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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
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UNITED STATES SENATE
OFFICE OF SENATOR MAX BAUCUS
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**EPA'S FAILURE TO DECLARE
A PUBLIC HEALTH EMERGENCY
IN LIBBY, MONTANA**

SEPTEMBER 2008

PREPARED FOR
CHAIRMAN BARBARA BOXER AND SENATOR MAX BAUCUS

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Executive Summary

In 1999, the U.S. Environmental Protection Agency (EPA) began investigating and cleaning up the massive asbestos contamination in Libby, Montana, caused primarily by W.R. Grace's vermiculite mining and processing activities there from 1963 through 1990. EPA initially focused on cleaning up the most heavily contaminated areas, such as the former vermiculite processing sites. In 2001, however, EPA began to focus on cleaning up homes and commercial buildings in Libby as well, which were also heavily contaminated with asbestos. One asbestos source of particular concern for EPA was the asbestos contaminated Zonolite Attic Insulation (ZAI), made by W.R. Grace and found in many Libby homes.

In 1999, EPA and the Agency for Toxic Substance and Disease Registry (ATSDR) also began to study the extent of the health impacts from the asbestos contamination in Libby. By 2001, EPA and ATSDR had determined that many people in Libby had died from asbestos exposure and that over 1,000 people had at least early signs of asbestos related disease (ARD). EPA officials involved with the site have stated that it was by far the worst contamination site to which EPA had ever responded.

To eliminate all significant asbestos exposure pathways and prevent more people from getting sick and dying, EPA determined in 2001 that it was necessary to take out the contaminated attic insulation from the Libby homes. Section 104(a)(3)(B) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) does not allow EPA to remove a product, such as insulation, that is part of the structure of a home. However, there is an exception to this provision. If EPA determines that a release or threat of a release from a product constitutes a public health emergency, it may remove a product that is part of the structure of a home. In addition, CERCLA states that if a public health emergency is declared the affected residents are entitled to medical care from the federal government and any other medical assistance appropriate under the circumstances.

In 2001, EPA's Regional Office in Denver, Colorado (Region 8), which has jurisdiction over the cleanup in Libby, determined that there was ample evidence to support a public health emergency, which would allow them to remove the insulation from Libby homes under CERCLA and would provide medical care to the residents of Libby. EPA's Administrator in Washington, D.C. appears to have supported the decision and in April of 2002 was on the verge of declaring a public health emergency, until the Office of Management and Budget (OMB) became involved in the decision-making process. In mid-April 2002, EPA reversed its position on the public health emergency. In May 2002, EPA issued a final decision that it would remove the insulation from Libby, but did not declare a public health emergency. Despite Region 8's objections, EPA determined that it could legally remove the insulation without a public health emergency because the

insulation was not a “product” since Libby residents had allegedly gotten the insulation from waste piles outside the W.R. Grace facilities.

EPA’s decision not to declare a public health emergency in 2002 has had a profound and lasting impact on the people of Libby as they continue to struggle with disease and death from asbestos contamination. It also put EPA on a course that ignored the need to fully understand the toxicity of the unique form of asbestos found in Libby, which has potentially endangered Libby residents and represents a serious but unqualified level of risk to millions of people across the United States where Libby asbestos has ended up.

Staff from Senator Max Baucus’s office and staff from the Environment and Public Works Committee (hereinafter referred to as Staff) conducted an extensive investigation of EPA’s decision not to declare a public health emergency and the consequences of that decision. The investigation, which focused primarily on the time period from 2001 to 2002, included a review of thousands of pages of EPA documents, as well as interviews of current and former EPA employees and residents of Libby, Montana. EPA’s Inspector General’s Office (OIG) assisted the Committee with its investigation by providing the Committee with interview notes and other documents related to a criminal investigation OIG conducted from 2006 through 2008. EPA’s Administrator provided some assistance in the investigation, but then refused to allow the Committee to interview EPA employees involved in the Libby matter, specifically the EPA engineers and scientists who were on-site in Libby during the relevant time period and the lead Regional attorney for the Libby cleanup.

This report finds:

- **A public health emergency exists in Libby, Montana.** The extent of disease and death in Libby, Montana from the asbestos contamination supports a determination that a public health emergency exists. The engineers, doctors, and scientist who were on-site in Libby during 2001 and 2002 have steadfastly maintained that a public health emergency existed in 2002 and still exists today. The on-site Libby team from 2001 and 2002, as well as the lead Regional attorney, have also maintained that CERCLA requires a declaration of a public health emergency to remove the Libby insulation under CERCLA.
- **EPA’s Region 8 and EPA’s Administrator concurred in a decision to declare a public health emergency in April of 2002.** In early April, 2002, the Acting Regional Administrator for Region 8 mailed to the Assistant Administrator for the Office of Solid Waste and Emergency Response (OSWER) an Action Memo with a declaration of a public health emergency. There is evidence that Administrator of EPA concurred in the decision and her press office prepared the press releases, communication strategies, and other materials in preparation for the imminent announcement. Individuals in Libby also have recounted statements by the former Administrator that she would declare a public health emergency.

- **OMB interfered with EPA's decision-making process and apparently discouraged EPA from declaring a public health emergency.** In mid-April, 2002, the Assistant Administrator for OSWER and Counsel to the Administrator were called to a meeting with high-level officials from OMB and the White House. At that meeting, OMB expressed concern about EPA's imminent declaration of a public health emergency because of the precedent it would set for other sites with Libby asbestos and the public concern it could cause. At this time, EPA reversed its decision to declare a public health emergency. Based on the proximity of time between this high-level OMB meeting and EPA's reversal of its decision, as well as discussions with former EPA officials, it appears likely that OMB discouraged EPA from declaring a public health emergency.
- **EPA's claim that insulation in Libby homes was not a product appears to stem from a concerted effort to avoid declaring a public health emergency, despite evidence that the declaration was warranted and the lack of factual basis for the non-product claim theory.** In April 2002, EPA began to look for justification, other than a public health emergency, for removing the insulation from Libby homes. OSWER and EPA's Office of General Counsel (OGC) proposed that the insulation was not a "product" because homeowners in Libby had taken piles of waste vermiculite outside of Grace's processing facilities and allegedly used it as insulation. This assumption would allow EPA to remove the insulation under CERCLA because the prohibition against removal only applies to "products" which are part of the structure of building. The EPA personnel who were on-site in Libby and the lead Regional attorney adamantly disputed the claim by OSWER and OGC that Libby residents used waste vermiculite as insulation, and told the Assistant Administrator of OSWER that there was no evidence to support it. The Assistant Administrator for OSWER told the Associate General Counsel for OGC there was no direct evidence to support the factual claim that the insulation was not a product. However, the Assistant Administrator for OSWER, urged on by the Associate General Counsel for OGC, signed the Action Memo with the false justification included.¹
- **The residents of Libby were deprived of medical care from the federal government to which they were legally entitled.** A public health emergency existed in Libby in 2002. In cases of a public health emergency caused by exposure to toxic substances, exposed individuals are entitled to medical care from the federal government and other medical assistance as appropriate under the circumstances. Consequently, had a public health emergency been declared, medical care would have been provided by the federal government to the residents of Libby exposed to asbestos.
- **EPA has delayed finishing a toxicity assessment of the Libby asbestos for over six years.** In 2002, EPA personnel on-site at Libby began requesting

¹ This report should not be construed as a demand that EPA stop removing Zonolite Attic Insulation from Libby homes. EPA has authority under CERCLA to remove Zonolite Attic Insulation by declaring a public health emergency in Libby, and the facts would support such a declaration.

toxicological studies on Libby asbestos. Regional officials believed toxicology studies needed to be completed in order to determine if the Libby cleanup is adequate to protect public health. A toxicity assessment was also needed to help determine what should be done about the Libby asbestos that is found at hundreds of old processing facilities and in millions of homes across the United States. However, EPA did not begin to undertake those studies until 2007, when Senator Baucus from Montana demanded that they do so.

- **EPA provided misleading information to the residents of Libby.** From 2003 to 2006, EPA provided letters to homeowners in Libby whose houses were decontaminated by EPA, stating that homeowners did not face any risks from residual asbestos left in their homes. Similar statements were made in a pamphlet given to Libby residents regarding the safety of small quantities of Libby asbestos. However, because EPA does not know the toxicity of Libby asbestos, EPA cannot substantiate the accuracy of any communications with Libby residents indicating that the cleanup of their homes eliminated the danger of contracting an asbestos related disease or that contact with small quantities of Libby asbestos is safe.
- **EPA has failed to address the national issue of asbestos contaminated Zonolite Attic Insulation.** When EPA failed to declare a public health emergency in Libby in 2002, it effectively avoided making a decision on how to deal with the millions of homes in the United States that have Zonolite Attic Insulation. People who work in attics with contaminated insulation may be exposed to dangerous amounts of airborne Libby asbestos. Despite the substantial risk, EPA has not made a sufficient effort to quantify that risk, and is only now beginning to conduct the analysis and studies needed to understand the extent of the toxicity of Libby asbestos.

I. Background

A. History of Libby, Montana

Located in the northwest corner of Montana, 35 miles east of Idaho and 65 miles south of Canada, Libby, Montana, is a community of approximately 3,000 people. In 1881, gold miners working in the mountains near Libby discovered vermiculite ore.² Vermiculite is a lightweight micaceous mineral mined from the earth, milled for impurities, and heated in a furnace where it expands like popcorn. The ore's excellent insulation properties made Libby vermiculite useful as an ingredient in products such as fireproofing and building insulation.³ In the 1920s, the Zonolite Company initiated commercial mining operations to remove the vermiculite, later processing the ore into numerous commercial products.⁴

W.R. Grace purchased the Libby vermiculite mining operation from the Zonolite Company in 1963.⁵ Grace owned and operated the vermiculite mine and related processing facilities until 1990, when it ceased operations.⁶ During the course of operation, the Libby vermiculite mines may have produced as much as 80 percent of the world's vermiculite.⁷ The vermiculite produced in Libby contained amphibole asbestos fibers, a particularly toxic form of naturally-occurring asbestos. For decades Grace processed and sold Libby vermiculite as soil conditioner and insulation, and shipped vermiculite to other processing plants throughout the country.⁸ In addition to releases of asbestos into the air directly from the vermiculite mining and processing activities, workers at Libby were exposed to asbestos while processing the ore and then spread the asbestos fibers to homes, businesses and schools throughout the town. Numerous citizens also installed the contaminated insulation into their homes, opening themselves and their families to potential exposure.

² U.S. EPA, "Libby Site Background" <http://www.epa.gov/region8/superfund/libby/background.html> (retrieved September 21, 2008).

³ Letter from W.R. Grace to the Honorable Christine Todd Whitman, Administrator, Environmental Protection Agency (April 10, 2002).

⁴ U.S. EPA, "Libby Site Background" <http://www.epa.gov/region8/superfund/libby/background.html> (retrieved September 21, 2008).

⁵ U.S. Department of Labor, Office of Inspector General, "Evaluation of MSHA's Handling of Inspections at the W.R. Grace & Company Mine in Libby, Montana," 2 (March 22, 2001).

⁶ *Id.* at 1.

⁷ U.S. EPA, "Libby Site Background" <http://www.epa.gov/region8/superfund/libby/background.html> (retrieved September 21, 2008).

⁸ U.S. EPA, Office of Inspector General, "Report: EPA's Actions Concerning Asbestos-Contaminated Vermiculite in Libby, Montana" 2 (March 31, 2001).

Asbestos exposure can be harmful to humans when the microscopic fibers become airborne and are inhaled.⁹ The fibers penetrate and then irritate the lungs, causing inflammation and scarring.¹⁰ Over time, such asbestos related scarring may develop into mesothelioma, or cancer of the pleural lining of the lung; cancer of the lung itself; or asbestosis, a thickening and scarring of the lungs.¹¹

Of the various types of asbestos, the amphibole asbestos found in Libby vermiculite is considered particularly dangerous, and is therefore significantly more likely to cause serious asbestos related diseases.¹² Because of the latency period – the time from the inhalation of fibers to the onset of disease – people exposed to asbestos may continue to develop asbestos related diseases for decades to come.¹³ When the Office of the Inspector General for the Environmental Protection Agency (EPA) issued its first report on EPA’s response in Libby in 2001, it was noted that a number of Libby residents had recently been diagnosed with asbestos related diseases even though the mining and processing facilities had ceased operations more than ten years earlier.¹⁴ Mortality studies conducted in Libby by ATSDR and the National Institute for Occupational Safety and Health (NIOSH) found that asbestosis in Libby residents occurs approximately forty to sixty times the expected incidence, and that the death rate from asbestosis in the Libby area is among the highest in the nation.¹⁵ It is estimated that several hundred Libby residents have already died from asbestos related illnesses.¹⁶

EPA first became involved in Libby after *Seattle Post-Intelligencer* journalist Andrew Schneider exposed the potential threat of asbestos poisoning.¹⁷ Subsequently, in June of 2000, EPA sent an emergency response team to sample lawn and garden products containing vermiculite and initiated air samples in loading areas near the mine to check for any asbestos fibers.¹⁸ Most of the samples collected showed evidence of asbestos

⁹ Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services, “Public Health Statement: Asbestos, CAS#: 1332-21-4” (September 2001).

¹⁰ U.S. EPA, “Asbestos: Basic Information,” <http://www.epa.gov/asbestos/pubs/help.html#Info> (retrieved September 21, 2008).

¹¹ *Id.* See also U.S. EPA “Action Memorandum Amendment for the Time-Critical Removal Action at the Libby Asbestos Site,” 8 (May 2, 2002).

¹² Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services, “Public Health Statement: Asbestos, CAS#: 1332-21-4” (September 2001).

¹³ U.S. EPA, Office of Inspector General, “Report: EPA’s Actions Concerning Asbestos-Contaminated Vermiculite in Libby, Montana,” 2 (March 31, 2001).

¹⁴ *Id.* at 2.

¹⁵ U.S. EPA “Action Memorandum Amendment for the Time-Critical Removal Action at the Libby Asbestos Site,” 8 (May 2, 2002).

¹⁶ Andrew Schneider, “A Town Left to Die,” *Seattle Post Intelligencer* (November 18, 1999).

¹⁷ Andrew Schneider, “Immediate Cleanup Sought in Mining Town,” *Seattle Post Intelligencer* (February 2, 2000).

¹⁸ U.S. EPA, “Libby Asbestos,” <http://www.epa.gov/region8/superfund/libby> (retrieved September 21, 2008).

contamination. The results of these initial tests prompted EPA to begin a major emergency cleanup response in Libby. In October of 2002, EPA added Libby to the National Priorities List (NPL) and began to establish a program to inspect all properties in Libby.¹⁹

As of 2008, EPA has completed cleanups at over 950 residential and commercial properties.²⁰ EPA expects to continue cleanup efforts and hopes to check at least 150 properties during the 2008 construction season.²¹ However EPA has not yet completed toxicology studies or a full risk assessment to determine if the cleanup is adequate.²² Based on current information, EPA estimates that 1,200 – 1,400 residential and business properties will need some type of cleanup.²³

B. Superfund

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or more commonly known as Superfund)²⁴ to create the hazardous substance cleanup program. Superfund is the federal government's preeminent program for cleaning up the nation's contaminated waste sites and for protecting public health and the environment from releases of hazardous substances. The statute was expanded and reauthorized by the Superfund Amendments and Reauthorization Act of 1986 (SARA).²⁵ Under Superfund, the federal government has the authority to take direct action to respond to situations involving the releases of toxic substances that may endanger public health or the environment.²⁶ Superfund also enables EPA to use the Superfund Trust Fund to cleanup a site.²⁷

The National Oil and Hazardous Substances Pollution Contingency Plan (NCP) contains the procedures and regulations for implementing the Superfund Program.²⁸ Actions under the Superfund program are triggered by a release (or threat of release) of a hazardous substance into the environment. The Superfund cleanup process starts with a

¹⁹ U.S. EPA, "Libby Site Background" <http://www.epa.gov/region8/superfund/libby/background.html> (retrieved September 21, 2008).

