

**Statement of Stephen J. Nesbitt**  
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**U.S. Environmental Protection Agency**  
**Before the Committee on Environment and Public Works**  
**United States Senate**  
**September 25, 2008**

Good morning Madam Chairman and Members of the Committee. I am Stephen Nesbitt, Assistant Inspector General for Investigations at the U.S. Environmental Protection Agency (EPA) Office of Inspector General (OIG). I have been a criminal investigator for nearly 19 years. I am pleased to be here today to discuss the OIG's investigation of EPA's cleanup activities in Libby, Montana. Specifically, I will detail the circumstances under which EPA officials decided not to declare a public health emergency and its decision not to conduct a baseline risk assessment in Libby based on documentation and interviews gathered during the course of our investigation. Over a 2-year period, we invested over 12,500 man hours; conducted over 400 interviews; and collected and reviewed over 1.5 million documents. At this Committee's request, we have also turned over a significant amount of our Libby case materials to assist you in your oversight work. I would like to emphasize at the outset, however, that we presented our findings of potential criminal violations to the Department of Justice but they determined that initiation of criminal proceedings was not warranted, and therefore declined to prosecute.

**Origins of OIG's Libby Investigation**

The OIG initiated an investigation on March 9, 2006, in response to a misconduct allegation raised by a former EPA toxicologist against a remediation contractor working in Libby. Under its contract with EPA Region 8, this contractor was to facilitate the remediation process in Libby and to collect and analyze asbestos samples, which were then used by EPA to evaluate remediation progress. Specifically, it was alleged that the contractor was manipulating the sampling process used to detect asbestos levels in homes within Libby by wetting down carpets that might contain asbestos in order to get lower asbestos readings in the air samples taken. We determined that this allegation did not merit prosecution. During the course of our investigation, witnesses and other EPA employees raised additional allegations regarding EPA's clean up actions in Libby that we believed warranted our attention.

**EPA Decision to Not Declare a Public Health Emergency in Libby Under CERCLA**

Allegations were raised that EPA has proceeded to clean up Zonolite attic insulation (ZAI) contained in attics and walls within homes in Libby under an emergency response removal action that is questionable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also know as Superfund. This insulation, which is derived from asbestos-containing vermiculite ore and contains

amphibole asbestos, could pose a health risk if disturbed and fibers are released into the air. The risk is not limited to Libby. EPA estimates that there may be anywhere from 15 to 52 million homes nationwide that contain ZAI.

EPA's On-Scene Coordinator (OSC) believed that this insulation had to be removed from homes in Libby because it could re-contaminate the area if left in attics and walls and somehow became airborne. However, CERCLA §104 specifically prohibits the use of Superfund money to clean up "products" that are part of the structure of residential buildings unless a public health emergency is declared. Zonolite is considered a consumer product in commerce. In a draft action memorandum from November 2001, the OSC proposed that a public health emergency be declared and that authorization be granted to remove insulation in 800 Libby homes.

Over the next several months, this draft memorandum was reviewed and revised by numerous officials within both Region 8 and EPA's Office of Solid Waste and Emergency Response (OSWER). E-mails show that officials mostly supported a public health declaration until February 2002, when Office of Management and Budget (OMB) staff raised questions and began to express doubts that such a declaration was necessary. EPA's Office of Prevention, Pesticides, and Toxic Substances (OPPTS) voiced concerns as well over the removal of insulation, noting that declaring a public health emergency requiring the removal of ZAI could then necessitate its removal from homes nationwide, which could cost billions of dollars. To prevent this, OPPTS suggested making the conditions at Libby unique by requiring multiple pathways of exposure at Libby, thus differentiating Libby homes from any other homes in the U.S. OPPTS also commented that it may be possible to isolate Libby from the rest of the country if it could be shown that "unpopped" vermiculite or off-spec material, which was readily available to Libby residents, could be found within the insulation in Libby homes.

In March 2002, then-EPA Administrator Christine Todd Whitman was briefed on Libby, the proposed home cleanup actions, and the recommendation that she declare a public health emergency. She was also told that the draft action memorandum with the public health emergency declaration was still being reviewed in EPA headquarters. A draft press release was later prepared for Administrator Whitman announcing the planned public health emergency. In April 2002, W.R. Grace sent a letter to Administrator Whitman objecting to EPA's plans to declare a public health emergency.

