

ASBESTOS CONTROL PROGRAM VIOLATION SIGNIFICANCE AND ENFORCEMENT RESPONSE GUIDANCE

Purpose and Reference Documents

The purpose of this guidance is to describe the procedures for compliance monitoring and enforcement response activities conducted by the Asbestos Control Program (ACP) and to define categories of violations based on their significance.

ACP inspects asbestos projects and will investigate suspected noncompliance by asbestos permit holders related to performance of asbestos projects, storage of asbestos-containing material, or maintenance of records related to asbestos projects pursuant to §75-2-518, Montana Code Annotated (MCA). When DEQ believes a violation of the Montana Asbestos Control Act, rules adopted under that Act, or the terms and conditions of a permit issued under that Act have occurred, it may initiate informal enforcement activities, including warning and violation letters or formal enforcement actions. Formal enforcement activities, including Administrative Orders, Judicial Orders, assessing administrative or civil penalties may be pursued by DEQ's Enforcement Program (ENF).

ENF provides guidance for DEQ's informal and formal enforcement processes.

DEQ has adopted rules to standardize penalty calculations among the different environmental media at Administrative Rules of Montana (ARM) Title 17, chapter 4, subchapter 3.

The United States Environmental Protection Agency (EPA) has not developed a policy which describes the relative severity of asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP) violations or responses regulatory agencies should take to address those violations. However, EPA has developed the Asbestos Demolition and Renovation Civil Penalty Policy, dated August 22, 1989.

EPA has also developed several policies regarding violations related to the Asbestos Hazard Emergency Response Act (AHERA), but none specifically address violations related to the Model Accreditation Plan (MAP) administered by DEQ.

Types of Violations, categorized by significance:

Violations discovered during inspections or investigations of complaints may be categorized as High Priority Violations (HPV) or Significant Violations (SV).

Definition of High Priority Violations

The following criteria may trigger HPV status. The determination of a high priority violation is made by ACP, legal counsel, and other DEQ personnel on a case by case basis after considering the specific facts of the case.

- Threat, or potential threat, to human health and the environment, such as:
 - Confirmed spill, release, emission
 - Failure to follow NESHAP work practices leading to exposure
 - Disposal practices that may cause releases
- Failing to inspect/sample high risk facilities, such as:
 - Large public buildings, schools, library, hospital, malls, restaurants, hotels
 - Facilities that may contain significant quantities of asbestos and/or high-risk of exposure to the public.
- Failure to get a permit or comply with a permit at the above-mentioned high-risk facilities.

Definition of Significant Violations

All violations that do not meet the HPV criteria are significant violations (SV). Examples of significant violations include late or inadequate notifications or permit applications, failure to pay fees, failure to have an accreditation card at the work site, failure to post a sign-in sheet, and failure to post a permit at the work site. Significant violations are subject to the Timely and Appropriate Response section of this guidance.

- Significant violations may be elevated to high priority violations when:
 - They result in high volume, extended duration, high percent of asbestos that is friable or potentially friable, or a high number of receptors potentially exposed
 - The owner or operator knows or should know of regulations, previous compliance assistance to the owner or operator from DEQ, the owners or operator is regularly slow to correct violations
 - Failure to comply with compliance assistance provided may be considered
- DEQ may consider the following extenuating circumstances in determining the level of enforcement response:
 - The violation occurred during an emergency such as facility burn or collapse; the owner or operator hired professionals who made mistakes; there were communication gaps or errors; and the violations were correctly addressed in a timely manner

Timely and Appropriate Response

Warning Letters (WL) may be issued for SV status cases when more information about the nature of the violation is needed, or where prompt corrective action can prevent a high priority violation. After internal review and discussion, a draft copy of the WL must be provided to the supervisor prior to finalization and mailing.