²⁰ *Id.*

²¹ *Id.*

²² Status report from EPA, "Status of Toxicity Assessment and Analytical Methods Support Studies for Libby Amphibole" July 2008.

²³ U.S. EPA, "Libby Site Background" <http://www.epa.gov/region8/superfund/libby/background.html> (retrieved September 21, 2008).

²⁴ 42 U.S.C. §§ 9601-9675.

²⁵ Pub. L. 99-499, 42 U.S.C. § 9601.

²⁶ 42 U.S.C. § 9604.

²⁷ 42 U.S.C. 9611-12; 40 CFR 304.

²⁸ 40 CFR 300.

site discovery or with a notification to EPA of a potential hazardous substance release. After a site has been identified, EPA or a state agency performs a preliminary assessment to judge the site's potential hazard. If this assessment determines that the site presents a serious threat, signified by getting a risk score of 28.5 in EPA's hazard ranking scoring system, the site is eligible for inclusion on the National Priorities List. The NPL is the official list of sites designated for long-term cleanup under the Superfund program.

There are two categories of cleanup activity in the Superfund program: (1) short-term removal action; and (2) long-term remedial action. The removal program is aimed at facilitating a quick response as removal actions seek to reduce the most obvious and immediate threats at a site. With some exceptions, Superfund generally limits removal actions to one year and expenditures are capped at \$2 million.²⁹

In contrast to removal actions, remedial actions generally necessitate more funds and time since remediation represents a more permanent cleanup. Generally, the first step in the remedial phase is a comprehensive investigation (feasibility study) of the site and analysis of cleanup alternatives or remedies. Once the feasibility study is completed, EPA selects the appropriate remedy for cleanup. EPA is required to solicit public comment during this decision-making process and states usually play an active role in the remedy selection process. After EPA decides the appropriate cleanup remedy for a site, it issues a formal Record of Decision (ROD). At this stage, the remedial phase, or long-term cleanup, begins.³⁰

Superfund contains certain limitations on the type of material that can be removed or remediated under the statute, including a limitation on removal or remedial action in response to a release from a product which is part of the structure of a building and results in exposure within the building.³¹ However, Superfund also provides EPA with authority to undertake a removal or remedial action with respect to such a product if the release constitutes a public health or environmental emergency and no one else with authority and capability to act will do so in a timely manner.³² In order to use this authority EPA must declare a public health emergency.

C. Summary of Committee's Investigation

On May 18, 2007, the Committee on Environment and Public Works (hereinafter the Committee) requested all EPA documents pertaining to EPA's decision not to declare a public health emergency in Libby in 2002 and to EPA's consideration of conducting

²⁹ CERCLA § 104(c)(1). A waiver can be obtained to bypass the time and budget constraints in this section. § 104(c)(1).

³⁰ 42 U.S.C. § 9621.

³¹ 42 U.S.C. § 9604(a)(3)(B).

³² 42 U.S.C. § 9603(a)(4).

toxicological studies of Libby asbestos since 2000.³³ On August 7, 2007, Senator Baucus held a town hall meeting in Libby, Montana, to review EPA's cleanup of the Libby Superfund site and reiterated his request for all EPA documents related to these issues at the site.³⁴ EPA provided partial responses to the Committee's request on June 15, 2007,³⁵ August 3, 2007,³⁶ and August 31, 2007.³⁷ In total, EPA provided approximately 14,000 pages of documents, the vast majority of which were e-mails from the relevant time period.

During the course of the investigation, staff for the Committee and Senator Baucus (hereinafter Staff) learned that EPA's Office of Inspector General (OIG) had begun a criminal investigation in March of 2006, of EPA's cleanup in Libby, Montana.³⁸ In the latter half of 2007 and the first half of 2008, the OIG briefed the Department of Justice's Public Integrity Section on OIG's investigation, requesting the Department of Justice pursue criminal charges for alleged false statements made by EPA to Libby residents, as well as possible criminal charges for EPA's removal of insulation under Superfund without declaring a public health emergency.³⁹ On June 6, 2008, the Department of Justice declined to pursue criminal charges against EPA officials and returned the matter to the OIG.⁴⁰

On June 16, 2008, the Committee sent a letter to the OIG requesting that the OIG provide the Committee with copies of notes from interviews it conducted with current EPA employees, former EPA employees, and residents of Libby during its criminal investigation. The letter also informed the OIG of the Committee's desire to interview investigators and other personnel within the OIG regarding the criminal investigation.⁴¹ On June 27, 2008, the OIG provided the notes from over a hundred interviews to Staff.⁴²

³³ Letter from Senate Committee on Environment and Public Works to Stephen L. Johnson, Administrator EPA (May 18, 2007).

³⁴ "Public Hearing Held by the Committee on Environmental and Public Works on the Oversight of Federal Efforts to Clean Up Asbestos in Lincoln County, Montana," Libby City Hall, Libby, Montana (August 7, 2007).

³⁵ Letter from Susan Parker Bodine, Assistant Administrator, EPA, to Honorable Barbara Boxer, Chairman, Senate Committee on Environment and Public Works (June 15, 2007).

³⁶ Letter from Susan Parker Bodine, Assistant Administrator, EPA, to Honorable Max Baucus, Senate Committee on Environment and Public Works (August 3, 2007).

³⁷ Letter from Susan Parker Bodine, Assistant Administrator, EPA, to Honorable Max Baucus, Senate Committee on Environment and Public Works (August 31, 2007).

³⁸ Staff interview of Sean Earle (August 26, 2008).

³⁹ Staff interview of Sean Earle (August 26, 2008).

⁴⁰ Staff interview of Sean Earle (August 26, 2008).

⁴¹ Letter from the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Member, Senate Committee on Environment and Public Works, to Bill A. Roderick, Deputy Inspector General, EPA Office of Inspector General (June 16, 2008).

⁴² Letter from Deputy Inspector General Bill A. Roderick, EPA Office of Inspector General, to the Honorable Max Baucus (June 27, 2008).

However, it withheld three interviews because the interviews contained accounts of discussions between EPA and the White House Office of Management and Budget (OMB). The Committee reiterated its request on July 11, 2008;⁴³ however, OIG notified the Committee on July 15, 2008, that the withheld interviews were turned over to EPA's Office of General Counsel for a determination of whether the documents should be released to the Committee.⁴⁴

On August 8, 2008, the Committee sent a letter to Stephen Johnson, Administrator of EPA, asking him to provide the withheld interviews and an email dated May 8, 2002, from OMB to EPA that staff had learned of during discussions with the OIG.⁴⁵ On August 20, 2008, EPA provided copies of the withheld interviews to the Committee, but the portions pertaining to the discussions with OMB were redacted.⁴⁶

When EPA failed to provide the withheld information, Senator Max Baucus (Montana) called EPA Administrator Johnson on August 21, 2008, and requested that he provide the withheld documents to the Committee. Administrator Johnson explained that OMB had instructed EPA not to provide the interviews and the e-mail to the Committee because they effected an important executive interest. After several conference calls between EPA, Staff, and Senate legal counsel, EPA agreed to allow Staff to read the redacted portions of the interviews as well as the withheld OMB e-mail, but not to copy them.⁴⁷ On August 28, 2008, Staff read and took notes on the redacted interviews and the e-mail. EPA has not provided a legal justification for refusing to provide the Committee with copies of the documents.

On August 8, 2008, the Committee sent a letter to EPA, requesting to interview eight current employees about their knowledge of the cleanup in Libby, Montana.⁴⁸ In a letter dated August 28, 2008, and a subsequent phone call with Staff, EPA refused to allow the

⁴³ Letter from the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Member, Senate Committee on Environment and Public Works, to Bill A. Roderick, Deputy Inspector General, EPA Office of Inspector General (July 11, 2008).

⁴⁴ Letter from Bill A. Roderick, Deputy Inspector General, EPA Office of Inspector General, to the Honorable Max Baucus (July 15, 2008).

⁴⁵ Letter from the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Member, Senate Committee on Environment and Public Works, to Stephen Johnson, Administrator, EPA (August 8, 2008).

⁴⁶ Letter from Christopher P. Bliley, Associate Administrator, EPA Office of Congressional and Intergovernmental Relations, to the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Senate Committee on Environment and Public Works (August 20, 2008).

⁴⁷ Letter from Christopher P. Bliley, Associate Administrator, EPA Office of Congressional and Intergovernmental Relations, to the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Senate Committee on Environment and Public Works (August 27, 2008).

⁴⁸ Letter from the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Member, Senate Committee on Environment and Public Works, to Stephen Johnson, Administrator, EPA (August 8, 2008).

Committee to interview all but one EPA employee requested by the Committee.⁴⁹ On September 3, 2008, Staff interviewed this individual, Randy Dietz, Attorney Advisor for Office of Solid Waste and Emergency Response (OSWER). Barry Breen, Deputy Associate Administrator for OSWER, also attended this interview.⁵⁰ At the end of this interview, Staff reiterated to EPA's Deputy General Counsel, who was present during the interview, the Committee's request to interview the other EPA employees, particularly the Libby on-scene coordinator, the EPA toxicologist assigned to the Libby asbestos site, and EPA's lead attorney for the Libby site. On September 16, 2008, after several conference calls, EPA relayed its final decision that it would not allow the Committee to interview the other EPA employees.⁵¹ EPA has failed to provide a legal justification – despite the Committee's repeated requests for a justification – for refusing to allow the Committee to interview the Agency employees with on-the-ground knowledge of EPA's activities in Libby, Montana.

On August 26, 2008, Staff interviewed Sean Earle, the lead investigator on the OIG's Libby criminal investigation. On September 4, 2008, Mike Daggett, Director for Program Integrity Investigations, and Steve Schanamann, a toxicologist with the OIG, were also interviewed.

On August 28, 2008, the Committee sent letters to six former EPA employees: Christine Todd Whitman, former EPA Administrator,⁵² Marianne Horinko, former Assistant Administrator for OSWER,⁵³ Edward Krenik, former head of EPA Congressional Relations,⁵⁴ John Spinello, former Deputy General Counsel,⁵⁵ Jeff Denit, former special assistant to the Assistant Administrator for OSWER,⁵⁶ and Jessica Furey, former Special Counsel to the Administrator.⁵⁷ Except for former Administrator Whitman, who never

⁴⁹ Letter from Christopher P. Bliley, Associate Administrator, EPA Office of Congressional and Intergovernmental Relations, to the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Senate Committee on Environment and Public Works (August 27, 2008).

⁵⁰ Staff interview of Randy Deitz and Barry Breen (September 3, 2008).

⁵¹ Letter from Christopher P. Bliley, Associate Administrator, EPA Office of Congressional and Intergovernmental Relations, to the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Senate Committee on Environment and Public Works (September 16, 2008).

⁵² Letter from the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Senate Committee on Environment and Public Works, to the Honorable Christine Todd Whitman (August 28, 2008).

⁵³ Letter from the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Senate Committee on Environment and Public Works, to Marianne Horinko (August 28, 2008).

⁵⁴ Letter from the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Senate Committee on Environment and Public Works, to Edward Krenik (August 28, 2008).

⁵⁵ Letter from the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Senate Committee on Environment and Public Works, to John Spinello (August 28, 2008).

⁵⁶ Letter from the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Senate Committee on Environment and Public Works, to Jeff Denit (August 28, 2008).

⁵⁷ Letter from the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Senate Committee on Environment and Public Works, to Jessica Furey (August 28, 2008).

made herself available to be interviewed, these interviews were conducted by Staff between September 3 and September 18, 2008.⁵⁸

On September 19, 2008, the Committee sent a letter to EPA requesting to interview Marcus Peacock, current Deputy Administrator of EPA and former Associate Director of OMB during 2001 to 2002. On September 22, 2008, EPA sent a letter to the Committee refusing to allow the Committee to interview Mr. Peacock.

The following Staff report is based on Staff's review of the approximately 14,000 pages of documents, including e-mails, draft action memoranda, press releases, and communication strategies; Staff's review of the notes from over a hundred interviews conducted during the IG's criminal investigation; and Staff's interviews conducted of OIG officials, including the lead criminal investigator, two current EPA officials and eight former EPA officials, and a local doctor and a local county official in Libby, Montana.

II. Findings

A. EPA's Decision to Declare a Public Health Emergency in Libby and the Subsequent Reversal of that Decision

1. Region 8 Assessment of Exposure Risk and Health Impacts

In 2000, the Agency for Toxic Substances and Disease Registry (ATSDR), in conjunction with the Department of Health and Human Services and the EPA, developed a community-based medical testing program, "in response to reports of illness among people exposed to asbestos-contaminated vermiculite in Libby, Montana."⁵⁹ The goal of this program was "to identify the asbestos-related health effects of participants exposed to asbestos from the vermiculite mine near Libby, Montana, and to refer these individuals for additional medical evaluation as needed." The program was also designed to assist

⁵⁸ Staff became aware that Aubrey Miller was no longer at EPA. *See* letter from Christopher P. Bliley, Associate Administrator, EPA Office of Congressional and Intergovernmental Relations, to the Honorable Barbara Boxer, Chairman, and the Honorable Max Baucus, Senate Committee on Environment and Public Works (August 27, 2008). Staff requested to interview Miller, and that interview took place on September 8, 2008.

⁵⁹ Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services, "Year 2000 Medical Testing of Individuals Potentially Exposed to Asbestos-form Minerals Associated with Vermiculite in Libby, Montana" (August 23, 2001).

EPA in identifying and eliminating current and future exposures to asbestos within the community.⁶⁰

The ATSDR program tested individuals eligible for participation, including former workers of W.R. Grace/Zonolite Company, secondary contractors of W.R. Grace, household contacts of former Grace workers, and individuals who had resided, worked, attended school, or participated in activities in the Libby area for a period of six or more months before December 31, 1990.⁶¹ ATSDR conducted a survey of each participant, chest radiographs, and simple breathing tests. The program identified eighteen exposure pathways, including working in the Libby vermiculite mine, living with a W.R. Grace mine-worker, vermiculite containing products within the home or yard, and contact with vermiculite insulation.⁶² ATSDR found that the majority of participants, “reported multiple, rather than single exposure pathways.”⁶³

The report’s findings were extraordinary. ATSDR found out of 6,149 people tested:

- Almost 18% of all participants had pleural abnormalities observed on the chest radiographs.⁶⁴
- 48% of former mine workers had abnormal pleural abnormalities.⁶⁵
- 24% of participants in contact with multiple exposure pathways had abnormal pleural findings, compared with 5% of participants with no apparent exposure.⁶⁶
- Almost 40% of those 65 years or older had pleural abnormalities, “related to both latency and length of exposure”⁶⁷

The asbestos contamination and impact to public health was documented in a memorandum by Christopher Weis, senior toxicologist for EPA Region 8 and science support coordinator for the Libby asbestos site, on July 9, 2001.⁶⁸ Dr. Weis wrote:

Asbestos material is present in soil, raw ore, ore concentrate and other soil-like materials at multiple locations in and around the

⁶⁰ *Id.* at 1.

⁶¹ *Id.* at 4.

⁶² *Id.* at 7-8.

⁶³ *Id.* at 17.

⁶⁴ *Id.* at 26.

⁶⁵ *Id.* at 12.

⁶⁶ *Id.* at 26.

⁶⁷ *Id.* at 13.

⁶⁸ Memorandum from Christopher P. Weis, Science Support Coordinator for Libby Asbestos Site, to Paul Peronard, On-Scene Coordinator for Libby Asbestos Site (July 9, 2001).

community of Libby. This asbestos material is primarily a friable amphibole containing a series of closely related minerals including actinolite, tremolite, winchite and richterite. Asbestos fibers of this type are known to be hazardous to humans when inhaled.

