

August 26, 2009

U.S. Environmental Protection Agency
Criminal Investigation Division
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TO: US EPA Region 8 Criminal Investigation Division
FROM: Christine Erickson, Staff Attorney, Public Employees for Environmental Responsibility (PEER)
RE: Request for Criminal Investigation – Colter Bay Village, Grand Teton National Park, Wyoming

This is a formal request for an investigation of alleged criminal violations relating to asbestos removal at Colter Bay Village in Grand Teton National Park. PEER is extremely concerned about the activities that took place and particularly concerned about the affect they have had and are continuing to have on human health and the environment in Wyoming. If substantiated, PEER believes these activities would prove to have constituted criminal conduct that is ongoing and that involves individuals who are serving in leadership roles.

Background

The conduct in question involves the National Park Service management's deliberate failure to comply with environmental regulations, conspiracy to hide such violations, and consistent practice of placing their staff and the general public in great danger, as well as destruction of the environment. In addition to civil violations under NESHAP and OSHA, we believe that the conduct in question evidence clear criminal violations under the Clean Air Act and the Comprehensive Emergency Response, Compensation, and Liability Act.

Pipe excavation and clean up

In May 2001, a frozen water pipe was excavated along the Colter Bay roadway. The National Park Service management at Grand Teton National Park (GTNP) executed a decision to replace the frozen water pipes with new water pipes found underground in the heart of Colter Bay Village. According to a report on the Transite Pipe Incident by Debra

Nims, Industrial Hygienist for Teton Environmental Health, GTNP's contractor, an initial excavation took place in early May to determine the extent of the freezing and damage to the pipe, which was approximately 8 feet deep and 2500 feet long. Shortly thereafter, the pipe was fully excavated in order to make repairs and restore water to homes and buildings in Colter Bay.

Before excavation began, GTNP management had instructed the park engineers to inspect the problem and have the contractor simply place the new pipe over the old pipe, as opposed to removing the old pipe and replacing it with the new. However, due to a lack of oversight by the GTNP management, the old pipe was pulled up and new pipe was put in its place. The contractor was aware at all times that the old pipe contained over 5 percent of very hazardous asbestos and that it would become easily friable upon excavation. GTNP employees attempted to stop the contractor, but were told continually not to disrupt the project.

The excavated pipe was initially piled at the excavation site where it, and the friable asbestos, was dumped along the road, exposed to visitors, and crushed by vehicles driving over it. Subsequently, GTNP's Acting Superintendent, Steve Iobst, instructed GTNP road crew, without training in asbestos or knowledge that the pipes contained asbestos, to move the pipes piled up along the road to the Colter Bay dump site, where they sat uncovered and unmarked for several days. Eventually the pieces of the pipe were placed in a separator pile, and the pipe was screened out while the soil was distributed to other park projects. By this time, so much of the pipe had been crushed that it is highly likely that friable asbestos made it into the soil which was distributed throughout the park.

On May 20, 2001, a GTNP employee received a phone call from a road crew member stating that they were having to move the pipes again. Jack Nickels issued the order and notice to clean up and dump the asbestos. Cam Hugie, GTNP Facility Manager, was in charge of directing and overseeing the cleanup. Some of the pipes were illegally dumped at unauthorized sites, including a local park and on Amtrak property. Other loads were taken to the Colter Bay dump site where they were dumped onto campsite fire grates that were being stored there and would later be redistributed amongst the campsites. A GTNP employee arrived at the Colter Bay dump site and documented the illegal dumping activities in violation of NESHAP requirements for approved asbestos landfills.

On May 24, 2001, the pipes were loaded into uncovered trucks and transported across state lines to the Circular Butte landfill in Mud Lake, Idaho. GTNP's Environmental Engineer, Bob Wemple, directed the road crew to take the pipes in uncovered Park Service dump trucks through Jackson Hole and 300 miles across state lines to Mud Lake. Once again, the employees engaged in the transportation of the asbestos containing materials were untrained and lacked the proper safety gear, such as gloves and masks. To our knowledge, seven dump truck loads were taken to Idaho by GTNP drivers on May 24th. The drivers were not certified to transport asbestos containing materials, the trucks were not carded, and the loads were neither covered nor contained.

In a June 21, 2001 report on the excavation, Industrial Hygienist Debra Nims stated that the work was executed by “persons who did not have OSHA-required training” and that the removal of transite is considered a Class II activity which requires handling by certified employees. Moreover, Ms. Nims observed that the work was not supervised by a qualified Supervisor, as required by OSHA. Her report further stated that the handling and transportation of the pipes resulted in many of the pipe fragments becoming friable, which under NESHAP standards are required to be wetted or otherwise treated to prevent the release of airborne fibers. Ms. Nims also noticed that GTNP had two park employees on site with appropriate EPA and OSHA training, but that these employees were not utilized during the excavation.

Clean up subsequent to DOL Notice of Unsafe Working Conditions

In June 2001, a GTNP employee called OSHA to report GTNP for a violation of 29 CFR Part 1960 in regard to the Colter Bay transite pipe excavation. On August 2, 2001, OSHA cited the National Park Service for unsafe or unhealthful working conditions. The notice reported that GTNP (1) failed to conduct an exposure assessment prior to removing pipe containing 5% asbestos (2) failed to use wet methods during the removal of the pipe (3) failed to promptly and properly dispose of the asbestos waste (4) allowed workers to dry shovel the dust and debris containing ACM (5) failed to inform the employees moving the pipe of the presence of asbestos and the precautions to be taken, and (6) failed to affix labels with the required wording to the pipe after it was removed. The notice gave GTNP 10 days within which to take corrective action and provide proof of abatement certification to OSHA.

