

GUIDING PRINCIPLES

Libby Asbestos Site Operations and Maintenance Planning and Implementation Background

Purpose:

This document has been prepared for use by the Libby Asbestos Superfund Oversight Committee (OC) to acquaint them on the background surrounding the development of guiding principles that have been used in Operations & Maintenance (O&M) planning and implementation activities. Lincoln County/Asbestos Resource Program (ARP) have conducted the initial drafting of the background and individual principles to initiate discussion. The overall purpose of articulating the guiding principles is to have concurrence between Lincoln County and DEQ to ease the ongoing planning and implementation, including EPA.

Early O&M Planning:

Efforts to initiate O&M planning have been ongoing for several years, mainly between EPA and DEQ. In early 2016, efforts were made to form the County's Institutional Control Steering Committee (ICSC) to provide input to DEQ and EPA. (The ICSC is identified in the Record of Decision (ROD) for OUs 4 (Libby) and 7 (Troy) as being a recommended means of gaining input from the local community into O&M planning.) The ICSC formation was delayed until the Lincoln County City-County Board of Health (BOH) was reorganized in late 2016. In early 2017 the ICSC was formed as an element of the BOH, and initial meeting to orient members on the Site information were conducted in mid 2017. The ICSC then went through a long, detailed process of outlining the (then) current conditions as the Remedial Action (RA) phase was drawing to a close. This exercise identified the topics that the Committee felt should be addressed in future O&M activities. As the ICSC developed specific recommendations, it became apparent that an overriding position statement was necessary to capture the Committee's overall recommendations, and to serve as a basis for future O&M planning efforts by the County. The ICSC presented a position statement to the BOH that was accepted as their policy, and then subsequently endorsed by the County Commissioners as the County's position. That occurred in January 2018 and is unchanged.

Key elements in the Statement are:

- Indiscriminate protection of human health and the environment will serve as the universal criterion for all O&M related actions and activities.
- Property owners will not bear the cost of any future issues related to the Libby Asbestos Superfund Site.
- Support of or participation in O&M elements will be based on this position.

At this stage of O&M planning, EPA's suggested policy would have discriminated against certain property types and circumstances and placed financial burden on the property owners.

ICSC Recommendations and O&M Planning:

In March 2018, the ICSC recommendations, as approved by the BOH, were provided to the public, DEQ and EPA. Those recommendations were based on the elements of the Statement. Since then, the County/ARP have actively engaged with DEQ and EPA, with major progress being achieved in O&M planning. As planning progressed, the interest and need to have a strong local participation in O&M was recognized, leading in part to the State legislation that established the Oversight Committee (and the predecessor Advisory Team). The legislation also established a funding mechanism to supplement other Federal and State funding.

Overall O&M planning has made significant progress but has been slower than desired owing to many factors. Currently, planning has developed to the point that further development could be greatly enhanced by clearly understanding Guiding Principles for the County/DEQ's use in planning and interaction with EPA.

Imperatives vs Policy:

Perhaps the biggest challenge in O&M planning has been to understand the “rules”, or absolute imperatives that guide the use of Federal Funds in O&M, vs opinions and suggested policy that are worthwhile to consider, but more appropriately is the purview of DEQ and the County. Separating these has been difficult. In general, it may be concluded there are likely no O&M activities that are universally “blocked” from funding from the three established fund sources by a mandated imperative. It is recognized that DEQ and the County must be good stewards of the O&M funds, which the OC will provide with their mandated responsibilities.

Left Over RA Funds:

The EPA commitment to make available the unused RA funds from the WR Grace settlement to the DEQ for O&M has yet to be articulated in any detail. Attempts to have EPA identify fund use imperatives (how the money may be used), as well as agreements on how the funds may be accessed continue to be unanswered.

Drafting Perspective:

The background document and individual Guiding Principles have been drafted primarily by Lincoln County as a means of initiating discussion on the OC. We value the close collaboration we have with DEQ, and this effort is meant to promote discussion and OC recommendations, and not intended in any way to represent DEQ views, though in many areas we are well aligned.

