.g., indoor dust, yard and garden soils, driveway materials, vermiculite insulation), these sources still exist throughout the community. This Action Memorandum Amendment and previous Amendments have described these conditions in detail. Previous investigations have shown that more than one-third of the approximately 4,400 properties in the Libby area contain varying levels of contaminated source materials, such as vermiculite insulation or contaminated soils. EPA studies in the Administrative Record (AR) have found that low levels of amphibole asbestos in soils can generate airborne fibers at or near the current OSHA Permissible Exposure Limit. These levels are significantly higher than those to which a residential population should be exposed. These

data are entirely consistent with investigations conducted by W.R. Grace concerning the handling of various vermiculite-bearing materials, which is reported in the Action Memorandum and subsequent Amendments and contained in the Site AR.

Investigations have clearly shown elevated levels of LA in the dust of residents' homes prior to cleanup (CDM, 2002, 2003a and 2003b; EPA Region 8, 2003). This dust contamination comes from several sources including, but not limited to: contaminated soil tracked into the homes; contamination that was picked up from the former vermiculite processing facilities and brought home on clothes and equipment; and releases of uncontained vermiculite insulation within homes. When disturbed, these LA-contaminated source materials may release LA fibers to indoor air resulting in complete exposure pathways. Actual exposure to these contaminated source materials may occur daily depending on the conditions and usage of the specific properties. Data contained in the reports in the Administrative Record indicate that activities performed by area residents and workers can result in elevated concentrations of respirable LA fibers in indoor air.

EPA has also determined that during a catastrophic event there is a significant threat of amphibole asbestos exposure from attics to the outside environment. In the last two years, there have been three house fires and one severe weather event involving homes containing VAI. In one of the fires, an explosion released VAI around the exterior of the home creating an exposure pathway to firefighters and passers-by. In the other two situations, flames breached the roofs and fibers were released to the atmosphere and surrounding properties. In the weather event, a microburst tore a roof off a home containing VAI, once again releasing visible vermiculite to the surrounding property.

LA fibers from the Libby mine site are hazardous to humans as evidenced by the abnormal occurrence of asbestos-related disease in area residents and workers. Workers and area residents exposed to asbestos fibers from the Libby mine site have been found to have increased mortality and morbidity from asbestos-related conditions, including asbestosis, pleural fibrosis, lung cancer, and mesothelioma. Asbestos-related lung diseases have also been observed in area residents with no direct occupational exposures, including family members of mine workers, and even in individuals with no known association with vermiculite mining or processing activities (Weis, 2001; ATSDR, 2003; Peipins et al., 2003; Miller, 2005; Whitehouse, 2008).

Past and current exposure to amphibole asbestos has had, and will continue to have, major adverse health impacts on Libby Site residents. Investigations performed by ATSDR have found an unusually high rate of cases of asbestos-related disease in this relatively small community. The death rate from asbestosis in Libby was at least 40 times that of the national average for the period from 1979-1998. The occurrences of disease are not limited to vermiculite-facility workers or their families, but are spread throughout the population. Medical care in Libby and Troy has historically been limited due to their isolated location and economic situation, thus reducing the chance of early detection and treatment of asbestos-related disease. (Montana Primary Care Health Professional Shortage Area List, 2001; Lincoln County Health Profile,

2002; U.S. Department of Health and Human Services, 2009). New diagnoses of ARD from past exposure to asbestos number two or three a month. A study in Libby of persons 18 years of age and older found that 1,186 of 6,668 participants (approximately 18% of those x-rayed) had abnormalities in the linings of their lungs (pleural abnormalities) (Peipins et al., 2003). The risk of pleural abnormalities increased with increasing age and increasing length of residence in the Libby area. The rate of pleural abnormalities found in groups within the United States who have no known asbestos exposures ranges from 0.2% to 2.3%.

The degree of asbestos contamination and the resulting medical impact is greater at Libby than that at other sites where vermiculite was shipped, processed or handled. There is documented widespread asbestos-related disease in Libby and Troy. An unfortunate convergence of factors has contributed to this situation:

1) There are multiple human exposure pathways in Libby and Troy;
2) Exposure has continued over a period of 60 or more years;
3) The vermiculite processing facilities were in very close proximity to the homes in Libby;
4) The meteorology of the area causes temperature inversions which trap air and asbestos carried by that air close to the ground;
5) The terrain further constrains contaminants within the steep walls of the valley, causing higher concentrations in localized areas;
6) The homes in these economically depressed communities are generally old, potentially leading to greater migration of contaminants into the living space from outdoors, attics and wall-spaces;
7) A high smoking rate among the people Libby and Troy increases the risk of asbestosis and lung cancer; and,
8) Medical care in Libby and Troy has historically been limited due to its isolated location and economic straits. Consequently, there was less chance of early detection for mesothelioma and appropriate care for asbestosis. That situation has recently changed with the CARD clinic.

There is an especially serious risk to tradesmen (electricians, craftsmen, etc.) in Libby and Troy due to the high number of homes impacted by LA. When working in homes in Libby and Troy, these individuals encounter multiple pathways of exposure including soil, air and indoor dust.

(ii). *High levels of hazardous substances or pollutants and contaminants in soils largely at or near the surface that may migrate.*

Soil contamination is prevalent throughout the Libby area. Region 8 has focused resources on cleaning up areas that were most highly contaminated, but many residential yards still contain measurable concentrations of LA at or near the surface (CDM, 2002, 2003a, 2003b). These soils, if unaddressed, can cause direct exposure when disturbed through normal activities and can contaminate the interiors of homes with LA-containing dust.

LA fibers from the Libby mine site are hazardous to humans as evidenced by the occurrence of asbestos-related disease in area residents and workers. Workers and area residents exposed to asbestos fibers from the Libby mine site have been found to have increased mortality and morbidity from asbestos-related conditions, including asbestosis, pleural fibrosis, lung cancer, and mesothelioma. Asbestos-related lung diseases have also been observed in area residents with no direct occupational exposures, including family members of mine workers, and even in those with no known association with the vermiculite mining or processing activities (Weis, 2001; ATSDR, 2003; Peipins et al., 2003; Miller, 2005; Whitehouse, 2008).

While most of the known larger contaminant sources and public areas (such as former vermiculite processing plants, schools, ball fields, and Riverside Park) have already been cleaned up, Region 8 recently discovered several additional contaminated "public" areas in Libby. These include the CVCC Golf Course, the ROW along Highway 37, the public compost pile at the county landfill and the creeks. Some of these properties presented immediate, unacceptable risks and were cleaned up quickly. For other properties, such as portions of the former Stimson Mill, the Highway 37 ROW, and the CVCC Golf Course, EPA has instituted interim containment measures such as fencing and/or issued public warnings. These properties are targeted for cleanup.

(iii). *The (lack) of availability of other appropriate Federal or state mechanisms to respond to the release.*

EPA believes that no person or local, state, or Federal agency is in the position, has the authority, or has the resources to independently and in a timely manner implement an effective response action to address the on-going threats presented at the Site. Other than CERCLA, there is no comprehensive Federal, state, or local program that provides both the authority and resources necessary to respond to a release of the scope presented in Libby at OUs 4 and 7. Under CERCLA as implemented by EPA under Executive Order 12580, EPA is the agency with the authority to address such releases.

B. Threats to the Environment

Work on an ecological risk assessment was initiated in September 2007. While currently no response actions are based on ecological impacts at the Site, this may change as data are collected. The Action Memorandum dated May 23, 2000 contains information about potential threats to the environment.

V. ENDANGERMENT DETERMINATION

The actual or threatened releases from this Site, if not addressed by continuation of the time-critical Removal Actions set forth in the original Action Memorandum and subsequent

Amendments, may present an imminent and substantial endangerment to public health or welfare or the environment. The original Action Memorandum for the Site, dated May 23, 2000 (EPA Region 8, 2000), as well as subsequent Amendments and the Administrative Record, describe in detail evidence of the toxicity associated with exposure to LA, the large number of human exposure pathways, the significantly elevated disease rate in Libby residents, and the variety of conditions present in and around Libby that could lead to continuing exposures.

Apart from this imminent and substantial endangerment, EPA Administrator Lisa P. Jackson found that the conditions in Libby associated with the release of amphibole asbestos from all sources, including VAI, present a public health emergency, pursuant to 42 U.S.C. § 9604(a)(4).

VI. EXEMPTION FROM STATUTORY LIMITS

The Libby Action Memorandum dated May 23, 2000 provided the documentation required to meet the NCP Section 300.415(b) criteria for a Removal Action. This Action Memorandum also provided EPA's determination regarding the applicability of CERCLA Section 104(c)(1)(A) [NCP Section 300.415(b)(5)(i)]. This provision allowed for using the emergency exemption from the $2 million and one year limits on removal actions. The two most recent site-wide Action Memorandum Amendments dated May 2006 and June 2006 expanded the scope of removal actions and raised the approved removal ceiling to $91,837,000. In addition, the recent August 2008 Action Memorandum for the Libby creeks raised the approved removal ceiling to $94,319,000[1]. It also found that conditions at the Site continued to satisfy the emergency exemption and met the CERCLA Section 104(c)(1)(C) [NCP Section 300.415(b)(5)(ii)] consistency exemption, which allows for a continued removal action over the cap when it is "otherwise appropriate and consistent with the remedial action to be taken." The conditions necessitating time critical removal action at the Libby Site still exist and continue to satisfy both the emergency and consistency exemptions from the statutory limits.

This Action Memorandum Amendment requests a ceiling increase under the already granted exemption from the statutory limits. This ceiling increase will support the continuation of the removal action originally authorized by the May 9, 2002, Action Memorandum Amendment, as amended by the two Action Memorandum Amendments from 2006 and the Action Memorandum Amendment signed in 2008. As discussed later in this Action Memorandum Amendment, this scope would now explicitly include properties in and around Troy, Montana (OU7), which meet the current Site Removal Criteria. An emergency exemption continues to be warranted to protect public health. Imminent and substantial risks to the public health of Libby residents continue to exist (Miller, 2005). Due to the prevalence of past and potential exposures, and the observed high rate of asbestos-related diseases, these risks are of an immediate and emergency nature. While conditions have improved considerably through EPA intervention, hundreds of properties

[1] The "Proposed Ceiling" of $94,319.000 listed in the Aug. 12, 2008 "Creeks" Action Memo was incorrectly calculated. The actual ceiling is $95,387,000.

meeting criteria set forth by EPA Region 8 for time-critical removal actions have yet to be addressed. Exposures to an already impacted population could potentially occur, and EPA is the only Agency with the resources to mitigate these conditions. In addition to meeting the criteria for an emergency condition, removal actions are also expected to be appropriate and consistent with future remedial actions, and thus continue to also meet the criteria for a consistency exemption from the $2 million and one year limits on removal actions as set forth in Section 300.415(b)(5)(ii) of the NCP. There are several reasons for this:

- LA, the contaminant of concern in Libby, is a mineral. There are no known viable treatment technologies that can diminish or reduce the toxicity of asbestos. To address exposures from asbestos, the most viable and commonly used physical cleanup options available are to remove it or to contain it. For time critical removal actions at the Site, Region 8 has used a combination of these approaches as appropriate.