[S]oils and other similar materials that contain elevated levels of friable asbestos minerals are a likely source of on-going release of hazardous fibers to air, and . . . it is necessary to reduce or eliminate pathways of exposure of this material to residents and workers.⁶⁹

Dr. Weis elaborated on the rationale for determining an “imminent and substantial endangerment”⁷⁰ to the health of the people of Libby:

Asbestos fibers from the Libby mine site are hazardous to humans as evidenced by the occurrence of asbestos-related disease in area workers and residents. Workers exposed to asbestos fibers at the Libby mine site have been shown to experience clear and significant increases in the incidence of asbestos-related conditions, including asbestosis, 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.⁷¹

Dr. Weis tested exposure to fibers within Libby residences, and noted three “routine and special activities in the home” that created potentially dangerous exposures to asbestos fibers: routine household activities, active cleaning activities, and simulated remodeling (direct contact with vermiculite insulation).⁷² Dr. Weis’s memo noted a significantly high level of asbestos fibers when there is a disturbance of vermiculite insulation.⁷³

Dr. Weis concluded that EPA should take steps to eliminate exposure pathways of amphibole asbestos in and around Libby, Montana, to ensure the health of Libby community members.⁷⁴

⁶⁹ *Id.* at 1.

⁷⁰ *Id.*

⁷¹ *Id.* at 2.

⁷² *Id.* at 6.

⁷³ *Id.* at 7.

⁷⁴ *Id.* at 12-13.

Superfund cleanups under section 104 of CERCLA generally limit EPA from responding to releases of hazardous substances “from products which are part of the structure of, and result in exposure within, residential buildings or businesses or community structures.”⁷⁵ EPA can respond to such releases, notwithstanding the statutory limitation, if they determine that the 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.”⁷⁶

Internal documents indicate EPA began discussing in 2001 the need to remove Zonolite Insulation. Matt Cohn, senior enforcement attorney in Region 8, drafted a memo dated April 23, 2001, outlining the legal issues presented by the situation in Libby.⁷⁷ He wrote:

EPA is concerned that failure to remove Zonolite Insulation from contaminated homes may result not only in post-cleanup recontamination indoors, but may also result in releases to the environment...⁷⁸

With respect to EPA’s authority to remove attic insulation, Cohn explained:

There is a threat of release to the environment if the Zonolite Insulation is not removed from the homes, and in accordance with Agency guidance a response action is generally appropriate when such a release poses a hazard to public health. However, while the asbestos in Zonolite Insulation in Libby homes may present a substantial threat of release into the environment, EPA’s ability to respond is limited by section 104(A)(3)(B) and (4) of CERCLA, which indicates that EPA shall not respond to a threat of release ‘*from products which are part of the structure of, and result in exposure within, residential buildings*’ Unless it ‘*constitutes a public health emergency ... and no other person with the authority and capability to respond to the emergency will do so in a timely manner.*’⁷⁹

In regards to determining whether a public health emergency exists, Cohn stated, “ATSDR’s findings, along with EPA’s toxicologist’s conclusions, will form the basis for such a determination.”⁸⁰

⁷⁵ CERCLA § 104(a)(3)(b); 42 U.S.C.A. § 9604(a)(3)(b). *See also* Matt Cohn, “Legal Issues and Policy Implications of Performing CERCLA Cleanups In Indoor Residential Areas Located Within the Libby Asbestos Site, Libby, Montana (April 23, 2001).

⁷⁶ CERCLA § 104(a)(4); 42 U.S.C.A. § 9604(a)(4)

⁷⁷ Matt Cohn, “Legal Issues and Policy Implications of Performing CERCLA Cleanups In Indoor Residential Areas Located Within the Libby Asbestos Site, Libby, Montana (April 23, 2001).

⁷⁸ *Id.* (emphasis in original).

⁷⁹ *Id.*

⁸⁰ *Id.*

Cohn also noted the severity of the condition in Libby, Montana: “EPA rarely finds health problems of the magnitude of those found in Libby. *If a precedent is to be set in using this section of CERCLA, Libby is an appropriate place to do so.*”⁸¹

Cohn was one of many to note Libby’s unique circumstances. EPA noted that Libby was (and remains) a unique situation warranting “special attention and prompt action.”⁸² EPA cites widespread contamination and very high concentrations of asbestos in the Libby community, multiple human exposure pathways to asbestos in Libby, and the large number of documented asbestos related health effects.⁸³ In Staff’s interviews, current and former employees, based on their review of health information of the people of Libby, noted the degree of health and environmental concerns with the Libby site.

Dr. Weis concurred with the need for removal of Zonolite Attic Insulation and provided the scientific basis for declaring a public health emergency. In December of 2001, Dr. Weis provided an updated memorandum, subject: “Amphibole Mineral Fibers in Source Materials in Residential and Commercial Areas of Libby Pose an Imminent and Substantial Endangerment to Public Health.”⁸⁴ This memo provided the rationale for his determination of the public health endangerment as a result of asbestos fibers present in a variety of different source materials within residential and commercial locations in Libby, Montana. Among those source materials, Dr. Weis noted the vermiculite insulation that contained friable asbestos minerals, and stated, “[a]ctive disturbance of vermiculite results in very high concentrations of fibers. . .”⁸⁵

Weis concluded that “vermiculite insulation in homes or commercial buildings is a substantial reservoir of asbestos-contaminated source material that may lead to on-going exposure of area residents and workers.”⁸⁶ Dr. Weis again recommended EPA take appropriate steps to reduce or eliminate exposure pathways.⁸⁷

⁸¹ *Id.* (emphasis added).

⁸² U.S. EPA, “What Makes Libby a Unique Situation Requiring Special Attention,” (April 5, 2002).

⁸³ *Id.*

⁸⁴ Memorandum from Christopher P. Weis, Senior Toxicologist/Science Support Coordinator for Libby Asbestos Site, to Paul Peronard, On-Scene Coordinator for Libby Asbestos Site (December 20, 2001) (emphasis added).

⁸⁵ Memorandum from Christopher P. Weis, Senior Toxicologist/Science Support Coordinator for Libby Asbestos Site, to Paul Peronard, On-Scene Coordinator for Libby Asbestos Site (December 20, 2001) (emphasis added). Weis reiterated this point in an addendum, stating, “Libby vermiculite [insulation] may serve as a source [of contamination] if disturbed.” Memorandum from Christopher P. Weis, Senior Toxicologist/Science Support Coordinator for Libby Asbestos Site, to Paul Peronard, On-Scene Coordinator for Libby Asbestos Site (April 16, 2002).

⁸⁶ *Id.* at 11.

⁸⁷ *Id.* at 16.

2. Region 8 Recommendation EPA Declare a Public Health Emergency

Records show officials within Region 8 and EPA Headquarters in Washington, D.C., convened a conference call in February 2002, to discuss the Action Memo for the Libby clean-up and the need to declare a public health emergency. On February 6, 2002, an EPA Headquarters employee emailed officials within Headquarters and Region 8, following the call: "Region 8 will draft basis for public health emergency, write up as a separate piece – for now – we will determine how it best fits in the Action Memo document. . ."⁸⁸ The email reiterated the basis for declaring a public health emergency: ATSDR studies, risk assessment, and the unique situation in Libby, Montana.

Subsequently, Region 8 in consultation with EPA Headquarters began drafting the basis for declaring a public health emergency. On February 12, 2002, Paul Peronard, on-scene coordinator for the Libby asbestos site, provided the group with a draft of the public health determination, to be inserted "somewhere in the Current Action Memo Amendment."⁸⁹ Peronard attached a one-page document providing the basis for declaring a public health emergency. The regional coordinator at EPA Headquarters, also sent a document detailing the unique nature of Libby, Montana:

EPA studies indicate that massive historical and ongoing asbestos releases have left contamination throughout the Libby area. The mine and processing facilities were very close to the center of town, contaminating many commercial and residential properties.

Libby is unique because EPA has found that public health effects related to contamination at the site constitute a public health emergency.⁹⁰

Discussions between Region 8 and EPA Headquarters on the Action Memo Amendment and on declaring a public health emergency were ongoing in early 2002. Attorneys within EPA's Office of General Counsel (OGC) participated in discussions with Region 8 about the Action Memo in mid-February 2002, shortly after Region 8 drafted language to declare a public health emergency.⁹¹ OGC edited the draft Action Memo, but there was

⁸⁸ Email from Patty Kalla to Jeff Denit, Peter Grevatt, Tom Shekells, Dan Thornton, Lee Tyner, Victoria Vanroden, Douglas Skie, Max Dodson, Matthew Cohn, Chris Weis, Paul Peronard, Steve Hawthorn, and Schatzi Fitz-James (February 6, 2002).

⁸⁹ Email from Paul Peronard to Tom Shekells, Patty Kalla, Chris Weis, Matthew Cohn, Douglas Skie, James Freeman (DOJ), and Steve Hawthorn (February 12, 2002) (with attachment "Determination that a Public Health Emergency Exists in Libby").

⁹⁰ Email from Dan Thornton to Patty Kalla, Lee Tyner, Matthew Cohn (February 14, 2002).

⁹¹ Email from Lee Tyner to Earl Salo (February 15, 2002) (with attachment Draft "Action Memorandum Amendment").

no indication officials within OGC considered striking the public health emergency determination.⁹²

On February 20, 2002, Paul Peronard circulated the latest draft of the Libby Action Memo to officials within Headquarters:

[T]his Action Memorandum Amendment changes the scope of the Removal Action to address all sources of amphibole asbestos where significant exposure may still take place. This approach is necessary because EPA and ATSDR investigations indicate that people in Libby have been exposed to amphibole asbestos via multiple pathways, and that cumulative exposures may be contributing to asbestos-related health effects.⁹³

Peronard stated, “The document is now in the Region to finalize . . . and send to HQ for final review and signature.”⁹⁴

3. EPA Headquarters’ Support for Region 8’s Recommendation to Declare a Public Health Emergency

On February 21, 2002, Marianne Horinko, Assistant Administrator for OSWER, received Peronard’s draft language,⁹⁵ and commented, “we need to get ATSDR on the record as well [regarding the public health emergency declaration]. We need to continually re-emphasize that the PHE is based on gross exposure, not just insulation.”⁹⁶ Later that month, Peter Grevatt, national science advisor at OSWER, responded, “I spoke with Henry Falk from ATSDR last week. They will support our action.”⁹⁷ Horinko

⁹² Email from Lee Tyner to Patty Kalla, Dan Thornton, Matthew Cohn, and Steve Hawthorn (February 15, 2002).

⁹³ “Draft Action Memorandum Amendment” (February 20, 2002).

⁹⁴ Email from Paul Peronard to Lee Tyner, Dan Thornton, Jeff Denit, Mike Shapiro, Peter Grevatt, Steve Jones, Richard Troast, Tom Sheckells, Patty Kalla, Matthew Cohn, Victoria Vanroden, Douglas Skie, Steve Hawthorn, Tom Simons, Schatzi Fitz-James, and James Freeman (DOJ) (February 20, 2002).

⁹⁵ Email from Mike Shapiro to Jeff Denit, copying Dan Thornton, Douglas Skie, Lee Tyner, Matthew Cohn, Patty Kalla, Peter Grevatt, Richard Troast, Schatzi Fitz-James, Steve Hawthorn, Steve Jones, Tom Shekells, Tom Simons, Victoria Vanroden, and James Freeman (DOJ), blind copying Marianne Horinko (February 21, 2002).

⁹⁶ Email from Marianne Horinko to Mike Shapiro, Dan Thornton, Douglas Skie, Lee Tyner, Matthew Cohn, Patty Kalla, Peter Grevatt, Richard Troast, Schatzi Fitz-James, Steve Hawthorn, Steve Jones, Tom Sheckells, Tom Simons, Victoria Vanroden, and James Freeman (DOJ) (February 22, 2002).

⁹⁷ Email from Peter Grevatt to Jeff Denit, copying Mike Shapiro, Tom Sheckells, and Marianne Horinko (February 25, 2002).

responded, “We need to get on Gov Whitman[’s] calendar to brief and make recommendations post haste.”⁹⁸

In February 2002, the Office of Pollution, Pesticides, and Toxic Substances (OPPTS) voiced its concerns about removing the attic insulation, citing potential national implication.⁹⁹ “The data we have at this point do not appear to suggest that [Zonolite Attic Insulation] will contribute significantly to risk in a typical attic situation. . . . In conclusion, we do not think a supportable argument has been made to declare Libby a Public Health Emergency based on the questionable added exposure burdens from [Zonolite Attic Insulation].¹⁰⁰ However, EPA appeared to discount the opinion of OPPTS and continued on the track of declaring a PHE.¹⁰¹

Attorneys in EPA Headquarters supported Region 8’s legal authority to remove Zonolite Attic Insulation by declaring a public health emergency.¹⁰² In March 2002, Jessica Furey, special counsel to the Administrator, requested EPA OGC provide information on Horinko’s authority to sign the Action Memo.¹⁰³ OGC wrote:

To respond to releases or threatened releases of hazardous substances that are part of the structure of (and result in exposure within) residences, EPA needs to make a determination under CERCLA § 104(a)(4) that the release or threatened release constitutes a public health emergency and no one else has the authority and capability to respond in a timely manner. . . . So, by signing the amendment to the Libby response action to clean up vermiculite insulation, Marianne [Horinko] will both make the § 104(a)(4) emergency finding (authorized by Delegation 14-2) and approve the Regional Administrator’s 104(c)(1) emergency finding (required by Delegation 14-2).¹⁰⁴

OGC also quelled earlier concerns regarding W.R. Grace’s ability to contest the public health emergency determination, “[i]n general, section 113(h) of CERCLA will protect

⁹⁸ Email from Mariaone Horinko to Peter Grevatt, copying Jeff Denit, Mike Shapiro, and Tom Sheckells (February 25, 2002).

⁹⁹ Email from Tom Simons to Peter Grevatt, Paul Peronard, Patty Kalla, and Tom Sheckells, copying Brad Schultz, Laura Casey, Cindy Fraleigh, Dave Kling, Dennis Deziel, Priscilla Flattery, Tony Baney, William Sanders, Victoria Vanroden (February 22, 2002) (with attachment “OPPT Comments on Action Memorandum Amendment Removal Action at the Libby Asbestos Site (February 22, 2002).

¹⁰⁰ “OPPT Comments on Action Memorandum Amendment Removal Action at the Libby Asbestos Site” (February 22, 2002).

¹⁰¹ “Public Health Emergency Determination and Action Memorandum Amendment for the Time-Critical Removal Action at the Libby Asbestos Site-Libby, Montana.” (March 14, 2002).

¹⁰² Email from Lee Tyner to Earl Salo (March 18, 2002) (with attachment “Libby Briefing for John Valeri”).

¹⁰³ Email from Lisa Friedman to Lee Tyner (March 15, 2002).