GUIDING PRINCIPLE 1
Libby Asbestos Site Operations and Maintenance Planning and Implementation

Principle Statement:

Indiscriminate protection of human health and the environment will serve as the universal criterion for all Operations & Maintenance (O&M) related actions and activities.

Background:

- See County Position Statement, January 2018
- Crafted to counter strongly held EPA view that certain property types or histories would be partially or wholly precluded from support in O&M.
- Examples cited: Previous “refusals” during remedial action (RA), and developers

Rationale:

- The fundamental principle driving O&M is protection of public health, consistent with the ROD and other documents.
- Arbitrary decisions that discriminate against properties based on prior history or current ownership (developers) does not uniformly consider the overall goal of protectiveness and leads to erosion of the overall community and individual protectiveness.

Consensus:

- EPA concurs that “refusals” are not excluded from O&M support.
- No imperatives have been provided by EPA related to developers or definition of wind fall profits, suggesting there are none.
- Consensus seems to exist for not excluding properties undergoing development from support, with remaining questions regarding extent and scope. (Developers and subdivisions will be presented as a separate principle(s).

GUIDING PRINCIPLE 2

Libby Asbestos Site Operations and Maintenance Planning and Implementation

Principle Statement:

Property owners will not bear the cost of any future issues related to the Libby Asbestos Superfund Site.

Background:

- See County Position Statement, January 2018
- Crafted to counter strongly held EPA view that the property owners should bear all or significant burden of future Operations & Maintenance (O&M) activities on their property.

Rationale:

- No basis in agreements with property owners during remedial action (RA) regarding their responsibility to maintain containments, etc.
- Placing the cost burden on owners does not uniformly consider the overall goal of protectiveness, and leads to erosion of the overall community and individual protectiveness.
- The National Priority List (NPL) area is an economically depressed area; shifting of the burden of cost to the owner for Libby amphibole asbestos (LA) issues is unrealistic and discriminatory.

Consensus:

- General consensus that the prior EPA view was misinterpreted, and that the Record of Decision (ROD) does not represent transferring cost burden to the owners.
- Some special considerations related to subdivisions may assign some cost to developers, but this is addressed as a separate Guiding Principle.

GUIDING PRINCIPLE 3

Libby Asbestos Site Operations and Maintenance Planning and Implementation

Principle Statement:

Land Use and/or Property Use changes are ongoing, and should be expected to continue in Operations & Maintenance (O&M). Such changes are deserving of support in O&M.

Background:

- Property conditions are not static, and have changed since the remedial action (RA) phase and/or should be expected to change.
- Land Use changes (i.e. changing from a residential/commercial to parks/schools, etc.) and Property Use changes (i.e. developing an infrequently used lot to a residential property, etc.) are defined in EPA RA planning documents.
- These terms as used by EPA are associated with a remedial action level or cleanup criteria based on risk to receptors for types of use and is not associated with zoning or other local use criteria.
- The nature of the RA action did not make provisions for a program to address such changes. Thus, changes have occurred that will require attention, as well as changing uses in O&M.
- Addressing such properties is anticipated in the Record of Decision (ROD), calling for a comprehensive *operations and maintenance* program to maintain remedy integrity, and address Libby amphibole asbestos (LA) where changes in land use have occurred. (See Background.)
- Proposed County PEN regulations include land use and property use changes as required notifications, triggering support from Asbestos Resource Program (ARP) that could include investigative and cleanup activities.
- Capturing information about changes on property related to LA is critical to both current and future owners, and plays a key role in property use planning and due diligence.

Rationale:

- Occurrence of these types of changes in property conditions must be anticipated (many have already occurred), and require support in O&M in order to maintain the remedy.

Consensus:

- A general consensus appears to now exist, based on the recognition that the RA action or evaluation at a property is temporal and does not address changes that have or will occur.

GUIDING PRINCIPLE 4

Libby Asbestos Site Operations and Maintenance Planning and Implementation

Principle Statement:

Changes to structures (interior and exterior), new construction, excavations, etc., are ongoing, and should be expected to continue in Operations & Maintenance (O&M). Such changes are deserving of support in O&M.