Violation Letters (VL) should be issued after the initial determination of HPV status cases. After internal review and discussion, a draft copy of the VL must be provided to the supervisor prior to finalization and mailing. ACP's attorney and bureau chief will review as appropriate. All violation letters are to be sent Certified Mail, Return Receipt Requested. An owner/operator can supply information rebutting or responding to the violation.

A Resolution Letter (RL) may be issued by ACP for SV status cases when a determination has been made that no further enforcement action is warranted and/or if the violation has been corrected. ACP may resolve issues through an initial WL or VL after reviewing information that is submitted in response to a WL or VL. The RL will contain language noting that documentation of the violation remains in the file.

In terms of timelines, a WL or VL will be issued within 30 days of discovery of a potential violation. If significant information is needed before issuing a WL or VL, further information should be requested, or an investigation initiated. Within 30 days of issuance of a VL, either a RL from ACP will be issued, further information will be requested, or a final determination that a violation warrants HPV status will be made.

If formal enforcement is needed to correct the violation or deter future violations, ACP will begin discussing the creation of an Enforcement Request (ER) with the section supervisor and legal. The ER is routed through the supervisor, bureau chief, legal, and division administrator, before being submitted to the ENF. Complex violations may require deviations from timeframes and must be communicated to the supervisor and reasons documented in the file.

When ENF signs the ER, responsibility for final resolution is transferred to ENF. ACP will continue to provide technical assistance to ENF and legal staff in case development, including appropriate corrective actions and penalty calculations, as requested, and ENF will provide status updates on asbestos cases to ACP.

Additional Important Considerations

Relationship between Compliance Assistance and Enforcement

Compliance assistance prior to any activity that could damage asbestos containing material is the first-choice strategy to avoid potential exposure and maintain compliance. This is accomplished through phone calls, email, or letters with the goal of preventing a potential HP or SV.

Relationship between Compliance Assistance and the Small Business Ombudsman (SBO)

Compliance assistance prior to any activity that could damage asbestos containing material is the first-choice strategy to avoid potential exposure and maintain compliance. This is accomplished through phone calls, email, or letters with the goal of preventing a potential HP or SV especially for projects involving multiple programs within DEQ.

Relationship between the Asbestos Control Program and the Solid Waste Program

In the federal system, *asbestos containing waste material* is considered a solid waste; the standard was established through the Clean Air Act, prior to the enactment of RCRA. In Montana, asbestos destined for disposal is considered a special waste and is referred to as *asbestos-contaminated material*. A trace amount of asbestos is the threshold for the designation as *asbestos-contaminated*. Careful coordination between the two programs should take place when a violation is discovered and in the development of compliance assistance and/or a formal enforcement response.

Relationship between the Asbestos Control Program and Asbestos in Schools Program

DEQ has not been delegated the Asbestos in Schools Program, but will provide information related to the management of asbestos in schools or potential AHERA violations to EPA. EPA AHERA staff reciprocate by notifying DEQ of potential NESHAP violations observed at schools.

Relationship between the Asbestos Control Program and Worker Protection

DEQ is preempted from implementing worker safety protection, and has an agreement with DLI and OSHA to share observations of potential worker safety violations associated with asbestos projects between the agencies. DLI and OSHA staff reciprocate by notifying DEQ of potential NESHAP violations. See Addendum A.

Relationship between Asbestos Violations and Clean Water Act Requirements

The discharge of asbestos to waters of the United States may be a violation of the Montana Water Quality Act and Clean Water Act. DEQ will share information related to the release of asbestos to water with the Water Quality Bureau.

Relationship between Asbestos Violations and Superfund Requirements

The discharge, emission, release, or other mismanagement of asbestos-containing material (ACM) may be a spill or release of a *hazardous substance*. Hazardous substances are regulated under the federal Superfund program, which is not delegated to the states. Depending on the amount of ACM released, a release of asbestos can exceed the reportable quantity established under Superfund. Failure to notify EPA of the exceedance could be a violation of that statute's reporting requirements. In addition to any enforcement taken by DEQ under the delegated NESHAP, or the state's Asbestos Control Act, the discharge or emissions of ACM and failure to report should also be evaluated for referral as a violation of federal Superfund.

