

## HEALTH AND ENVIRONMENT REGULATIONS

### CHAPTER 8: Asbestos Pollution

#### Subchapter 1: Libby Amphibole (LA) Property Evaluation Notification (PEN)

(Date Adopted: March 11, 2020; Date Effective: February 1, 2021)

#### I. REGULATION, AUTHORITY AND PURPOSE

- A. The City/County Board of Health for Lincoln County (Board of Health) was created as the Local Board of Health for Lincoln County by an Inter-local Agreement between the City of Libby and Lincoln County with authority under Mont Code Ann. § 50-2116(2)(c)(v)(A) to enact public health regulations to protect public health, safety, and welfare and to facilitate Institutional Controls selected by the United States Environmental Protection Agency (USEPA) and Montana Department of Environmental Quality (DEQ) for the Libby Asbestos Superfund Site.
- B. The Board of Health finds there is a threat to public health, safety, and welfare posed by the environmental conditions that led the USEPA to designate the Libby Asbestos Superfund Site. That threat was largely mitigated by completion of remedial actions performed by the USEPA. The remedial action included leaving some contamination in place. As such, the final remedial action condition as well as ongoing and future changes on properties must be maintained to ensure protectiveness of the remedy.
- C. The Board of Health collaborates with the DEQ and the USEPA to continue to protect public health, safety, and welfare by ensuring that the Libby Asbestos Superfund Site remedies remain protective and LA asbestos is properly managed to ensure protectiveness of the remedy.
- D. The Lincoln County Asbestos Resource Program (ARP) is a Board of Health directed public health program that was established in 2012 with the mission of reducing potential exposure to LA asbestos that is found within the Libby Asbestos Superfund Site and the surrounding areas of Lincoln County. A key goal of the Board of Health directed ARP to minimize burden on the community members themselves. The program was developed by the USEPA as a pilot study as the Environmental Resource Specialist (ERS) program and through a cooperative agreement passed on to Lincoln County ARP program in January 2014 and modified under the guidance of the Board of Health to its current program under the guidance of the Board of Health and is currently funded through a cooperative agreement/grant from the USEPA.
- E. DEQ is responsible for future Operation and Maintenance (O&M) of the Site, and funding from DEQ is anticipated for ARP to support O&M activities.
- F. The Board of Health has chosen to implement this Property Evaluation Notification Regulation pursuant to its authority under Mont Code Ann. § 50-2-116(2)(c)(v)(A) to protect public health, safety, and welfare.

#### II. GENERAL PROVISIONS

- A. Title: These regulations shall be known as the "LIBBY AMPHIBOLE (LA) ASBESTOS PROPERTY EVALUATION NOTIFICATION (PEN)".