- Because asbestos use was widespread in the past, the basic approach for asbestos abatement is well understood. There are a limited number of options available for cleanup. Most importantly, when asbestos is determined to be friable, the preferred mechanism to address potential exposures is to remove or contain the source.

- Investigations have shown that sources of LA, including, but not limited to, contaminated soil, vermiculite insulation, and vermiculite processing wastes are prevalent throughout Libby. Past and current investigations have clearly shown that, when disturbed, these sources can release LA to the air and have the potential to be released to the environment and contaminate indoor dust. This appears to be true even though LA concentrations in the source material are relatively low (Supplemental Quality Assurance Project Plan Report, EPA 2007). The primary objective of the removal actions is to remove or isolate these sources. Future site cleanups will continue to utilize removal and containment strategies.

- To ensure that Removal Actions are protective and consistent with future remedial actions, Region 8 has taken a conservative approach and adopted protocols that minimize the possibility of having to clean up a property twice. In general, EPA only begins a removal action when property conditions warrant a time-critical response. Furthermore, to reduce the likelihood of returning to a property, EPA also addresses lower levels of contamination found on the property. Initial post-cleanup sampling provided some validation of the efficacy and protectiveness of the cleanups (CDM, 2003c, 2004). This approach ensures that the worst risks are addressed first and that cleanups reduce the most prevalent exposure pathways, while the effort to determine what will be an effective final cleanup moves forward. The RI/FS for OU 4 and OU7 will evaluate current cleanup protocols as well as other options for cleanup.

VII. PROPOSED ACTIONS AND ESTIMATED COSTS

A. Proposed Action Description

The Action Memorandum Amendment from May 2002 sets forth the basic scope of the current set of Removal Actions at the Libby Asbestos Site. While the basic need for cleanup and the general nature of the proposed actions has not changed, EPA has discovered that (1) more properties require cleanup than originally anticipated and (2) the difficulty and cost of cleanup is higher than originally anticipated. Currently, approximately 1,000 unaddressed properties in the Libby area meet the Removal Criteria for the Site. In addition, first-year, full-scale investigations of properties in and around Troy, Montana indicate that 102 of the approximately 800 properties screened there also require cleanup. If the analysis of the activity based sampling results indicates that risks in Libby and Troy are higher than currently thought, as preliminary review of the results indicate, EPA will likely revise the current removal action level for asbestos in soil. Consequently, the total number of properties requiring cleanup may change. In addition, EPA will continue the Environmental Resource Specialist service for the entire site.

The data from the Supplemental Quality Assurance Project Plan report indicates a need to modify the current Removal Actions approach. Based on the December 15, 2003, document titled: "*LIBBY ASBESTOS SITE RESIDENTIAL/COMMERCIAL CLEANUP ACTION LEVEL AND CLEARANCE CRITERIA TECHNICAL MEMORANDUM,*" once a property has met the current removal triggers, all LA that is detectable by Polarized Light Microscopy (PLM) is removed from the surface. However, there are some properties where visible vermiculite was left in place because LA was not detected by PLM. For properties that meet the current removal triggers, it was proposed that EPA remove all levels of LA detected by PLM from the property surface as well as all visible vermiculite material. Consequently, beginning in October 2006, EPA increased the rigor of the visual inspections performed on properties (see Site-Specific Standard Operating Procedure for Semi-Quantitative Visual Estimation of Vermiculite in Soil, CDM 2006 in Site AR). It is hoped that this improved methodology will aid in the delineation of LA-bearing source materials. Also, beginning in October of 2006, EPA improved the methodology for collecting soil samples (going to 30-point composites instead of five-point composites). It is expected that combining these methods will provide EPA a much better field-usable tool for guiding its cleanups. This change in approach will be assessed by the Indoor and Outdoor ABS programs discussed earlier in this Action Memorandum Amendment.

Lastly, given the current state and planned future use, it is likely that additional Removal work will be required at OU1, OU2, OU5, and/or OU6.

B. Contribution to remedial performance

EPA finalized the listing for the Libby Site in October 2002. While cleanup at the Site continues to be conducted using removal authority, the Site was transitioned to the Region 8 Remedial

Program after final listing on the NPL. Information and experience gained during the removal actions are continually used to refine the cleanup action and to plan for future work. Likewise, as more information is learned about the nature of the contamination and the risks presented, adjustments to the cleanup approach will be made as necessary. It is expected that the cleanup approaches used during removal actions will be similar to, and consistent with, those used during remedial actions.

C. Description of alternative technologies

EPA attempts to employ the most appropriate technologies for addressing risks. At this time, there are no other known viable alternative technologies available for addressing asbestos.

D. EE/CA

No EE/CA is required.

E. Applicable or relevant and appropriate requirements

See the Federal and State Applicable or Relevant and Appropriate Requirements (ARARs) identified and/or discussed in the original Action Memorandum dated May 23, 2000. There have been no new Federal or State ARARs that would be applicable to this Site developed since that time.

F. Project Schedule

The total number of properties currently identified as requiring cleanup (based on the December 2003 memo) including those in and around Troy, is now estimated to be 2,050, with 1,103 of those being completed as of December 18, 2008. Since the cleanup of residential/commercial properties began in earnest in 2003 (see Table 1), over the last six construction seasons the number of properties EPA has cleaned annually has ranged from 150 to 225. While EPA has become more effective in conducting LA removals, as discussed earlier in this Action Memorandum Amendment, EPA has seen an increase in the number of large properties in the Libby area. Preliminary reviews of the properties in the Troy area suggest that there is a mix of large and small properties that meet the current OU4/OU7 cleanup criteria. For planning purposes it is assumed that approximately $25,000,000 in special account/settlement funds will be required annually to cleanup Libby Asbestos Site properties in 2009 through 2013.

It is worth noting that the exact total number of properties to be addressed in and around Libby and Troy may not be known until the publication of a final Record of Decision (ROD). A final ROD is planned for 2013. The final ROD will incorporate the results of the toxicity studies and exposure assessment.

G. Estimated Costs

This ceiling increase is designed to cover projected 2009 through 2013 removal action costs and removal action expenditures accrued since the initiation of the project. Removal expenditures to date at the Site are currently estimated to be $165,000,000. Total removal expenditures for 2009 through 2013 are estimated to be $125,000,000. While the nature of cleanup has not fundamentally changed, the May 2002 Action Memorandum Amendment underestimated the scope, complexity, and cost of cleanup, especially with regards to interior cleaning and the removal of VAI. Likewise the two 2006 Action Memorandum Amendments anticipated that a ROD would follow soon thereafter.

This Amendment provides only a basic, cumulative breakout of the removal ceiling documented in the June 2006 Action Memorandum Amendment and the proposed removal ceiling (Table 2).

Table 2. Proposed Removal Project Ceiling

Category	Current Ceiling	Proposed Increase	Proposed Ceiling
Extramural Costs			
Property Cleanups	$93,769,000	$194,613,000**	$288,382,000
Intramural Costs	$ 1,168,000	$ 13,215,000	$ 14,383,000
Subtotal	$94,937,000	$207,828,000	$302,765,000
Contingency	$ 450,000***	$ 30,276,500****	$ 30,726.5,000
TOTAL	**$95,387,000***	**$238,104,500**	**$333,491,500**

* Please note that the "Proposed Ceiling" of $94,319,000 listed in the Aug. 12, 2008 "Creeks" Action Memo was incorrectly calculated. The 2008 memo reflected an intramural "proposed ceiling" of $100,000 rather than the correct value of $1,168,000.

** $165,000,000 (Expenses to date) – 95,387,000 (current ceiling) + $125,000,000 (est. 2009 - 2013 costs) {$165,000,000 - $95,387,000 + $125,000,000 = $194,613,000}

*** Calculated utilizing a 20% contingency

**** Calculated utilizing a 10% contingency ($302,765,000 * 0.1 = $30,276,500)

As documented in the May 2006 Action Memorandum Amendment (and in previous Action Memorandum Amendments), the Libby Asbestos Site has major expenditures that do not count against this Site ceiling. Through May 2009, these expenditures totaled approximately $52,000,000. Please note that amounts are approximate. Also note that these estimates do not include prejudgment interest, indirect costs and potential enforcement and litigation costs (including Department of Justice costs), which are not counted against the removal ceiling.

VIII. EXPECTED CHANGE IN THE SITUATION SHOULD ACTION BE DELAYED OR NOT TAKEN

Delayed action will result in continued public exposure to unsafe amounts of Libby Amphibole asbestos. This will increase the risk to public health and continue to burden an already impacted community.

IX. OUTSTANDING POLICY ISSUES

The Determination and Findings of Public Health Emergency may create the impression to the public that all attic insulation of this type constitutes a health threat. EPA believes this to be unfounded. The Libby Site is unique, involving multiple pathways and sources of exposure, in addition to attic insulation (see Section III. THE THREAT POSED BY ASBSETOS AT THE LIBBY SITE IS UNIQUE IN ITS SEVERITY AND SCOPE).

X. ENFORCEMENT

A separate Enforcement Summary has been prepared by the Site Attorney.

XI. RECOMMENDATION

This decision document represents the selected removal action for the removal of Libby Amphibole asbestos sources from properties at the Libby Asbestos Site in Lincoln County, Montana. The proposed removal actions have been developed in accordance with CERCLA as amended and are consistent with the NCP. The decision is based on the Administrative Record for the Site. Conditions at the Site continue to meet the NCP [40 CFR § 300.415(b)] criteria for removal actions. The NCP [40 CFR § 300.415(b)(5)(i)] and [40 CFR § 300.415(b)(5)(ii)] criteria for exemptions from the statutory limits that have been previously documented continue to exist. I recommend your formal approval of the proposed removal action ceiling increase.

Barry Breen.

Approve: Principal Deputy Asst Adm. Date: 6/17/09

for Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

Disapprove: _____ Date: _____

Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

Attachment: Determination and Findings of Public Health Emergency

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From: Marta Montoro
To: Ellen Manges; John Michaud; Ellyn Fine
Subject: Signed PHE
Date: 06/17/2009 11:06 AM
Attachments: FinalPHE.06.17.09.pdf

Here it is -

FinalPHE.06.17.09.pdf

Marta E. Montoro
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

THE ADMINISTRATOR

Determination and Findings of Public Health Emergency For the Libby Asbestos Site In Lincoln County, Montana

For the reasons summarized below, I have determined that conditions at the Libby Asbestos Site presented by the release and threatened release of amphibole asbestos constitute a public health emergency under Section 104(a)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). I further find that no other person with the authority and capability to respond to the conditions at the Libby Asbestos Site will do so in a timely manner. For purposes of this Determination, the Libby Asbestos Site includes the towns of Libby and Troy in Lincoln County, Montana.

