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United States General Accounting Office
Washington, DC 20548

September 5, 2003

The Honorable James M. Inhofe
Chairman, Committee on Environment
and Public Works
United States Senate

Subject: *Hazardous Waste: EPA's Cleanup of the Eagle-Picher Henryetta, Oklahoma, Site*

Dear Mr. Chairman:

From 1996 to 1997, the U.S. Environmental Protection Agency (EPA) conducted a cleanup action on a former zinc smelter operated by Eagle-Picher Mining and Smelting, Inc. and other areas contaminated by materials from this site near Henryetta, Oklahoma. EPA's cleanup focused on removing the immediate health threat posed by lead- and arsenic-contaminated soil transported from the Eagle-Picher site to residential and other highly accessible areas. Cleanup actions on the Eagle-Picher site involved establishing proper drainage on the site, encapsulating the Eagle-Picher site with clay and cover soil, and establishing vegetative cover at the site to protect nearby residents from recontamination from wind and water erosion of hazardous materials. Since completion of the cleanup, private landowners of a neighboring property have raised concerns about contamination of their property resulting from EPA's cleanup actions. Landowners allege that EPA, through its contractors, transported and negligently disposed of hazardous substances on their property. The landowners also allege that EPA's actions at the site contributed to the migration of contamination from the Eagle-Picher site onto their property. These landowners are currently pursuing litigation against EPA and the city of Henryetta for damages incurred as a result of the cleanup. EPA asserts that the cleanup met its objectives and successfully removed the immediate threat to human health and the environment.

You asked us to provide information on (1) the environmental cleanup actions EPA conducted at the Eagle-Picher Henryetta site and (2) the actions EPA has taken in response to neighboring landowners' concerns related to the Eagle-Picher cleanup site. To address these objectives, we reviewed documents on the background of the site, EPA cleanup activities, and documents provided by private landowners. We also interviewed officials from EPA headquarters and Region 6 offices, the Department of Interior's Bureau of Reclamation and its contractor on the Eagle-Picher cleanup, the Oklahoma Department of Environmental Quality, a representative of the city of Henryetta, and private landowners. In addition, we visited the site and neighboring property. Because

the landowners are currently involved in litigation against EPA and others related to the site cleanup, we did not assess the sufficiency or effectiveness of EPA's cleanup or the merits of the landowners' litigation against EPA. We present the results of the litigation, to date, but we did not determine the cause of contamination associated with the cleanup or any liabilities associated with the cleanup. A map of the Eagle-Picher hazardous waste site and the landowners' property is included in enclosure I. A detailed narrative chronology of events related to the Eagle-Picher Henryetta hazardous waste site and legal issues surrounding litigation against EPA and others is included in enclosure II.

Background

From 1916 to 1968, Eagle-Picher Mining and Smelting, Inc. operated a smelter producing zinc, cadmium, and germanium on a 70-acre property near Henryetta, Oklahoma. Eagle-Picher received ore from mines in northeastern Oklahoma and operated a smelter for recovering metals from the ore. These operations left the site with high concentrations of arsenic, lead, and zinc in waste primarily located in four piles on the north and south areas of the site. Eagle-Picher, Inc. ceased operations on the site in 1968, and donated the property to the city of Henryetta in 1974. The city of Henryetta took steps to develop the property, leasing portions of it to industrial facilities, including a coal mining company that used the site for storage and transportation and mined the property to the north of the smelter extensively. In addition, the city used soil from the site as fill material at locations throughout Henryetta, including residences, schools, and parks, between 1974 and 1995.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) established the Superfund program to clean up highly contaminated hazardous waste sites. CERCLA authorizes EPA to respond to hazardous substance releases that threaten public health or welfare or the environment in two general ways: (1) removal actions, which generally address environmental emergencies and are generally short-term actions to diminish the threat of a release, or (2) remedial actions, which are generally permanent cleanups that are more costly and take longer to complete. CERCLA authorizes EPA to compel parties responsible for the contamination to clean up the sites; allows EPA to pay for cleanups, then seek reimbursement from the responsible parties; and establishes a trust fund to help EPA pay for cleanups and related program activities. EPA may enter into settlement agreements with potentially responsible parties (PRPs) that require them to clean up the site or pay for cleanup. In addition, PRPs may sue to seek contribution from other PRPs for their response costs incurred during cleanups.

In 1996, Oklahoma state environmental officials requested assistance from EPA in addressing contamination on the Eagle-Picher site and other locations throughout Henryetta. Sampling conducted for EPA indicated soil taken from the Eagle-Picher site and used as fill in residential and other highly accessible areas, including areas frequented by children, was contaminated with lead and arsenic.

Specifically, EPA found contamination at levels presenting health concerns at three schools, three parks, 93 residential alleys, and 162 residential properties.

EPA's Cleanup Action Focused on Removing Hazardous Waste from High-Access Areas and Consolidating and Containing Waste at the Eagle-Picher Site

In August 1996, EPA initiated a removal action on the Eagle-Picher site and other locations throughout Henryetta in accordance with CERCLA. EPA determined that the site, including locations where material from the site was used as fill material in construction, presented an imminent and substantial endangerment to public health and the environment because of lead and arsenic contamination in high-access areas. However, because the site did not affect residential drinking water or a large population, it did not qualify for proposal to EPA's list of the nation's most contaminated sites, called the National Priorities List. EPA placed a ceiling of \$8 million on EPA's project cost.

Working in partnership with the Oklahoma Department of Environmental Quality, EPA's removal action focused on excavating contaminated soil and wastes used as fill material in residential and high-access areas such as schools and parks, and on addressing residential areas contaminated by wind or water erosion from the site. The cleanup action also included moving contaminated material from these locations to the Eagle-Picher property; consolidating contaminated material present at the site; and placing a clay cap, cover soil, and vegetation over the material to protect nearby residents from further contamination. In January 1997, EPA officials also obtained an agreement granting access to property to the north of the Eagle-Picher site from the then-current landowner. This agreement allowed EPA to address contamination in a pond, located on both properties, which was filled with coal sediments used by the coal mining company that leased a portion of the Eagle-Picher site to wash coal after it was mined from the property to the north. EPA states that it filled this pond with clean soil and uncontaminated debris such as cement blocks from residential properties to remove the threat of direct contact with contaminated waste material in the pond.

EPA completed the majority of its cleanup actions on the site in August 1997, with other drainage work completed in December 1997. On February 4, 1998, EPA notified the Henryetta Economic Development Authority that all phases of the design and implementation of the cleanup action at the site were complete and that the site was ready for appropriate commercial or industrial redevelopment.¹ On December 11, 1998, the Oklahoma Department of Environmental Quality sent a similar letter to the city of Henryetta stating that EPA and the department had completed a project that identified and buried remaining contamination from the smelter operation and that no environmental factors precluded construction and use of the property for industrial or commercial purposes.

¹ A January 2001 deed restriction placed on the Eagle-Picher site prohibited residential, childcare, or nursing care development.

