



EARTHJUSTICE

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CERTIFIED MAIL – RETURN RECEIPT REQUESTED

October 19, 2007

Chief Abigail Kimbell
United States Department of Agriculture Forest Service
1400 Independence Ave., SW
Washington, D.C. 20250-0003

RE: Notice of Violation concerning the Operation of an Open Dump at the Smoky Canyon Mine in Violation of Section 4005(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6945(a)

Dear Chief Kimball:

This is a notice, pursuant to section 7002(b)(1)(A) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(b)(1)(A), and 40 C.F.R. Part 254, of your violation of the prohibition against the open dumping of solid waste as set forth in section 4005(a) of RCRA, 42 U.S.C. § 6945(a) and 40 C.F.R. Part 257. The notice is given on behalf of the following organizations:

Greater Yellowstone Coalition
162 N. Woodruff Ave.
Idaho Falls, ID 83401
(208) 522-7927

Natural Resources Defense Council
111 Sutter St., 20th floor
San Francisco, CA 94104
(415) 875-6100.

Background

The J.R. Simplot Company (“Simplot”) has operated the Smoky Canyon phosphate mine on land owned and managed by the U.S. Forest Service in the Caribou-Targhee National Forest since 1984. The Smoky Canyon Mine consists of five mine panels and numerous waste rock disposal areas. The majority of the mined area (the land disturbed by mining) is an unremediated Superfund site. In the process of uncovering and separating ore from spoil, Simplot placed

millions of tons of overburden and waste shale in waste dumps on ridges above and below the mine pits, on haul roads, and into Pole Canyon Creek. Under the influence of rainfall and snowmelt, these waste rock and overburden dump areas leach toxic levels of selenium to surface and groundwater. Today, these waste and overburden dumps at the Smoky Canyon Mine are the sources of significant environmental contamination due to exceedingly high levels of selenium in the shales that cover and separate the ore beds. Major removal and remedial actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) are now required to correct and remedy the problems caused by these dumps on the inactive portions of the mine site.

The active portion of the Smoky Canyon Mine primarily consists of Panels B and C, which are currently being mined and are not part of the Smoky Canyon Mine Superfund Site. At these panels, Simplot removes overburden and waste rock and disposes of the waste in a dump called an “overburden disposal area” or “ODA.” Currently Simplot is under a Consent Order (dated March 26, 2002) with the Idaho Department of Environmental Quality, to monitor groundwater wells for numerous contaminants, including selenium. The purpose of the Consent Order is to determine, in part, whether the ODA is causing an environmental hazard. The quarterly groundwater monitoring data, provided by Simplot to federal and state agencies pursuant to the Consent Order and to the Greater Yellowstone Coalition through a separate agreement, provide the basis for this notice of violation. This notice does not address the inactive portion of the Smoky Canyon Mine, because of the ongoing CERCLA removal and remedial actions.

The Smoky Canyon Mine is an Illegal Open Dump Operating in Violation of Section 4005(a) of RCRA and 40 C.F.R. Part 257

The Smoky Canyon Mine is in violation of the federal prohibition against open dumping set forth in section 4005(a) of RCRA, 42 U.S.C. § 6945(a). Section 4005(a) states that “upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited...” 42 U.S.C. § 6945(a). Solid waste, as defined in RCRA, includes “any other discarded materials including solid, liquid, semisolid, or contained gaseous material resulting from... mining... operations.” 42 U.S.C. § 6903(27). EPA promulgated criteria under section 6907(a)(3) defining solid waste management practices which constitute the prohibited open dumping of solid waste, and those criteria are contained in 40 C.F.R. Parts 257 and 258.

The Smoky Canyon Mine’s waste rock dump for the Panel B mine pit is an open dump, as that term is defined in 40 C.F.R. Part 257. Specifically, the Smoky Canyon Mine is in violation of 40 C.F.R. § 257.3-4(a), because the waste rock disposal area for Panel B is contaminating an underground drinking water source beyond the solid waste boundary. The definition of “underground drinking water source” includes any aquifer in which the groundwater contains less than 10,000 mg/l total dissolved solids. 40 C.F.R. § 257.3-4(c)(4). Contaminate, according to section 257.3-4(c)(2) means introduce a substance that would cause “an increase in the concentration of that substance in the ground water where the existing concentration of that substance exceeds the maximum contaminant level specified in appendix I.”

According to groundwater monitoring data submitted to the U.S. Forest Service by Simplot, the groundwater downgradient of the waste rock dump for Panel B exceeds the maximum contaminant level set forth in appendix I of 40 C.F.R. Part 257 for selenium. Specifically, monitoring data contained in Simplot's report entitled "Consent Order: Panels B & C Monitoring Activities and Results CY-2006" indicate that selenium concentrations in the mine's Culinary Well ranged from 0.035 mg/l to 0.046 mg/l during quarterly sampling in 2006. According to the above-cited report, Simplot's "background limit" for the Culinary Well is 0.028 mg/l. The Culinary Well is downgradient from the waste rock dump containing seleniferous waste rock removed from active panels. Seepage from the waste rock dump to the groundwater increases the level of selenium in the groundwater. In fact, the groundwater at the Culinary Well, by Simplot's own admission, is experiencing increases and has measured as high as 0.049 in 2005. (See, J.R. Simplot Company, "Consent Order: Panels B & C Monitoring Activities & Results CY 2005," received by Idaho Department of Environmental Quality, March 22, 2006.) Section 257.3-4 prohibits the contamination of an underground drinking water source, which, in this instance, means the introduction of additional selenium into the groundwater where the groundwater already exceeds the maximum contaminant level of 0.10 mg/l, as specified in appendix 1.

According to 40 C.F.R. § 257.3, solid waste disposal facilities that violate any of the criteria set forth in 40 C.F.R. Part 257 "pose a reasonable probability of adverse effects on health or the environment." Furthermore, according to 40 C.F.R. § 257.1(a)(1), "[f]acilities failing to satisfy ... the criteria in §§ 257.1 through 257.4 ... are considered open dumps, which are prohibited under section 4005 of [RCRA]."

Sixty-Day Notice Pursuant to Section 7002(b)(1)(A) of RCRA

Under section 7002(b)(1)(A) of RCRA, 42 U.S.C. § 6972(b)(1)(A), Greater Yellowstone Coalition and Natural Resources Defense Council may commence a citizen suit in federal district court to enforce the prohibition described above at any time beginning sixty days from the date of your receipt of this letter. 40 C.F.R. Part 254.

I am acting as attorney for Greater Yellowstone Coalition and Natural Resources Defense Council in this matter. Please address any communications to me at the address and telephone number set forth below.

Respectfully,

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cc:

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