Transportation Requirements

The transportation of asbestos may be subject to the Department of Transportation's hazardous materials transportation requirements. DEQ will share information related to the improper transportation of asbestos with the Department of Transportation.

Criminal Referral

The Clean Air Act of Montana and Asbestos Control Act provide criminal sanctions for environmental violations. The federal Clean Air Act also provides for criminal sanctions. ENF and Chief Legal Counsel will make referrals for criminal investigation to the respective county attorney, state special assistant attorney general, or EPA Criminal Investigation Division, whichever is consistent with DEQ's ERM.

Addendum A

June 11, 2010

Michael Foreman
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Billings Area Office OSHA
2900 4th Ave N Ste 303
Billings, MT 59101

Bryan Page
State of Montana
Department of Labor and Industry
PO Box 1728
Helena, MT 59624-1605

Re: Protocol for Asbestos Related Communication Between MTDEQ, DLI and OSHA

Gentlemen,

As we have discussed, the State of Montana Department of Environmental Quality (DEQ) Asbestos Control Program (ACP) is no longer able to enforce worker safety standards that are already addressed in OSHA, pursuant to *Gade v. National Solid Wastes Management Association*, 505 U.S. 88; 112 S. Ct. 2374; 120 L. Ed. 2d 73 (1992). Considering that the ACP has regularly observed and cited asbestos abatement contractors for violations of OSHA regulations contained in 29 CFR 1926.1101, and because we anticipate it to be in the best interest of worker safety and public health to continue to ensure that these regulations are enforced, Montana DEQ proposes the following protocol for the reporting of suspected violations of asbestos-related OSHA regulations.

1. In the case of an observed potential worker safety violation that is no longer enforceable by DEQ, the ACP will provide a brief description of the potential violation by email and/or phone, to either the Billings office of Occupational Safety and Health Administration or the Montana Department of Labor and Industry, depending on circumstances and jurisdictions. Please note that DEQ personnel have no authority to, and cannot promise to, specifically seek out worker safety violations, but will report suspected violations of asbestos-related OSHA regulations that they observe in the course of their duties.
2. Upon request, the ACP can provide to the proper agency the following information, including but not limited to:
 - a. Site and project permits (which include contact and work plan information),
 - b. Any documentation compiled while at the site which may include but is not limited to samples and photos, and
 - c. Inspection notes.

Primary contacts for the Montana Department of Labor and Industry (to be called in cases which involve or may impact workers employed by state or local governmental entities):

Bryan Page	444-1605	bpage@mt.gov
Judy Murphy	444-5267	jumurphy@mt.gov

Primary contact for OSHA (to be called in cases which involve or may impact private sector employees):

Michael Foreman	247-7494	complaints.F033@dol.gov
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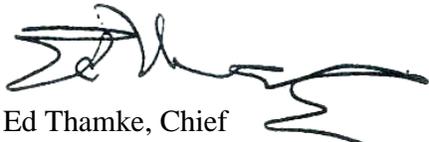
Contacts for the DEQ Asbestos Control Program:

John Podolinsky	444-2690	jpodolinsky@mt.gov
Rich Morse	444-1436	rmorse@mt.gov
D. Eason, Jr.	444-2886	deason@mt.gov

If you would prefer a more comprehensive protocol, we could convene a work group and finalize the draft that John Podolinsky provided you earlier this year (1/13/2010).

Thank you for your cooperation in helping keep Montana a safe place to work and live. Please do not hesitate to contact me, Hazardous Waste Section Supervisor Mark Hall (444-4096), or any of our ACP contacts listed above should questions arise.

Sincerely,



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c: DEQ Asbestos Control Program
Jane Amdahl, Director's Office
DEQ Enforcement Division