Background:

- Property conditions are not static and have changed since the remedial action (RA) phase and/or should be expected to change.
- Land Use changes (i.e. changing from a residential/commercial to parks/schools, etc.) and Property Use changes (i.e. developing an infrequently used lot to a residential property, etc.) are defined in EPA RA planning documents.
- Modifications and/or normal use and repair of structures, and excavations, presents the potential for exposure to previously unknown or encapsulated Libby amphibole asbestos (LA).
- The nature of the RA action did not make provisions for a program to address such changes. Thus, changes have occurred that will require attention, as well as changing uses in O&M.
- Addressing such properties is anticipated in the Record of Decision (ROD), calling for a comprehensive *operations and maintenance* program to maintain remedy integrity, and address LA where changes in land use have occurred. (See Background.)
- Proposed County Property Evaluation Notification (PEN) regulations include these types of use changes as required notifications, triggering support from Asbestos Resource Program (ARP) that could include investigative and cleanup activities.
- Capturing information about changes on property related to LA is critical to both current and future owners, and plays a key role in property use planning and due diligence.

Rationale:

- Occurrence of these types of changes in property conditions must be anticipated (many have already occurred), and require support in O&M in order to maintain the remedy.

Consensus:

- General consensus on principle.

GUIDING PRINCIPLE 5

Libby Asbestos Site Operations and Maintenance Planning and Implementation

Principle Statement:

Real estate transactions require support in Operations & Maintenance (O&M) to provide parties with property-specific Libby amphibole asbestos (LA)-related information as well as guidance on evaluation of information, best management practices, etc.

Background:

- Comfort letters provided by EPA during remedial action (RA) are no longer being issued. These letters provided a measure of “comfort” to interested parties (i.e., property sellers/buyers, lenders, banks, real estate agents, etc.) explaining the potential or actual EPA involvement at a property or site.
- Owners, buyers, lenders and others have a legitimate need to access property information that may exist in project data bases.
- Project data bases are not amenable to direct public access, and require institutional knowledge and skill to locate information, and to make interpretations. DEQ has assumed responsibility for the database which includes all EPA RA information. Asbestos Resource Program (ARP) will support DEQ in database updates as contacts are made from or to property owners.
- Proposed County Property Evaluation Notification (PEN) regulations include real estate transactions as an applicable activity requiring notification, and triggering support from ARP to provide information. The regulations also require that the information be provided to the buyer or others as part of due diligence/disclosure.
- ARP is developing a standardized basic response to these inquiries that will serve basic needs of the buyers, sellers, lenders, etc.
- The information to be provided by the ARP is informational and educational and is not a warranty or certification of site conditions.
- Open information and appropriate support of real estate transactions is essential to community welfare and growth.

Rationale:

- Commonly held legal obligations for owners to disclose conditions, as well as lender driven specific requirements, necessitate a process to provide appropriate information.

Consensus:

- General consensus on principle.

GUIDING PRINCIPLE 6

Libby Asbestos Site Operations and Maintenance Planning and Implementation

Principle Statement:

Subdivisions and development activities are not precluded from support activities during Operations & Maintenance (O&M).

Background:

- EPA has held the view that developers should be excluded from O&M support, particularly related to supporting costs for evaluations or clean up. No imperatives have been provided that support this view.
- Alleged EPA concerns about “windfall profit” are addressed via the proposed County Property Evaluation Notification (PEN) regulations that address informational and other support for planning, subdivision approval, and real estate transaction disclosures.
- Requests to provide documented imperatives related to “windfall profits” have not been provided, with the assumption that none exist that are not satisfied by the planned elements of the PEN regulations.
- As with other land and property use changes, subdivision developments have occurred during remedial action (RA), and activity at existing or new subdivisions is both ongoing and to be expected in the future.
- No institutional controls (ICs) or systematic approach to subdivision activity was embodied in the RA activities, being left to future established ICs. As a result, a well-planned approach to these issues is not in place, and issues related to existing subdivisions is being dealt with on an *ad hoc* basis, generally in conformance with other Guiding Principles.
- The issues related to subdivisions and developments are themselves complicated, while the selected approach is far more consequential to remedy protection and owner support than individual property considerations.
- Proposed County PEN regulations and parallel revisions to the Subdivision regulations require that subdivision activities be a required notification, and that coordination or approval by the ARP is required for a new subdivision. These elements are actively being developed.
- The EPA RA sampling and evaluation procedures do not lend themselves well to “screening” and preliminary subdivisions evaluations.
- Attention is being given to preliminary screening actions are a requirement for new subdivision approvals, followed by more targeted evaluations once specific Property Use is known of a lot by lot basis.
- Issues related to existing subdivisions are and will require a more *ad hoc* approach.
- Dealing with these realities is a significant and real issue at the local, County level.