¹⁰⁴ *Id.* See also email from Lisa Friedman to Earl Salo (March 15, 2002).

the Agency from judicial review of its choice of response action until the work is done.”¹⁰⁵

Headquarters proceeded with preparations for the declaration of a public health emergency. Emails indicate Horinko requested to brief Administrator Whitman in early March.¹⁰⁶ On February 26, 2002, Horinko told Grevatt to “work with Joe Martyak [press officer for EPA Headquarters] on the press statement for Libby.”¹⁰⁷ She stated, “I’d like to frame it as, we are declaring a [public health emergency] due to the gross, long term exposures for the Libby residents, and thus we are taking aggressive action (including select removal of insulation).”¹⁰⁸ It appears EPA staff briefed Administrator Whitman on March 19, 2002.¹⁰⁹ On April 9, 2002, Bonnie Piper, spokeswoman with EPA Headquarters Press Office, emailed staff, including Jessica Furey, special counsel for the Administrator, noting: “*I believe CTW [Administrator Whitman] wants this PHE announced within 10 days.*”¹¹⁰

In fact, Lincoln County Commissioner Marianne Roose, in an interview with Staff, verified that Administrator Whitman discussed declaring a public health emergency when she visited Libby, in September 2001. Roose commented:

“[Administrator Whitman] listened to the concerns of the community, we had different folks that had testified, and Senator Baucus asked some questions, and [Administrator Whitman] of course asked several questions, and when it was all done she was really, I have to tell you, she

¹⁰⁵ Email from Lee Tyner to Earl Salo (March 18, 2002) (with attachment “Libby Briefing for John Valeri”). In staff interviews of current EPA officials, EPA has claimed the threat of a suit by Grace that would stop EPA’s removal of the insulation was a primary reason they eventually rejected the PHE declaration in 2002. Administrator Whitman, in a January 16, 2003, letter to Senator Patty Murray also cited possible legal challenges as a reason she ultimately decided not to declare a PHE. See letter from the Honorable Christine Todd Whitman to the Honorable Patty Murray (January 16, 2003). WR Grace did oppose EPA’s plan to remove attic insulation. *Letter to Whitman from Corcoran*. However, staff has been unable to find any mention of this legal concern in the e-mails and other historical records from the relevant time period that EPA provided to the Committee. Moreover, staff notes that section 113(h) of CERCLA has historically acted as a complete bar to legal challenges to EPA’s removal or remedial actions under CERCLA.

¹⁰⁶ Email from Jessica Furey to John Spinello (March 4, 2002). See also email from Marianne Horinko to Peter Grevatt, copying Jeff Denit, Mike Shapiro, and Tom Sheckells (February 25, 2002) and email from Susan Bromm to John Spinello (February 28, 2002).

¹⁰⁷ Email from Marianne Horinko to Peter Grevatt, Jeff Denit, copying Barbara Hostage, Gayle Rice, and Caroline Brown (February 26, 2002).

¹⁰⁸ *Id.*

¹⁰⁹ Email from Patty Kalla to Marianne Horinko, Mike Shapiro, Jeff Denit, Peter Grevatt, Larry Reed, Cindy Fraleigh, Tom Simons, Lee Tyner, Earl Salo, Lisa Friedman, Dave Kling, Susan Bromm, Victoria Vanroden, John Spinello, Bonnie Piper, Jessica Furey, Douglas Skie, Steve Hawthorn, Max Dodson, Jack McGraw, Paul Peronard, Matthew Cohn, Chris Weis, Tom Sheckells, and Richard Troast (March 18, 2002).

¹¹⁰ Email from Bonnie Piper to Joe Martyak, Jessica Furey, Bonnie Bellow, Jane Kenny, Paul Gilman, Ed Krenik, Randy Deitz, Michelle McKeever, and John Kasper (April 9, 2002) (emphasis added).

was pretty emotionally touched by what she saw and heard that day, and she promised that when she went back to DC that she would see that a PHE was declared on behalf of the community of Libby, MT due to all of the evidence and the concern that she had had presented to her that day at the hearing.”¹¹¹

In early March 2002, documents including draft press releases, communication strategies and the draft action memorandum indicate that EPA’s declaration of a public health emergency in Libby was imminent.¹¹² In fact, not only did EPA draft press releases, ATSDR received approval on its own press release, announcing the public health emergency.¹¹³

On March 28, 2002, Jeff Denit, special assistant to the Assistant Administrator for OSWER (Horinko), emailed EPA staff, “timing of pending final decision on declaration of Public Health Emergency: Tentatively, the earliest date for this is April 5, 2002 and may be the following week to allow for full coordination and completion of materials and records.”¹¹⁴ Denit also indicated press materials had been drafted: “because of the unique conditions found at Libby and because this is the first time a public health emergency has ever been declared under ‘superfund’, it is likely to receive some national coverage. The PHE allows targeted cleanup of insulation product at Libby. . .”¹¹⁵

EPA Headquarters had drafted a press release, and continued to make edits on the document throughout late March and early April.¹¹⁶ An EPA Headquarters official emailed, “It seems to me the news is that EPA for the first time is declaring a public health emergency under the Superfund law, which should be in the first paragraph.”¹¹⁷ EPA OSWER sent all press materials to Jessica Furey, in Administrator Whitman’s office:

We are targeting March 27, 2002, for completing ‘good’ drafts of the desk statements, fact sheets, and Q and As. *These documents*

¹¹¹ Staff interview with Marianne Roose (September 19, 2008).

¹¹² Draft Press Release, “EPA Continues Cleanup Activities in Libby, MT: Agency to Address Residential and Commercial Property Cleanups” (March 28, 2002). See also email from Jeff Denit to Susan Spencer, copying Tom Sheckells (March 28, 2002), email from Lisa Friedman to Lee Tyner (March 15, 2002), email from Bonnie Piper to Joe Martyak, Jessica Furey, Bonnie Bellow, Jane Kenny, Paul Gilman, Ed Krenik, Randy Deitz, Michelle McKeever, and John Kasper (April 9, 2002), and email from Tom Sheckells to Jessica Furey, copying Marianne Horinko, Gayle Rice, Larry Reed, and Jeff Denit (March 22, 2002).

¹¹³ Email from Kathy Skipper, CDC, to Bonnie Piper (May 1, 2002).

¹¹⁴ Email from Jeff Denit to Susan Spencer, copying Tom Sheckells (March 28, 2002).

¹¹⁵ *Id.*

¹¹⁶ Email from Suzanne Wells to Jeff Denit, Tom Sheckells, and Helen Duteau (March 28, 2002).

¹¹⁷ Email from Lauren Mical to Jeff Denit, copying Randy Deitz and Marjorie Buckholtz (April 1, 2002).

*can be relied upon to prepare the press statement and Governor Whitman's talking points.*¹¹⁸

This press release eventually included a drafted quote by Administrator Whitman:

The EPA believes that the conditions in Libby present an imminent and substantial endangerment to human health and the environment. By declaring a public health emergency, the EPA can take aggressive steps to protect the citizens of Libby from enduring further exposure to asbestos.¹¹⁹

Several former EPA officials involved with Libby have told Staff it would be uncharacteristic for the Agency to produce communication documents, including press releases, unless a decision had been made by the Administrator. In Staff's interview with Jessica Furey:

Staff: Is it possible then that people were preparing/drafting an Action Memo that had a public health emergency, press office drafting fact sheets and press releases, would they do that without thinking that's where the agency was going to go with that?

Furey : That would be unusual to have communications materials drafted before a final decision is made.¹²⁰

Staff also interviewed Ed Krenik, head of EPA Congressional Relations:

Staff: So it's not unusual for press to be prepared by Headquarters press office prior to this decision?

Krenik: Well I don't know if Headquarters created that document or if it was the region and sent...

Staff: It was Headquarters.

¹¹⁸ Email from Tom Sheckells to Jessica Furey, copying Marianne Horinko, Gayle Rice, Larry Reed, and Jeff Denit (March 22, 2002) (emphasis added). *See also* email from Earl Salo to Bonnie Piper, copying Tom Sheckells, Matthew Cohn, and Lee Tyner (April 2, 2002), and email from Bonnie Piper to Marjorie Buckholtz, copying Marianne Horinko, Gayle Rice, and Lauren Mical (April 9, 2002).

¹¹⁹ Email from Bonnie Piper to Joe Martyak, Marianne Horinko, Gayle Rice, Jeff Denit, Tom Sheckells, Lauren Mical, Dan Thornton, Patty Kalla, Helen Duteau, Dave Ryan, Dave Deegan, Steffanie Bell, Jessica Furey, Paul Gilman, Jane Kenny, Bonnie Bellow (April 9, 2002) (with attachment Draft Press Release, "EPA Continues Cleanup Activities in Libby, MT: Agency to Address Residential and Commercial Property Cleanups" (March 28, 2002)).

¹²⁰ Staff interview of Jessica Furey (September 9, 2008).

Krenik:From what I know I would say it would be, that the Headquarters office would not create a press release until there was a decision made at Headquarters. So if you're telling me that that document was created by somebody at Headquarters prior to a decision being made at Headquarters, I would find that strange.¹²¹

On April 5, 2002, Region 8 Acting Regional Administrator Jack McGraw signed a transmittal memo to Horinko recommending signature, and the Action Memorandum Amendment was mailed to EPA Headquarters.¹²² The document stated, "The purpose of this ACTION MEMORANDUM AMENDMENT is to: 1) document the determination that a public health emergency exists in the Libby Valley in Lincoln County, Montana. . . ."¹²³ On April 9, 2002, Dan Thornton, coordinator for Region 8 at EPA Headquarters, emailed Jessica Furey, stating, "per your call last night, this is a status update on the Libby, Montana announcement."¹²⁴ Thornton stated McGraw had signed the transmittal memo recommending signature to the Action Memo Amendment and noted, "*Marianne Horinko could sign by the end of the week.*"¹²⁵

4. EPA Headquarters' Consideration of Alternatives to Avoid Declaring Public Health Emergency

However, on April 9, 2002, there was an abrupt reversal of EPA's decision to declare a public health emergency. That day, Jessica Furey met with EPA's OGC.¹²⁶ Furey requested OGC to draft alternatives for EPA's legal authority to remove the Libby attic insulation. Earl Salo, Assistant General Counsel, responded to Furey, noting the lack of any real alternative.¹²⁷

Staff was unable to definitively determine who originally gave the directive to come up with alternate theories for dealing with Libby attic insulation.¹²⁸ However, emails

¹²¹ Staff interview of Ed Krenik (September 11, 2008).

¹²² "Action Memorandum Amendment" (April 10, 2002) and email from Dan Thornton to Jessica Furey, copying Jeff Denit, Bonnie Piper, Paul Gilman, Peter Grevatt, Tom Shckells, Lauren Mical, Victoria Vanroden, Larry Reed, Tom Simons, and Lee Tyner (April 9, 2002).

¹²³ "Action Memorandum Amendment" 1 (April 10, 2002).

¹²⁴ Email from Dan Thornton to Jessica Furey, copying Jeff Denit, Bonnie Piper, Paul Gilman, Peter Grevatt, Tom Shckells, Lauren Mical, Victoria Vanroden, Larry Reed, Tom Simons, and Lee Tyner (April 9, 2002).

¹²⁵ *Id.* (emphasis added).

¹²⁶ Meeting request from Jessica Furey to Earl Salo and Lisa Friedman (April 9, 2002, 3:00 p.m.).

¹²⁷ Email from Earl Salo to Jessica Furey, copying Lisa Friedman, Lee Tyner, Susan Bromm, and Victoria Vanroden (April 9, 2002).

¹²⁸ The April email seems to indicate Administrator Whitman's interest in alternative theories. Email from Caroline Previ to Lee Tyner, Earl Salo, Victoria Vanroden, Tom Sheckells, Patty Smith, and

indicate a high-level meeting was set up between EPA officials and White House Office of Management and Budget (OMB) during the same time period that Jessica Furey requested OGC to find alternatives to the public health emergency.¹²⁹ The meeting was scheduled for April 16, 2002, with participants including Jessica Furey, Marianne Horinko, and OGC,¹³⁰ as well as Phillip Perry, General Counsel to OMB, Marcus Peacock, Associate Director of OMB, Diana Schacht, Special Assistant for Domestic Policy for White House Domestic Policy Council, and John Howard, with White House Council of Environmental Quality (CEQ).¹³¹ In Staff's interview of Jessica Furey, she noted:

I do remember going over to OMB with Marianne for one meeting, I remember the issue of precedent coming up. There was a lot of discussion if this had been done before, there was concern about sort of the slippery slope, if you do it in this case why this situation and where do you draw the line for other situations. And will that create public hysteria.¹³²

Later in the interview with Furey, the following exchange took place regarding the directive to look at options other than a public health emergency:

Staff: Our million dollar question here is if you're preparing press releases, and now all of a sudden you're looking for options ... do you know where that direction came from to look at other options?

Furey: Where? I don't remember specifically. I remember we went over to OMB and we got a lot of questions about precedent, had this been done before, but I don't remember who specifically raised it first. You know, I don't remember, that's a good question. It's not something that Whitman would have initiated that I can think of.¹³³

Matthew Cohn (April 10, 2002). However, Jessica Furey stated to Committee staff that she was unsure where the directive came from. See Staff interview of Jessica Furey (September 9, 2008).

¹²⁹ Email from Lisa Friedman to Earl Salo (April 11, 2002) (forwarding meeting "Libby Mtg w/ Furey/Horinko/Friedman/Perry-OMB/Peacock-OMB/Schact-DPC/Howard-CEQ", scheduled for April 16, 2002, at 1:00 p.m.)

¹³⁰ Emails indicate Friedman asked Salo to go in her place. Email from Lisa Friedman to Earl Salo (April 11, 2002) Salo later agrees. Email from Earl Salo to Gail Davis, copying Lisa Friedman (April 12, 2002).

¹³¹ Email from Caroline Brown to OSWER Calendar Distribution (April 15, 2002) (attaching Horinko's schedule, including "Libby Mtg w/ Furey/Horinko/Friedman/Perry-OMB/Peacock-OMB/Schact-DPC/Howard-CEQ", scheduled for April 16, 2002, at 1:00 p.m.). Jessica Furey confirmed this meeting occurred during her interview with Committee staff. See also, Staff interview of Jessica Furey (September 9, 2008).

¹³² Staff interview of Jessica Furey (September 9, 2008).

¹³³ *Id.*

EPA appeared to be prepared to declare a public health emergency until the high-level OMB meeting. Following this meeting, EPA reversed course on declaring a public health emergency. From this sequence of events, as well as other documents reviewed and the interviews of former EPA employees, there is reason to believe OMB discouraged EPA from declaring a public health emergency, and EPA thereafter tried to find an alternate way to justify removing attic insulation.

OGC began discussing three “possible arguments for not making a public emergency finding.” On April 10, 2002, just one day after Furey met with OGC, OGC emailed Furey, providing what appears to be a preliminary response, listing three alternatives to declaring a public health emergency.¹³⁴ Lisa K. Friedman, Associate General Counsel for OSWER, told Furey, “we’ll let you know later today what we come up with!”¹³⁵

OGC then proceeded to draft legal reasoning for each of the three alternatives, including the alternative of insulation removal under CERCLA based on it being a “non-product.”¹³⁶ OGC outlined that CERCLA limits EPA when the removal is based on exposure within buildings from *products* which are part of the structure. However, OGC was aware that W.R. Grace put out piles of waste vermiculite for the residents of Libby to take and use, and so OGC proposed that Libby residents might have placed this waste vermiculite in their attics. Consequently, OGC argued the insulation found in Libby attics is not a product.¹³⁷ It appears that the purpose of this evaluation was tactic to avoid declaring a public health emergency.

However, this waste vermiculite was not used in the attics of Libby homes. In the interview with OIG, Paul Peronard, explained that EPA Headquarters’ factual basis for the proposed non-product theory was invalid.¹³⁸ Peronard stated that vermiculite must be expanded to be suitable for insulation.¹³⁹ The piles of vermiculite left out for Grace

¹³⁴ Email from Lisa Friedman to Jessica Furey, copying Earl Salo and Lee Tyner (April 10, 2002). First, OGC proposes that the insulation is not “product”, citing their understanding that some Libby residents picked up “off-spec insulation” from the Grace plant to use in their homes. Second, OGC suggests the insulation does not result in “exposure within” a building but instead poses risk of outdoor exposure. The third alternative is that the insulation is not “part of the structure of” a building.

¹³⁵ *Id.*

¹³⁶ Email from Earl Salo to Lee Tyner and Lisa Friedman (April 10, 2002) (with attachment “Argument on Indoor Exposure”) and email from Lee Tyner to Lisa Friedman and Earl Salo (April 10, 2002) (with attachments “Option 2 – The removal of the vermiculite insulation does not fall within the restrictions of CERCLA § 104(a)(3)(B)).