What Constitutes the Public Health Emergency at the Libby Asbestos Site

Asbestos is a hazardous substance. Amphibole asbestos has been released throughout the Libby Asbestos Site over many decades as a result of the operation of a vermiculite mine and associated facilities. The Libby Asbestos Site is unique with respect to the multiplicity of exposure routes, the cumulative exposures experienced by community members, and the adverse health effects from asbestos exposure already present and documented in the residents.

Investigations performed by the Agency for Toxic Substances and Disease Registry (ATSDR) have found hundreds of cases of asbestos-related disease in this relatively small community. ATSDR documented a disease and death rate from asbestosis in the Libby area significantly higher than the national average for the period from 1979-1998. The occurrences of disease are not limited to vermiculite-facility workers or their families, but are spread throughout the population. Medical care in Libby has historically been limited due to Libby's isolated location and economic situation, thus reducing the chance of early detection and treatment of asbestos-related disease.

EPA's Actions at the Libby Asbestos Site

EPA's cleanup efforts have greatly reduced exposure, but there still exists a continued significant threat to public health from actual and potential releases at the Site. Ongoing exposure is expected to increase both the severity and incidence of observed health effects. Even in the absence of additional exposure, however, pulmonary and

pleural health effects from this asbestos exposure can be expected to progress. Therefore, the incidence of observed health effects, as well as the severity of those health effects, may increase in the future.

Asbestos Releases at the Site

Residents of the Libby community have been exposed to asbestos from various sources, including asbestos in vermiculite, vermiculite processing wastes, uncontained vermiculite insulation, and soil containing vermiculite. The vermiculite mine wastes, as well as off-specification intermediate asbestos-containing material, were made available to the community and were widely distributed throughout southern Lincoln County, an area that encompasses the towns of Libby and Troy. The community used this asbestos-containing material as a soil amendment in residential yards and as fill for their driveways, gardens, and public areas, including recreational fields. Children in the community had access to and played on waste vermiculite piles. Many of the homeowners insulated their homes with asbestos-containing vermiculite insulation. These exposures are in addition to the significant exposures that occurred historically through association with vermiculite mine workers or as a result of working at the mine.

Soil in the Libby community was additionally contaminated by the atmospheric deposition of asbestos released from the vermiculite processing facilities in Libby, which were in close proximity to the homes in Libby. Soil also may have been contaminated by atmospheric redistribution of asbestos from the community's transportation and uses of the vermiculite mine wastes. Atmospheric deposition also would have contributed asbestos to indoor dust in residences and commercial buildings. Asbestos released to air was likely concentrated by Libby's unique topographical and meteorological situation. Libby is in a narrow valley surrounded by mountains that are 4,000 feet higher than the town, which in winter leads to persistent temperature inversions that have the effect of concentrating atmospheric contaminants, including asbestos, in the valley.

The major source of health risk is from the inhalation route of exposure. Historical, current and potential future environmental inhalation exposure pathways include the following:

1. Air in attic spaces and crawl spaces (resident, tradesperson)
2. Indoor air near breached walls (resident, tradesperson)
3. Indoor air where fibers are present in indoor dust (resident, tradesperson, commercial worker, student, teacher)
4. Outdoor air near highways and rail lines where asbestos material spillage occurred (tradesperson, resident)
5. Outdoor air near disturbed soil (resident, tradesperson, student, teacher, recreational visitor)
6. Outdoor ambient air (resident, commercial worker, tradesperson, student, teacher, recreational visitor)

Historical inhalation pathways included the following:

1. Vermiculite waste piles (children, resident, recreational visitor)
2. Association with vermiculite mine workers
3. Occupational exposure through employment at the mine.

Statutory Basis

I make this determination pursuant to Section 104(a)(4) of CERCLA, which provides the President with broad authority to respond to a release or threat of any release of any hazardous substance, if "...in the President's discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner."

The President's authority under CERCLA Section 104(a)(4) is delegated to the Administrator of the Environmental Protection Agency in Section 2(g) of Executive Order 12580, 52 Fed. Reg. 2923 (Jan 29, 1987).

Jun 17, 2009
Dated:

Lisa P. Jackson,
Administrator.

From:	Carol Campbell
To:	Sandy Fells; Wendy Chipp; Richard Mylott; Wendy Dew; Grandison.Lawrence@epamail.epa.gov; Sonya Pennock; Ted Linnert; Tim Davis
Subject:	Thanks for all your hard work on Libby
Date:	06/17/2009 04:11 PM

I really appreciate all of the work each of you did as we were getting ready for the PHE declaration today. Time was short, things were changing by the minute and yet you all managed to draft a press release, get a communication strategy developed,and get a quality web site up and running in a very short period of time. Thanks again. If I forgot anyone, please send it on. cc

Carol L. Campbell, Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
303-312-6340 (W)
303-312-6071(fax)

From:	Wendy Chipp
To:	
Bcc:	Russell Leclerc
Subject:	The Missoulian: Baucus helps deliver grant for Libby
Date:	05/22/2009 10:57 AM

Baucus helps deliver grant for Libby

By CHARLES S. JOHNSON Missoulian State Bureau

HELENA - The federal government is making a $6 million health grant to Libby to help people suffering from asbestos-related illness and to possibly accelerate its declaration of a public health emergency there, U.S. Sen. Max Baucus, D-Mont., said Thursday.

The U.S. Environmental Protection Agency has already declared the Libby area a Superfund site, but not yet a public health emergency.

That health emergency designation would expand the environmental cleanup of the area and broaden health coverage for those suffering from asbestos-related disease.

Baucus said he has been fighting for years to get a public health emergency declared in Libby, but the Bush administration blocked that attempt. He said he is confident the Obama administration will do so based on sound science and “to right the sins of the last administration.”

“I made a promise that I intend to keep,” he said. “I have every confidence that a public health emergency will be declared in Libby. We won't stop pushing until that happens.”

More than 200 people have died and hundreds of others suffer from asbestos contamination blamed on W.R. Grace & Co.'s now-shuttered vermiculite mine in Libby.

Baucus called the $6 million grant “vital to folks up in Libby who are victims of asbestos-related disease.”

In Libby, reaction to the grant was highly positive.

Karol Spas-Otte, director of nurses for the Lincoln County Health Department, was pleased to learn of the availability of the federal grants, saying: “The need is here.”

“We're just very excited about something like this coming through after the trial,” Spas-Otte said. “This is some very good news that counteracts the disappointment everyone felt after the

trial."

She was referring to the recent acquittal, in U.S. District Court in Missoula, of W.R. Grace & Co. and three of its former executives of all criminal charges related to the asbestos poisoning in Libby.

Libby Mayor Doug Roll called the grant "great news" and said the city welcomes anything that Sens. Jon Tester and Baucus can do.

"Both of them are working hard for us, especially Senator Baucus," Roll said. "He has been on this issue for years. This is just the latest thing."

The U.S. Department of Health and Human Services will announce the grant Friday for the Lincoln County Health Department and at least three other health care entities. They include the Center for Asbestos-Related Diseases Clinic, Lincoln County Health Center, St. John's Lutheran Hospital and the Montana Department of Public Health and Human Services.

The grants would go for screening and providing health care services for people with asbestos-related illness.

"I have talked with the head of HHS, Kathleen Sebelius, and the head of the EPA, Lisa Jackson, and they both know how important it is to help the folks in Libby," Baucus said. "We have been working for months together to figure out how to best help the folks affected by this tragedy."

Since news stories linked widespread deaths and illness to exposure to asbestos fibers at the defunct W.R. Grace & Co. mine, Baucus said he has visited Libby more than 20 times and brought many federal Cabinet secretaries, helped save the CARD Clinic and pressed the EPA to keep the cleanup moving forward.

He called the latest grant another step in his decadelong fight to bring justice to Libby people "who were poisoned at the hands of Grace."

Baucus is chairman of the Senate Finance Committee, which has jurisdiction over HHS, and is a senior member of the Senate Environment and Public Works Committee, which has jurisdiction over the EPA

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To:	Michael Boydston
Subject:	U.S. Environmental Protection Agency Daily Digest Bulletin
Date:	06/18/2009 09:51 AM

You have requested to receive a Daily Digest e-mail from U.S. Environmental Protection Agency.

Message: 1
From: U.S. EPA <usaepa@govdelivery.com>
Date: Wed, 17 Jun 2009 12:23:17 -0500 (CDT)
Subject: Superfund & Brownfields News Release (HQ): EPA Announces Public Health Emergency in Libby, Montana

CONTACTS:
EPA Press Office-202-564-1692
HHS Press Office-202-690-6343

FOR IMMEDIATE RELEASE
June 17, 2009

EPA Announces Public Health Emergency in Libby, Montana

EPA to Move Aggressively on Cleanup and HHS to Assist Area Residents with Medical Care

WASHINGTON – U.S. Environmental Protection Agency Administrator Lisa P. Jackson today announced the agency has determined that a public health emergency exists at the Libby asbestos site in northwest Montana. Over the past years, hundreds of asbestos-related disease cases have been documented in this small community, which covers the towns of Libby and Troy. The announcement was made today at a joint press conference with Department of Health and Human Services Secretary Kathleen Sebelius and U.S. Sens. Max Baucus and Jon Tester.

This is the first time EPA has made a determination under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) that conditions at a site constitute a public health emergency. This determination recognizes the serious impact to the public health from the contamination at Libby and underscores the need for further action and health care for area residents who have been or may be exposed to asbestos. Investigations performed by the Agency for Toxic Substance and Disease Registry have found the incidence of occurrence of asbestosis, a lung condition, in the Libby area staggeringly higher than the national average for the period from 1979-1998. EPA is working closely with the Department of Health and Human Services, which is making available a short-term grant to provide needed asbestos-related medical care to Libby and Troy residents.

During her Senate confirmation hearing, Administrator Jackson committed to review the situation at the Libby asbestos site based on current site information, sound science and EPA's legal authorities. As a result of her review, the Administrator has decided that conditions at the site present a significant threat to public health and that making a public health emergency determination is appropriate.