Also in April 2002, EPA officials met with OMB staff about the draft action memorandum. There was also communication about this issue between the Council on Environmental Quality and EPA officials on the proposed public health emergency declaration. Three legal alternatives to declaring a public health emergency were provided by EPA's Office of General Counsel: 1) that Zonolite asbestos removal in Libby was merely a pilot project; 2) that the Zonolite asbestos in Libby is not a product within the meaning of CERCLA because W.R. Grace gave the material away for free or that it was off-spec material; and 3) that the exposure to Zonolite asbestos occurred outside the home. In May 2002, a new draft action memorandum was circulated for review within EPA headquarters that removed all references to a public health emergency

declaration and to Zonolite by name. Despite Region 8's recommendation, EPA headquarters determined that Region 8 should proceed to clean up the Zonolite asbestos in Libby homes without declaring a public health emergency. An EPA attorney opined that if the insulation was viewed as a "non-product" then it would be legal to use CERCLA funds for the cleanup in Libby. This was done despite the assertions of Region 8 and the OSC that this was not correct. OMB provided input on the draft action memorandum, and encouraged additional legal language be included on how the insulation was not a product within the meaning of CERCLA.

The final action memorandum was signed on May 9, 2002, by then-Assistant Administrator for OSWER Marianne Horinko as the approving official. It allowed for the clean up of homes and yards at a cost of \$54 million without declaring a public health emergency. EPA did not seek reimbursement from W.R. Grace for the residential cleanup costs.

### **EPA Decision to Not Conduct a Baseline Risk Assessment in Libby**

During the course of our investigation, information was brought to our attention regarding the decision by EPA to refrain from conducting a baseline risk assessment, or toxicological study, concerning the effects of Libby amphibole asbestos on residents. It was alleged that remediation decisions were being made without adequate science because this assessment was not done, possibly placing Libby residents at risk.

Under CERCLA, the National Contingency Plan (NCP) governs the cleanup of National Priorities List (NPL) sites. The NCP requires that EPA, as appropriate, conduct a remedial investigation and a baseline risk assessment for all NPL sites. The NCP designates the Agency for Toxic Substances and Disease Registry (ATSDR), a component of the Department of Health and Human Services, as the responsible agency for performing public health assessments for NPL sites. On May 28, 2003, ATSDR released the final version of its report, which concluded, in part, that the citizens of Libby were exposed to hazardous levels of asbestos, and had elevated levels of disease and death from exposure to asbestos. It also recommended, in part, that EPA conduct a toxicological investigation (toxicity assessment) and epidemiology studies.

In September 2002, the Remedial Project Manager (RPM) for Libby requested funds to conduct both the remediation and the required risk assessment. Specifically, the RPM requested a total of \$21 million—\$17 million of which would go to cleanup activities and \$4 million for a risk assessment. This \$21 million reflected the funding level then-Assistant Administrator for OSWER Horinko committed to before Congress. However, EPA headquarters proposed only \$17 million for cleanup activities and no funding for a risk assessment. At that funding level, the RPM was forced to stop all additional risk assessment work. The RPM recognized that remediation decisions may not be as supportable as EPA would like without conducting a risk assessment.

In December 2006, the OIG issued a report based on a request from Montana Senators Baucus and Burns that looked at EPA's cleanup efforts in Libby. In our limited

review, we found that EPA has neither planned nor completed a risk and toxicity assessment of the Libby amphibole asbestos to determine the safe level of human exposure. Thus, EPA could not be sure that the ongoing Libby cleanup is sufficient to prevent humans from contracting asbestos-related diseases. Also, EPA presented inconsistent positions on safety issues in two public information documents. We recommended that EPA: 1) fund and execute a comprehensive amphibole asbestos toxicity assessment; and 2) review and correct any statements that cannot be supported in any documentation mailed or made available to Libby residents regarding the safety of living with or handling asbestos until EPA confirms those facts through a toxicity assessment. After our report was issued, EPA officials began to move forward with the planning and funding of a baseline risk assessment.

### **Referral to the Department of Justice**

The OIG briefed attorneys from the Department of Justice's (DOJ) Public Integrity Section on all aspects of our investigation between August 2007 and May 2008. In a letter dated June 6, 2008, the Chief of DOJ's Public Integrity Section notified the OIG of its determination that the initiation of criminal proceedings in this matter was not warranted, and therefore declined prosecution.

### **Conclusion**

EPA's mission is to protect human health and the environment. During the course of our investigation, numerous EPA employees and Libby citizens questioned EPA's cleanup actions and whether decisions were based more on budgetary reasons rather than sound science or the welfare of Libby residents. We presented the facts of our investigation to DOJ as we are required to do by law and abide by their determination.

Thank you for the opportunity to testify before you today. I would be pleased to answer any questions the Committee may have.