



Libby Asbestos Site Operations and Maintenance Funding Memo for DEQ state-held funds

Purpose: This Funding Memo focuses on Libby Asbestos Site Operable Units 4 and 7 (OU4/OU7) transitioning into Operations and Maintenance (O&M) in April 2020. Upon the request of the Libby Asbestos Superfund Advisory Committee (LASOC), DEQ reviewed six Libby O&M situations with funding uncertainties labeled by LASOC as “federal O&M funding shortfalls” for a determination of where state funds would not be used. In response to the request, a DEQ position has been provided for the potential use of state-held funds. These six situations may not address all future scenarios. As the O&M program develops, additional DEQ positions may be updated into this Funding Memo and/or DEQ positions may change as concrete circumstances are encountered.

Background: OU4 and OU7 include areas impacted by contamination from activities associated with mining, processing, and shipping of vermiculite by W.R. Grace & Co. (Grace). In general, the remedy for the Site has consisted of a combination of excavating contaminated soil and replacement with clean backfill, capping contamination remaining in place following partial excavation with clean backfill, removing accessible contaminated building materials, and blocking/sealing remaining inaccessible contaminated building materials in place.

Operable Unit	Description	Status
OU4	Residential/commercial properties in Libby	Remedial action completed and Operational & Functional phase in 2019. Transition to O&M on April 1, 2020.
OU7	Residential/commercial properties in Troy	Remedial action completed and Operational & Functional phase in 2019. Transition to O&M on April 1, 2020.

Remedial action is complete. OU4 and OU7 have been in the Operational and Functional phase since 2019 and will transition into Operations and Maintenance on April 1, 2020. DEQ is the primary agency responsible for O&M activities at OU4 and OU7, with support and oversight provided by other agencies and stakeholders. DEQ is statutorily responsible for these O&M activities because EPA and DEQ settled with Grace for all of the company’s liabilities, except those at OU3, in the 2008 bankruptcy settlement. In the settlement, Montana received settlement funds to be set aside for long-term management of asbestos. There are also state funds authorized in Montana Code Annotated (MCA) 75-10-743(10)(c) and 75-10-704(4)(j)(i), where DEQ receives \$600,000 per year until 2028 and any of these unspent funds will be used to establish a permanent Trust fund through MCA 75-10-1603.

- **EPA O&M Responsibilities:** EPA is the oversight agency responsible for determining whether the remedy at the Site is protective of human health and environment. In making this determination, EPA is responsible for conducting five-year reviews.
- **DEQ O&M Responsibilities:** DEQ will be responsible for developing and implementing cooperative agreements with local agencies and stakeholders and administering contracts, as necessary, to implement institutional controls (ICs) and protect the physical remedy. DEQ will also be responsible for managing past and future information regarding property investigations, response actions, and presence of known remaining LA and LA source materials. In addition, DEQ will be responsible for conducting inspections of the Site on at least an annual basis.

- **Lincoln County and Asbestos Resource Program O&M Responsibilities (as outlined in DEQ/County cooperative agreements):** Asbestos Resource Program (ARP) works under the direction of the city-county board of health (BOH) for Lincoln County. DEQ anticipates that ARP will be the local presence responsible for implementing protective measures and selected ICs during O&M. Additionally, ARP may implement the Lincoln County Property Evaluation Notification regulation (PEN); and the Lincoln County Solid Waste Program will operate and maintain the Class IV Asbestos Cell at the Libby Class II landfill.
- **Stakeholders:** The primary stakeholders for the Site are property owners, residents, and workers. As stated in the ROD, the selected physical remedy called for leaving contamination in soil and within inaccessible areas in homes/businesses where it did not present a risk of exposure. Stakeholders may be exposed to LA during O&M if O&M activities and associated ICs and Best Management Practices are not maintained, monitored, and followed. *The property owner is expected to ensure activities on their property do not disturb the physical protective remedy in place.* Assistance will be available to homeowners to address potential exposures to LA and LA source materials through DEQ and ARP resources. Processes for reimbursement of investigation and/or response activities and decision criteria are detailed in the DEQ OU4/OU7 O&M Manual.

Overview of LASOC and their activities as related to state-held funds: Montana Legislature enacted the Libby Asbestos Oversight Committee (LASOC), which is attached to DEQ for administrative purposes. LASOC was created to enhance communication with stakeholders. In addition, LASOC advises DEQ, through recommendations, on administration of the Libby Asbestos Cleanup Trust Fund and operation and maintenance accounts. DEQ will take these recommendations into consideration, but the agency has final approval authority of state-held funds.

The Libby Asbestos Superfund Oversight Committee includes the following positions:

- Chairman Lincoln County Commissioner
- Director of the Department of Environmental Quality
- Citizen of Lincoln County
- One member of the Montana House of Representatives
- One member of the Montana Senate

LASOC meets at least quarterly either in Helena or Libby. LASOC bylaws outline a process to receive recommendations for state-held funds and carry them forward to request DEQ approval. DEQ-as an agency-will need to assess whether recommendations can be funded based on policy, precedent, and/or state law and make a final funding decision. DEQ is cognizant of its responsibility to fund O&M needs long term.