"This is a tragic public health situation that has not received the recognition it deserves by the federal government for far too long. We're making a long-delayed commitment to the people of Libby and Troy. Based on a rigorous re-evaluation of the situation on the ground, we will continue to move aggressively on the cleanup efforts and protect the health of the people," said EPA Administrator Lisa P. Jackson. "We're here to help create a long and prosperous future for this town." She added,

“Senator Max Baucus has been a tireless advocate for the people living in Libby and Troy who have confronted this public health tragedy for generations and we commend him for his work. We look forward to working with him and Senator Tester who has been working diligently since being elected to the Senate to bring much needed support to these communities.”

“Senator Baucus and Senator Tester have powerfully brought the voices of the people of Libby and Troy to Washington so the nation could hear and understand what happened. They refused to give up on finding the best ways to help those who have suffered so much. Today’s announcement reflects our Administration’s concern for the residents of Lincoln County and our intention to act decisively to protect and improve their health and quality of life,’ said Secretary Sebelius. “The Department of Health and Human Services has been working closely with the EPA and the residents of Lincoln County for a number of years to conduct screenings and help provide access to care. Now, we have come together with Senator Baucus and Senator Tester, Administrator Jackson, and agencies across HHS, to offer a new grant to provide short-term medical assistance for screening, diagnostic and treatment services in a comprehensive and coordinated manner in partnership with local officials on the ground in Lincoln County. “

Sen. Max Baucus, a long-time advocate on this issue, consistently sought out a determination of a public health emergency in this region.

“This is a great day for Libby. This is a town that was poisoned by W.R. Grace, then had to wait year after year as the last administration failed to determine that public health emergency exists. But today is a new day,” said Sen. Baucus. “Today is the day that Administrator Jackson did the right thing and made this vital determination. Today is the day that Secretary Sebelius declared that people in Libby will get the health care they need. Today is the day that after years of work we were able to succeed in getting this done. Yet, we won’t stop here. We will continue to push until Libby has a clean bill of health.”

“This is a long-overdue, common-sense decision that will go a long way for Libby and the thousands of folks who were poisoned there,” Sen. Tester said. “This decision will help make quality health care more accessible and it will open the door to get new resources on the ground. We still have a long way to do right by the folks in Libby. Working together with the Department of Health and Human Services and the Environmental Protection Agency, we’re making very good progress.”

Secretary Sebelius tasked two HHS agencies – the Health Resources and Services Administration and the Centers for Disease Control and Prevention/Agency for Toxic Substances and Disease Registry – to help county residents. These two agencies will support a new grant to assist affected residents who need medical care. Local officials are currently putting together a grant proposal that will lay out options for provision of medical care that will work for the residents of Lincoln County. HHS anticipates that this grant can be awarded in August 2009.

The Libby asbestos site has been on the EPA’s Superfund National Priorities List since 2002, and cleanup has taken place since 2000. EPA has made progress in helping to remove the threat of asbestos in the land and air, and with it, the increased risks of lung cancer, asbestosis, and other respiratory problems. While EPA’s cleanup efforts have greatly reduced exposure, actual and potential releases of amphibole asbestos remain a significant threat to public health in that area.

The Libby asbestos site includes portions of the towns of Libby and Troy and an inactive vermiculite mine seven miles northeast of the town. Gold miners discovered vermiculite in Libby in 1881; in the 1920s the Zonolite Company formed and began mining the vermiculite. In 1963, W.R. Grace bought the Zonolite mining operations. The mine closed in 1990. It is estimated that the Libby mine was the source of over 70 percent of all vermiculite sold in the United States from 1919 to 1990.

More information: http://www.epa.gov/libby

R176

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From: Peter Ornstein
To:
Subject: UPLOAD F:\MyFiles\Documents\wp\CERCLA\Libby\PHE FOIA\Baucus press release re PHE May_21_2009.pdf
Date: 06/02/2011 02:59 PM
Attachments: Baucus press release re PHE May_21_2009.pdf

- Baucus press release re PHE May_21_2009.pdf

Robert Ward/RC/R8/USEPA/US
05/21/2009 11:47 AM

To "Peter Ornstein" <Ornstein.Peter@epamail.epa.gov>
cc
bcc
Subject Fw: Baucus Press release Today

Sent by EPA Wireless E-Mail Services
Shirley Kelley

----- Original Message -----
From: Shirley Kelley
Sent: 05/21/2009 11:23 AM MDT
To: Robert Ward
Subject: Fw: Baucus Press release Today

Hi Bob, from Carol's email today.

Shirley A. Kelley
Staff Assistant to the Regional Administrator
US EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129
303-312-6532

----- Forwarded by Shirley Kelley/RA/R8/USEPA/US on 05/21/2009 11:22 AM -----

Bob Sussman/DC/USEPA/US
05/21/2009 10:58 AM

To Carol Rushin/R8/USEPA/US@EPA, Barry Breen/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, James Woolford/DC/USEPA/US@EPA, Renee Wynn/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA
cc
Subject Baucus Press release Today

FYI, here is the press release we put out today.

BAUCUS: HEALTH CARE FUNDING HEADED TO LIBBY
Senator Says Federal Funding Could Lay The Groundwork For A Public Health Emergency

(Washington D.C.) Montana Senator Max Baucus today announced that funding is being sent to Libby to provide health care for people with asbestos-related illness and help pave the way for a possible public health emergency.

Baucus said tomorrow the Department of Health and Human Services (HHS) will announce a $6 million grant opportunity for the Lincoln County Health Department and a consortium of at least three health care entities to provide screenings and health care services to people battling asbestos-related illnesses.

"This funding is vital to folks up in Libby who are victims of asbestos-related disease, and will benefit a lot of people," Baucus said. "And just as important, it could lay the groundwork for the next step in this process - the declaration of a public health emergency."

Baucus said that if a public health emergency is declared, the Federal Government would be required to provide health care to Libby residents with asbestos-related disease.

The grant from HHS would then serve as part of the Federal Government's effort to build the capacity on the ground in Lincoln County to meet its obligation should a public health emergency be declared.

A public health emergency would authorize cleanup work in homes and other structures as well as require the Federal government to provide screenings and health care for Libby residents with asbestos related disease.

The public health emergency would be declared by the Environmental Protection Administration.

"I've talked with the head of HHS, Kathleen Sebelius and the head of the EPA, Lisa Jackson, and they both know how important it is to help the folks in Libby," Baucus said "We all have been working for months together to figure out how to best help folks affected by this tragedy."

Examples of potential consortium members identified by HHS include the Center for Asbestos - Related Diseases (CARD) Clinic, Lincoln County Community Health Center (LCCHC), St. John's Lutheran Hospital, or the Montana Department of Public Health and Human services (MD-PHHS.)

Baucus has been a long time champion of getting a public health emergency declared in Libby. In 2008, Baucus released a report detailing a 2002 attempt by the EPA to declare a Public Health Emergency that was thwarted by the previous Administration's Office of Management and Budget.

Baucus lambasted the decision to not declare a public health emergency at the time, calling it an "outrage."

Since news reports linked widespread deaths and illness to exposure to deadly asbestos fibers at the defunct W.R Grace and Co. mine, Baucus has visited Libby personally more than 20 times, secured millions for healthcare and cleanup, brought numerous White House cabinet secretaries to the town, helped save the CARD clinic, and has dogged the EPA to keep cleanup efforts moving forward.

Baucus said this is one more step in his decade-long fight to bring justice to folks in Libby "who were poisoned at the hands of Grace."

"I made a promise that I intend to keep," Baucus said. "I have every confidence that a Public Health Emergency will be declared in Libby. We won't stop pushing until that happens. We expect this Administration to make decisions based on sound science and to right the sins of the last Administration."

Baucus is chairman of the Senate Finance Committee, which has jurisdiction over HHS, as well as a senior member of the Senate Environment and Public Works Committee which has jurisdiction over the EPA.

From: Peter Ornstein
To:
Subject: UPLOAD F:\MyFiles\Documents\wp\CERCLA\Libby\PHE FOIA\cerfication of index of AR for PHE signed by R8 6-16-09.pdf
Date: 06/02/2011 02:59 PM
Attachments: cerfication of index of AR for PHE signed by R8 6-16-09.pdf

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- cerfication of index of AR for PHE signed by R8 6-16-09.pdf

CERTIFICATION OF INDEX OF DOCUMENTS
IN THE ADMINISTRATIVE RECORD
FOR THE FINDING OF A PUBLIC HEALTH EMERGENCY
AT THE LIBBY ASBESTOS SITE

(b) (5)

By the United States Environmental Protection Agency:

In witness whereof, I have subscribed my name this _____ day of June, 2009 in Washington, D.C.

_____
Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

In witness whereof, I have subscribed my name this 16th day of June, 2009 in Denver, Colorado.

_____
For Carol Rushin
Acting Regional Administrator
EPA Region 8

INDEX OF DOCUMENTS
IN THE ADMINISTRATIVE RECORD
FOR THE FINDING OF A PUBLIC HEALTH EMERGENCY
AT THE LIBBY ASBESTOS SITE

(b) (5)

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[redacted]

From:	Peter Ornstein
To:	
Subject:	UPLOAD F:\MyFiles\Documents\wp\CERCLA\Libby\PHE FOIA\concurrence sheet - certification of index of documents for PHE.pdf
Date:	06/02/2011 02:59 PM
Attachments:	concurrence sheet - certification of index of documents for PHE.pdf

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- concurrence sheet - certification of index of documents for PHE.pdf

CONCURRENCE SHEET - Certification of Index of Documents Comprising the Administrative Record for the Finding of a Public Health Emergency at the Libby Asbestos Superfund Site, June 2009

Victor Ketellapper, EPR	VK	6-12-09
Wendy O'Brien, EPR	WMO	6/15/09
Helen Dawson, EPR	HD	6-12-09
Russ Leclerc, EPR	RL	6/15/09
Bill Murray, EPR	cm	6/15/09
Andy Lensink, ENF-L	AJL	6/15/09
Mike Risner, Director - LEP	MC	6/15/09
Eddie Sierra, Acting ARA - ECEJ	Sierra	06/15/2009
Mike Boydston, ORC	MB	6/15/09
Peter Ornstein, ORC	PO	6/16/09
Bob Ward, Regional Counsel	RWD	6/16/09
Carol Campbell, ARA - EPR	CC	6/15/09

From: Peter Ornstein
To:
Subject: UPLOAD F:\MyFiles\Documents\wp\CERCLA\Libby\PHE FOIA\concurrence sheet - cover memo for PHE.pdf
Date: 06/02/2011 02:59 PM
Attachments: concurrence sheet - cover memo for PHE.pdf

- concurrence sheet - cover memo for PHE.pdf

CONCURRENCE SHEET - Cover Memorandum - Finding of Public Health Emergency for the Libby Asbestos Site in Lincoln County, Montana, June 2009