EPA Provided Neighboring Landowners with Documents Related to the Eagle-Picher Cleanup

On October 10, 2000, owners of a portion of the property located to the north of the Eagle-Picher site submitted a hazardous waste release incident report to EPA's National Response Center. One of four private citizens co-owning the property reported stepping in water near the Eagle-Picher property line and later experiencing chemical burns on his feet. The landowners retained legal counsel on October 17, 2000, and made a series of Freedom of Information Act requests for documents relating to the Eagle-Picher removal action from October 2000 through March 2001. The landowners asserted in communication to EPA that the removal action failed to eliminate exposure to hazardous substances and failed to prevent the migration of contaminants through soil erosion into water pathways. Landowners reported incurring expenses for two environmental engineering studies, a property survey, laboratory tests on soil and water samples, telephone calls, travel to EPA Region 6 and EPA headquarters, and medical expenses.

According to EPA regional and headquarters officials, EPA responded appropriately to the concerns of the landowners, expressed through correspondence, telephone calls, and requests for information under the Freedom of Information Act between October 2000 and March 2001. EPA referred the October 2000 incident report submitted by the landowners to EPA's National Response Center to the Oklahoma Department of Environmental Quality, which responded by reviewing the landowners' concerns and contacting the landowners to explain that the levels of contamination present did not warrant action by EPA or Oklahoma. EPA responded to the landowners' written requests for information by advising them of the cost to provide documents, and when the cost proved excessive, providing the documents for landowners' counsel to review at EPA's offices. Although EPA took several months to respond to some requests for information, EPA attributes these delays to the time required to retrieve documents placed in storage, review files to locate appropriate documents, and determine a cost estimate for providing the documents directly to the landowners.

The landowners disagree that EPA was responsive to their concerns about contamination on their property and assert that EPA's systemic attitude has impeded their efforts to obtain information about the cleanup. The landowners cited unnecessary delays in providing documents and alleged that EPA attempted to hide the truth about cleanup actions.

On March 16, 2001, the landowners sued EPA and other parties in federal district court, seeking among other things to recover cleanup costs under CERCLA resulting from contamination on their property. The landowners alleged that a release of hazardous substances from the Eagle-Picher property caused the contamination and that EPA's cleanup activities had caused the release. At a February 2002 meeting with Department of Justice attorneys representing the United States, the landowners proposed settling its litigation for \$602 million: \$373 million to remedy alleged contamination on the landowners' property; \$100

million to remedy the alleged failure of the Eagle-Picher cleanup; \$2 million in damages for trespass, nuisance, and personal injuries; \$126 million for economic losses; and \$103,000 in expenses incurred for two environmental engineering studies, a property survey, laboratory tests on soil and water samples, telephone calls, travel to EPA Region 6 and EPA headquarters, and medical expenses. The landowners later revised this figure to \$28 million, citing a desire to compromise and save taxpayer dollars. Justice contacted the landowners in March 2002 and stated that it would not settle. Among other things, the government argued that landowners had not incurred any cleanup costs recoverable under CERCLA. Although the landowners report that they have not cleaned up or contained the contamination on their property, they argue that some of the costs they have incurred, including the costs of the environmental engineering studies, are response costs under CERCLA.

The district court dismissed the suit, holding in part that the landowners themselves were responsible parties because the release was occurring on their property, and that under CERCLA responsible parties cannot generally recover cleanup costs. While there is an exception to this rule for “innocent landowners,” those that exercised due diligence before purchase in determining whether the property was contaminated and due care with respect to hazardous substances found on the property, the landowners failed to assert that they qualified for this exception. The landowners appealed, contending among other things that they are not responsible parties and that in any event they qualify as innocent landowners. The appeal is pending. A more detailed description of the litigation is included in enclosure II.

Observations

Based on our observations, EPA has carried out its planned activities to remove lead and arsenic contamination from residential and high-access areas and to mitigate exposure to and migration of lead- and arsenic-contaminated material from the Eagle-Picher site. From 1996 to 1997, EPA and its contractors took actions designed to remove contamination from residential and high-access areas, establish proper drainage on the Eagle-Picher site, consolidate and cover hazardous material on the Eagle-Picher site with clay and cover soil, and establish vegetative cover over the hazardous material on the site to protect nearby residents against further contamination. Our review of EPA’s records shows that the Eagle-Picher site and the landowners’ property were used for a number of industrial activities over the past century, hence determining the cause of current contamination on either property would be problematic. Further, the removal action did not purport to eliminate hazardous material at the Eagle-Picher site or to make the Eagle-Picher site suitable for residential development. Similarly, the action was not intended to remove contamination from the landowners’ property because, unlike the other properties where EPA took action, it is not a residential property where EPA determined that an imminent and substantial endangerment existed. As we describe above, the district court dismissed the landowners’ suit in its entirety, and the landowners are appealing on the cleanup cost issues. We note

that final judgment regarding the merits of the landowners' case against EPA is reserved for the court.

Agency and Other Interested Party Comments

We provided EPA with a draft of this letter for review and comment. EPA agreed with the letter's findings and observations and stated that the actions EPA has taken at the Eagle-Picher site were appropriate to address the human health threats posed by the site. EPA also provided technical comments and clarifications, which we incorporated in the letter as appropriate. In addition, we provided the landowners with an opportunity to review and comment on a draft of this letter. The landowners disagreed with several of the letter's findings and observations. The landowners maintain that EPA's cleanup of the Eagle-Picher site failed and assert that EPA's actions during the cleanup were negligent or incompetent. Based on our review of EPA records and discussions with EPA, EPA's contractors for the cleanup, and state and local officials, we believe EPA carried out its planned activities at the Eagle-Picher site. Written comments provided by EPA and the private landowners appear in enclosures III and IV, respectively.

We conducted our work from May 2003 through August 2003 in accordance with generally accepted government auditing standards.

As agreed with your office, unless you publicly announce the contents of this letter earlier, we plan no further distribution of it until 30 days after the date of this letter. At that time, we will send copies to other interested parties and make copies available to others who request them. In addition, the letter will be available on GAO's Web site at <http://www.gao.gov>.