- B. Authority: Authorization for these regulations is through Montana Code Annotated (MCA) § 50-2-116(2)(c)(v)(A).
- C. Purpose: The purpose of this regulation is to reduce the possibility of the public's exposure to LA asbestos as a result of Applicable Activities, as defined in Definitions in Section F.2 of this regulation. These activities shall be referred to as Applicable Activities. This PEN regulation is focused on providing LA asbestos property information, data, education, and evaluations to protect the public during Applicable Activities. This PEN regulation is an institutional control listed within the Operating Unit 4 and Operating Unit 7 Institutional Control Implementation and Assurance Plan (ICIAP). Note that this PEN regulation is separate from the Montana Asbestos Control Act, DEQ Asbestos Control Program requirements, or other due diligence processes, and does not replace or supersede the associated regulations on asbestos in Montana.
- D. Contingent Applicability: Implementation and execution of this regulation is dependent upon the existence and continued functionality and funding of the ARP. Similarly, success of the ARP is highly dependent upon the existence of this regulation. If the ARP ceases to exist or is unable to effectively function from lack of funding or other reasons, then this regulation will be suspended until the ARP, or other BOH designated organization, is functional and able to again support implementation and execution. Such suspension shall not be effective until the Board of Health affirmatively votes to suspend this regulation.
- E. Jurisdiction: This LA PEN regulation governs activities within the Libby Asbestos Superfund Site National Priorities List boundary which is composed of eight Operable Units, all of which are located in Lincoln County, Montana. Jurisdiction includes Operable Units 1, 2, 4, 5, and 7. Operable Unit 3 (the Former Libby Vermiculite Mine), Operable Unit 6 (Burlington Northern Santa Fe Railroad and Rail corridors) and Operable Unit 8 (Roadways) are excluded from the requirements of this LA PEN regulation. Descriptions of the jurisdictional areas included within each Operable Unit governed by this PEN regulation are detailed in each respective Record of Decision and summarized below:
1. Operable Unit 1 is the former Export Plant, and is situated on the south side of the Kootenai River, just north of the downtown area of the City of Libby, Montana. OUI includes the embankments of Montana Highway 37, the former Export Plant, and the Riverside Park. The property is bounded by the Kootenai River on the north, Highway 37 on the east, the Burlington Northern Santa Fe railroad thoroughfare on the south, and the State of Montana property on the West (EPA, May 2010a). These areas and boundaries are shown the Operable Unit 1 Record of Decision Exhibit 2-2 (EPA, May 2010a). Currently in the final stages of Deletion from the NPL.
  2. Operable Unit 2 includes area impacted by contamination released from the former Screening Plant. These areas include the former Screening Plant, the Flyway property, a privately-owned property, and the Rainy Creek Road Frontage and Highway 37 right-of-way adjacent to Rainy Creek Road (EPA, May 2010b). These areas and boundaries are shown in the Operable Unit 2 Record of Decision Exhibit 22 (EPA, May 2010b). Formally Deleted from the NPL on April 10, 2019.

3. Operable Unit 4 is called Libby Residential/Commercial areas. Operable Unit 4 is defined as the residential, commercial, industrial (not associated with Grace Mining Operations), and public properties, including schools and parks, in and around the City of Libby (EPA, February 2016). The boundaries for Operable Unit 4 are shown in Exhibit 1-2, Figure 1-2, and Figures 5-2 through 5-16 in the Operable Unit 4 through 8 Record of Decision (EPA, February 2016).
4. Operable Unit 5 is called the Former Stimson Lumber Company. Operable Unit 5 is defined geographically by the parcel of land that included the former Stimson Lumber Company. OU5 is bounded by the high bank of Libby Creek to the east, the Burlington Northern Santa Fe railroad to the north, and properties within Operable Unit 4 to the south and west (EPA, February 2016). The boundaries for Operable Unit 5 are shown in Exhibit 1-2, Figure 1-2, and Figures 5-17a through 5-17b in the Operable Unit 4 through 8 Record of Decision (EPA, February 2016).
5. Operable Unit 7 is called Town of Troy, and is defined as the residential, commercial, and public properties in and around the Town of Troy, Montana located 20 miles west of downtown Libby (EPA, February 2016). The boundaries for Operable Unit 7 are shown in Exhibit 1-2, Figure 1-2, and Figures 5-21 through 5-25 in the Operable Unit 4 through 8 Record of Decision (EPA, February 2016).

**F. Definitions:** The following definitions shall apply in the interpretation and enforcement of this regulation. The word "shall" as used in this regulation indicates a mandatory requirement.

1. LA asbestos is specific to the form of naturally occurring amphibole asbestos comprised of a range of mineral types and morphologies, and associated with the Libby vermiculite deposits in the region near the Libby Asbestos Superfund Site (EPA, February 2016). LA asbestos forms durable, long, thin structures that are generally respirable, can reasonably be expected to cause disease, and is considered to be the contaminant of concern at the Libby Asbestos Superfund Site (EPA, February 2016).
2. "Applicable Activities" means activities related to real property to include:
  - a. Excavation, grading, and landscaping;
  - b. Interior or exterior demolition, repair, modification, disturbance of material, or remodeling of permanent or temporary structures;
  - c. Transfer of real property regardless of whether any comfort letter has been issued by USEPA or any other agency;
  - d. Change in Land Use Category or Property Use Area as used in Sections 2.3 and 4.2 of the *Remedial Design Report, Revision 1, Libby Asbestos Site Operable Units 4 & 7* (April 5, 2017); and
  - e. Any dividing of land, including through subdivision, family transfer, Court-ordered division, or other division of land.
3. "LA Asbestos Property Evaluation" means a required evaluation, performed by the ARP, to include evaluation of data and information related to LA asbestos based on the notification by a property owner or interested party who has submitted a PEN due to planned Applicable Activities within the jurisdiction

(Section E above). The LA Asbestos Property Evaluation will be performed by the ARP to provide information relative to the potential for LA Asbestos exposure related to the Applicable Activity as detailed. This regulation details the PEN notification requirements and the associated LA Asbestos Property Evaluation elements to be provided in an effort to protect the remedy and public health.