Victor Ketellapper, EPR		
Wendy O'Brien, EPR	WMO	6/15/09
Helen Dawson, EPR		
Russ Leclerc, EPR	Russ L	6/15/09
Bill Murray, EPR	cm	6/15/09
Andy Lensink, ENF-L	AOL	6/15/09
Mike Risner, Director - LEP	MC	6/15/09
Eddie Sierra, Acting ARA - ECEJ	Eguerra	06/15/2009
Mike Boydston, ORC	MB	6/15/09
Peter Ornstein, ORC	PO	6/16/09
Bob Ward, Regional Counsel	BWard	6/16/09
Carol Campbell, ARA - EPR	CLC	6/15/09

From: Peter Ornstein
To:
Subject: UPLOAD F:\MyFiles\Documents\wp\CERCLA\Libby\PHE FOIA\cover memo for PHE - signed by R8 6-16-09.pdf
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
1595 Wynkoop Street
DENVER, CO 80202-1129
Phone 800-227-8917
http://www.epa.gov/region08

Ref: 8RA

RECOMMENDATION CONCERNING FINDING OF PUBLIC HEALTH EMERGENCY

SUBJECT: Public Health Emergency at the Libby Asbestos Site - Libby, Lincoln County, Montana

FROM: for Carol Rushin
Acting Regional Administrator 6/16/09

Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

TO: Lisa Jackson
Administrator

Re: Site ID#: BC

(b) (5)

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From: Peter Ornstein
To:
Subject: UPLOAD F:\MyFiles\Documents\wp\CERCLA\Libby\PHE FOIA\Final Recommendation, Cert of Index for PHE.pdf
Date: 06/02/2011 02:59 PM
Attachments: Final Recommendation, Cert of Index for PHE.pdf

- Final Recommendation, Cert of Index for PHE.pdf

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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http://www.epa.gov/region08

Ref: 8RA

RECOMMENDATION CONCERNING DETERMINATION AND FINDINGS OF PUBLIC HEALTH EMERGENCY

SUBJECT: Public Health Emergency at the Libby Asbestos Site - Libby, Lincoln County, Montana

FROM: for Carol Rushin 6/16/09
Acting Regional Administrator

Mathy V. Stanislaus 6/16/09
Assistant Administrator
Office of Solid Waste and Emergency Response

TO: Lisa Jackson
Administrator

Re: Site ID#: BC

Professional staff have reviewed the Administrative Record compiled for the Determination and Findings of Public Health Emergency at the Libby Asbestos National Priorities List Site and have informed us that the Administrative Record supports the determination and findings. Therefore, based on the Administrative Record and on the advice and recommendations we have received, we recommend that you determine that a Public Health Emergency exists under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, at the Libby Asbestos National Priorities List Site.

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CERTIFICATION OF INDEX OF DOCUMENTS IN THE ADMINISTRATIVE RECORD FOR THE DETERMINATION AND FINDINGS OF PUBLIC HEALTH EMERGENCY FOR THE LIBBY ASBESTOS SITE IN LINCOLN COUNTY, MONTANA

This certification identifies documents considered or relied on for the Determination and Findings of Public Health Emergency under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, for the Libby Asbestos Site in Montana, Site/Spill ID # 08-BC. The documents are in the Administrative Record for the Site. The attached index lists the documents considered or relied on for the Public Health Emergency Determination and Findings.

By the United States Environmental Protection Agency:

In witness whereof, I have subscribed my name this 16 day of June, 2009 in Washington, D.C.

Mathy V. Stanislaus
Assistant Administrator
Office of Solid Waste and Emergency Response

In witness whereof, I have subscribed my name this 16th day of June, 2009 in Denver, Colorado.

For Carol Rushin
Acting Regional Administrator
EPA Region 8

INDEX OF DOCUMENTS IN THE ADMINISTRATIVE RECORD FOR THE DETRMINATION AND FINDINGS OF PUBLIC HEALTH EMERGENCY AT THE LIBBY ASBESTOS SITE

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From: Peter Ornstein
To:
Subject: UPLOAD F:\MyFiles\Documents\wp\CERCLA\Libby\PHE FOIA\2006 action memo LIBBY_AR_SUPP3.pdf
Date: 06/02/2011 02:59 PM
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- 2006 action memo LIBBY_AR_SUPP3.pdf

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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ADMINISTRATIVE RECORD

Ref: 8EPR-SR

MAY 15 2006

ACTION MEMORANDUM AMENDMENT

SUBJECT: Action Memorandum Amendment Requesting Formal Approval of a Ceiling Increase for the Time-Critical Removal Action at the Libby Asbestos Site – Libby, Lincoln County, Montana.

FROM: Robert E. Roberts
Regional Administrator

TO: Susan Parker Bodine, Assistant Administrator
Office of Solid Waste and Emergency Response

THROUGH: Michael B. Cook, Director
for Office of Superfund Remediation and Technology Innovation (OSRTI).

Site ID#: BC
Category of Removal: Time Critical, NPL, EPA Fund-Lead

I. INTRODUCTION

The purpose of this Action Memorandum Amendment is to formally request and document your approval of a ceiling increase for the Libby Asbestos Site (Site) in Lincoln County, Montana. The previous Action Memorandum Amendment dated May 9, 2002 set forth the need and scope for additional cleanup activities at the Site. Those cleanup activities are progressing and are still of a time critical nature. However, the difficulty and expense of cleanup are greater than anticipated, and additional removal funding is required to continue the necessary time-critical removal actions. EPA Region 8 (Region 8) is also concurrently completing a remedial investigation and working toward publication of a Record of Decision (ROD) that will cover necessary, but non-time critical, response actions.

II. SITE CONDITIONS AND BACKGROUND

A. Site Description

The initial Action Memorandum and subsequent Amendments provide basic descriptions

of the vermiculite mine, vermiculite processing facilities, several contaminated properties, and the conditions found throughout the Libby Valley. Since the previous Action Memorandum Amendment of May 9, 2002, the Site became final on the National Priorities List (NPL) in October 2002. Additional investigation has focused on two major aspects: (1) evaluating conditions at individual residential and commercial properties throughout Libby as necessary to implement the time critical removal actions set forth in the May 2002 Action Memorandum Amendment, and (2) collecting data necessary to complete a Remedial Investigation/Feasibility Study (RI/FS) and publish a ROD.

The Libby Asbestos Site currently consists of eight operable units (OUs). OU00 and OU4 represent site-wide operable units for removal actions and remedial actions, respectively. OUs 1, 2, 3, 5 and 6 are described in the next section. OU7 represents the town of Troy, MT. Troy is located 15 miles west of Libby and has a population of 957. There are approximately 1,000 residences within the Troy Study Area Boundary that will be investigated to determine if cleanup is required. Due to its location, and to the fact that vermiculite uses were similar in Troy as they were in Libby, and due to the fact that mine workers also lived in Troy, the town is suspected of being contaminated in a nature similar to that of Libby. The Montana Department of Environmental Quality (MDEQ) and EPA signed a cooperative agreement which calls for MDEQ to begin investigations and screening of individual Troy properties in 2006. Background work is currently being conducted. The Troy response action (and related costs) is not addressed in this Action Memorandum Amendment.

B. Other Actions to Date

The previous Action Memorandum Amendment provided a description of various activities at the Site and their progress as of May 2002. These activities were completed or continued as necessary, and additional activities were started. For activities or locations that were NOT completed as of May 2002, but are completed now, an updated summary is found below:

PREVIOUS ACTIONS	
Location	**Action Description and Updated Status**
Export Plant	The Export Plant is Operable Unit 1. Pursuant to a Unilateral Order from EPA, W.R. Grace demolished and disposed of four buildings on the property and removed approximately 17,500 cubic yards of contaminated soil and debris from the property. Region 8 completed remaining demolition work of one building in 2002. The lumber business formerly operating at this location was relocated by W.R. Grace in 2003 to a new location in Libby. Removal work here is complete.

Screening Plant	This property consists of five distinct, contiguous parcels and makes up Operable Unit 2. All currently planned removal actions have been completed by 2005. **(1) Raintree Nursery.** Region 8 completed cleanup of this parcel in 2003. Approximately 17 acres were addressed, and 250,000 cubic yards of contaminated debris and soil were removed. Restoration of this parcel is essentially complete, with only punch-list items remaining. **(2) North Side Parker Property.** Region 8 completed cleanup here in 2004, addressing approximately four additional acres. **(3) Flyway Property**. Region 8 completed approximately ¼ of the cleanup of the Flyway parcel in 2002; W.R. Grace, pursuant to an Administrative Order on Consent with EPA, cleaned up the remainder of the parcel in 2004. In all, approximately sixteen acres were addressed, and approximately 50,000 cubic yards of soil were removed. EPA, working with the Montana Department of Transportation, capped a contaminated area on the Highway 37 right of way along the Flyway in 2005. **(4) KDC Bluffs Property**. Several areas of the KDC Bluffs parcel were cleaned up by EPA in 2001; some lower level contamination remains and will be evaluated for future Remedial Actions. **(5) Wise Property.** This is a property between Raintree Nursery and the Flyway. Cleanup was completed in 2005.
Rainy Creek Road	Rainy Creek Road and the mine itself make up Operable Unit 3. Rainy Creek Road is a forest service access road to the former vermiculite mine. It is highly contaminated, and site access remains restricted. Nearly half the road was paved, and semi-permanent decontamination stations were installed to facilitate soil disposal at the former mine. Soil disposal is ongoing. Operable Unit 3 is targeted for a future Remedial Investigation/Feasibility Study (RI/FS). EPA intends to begin negotiations with W.R. Grace regarding future conduct of the RI/FS. The RI/FS will help determine the need for future remedial actions.
Libby High School and Middle School Tracks (OU4).	Cleanup completed by 2002. Both tracks were restored in 2003. Work is complete.
Siefke Property (OU4).	Highly contaminated, large residential property which was identified early. Cleanup was completed in 2002, and restoration was completed in 2004.
Johnson, Sanderson, Temple, Struck, Rice, Fuhlendorf, Spencer, and Westfall properties (OU4).	Highly contaminated residential properties which were identified early. All cleanup and restoration was completed by 2003.
Champion Haul Road (OU4).	Cleanup was completed in 2003.