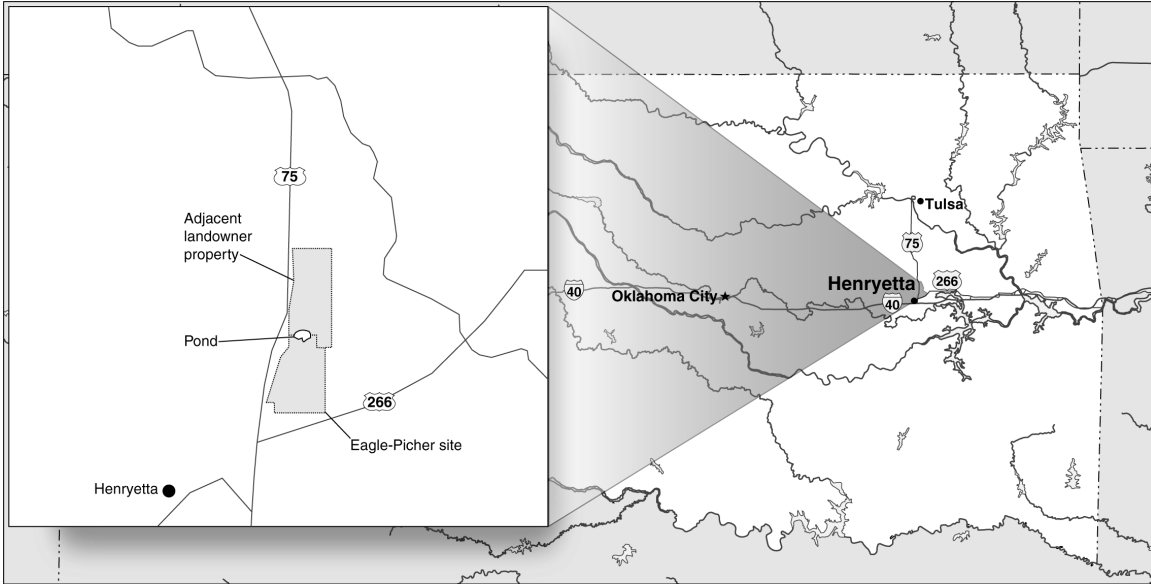
If you or your staff have any questions about this letter, please contact me or Peg Reese at (202) 512-3841. Major contributors to this letter were Richard Johnson, Joanna McFarland, Kirk Menard, Judy Pagano, and Leigh White.



John B. Stephenson
Director, Natural Resources and Environment

Enclosures

Map of Henryetta, Oklahoma, Eagle-Picher Hazardous Waste Site and Adjacent Landowner Property



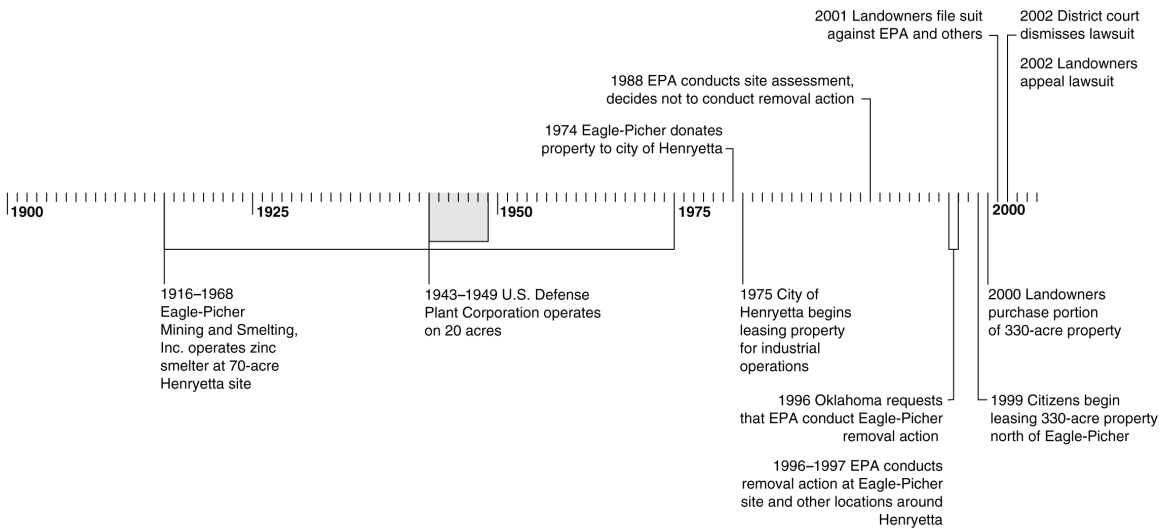
Source: GAO.

Note: Eagle-Picher site and adjacent landowner property are not to scale.

Narrative Chronology of Events Related to the Eagle-Picher Henryetta Hazardous Waste Site

This enclosure provides a narrative chronology of events related to the Eagle-Picher site in Henryetta, from its historical industrial use to EPA’s 1996 CERCLA removal action and current litigation related to that action. This enclosure presents private landowners’ concerns about contamination from the Eagle-Picher site onto neighboring property, culminating in a lawsuit against EPA and others, and EPA’s response to the landowners’ concerns. Figure 1 provides a timeline of key events related to the Eagle-Picher site.

Figure 1: Timeline of Key Events



Source: GAO.

Eagle-Picher Site History

The Eagle-Picher CERCLA site is located in the city of Henryetta, Oklahoma, in east-central Oklahoma. The property is located northeast of downtown Henryetta, population 6,096, and is west of the town of Dewar, population 919, in Okmulgee County. From 1916 to 1968, Eagle-Picher Mining and Smelting, Inc. (now EaglePicher Inc.) operated a smelter on 70 acres near Henryetta, Oklahoma. The smelter was used to recover zinc, cadmium, and germanium from ore received from mines in northeastern Oklahoma. From 1943 to 1949, the U.S. Defense Plant Corporation also operated on approximately 20 acres of the 70-acre site.

Eagle-Picher ceased operations on the site in 1968 and donated the property to the city of Henryetta in 1974. The city never operated the site, but leased portions of the property beginning in 1975 to four companies: Permocast, Inc. (an aluminum casting company), P&K Company, Ltd. (a coal mining operation), Klutts Trucking (coal hauling for P&K Company), and Glover Construction (an asphalt plant). During P&K’s occupation of the land, the company built a coal sedimentation

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pond—a pond used to remove coal sediments during coal processing—on the northern end of the property extending beyond the Eagle-Picher property line. According to a representative for the city of Henryetta, P&K Company also conducted extensive coal mining operations on the property to the north of the Eagle-Picher site under an informal agreement with the then-owner. P&K Company, Klutts Trucking, and Glover Construction vacated the Eagle-Picher site prior to EPA's 1996 removal action. Permocast is still active on about 3 acres near the northwest corner of the site.

Industrial operations left the Eagle-Picher site with high concentrations of arsenic, lead, and zinc in waste primarily located in piles on the north and south portions of the site. Over 170,000 cubic yards of bulk solid waste from the smelter remained on the site from Eagle-Picher's operations. During the 1980s, EPA and Oklahoma state agencies conducted numerous site investigations on the Eagle-Picher property, identifying high concentrations of several metals in waste piles and soil located near these piles. Air samples also indicated lead and zinc contamination near a residence located near the Eagle-Picher site. In 1988, EPA conducted a site assessment to determine if a removal action was necessary to address the lack of site security around heavy metal-contaminated zinc ore and waste piles on the Eagle-Picher site. The assessment was conducted to determine if lead contamination in waste material posed a threat to public health and welfare through direct physical contact with the material. However, because sampling indicated that contamination levels did not present an imminent and substantial endangerment at that time, EPA decided that no further action was necessary.

