



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

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Policy on Listing Mixed Ownership Mine or Mill Sites Created as a Result of the General Mining Law of 1872 on the Federal Agency Hazardous Waste Compliance Docket

FROM: David J. Kling, Director
Federal Facilities Enforcement Office (FFEO)

TO: Regional Docket Coordinators

This policy addresses the issue of when so-called "mixed ownership" mine or mill sites, created as a result of the General Mining Law of 1872 (GML), 30 U.S.C. § 22 *et seq.*, should be included on the published list of federal facilities which have been reported to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 120(c) Federal Agency Hazardous Waste Compliance Docket (Docket).¹ For the reasons stated

¹ Section 120(c) of CERCLA states that:

The Administrator shall establish a special Federal Agency Hazardous Waste Compliance Docket (hereinafter in this section referred to as the "docket") which shall contain each of the following:

- (1) All information submitted under section 3016 of the Solid Waste Disposal Act [42 U.S.C.A. § 6937] and subsection (b) of this section regarding any Federal facility and notice of each subsequent action taken under this chapter with respect to the facility.
- (2) Information submitted by each department, agency, or instrumentality of the United States under section 3005 or 3010 of such Act [42 U.S.C.A. § 6925 or 6930].
- (3) Information submitted by the department, agency, or instrumentality under section 103 of CERCLA [42 U.S.C.A. § 9603].

The docket shall be available for public inspection at reasonable times. Six months after establishment of the docket and every 6 months thereafter, the Administrator shall publish in the Federal Register a list of the Federal facilities which have been included in the docket during the immediately preceding 6-month period. Such publication shall also indicate where in the appropriate regional office of the Environmental Protection Agency additional information may be obtained with respect to any facility on the docket. The Administrator shall establish a program to provide information to the public with respect to facilities which are included in the docket under this subsection. (emphasis added)

below, we believe that, as a matter of policy, mixed ownership mine or mill sites created as a result of the GML generally should not be included on the published list of federal facilities which have been reported to the Docket. This policy recognizes that individual mine or mill sites should be evaluated on a case-by-case basis, and does not in any way address the status of the federal government as a potentially responsible party (PRP). The policy does not address issues regarding “ownership” under CERCLA, nor does it address any federal cleanup obligations. This policy simply speaks to Congress’ intent regarding the types of facilities that should be included on the published list of federal facilities which have been reported to the Docket.

Background

Mixed ownership mine or mill sites are those located partially on private land and partially on public land. Unlike Department of Defense or Department of Energy federal facilities, which are or were operated by the United States or its contractor and are entirely in Federal ownership, many mine and mill sites consist of both federal and private land ownership.

Generally, under the GML, a person may establish private rights to mine certain minerals on federally-owned land by staking a claim to the land. Once a claim is established and if it is maintained, the claimant gains rights to the beneficial use of the property incident to mining, but the fee simple title remains with the federal government. Prior to enactment of the Federal Land Policy and Management Act of 1976 (FLPMA), the claimant had a right to extract the minerals and control the surface. Since the enactment of FLPMA, the claimant has the right to extract the minerals and may use the surface to the extent necessary to develop the claim, subject to surface management regulations of the land managing agency. The claim is private property, is taxable, and can be sold, leased, bequeathed, etc. If the claim is abandoned or otherwise becomes invalid, all of the property rights revert to the federal government and the land is under the control of the Federal Land Managing Agencies (FLMA), usually the Forest Service (FS) within the United States Department of Agriculture or the Bureau of Land Management (BLM) within the United States Department of the Interior.

A claimant may, through a process called “patenting,” buy the fee simple interest from the federal government and own the property in its entirety. If the owner of patented property abandons it, the property does not revert to the United States, but remains private land. The effect of the GML is that thousands of former mine or mill sites are now private properties (inholdings) within the boundaries of federal land managed as National Forests, National Parks, and BLM-managed lands.

Many FLMAAs do not have a comprehensive inventory of all mine sites, and neither do the states or EPA. However, there are estimated to be tens of thousands of mines on federal lands, and approximately an equal number on private lands, including many with releases of hazardous substances. A mixed ownership mine “site,” often a mining district, may have involved hundreds of private entities as owners or operators. A large-scale map of a National Forest or BLM-managed lands may indicate the overall boundary and imply that all of the land inside is federally-owned. A more detailed map will indicate that there are many private inholdings,

frequently including mine or mill sites,² which, as explained above, the FLMA has little or no control over but which may impact the interspersed federally-owned land.