4. "Days" means business days (i.e., Monday, Tuesday, Wednesday, Thursday, and Friday), excluding holidays observed by Lincoln County and ARP.
5. "Person" is any individual, institution, partnership, business, corporation, association, or other private or government entity.
6. "Property" is real property that is fixed property, principally land and structures. This regulation applies to the Applicable Activities related to real property within the jurisdiction.

G. Severability: If any provision of this Regulation is declared invalid by any court or tribunal, the remaining provisions of this Regulation shall not be affected thereby.

### III. LIBBY AMPHIBOLE ASBESTOS PROPERTY NOTIFICATION PROCESS

A. LA Asbestos Property Evaluation Notification (PEN) Process Requirements: Prior to performing Applicable Activities within the above defined jurisdiction, a person is required to notify the ARP of the proposed Applicable Activities through the PEN process.

B. Applicability Specifics:

1. The following Applicable Activities within the jurisdiction require a PEN:
  - a. Excavation, grading, and landscaping;
  - b. Interior or exterior demolition, repair, modification, disturbance of material, or remodeling of permanent or temporary structures;
  - c. Transfer of real property regardless of whether any comfort letter has been issued by USEPA or any other agency;
  - d. Change in Land Use Category or Property Use Area as used in Sections 2.3 and 4.2 of the *Remedial Design Report, Revision 1, Libby Asbestos Site Operable Units 4 & 7* (April 5, 2017); and
  - e. Any dividing of land, including through subdivision, family transfer, Court-ordered division, or other division of land.
2. In addition to the defined Applicable Activities, the following activities within the jurisdiction also require a PEN:
  - a. These requirements are applicable to modification or construction of wastewater systems requiring disturbance of surface or subsurface soils.
  - b. These requirements are applicable to any division of property, including through subdivision, family transfer, Court-ordered division, or other division of land. Subdivision definitions, requirements, and permits are authorized by separate entities and regulations. The Lincoln County Subdivision regulations contain specific requirements related to

examination of potential LA related issues as a condition of approval of the subdivision. Division of property exempt from the Subdivision regulations is however an Applicable Activity requiring a PEN.

- c. These requirements are applicable to government entities performing Applicable Activities within the jurisdiction.
- d. Emergency response activities (such as floods, fires, natural disasters, building collapse, sinkholes, earthquakes, etc.) where the excavation, modification, or demolition activities are conducted in response to a property emergency. In this case, the ability to submit a PEN form beforehand is not feasible. Thus, the property owner shall notify ARP of the emergency response activity within three (3) business days to determine if a post-facto PEN notification or inspection is required.

3. Exclusions to PEN Process include the following:

- a. Remodeling activities that are cosmetic in nature (e.g. wallpaper installation or removal, carpet installation or removal, painting, installing built-in furniture, etc.) that will not disturb the existing interior flooring (excluding carpet), interior walls, ceilings, structural elements, exterior siding, roofing, foundations, utility penetrations or insulation;
- b. Exterior landscaping or remodeling that will not disturb surface or subsurface soil (e.g., concrete repair/staining, replace slats on decking, staining or painting fencing, etc.); or
- c. Emergency response activities (such as floods, fires, natural disasters, building collapse, sinkholes, earthquakes, etc.) where the excavation, modification, or demolition activities are conducted in response to a property emergency. In this case, the ARP shall be notified the next business day to determine if a post-facto PEN notification or inspection is required.

C. PEN Requirements: The notification of intent to perform Applicable Activities for a property shall be made to the ARP by the owner of the property, or the owner's authorized agent, on a form provided by the ARP (electronic or hard-copy) and/or through the Montana811 utility locate request process.