In 1996, prompted by heightened concern about material from the Eagle-Picher site moved to residential and high-access areas, the Oklahoma Department of Environmental Quality (ODEQ) contacted EPA requesting a CERCLA cleanup of the site. This time EPA decided to proceed. EPA officials explained that several factors contributed to the agency's decision to conduct a removal action at the site in 1996.

- (1) The health standard for lead had changed, indicating that lead levels in the area were a greater concern than previously believed.
- (2) Samples indicated that contaminated material from the Eagle-Picher site was migrating to residences located immediately south of the site.
- (3) ODEQ informed EPA that material from the Eagle-Picher site was used as fill material in the construction of residential driveways, schools, alleys, and other high-access areas.

A site assessment conducted for EPA by Ecology and Environment, Inc. from 1995 to 1996, prior to the removal action, reported that the site posed a threat to the public and the environment through the risk of direct contact and off-site migration of contaminants through wind and water erosion. The assessment found that contaminated material had traveled through a tributary to a creek located to the north of the Eagle-Picher site. The assessment also found that

residences and businesses located south of the Eagle-Picher site within 500 feet of the southern waste piles as well as high-access areas where smelter material was used as fill material were contaminated with lead. Lead exposure can be harmful to humans when ingested or inhaled, but is particularly harmful to children because of their increased susceptibility to the adverse neurological and developmental effects of lead. Ecology and Environment, Inc. also developed a work plan that provided the conceptual design and cost estimates for the removal action.

Eagle-Picher Henryetta CERCLA Removal Action

EPA initiated a removal action on the Eagle-Picher site and other locations contaminated with material from the site in August 1996. EPA and ODEQ entered into a contract pursuant to CERCLA setting forth the responsibilities of both agencies in conducting the removal action. The removal action addressed threats at areas accessible to children, residential properties, and the Eagle-Picher site, as well as an additional industrial site in the area. The primary concern was the threat to public health posed by arsenic- and lead-contaminated soil.

As the lead agency under the contract, EPA's responsibilities included excavating contaminated soil from residential properties and other highly accessible areas, restoring these properties to near original condition, and consolidating and encapsulating waste at the Eagle-Picher site. EPA's responsibilities at the Eagle-Picher site also included establishing proper drainage to minimize further off-site migration of hazardous material, placing a clay cap over the heavily contaminated areas, and placing cover soil over the entire smelter facility site to protect nearby residents from further contamination. The initial work plan developed by Ecology and Environment, Inc. included draining and filling the coal sedimentation pond located on both the Eagle-Picher site and the property to the north with clean soil or hazardous material from the northern waste pile, or both. ODEQ's responsibilities included establishing a vegetative cover on areas of the Eagle-Picher site and providing funding to reimburse EPA for 18 percent of the cost of performing the removal action. In addition, the removal action included the excavation of waste from a separate former smelter site in the area, operated by Victory Metals, and the consolidation of this waste at the Eagle-Picher site. EPA was responsible for excavation and consolidation of the waste, while ODEQ was responsible for establishing vegetative cover on disturbed areas at the Victory Metals site and reimbursing EPA for costs in connection with the removal action at the Victory Metals site.

To conduct the removal action, EPA entered into an interagency agreement with the Department of Interior's Bureau of Reclamation (BOR) for engineering and contracting support for removal activities. BOR contracted with Environmental Chemical Corporation (ECC) to conduct the engineering work on the site. ECC began excavating material from residential and high-access areas in August 1996 and completed excavation at three parks, three schools, and 162 residential properties by July 1997. Relocation and consolidation of waste at the Eagle-

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Picher site was initiated in February 1997. Small ponds located on the site were filled with soil and compacted, and the most contaminated smelter material was relocated to the consolidated waste area on the site. Material from waste piles, as well as waste excavated at the Victory Metals site and other areas, was also relocated to the consolidated waste area. BOR officials explained that culverts were installed to drain water from the consolidated waste area—a large, contoured plateau—and direct water into natural gullies located on the site.

In addition, in January 1997, EPA and the then-owner of the property immediately north of the Eagle-Picher site entered into an agreement allowing EPA access to the property. The property, used for coal mining operations by P&K Company during its lease on the Eagle-Picher site, contained a portion of the coal sedimentation pond located on both pieces of land. The access agreement stated that the landowner consented to officers, employees, and parties authorized by EPA entering and having continued access to the property for taking samples and other actions related to the investigation of contamination and for the performance of a response action including, but not limited to

- the use of mechanical equipment,
- the removal of contaminated material,
- the replacement of removed contaminated material with clean material and regrading of replaced material to the property's near-original grade,
- the replacement of vegetation whose removal was necessary with locally available vegetation, and
- other actions necessary to mitigate releases or threats of releases of hazardous substances from the property.

EPA contractors began draining the north coal sedimentation pond in March 1997. EPA officials stated that its contractors placed clean soil and large, uncontaminated debris into the coal sedimentation pond partially located on this property. EPA officials explained that although Ecology and Environment, Inc.'s initial plan mentioned the possibility of placing hazardous waste in the pond, EPA did not proceed with this plan. EPA and its contractors state that activities conducted on the private property were limited to draining and filling the coal sedimentation pond with clean material and installing a large drainage pipe that directed excess water around the coal sedimentation pond into natural gullies on the site.

EPA began capping the consolidated waste area with clay donated by a local company in April 1997. Soil donated by a local strip mine in exchange for leveling the property provided cover soil for the entire Eagle-Picher site. With technical support from the U.S. Department of Agriculture's Natural Resources Conservation Service and other local entities, vegetation was planted to provide protection against the erosion of contaminated materials. Sewage sludge provided by the city of Tulsa and the city of Okmulgee also assisted in treating soil to facilitate revegetation. EPA completed major removal operations in August

1997. Additional drainage work was completed in December 1997, and ODEQ continued planting vegetation on the site into the spring of 1998.

After completion of the removal action, the city of Henryetta agreed to conduct long-term maintenance on the Eagle-Picher site. ODEQ has provided technical expertise on maintenance activities to the city as needed. According to city and EPA officials, the primary concern in maintaining the site is ensuring the integrity of the cap placed over the consolidated waste area to prevent exposure of hazardous waste. EPA officials explained that appropriate maintenance activities include controlling erosion at the site, particularly around drainage pipes where water erosion of cover soil could occur. EPA officials stated that they asked the previous owner of the property north of the Eagle-Picher site to assume responsibility over maintaining the portion of the cleanup that occurred beyond the Eagle-Picher property line, but the previous owner declined. According to a city of Henryetta representative, the city attempted to conduct maintenance on this property, although the city lacked the authority to enter the property. A city of Henryetta official noted that the logistics of this arrangement were unclear. In January 2001, a deed restriction was placed on the Eagle-Picher site that limited land use to commercial or industrial use and prohibited residential, childcare, or nursing care development because of the continuing presence of authorized concentrations of hazardous substances in the soil and groundwater. The deed restriction also stipulated that the groundwater under the site should not be used for drinking or industrial uses and that activities on the site must preserve and protect the cap over the hazardous waste.