A review of CERCLA Section 120(c) and its legislative history reveals that Congress did not directly address whether mixed ownership mining sites should be identified as federal facilities in the Docket. Therefore, we believe that the decision whether to include such sites on the published list of federal facilities which have been reported to the Docket should be guided by sound policy reasons.³

Policy

It is our policy that mixed ownership mine or mill sites generally should not be included on the published list of federal facilities which have been reported to the Docket. This policy recognizes that individual mine or mill sites should be evaluated on a case-by-case basis, and does not in any way address the status of the federal government as a PRP. The policy does not address issues regarding “ownership” under CERCLA, nor does it address any federal cleanup obligations. This policy simply speaks to Congress’ intent regarding the types of facilities that should be included on the published list of federal facilities which have been reported to the Docket. Because these sites are typically encumbered by substantial private rights derived from the GML and the contamination at these sites is typically the result of private activities, we believe that treating these sites as private facilities will foster the most effective use of CERCLA response authorities.

At “mixed ownership” mine or mill sites, the efficient use of limited EPA and FLMA resources is greatly facilitated through a cooperative approach. As part of this cooperative effort, EPA and the FLMA need to evaluate issues such as whether EPA or the FLMA is pursuing PRPs at the site, and how the EPA and/or the FLMA is otherwise addressing the contamination at the site. EPA regions, in cooperation with the FLMA and the states in which the sites are located, may also find it helpful to develop a prescreening process which could reveal potentially significant problems at a site and feed into the cooperative effort to address these sites. At some “mixed ownership” mining sites, EPA will be the lead agency and will generally need to work with the FLMA to effectively address any release of hazardous substances on the federally owned areas of the site, while at other “mixed ownership” mining sites the FLMA may be the lead agency and will generally need EPA authority to effectively address the risks posed by the non-federal areas of the site. Several EPA regions have entered into site specific memoranda of agreement to define the respective roles of the agencies. Additional guidance or interagency

² Federal land laws other than the GML (such as the railroad and homestead acts) have also created private property rights within these Federal lands. In addition, federal law has created state trust lands interspersed within federal land units.

³ Nothing in this Policy is intended to alter or modify a federal agency’s obligation under CERCLA Section 120 to determine whether information must be reported to the Docket based on the criteria set forth in Section 120(c)(1)-(3). Also, the fact that information is reported to the Docket does not necessarily mean that the site will be included on the published list of facilities which have been reported to the Docket.

agreements may also need to be developed to support coordinated enforcement and response actions at mixed ownership mining sites. Mixed ownership sites with potential or confirmed hazardous releases that are not included on the published list of federal facilities which have been reported to the Docket should, however, be considered for inclusion in EPA's CERCLIS database.

Other Mine Sites

Unpatented abandoned mine or mill sites which were created under a GML claim, entirely on federal lands, and that have reverted to federal control, should be discussed with the FLMA having "jurisdiction, custody, or control" of the site and EPA HQ (FFEO and the Office of Site Remediation Enforcement (OSRE)) before including the site on the published list of federal facilities reported to the Docket. Additionally, mines, mill, or mine waste disposal areas on FLMA lands that were created under a federal permit or lease should be discussed with the FLMA having "jurisdiction, custody, or control" of the site and EPA HQ before including that site on the published list of federal facilities which have been reported to the Docket.

The discussion in this document is intended solely as guidance to EPA personnel. This document is not a regulation, nor does it change or substitute for any regulation. Thus, it does not impose legally binding requirements on EPA, States, or the regulated community. This guidance does not confer legal rights or impose legal obligations upon any member of the public. In the event of a conflict between the discussion in this document and any statute or regulation, this document would not be controlling. The general description provided here may not apply to a particular situation based upon the circumstances. Interested parties are free to raise questions and objections about the substance of this guidance and the appropriateness of the application of this guidance to a particular situation. EPA and other decisionmakers retain the discretion to adopt approaches on a case-by-case basis that differ from those described in this guidance where appropriate and to amend this guidance without public notice.

Thank you for your time and attention to this Policy on listing "mixed ownership" mine or mill sites on the published list of federal facilities which have been reported to the Docket. For further discussion on mining and private party enforcement issues contact Joe Tieger of OSRE (202-564-4276), on CERCLA Section 120 issues, Andrew Cherry of FFEO (202-564-2589), and on Docket issues, Augusta Wills of FFEO (202-564-2468).

References:

General Mining Law of 1872, 30 U.S.C. §§ 21-54.
Comprehensive Environmental Response Compensation and Compensation Act, as amended, 42 U.S.C.A. §9601 et seq.
Executive Order No. 12580, January 23, 1987.

cc: HQ and Regional Site Assessment Staff
Regional Mining Coordinators
Regional Federal Facility Program Managers