NEW ACTIONS	
Location	**Action Description and Updated Status**
Riverside Park and Boat Ramp	Subsurface contamination was encountered during construction of a new park and boat ramp by the City of Libby in 2003. The parcel is contiguous to the former screening plant. EPA halted construction and cleaned the parcel in late 2003. Approximately 15 acres of soil were excavated to an average depth of two feet. Cleanup and restoration are complete.
Lincoln County Landfill Asbestos Cell	Region 8 constructed and operates a new cell at the Lincoln County Landfill that is used for disposal of vermiculite insulation and other construction debris. Construction of the cell was completed in 2003. The cell was expanded in 2004. Disposal operations are ongoing.
Burlington Northern Santa Fe Rail Yard	The Burlington Northern Santa Fe (BNSF) Rail Yard is Operable Unit 6. Pursuant to an Administrative Order on Consent with EPA, BNSF began cleanup of the contaminated rail yard in 2003 but had to cease work due to complexities with soil removal below the tracks. Work began again in 2004, most tracks were removed, and removal work is now complete. Most contaminated soils were removed, but some contamination was capped in place. Institutional controls for contamination that was left in place will be evaluated as part of the RI/FS and future ROD.
Former Stimson Lumber Mill	The former Stimson Lumber Mill represents Operable Unit 5. Region 8 conducted extensive sampling of the former lumber mill and has identified two primary areas requiring cleanup. The first of these, the former central maintenance building, was completed in 2005. The second, a former nursery area, was fenced off in 2004 and will be further investigated in 2006.
Systematic screening and cleanup of individual residential and commercial properties in Libby Valley	As the first phase of the Remedial Investigation (RI), and to gather the information required to make decisions on which properties require time critical removal action, Region 8 inspected and sampled approximately 3700 properties in 2002, 2003, and 2004. Most inspection is complete, though additional RI sampling is planned for 2006. As of December 2005, approximately 578 time critical properties have been cleaned up, including several properties that were recently identified. Work is ongoing.

C. Current Actions

Region 8 is continuing systematic investigation and cleanup of individual properties throughout the Libby area described in the May 2002 Action Memorandum Amendment. There are multiple objectives to the investigation: (1) identify properties that meet criteria for time critical removal actions and require immediate cleanup, (2) collect information and data necessary to complete an RI/FS, Baseline Risk Assessment, and ROD, and (3) identify properties that may require future Remedial Action based upon criteria that will be set forth in the ROD.

Based on current knowledge, Region 8 *estimates* that at least 1400 residential/commercial

properties in and around Libby will require cleanup, of which approximately 850 remain (approximately 550 time critical removal action properties were cleaned up through October 2005). The 1400+ figure includes properties that meet criteria for time critical removal actions as well as estimates of the number of properties that may meet future criteria established for remedial action. While a large percentage of properties remaining to be cleaned up have conditions justifying time critical removal actions, cleanup of these properties using removal authority will generally continue only until publication of the ROD, at which time cleanup will continue using remedial authority. Remedial authority will then be used to clean up the remaining properties that meet time critical removal action criteria, and properties that may meet future criteria established for remedial action. EPA may encounter situations in the future for which removal actions are appropriate, even after a ROD is published. EPA will continue to prioritize properties that meet time critical removal action criteria and conduct cleanup as rapidly as resources and conditions permit. Region 8 expects to publish a ROD for residential/commercial cleanup (Operable Units 00 and 04) in 2006. The ROD will establish final cleanup levels and criteria which will enable Region 8 to more accurately quantify the total number of properties requiring cleanup.

In addition to conducting physical cleanups, EPA also continues to provide guidance, training, and assistance for Libby residents. Such actions include development and publication of fact sheets for residents and local contractors who may encounter vermiculite and asbestos, asbestos abatement and health and safety training for local contractors, and public warnings for areas of contamination discovered in public areas. These actions are intended to address ongoing exposures that cannot be immediately addressed through removal actions.

Region 8 has made significant progress toward a ROD despite the controversial and extremely complex nature of asbestos analysis and risk assessment. A few critical activities are highlighted below:

- In 2002, 2003, and 2004, Region 8 inspected and sampled approximately 3700 properties in the Libby area. EPA inspected for vermiculite insulation, visible vermiculite in soils, and collected soil and dust samples. Because contamination was generally placed at particular properties through human activities, rather than being spread uniformly by air or water, there was no clear pattern to the contamination. This warranted that each property in Libby be inspected. The information collected was used to determine which properties warranted time critical removal actions and to define the nature and extent of contamination across the Site.
- In 2002 and 2003, Region 8 designed and began conducting a Performance Evaluation (PE) Study to test the efficacy of existing and new analytical procedures for measuring asbestos in soil. Existing analytical methods are often not cost effective and are often unable to detect asbestos in soil at levels that are of likely health concern. The PE Study was extremely complex, primarily because some methods had to be modified and developed specifically for Libby, and there were no existing "standards" to test the methods against. Most of the PE Study is complete. The study helped Region 8 develop and validate a cost-effective, new analytical

method tailored to Libby soils. This method was used to analyze over 15,000 soil samples collected in residential yards.

- In 2003, Region 8 published the Draft Final Action Level and Clearance Criteria Technical Memorandum, which set forth additional screening level risk assessment calculations for Libby and the criteria for determining if a property warrants a time critical removal action under the current emergency response program (EPA Region 8, 2003).
- In 2002, 2003, and 2004 Region 8 worked extensively with EPA Headquarters and other EPA Regions to review and update the IRIS asbestos risk model. Developing and adopting a more accurate and accepted risk model is important for completion of a credible Baseline Risk Assessment in Libby.
- In 2004, Region 8 designed and conducted a post-cleanup sampling program to test the efficacy of the residential/commercial cleanup approach. This data is critical for evaluation of interim containment measures included in the removal action cleanup plan (such as leaving contamination in place in walls, or leaving contamination at depth) and for development of final cleanup levels and protocol (CDM, 2003c, 2004).
- Region 8 is currently conducting RI sampling to fill in remaining data gaps, focusing on evaluation of current cleanup protocols and low concentration exposures that will likely be the subject of future Remedial Actions.

D. State, Local, and Other Authorities Roles

There are no significant changes in roles from the May 9, 2002 Action Memorandum Amendment, other than the Montana Department of Environmental Quality (MDEQ) assuming the lead role for the investigation and screening of Troy, MT. The Agency for Toxic Substances and Disease Registry (ATSDR) and the Public Health Service (PHS) continue to work with local entities to address issues of public health. The United States Geologic Service (USGS) continues to provide EPA with technical assistance regarding the mineralogy, morphology, and measurement of Libby asbestos. Lincoln County and the City of Libby are active in several local advisory groups and coordinate directly with EPA on many issues regarding the removal actions and remedial investigations. In addition to their lead role for Troy, the MDEQ continue to coordinate with EPA on the implementation of all removal actions and remedial investigations.

III. THREATS TO PUBLIC HEALTH OR WELFARE OR THE ENVIRONMENT, AND STATUTORY AND REGULATORY AUTHORITIES

A. Despite significant progress on cleanup, conditions in Libby still present significant threats to public health. EPA has considered the factors the determine the appropriateness of a removal action described in Section 300.415(b)(ii) of the NCP, and at least two factors continue to be present in the Libby area:

(i). Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants and contaminants.

- Libby asbestos contaminated source materials (e.g., indoor dust, yard and garden soils, driveway materials, vermiculite insulation) are still found throughout the community. The Action Memorandum Amendment dated May 8, 2002 described these conditions in detail (EPA Region 8, 2002). Subsequent investigations have shown that about one-third of the approximately 4000 properties in the Libby area contain varying levels of contaminated source materials, such as vermiculite insulation or contaminated soils (CDM, 2002 and 2003a)

- Investigations have clearly shown elevated levels of Libby asbestos in the dust of resident's homes. (CDM, 2002, 2003a and 2003b; EPA Region 8, 2003) This dust contamination comes from several sources including but not necessarily limited to: contaminated soil at the property that is tracked into the home; contamination that was picked up at former vermiculite processing facilities in the past and brought home on clothes and equipment; releases of vermiculite insulation from the attic or walls.

- These asbestos contaminated source materials, when disturbed, may release asbestos fibers to the air resulting in complete exposure pathways. Actual exposure to these contaminated source materials may occur daily depending on the conditions and usage of the specific properties. Activities similar to those that are likely to be performed by area residents and workers can result in elevated concentrations of respirable asbestos fibers in air. Further, concentrations of fibers in air generated by disturbance of contaminated source materials may exceed OSHA occupational standards and EPA cancer risk guidelines (EPA Region 8, 2003; Weis, 2001; Miller, 2005).

- Asbestos fibers from the Libby mine site are hazardous to humans as evidenced by the occurrence of asbestos-related disease in area residents and workers. Workers and area residents exposed to asbestos fibers from the Libby mine site have been found to have increased mortality and morbidity from asbestos-related conditions, including asbestosis, pleural fibrosis, lung cancer, and mesothelioma. Asbestos-related lung diseases have also been observed in area residents with no direct occupational exposures, including family members of mine workers, and even in those with no known association with the vermiculite mining or processing activities (Weis, 2001; Miller, 2005).

(ii). High levels of hazardous substances or pollutants and contaminants in soils largely at or near the surface that may migrate.

- Soil contamination is prevalent throughout the Libby area. Region 8 has focused resources on cleaning up areas that were most highly contaminated, but many residential yards still contain measurable concentrations of Libby asbestos at or near the surface (CDM, 2002, 2003a, 2003b). These soils, if unaddressed, can cause direct exposure when disturbed through normal activities and can contaminate the interior of homes with asbestos-containing dust. Screening level risk calculations by Region 8 suggest that the contamination of indoor dust by outdoor soils is one of the most important exposure pathways in Libby (EPA Region 8, 2003).

- While most of the known larger contaminant sources and public areas (such as former vermiculite processing plants, schools, ball fields, and Riverside Park) have already been cleaned up, Region 8 has discovered several new "public" areas of contamination in Libby as well. These include J. Neils Park, the public golf course, the St. John's Hospital helipad, tbe right-of-way (ROW) along Highway 37, the public compost pile at the county landfill, and others. Some of these properties presented immediate, unacceptable risks and were cleaned up quickly. For other properties, such as portions of the former Stimson Mill, the Highway 37 ROW, and the public golf course, EPA has instituted interim containment measures such as fencing and/or issued public warnings. These properties and others were earmarked for possible future remedial action.

IV. ENDANGERMENT DETERMINATION

The actual or threatened releases from this Site, if not addressed by continuing to implement the time critical removal actions set forth the in the original Action Memorandum and subsequent Amendments, may present an imminent and substantial endangerment to public health or welfare or the environment. The original Action Memorandum for the Site, dated May 23, 2000 (EPA Region 8, 2000), as well as subsequent Amendments and the administrative record, describe in detail the toxicity associated with Libby asbestos, the significantly elevated disease rate in Libby residents, and the variety of conditions present in and around Libby that lead to continuing exposures.