Private Landowners' Concerns about Contamination from the Eagle-Picher Site onto Neighboring Property

Four private citizens began leasing the property north of the Eagle-Picher site in October 1999. The property was used by P&K Company for coal mining while it leased a portion of the Eagle-Picher site from the city of Henryetta, and is located downwind from the Eagle-Picher site and subject to prevailing southerly winds. The citizens stated that they had an informal agreement with the previous landowner to lease the land with the intent of purchasing it later. The citizens occupied the site to pursue several business developments, including building an asphalt plant, building and leasing commercial properties on land fronting the highway, and building a prison facility. The citizens reportedly paid \$250,000 to purchase, transport, and erect an asphalt plant on the property in late 1999. The citizens also report initiating discussions with a potential investor in 1996 about financing the construction of a medium-security geriatric prison facility on the site.

During discussions in May 2003, the landowners told us they believed the land they intended to purchase was suitable for these development plans because state and local newspaper articles reported that EPA had cleaned up the Eagle-Picher site adjacent to the land and deemed it available for industrial business use. The landowners stated that they assumed from this information that the property they

planned to purchase was a good site for locating an asphalt plant and a prison. Furthermore, the landowners noted that no deed restrictions existed on the property and no problems were identified by the title search conducted before they purchased the property. The landowners also stated that they did not realize the coal sedimentation pond, drained and filled by EPA during the cleanup, was partially located on their property. When asked whether a survey was conducted on the property to clarify the property boundary with the Eagle-Picher site before the purchase was made, the citizens told us that the local bank providing the loan did not require one. The citizens' purchase of a portion of the 330-acre property became final in July 2000.² The citizens maintained an informal agreement with the previous owner to purchase the remainder of the property located along the highway when they were able.

In October 2000, one of the landowners stated that he stepped into water on the southern portion of his property bordering the Eagle-Picher site and experienced chemical burns on his feet. On October 10, 2000, a private law firm representing the landowners called EPA's National Response Center reporting that a hazardous waste release occurred on the landowners' property. From October 2000 through March 2001, the landowners and their counsel contacted EPA requesting additional information about the Eagle-Picher site. The landowners also employed two environmental firms to conduct a site investigation that entailed testing soil and water on the property and to conduct an assessment of health risks associated with contamination on the property. The site investigation found elevated levels of pollutants and concluded that portions of the Eagle-Picher cleanup had been compromised. The assessment of health risks found that contamination on the site could pose carcinogenic risks to workers. The landowners also engaged an engineering firm to survey their property to confirm the location of the boundary with the Eagle-Picher site.

The landowners reported experiencing additional health problems since the October 2000 incident, including heart problems, skin lesions, and difficulty speaking and breathing while on their property. The landowners also indicated that contamination on their property has left them on the brink of bankruptcy. The landowners ceased discussions with a potential investor in a prison to be built on the property in December 2000, citing the discovery of a hazardous material release on the Eagle-Picher site. The landowners also stated that the asphalt plant erected on the property was never operated because of the discovery of hazardous material.

EPA's Response to Landowner Concerns about the Eagle-Picher Cleanup

EPA responded to the private landowners' October 10, 2000, incident report to the National Response Center by referring the incident to EPA Region 6, which referred the incident to ODEQ. EPA officials explained that when the National

² According to a city of Henryetta representative, the landowners purchased approximately 280 acres in 2000.

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Response Center receives an incident report, it contacts the appropriate EPA regional office to determine if immediate response is warranted. EPA officials explained that events such as train wrecks or airplane crashes would require immediate response. In this case, EPA determined that the incident was indicative of a pre-existing condition and did not warrant immediate response. Region 6 officials referred the report to ODEQ because state officials are closer to and more familiar with sites in their area. The director of the Waste Management Division at ODEQ told us that ODEQ handles incident report referrals on a case-by-case basis and does not have formal procedures in place for responding to reports. In this case, ODEQ reviewed sampling data supplied by the landowners' counsel and determined that the site did not need to be cleaned up to residential standards, and therefore the level of contamination present did not justify a cleanup. ODEQ officials telephoned the landowners and explained its conclusion that the contamination did not require any action. On December 17, 2002, one of the landowners E-mailed EPA Region 6's Internet Comments E-mail address reiterating concerns about contamination resulting from the Eagle-Picher cleanup. An EPA Region 6 official responded to this E-mail with a letter sent January 17, 2003, stating that the concerns raised were the same as, or very similar to, issues EPA discussed previously with the landowners and their counsel and did not warrant additional EPA response or action.

From October 2000 through March 2001, the landowners and their counsel contacted EPA through written correspondence, telephone calls, and Freedom of Information Act requests seeking information about the Eagle-Picher cleanup. EPA responded to landowners' written requests for information by advising the landowners of the cost to provide documents and, when the cost proved excessive, providing the documents for landowners' counsel to review at EPA's offices. EPA officials told us the agency responded to landowners' concerns appropriately. Although EPA took several months to respond to some requests for information, EPA explained that delays resulted from the time required to retrieve documents placed in storage, review files to locate appropriate documents, and determine a cost estimate for providing the documents directly to the landowners. For example, EPA responded to the landowners' December 13, 2000, request for documents on March 12, 2001, attributing the delay to the time required to review site documents and determine an estimated cost for identifying and copying appropriate documents. EPA officials stated that document requests after the landowners filed suit were treated as discovery requests within the litigation rather than Freedom of Information Act requests and were addressed by EPA and Department of Justice attorneys.

Landowners Pursue Litigation against EPA, ODEQ, the City of Henryetta, and Others

The landowners disagree that EPA was responsive to their concerns about contamination on their property and assert that EPA's systemic attitude has impeded their efforts to obtain information about the cleanup. The landowners

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cited unnecessary delays in providing documents and alleged that EPA attempted to hide the truth about cleanup actions.

On March 16, 2001, the landowners filed suit in federal district court against numerous defendants, including EPA and the city of Henryetta, the two defendants that are the focus of this report. Alleging that these defendants were respectively a former and the current owner, the landowners sought response costs under CERCLA and an injunction under CERCLA requiring EPA and the city to carry out further cleanup activities on the Eagle-Picher site and to clean up the landowners' property. The landowners also brought several claims under state law, alleging that (1) EPA had trespassed on their property;³ (2) the contamination from the Eagle-Picher site constituted a public nuisance for which EPA and the city were responsible; (3) the landowners had suffered personal injury from the contamination on their property originating from the Eagle-Picher site; and (4) the landowners had suffered economic loss as a result of the contamination on their property from the Eagle-Picher site.