¹³⁷ *Id.*

¹³⁸ OIG interview of Paul Peronard (August 6, 2007).

¹³⁹ *Id.*

employees were unexpanded vermiculite, not suitable for attic insulation.¹⁴⁰ Therefore, Peronard says, the non-product theory is inaccurate.¹⁴¹

However, OGC made the assumption that Libby community members used this waste vermiculite as insulation. Thus, “it is not really a product as we usually think of ‘product’ – something carefully manufactured and carried in the stream of the structure of the building – it was just poured into the interstices in the walls and above the ceiling.”¹⁴²

Salo later clarified OGC thinking with respect to the non-product theory: “Some of the insulation was made available to homeowners at no cost by a local manufacturer, which may not have been packaged, labeled, inspected, tested or otherwise processed the insulation as would normally be done for a commercial product. . . . EPA is considering interpreting the term ‘product’ not to include this insulation. Our legal theory would be that Congress did not address the question of how to interpret the term ‘product,’ and that a reasonable interpretation under Chevron¹⁴³ is to limit it to substances processed, and therefore regulated, in ways typical of commercial products, because substances not processed in this manner are more likely to pose risks that warrant cleanup.”¹⁴⁴

However, it appears OGC itself was unsure of the factual basis for this claim, and stated:

Sometimes Grace left piles of vermiculite (*off-spec? expanded?*) around for the citizens of Libby (*or just employees?*) to take home. . . . We cannot now distinguish between that vermiculite insulation that was bought in bags as a product and installed in homes and businesses, and that vermiculite that Grace made available and people in town helped themselves to (*true?*)¹⁴⁵

On April 10, 2002, OGC sent Furey their response, “here’s a rough stab at trying to articulate arguments which would support EPA’s removing asbestos-contaminated insulation from homes in Libby, Montana without making a public health emergency finding under CERCLA § 104(a)(4). *All of them are very fact-dependent, and we really don’t know whether we have the facts to make the arguments.*”¹⁴⁶ Furey responded, “thanks for your good (and quick!) work on this.”¹⁴⁷

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Email from Lee Tyner to Lisa Friedman and Earl Salo (April 10, 2002).

¹⁴³ *Chevron USA Inc. v. NRDC*, 467 US 837 (1984).

¹⁴⁴ Email from Earl Salo to OGC Associates, copying Lee Tyner, Lisa Friedman, and John Valeri (April 19, 2002).

¹⁴⁵ Email from Lee Tyner to Lisa Friedman and Earl Salo (April 10, 2002) (emphasis added).

¹⁴⁶ Email from Lisa Friedman to Jessica Furey, Marianne Horinko, and Jeff Denit, copying Earl Salo and Lee Tyner (April 10, 2002) (with attachment) (emphasis added).

¹⁴⁷ Email from Jessica Furey to Lisa Friedman (April 10, 2002).

Matt Cohn, enforcement attorney in Region 8, was also asked to contribute to alternative options for EPA Administrator Whitman.¹⁴⁸ At some point, Cohn received a draft of OGC's suggestions. On April 12, 2002, Matt Cohn sent a memo to Furey discounting all three of EPA's alternative legal theories.¹⁴⁹ With respect to the 'non-product' theory, Cohn noted, "There is nothing in our record to indicate that these 'giveaways' were put in people's attics. . . . While it would not be unreasonable to assume some small amount did get used as insulation, it would be difficult to argue to a judge that the amount was significant."¹⁵⁰ On April 15, 2002, Cohn again conveyed these concerns, this time to Horinko's special assistant, Jeff Denit. Denit emailed Horinko:

I've double-checked w/ Matt Cohn about record support for 'non-product' insulation: . . . The giveaways we can document are for wastes used at track, out buildings, yard rocks that wouldn't be used in insulation. *Since Libby is one of the few, if not only site where EPA is looked upon favorably, and PHE would be favorably received and admin'r would be praised, ????*¹⁵¹

In Horinko's interview, Staff asked her about Region 8's concerns with the 'non-product' theory:

Staff: Did the region ever come back to you and say we don't think the facts supported [the non-product theory]?

Horinko: As I recall there was some back and forth about that, but my feeling was that if OGC stands behind it, they're a fine group of lawyers.

Staff: Do you remember Matt Cohn with Region 8? Do you recall his involvement with this?

Horinko: I believe he was the one raising the questions about the factual basis for the waste determination.

Staff: In what context do you recall?

Horinko: He may have written a memo or an email, something in writing.

¹⁴⁸ Email from Caroline Previ to Lee Tyner, Earl Salo, Victoria Vanroden, Tom Sheckells, Patty Smith, and Matthew Cohn (April 10, 2002).

¹⁴⁹ Fax from Matt Cohn to Jessica Furey, "Response to OGC Alternatives to Public Health Emergency" (April 12, 2002).

¹⁵⁰ *Id.*

¹⁵¹ Email from Jeff Denit to Marianne Horinko (April 15, 2002) (emphasis added).

- Staff: But when you went with the non product theory that discounted what he was saying?
- Horinko: Well, the lawyers in OGC assured me they had enough evidence to make that determination. It's not the first time lawyers have disagreed about something.
- Staff: So did the attorneys at OGC expressly note Matt Cohn's concerns and say no, we feel...
- Horinko: I don't remember that they expressly noted Matt's concerns or just assured us that they felt they had enough evidence to support that determination.¹⁵²

However, Earl Salo in his second interview with OIG noted he was misinformed about the use of the waste vermiculite:

SALO stated that he heard about the 'large piles' and that residents were using this material at their homes. SALO was asked if he thought the material in the piles was the same as that used as attic insulation by the residents in their homes. SALO replied, that he thought this was the same, SALO was shown several emails which disputed the theory of non-product attic insulation being used by residents of Libby, and available for the residents use. When asked how the decision not to declare a PHE was made based on facts not supported by the EPA persons performing the cleanup, SALO stated that he was unaware of this information and thought the piles of vermiculite set out by W.R. Grace were insulation. It became apparent during the interview that SALO was unaware of the difference in the vermiculite of the piles found around Libby, and that of expanded vermiculite insulation product found in the attics of the Libby residents.¹⁵³

On April 13, 2002, Horinko conveyed to Shapiro and Denit, "One reason we are so tied up in knots over the [public health emergency] is that we seem to have no guidance or criteria as to what constitutes a [public health emergency]. . . . [C]ould ctw [Whitman] say as part of the rollout that she has directed us to work with [ATSDR] to develop such guidance?"¹⁵⁴ Denit responded, "Don't have criteria for PHE but Libby is at far end of scale: mortality/morbidity, etc. Declare phe at Libby, not elsewhere until epa/atsdr work out criteria guide of what min specs constitute a [public health emergency]." He again

¹⁵² Staff interview of Marianne Horinko (September 10, 2008).

¹⁵³ OIG interview of Earl Salo (April 4, 2008).

¹⁵⁴ Email from Marianne Horinko to Mike Shapiro, copying Jeff Denit and Gayle Rice (April 13, 2002).

reiterated his concerns for removing insulation on the non-product theory: "Not picking up much support for 104 b theory/lots of concern about press coverage: 'cover-up'..."¹⁵⁵

In mid-April, 2002, it appeared that EPA began to consider omitting the non-product theory from the Action Memo, possibly based on the concerns raised by the Region that it lacked a factual basis. On April 18th, 2002, Salo emailed his colleagues in OGC, "*Jessica [Furey] says the Administrator wants to consider the possibility of hav[ing] no legal theory in the action memo.*"¹⁵⁶

Meanwhile, EPA Headquarters continued to receive information from Region 8 on Libby's unique situation that would support a public health emergency declaration. On April 17, 2002, Grevatt received information from Weis on the health impact of vermiculite asbestos in Libby, citing ATSDR studies and discussions, "18% of 5,590 (1,006) individuals showed evidence of asbestos-related abnormalities Mortality study has been reevaluated by ATSDR. Lincoln County now first in the nation with respect to asbestos-related deat[hs] per capita."¹⁵⁷ Grevatt forwarded the information to Horinko and Furey, stating, "I think these are particularly compelling data, and help to emphasize how different Libby is from the rest of the country."¹⁵⁸

5. EPA Headquarters' Decision to Remove Insulation without Declaring Public Health Emergency

In late April or early May, emails indicate EPA Headquarters decided to remove the attic insulation, without declaring a public health emergency or stating a legal basis for the removal. It appears some officials within Headquarters hoped to direct Region 8 to act without publicly issuing a formal Action Memo; however, Majorie Buckholtz at EPA Headquarters noted:

Earl Salo [OGC] said we shouldn't send memo directing region to do stuff – that is the place of the Action Memo and it makes us look bad to be directing things outside of the process. (smells political and smarmy)¹⁵⁹

¹⁵⁵ Email from Jeff Denit to Marianne Horinko (April 16, 2002).

¹⁵⁶ Email from Earl Salo to Lisa Friedman and Lee Tyner (April 18, 2002). (emphasis added).

¹⁵⁷ Email from Chris Weis to Peter Grevatt (April 16, 2002) (citing Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services, "Year 2000 Medical Testing of Individuals Potentially Exposed to Asbestosform Minerals Associated with Vermiculite in Libby, Montana" (August 23, 2001) (ATSDR 2001 report)).

¹⁵⁸ Email from Peter Grevatt to Jeff Denit, Marianne Horinko, Mike Shapiro, and Jessica Furey (April 17, 2002).

¹⁵⁹ Email from Marjorie Buckholtz to Marianne Horinko, Joe Martyak, Earl Salo, Jack McGraw, copying Jeff Denit, Bonnie Piper, Randy Deitz, and Lauren Mical (May 1, 2002) (emphasis added).

Headquarters then drafted the Action Memo to authorize removal of insulation without declaring a public health emergency. Jack McGraw agreed, as long as the insulation is addressed. Horinko received an email from an official in Headquarters stating: “I talked to McGraw, and he agreed that as long as the action memo mentions ZONOLITE, he’s cool with proceeding.” The email stated McGraw’s concerns, including: “*EPA is in WR Grace’s pocket and afraid to declare PHE because they don’t want us to.*”¹⁶⁰ It appears at this point, the Action Memo Amendment was revised again.

However the Action Memo did not include the legal basis for removing attic insulation.¹⁶¹ On May 2, 2002, Lauren Mical, EPA Office of Media Relations, provided a list of questions and answers related to the Libby cleanup. Mical left the final question – “under what authority does EPA remove insulation without a public health emergency?” – without an answer. Rather she stated, “Earl Salo and Jeff Denit working on response.”¹⁶²

On May 1, 2002, Region 8 provided a draft communication strategy.¹⁶³ It stated, “EPA HQ is discussing making an announcement that EPA will remove Zonolite Insulation from Libby homes without determining that a Public Health Emergency exists.”¹⁶⁴ EPA Headquarters responded, “we shouldn’t start out by telling what we are not doing (ie, not declaring a PHE) – but rather what we are doing.”¹⁶⁵ The document was then edited to remove reference of the public health emergency.¹⁶⁶

On May 2, 2002, McGraw again signed and submitted the Action Memo Amendment to Headquarters.¹⁶⁷ Yet again – EPA prepared to finalize the Action Memo Amendment

¹⁶⁰ *Id.* (emphasis added).

¹⁶¹ U.S. EPA “Action Memorandum Amendment for the Time-Critical Removal Action at the Libby Asbestos Site” (May 2, 2002). *See also* email from Marjorie Buckholtz to Marianne Horinko, copying Jeff Denit, Randy Deitz, and Lauren Mical (May 7, 2002) (“In the absence of specific legal doctrine, we are relying on our removal authority to be protective of public health and the environment.”)

¹⁶² Email from Lauren Mical to Bonnie Piper, Tom Simons, Douglas Parsons, Tom Scheckells, Jeff Denit, and Marjorie Buckholtz (May 2, 2002).

¹⁶³ Email from Wendy Thomi to Aubrey Miller, Bert Garcia, Bob Fox, Chris Weis, Dale Vodehnal, David Williams, Douglas Skie, Duc Nguyen, Jim Christiansen, Johanna Miller, John Wardell, Kelcey Land, Matthew Cohn, Paul Peronard, Rich Lathrop, Sandy Fells, Sonya Pennock, Steve Hawthorn, Bonnie Piper, Patty Kalla, and Jack McGraw (May 1, 2002) (attaching “DRAFT – Deliberative Process Communication Strategy: Libby Montana Zonolite Insulation Removal” (May 1, 2002)).

¹⁶⁴ “DRAFT – Deliberative Process Communication Strategy: Libby Montana Zonolite Insulation Removal” (May 1, 2002) (emphasis in original).

¹⁶⁵ Email from Marjorie Buckholtz to Bonnie Piper, copying Lauren Mical and Randy Deitz (May 1, 2002).

¹⁶⁶ “DRAFT – Deliberative Process Communication Strategy: Libby Montana Zonolite Insulation Removal” (May 1, 2002) (with edits). The Issue is amended to state, “EPA HQ is preparing to sign an action memo that enables Region 8 to move forward with cleanup plans including removing the Zonolite insulation in homes when appropriate.

¹⁶⁷ U.S. EPA “Action Memorandum Amendment for the Time-Critical Removal Action at the Libby Asbestos Site” (May 2, 2002).

and announcement of the removal of attic insulation, but this time without declaring a public health emergency or stating a legal basis for the removal.¹⁶⁸ Press releases were revised.¹⁶⁹ Bonnie Piper emailed EPA officials, “below is the ‘old’ fact sheet [from ATSDR] that she [Kathy Skipper, ATSDR] is going to clean up (deleting reference to public health emergency).”¹⁷⁰ On May 3, 2002, Victoria Vanroden, Office of Superfund Remediation and Technology Innovation, emailed Barry Breen, “the Action Memo was to be signed today by Marianne Horinko.”¹⁷¹ However, she emailed again on May 6, 2002, “it appears the Action Memo has not been signed yet.”¹⁷² On May 8, 2002, EPA held a conference call with Region 8 officials and Headquarters, to discuss the Action Memo and announcement.¹⁷³

6. OMB’s Demand for Legal Authority Without Declaring a Public Health Emergency and EPA’s Subsequent Return to the Discredited Non-Product Legal Theory

On May 7, 2002, OMB entered the picture again. John Spinello, Assistant Counsel to Administrator Whitman, sent a one line email to John Wood, Office of General Counsel for OMB, “John: As we discussed. Thanks,” and attached the Libby Action Memo Amendment.¹⁷⁴

On May 8, 2002, at 4:56 p.m., OMB emailed specific changes to the Action Memo, including additional language: “The multi-pathway, extreme exposures of the residents of Libby, Montana is unique. Vermiculite removal activities at this site set no precedent for possible future removals from other locations.”¹⁷⁵

¹⁶⁸ Email from Victoria Vanroden to Barry Breen, Susan Bromm, Kenneth Patterson, and Bruce Kulpan (May 3, 2002) (“The Action Memo was to be signed today by Marianne Horinko.”).

¹⁶⁹ Email from Lauren Mical to Wendy Thomi, copying Bonnie Piper, Douglas Skie, Earl Salo, Jack McGraw, Jeff Denit, Jim Christiansen, John Wardell, Marjorie Buckholtz, Patty Kalla, Paul Peronard, Randy Deitz, Rich Lathrop, Sonya Pennock, Steve Hawthorn, and Tom Sheckells (May 3, 2002). *See also* email from Max Dodson to Jeff Denit (May 9, 2002) (“Drop the Declaration of Health Emergency stuff and the ‘national implication’ stuff.”)

¹⁷⁰ Email from Bonnie Piper to Earl Salo, John Spinello, Dave Kling, Tom Simons, Douglas Parsons, and Susan Hazen (May 8, 2002).

¹⁷¹ Email from Victoria Vanroden to Barry Breen, Susan Bromm, Kenneth Patterson, and Bruce Kulpan (May 3, 2002).