V. EXEMPTION FROM STATUTORY LIMITS

The Libby Action Memorandum dated May 23, 2000 provided the documentation required to meet the NCP Section 300.415(b)(2) criteria for a removal action and support EPA's determination regarding the applicability of CERCLA Section 104(c)(1) [NCP Section 300.415(b)(5)(i)] emergency exemption from the $2 million and one year limits on removal actions. The most recent Action Memorandum Amendment dated May 9, 2002 expanded the scope of removal actions and raised the approved removal ceiling to $55,635,000. It also found that conditions at the Site continued to satisfy the emergency exemption and met the CERCLA Section 104(c) [NCP Section 300.415(b)(5)(ii)] consistency exemption, which allows for a continued removal action over the cap when it is "otherwise appropriate and consistent with the remedial action to be taken." The conditions necessitating time critical removal action in Libby still exist and continue to satisfy both the emergency and consistency exemptions from the statutory limits. The difficulty and costs of mitigating these conditions have proven higher than estimated in the May 9, 2002 Action Memorandum. As a result, Region 8 has informally requested, and OERR has authorized, an additional ceiling increase to permit the continuation of removal activities in 2005. This Action Memorandum Amendment formally requests a ceiling increase under the already granted exemption from the statutory limits. This ceiling increase is necessary to continue the removal action authorized by the May 9, 2002 Action Memorandum Amendment through the expected completion of a Record of Decision.

An emergency exemption continues to be warranted to protect public health. Imminent

and substantial risks to the public health of Libby residents continue to exist (Miller, 2005). Due to the prevalence of past and current exposures and the observed high rate of disease, these risks are of an immediate and emergency nature. While conditions have improved considerably through EPA intervention, hundreds of properties meeting criteria set forth by EPA Region 8 for time critical removal actions have yet to be addressed. Exposures to an already impacted population continue to occur, and EPA is the only Agency with the resources to mitigate these conditions.

In addition to meeting the criteria for an emergency condition, removal actions are also expected to be appropriate and consistent with future remedial actions, and thus continue to also meet the criteria for a consistency exemption from the $2 million and one year limits on removal actions as set forth in Section 300.415(b)(5)(ii) of the NCP. There are several reasons for this:

- Libby Asbestos, the contaminant of concern in Libby, is a naturally occurring mineral. There are no known viable treatment technologies that can diminish or reduce the toxicity of asbestos. To address exposures from asbestos, the most viable and commonly used physical cleanup options available are to remove it or to contain it. For time critical removal actions at the Site, Region 8 has used a combination of both as appropriate.
- Because asbestos use was widespread in the past, the *basic* approach for asbestos abatement is well understood. There are a limited number of options available for cleanup. Most importantly, when asbestos is determined to be friable, the preferred mechanism to address potential exposures is to remove the source.
- Investigations have shown that sources of Libby asbestos, including, but not limited to, contaminated soil, vermiculite insulation, and vermiculite processing wastes are prevalent throughout Libby. Past investigations have clearly shown that, when disturbed, these sources can release asbestos to the air and have the potential to contaminate indoor dust. The primary objective of the removal actions in Libby is to remove or isolate these sources. Any future remedial actions are likely to employ source removal as a key component of cleanup.
- To EPA's knowledge, large-scale removal of vermiculite insulation had not been attempted prior to EPA's cleanup in Libby. Due to the highly friable and pervasive nature of this material, it presented numerous technical challenges. Various cleanup techniques for dealing with vermiculite insulation and other media were evaluated during the initial cleanups of residential/commercial properties. Region 8 used this experience to evaluate the efficacy of various approaches and to refine our cleanup strategy. This information will be used in the RI/FS.
- While the *basic* approach to asbestos cleanup is well understood and relatively simple, the degree to which cleanup is necessary, and exactly which situations require cleanup, can be controversial. A large degree of uncertainty exists in the scientific community as to (1) what constitutes a "safe" level of asbestos in soil, dust, and other media and (2) how to effectively measure these levels. This makes establishment of site-specific action levels extremely challenging. As described in Section II (C) of this Amendment, EPA is currently working to resolve these difficult issues and continues to evaluate the effectiveness of interim containment measures instituted as part of removal actions.

However, to ensure that Removal Actions are protective and consistent with future remedial actions at Libby, Region 8 has taken a conservative approach and adopted protocols that attempt to minimize the possibility of having to clean up a property twice. In general, EPA only begins a cleanup if a property has conditions that warrant a time critical removal action, but once a cleanup begins, EPA addresses lower levels of contamination that may exist on some portion of the property. Post-cleanup sampling has thus far validated the efficacy and protectiveness of the cleanups (CDM, 2003c, 2004). This approach ensures the worst risks are addressed first and that cleanups are cost-effective, protective, and well accepted by the community and the State of Montana. The RI/FS will evaluate current cleanup protocols as well as other options for cleanup.

VI. PROPOSED ACTIONS AND ESTIMATED COSTS

A. Proposed Action Description

The Action Memorandum Amendment dated May 2002 set forth the proposed actions. While the basic need for cleanup and the general nature of the proposed actions has not changed, EPA has discovered that (1) more properties require cleanup than originally anticipated and (2) the difficulty and cost of cleanup are higher than originally anticipated.

B. Contribution to remedial performance

The Site was made final on the NPL in October 2002. While cleanup at the Site continues to be conducted using removal authority, the Site was transitioned to the Region 8 Remedial Program after final listing on the NPL. This was due to the scope and complexity of the work, and to ensure consistency with the long term response action. Information and experience gained during the removal actions is used to continually refine the process and to plan for future work. Likewise, as more information is learned about the nature of the contamination and the risks presented, adjustments to the cleanup approach are made as necessary. The most contaminated properties are targeted first and, as discussed in Section V of this Amendment, by taking steps such as removing all *detectable* asbestos from surface soils at those properties, EPA attempts to ensure that properties must only be cleaned once. This approach is protective as well as cost effective. It is expected that the cleanup approaches used during removal actions will be similar to, and consistent with, those used during remedial actions.

C. Description of alternative technologies

EPA attempts to employ the most appropriate technologies for addressing risks, but there are no known viable alternative technologies available at this time for addressing asbestos.

D. EE/CA

No EE/CA is required.

E. Applicable or relevant and appropriate requirements

See the Federal and State ARARs identified and/or discussed in the original Action Memorandum dated May 23, 2000.

F. Project Schedule

The total number of properties requiring clean up in and around Libby will not be known until publication of a ROD, expected in 2006. Based on current knowledge, Region 8 estimates that approximately 1400 properties will require cleanup, of which approximately 550 have already been addressed. While a large percentage of remaining properties have conditions described in the May 2002 Action Memo Amendment, cleanup using removal authority will continue only until publication of a ROD, at which time cleanup will continue using remedial authority. Remedial authority will then be used to clean up both classifications of properties: those that meet time critical removal action criteria but are not yet complete, and those that may meet future criteria established for remedial action. EPA may encounter situations in the future for which removal actions are appropriate, even after a ROD is published. EPA will also continue to prioritize cleanup of properties that meet time critical removal action criteria. Region 8 expects that approximately 170-200 properties can be cleaned up per year at current funding levels. The overall project schedule is contingent upon funding and the total number of properties requiring cleanup, but based on current knowledge, the current funding situation, and the actual date of a ROD, Region 8 estimates that approximately 1 year of time critical removal actions and 4-6 years of remedial actions remain. Approximately 220 properties are expected to be completed in calendar year 2006.

G. Estimated Costs

The ceiling increase is projected to cover two years of additional removal actions at production rates similar to those in 2003-2005 (170-200 properties expected to be cleaned per year). While the nature of cleanup has not fundamentally changed, the May 2002 Action Memorandum Amendment underestimated the scope, complexity, and cost of cleanup, especially with regards to interior cleaning and the removal of vermiculite insulation. Because of this, Region 8 has expended funds quicker than anticipated and the job is not complete. Region 8 has received informal approval for the expenditure of funds in excess of the prior ceiling. However, after two years of investigation and cleanup, Region 8 is able to more accurately forecast cleanup requirements, both on a per property basis and overall. Because of this increased accuracy, and for simplicity, this Amendment provides only a basic, cumulative breakout of the removal ceiling documented in the May 2, 2002 Action Memorandum Amendment and the proposed removal ceiling (Table 1). An estimate of other external costs that have been or will be incurred that do not count against the removal ceiling is also provided (Table 2).

Table 1. Proposed Removal Project Ceiling (current through March 2005).

Category	**Approved Ceiling (Action Memo Amendment dated May 2, 2002)**	**Proposed Ceiling Increase**	**Proposed Total**
Extramural Costs	$45,525,000	$30,000,000	$75,525,000
Contingency @ 20% of Extramural	$9,100,000	$6,000,000	$15,100,000
Intramural Costs	$960,000	$100,000	$1,060,000
TOTAL	**$55,635,000**	**$36,100,000**	**$91,735,000**

Table 2. Other major expenditures not counted against ceiling. Note that amounts are approximate. Also note that these estimates do not include prejudgment interest, indirect costs and potential enforcement and litigation costs (including Department of Justice costs). These costs are not counted against the removal ceiling.

Task	**Previous Expenditures Through CY 2004 (approximate)**	**Planned Expenditures CY 2005-2006 (approximate)**
Phase I and Phase II Removal Sampling Investigations	$8,100,000	0
Medical Screening Support	$500,000	0
Contaminant Screening Study (first phase of Remedial Investigation)	$5,000,000	$500,000
Remedial Investigation & Risk Assessment	$2,500,000	$1,500,000
Performance Evaluation/ Analytical Methods Study	$1,000,000	$200,000
USGS Support	$2,000,000	0
Community Involvement	$500,000	$500,000
Database Creation, Management, Quality Assurance, and Data Entry	$2,000,000	$1,500,000
TOTAL	**$21,600,000.00**	**$4,200,000.00**

VII. EXPECTED CHANGE IN THE SITUATION SHOULD ACTION BE DELAYED OR NOT TAKEN

Delayed action will result in continued public exposure to unsafe amounts of amphibole asbestos. This will increase the risk to public health and continue to burden an already impacted community.

VIII. OUTSTANDING POLICY ISSUES

There are no new policy issues or considerations.

IX. ENFORCEMENT

On March 30, 2001, the Department of Justice, on behalf of EPA, filed a lawsuit in the District of Montana against W.R. Grace & Co. and related entities to recover costs EPA has and will incur as a result of the Libby Asbestos Site response action. On December 19, 2002 the district court ruled, among other things, that EPA's response activities at the site were not inconsistent with the NCP. On August 26, 2003, the district court ordered W.R. Grace to reimburse EPA $54,527,081.11 for response costs EPA had incurred through December 31, 2001, and issued a declaratory judgment on liability for future response costs. (The district court later awarded an additional $3,742,453.87 in pre-judgment interest.) W.R. Grace appealed the district court's rulings regarding consistency with the NCP, the amount of costs incurred through December 31, 2001, and the declaratory judgment. (But not the award of pre-judgment interest.) On December 1, 2005, the Court of Appeals for the Ninth Circuit affirmed the district court judgment in full. It is not currently known whether W.R. Grace will seek additional judicial review of the district court judgment. It is important to note that W.R. Grace is currently reorganizing pursuant to Chapter 11 of the Bankruptcy Code. Any payment of the judgment awarded in this case will be made pursuant to a Plan of Reorganization approved by the Bankruptcy Court. The timing of approval of a Plan of Reorganization cannot be estimated at this time.