1. Notification for those Applicable Activities regulated by Montana811 through MCA Title 69, Chapter 4, Part 5 are automatically notified to the ARP when submitted through the Montana811 notification process and will serve as notification to ARP relative to the PEN process. If activities are limited to those regulated by Montana811 then no additional PEN-specific ARP form is required.

2. Applicable Activities not captured under Montana811 Notifications within the jurisdiction will require preparation and submittal of the ARP PEN form signed and dated by the applicant, and will include the following information, at a minimum:

- a. The name, address, email address, and telephone number of the person who owns the real property;
- b. The name, address, email address and telephone number of the person submitting the PEN.
- c. The physical address of the property or a legal description if a physical address is not assigned where the Applicable Activity will take place;

- d. The name, address, email address, and phone number of the person who will be responsible for performing the Applicable Activity, if it is not the owner of the real property. If a contractor is to be used, provide their name, address, telephone number, and any asbestos related credentials or certifications;
- e. Confirmation that Montana811 has been notified, if applicable; and
- f. A description of the proposed activity, including:
  - i. The general nature and extent of the project including the project objective, including a specific statement regarding whether division of property is an objective;
  - ii. Estimated location, mass, area, and volume (as applicable) of the media or building materials that will be disturbed or removed;
  - iii. If already proposed, any mitigating or best management practices that are planned to reduce or eliminate the exposure to LA asbestos and/or vermiculite, if anticipated, and measures to reduce the generation of dust;
  - iv. Planned activities for transporting and disposing of building materials, soil, waste, disturbed materials, and potential LA asbestos and/or vermiculite; and
  - v. If the Applicable Activity is the sale of real property or change in Land Use Category, the description should state "sale of property" or "Change in Land Use Category".

D. Fee: No fee will be associated with a PEN for the owner or person submitting the notification.

E. PEN and LA Asbestos Property Evaluation Process: PEN forms shall be submitted to ARP and a subsequent LA Asbestos Property Evaluation conducted. In addition to the "ARP Required Response" outlined in Section III.E. below, ARP is authorized to do none, any, or all of the following activities in response to a PEN submission:

1. Collection of prior information related to LA investigations, inspections, site records, evaluations, designs, remedies, communications, etc. as may be available from EPA documents and database, DEQ Libby Instance Response Manager database, or other accessible sources;
2. Site observations, including reference to available maps/figures and other available records, and an ARP site visit of the subject property (on or near the property depending on access permission granted by the owner);
3. Discussion with owner, PEN applicant, or contractor representatives related to property conditions and proposed activities;
4. An evaluation of prior information and site observations in relation to former and current land use, existing conditions, future land use, and proposed activities at the property;
5. Summarization of collected information, site observations, evaluations;
6. Recommendations as may be specific to the Subdivision approval process for follow up activities, such as sampling, evaluations, and cleanups;

7. Recommendations for Best Management Practices, available resources to support the activity, and informational/educational materials;
8. Follow up site visit, if applicable;
9. Dialog and communication summary;
10. Assistance in identifying a remediation contractor, if applicable;
11. Guidance related to possible mitigation of expenses for the incremental cost to the project attributable to the presence of LA;
12. Evaluations and/or recommendations specific to the Subdivision review and approval process;
13. Updates to property evaluation and pertinent applicable activities or inspections will be uploaded and tracked by ARP in the DEQ Libby Instance Response Manager database.

**F. ARP Required Response:**

1. Notifications shall be submitted at least three (3) full business days prior to the initiation of Applicable Activities. Once notified, the ARP has two full business days to discuss activities to be performed and to respond by giving the current property status. Day one begins the next operating business day after the PEN form submittal to the ARP. The timeline for ARP's discussion with the applicant is based on expected circumstances. If there are unforeseen circumstances, ARP will provide notice to the applicant of a modified timeline.
2. Once a complete PEN form is submitted, the ARP shall review the notification and perform the ARP LA Asbestos Property Evaluation to assess the potential for LA asbestos exposure based on previous LA asbestos evaluations, remedies, and inspections. If the PEN notification is incomplete, the ARP may request additional information prior to performing or completing their Evaluation.
3. Notifications to ARP are separate from, and not limited to, other required notifications under local, county, state, or federal law.