Rationale:

- A punitive approach to subdivisions and developers denying them support services is inconsistent with other O&M objectives, and is both arbitrary and discriminatory.
- A proactive approach will serve to reduce uncertainty and the potential for exposures or releases of Libby amphibole asbestos (LA).
- A viable, non-punitive approach is essential to support future land use planning, and growth.
- Asbestos Resource Program (ARP) and DEQ are confident in their abilities to exercise sound professional judgment, as well as responsible fiscal management for this set of issues.
- More detailed proposals are needed from the County and DEQ to support the extent of O&M support for this class of properties.
- The County is evaluating processes for both the PEN and Subdivision regulations that could address existing and new subdivision.
- The Institutional Control Steering Committee (ICSC) is generally opposed to a break in the County position that requires property owners assume costs related to LA, specifically including subdivisions and development.
- Requiring that a developer pay certain expenses would be departure from the overall County policy statement, but warrants consideration for certain conditions.

Consensus:

- EPA continues to voice concern about funding for support of subdivisions or developer related issues, though no imperatives can be produced.
- County and DEQ recognize the importance of this issue, and the reality that we jointly need to find a solution.
- For now, support is needed for the general principle that this class of properties are precluded from O&M support.

GUIDING PRINCIPLE 7

Libby Asbestos Site Operations and Maintenance Planning and Implementation

Principle Statement:

The approach to developing institutional controls (ICs) for Operations & Maintenance (O&M), including the related documents, is founded on strong encouragement for property owners to be informed and avail themselves of resources.

Background:

- The “carrot” approach vs strong prescriptive and “stick” approaches is more likely to gain public support, and thus achieve the overall objectives of O&M.
- The County, and the Cities of Libby and Troy, do not have robust, detailed planning, permitting, or zoning controls that can serve as a foundation for O&M planning or regulations.
- The Asbestos Resource Program (ARP) is a strong program built on the above principle and has generally been effective, and viewed by the community as a trusted resource.
- Strong enforcement related approaches are not consistent with community values, and the approach taken on other community health and planning issues.

Rationale:

- The likelihood for success in O&M is much higher with a collaborative approach supported by appropriate resources.
- Strong County (ARP) involvement to deliver the O&M program at a local level further increases the prospects for success.

Consensus:

- General consensus on principle.

GUIDING PRINCIPLE 8

Libby Asbestos Site Operations and Maintenance Planning and Implementation

Principle Statement:

Funding sources to support the planned Operations & Maintenance (O&M) activities are not encumbered by identified imperatives that preclude specific uses.

Background:

- The three known sources of O&M funds that will be entrusted to DEQ are the EPA secured O&M settlement funds, DEQ O&M settlement funds, and the State funds established by HB315/SB20.
- The promise to make available the balance of remedial action (RA) funds from the WR Grace settlement has not been detailed, and is the subject of continued efforts by the County, DEQ and the Oversight Committee (OC) to engage in dialog with EPA to clarify how the funds will be made available.
- Policy suggested by EPA in early O&M planning was to tailor O&M activities to make sure the funds are not depleted. This notion places priority on artificial assumptions of the adequacy of funds over doing what is appropriate. Arbitrary limits on levels of support would be biased and discriminatory.
- The Institutional Control Steering Committee (ICSC) and County continue to support the principle that we should collectively do what is right and appropriate in O&M, and deal with fund short falls, if any, as they become apparent. The responsibility to be good stewards of the funds is clearly recognized and the OC will play a lead role in assuring wise use of funds.
- An early request of the OC was for the overall O&M workgroup to develop a matrix of likely tasks that will require consideration for support in O&M versus a qualitative opinion of whether each fund could be used for that purpose. The outcome was that there were no O&M tasks for which “no” was assigned from all three funds. Many tasks were categorized as “yes” or “maybe”, depending on policies that would likely be set by the OC, DEQ and County. (A request to populate this matrix with the left over WR Grace RA funds has not been fulfilled reportedly for legal reasons.)

