



EARTHJUSTICE

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ENVIRONMENTAL LAW CLINIC AT STANFORD UNIVERSITY

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

November 6, 2007

Peter D. Keisler
United States Attorney General (Acting)
United States Department of Justice
Tenth and Pennsylvania Avenues, NW
Washington, DC 20530

Stephen Johnson
Administrator
Environmental Protection Agency
1101A EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

**RE: Notice of Citizen Suit Concerning the Failure of the EPA Administrator to
Comply with a Mandatory Duty to Promulgate Regulations under CERCLA**

Dear Administrator Johnson and Attorney General Keisler:

This is a notice of “a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator” within the meaning of section 310(a)(2) of the Comprehensive Emergency Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9659(a)(2). This notice is given pursuant to 42 U.S.C. §9659(e) and 40 C.F.R. Part 374 as a prerequisite to bringing a civil action. The notice is given on behalf of the following organizations:

Sierra Club
85 Second Street, 2d Floor
San Francisco, California 94105
(415) 977-5500
Contact: Ed Hopkins, Director of the Environmental Quality Program, (202) 675-7908

Amigos Bravos
P.O. Box 238
Taos, NM 87571
(505) 758-3874
Contact: Brian Shields, Executive Director

Great Basin Mine Watch
85 Keystone Ave, Suite K
Reno, NV 89503
(775) 348-1986
Contact: Dan Randolph, Executive Director

Idaho Conservation League
PO Box 844
Boise, Idaho 83701
(208) 345-6942 ext. 13
Contact: John Robison, Public Lands Director

Failure to Comply with the Mandatory Duty to Promulgate Regulations pursuant to Section 108(b) of CERCLA:

When CERCLA was passed in 1980, it directed the President to develop regulations requiring businesses that handle hazardous substances to prove their ability to pay for cleanup of spills or other environmental contamination that could result from their operations. Specifically, section 108(b)(1) of CERCLA required the President to promulgate

requirements (for facilities in addition to those under Subtitle C of the Solid Waste Disposal Act [citation omitted] and other Federal law) that classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage or disposal of hazardous substances.

42 U.S.C. §9608(b)(1). In addition, section 108(b)(1) required the President “to identify those classes [of facilities] for which requirements will be first developed and publish notice of such identification in the Federal Register” not later than three years after December 11, 1980. *Id.* By Executive Order, the functions vested in the President in CERCLA section 108(b) were delegated to the Administrator of EPA. Executive Order No. 12,580, 52 Fed. Reg. 2923 (1987) at section 7(d)(1).

To date, however, no EPA Administrator has identified classes of facilities that pose risks of creating environmental liabilities, published notice of their identification in the Federal Register, or promulgated any regulations that require facilities handling hazardous substances to establish and maintain evidence of financial responsibility for cleanup. Accordingly, the Administrator has failed to perform a nondiscretionary duty within the meaning of CERCLA section 310(a)(2).

EPA’s failure to promulgate financial assurance regulations for facilities that handle hazardous substances places a great burden on the American taxpayer. In 1980, Congress established the Superfund Trust Fund to clean up hazardous sites when the liable party cannot be identified or is unable to pay. The Superfund Trust was funded by excise taxes on crude oil and chemicals and by a corporate environmental income tax. These taxes, however, expired in 1995, and Superfund’s \$3.8 billion surplus has now been spent. Currently the fund relies on annual

congressional appropriations, and thus *taxpayers* rather than polluters fund Superfund cleanups when responsible parties cannot pay. This situation is becoming more prevalent as many companies are using bankruptcy to clear their plate of all environmental cleanup responsibilities. Approximately 38,500 businesses declare bankruptcy each year, and many of these companies leave substantial environmental liabilities. Financial assurance regulations would ensure that cleanup and closure costs are borne by the facilities that created the problems.

Without such financial assurance the public shoulders a heavy burden. The recent bankruptcy of Asarco is illustrative. Asarco is a century-old American mining and smelting company whose liabilities include the environmental cleanup of 94 Superfund sites in 21 states. The bill to clean up Asarco's environmental contamination is estimated at more than \$1 billion, according to court filings. Asarco agreed to set up a trust fund of \$100 million to help pay the cleanup costs. Asarco's liabilities, however, far exceed this amount. It is likely that U.S. taxpayers ultimately will be responsible for the remainder.

In 1980, Congress recognized the need for financial assurance and expressly provided in section 108(b) that the President promulgate regulations, no earlier than 1985, requiring companies handling hazardous substances to provide financial assurance sufficient to cover potential cleanup costs. Nevertheless, despite the passage of 22 years, EPA has failed to promulgate the required regulations. In view of the chronic under funding of the Superfund program and the termination of taxes to add needed revenue, it is critical that EPA require high-risk businesses, such as mining companies, to provide evidence of their financial ability to clean up contamination. The longstanding failure of EPA to promulgate such requirements greatly increases the likelihood that polluters will continue to default on their financial responsibility to clean up the toxic sites they create. Financial assurance requirements are needed to ensure that polluters responsible for hazardous substance contamination can shoulder their liabilities. Such regulations will also help to ensure that companies handling hazardous substances engage in safer practices, and thus cause less environmental harm, because the companies will be financially responsible for complete cleanup.

60-Day Notice Pursuant to Section 310(e) of CERCLA

Under section 310(e) of CERCLA, 42 U.S.C. §9659(e), Sierra Club, Amigos Bravos, Great Basin Mine Watch, and Idaho Conservation League may commence a citizen suit to compel you to perform any or all of the above duties at any time beginning sixty days from the date of your receipt of this letter. 40 C.F.R. §374.4(b).

I am acting as attorney for Sierra Club, Amigos Bravos, Great Basin Mine Watch and Idaho Conservation League in this matter. Please address any communications to me at the address and telephone number set forth below.

Sincerely,

Lisa G. Evans *by yun*

Lisa Gollin Evans
Earthjustice
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