**G. Evaluation Reporting:** Upon completion of the LA Asbestos Property Evaluation, the ARP will communicate the findings to the applicant and/or owner, and document the communication. Different PEN deliverables will be offered according to the applicable activity:

1. Response for excavation, grading, landscaping activities: After receiving a completed PEN form, a phone call and/or email to the PEN requestor explaining the current status of the property will suffice as a completed PEN response. Confirmation that Montana811 utility locate has been notified of planned digging activity will be requested. Please see Section III B (1) for details on Montana811 utility locates and the PEN notification. If follow-up is needed, an additional evaluation performed by ARP may be conducted. An additional phone call, email

and/or letter would summarize the findings of this additional evaluation and any additional steps that need to be taken. Best management practices and guidance for disposal, relevant to the applicable activity, will be shared with the PEN requestor. A summary of PEN activities, and associated records or documents, will be retained in DEQ and/or ARP databases or files.

2. Response for interior/exterior demolition, repair, modification, disturbance of material, or remodeling to permanent or temporary structures: After receiving a completed PEN form, a phone call and/or email to the PEN requestor explaining the current status of the property will suffice as a completed PEN response. If follow-up is needed, an additional evaluation performed by ARP may be conducted. An email and/or letter would summarize the findings of this additional evaluation and any additional steps that need to be taken. Best management practices and guidance for disposal, relevant to the applicable activity, will be shared with the PEN requestor. A summary of PEN activities, and associated records or documents, will be retained in DEQ and/or ARP databases or files.
3. Response for sale of real property: After receiving a completed PEN form, a phone call and/or email to the PEN requestor explaining the current status of the property will suffice as a completed PEN response. After communicating with the buyer and/or seller of real property, ARP will develop a letter detailing the current status of the property and activities performed on the property during cleanup. The letter can be delivered electronically or by mail. See Section E 3(G) on Disclosure of LA Asbestos Property Evaluation in Sale of Property. Maintenance requirements for installed engineering controls, relevant to the specific remedy on the property, will be shared with the PEN requestor. A summary of PEN activities, and associated records or documents, will be retained in DEQ and/or ARP databases or files.
4. Response for Change in Land Use Category or Property Use Area: After receiving a completed PEN form, ARP will make a phone call and/or send an email to the PEN requestor explain the current status of the property. An additional evaluation performed by ARP may be required which entails the analysis of previous sampling, if any, within the proposed work area, researching property files of surrounding properties near the proposed work area, and a visual soil inspection of the work areas. A detailed report summarizing the findings of this additional evaluation, along with an ARP recommendation for any additional steps that need to be taken will be given to the PEN requestor. Best management practices and guidance for disposal, relevant to the applicable activity, will be shared with the PEN requestor. A summary of PEN activities, and associated records or documents, will be retained in DEQ and/or ARP databases or files.
5. Response for any division of property, including through subdivision, family transfer, Court-ordered division, or other division of land: The Lincoln County Subdivision Regulations require an APR evaluation initiated through a PEN submission as part of the subdivision application review. After receiving a completed PEN form, ARP will make a phone call and/or email to the PEN requestor explaining the current status of the property. An additional evaluation performed by ARP is required which entails the analysis of previous sampling, if any, within the proposed work area, researching property files of surrounding



properties near the work area and a visual soil inspection of the proposed work areas. A detailed report summarizing the findings of this additional evaluation, along with an ARP recommendation and any additional steps that need to be taken will be given to the PEN requestor. This letter may be included in the new subdivision package for the County Planner to receive. Best management practices and guidance for disposal, relevant to the applicable activity, will be shared with the PEN requestor. A summary of PEN activities, and associated records or documents, will be retained in DEQ and/or ARP databases or files.