Subsequent to the OSHA citation, GTNP hired a contractor to come in and clean up the remaining asbestos as part of the “corrective action” plan. According to GTNP Industrial Hygienist, Debra Nims, the contractor had again scheduled to take the loads of asbestos pipe to Mud Lake, Idaho, without meeting the proper statutory requirements.

Criminal Violations

1. Clean Air Act (CAA)

The Clean Air Act provides that any person who "knowingly " releases into the air any hazardous air pollutant criminally liable and subject to fines and imprisonment. 42 U.S.C. § 7413(c)(5)(A). Asbestos is considered a hazardous air pollutant under § 7412(b).

The Act also makes it unlawful to violate or conspire to violate regulations concerning the removal and disposal of asbestos. Violations of asbestos work practice standards promulgated by the EPA under the Act, including improper handling and removal of asbestos-containing material and failure to give required notices, are also punishable under the criminal provisions of the statute.

Any "owner or operator of a renovation or demolition activity" who removes a specified minimal amount of "regulated asbestos-containing material," must comply with

numerous requirements including that asbestos be wetted during removal and strictly contained, and that workers wear safety gear and masks. Specifically, the Act requires that (1) the "asbestos-containing material" be "adequately wet" during removal operations; (2) the "asbestos-containing material" be carefully lowered to the floor or ground and not dropped, thrown, slid, or otherwise damaged; (3) the "asbestos-containing material" be sealed in leak tight containers while wet; and (4) the "asbestos-containing material" not be removed, disturbed, or otherwise handled unless a foreman or management-level person who has been trained in the means of complying with the applicable standards is present on-site. *See generally* 40 C.F.R. 61.140, *et seq.* Applicable federal regulations also require that any asbestos removed be secured with "glove bags" or performed within a "negative pressure enclosure." *See generally* 29 C.F.R. §§ 1910.1001, 1926.1101; 59 Fed. Reg. 40964 (1994).

In *U.S. v. Weintraub*, the court held that a person "knowingly violates" the Clean Air Act if the person has knowledge of facts and circumstances that comprise a violation of the statute. *U.S. v. Weintraub*, 273 F.3d 139 (2d Cir. 2001). The person(s) need only know of enough facts to distinguish conduct that is likely culpable from conduct that is entirely innocent. *Id.* Thus, a person need only know of facts that would cause a reasonable person to expect that the conduct in question was subject to strict regulation. *Id.*

The Park Service's excavation project at Colter Bay violated several applicable Clean Air Act regulations, including the release of a hazardous substance into the air and improper removal and disposal of asbestos. Moreover, the Park Service management that authorized and oversaw the renovation and clean up had clear knowledge that their conduct was culpable under the Clean Air Act and conspired to violate and cover up the violations under the Act. The statute of limitations does not bar an inquiry in this case since the violation is still ongoing and constitutes a conspiracy to violate the Clean Air Act. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982); *See also Center for Biological Diversity v. Hamilton*, 453 F. 3d 1331, 1334 (11th Cir. 2006). Accordingly, the EPA must investigate the willful conduct on the part of the Park Service to violate Act and the regulations promulgated there under.

2. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires notification to the National Response Center immediately following the release of a hazardous substance in an amount that exceeds its reportable quantity. 42 U.S.C. § 9603. Asbestos is a CERCLA hazardous substance. 42 U.S.C. § 9601(14); 40 CFR § 302.4. CERCLA § 103(b) authorizes criminal sanctions for the failure to report the release of hazardous substances. 42 U.S.C § 9603(b). Under § 103(b), a person in charge of a facility from which there is a release of hazardous substance equal to or exceeding the reportable quantity is criminally liable for failing to notify the National Response Center as soon as it had knowledge of it. *Id.* For purposes of this section, a person includes a federal government agency and facility means "any building, structure, installation, impoundment, landfill or site where a hazardous substance is located." 42

U.S.C. § 9601(9) and (21). The reportable quantity for asbestos is one pound. 40 C.F.R. Section 302.4.

Here, all elements of a § 103(b) violation are present to justify an investigation of the precise amount of friable asbestos released during the excavation and clean up of the 2500 feet of asbestos containing pipe at Colter Bay in Grand Teton National Park. There is clear evidence that GTNP management knew about the release of asbestos during the pipe excavation and failed to notify the National Response Center as required under CERCLA. Since the incident in 2001, GTNP has continuously toiled to conceal and suppress knowledge of the violations, making the offenses ongoing and therefore not barred by the applicable statute of limitations. *See Pub. Citizen, Inc. v. Mukasey*, 2008 U.S. Dist. LEXIS 81246, *26 (N.D. Cal. Oct. 9, 2008). The Park Service is therefore subject to criminal sanctions under CERCLA § 103(b).

Conclusion:

The National Park Service has violated the criminal provisions of the Clean Air Act and the Comprehensive Emergency Response, Compensation and Liability Act in its deliberate, reckless, and knowing endangerment of Park Service employees and Grand Teton residents by failing to report the release of asbestos and conspiring to conceal information about the excavation which has exposed humans to high levels of hazardous asbestos.

We respectfully request that you launch a criminal investigation of these alleged violations.

Sincerely,

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Encl.