

ADMINISTRATIVE RECORD

APR 16 2007
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April 13, 2007

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PSE
Site # EH Date 1.07.06.00
Confidential No
Admin. Record Yes
Key Words/Comments: Comments on proposed plan

Re: Comments to EPA's January 2007 Proposed Plan for Final Cleanup of East Helena's Residential Soils and Undeveloped Lands (Operable Unit No. 2)

Dear EPA:

We live outside of East Helena proper, near the Eastgate community water tower. Our residence consists of 17 acres, 10 of which are undeveloped and are subdividable into two 5-acre parcels.

In spring 2005, prior to purchasing our residence, we contacted the EPA, the Lewis and Clark County Health Department and the Montana Department of Environmental Quality to inquire whether the residence was part of the East Helena superfund site and whether any cleanup would be necessary at the residence. We were told that no cleanup level for lead had yet been established by EPA, but that it would likely be in the neighborhood of 1,000 ppm. We were provided copies of lead sampling results taken for our residence, all of which were near our house. We requested copies of sampling results done near our neighbors' homes, but were told those results could not be released to us. The highest sampling result for our residence was between 500 ppm and 1,000 ppm; most were below 400 ppm. We were also told us that based on the sampling results of our residence, our property was not part of the superfund site and was not targeted for cleanup by the EPA.

We recently reviewed the EPA's proposed plan for the East Helena Superfund Site (Operable Unit 2) and were quite surprised to see that, contrary to what we were told, our residence appears to be included in the East Helena superfund site boundary. We are also deeply troubled by what we read in the proposed plan. Our major concerns are set forth below.

- The proposed plan states that "landowners seeking to change the use of undeveloped land . . . will bear all associated cleanup costs." Such a requirement flies in the face of both CERCLA and EPA's own internal guidance. Under CERCLA, innocent landowners such as ourselves, bona fide prospective purchasers, and contiguous property owners are conditionally exempt from any cleanup casts associated with contamination in superfund sites. Moreover, the EPA Superfund Lead-Contaminated Residential Sites Handbook (August 2003) plainly states, "EPA . . . generally will not take CERCLA enforcement actions against an owner of residential property unless the residential homeowner's activities lead to a release or threat of release of

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hazardous substances resulting in the taking of a response action at a site.” See Handbook at pg. 62. EPA’s proposed plan essentially constitutes an enforcement action against residential landowners and attempts to circumvent both the spirit and black letter law of CERCLA, as well as the EPA’s own guidance, by trying to hold residential landowners liable for the cleanup of contaminated areas. Such an attempt is not only inappropriate, but likely illegal.

- The EPA’s selection of lead levels have no apparent rational basis, and as applied, are not protective of human health. The EPA has failed to provide any legitimate basis for requiring a 500 ppm lead cleanup level for undeveloped lands, all the while allowing developed residences to contain levels of lead between 500 ppm and 1000 ppm. Either 1,000 ppm is protective or 500 ppm is protective. If they both are equally protective or the difference is negligible (as is suggested on page 12 of the plan), then there is no rational basis for the undeveloped land lead cleanup level to be 500 ppm. If 1,000 ppm is not protective, then every property exceeding 500 ppm should be cleaned up by the EPA to 500 ppm.

Furthermore, under the plan, neighbor A could have 999 ppm of lead on his developed property and the EPA would require no cleanup. Neighbor B, right next door, could have 1,001 ppm lead on his developed property (or 501 ppm on his undeveloped property) and the property would be required to be cleaned up to 500 ppm. This would result in a patchwork of properties, some meeting a protective level of 500 ppm and others having lead levels almost twice as high. Indeed, under the existing plan, should we develop our undeveloped land and have to cleanup the property to 500 ppm, it would be contiguous to our house area, where the lead levels exceed 500 ppm. Such results clearly cannot be deemed protective.

We additionally note that if the lead cleanup levels were based on blood lead study data as the plan suggests, such a basis is contradicted by EPA’s own guidance. See EPA Superfund Lead-Contaminated Residential Sites Handbook (August 2003) at pg. B-4 (“OSWER recommends that blood lead studies not be used for establishing long-term remedial . . . cleanup levels at lead sites.”)

- The proposed plan fails to properly identify anticipated institutional controls and appears to attempt to place at least partial responsibility for developing those controls in the hands of local government. As EPA’s own guidance makes clear, developing appropriate institutional controls is the EPA’s responsibility, not local government’s. See Institutional Controls: A Site Manager’s Guide to Identifying, Evaluating, and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups” (EPA 540-F-00-005, 09/2000).
- The proposed plan fails to include any cost estimate for future development of undeveloped residential areas similar to our property.
- Capping undeveloped property is not a feasible final remedy alternative and should not have been included as if it were one. Any cap put in place will only be disturbed when development occurs. At the most, capping is a temporary, short-term remedy.

- Recent studies demonstrate that detrimental lead effects are not limited to children under the age of 7, but in fact, can be seen in children up to the age of 18. Nothing in the proposed plan appears to recognize that fact.
- The plan suggests EPA has no knowledge of the actual extent of contamination on undeveloped property. We therefore question the accuracy of the boundary map provided in the plan. Moreover, it is premature to be proposing a final plan for a superfund site if, in fact, the EPA does not even know the extent of the contamination because, for instance, if that is indeed the case, the cost estimates used for alternative comparisons cannot possibly be accurate.

Sincerely,

Laura and Brian Vachowski
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