X. RECOMMENDATION

This decision document represents the selected removal action for the removal of Libby asbestos sources from targeted homes, businesses, and public buildings at the Libby Asbestos Site in Lincoln County, Montana. The proposed removal actions have been developed in accordance with CERCLA as amended and are consistent with the NCP. The decision is based on the administrative record for the Site.

Conditions at the Site continue to meet the NCP [40 CFR § 300.415(b)] criteria for a removal action. The NCP [40 CFR § 300.415(b)(5)(i)] and [40 CFR § 300.415(b)(5)(ii)] criteria for exemptions from the statutory limits that have been previously documented continue to exist. I recommend your formal approval of the proposed removal action ceiling increase.

Approve: _____ Date: 6-2-06
Susan Parker Bodine,
Assistant Administrator
Office of Solid Waste and Emergency Response

Disapprove: _____ Date: _____
Susan Parker Bodine,
Assistant Administrator
Office of Solid Waste and Emergency Response

REFERENCES

CDM, 2002. Sampling and Analysis Plan, Remedial Investigation, Contaminant Screening Study, Libby Asbestos Site, Operable Unit 4. April 30, 2002.

CDM 2003a. Sampling and Analysis Plan, Revision 1, Remedial Investigation, Contaminant Screening Study, Libby Asbestos Site, Operable Unit 4. May, 2003

CDM 2003b. Pre-Design Inspection Work Plan, Libby Asbestos Site, November 25, 2003.

CDM 2003c. Sampling and Analysis Plan Addendum, Post-Cleanup Evaluation Sampling, Remedial Investigation, Contaminant Screening Study, Libby Asbestos Site, Operable Unit 4. December 1, 2003.

CDM 2004. Technical Memorandum: Contaminant Screening Study, Post Cleanup Evaluation Sampling, Libby Asbestos Site, Operable Unit 4. September 1, 2004.

EPA Region 8, 2000. Action Memorandum, Libby Asbestos Site, May 23, 2000.

EPA Region 8, 2002. Action Memorandum Amendment, Libby Asbestos Site, May 8, 2002.

EPA Region 8, 2003. Draft Final US EPA Technical Memorandum: Libby Asbestos Site Residential/Commercial Cleanup Action Level and Clearance Criteria. December, 15, 2003.

Miller, 2005. *Amphibole Mineral Fiber Contamination of Various Source Materials in Residential and Commercial Areas of Libby Pose an Imminent and Substantial Endangerment to Public Health.* Memorandum from Aubrey Miller, USEPA Regional Medical Officer and

Site. Dated 9/29/2005. US EPA, Region 8

Weis, 2001. *Amphibole Mineral Fibers in Source Materials in Residential and Commercial Areas of Libby Pose an Imminent and Substantial Endangerment to Public Health.* Memorandum from Christopher P. Weis, USEPA Regional Toxicologist, to Paul Peronard, USEPA On-Scene Coordinator for the Libby Asbestos Site. Dated 12/20/2001. US EPA, Region 8.

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Show Details

Update on Libby / Dial-in Number: (b) (6) / Conference Code: (b) (6)

Tue 06/30/2009 9:15 AM - 10:00 AM

Chair: **Mathy Stanislaus/DC/USEPA/US**
Sent By: **Jennifer Wilbur/DC/USEPA/US**
Location: EPA W 3146

Required:	Arvin Ganesan/DC/USEPA/US@EPA, Carolyn Levine/DC/USEPA/US@EPA, Elizabeth Southerland/DC/USEPA/US@EPA, Ellen Manges/DC/USEPA/US@EPA, Jennifer Lue/DC/USEPA/US@EPA, Mary-Kay Lynch/DC/USEPA/US@EPA
Optional:	Ellyn Fine/DC/USEPA/US@EPA, wilbur.jennifer@epa.gov

Description

Personal Notes

From:	Craig Grimm
To:	Terry
Cc:	Mike Cirian; Group R8Eisc
Bcc:	Sandy Fells
Subject:	"EPA announces a public health emergency at Libby Asbestos Superfund Site"
Date:	07/01/2009 04:16 PM

Hi Terry,

This message is in response to your call to our office this afternoon requesting the official statement from U.S. EPA for the 6/17/2009 public health emergency declaration in Libby, MT.

(1) EPA documents on this matter can be found on the Internet at:

Libby Public Health Emergency
"EPA announces a public health emergency at Libby Asbestos Superfund Site"

http://www.epa.gov/region8/superfund/libby/phe.html

(2) I also referred you to Mike Cirian for further assistance:

US EPA Region 8 (http://www.epa.gov/region08/)
Office of Ecosystems Protection and Remediation: Superfund Remedial Response Program

Mike Cirian - Phone: 406-293-6194, Email: Cirian.Mike@epa.gov

Let us know if we can help with anything else.

Regards,
Craig

==========

Craig Grimm
public information specialist
ASRC Management Services (contractor)

US EPA Region 8
Environmental Information Service Center
1595 Wynkoop St.
Denver, Colorado 80202-1129
Bus: 303.312.7057 Fax: 303.312.7910 Toll Free: 1.800.227.8917, x312.7057

grimm.craig@epa.gov

figure out where libby docs are: Completed on 04/23/2009

Start by: Due by: Thu 04/16/2009

Participation is **delegated** for Jonathan Newton

Priority: Medium

Category:	Libby

Description

and get back to PO.

4/16 - ES says AM and PHE are w R8; AL says thinks they are with RL. MB left msg w RL. ES says Q&A w MKL.

From: Erin Perkins
To: Charles Openchowski; Lee Tyner
Subject: here you are!!!!
Date: 06/17/2009 03:41 PM

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http://www.epa.gov/region8/superfund/libby/phe.html

From: Mary-Kay Lynch
To: Pat Hirsch; Byron Brown; John Michaud
Subject: inside EPA re Libby
Date: 05/04/2009 04:37 PM

EPA Release Of Libby Asbestos Memo Prompts Fresh Activist Concerns

EPA's release of a long-sought Inspector General (IG) memo on the agency's asbestos cleanup in Libby, MT, in response to activists' lawsuit, is raising more questions than it answers regarding how the agency has handled the potentially precedent-setting cleanup and why it initially blocked public release of the document, the activists say.

At issue is the so-called "Rumple Report," a memo IG Special Agent Cory Rumple drafted in 2006 after conducting an investigation in response to complaints from Libby residents that EPA and its contractors were not properly cleaning their asbestos-contaminated homes.

The memo prompted the IG in December 2006 to issue a quick reaction report titled *EPA Needs to Plan and Complete a Toxicity Assessment for the Libby Asbestos Cleanup*, which found the agency had never conducted a proper risk assessment in the town. But the Bush EPA declined to release the Rumple memo itself, despite repeated requests from activists.

The Obama EPA released the document April 29, along with a new explanatory memo by Rumple, in response to an April 21 lawsuit filed by Public Employees for Environmental Responsibility (PEER).

The activist group praised the document's release as a key indication that President Obama and Attorney General Eric Holder's pledges for openness will be honored.

But the document itself reveals "critical deficiencies" in EPA's cleanup efforts in Libby, PEER says, including a "thorough 'disconnect between scientists and the agency' over how to conduct the" cleanup, "[d]istribution of 'exceptionally deceiving' public health information to Libby residents," and "[b]itter in-fighting within the EPA that led to dysfunctional decisions and resignations of key specialists."

In addition, PEER questions why the IG launched a 21-month criminal investigation following Rumple's 2006 memo despite Rumple's conclusion that such an investigation was unnecessary and that the IG's Office of Program Evaluation should instead analyze the programmatic lapses his memo identified. The criminal probe ultimately led to a referral that was declined by federal prosecutors, PEER notes.

“As a result of the Inspector General pursuing a fruitless criminal inquiry, today we still do not have a clear idea of whether the Libby clean-up is protective of the public,” PEER says. “Nor do we have any assurances that EPA will not repeat the same mistakes tomorrow.”

The criticism follows EPA's recent release of a controversial report -- titled *Summary of Outdoor Ambient Air Monitoring for Asbestos At the Libby Asbestos Site* -- in which the agency concludes the inhalation of outdoor ambient air in and around Libby is no longer likely to be a significant cancer risk to area residents and workers. It also comes as Sen. Max Baucus (D-MT) is pushing the agency to declare a public health emergency in the town, a potentially precedent-setting move that could trigger numerous asbestos cleanups throughout the country.

A report Democratic investigators released in September suggested Bush White House officials may have blocked EPA in 2002 from issuing such a finding, despite Bush administration officials' claim to the contrary.

Staff for Baucus did not return calls seeking comment.

512009_libby

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P.O. Box 7167, Ben Franklin Station, Washington, DC 20044

From: Erin Perkins
To: Charles Openchowski
Subject: libby
Date: 06/17/2009 02:47 PM

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not sure if the press conference is up yet, but I will check to see when they are going to put it up...

http://www.epa.gov/region8/superfund/libby/phe.html

From: Karol Spas
To: Ashley day; Aubrey Miller; aubyna@ (b) (6) Barb Guthneck; Betty Challinor; Bill Patten; Brad Black; Catherine LeCours; Cheryl Fox; Dan Strausbaugh; Earl Messick; Eileen Carney; Gayla Benefield; Gretchen Perkins; Helen Andries; James Hopkins; Jan Sanderson; Jeanie Gentry; Jim Wheelis; JoElyn Brus; Kate Huntsberger; Kerry Beasley; Kimberly Rowse; Kirbi Maki; Laura Sedler; LeRoy Thom; Lincoln Co Health Dept; Linda Rodriguez-Newstrom; Lisa Berry-Bobovski; Maria Clemons; Marianne Roose; Mary Tevebaugh; Megan Twohig; Mike Giesey; Rebecca Cline; Sandy Matheny; Sheryl Nordahl-US Attorney General's Office; Tanis Hernandez; Ted Linnert; Terry Spear; Tony Berget; Wendy OBrien; Wendy Thomi
Subject: public health emergency
Date: 06/18/2009 12:12 PM

Hi everyone! I should have sent this out yesterday, but guess I was in shock. Yesterday, Libby was declared a public health emergency!!!!!!! Can you really believe it? Our grant money will still be coming and the logistics of money to follow will be worked out Yahoo!!!!
Karol