On February 12, 2002, the landowners, Department of Justice attorneys representing EPA in the lawsuit, EPA Region 6 officials, and a congressional staff member met to discuss the litigation. The landowners proposed settling its litigation for \$602 million: \$373 million to remedy alleged contamination on the landowners' property; \$100 million to remedy the alleged failure of the Eagle-Picher cleanup; \$2 million in damages for trespass, nuisance, and personal injuries; \$126 million for economic losses; and \$103,000 in expenses incurred for two environmental engineering studies, a property survey, laboratory tests on soil and water samples, telephone calls, travel to EPA Region 6 and EPA headquarters, and medical expenses. The landowners later revised this figure to \$28 million, citing a desire to compromise and save taxpayer dollars.

Following this meeting, Justice wrote the landowners' counsel on March 19, 2002, and stated that it would not settle. Justice stated in its letter that EPA did a good job in cleaning up the Eagle-Picher site and that Justice has not seen any evidence that EPA's work harmed the landowners' property or that the cleanup action failed. Justice also stated that no contaminated wastes were placed in the coal sedimentation pond or on the landowners' property. With regard to the landowners' claims for nuisance, economic losses, and medical expenses, Justice stated that the landowners failed to follow the appropriate procedure for filing tort claims against the United States.⁴ Regarding their claims under CERCLA, Justice asserted that the landowners had not established that they had already incurred response costs or that any such costs were necessary. Justice also noted that the only way for the landowners to recover all of their costs would be to show that they were "innocent landowners" under CERCLA, meaning among other things that they exercised due diligence in inquiring into the condition of the

³ Specifically, the landowners alleged that EPA had dumped both hazardous and nonhazardous substances on their property, moved and used soil on their property, and erected signs on their property, all without permission.

⁴ The landowners have not pursued these claims.

property before they bought it and due care with respect to hazardous substances that may be present on their property.

On September 30, 2002, the district court dismissed the landowners' suit against EPA and the city.⁵ The court held that the landowners were PRPs for the contamination on their property, and that applicable CERCLA case law generally prohibited PRPs from recovering response costs.⁶ Although "innocent landowners" may bring cost recovery actions under CERCLA, the court noted that the landowners did not argue that they qualified for this exception to the general rule prohibiting cost recovery actions by PRPs.⁷ Because the landowners could not seek any response costs from EPA and the city, the court did not decide whether the landowners had in fact incurred such response costs. Because no federal claims remained, the court accordingly dismissed the state law claims against the city, although it noted that the landowners could re-file these claims in state court. In an earlier ruling, the district court also rejected the landowners attempt to obtain an injunction, holding that because CERCLA does not require EPA to take remedial action, courts lack the power to order it to do so.⁸ The earlier ruling also dismissed the landowners' state law claims against the United States, holding that the landowners had failed to follow required administrative procedures in filing such claims against the United States.

The landowners have appealed that part of the district court's order dismissing their claim for response costs under CERCLA. The landowners contend among other things that they are not responsible parties, that in any event they qualify as innocent landowners, and that applicable CERCLA case law does not prohibit them from recovering costs from EPA and the city. The landowners have hired new counsel to pursue the appeal, which is pending.

City of Henryetta Attempts to Condemn a Portion of Private Property Neighboring the Eagle-Picher Site

Because the landowners will not allow the city of Henryetta to conduct maintenance on the portion of the cleanup that occurred on their property, the city is currently attempting to condemn about 12 acres bordering the Eagle-Picher site. A representative of the city of Henryetta explained that city officials attempted to conduct maintenance on the landowners' property but were told

⁵ *Young v. United States*, No. CIV-01-155-S (E.D. Okla. Sept. 30, 2002).

⁶ The court also noted that the landowners could have sought contribution from EPA and the city for the landowners' cleanup costs had the landowners themselves been subject to a cleanup order or a cost recovery action under CERCLA. However, neither circumstance was present in this case.

⁷ To be considered an innocent owner, owners must establish that at the time of acquiring the contaminated property they exercised due diligence in determining whether the property was contaminated, and that since acquiring the property they have exercised due care with respect to any hazardous substances present. 42 U.S.C. §§ 9601(35), 9607; see *Sinclair Oil Corp. v. Dymon, Inc.*, 988 F.Supp. 1394, 1397 (D. Kan. 1997).

⁸ In addition, the earlier ruling held that to the extent EPA was not negligent, CERCLA specifically exempted it from liability under the theory that it had arranged for the disposal of hazardous substances on the landowners' property as a result of EPA's cleanup activities.

Enclosure II

they were trespassing and were asked to leave the property. An EPA official stated that surface water is cutting into a gully along the drainage pipe that terminates into a natural drainage pathway on the landowners' property. This gully needs to be repaired because, if left unchecked, it could eventually damage the drainage pipe or cut into the hazardous substances encapsulated on the site.

Comments from the Environmental Protection Agency



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

AUG 26 2003

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Mr. John B. Stephenson
Director, Natural Resources and Environment
United States General Accounting Office
Washington, DC 20548

Dear Mr. Stephenson:

Thank you for the opportunity to review the General Accounting Office's (GAO) draft report, "Hazardous Waste: EPA's Cleanup of the Eagle-Picher Henryetta, Oklahoma, Site." We find that the report accurately reflects the U.S. Environmental Protection Agency's (EPA) position regarding the issues raised by landowners near the site.

For many months we have had extensive communications with Senator James Inhofe and provided him voluminous background information on EPA activities at the site. Your report captures this information as well. We believe the actions EPA has taken at the Eagle Picher site were appropriate to address human health threats posed by the site.

Again, thank you for the opportunity to review your draft report.

Sincerely,

A handwritten signature in cursive script that reads "Tom Dunne".

Tom Dunne
Associate Assistant Administrator

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Comments from Private Landowners

Jack Young Asphalt & Construction Co.Inc.

U.S.G.A.O.
441 G street,N.W.,Room 2T23
Washington, D.C. 20548

Attention: Mr. John Stephenson

Re: *EPA's Cleanup of the Eagle Pitcher Henryetta, OK Site*(GAO-03-1051R).

Dear Sir:

We, myself, my partner Dayle James, and our wives, appreciate Ms. Peg Reese from GAO taking the time and interest to visit our offices again, to allow us to review your Draft Report on the captioned matter. We also appreciate your allowing us to submit our comments on the Draft Report which, as I understand, will be included in your Final Report. It is our understanding that GAO is seeking "the truth" with regard to the subject of this investigation and Report and I can assure you that anything we include in the following comments is "the truth", to the best of our knowledge. However, with all due respect, we fear that, based on the Draft Report, GAO appears to have been misled on several key issues. Inasmuch as I do not have a copy of the Draft before me and must rely on my memory, I may unintentionally mis-state certain matters. Nonetheless, we urge you, and others with GAO who are involved in this matter to seriously consider the following.

- DRAFT:** We understand that because of pending litigation, GAO does not seek to determine the cause of the contamination associated with the EPA/BOR removal project or to assess responsibility therefor.