¹⁷² Email from Victoria Vanroden to Barry Breen, Susan Bromm, Kenneth Patterson, and Bruce Kulpan copying Yolaanda Walker (May 6, 2002).

¹⁷³ Email from Gail Davis to Bonnie Piper, Jack McGraw, Randy Deitz, Earl Salo, Douglas Parsons, Susan Hazen, and Joe Martyak, copying Valarie Bynum, Shirley Kelley, Dennis Franklin, and Denise Adams (May 8, 2002).

¹⁷⁴ Email from John Spinello to John Wood (May 7, 2002) (attaching the Libby Action Memo Amendment).

¹⁷⁵ Email from Tad Gallion (OMB) to Randy Deitz (May 8, 2002).

At 6:21 p.m., Deitz forwarded OMB comments to Horinko, stating:

I have no idea if we ever envisioned OMB having any say in the action memo. Out of the blue I got a call from the OMB SF analyst saying they had comments. I am not even sure how they got a copy of the action memo.¹⁷⁶

Horinko responded, "has OMB ever commented on an action memo before? I hate to set that precedent . . ." ¹⁷⁷ Salo also responded:

My only concern is with the second sentence of #2. It does not improve EPA's ability to treat future cases differently, but it is a clear signal that EPA is uncomfortable with the precedent it may be setting, and is therefore both a legal and political liability. I'd delete it.¹⁷⁸

Horinko responded:

Good advice Earl. If we do accommodate any changes, I told Randy [Dietz] to make it clear to Marcus [Peacock of OMB] that I am doing this out of the goodness of my heart/because I think the changes are sensible, and not because I believe OMB has authority to review our action memos!¹⁷⁹

The Action Memo Amendment had been finalized and EPA was ready to make the announcement. However on May 8, 2002 at 7:42 p.m., Marcus Peacock, Associate Director of OMB, emailed Elizabeth Stolpe, Associate Director of Council on Environmental Quality, copying several high-level officials, including Marianne Horinko, Randy Deitz, and Joe Martyak of EPA, with the subject: "Re: TIME SENSITIVE Libby MT Superfund announcement."¹⁸⁰ The email, which EPA would only

¹⁷⁶ Email from Randy Deitz to Jeff Denit, Tom Sheckells, Earl Salo, copying Marianne Horinko (May 8, 2002).

¹⁷⁷ Email from Marianne Horinko to Randy Deitz, copying Earl Salo, Jeff Denit, and Tom Sheckells (May 9, 2002).

¹⁷⁸ Email from Earl Salo to Randy Deitz, copying Jeff Denit, Marianne Horinko, and Tom Sheckells (May 9, 2002).

¹⁷⁹ Email from Marianne Horinko to Earl Salo, copying Jeff Denit, Randy Deitz, and Tom Sheckells (May 9, 2002).

¹⁸⁰ Email from Marcus Peacock to Elizabeth Stolpe, copying Marianne Horinko, Randy Deitz, and Joe Martyak (May 8, 2002).

allow the Committee to read in the presence of EPA's attorneys but not retain a copy, states:

Both OMB OGC and Nancy Dorn at OMB have put a hold on this. OMB OGC is still discussing this with EPA.

On the email, Peacock also copied other high level officials throughout the White House, Office of the Executive of the President, and Office of the Vice President, including: James Connaughton, Chairman of CEQ; Jay Leftkowitz, Deputy Director of White House Domestic Policy Council; Robert McNally, with the White House Office of Policy Development; Kristen Silverberg, Special Assistant and Advisor to the President's Chief of Staff; Karen Knutson, Deputy Assistant for Domestic Policy to the Vice President; Randall S. Kroszner, member of the President's Council of Economic Advisors; John Graham, Administrator, Office of Information and Regulatory Affairs (OIRA) in OMB; Paul Noe, Counsel to the Administrator at OIRA; D. Marcus Sumerlin, Deputy Director of the National Economic Council; Samuel Thernstrom, Director of Communications at CEQ; Matthew Koch, Associate Director, White House Office of Cabinet Affairs; and John Wood, associate general counsel for OMB.

The next day, EPA received word that OMB has requested additional changes to the memo. On May 9, 2002, at 11:56 a.m., Salo emailed Tyner and Friedman, "Bob says OMB wants a legal theory in the action memo."¹⁸¹ Salo attached a one paragraph document providing that EPA had legal authority to remove the insulation because "homes in Libby contain insulation that consists of Libby vermiculite that did not constitute a 'product' under § 104(a)(3)." Thus in response to pressure from OMB for a legal theory, OGC returned to the non-product theory previously discredited by the Region. Tyner responded, "*Does the action memo have any facts to back it up?*"¹⁸² Friedman also responded to Salo:

Looks OK to me. I think this summarizes the best argument we can make that the give-away insulation is not a 'product.' . . . Do we need written justification in the record for responding to all homes – eg., we can't tell which homes used purchased insulation and which used give-away insulation, so we're cleaning up all of them?¹⁸³

Salo responded, "I know I dodged that issue. It's so fact-dependent that I'm afraid anything I write might be inaccurate or counter-productive."¹⁸⁴

¹⁸¹ Email from Earl Salo to Lee Tyner and Lisa Friedman (May 9, 2002) (with attachment "Insert on 'product' under § 104(a)(3)),

¹⁸² Email from Lee Tyner to Earl Salo (May 9, 2002) (emphasis added).

¹⁸³ Email from Lisa Friedman to Earl Salo (May 9, 2002).

¹⁸⁴ Email from Earl Salo to Lisa Friedman, copying Lee Tyner (May 9, 2002).

Following this dialogue within OGC, Salo sent the language to Spinello.¹⁸⁵ Spinello emailed Wood of OMB at 1:17 p.m. on May 9, 2002, and included the non-product legal theory, “John: As discussed, draft language regarding ‘product’ follows.”¹⁸⁶ Spinello emailed Gayle Rice, chief of staff for Marianne Horinko, “Gayle: As we discussed, the following language should be added to the introduction and also to Section VIII.”

These changes established a legal theory for the removal of insulation without declaring a public health emergency: “EPA believes that under these unique facts the removal actions specified herein are not limited by the provision for ‘products’ in CERCLA.”¹⁸⁷ At 4:40 p.m. that same day, Rice emailed these changes to Thornton, “please make the following changes to the Action Memo, per a conversation with OMB/OGC/Horinko,”¹⁸⁸ providing evidence that Horinko, Spinello and OMB discussed the Action Memo that day.

EPA Headquarters made numerous changes to the Action Memo, including the addition of the ‘non-product’ legal theory, on May 9, 2002. Despite these changes, the Action Memo retained McGraw’s signature from May 2, 2002. An email from Dan Thornton to Rice, Horinko, and others on May 9, 2002 states: “I have incorporated the suggested changes, and modified the AM so that they fit in the existing sections per your request.”¹⁸⁹

At 5:45 p.m. on May 9, 2002, Spinello forwarded the Action Memo to Wood at OMB, stating, “this is the final action memo. I have reviewed it and believe it reflects all the edits we discussed.”¹⁹⁰ Spinello also sent Wood the press release.¹⁹¹ At 5:56 p.m., Rice asked Spinello, “who do we need to hear from to give the OK to Marianne to approve this?”¹⁹² Spinello responded that he is waiting to hear from OMB, to “quickly eye-ball” the changes made.¹⁹³

At 6:47 p.m., Wood responded, “thank you for your efforts to alleviate my concerns. Here are just a few edits, which are necessary to avoid the problems we discussed earlier.”¹⁹⁴ Wood requested all reference to the CERCLA section providing a public health emergency (104(a)(4)) be removed from the Action Memo:

¹⁸⁵ Email from Earl Salo to John Spinello (May 9, 2002, 12:01 p.m.).

¹⁸⁶ Email from John Spinello to John Wood, copying Earl Salo (May 9, 2002).

¹⁸⁷ Email from John Spinello to Gayle Rice (May 9, 2002, 4:02 p.m.).

¹⁸⁸ Email from Gayle Rice to Dan Thornton, copying Marianne Horinko, Jeff Denit, John Spinello, Tom Sheckells, and Max Dodson (May 9, 2002, 4:40 p.m.).

¹⁸⁹ Email from Dan Thornton to Gayle Rice, copying Jeff Denit, Marianne Horinko, John Spinello, Max Dodson, and Tom Sheckells (May 9, 2002, 5:04 p.m.).

¹⁹⁰ Email from John Spinello to John Wood (May 9, 2002, 5:45p.m.).

¹⁹¹ Email from John Spinello to John Wood (May 9, 2002, 5:55 p.m.).

¹⁹² Email from Gayle Rice to John Spinello (May 9, 2002, 5:56 p.m.).

¹⁹³ Email from John Spinello to Gayle Rice (May 9, 2002, 6:26 p.m.).

¹⁹⁴ Email from John Wood to John Spinello (May 9, 2002, 6:47 p.m.).

Please change ‘the removal actions specified herein are not limited by the provision for “products” in CERCLA § 104(a)(3) and (4)’ to ‘the vermiculite to be removed from residences and businesses does not constitute a product under CERCLA § 104(a)(3).’ MOST IMPORTANTLY, MAKE SURE THAT THE CITATION OF 104(A)(4) IS DELETED.¹⁹⁵

Wood also directed Spinello:

As currently written, this indicates that ‘some portion’ of the vermiculite is not a product, but that ‘all’ sources will be removed. While that may end up being the case (b/c it may be impracticable to find out which were in fact purchased), we should not state that explicitly.¹⁹⁶

Wood suggested the documents be changed to indicate all homes to be cleaned in Libby used the waste ‘non-product’ vermiculite as insulation. Wood requested the language state “‘the highly unusual facts indicating that *homes in Libby* contain insulation that consists of asbestos-containing vermiculite mined at Libby” was not sold as commercial product.¹⁹⁷ Spinello indicated his support for Wood’s changes and forwarded them to Horinko, Furey, and Rice.¹⁹⁸ At 7:22 p.m., Horinko responded with her objection to the change:

John, as discussed, we have no direct evidence that the homes contain waste vermiculite. All that we know is that Grace gave away vermiculite, and some may have ended up in the insulation, we don’t know how much and will never know given the time passage. Therefuore [sic], I am not comfortable signing any thing [sic] so definitive.¹⁹⁹

Spinello responded, “I understand. I believe we’ve worked this out w/ OMB, it now appears to be more about logistics.”²⁰⁰

¹⁹⁵ *Id.* (emphasis in original).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (emphasis added)

¹⁹⁸ Email from John Spinello to Gayle Rice, Marianne Horinko, and Jessica Furey (May 9, 2002, 6:58 p.m.).

¹⁹⁹ Email from Marianne Horinko to John Spinello, copying Gayle Rice and Jessica Furey (May 9, 2002, 7:22 p.m.).

²⁰⁰ Email from John Spinello to Marianne Horinko, copying Gayle Rice and Jessica Furey (May 9, 2002, 8:04 p.m.).

In the morning of May 10, 2002, Furey responded to Spinello, "John: I am unable to access the latest version of the [Action Memo]. Were you able to address marianne's concerns. I concur with her comments."²⁰¹ Spinello responded:

Yes, I believe we worked out Marianne's concerns. She and her staff are reviewing now, but I think she will be satisfied. In the latest (final?) draft we don't say that we have 'evidence' or that homes in Libby 'may have' vermiculite insulation that was given away and thus not a product. Instead, we make no factual representations on this specific point, but say simply that: (1) vermiculite was given away at the mine, and (2) that we believe the limitation on products does not apply. *Without explicitly connecting the dots, we express an inference.* I think, among the several less-than-perfect ways to write this, it is as good as any.²⁰²

Rice forwarded Spinello's email to Denit, "Jeff: Please review asap – let me know if you have any objections!"²⁰³ Emails suggest Jeff Denit sent OMB's proposed changes to the Action Memo to EPA officials at Region 8, and Region 8 voiced the exact concern that Horinko has. Denit emailed Horinko after relaying Region 8's concerns to Spinello over the phone:

Reg[ion 8] concerned that homes (absent modifier) is too broad, etc. Disc[ussed] w/ John [Spinello] reveal his perspective that *if OMB doesn't agree to mod[ification] we elevate, lose time etc.*²⁰⁴

Denit then stated, "I disc[ussed] w/ Max [Dodson] and advised john [Spinello] that R8 agrees to omb change so we're proceeding as edited by you/John..."²⁰⁵

On May 10, 2002, Matt Cohn received a document drafted by John Spinello that explained EPA authority to remove insulation without declaring a public health emergency. Cohn emailed Spinello on May 13, 2002, questioning the accuracy of EPA authority to remove the Libby attic insulation under CERCLA without a PHIE:

Section 104 of CERCLA is unambiguous, the Agency must determine the existence of a public health emergency in order to remove a product which is part of a structure and results in exposure within that structure. . . . *The record does not currently*

²⁰¹ Email from Jessica Furey to John Spinello (May 10, 2002, 10:15 a.m.).

²⁰² Email from John Spinello to Jessica Furey (May 10, 2002, 10:45 a.m.) (emphasis added).

²⁰³ Email from Gayle Rice to Jeff Denit (May 10, 2002, 9:23 a.m.).

²⁰⁴ Email from Jeff Denit to Marianne Horinko, copying Ed Krenik, Gayle Rice, Marjorie Buckholtz, Joe Martyak, and John Spinello (May 10, 2002, 2:09 p.m.) (emphasis added).

²⁰⁵ *Id.*

*support arguments that it is not a product or that exposure does not occur within the structure.*²⁰⁶

The reviewed records are devoid of any response by Spinello to Cohn's objections.

Horinko ultimately signed a final Action Memo Amendment. Emails indicate changes were not finalized until May 10, 2002;²⁰⁷ however, Horinko's signature is dated May 9, 2002.²⁰⁸ The Action Memo greatly expanded the scope of removal authority to include Zonolite insulation removal from the attics of Libby homes.

However, EPA did not declare a public health emergency. Rather, EPA concluded that the insulation in Libby was not a "product" within the meaning of the limitation provided in CERCLA § 104(a)(3)(b).²⁰⁹ The final Action Memo, that Horinko signed, says that Libby homes contain non-product vermiculite.²¹⁰ It states, "this action is based upon the unique circumstances in Libby, which include ... the highly unusual facts indicating that homes in Libby contain insulation that consists of the asbestos-containing vermiculite mined at Libby that was not inspected, packaged, labeled, warranted, regulated or sold as a commercial product."²¹¹

This argument that the insulation was not a product was premised on the assumption that some of the insulation in Libby homes had come from waste piles outside WR Grace's processing facilities, rather than being purchased from a store.²¹² An argument that the Region steadfastly maintained was not supported by the evidence in Libby.²¹³ Relying on this theory, EPA claimed this authority to remove asbestos-contaminated insulation in Libby without declaring a public health emergency.²¹⁴ More importantly, this allowed EPA and OMB to avoid the national public health issues posed by asbestos-contaminated vermiculite ore and Zonolite insulation that would have been raised if a public health emergency had been declared.

Currently, EPA is removing Zonolite from attics of some contaminated houses in Libby, but leaving the insulation in walls. EPA is not cleaning up every house in Libby with

²⁰⁶ Email from Matthew Cohn to John Spinello and Bonnie Piper (May 13, 2002) (emphasis added).

²⁰⁷ Email from Gayle Rice to John Spinello (May 10, 2002).

²⁰⁸ U.S. EPA "Action Memorandum Amendment for the Time-Critical Removal Action at the Libby Asbestos Site" (May 2, 2002) (signature page dated May 9, 2002).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Email from Lisa Friedman to Jessica Furey, Lee Tyner and Earl Salo, (April 10, 2002).

²¹³ Memo from Duc Nguyen (sent on behalf of to Dan Thornton, *Region 8 Comments on Testimony and Q & A's for June 20, 2002 Senate Hearing* (June 14, 2002).