“Pots of Money” Outline: There are four separate funds that could be available to fund various elements of O&M activities for the Libby Asbestos Superfund Site. Two of these funds are held by EPA, and two are held by the State of Montana.

EPA: Federal-held funds

1. **Primary O&M federal funding source.** Approximately \$12M O&M Fund. This money was set aside at the time of bankruptcy settlement to assist in paying for O&M costs. This money is held by EPA, and thus carries restrictions for being used for those activities that EPA considers appropriate for O&M. DEQ will access this money through a cooperative agreement with EPA, and will subsequently fund the Lincoln County ARP with these funds through a separate agreement between DEQ and ARP.

2. **Secondary O&M federal funding source.** Remaining Remedial Action Money. Doug Benevento (prior EPA Region 8 Regional Administrator) committed in a December 19, 2018 letter to Governor Bullock that the remaining remedial action money (actual amount yet to be determined) would be held and be available for the State of Montana and Lincoln County to **supplement** the \$12M O&M fund once the \$12M fund has been expended. The remaining RA money (exact amount undetermined) will be held by EPA, and thus carries restrictions for being used for those activities that EPA considers appropriate for O&M.

DEQ: State-held funds

3. **Primary state funding source for O&M and other Libby asbestos (non-specific but excludes OU3).** \$5M Settlement Money to the State of Montana. Montana received approximately \$5M as part of the bankruptcy settlement with W.R. Grace. It was anticipated that this money would be used for the state's 10% cost share for remedial action (which was not needed) and/or for O&M costs. Because this money is held by the State of Montana, the state has more latitude in the activities the money could be used for, as long as they pertain to the Libby Asbestos site.
4. **Supplemental state funding source for Libby asbestos cleanup, long term O&M, and administrative costs.** As authorized in MCA 75-10-743(10)(c) and 75-10-704(4)(j)(i), DEQ receives \$600,000 per year until 2028 and any of these unspent funds will be used to establish a permanent Trust fund. This fund was developed by the State of Montana to fund the LASOC and to supplement other O&M funds. The fund is managed by DEQ, and the LASOC has authority to recommend to DEQ which O&M activities they believe should be funded. It is expected that the money would be used for those activities that would NOT be covered by either of the funds held by EPA since the state-appropriated fund has a broader applicability.

Funding Situations Overview and DEQ Positions: The situations outlined below are from categories of activities from discussions in the Libby O&M Working Group (see attached funding flowcharts) and are responsive to questions asked by representatives of Lincoln County. Generally, EPA has questioned whether EPA-held O&M funds (1 and 2 above) should apply to these situations and more information is detailed in the O&M Plan. Therefore, DEQ has evaluated these situations and articulated a DEQ position. The approach and rationale for each is provided below. DEQ has noted where individual situations do not preclude LASOC potential funding recommendations on a case by case basis through state-held funds (3 and 4 above). These six situations may not address all future scenarios. As the O&M program develops, additional DEQ positions may be updated into this Funding Memo.

The 6 situations discussed are:

1. Property Development-specifically if a developer is proposing the work.
 - a. Example scenario: Someone purchases a 20-acre lot with the intention to develop the property. The purchaser has done their due diligence and the property was purchased at fair market value. Due diligence may include, but is not limited to, consultation with ARP regarding the property status, consideration of the increase in fair market value of the property attributable to the cleanup, comparison of similar property sales, etc.
 - b. DEQ's position on this scenario is that state-held O&M may be used for sampling and cleanup costs on a case by case basis. DEQ supports the revitalization and transformation of Libby in O&M, so the community can grow past the Superfund stigma. See situation #5 for a change in the EPA-defined use. Example scenario: Someone purchases a 20-acre lot at a distressed price (not fair market value) and they divide the lot into two 10 acre lots on which houses will be built, or a new subdivision. The State has concerns about funding a windfall

for developer, wherein someone purchases property at a distressed price, receives funding to remediate it, and then sells the property at a higher price because of that remediation.

DEQ's position on this scenario is that sampling and cleanup costs are part of the cost of development and state-held funds should not be expended on these costs. DEQ's approach is consistent with due diligence and windfall provisions of CERCLA. Simply stated, DEQ does not support applying State Settlement or Libby Trust funding to windfall situations that lead to gross financial benefit due to the use of funds tied to the Libby NPL Site.

This doesn't preclude individual situations being presented, evaluated, and recommended by LASOC on a case by case basis, and a determination may be made by DEQ as to whether state-held O&M funds should be made available. DEQ will not consider applying State Settlement or Libby Trust funding to windfall situations with intent of gross financial benefit.