COMMENT: The cause, and the responsibility for the release of hazardous substances from the smelter site onto our property is abundantly clear.
- DRAFT:** EPA/BOR installed a clay cap, cover soil, and a vegetative cover for the smelter site.

COMMENT: From your investigation GAO knows EPA did not prepare any design plans for the project, only a statement of general intentions in their Action Memorandum. Nor did BOR submit any design plans to the contractor, just a vague statement of intentions and concepts that actually called for the contractor to submit its own version of project objectives. Nor did BOR prepare any "as built" plans, merely a "general review" with little specifics. We concede that EPA/ BOR probably intended to install a clay cap, cover soil, and to re-vegetate the smelter site. But the difficulty in our search for the truth has never been so much with what EPA/BOR or the contractor "intended" or "planned" to do, but more with exactly what work was performed and where it was performed. A review or analysis of these documents will not disclose these pertinent facts. We have spoken to several of the workers that performed the day-to-day work on the project and their accounts of what they did and where they did it are vastly different from what EPA/BOR or the contractor suggest. We assume that in your quest for the truth, GAO has also

- spoken to many of these same workers and have found the same inconsistencies.
3. **DRAFT:** EPA/BOR installed a drainage system for the smelter site.
COMMENT: We also recognize that EPA/BOR probably intended to design and install a drainage system to prevent the migration of contaminate-laden precipitation from the smelter site onto adjoining landowners. Unfortunately, the drainage system EPA/BOR and the contractor installed was not completely on the smelter site. Much of the EPA/BOR drainage system was actually installed on our adjoining property. I can assure you, this fact will not appear in any of the documents mentioned above. But then GAO already knows that. The portion of the drainage system on our property consists of about 300 to 400 feet of 24" PVC pipe. Approximately 100 feet of this drainage pipe was left surficially exposed on our property, which the contractor installed backwards, was then approved by EPA/BOR, for which the contractor was paid. This "backwardness" merely exacerbates the release of contaminate-laden precipitation onto our site. But regardless of whether the drainage pipe was actually installed correctly or backwards, its design and purpose was to transport and deposit significant amounts of contaminate-laden precipitation directly onto our property on a daily basis. As we know your Report will confirm, the southerly part of our tract is approximately 75 feet down-gradient from the smelter site which, of course, serves to accelerate the migration of this contaminate-laden precipitation onto our property. The disturbing thing about this is that inasmuch as none of our property was included in the EPA/BOR removal project, it is irrefutable that whomever was responsible for the design and/or installation of such a system was either negligent or grossly incompetent. Meaning no disrespect, but we are not suggesting that the engineering staff at EPA Region VI, or the engineering staff of BOR in Denver, or the engineers of the contractor in California are incompetent. So the troubling questions remain, [1] who would design, and [2] who would actually install a drainage system on known *non-project* property that completely defeats a primary objective of the EPA/BOR removal project? We have asked these questions for three years without getting truthful answers and trust the GAO investigation will reveal the truth. We are sure that is in part why Senator Inhofe sought your independent review. As your letterhead states, "Accountability*Integrity*Reliability".
 4. **DRAFT:** EPA/BOR claims to have filled the pond that was half on our property and half on the smelter site with clean soil and uncontaminated debris.
COMMENT: The conversations of GAO with workers on the EPA/BOR project have told you a very different story. We have spoken to several of them and the Affidavits of some are attached. From the Affidavits, you will note that they confirm they drove several truck loads of hazardous waste from the South Piles on the smelter site, which were the most heavily contaminated of any on the smelter site that were dumped into the pond. EPA/BOR caused the huge North Pile 1, which contained over 166,000 cubic yards of contaminated waste to be bull dozed into the Pond. The BOR report confirms that the toxic liquid contents of the pond were drained onto our property. After the litigation was filed, we caused additional soil samples to be taken from that part of the pond that is on our property and had it tested. The tests revealed high concentrations of the same hazardous substances found in the samples of Nationwide Environmental Services at the base of the pond on our property taken in November, 2000. Neither EPA, ODEQ, or the City of Henryetta have ever returned to take any soil or water samples from our property.

Again the questions, who would design a project and/or carry out a project, that [1] requires the workers to trespass onto adjacent property with heavy machinery, [2] that requires the workers to trespass onto adjacent property by draining the contents of a large coal sedimentation pond onto adjacent property, and [3] trespass onto adjacent property to dump large quantities of hazardous substances?? Was that negligence of gross incompetence? If GAO does not feel our tests are reliable, we would assume they have conducted their own sampling and testing to ascertain the truth of exactly what was deposited into the pond on our adjacent property. And, why did EPA/BOR take all of this action by trespassing and damaging our adjacent property? We were led to think EPA/BOR were trying to cover up some misdeeds. What did GAO ascertain?

5. **DRAFT:** ODEQ purportedly made the determination that the levels of contamination did not warrant further action by EPA because EPA raised the required levels for action in 2001.
COMMENT: Dayle James was with Marvin Boatwright (ODEQ) the only time their office visited our property after the release in the Fall of 2000. Upon arrival at the edge of our property, within minutes Boatwright complained that he could taste the contamination merely from breathing at that distance. That is the only *investigation* ODEQ has made. Neither they nor EPA have ever come onto our property to take any soil or water samples or make any other evaluation of the conditions. The City of Henryetta tried to trespass, again, on our property to make a feeble attempt to cover up some of the exposed drainage pipe and when our Lawyers told them they were trespassing, they promptly left. There really isn't any question about what was done at the smelter site and how it has failed. All EPA, ODEQ and DOJ have attempted is to cover up for the negligence in the removal action and the damages it has cost us. If GAO feels otherwise, then ask EPA and ODEQ to send a copy of their test results and compare those with the test results of NES (Ben Costello) who gathered samples from our site in the Fall of 2000. I'm sure you have studied the NES report. No other engineer disputes the findings of NES. Plain and simple, the EPA removal action has failed and the smelter site continues to discharge hazardous substances onto our property and other lands, including Tribal lands of the Creek Nation.