²¹⁴ Draft "Communication Strategy: Libby Montana Zonolite Insulation Removal" (May 1, 2002).

Zonolite insulation, contending that their asbestos detection testing has indicated many homes do not need to be cleaned up and insulation does not need to be removed from walls and other non-attic areas of homes at this time.²¹⁵

B. Consequences of EPA's Failure to Declare a Public Health Emergency

While EPA did begin to remove Zonolite Attic Insulation from Libby attics in 2002 and continues to remove it from Libby homes today, EPA's reversal of its decision to declare a Public Health Emergency in Libby had significant negative consequences for the residents of Libby and potentially for others in the U.S. exposed to Libby asbestos. The most significant and immediate impact in 2002 was the deprivation of full medical care that could have been provided by the federal government upon the declaration of a public health emergency. The additional negative consequences resulted from the dwindling attention paid by EPA to Libby, Montana, and to the national issue of Zonolite Attic Insulation that flowed from the decision not to declare a public health emergency. These included a four year or more delay in toxicology studies on Libby asbestos, misleading communications to the residents of Libby regarding the effectiveness of the EPA cleanup there, and the failure to implement a national strategy for dealing with the Zonolite Attic Insulation found in millions of homes across the United States.

1. Deprivation of Full Medical Care for Libby Community

a. Residents of Libby Legally Entitled to Medical Care if a Public Health Emergency is Declared

Section 104(a)(4) of CERCLA authorizes the President to respond to a release or the threat of a release of a product that is part of the structure of a home (including insulation) and results in exposure within the home if he determines the release constitutes a public health or environmental emergency. 42 U.S.C. § 9604(a)(4). Sections 104(i)(1)(D) and (E) of CERCLA state:

In addition, said Administrator [of ATSDR] shall--...(D) **in case 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, epidemiological studies, or **any other assistance appropriate under the circumstances**; and (E) either independently or as part of other health status survey, conduct periodic survey and screening

²¹⁵ U.S. EPA, "Action Memorandum Amendment Requesting Formal Approval of a Ceiling Increase for the Time-Critical Removal Action at the Libby Asbestos Site—Libby, Montana" (May 15, 2006).

programs to determine relationships between exposure to toxic substances and illness...²¹⁶

If the President, acting through the Administrator of EPA, determines that a public health emergency exists and that a product which is part of the structure of a home needs to be removed because of the release or threat of release of a toxic substance within the home, then ATSDR must provide medical care and testing to exposed individuals or any other medical assistance appropriate under the circumstances.

In the case of Libby, Montana, asbestos related disease is a multi-decade illness from the initial exposure to the resulting death.²¹⁷ Consequently, ATSDR would be required to ensure that Libby residents have adequate short-term and long-term medical care. Moreover, Dr. Aubrey Miller, the Libby on-site Public Health Officer in 2001 and 2002, explained that providing Libby residents suffering from asbestos related disease with long-term medical care was one of the goals of the proposed public health emergency declaration in 2001 and 2002.²¹⁸

On June 20, 2003, Dr. Julie Louise Gerberding, the Administrator of ATSDR, sent a letter to the Libby Community Advisory Group in response to their request that ATSDR declare a public health emergency so Libby residents could get medical care from the federal government. In her letter explaining why ATSDR would not declare a public health emergency, Dr. Gerberding explained that sections 104(i)(1)(D) and (E) 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... HHS lacks the resources or the statutory authority to provide long-term healthcare under CERCLA or any other existing federal legislation...²¹⁹

There is nothing in CERCLA that supports the Administrator of ATSDR's interpretation, nor was Staff able to find any legislative history that would support an interpretation other than the plain meaning of the statute. Contrary to Dr. Gerberding's assertions in her letter, sections 104(i)(1)(D) and (E) clearly provide not just the authority but the duty for ATSDR to provide medical care and any other assistance appropriate under the circumstances.

²¹⁶ 42 U.S.C. § 9604(i)(1)(D) and (E) (emphasis added).

²¹⁷ Staff interview of Dr. Brad Black (September 16, 2008).

²¹⁸ Staff interview of Dr. Aubrey Miller (September 8, 2008).

²¹⁹ Letter from Dr. Julie Louise Gerberding to Libby Community Advisory Group, page 1 (June 20, 2003).

A public health emergency and the provision of medical care under CERCLA is undoubtedly intended to be reserved for extraordinary circumstances, as evidenced by the fact that EPA has never formerly declared a public health emergency.²²⁰ EPA officials, however, acknowledged that the Libby tragedy is unique and in the view of some, the worst Superfund site in the country:

- Marianne Horinko, Assistant Administrator for OSWER in 2002, stated, “[u]nlike most superfund sites where there was some threatened or perceived risk, . . . people in Libby were actually becoming ill and dying as a result of exposure to that asbestos.”²²¹
- “We were all appalled with what was happening there [in Libby],” said Jessica Furey, Counsel to the Administrator, “people’s health were of grave concern.”²²²
- Randy Deitz, attorney advisor to the Assistant Administrator for OSWER, highlighted that Libby was “one of the few [EPA cleanup] sites with demonstrable deaths” as a result of the contamination.²²³
- Dr. Miller, on-site Public Health Officer for Libby, stated, “Libby is the worst site in the agency’s history.”²²⁴

The Administrator of EPA should have declared a public health emergency as the justification for removing insulation from Libby homes because the tragic facts in Libby overwhelmingly support such a declaration. When the Administrator did not declare a public health emergency in 2002, the people of Libby were deprived of the full medical care they desperately needed and still need.

b. The Need for Long Term Medical Care in Libby, Montana

As previously discussed in this report, over 1,000 people who lived in the Libby area have been diagnosed so far with lung abnormalities consistent with exposure to asbestos. The ones who are currently ill need immediate health care, while others who are asymptomatic need periodic monitoring to check on whether they are developing asbestos related disease.²²⁵

The Center for Asbestos Related Disease (CARD) is a clinic that was established in July of 2000 in Libby to provide a specialized center for screening for asbestos related disease

²²⁰ Staff interview of Randy Deitz and Barry Breen (September 3, 2008).

²²¹ Staff interview of Marianne Horinko (September 10, 2008).

²²² Staff interview of Jessica Furey (September 9, 2008).

²²³ Staff interview of Randy Deitz and Barry Breen (September 3, 2008).

²²⁴ Staff interview of Dr. Aubrey Miller (September 8, 2008).

²²⁵ Staff interview of Dr. Brad Black (September 16, 2008).

(ARD), to help treat those with active asbestos related disease, and to conduct research into treatments and cure for asbestos related disease.²²⁶ Dr. Brad Black, the Director of CARD stated:

[W]e set the clinic up to really pick up people that had abnormal screenings and needed to have that sorted out from a health standpoint... After the [ATSDR screenings] it became obvious how large the problem was so we focused the clinic on the long term, we said well this is going to be a problem that's going to take 30, 40 years to follow thru. And so we pointed our goals toward a long term health care clinic that would ultimately be the center of research looking for hopefully some sort of therapy that would be effective against the fibrosis.²²⁷

Dr. Black explained that when someone comes into CARD, the clinic will develop an asbestos exposure history for the patient. If the patient's history indicates significant exposure to Libby asbestos, the clinic will take a chest x-ray and administer a breathing test. If the chest x-ray and breathing test indicate active asbestos related disease, the clinic will both treat the pulmonary symptoms and refer the patient to a primary care physician. CARD will then continue to treat the patient's pulmonary symptoms, as well as work with the patient's primary care physician in caring for the patient. CARD has screened over 2400 patients since 2000, and gets about 20 new patients per month currently.²²⁸

CARD accepts no money directly from patients. Money to reimburse the clinic for the cost of screening patients and long term care for patients with active disease comes from four sources: the patient's own insurance, an insurance program voluntarily set up by WR Grace to cover Libby residents with asbestos related disease resulting from the company's actions, the Libby Asbestos Medical Plan (LAMP), and Medicare. The LAMP is a fund that was set up by EPA around 2001 using money from an early civil settlement with Grace. That money has since run out, but the State of Montana added an additional \$1.5 million to the LAMP fund last year.²²⁹

Dr. Black explained that a significant gap in medical care reimbursement resulted from WR Grace's increasing reluctance to pay for oxygen therapy (oxygen tanks and tubes) with advanced asbestos related disease. Because the vast majority of CARD's patients do not have their own health insurance, any amount for oxygen therapy that is not covered by Medicare must be borne by the patient. Given the low income level for the Libby

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

area, Dr. Black explained that when W.R. Grace's insurance provider sends a letter to the patient refusing to pay for oxygen therapy:

... a lot of people will stop using oxygen. They're hesitant to use it because people don't like the stigma of the oxygen, yet their bodies need it, it's better for their health and longevity and exercise and everything when they need oxygen. Yet if they get a letter that says you don't, there's no reason you need oxygen it discourages people from doing the healthy things they need to do to make their lives better and help them live longer and enjoy it, so it's really difficult...²³⁰

Dr. Black went on to explain his concerns about sufficient financial support to cover the future medical needs in Libby. Dr. Black stated, "[t]he demands on cost right now are continuing to escalate and I think they will probably for at least the next 10 years when we hit the peak of probably the asbestos disease, I think it's going to be another 10 years until the peak hits." Dr. Black expressed his apprehension that the LAMP fund will be quickly exhausted.²³¹ Since neither individual health insurance, nor WR Grace's insurance, nor Medicare will cover the cost of asbestos related disease screening, that crucial program may have to be shut down. Moreover, Dr. Black speculates that based on recent trends WR Grace will stop funding their voluntary insurance program once the company emerges from bankruptcy.²³²

2. Delay of Toxicology Studies for More Than Four Years

Superfund uses risk assessment to determine a site's ultimate level of cleanup. The risk assessment may be primarily based on EPA's Integrated Risk Information System (IRIS) if the contaminant is well known and studied and there are reasonably accepted risk levels contained in IRIS. For less well known contaminants or ones that have not been well studied, a toxicity assessment may be undertaken that includes both epidemiological studies (the study of populations to determine frequency and distribution of disease) and toxicology studies (discussed further below).²³³ From these studies, EPA can complete a risk assessment.

a. *Amphibole vs. Chrysotile Asbestos*

"Asbestos" is a term applied to a special group of fibrous silicate minerals that form as long, very thin fibers that usually occur in bundles. When handled or crushed, the asbestos bundles separate into individual mineral fibers. They do not dissolve in water

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ Office of Inspector General, U.S. Environmental Protection Agency, "Quick Reaction Report: EPA Needs to Plan and Complete a Toxicity Assessment for the Libby Asbestos Cleanup," Report No. 2007-P-000002 (December 5, 2006).

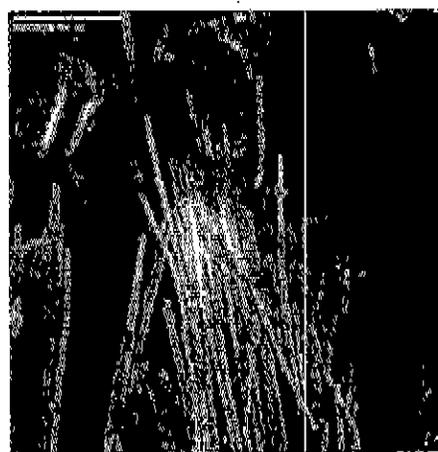
and are very resistant to heat, fire, chemical and biological break down. Because of these properties, asbestos has been mined for thousands of years and used in a wide range of manufactured products such as building materials.²³⁴

Natural asbestos is found in two varieties: serpentine asbestos and amphibole asbestos. Approximately 90% of serpentine is the variety chrysotile, which is comprised of flexible and spiraled or curved asbestos fibers. Amphibole asbestos fibers, unlike chrysotile, are generally brittle and often have a needle-like shape.

Chrysotile Asbestos Fibers



Amphibole Asbestos fibers



Chrysotile asbestos fiber, also known as white asbestos, is by far the predominate type used in commercial products. Amphibole asbestos fibers have very limited commercial use, but are sometimes found as a natural contaminant in other commercial products.²³⁵ Raw Libby vermiculite has been shown to contain up to 26% amphibole asbestos.²³⁶ Zonolite Attic Insulation has been shown to contain from trace amounts to up to 5% amphibole asbestos.²³⁷

All forms of asbestos are hazardous to health, but amphibole asbestos is considered to be more hazardous than chrysotile.²³⁸ For example, it is now generally agreed that amphibole asbestos is more potent than chrysotile asbestos in causing mesothelioma. A recent analysis showed that amphibole asbestos is at least 200 times more potent than

²³⁴ Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services, "Public Health Statement: Asbestos, CAS#: 1332-21-4" (September 2001).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ OIG Interview of Paul Peronard (August 6, 2007).

²³⁸ Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services, "Public Health Statement: Asbestos, CAS#: 1332-21-4" (September 2001).

chrysotile in causing this deadly form of cancer.²³⁹ The high rate of asbestos disease in Libby, Montana, also strongly suggests that the Libby amphibole asbestos is more hazardous than chrysotile.²⁴⁰

b. The Need for Toxicology Studies

EPA's Integrated Risk Information System (IRIS) is an electronic database containing information on health effects from exposure to various hazardous substances in the environment. IRIS was developed for use in risk assessments, decision-making and regulatory activities, including determining final cleanup goals for Superfund sites.²⁴¹ The current risk assessment in IRIS for asbestos was last updated in 1986.²⁴² Experts have recognized this risk assessment as insufficient to evaluate the dangers of amphibole asbestos, including Libby asbestos, because exposure estimates are poor, it does not consider the different toxicities of the different types of asbestos, and it does not consider

non-cancerous effects such as asbestosis.²⁴³ EPA is currently in the process of revising the IRIS risk assessment to include more studies based on amphibole asbestos.²⁴⁴

Toxicology is the study of the relationship between the amount of a contaminant and its effect on an organism. Exposures to certain chemicals and other substances have the potential to adversely affect human health. Toxicology studies use animals such as rats and expose them to the substance of concern at different dose levels to help estimate acceptable levels of exposure for the protection of human health.²⁴⁵

²³⁹ Wayne Berman and Kenny Crump, "A Meta-Analysis of Asbestos-Related Cancer Risk that Addresses Fiber Size and Mineral Type," in *Critical Reviews of Toxicology* (Volume 38, Issue S1 August 2008, pages 49-73).

²⁴⁰ Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services, "Year 2000 Medical Testing of Individuals Potentially Exposed to Asbestoform Minerals Associated with Vermiculite in Libby, Montana: A Report to the Community," (August 23, 2001). See also, Staff interview of Dr. Aubrey Miller (September 8, 2008).

²⁴¹ U.S. Environmental Protection Agency, "Integrated Risk Information System: What is IRIS?" <<http://www.epa.gov/iriswebp/iris/intro.htm>> (viewed September 13, 2008).

²⁴² National Center for Environmental Assessment, Office of Research and Development, U.S. Environmental Protection Agency, "A Review of Uncertainties in the Current IRIS Cancer Unit Risk for Asbestos: Strategies for Uncertainty Analysis in Risk Assessment."

²⁴³ *Id.* See also Staff interview of Dr. Aubrey Miller (September 8, 2008).

²⁴⁴ National Center for Environmental Assessment, Office of Research and Development, U.S. Environmental Protection Agency, "A Review of Uncertainties in the Current IRIS Cancer Unit Risk for Asbestos: Strategies for Uncertainty Analysis in Risk Assessment." <http://www.epa.gov/ORD/scienceforum/2006/pdfs/global_challenges_final_posters/GC-12_DeVoney.pdf> (viewed September 13, 2008).

²⁴⁵ Purdue University, "School of Health Sciences-Toxicology Graduate Program, Toxicology Defined," <<http://www.healthsciences.purdue.edu/academics/graduate/toxicology/>> (viewed September 14, 2008).