- H. Disclosure of LA Asbestos Property Evaluation in Sale of Property: Sellers of real property shall submit a PEN application as outlined in Section III.B.2. above. Sellers shall provide a copy of the resulting LA Asbestos Property Evaluation to any buyer, or buyer's agent, prior to sale of seller's property. At buyer's request, seller shall also provide a copy of the resulting LA Asbestos Property Evaluation to any third parties (for example, lending institutions, insurers, etc.).
- I. Individuals not performing Applicable Activities, but who wish to obtain a LA Asbestos Property Evaluation for a property, may contact ARP to submit a request for a LA Asbestos Property Evaluation. ARP, at its discretion, may initiate the PEN process on any property within the jurisdiction of this regulation. Those LA Asbestos Property Evaluation will be processed based on ARP availability.
- J. Penalties: Violations of any provision of this regulation is counter to the USEPA Libby Asbestos Superfund Site remedy, operation and maintenance, and institutional control measures. Violations of this notification could result in exposure to or spreading of LA contamination and may be subject to enforcement provisions by the BOH under MCA § 50-2-124. Failure to comply may exclude consideration of any financial assistance that may be available.
- K. Effective Date: Once the regulation is adopted by the City/County Board of Health for Lincoln County, the requirements of this regulation shall not become effective until the City/County Board of Health for Lincoln County passes a resolution stating the effective date of this regulation.

#### IV. REFERENCES

EPA, 2010a. *Record of Decision for Libby Asbestos Superfund Site, The Former Export Plant Operable Unit 1.* EPA Document #: 1154081.

EPA, 2010b. *Record of Decision for Libby Asbestos Superfund Site, The Former Screening Plant and Surrounding Properties Operable Unit 2.* EPA Document #: 1154082.


EPA, 2016. *Record of Decision for Libby Asbestos Superfund Site, Libby and Troy Residential and Commercial Properties, Parks and Schools, Transportation Corridors, and Industrial Park, Operable Units 4 through 8, Lincoln County, Montana.* EPA Document #: 1563024.

EPA, 2020. *Operable Units 4 and 7, Final Institutional Control Implementation and Assurance Plan, Libby Asbestos Superfund Site, Libby, Montana.* March 2020. EPA Document #: 100007518.

EPA, 2020. *Libby Asbestos Superfund Site, Libby and Troy Residential and Commercial Properties, Parks, and Schools, Operable Units 4 and 7, Lincoln County, Montana, Final Operations and Maintenance Plan, Revision 0*. April 2020. EPA Document #: 100007658.

DEQ, 2020. *Libby and Troy Residential and Commercial Properties, Parks, and School, Operable Units 4 and 7, Lincoln County, Montana*. Libby Asbestos Superfund Site. May 2020.

Lincoln County, 2020. *Lincoln County Subdivision Regulations*. Prepared to comply with the Montana Subdivision and Platting Act.

  
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Board Chair  
City-County Board of Health for Lincoln County

11/13/2021  
Date

RESOLUTION NO.# 2021-1

WHEREAS, the Montana Department of Environmental Quality and Lincoln County, acting through the Lincoln County Asbestos Resource Program ("ARP"), entered into a Memorandum of Agreement ("MOA") for the reimbursement of costs to Lincoln County and/or ARP for costs incurred in ARP's continued role as the local presence responsible for implementing protective measures and selected institutional controls during operation and maintenance pursuant to the MOA; and

WHEREAS the MOA contemplates that ARP will utilize a Property Evaluation Notification ("PEN") system to further its responsibilities under the MOA; and

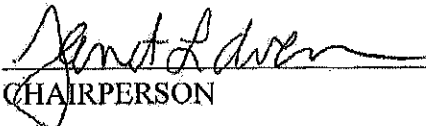
WHEREAS the City County Board of Health for Lincoln County ("Board of Health") adopted a PEN Regulation on March 11, 2020 for the ARP to utilize in its role under the MOA; and

WHEREAS Section III.K. of the PEN Regulation provided for an effective date upon the Board of Health's passage of a resolution stating the PEN Regulation effective date;

WHEREAS the purpose of this Resolution is to establish the effective date for the PEN Regulation; and IT IS HEREBY RESOLVED:

The PEN Regulation adopted by the Board of Health shall be effective as of February 1, 2021.

DATED this 13 day of January 2021.

  
CHAIRPERSON