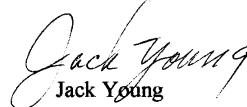
6. **DRAFT:** DOJ is of the opinion that because the EPA removal action has failed and is leaking hazardous substances onto our property, in order for us to recover our costs in response to the release we would have to show we were "innocent landowners" under CERCLA.
COMMENT: Since I'm not a lawyer, it is difficult for me to present much of a legal argument although in the past three years I have come to know a little about CERCLA. From my non-legal reading of CERCLA, with all due respect, DOJ is flat wrong. To follow their reasoning, if a twenty mile pipeline carrying hazardous substances was to rupture and leak its contents onto hundreds of farms, each of the farmers that incurred costs trying to contain the effects of the leak would have to first prove they were "innocent purchasers" of their own farms in order to recover their costs. Merely because the hazardous substances just happened to end up on their land. It even sounds silly. But

that's not what CERCLA says. The whole concept about CERCLA is making those responsible for the release, liable for its clean up and that is exactly what Congress said. One would like to think that with thousands of lawyers working at DOJ at least one of them would be able to understand the plain language of CERCLA. You should also keep in mind that it was the same DOJ that tried to convince the judge in our case that the federal government was shielded from CERCLA liability based on sovereign immunity. Anyone with a third grade education could read Section 120 of the Act and understands that it plainly says that sovereign immunity is expressly waived for the federal government. So, no, frankly, I don't put much stock in what DOJ might have to say and I would think GAO could read and understand CERCLA for themselves. The "innocent purchaser" language is contained in one of only three defenses to CERCLA response cost liability. The other two are that the release was caused solely by an act of God or an act of War. What GAO needs to understand in realizing the complete lack of understanding by DOJ of CERCLA, is that we were the Plaintiffs, not Defendants. We were the ones that brought the lawsuit, not the ones being sued. If we had taken the position that we were somehow responsible for the failure of the EPA removal action and the leakage of the hazardous substances and were asking others, such as EPA, to contribute to the clean up, then we could assert a defense that we were merely "innocent purchasers". But that was not the case. The simple truth is that we had nothing to do with the failure of the EPA remedy or the release.

OTHER COMMENTS: Inasmuch as we were not able to retain a copy of the Draft, I am understandably limited in how much of it I can retain in my memory. I trust these comments have not come across as too "*caustic*", to coin a phrase, but we have been struggling for three years at great expense merely trying to get our business back together after discovering what EPA and others put on our property. If we can't trust our government to admit its mistakes and make things right, then we need to tear up the Constitution and get the hell out of Iraq, Afghanistan, and a whole bunch of other places on whom we are trying to impose our concepts of peace, freedom, liberty, and democracy and simply stay at home. I doubt those folks could do things any worse than our own government.

I appreciate the opportunity to submit these Comments which I trust will be received by GAO in the light in which they were intended. All we want is justice under the law.

Sincerely,


Jack Young

GAO Comments

The following are GAO's comments on the private landowners' undated letter, received by GAO on August 26, 2003.

1. Determining the cause of contamination associated with the cleanup was beyond the scope of our review. We note, however, that the cause of contamination on the landowners' property is not clear. As our report states, our review of EPA's records shows that the Eagle-Picher site and the landowners' property were used for a number of industrial activities. Federal and state officials told us that at least some contamination was present on the landowners' property before EPA conducted its removal action. Therefore, our report states that determining the cause of current contamination on either property would be problematic.

2. As we reported, in addition to EPA's Action Memorandum, EPA's contractor, Ecology & Environment, Inc., prepared a Removal Site Assessment Report that included a Conceptual Closure Design & Work Plan for the removal action. This document provided the conceptual design for the removal action. We agree that BOR did not submit any design plans. However, EPA contracted with BOR to conduct the engineering work to implement EPA's design plans for the removal action, not to provide additional design plans.

The landowners assume that we spoke to many workers about their accounts of work performed during the cleanup and that we found inconsistencies between these accounts and EPA's plans for the site. While we reviewed the affidavits obtained by the landowners from two workers who performed work on the site, it was beyond the scope of our review to interview every worker associated with EPA's cleanup. EPA officials and EPA contractors told us that the actions taken during the cleanup were consistent with the design plan.

3. The landowners assert that the drainage system installed by EPA and its contractors was installed on both the Eagle-Picher site and the landowners' property, included a drainage pipe that was installed backwards, and was designed to transport and deposit contaminated material onto their property. Our report states, and we have explained our role and scope on this review to the landowners on numerous occasions, that we did not evaluate the sufficiency or effectiveness of EPA's actions during the cleanup. However, we note that EPA obtained an agreement with the then-current owner of the adjacent property north of the Eagle-Picher site that allowed EPA to access the property to conduct a range of work during the removal action, including installing a portion of the drainage system. EPA officials told us that a portion of the drainage system was installed on the adjacent property to direct drainage around the consolidated waste area on the Eagle-Picher site and into natural gullies located on the adjacent property. Regarding the installation of the drainage pipe, we observed the drainage pipe during our site visit, but were unable to determine whether the pipe was installed backwards or not. We disagree with the landowners' assertion

that the drainage system was designed to transport and deposit contaminated material onto the landowners' property. According to BOR's Removal Action Report, drainage control measures were constructed to significantly minimize the potential for off-site migration of contaminants by capturing and redirecting water on the site. We note that EPA and city of Henryetta officials told us the drainage area on the landowners' property needed maintenance, and that city workers were refused access to the landowners' property. We further note that the removal action purported to mitigate migration of contaminants, not to prevent any migration of contaminants.

The landowners also assert that the party responsible for designing and installing the drainage system was negligent or grossly incompetent. As our report states, because the landowners are currently involved in litigation against EPA and others, we did not assess the sufficiency of the cleanup or determine any liabilities associated with the cleanup.

4. Regarding the landowners' claims of trespass, we note that EPA obtained an access agreement signed by the former owner on January 20, 1997. The agreement authorized EPA to conduct a range of activities on the property, including the use of mechanical equipment, removal and replacement of contaminated material, and other actions necessary to mitigate releases or threats of releases from the property. With regard to whether hazardous material was placed on the adjacent property during the cleanup, officials from EPA, BOR, and Environmental Chemical Corporation (BOR's contractor) have all stated that, although EPA's initial plans included placing hazardous waste into the pond as an option, EPA and its contractors did not proceed with this plan. Rather, EPA and its contractors state that uncontaminated debris such as cement blocks were placed into the pond, along with clean soil.

Regarding the landowners' assumption that we conducted our own sampling and testing to ascertain the truth about what was deposited into the pond located on both properties, as we stated in comments 1 and 3, determining the cause of contamination or any liabilities associated with the cleanup was beyond the scope of our review.

5. We disagree with the landowners' characterization of our report statements regarding ODEQ's response to the landowners' hazardous waste incident report. Our report does not state that ODEQ made the determination that the levels of contamination did not warrant further action by EPA because EPA raised the required levels for action in 2001. Rather, our report states that ODEQ reviewed sampling data supplied by the landowners' counsel and determined that the site did not need to be cleaned up to residential standards, and therefore the level of contamination present did not justify a cleanup. While we reviewed the landowners' environmental studies, it was beyond the scope of our review to determine the cause of contamination or any liabilities associated with EPA's removal action.

Based on our observations, EPA carried out its planned activities to remove contamination from residential and high-access areas and to mitigate exposure to contaminated material from the Eagle-Picher site. Federal, state, and local officials told us that EPA's removal action met its objectives. We note that the removal action did not purport to eliminate hazardous material at the Eagle-Picher site or to remove contamination from the landowners' property because the property was not a residential property.

6. We have no response to the landowners' comments regarding litigation against EPA and others. As stated in our report, we present the results of litigation but because the landowners' litigation is ongoing, we did not assess the merits of the landowners' litigation against EPA. We state, however, that final judgment regarding the merits of the landowners' case against EPA is reserved for the court.

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