- c. A potential disqualification to note: The Superfund remedy was specific to Libby Amphibole Asbestos (LAA) from mining operations. If a building being demolished had vermiculite related to the mine site in the walls as well as non-related asbestos in pipe fittings, floor tiles, and concrete blocks, LA-specific abatement work will need to be identified and carefully documented to ensure reimbursement eligibility. This situation would require additional tracking procedures be utilized in order to ensure abatement and disposal costs can be adequately segregated between asbestos types. These procedures would be described in the ARP-developed SOW.

2. If the property and/or engineered controls have not been maintained.

- a. Example scenario: the property owner has not maintained their property or has not taken the measures that would be expected of a normal property owner to maintain their property.

DEQ's position on this scenario is that state-held O&M should not be used on properties where the homeowner has failed to maintain the remedy.

- b. Additional note: O&M funds are specifically for activities ensuring protection of the remedy. Properties owners have a reasonable responsibility pursuant to CERCLA to maintain the remedy and if cleanup occurred on their property, they are required to maintain the protectiveness of the remedy, as part of O&M. If the property owner has not maintained their property, then such relevant resulting public health threats may be the responsibility of the local governmental agencies. Local governmental agencies have different authorities and capabilities than DEQ.

This doesn't preclude individual situations being presented, evaluated, and recommended by LASOC on a case by case basis, and a determination may be made by DEQ -with consideration of fairness and sensitivity to each individual situation - as to whether state-held O&M funds should be made available.

3. If the property is a refusal.

- a. Example scenario: the property owner refused to allow EPA access to investigate and/or remediate their property. Properties that were refusals had Notice of Environmental

Contamination/Notice of Potential Environmental Contamination filed in their property file with the Lincoln County Clerk and Recorder's office. Over the last year, the owners of several refusal properties wanted the status of their properties changed, and they took on the costs associated with this on their own, submitted the information to EPA, and had their property status changed (i.e., their property files with the Clerk and Recorder's office had documentation added that rescinded the NOEC/NOPEC that had been filed previously). This sets the stage in the community for the financial responsibility of the property owner in future scenarios.

DEQ's position is that state-held funds should not be expended on any sampling or cleanup costs associated with refusals. Given that notices are on file with the Clerk and Recorder's office, potential buyers should be aware of potential or actual contamination at the property through due diligence and will be able address this during real estate negotiations.

This doesn't preclude individual situations being presented, evaluated, and recommended by LASOC on a case by case basis, and a determination may be made by DEQ as to whether state-held O&M funds should be made available. Individual situations for recommendations may include, but not limited to, inheritances of refusal properties and future purchasers of property at a fair market value.

4. If insurance will be paying for part or all LAA abatement costs and insurance information is not provided.
 - a. Example scenarios: (1) A home fire wherein the homeowner had insurance but didn't want to file a claim (and risk higher rates) but wanted the Superfund project to do all the "cleanup". (2) A home where the Superfund project paid for the LAA related work, and the insurance company ALSO paid for it.

DEQ's position is that state-held funds should not be expended on paying for part or all LAA abatement costs when no insurance information is provided. DEQ will not be positioned to intentionally or unintentionally participate in potentially misrepresented insurance claims. Also, in a scenario of a home fire wherein the homeowner had no insurance, DEQ's position is that state-held funds should not be expended outside of LAA abatement (e.g. property restoration, etc.).

5. Is this a change in the EPA-defined use?
 - a. Example scenario: An area that was considered a limited-use area (LUA) is changed to a use that entails more exposure time, such as changing an unused wooded portion of a lot to a lawn, or demolishing sheds and decks and exposing previously inaccessible areas. The "land use" (frequency and type) is what was used in the risk assessment for the purposes of determining potential exposure time; this does NOT equate to land uses that one normally thinks of for zoning, etc.

The ROD indicates that changes in land use will be tracked, but does not specify whether this would be "deferred remediation."

- b. Both DEQ and EPA believe that this scenario will need to be evaluated on a case by case basis to determine if additional clean-up is needed. EPA's position is that federal funds can only be used for sampling after changes are complete (i.e. confirmation sampling only).

However, federal funds could be used for cleanup. DEQ's position is that state-held O&M funds could be used for any sampling (i.e. investigative and confirmation sampling) and cleanup costs in lieu of federal funds.

6. A "miss" or "unforeseen condition"
 - a. These terms are not defined in the Record of Decision (ROD), but the ROD states that EPA would come back to conduct response activities for these scenarios on a case by case basis. Currently, the outlined process for a decision is to further discuss with EPA at such time.
 - b. DEQ's position is that if EPA has determined that if federal funds can't be used first, then state-held funds should be available.

Attachments:

- Draft Investigation Sampling Flow Chart for Non-Federal Properties
- Draft Property Reimbursement Eligibility Flow Chart for Non-Federal Properties