Agency records indicate that in 2002, the EPA on-site team in Libby, including Senior Toxicologist Chris Weis, began requesting that EPA conduct toxicology studies to get a better understanding of the health risks associated with Libby asbestos, particularly non-cancerous risks.²⁴⁶ This was based in part on the flaws in the IRIS risk assessment for asbestos, as well as a massive study done by ATSDR in 2001 of approximately 6,000 people who lived in the Libby area, which showed that over 1,000 of them had pleural abnormalities consistent with exposure to asbestos.²⁴⁷ The toxicology studies would be used to help screen areas in Libby, including homes, to determine what needed to be cleaned up, and to develop a final cleanup level.²⁴⁸

c. Delay of Toxicology Studies until 2007

The Libby on-site team submitted a proposed toxicology study to OSWER on March 18, 2003. The study proposal noted:

The USEPA has not yet established a quantitative procedure for estimating the likelihood or severity of non-cancer effects from inhalation of asbestos. Thus, it is unknown whether the actions being taken [in Libby] to guard against excess cancer risk will or will not be sufficient to protect against the non-cancer effects of asbestos.²⁴⁹

The objective of the study was therefore to:

Generate reliable exposure data for non-cancer effects in animals (rats) exposed by inhalation of [Libby asbestos]. These data will be used to help estimate an exposure level that is without significant risk of causing unacceptable non-cancer effects in residents of Libby.²⁵⁰

²⁴⁶ OIG interview of Paul Peronard (August 6, 2007). Page 4.

²⁴⁷ Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services, “Year 2000 Medical Testing of Individuals Potentially Exposed to Asbestos-form Minerals Associated with Vermiculite in Libby, Montana: A Report to the Community” (August 23, 2001).

²⁴⁸ Staff interview of Dr. Aubrey Miller (September 8, 2008). See also, Email from Elizabeth Southerland to Jayne Michaud and Sharon Frey, attaching “Information Memo; Libby Asbestos Toxicity Study,” (November 13, 2002).

²⁴⁹ U.S. EPA, Region 8 “Quality Assurance Project Plan (Revision 0) For Non-Cancer Effects in Rats From Subchronic Inhalation Exposure to Asbestos Fibers: for use at the Libby, Montana, Superfund Site,” (March 18, 2003).

²⁵⁰ *Id.*

Internal e-mails show that there was substantial discussion and planning at OSWER related to the proposed study.²⁵¹

On May 28, 2003, ATSDR released the final version of its report, *Public Health Assessments for the Libby NPL site, Operable Unit 4, Town of Libby and Affected Libby Valley Residential and Commercial Properties*, in which ATSDR also recommended that toxicology studies be conducted for Libby, Montana.²⁵²

However, the proposed toxicology study was never undertaken because EPA never approved the budget request for the study.²⁵³ Dr. Miller, one of the authors of the proposed toxicology study, explained that money was initially budgeted by OSWER for the study, but when several million dollars was cut from the Libby removal budget during FY2003, the remaining money was completely allocated to cleaning up homes and other properties in Libby. Dr. Miller was told that EPA was no longer interested in studies, but instead only wanted to get the cleanup done. Dr. Miller went on to explain that OSWER later determined that the Libby removal money should not be used for toxicology studies, and that these studies should be funded and conducted by EPA's Office and Research and Development (ORD) in Raleigh, North Carolina. According to Dr. Miller, though, ORD had other priorities and never funded the Libby toxicology study.²⁵⁴

Emails from earlier in 2002 indicate that this lack of interest in completing a toxicity assessment began shortly after the public health emergency declaration was reversed. In an email sent on September 24, 2002 to Matt Cohn, Jim Christiansen, the Libby on-site coordinator at the time, stated:

My budget request to HQ for Libby this year was \$21.1 M. \$17M of that was cleanup. \$4M was for "investigation"—risk assessment, RI, etc. Despite Ms. Horinko's assurance to Libby and the Senate Committee [during a hearing held on May 2, 2002] to provide the full amount, HQ first proposal to the region was to give us \$17M, and no additional "investigation." Basically, the message was "you've spent enough on investigation in Libby already, you shouldn't need funds, fund it from regional."

We ain't got it in the Region. My biggest concern with this is cost recovery. Kind of penny wise, pound foolish scenario. I could

²⁵¹ Emails between Richard Troast, Elizabeth Southerland, Jayne Michaud, and Jim Luey (November 13, 2002 and November 15, 2002).

²⁵² Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services, "Public Health Assessment: Libby Asbestos Site, Libby, Lincoln County, Montana." <http://www.atsdr.cdc.gov/HAC/pha/libby3/lby_p1.html> (viewed September 13, 2008).

²⁵³ Office of Inspector General, U.S. Environmental Protection Agency, "Quick Reaction Report: EPA Needs to Plan and Complete a Toxicity Assessment for the Libby Asbestos Cleanup," Report No. 2007-P-000002 (December 5, 2006).

²⁵⁴ Staff interview of Dr. Aubrey Miller (September 8, 2008).

probably find a way to cleanup Libby to a degree we are comfortable with risk-wise without spending too much additional “investigation” money, but some of the decisions may not be as “supported” as we would like, may run contrary to past/current asbestos practices, and it may end up costing the agency in cost recovery in the end. Animal studies come to mind...²⁵⁵

Toxicology studies were finally funded in 2007, but the actual animal studies have yet to begin.²⁵⁶ EPA expects to complete the studies in 2010. Barry Breen, Deputy Assistant Administrator for OSWER, explained that the only reason the toxicology studies were funded in 2007 is because Senator Baucus, during a meeting held with EPA management in 2006, demanded that EPA conduct the studies.²⁵⁷

The four year delay in the toxicology studies and the continuing delay in the toxicity assessment for the Libby asbestos has meant that EPA cannot be sure that the ongoing Libby cleanup is sufficient to prevent the residents of Libby from contracting asbestos related diseases.²⁵⁸ In addition, the delay likely contributed to misleading statements made by EPA to the residents of Libby, and prevented EPA from being able to determine the nationwide risks from Libby asbestos and Zonolite Attic Insulation. The next sections discuss these issues.

3. Misleading Communications Made to Libby Residents

Because EPA has not comprehensively analyzed the toxicity of Libby asbestos, EPA cannot substantiate the accuracy of any communications with Libby residents indicating that the cleanup of their homes eliminated the danger of contracting asbestos related disease.²⁵⁹

In 2003, EPA began sending letters to homeowners in the Libby area whose property and homes were cleaned up, including the removal of Zonolite Attic Insulation, under its emergency response authority. These letters are sometimes referred to by EPA as “comfort letters”. The letters stated, “Very low, often immeasurable, levels of Libby

²⁵⁵ Email from Jim Christiansen to Matt Cohn (September 24, 2002).

²⁵⁶ Status report from EPA, “Status of Toxicity Assessment and Analytical Methods Support Studies for Libby Amphibole” July 2008.

²⁵⁷ Staff interview of Randy Deitz and Barry Breen (September 3, 2008).

²⁵⁸ Office of Inspector General, U.S. Environmental Protection Agency, “Quick Reaction Report: EPA Needs to Plan and Complete a Toxicity Assessment for the Libby Asbestos Cleanup,” Report No. 2007-P-000002, (December 5, 2006).

²⁵⁹ *Id.*

asbestos may remain in soil, indoor dust, fabrics, upholstery, and carpets. Current EPA risk assessments suggest that these circumstances do not pose a significant health risk.”²⁶⁰

Given that there was, and still is, no current toxicity assessment for Libby asbestos, the above statement to homeowners was misleading at best, if not outright false.²⁶¹ On April 24, 2006, the Libby Area Technical Assistance Group (LATAG), a local community committee set up to review technical issues regarding the Libby cleanup and to communicate concerns to EPA, sent a letter to EPA stating:

Of equivalent or greater concern to LATAG... is the issue of what appears to be falsified, misleading and erroneous comfort letters, and their message that have been distributed by your previous managers during the past years to over 600 homeowners... It is very disturbing to many of us in Libby to learn that we may have been misled (at best, or lied to at worse) about the true conclusions and uses of these letter, since they actually cannot proclaim that a safe and clean environment exists—based on any credible site data; these facts, in turn, mean that residual contamination may exist at high enough levels to sustain continued potential excess health hazards even after the removal actions’ partial cleanups.²⁶²

In addition, Mary Goldade, Region 8 Environmental Chemist and member of the EPA Technical Assistance Unit for Libby, stated that the letter was, “exceptionally deceiving.”²⁶³ The concern was that Libby residents might have a false sense of security and not take appropriate precautions around residual asbestos.

At the same time that the misleading “comfort letters” were going out, EPA also issued a pamphlet entitled *Living with Vermiculite* to Libby residents in October 2003.²⁶⁴ *Living with Vermiculite* states, “Although all asbestos is hazardous, it is important to keep potential exposures in perspective. Even though contact with or working near vermiculite or other asbestos-containing materials can release asbestos fibers into the air, if such exposures are infrequent or for short durations, they will not likely significantly increase your risk of health effects, especially if common-sense precautions are taken.”

Since EPA has never determined a minimum safe level for Libby asbestos, EPA cannot honestly make statements that exposures of infrequent or short duration will not

²⁶⁰ Letter from Jim Christiansen, Remedial Project Manager to Libby Resident “Re: EPA Cleanup at [Address], Libby, MT,” (March 29, 2006).

²⁶¹ Office of Inspector General, U.S. Environmental Protection Agency, “Quick Reaction Report: EPA Needs to Plan and Complete a Toxicity Assessment for the Libby Asbestos Cleanup,” Report No. 2007-P-000002, (December 5, 2006).

²⁶² Letter from Libby Area Technical Assistance Group to Max Dodson, Associate Regional Administrator USEPA Region 8, (April 24, 2006).

²⁶³ OIG interview of Mary Goldade (April 19, 2006).

²⁶⁴ EPA “Living with Vermiculite” (October 2003).

significantly increase your risk of health effects. Mary Goldade, after seeing the *Living with Vermiculite* pamphlet stated that, “she has not seen any data which would allow a conclusion to be made on the frequency of exposure, nor has she seen data which would support the conclusion that ‘short durations’ of exposure would not increase risks of health effects.”²⁶⁵ Paul Peronard, current EPA on-site coordinator, also described the pamphlet as problematic and not, “good communication.”²⁶⁶

Paul Peronard was the original on-site coordinator in Libby, but was reassigned off the project in late 2002. When Paul Peronard was reassigned back to Libby in 2006 as the on-site coordinator, he redid the “comfort letters” to eliminate statements that residual asbestos in homes was safe. He also stopped the distribution of the *Living with Asbestos* pamphlet.²⁶⁷

4. Failure to Implement a National Strategy for Addressing Zonolite Attic Insulation

Staff found that EPA has never implemented a national strategy for dealing with the question of Zonolite Attic Insulation, which is found in millions of home across the United States. EPA has taken some smaller steps on this issue, including the development of a brochure in May of 2003 entitled *Current Best Practices for Vermiculite Attic Insulation*.²⁶⁸ Jessica Furey indicated that EPA intended at the time to distribute the brochure in hardware stores and other businesses throughout the U.S. Staff has been unable to determine if this brochure was ever widely distributed.²⁶⁹

At least as early as 2004, EPA began to develop a possible Asbestos Action Plan, focused primarily on Zonolite Attic Insulation.²⁷⁰ The Asbestos Action Plan was later changed to the Asbestos Project Plan in November of 2005 and posted on EPA’s website.²⁷¹ The Asbestos Project Plan has three objectives: (1) improving the state of the science for asbestos; (2) identifying and addressing exposure and risk reduction opportunities associated with asbestos in products, schools and buildings; and (3) characterizing and reducing asbestos exposures through assessment and cleanup.²⁷² It appears, however, that EPA has made little progress toward implementing the first two objectives.

²⁶⁵ OIG interview of Mary Goldade (April 19, 2006).

²⁶⁶ OIG interview of Paul Peronard (August 6, 2007).

²⁶⁷ OIG interview of Paul Peronard (August 6, 2007). Page 4.

²⁶⁸ U.S. EPA, “Current Best Practices for Vermiculite Attic Insulation-May 2003.” <<http://www.epa.gov/asbestos/pubs/insulation.html>> (viewed September 18, 2008).

²⁶⁹ *Id.*

²⁷⁰ U.S. EPA, “Asbestos Action Plan Draft-May 4, 2004.”

²⁷¹ U.S. EPA, “Asbestos Action Plan Draft-May 4, 2004.” *See also* U.S. EPA, “Asbestos Project Plan-November 2005.”

²⁷² U.S. EPA, “Asbestos Project Plan-November 2005.”

With respect to the first objective to improve the state of science for asbestos, as discussed in a previous section, EPA has failed to conduct toxicological studies and finish the toxicity assessment for Libby asbestos in a timely manner. The toxicity assessment is currently not scheduled to be completed until 2010.²⁷³ ATSDR also announced this past June (2008) that it would be spending \$8 million to conduct a Libby Amphibole Health Risk Initiative, which will include epidemiological studies and other crucial research.²⁷⁴ This study is scheduled to begin in 2009, seven years after EPA scientists in Region 8 asked for studies to be done to better understand the risks of Libby asbestos.

With respect to the second objective to identify and address exposure and risk reduction opportunities associated with asbestos in products, schools and buildings, it appears that EPA has yet to accomplish the most crucial task of working with the Occupational Safety and Health Administration (OSHA) to update the asbestos-in-buildings guidance documents for managing asbestos in buildings and facilities.²⁷⁵ OSHA guidance currently does not specifically address the very friable and easily disturbed Zonolite Attic Insulation, and a review of OSHA's publications indicates that their guidance has not been updated since 1990.²⁷⁶ The failure to update the OSHA guidance documents is potentially a very serious problem for contractors who work in attics, since as Dr. Aubrey Miller explained, "exposure levels are humongous in attics; you cannot be there for 30 minutes even with respiratory protection and many are going there without any protection at all."²⁷⁷

Some of the existing information on EPA's website is also clearly erroneous. For example, EPA's webpage entitled *Asbestos in Your Home* states, "Houses built between 1930 and 1950 may have asbestos as insulation." However, the asbestos contaminated Zonolite Attic Insulation was installed in homes between the early 1960's through the early 1990s.²⁷⁸ Consequently, homeowners living in newer homes may be misinformed about the possibility of asbestos contaminated insulation in their attics.

It is clear that had a public health emergency been declared back in 2002 with respect to Zonolite Attic Insulation in Libby, EPA would likely have had to address the national issue of Zonolite Attic Insulation many years ago because the American public would have demanded it. One EPA expert explained, "EPA was going to let people know, but they were changed from their direction. A PHE definitely would have helped— it would

²⁷³ Staff interview of Randy Deitz and Barry Breen (September 3, 2008).

²⁷⁴ Agency for Toxic Substances and Disease Registry, U.S. Department of Health and Human Services, "Fact Sheet: ATSDR Libby Amphibole Health Risk Initiative."

²⁷⁵ U.S. EPA, "Asbestos Project Plan-November 2005."

²⁷⁶ U.S. OSHA, "Managing Asbestos in Place: A Building Owner's Guide to Operations and Maintenance Programs" ("Green Book") 7/90; "Guidance for Controlling Asbestos Containing Material in Buildings" ("Purple Book") 6/85; "Asbestos in Buildings: Guidance for Service and Maintenance Personnel" ("Custodial Brochure") 7/85

²⁷⁷ Staff interview of Dr. Aubrey Miller (September 8, 2008).

²⁷⁸ *Id.*

have provided media and public attention. Without a PHE, asbestos has not become a public health issue. That's the politics of asbestos."²⁷⁹

The national issue of what to do about Zonolite Attic Insulation was a tough question that EPA and OMB faced in 2002 as they contemplated whether to declare a public health emergency in Libby, Montana. But, it was not a question that should have been put off for more than six years.

²⁷⁹ *Id.*