Rationale:

- This principle upholds doing the job right, over artificially drawn limits.
- The OC role is a responsibility and clear commitment to allow the County and DEQ to manage the funds. This innovative structure is unique to Superfund O&M.

Consensus:

- DEQ and the County are confident that the funds can be managed successfully to support this principle, and that shortfalls if any can be proactively addressed at the Federal and State level.

GUIDING PRINCIPLE 9
Libby Asbestos Site Operations and Maintenance Planning and Implementation

Principle Statement:

DEQ support for procurements and contracting is an essential element to Operations & Maintenance (O&M) planning.

Background:

- Early attempts by the County to conduct a pre-qualification process, and establish standing agreements with clean-up contractors was not fruitful. The County lacked the expertise, and guidance from EPA and the U.S. Army Corps of Engineers was not provided.
- DEQ has contracting specialists who can conduct a pre-qualification selection of both clean-up contractors, and analytical laboratories.
- It is likely that generally the pre-qualified contractors and labs will be used for referral to property owners and their contractors/consultants, or in some cases direct accessed by Asbestos Resource Program (ARP)/DEQ. (See principle related to reimbursements.)
- ARP has provided input to DEQ for their use in moving this forward.

Rationale:

- The expertise is available in-house with DEQ, which is more efficient to complete the selections.
- Using the DEQ resource avoids the need to examine another outside selection process.

Consensus:

- General consensus on principle.

GUIDING PRINCIPLE 10
Libby Asbestos Site Operations and Maintenance Planning and Implementation

Principle Statement:

A reimbursement approach to providing funding support to property owners is the favored basis for Operations & Maintenance (O&M) planning.

Background:

- Early notions of how contractors or owners would be funded for clean ups focused on Asbestos Resource Program (ARP) assigning contractors to perform work and paying them directly.
- In addition to difficulties in procurement efforts, it was soon concluded that this direct approach, similar to the EPA remedial design (RA) phase approach, was not realistic. Reasons included liability considerations for the County and DEQ, loss of the homeowner exemption to certain activities, over involvement in the planning and execution stages of a clean-up.
- DEQ proposed a system whereby owners instead would be reimbursed, thus maintaining the owner's responsibility overall for the activities and contracting.
- Details are being developed on this process, and how the "delta" costs will be determined, the oversight role of ARP, etc.
- Much ongoing discussion revolves around the determination of the "delta" costs. While general guidance is required, along with approvals of budgets and scopes of work, it is not realistic to expect that guidance for "every" scenario can or should be attempted. The detailed guidance employed by EPA for these decisions in RA relied on professional judgment, subject to review and oversight.

Rationale:

- The reimbursement approach is a sound and efficient means of providing funding support.

Consensus:

- Consensus with DEQ on approach; details being developed.

GUIDING PRINCIPLE 11
Libby Asbestos Site Operations and Maintenance Planning and Implementation

Principle Statement:

Support of planning for future property uses or changes is an essential activity and warrants support in Operations & Maintenance (O&M).

Background:

- The proposed County Property Evaluation Notification (PEN) regulations will address imminent activities such as modifications to structures, excavations, subdivision approvals, real estate transactions, etc. However, these required notifications, do not acknowledge the need for various parties to seek information for the purposes of planning. For example, a home owner could benefit from the information and support provided in the PEN process as they contemplate a project...well before they are ready to do a formal PEN application.
- The proposed PEN regulations acknowledges this need and establishes that information and guidance can be provided subject to availability of staff time.
- The Asbestos Resource Program (ARP) currently field inquiries that fit this category.

Rationale:

- This proactive approach to providing information and guidance will support decision making and should help identify issues in advance of actual development or construction activities.

Consensus:

- General consensus on principle.