

State of Montana

Natural Resource Damage Program

MEMORANDUM

TO: Members of the Interested Public

FROM: Montana Natural Resource Damage Program

DATE: October 18, 2023

SUBJECT: Libby Asbestos Operable Unit 3 Interim Restoration Plan
Soliciting Early Restoration Project Ideas and Scoping Impacts

1. Introduction

The State of Montana Natural Resource Damage Program (NRDP), on behalf of the Governor of Montana (Trustee), is preparing an Interim Restoration Plan for the natural resources that were injured by the release of hazardous substances in or relating to Operable Unit 3 (OU3) of the Libby Asbestos Superfund Site. As part of the Interim Restoration Plan, the State is considering funding early restoration projects that can restore, replace, or acquire the equivalent of injured or lost natural resources, or their services, associated with Libby OU3. Early restoration projects would be funded from the natural resource damage (NRD) funds obtained in the 2023 settlement between the State of Montana and W.R. Grace (Grace).

NRDP is seeking public input on the preparation of the Interim Restoration Plan by soliciting proposals for early restoration projects from interested individuals and entities. In addition, NRDP is scoping the issues that may be associated with the implementation of any proposed early restoration projects. The State is engaging in this scoping process to ensure that all impacts on the human environment associated with the interim restoration plan are identified.

This memorandum includes the following sections:

1. Introduction
2. Libby Asbestos OU3 Settlement Background and Natural Resource Damages
3. Purpose and Scope of Natural Resource Restoration
4. Initial Funding Available for Early Restoration Projects
5. Project Eligibility Requirements
6. Preliminary Projects
7. How You Can Participate

Attachment A – Libby Asbestos OU3 Early Restoration Concept Abstract Form

Attachment B – Guidance for Project Idea Submittals

2. Libby Asbestos OU3 Settlement Background and Natural Resource Damages

The State of Montana obtained NRD funds from the 2023 Settlement Agreement (<https://dojmt.gov/wp-content/uploads/Libby-Asbestos-Settlement-Agreement-rs.pdf>) with Grace, the owner of a vermiculite mine near Libby, Montana that operated from the 1920s to 1990. Contamination within the Libby Asbestos Superfund site is largely due to asbestos that was present in the vermiculite from the mine and released to the environment through the mining and milling process, tailings runoff, transportation of materials, and asbestos-containing waste. Additional contamination has also been found from the mining and milling operations, various chemical reagents used in processing, and a historic landfill.

The 2023 Settlement Agreement between the State and Grace included, among other provisions, \$18.5 million in natural resource damages to be paid to the State over 10 years. The first \$5 million was paid to the State in October 2023 and the rest is to be paid out in \$1.5 million annual installments (plus 4.19% interest) for 9 years. This money must be used to “restore, replace, rehabilitate, or acquire the equivalent of injured natural resources and services in or related to OU3” and support those actions (through development of a restoration plan and related costs).

The Comprehensive Environmental Response, Compensation and Liability Act, 42 U. S. C. § 9601 *et seq.*, (CERCLA) provides that prior to spending NRD funds, a state must prepare a comprehensive restoration plan that provides for the expenditure of such funds on appropriate projects that would restore, replace, rehabilitate, or acquire the equivalent of the injured or lost natural resources and services that were the subject of the NRD claim. However, the final remedy (cleanup) for OU3 is not yet known, so the full extent of the injury at OU3 is also currently unknown. Grace, with oversight by the U.S. Environmental Protection Agency (EPA) in consultation with the Montana Department of Environmental Quality, is currently conducting a feasibility study to evaluate different cleanup options. The purpose of the feasibility study is to develop appropriate remedial alternatives to select an appropriate remedy. (40 C.F.R. § 300.430(e)(1)). EPA anticipates a Record of Decision will be reached in 2026, which will describe the selected remedy.

The State will not develop a comprehensive restoration plan until the final remedy is selected, at the earliest. Rather than implementing no restoration until that time, however, NRDP plans to prepare an Interim Restoration Plan that will establish a process under which early restoration projects can be funded prior to the development of a comprehensive restoration plan. Early restoration projects are beneficial in that they can begin to restore natural resources to baseline conditions (thereby reducing the overall time and extent of the injury) and compensate the public for lost use of natural resources and the services they provide. To be funded, early restoration projects must comply with CERCLA, NRD regulations, the 2023 Settlement Agreement, and state law, as well as meet certain eligibility requirements.

During this scoping period, NRDP is soliciting early restoration project ideas from the public and concerns about potential impacts from implementing early restoration projects. Selected early restoration projects will be included in the Draft Interim Restoration Plan, which will go out for public comment before being finalized.

3. Purpose and Scope of Natural Resource Restoration

The overall goal of the restoration plan is to identify actions that restore, rehabilitate, replace, or acquire the equivalent of the injured natural resources and the services they provide. A summary of the injuries to State resources in or relating to OU3 was developed as Exhibit E to the settlement agreement

and can be accessed in the [2023 Settlement Agreement](#). To summarize, NRDP has identified the following State natural resources and services injured by the operations at Libby OU3:

- Surface water
- Sediment and sediment pore water
- Seeps
- Groundwater
- Wildlife (mammals, birds, fish, reptiles, amphibians, aquatic and terrestrial invertebrates, etc.)
- Aquatic and terrestrial plants
- Aquatic, wetland, and upland habitats
- Recreation (fishing, wildlife viewing, etc.)

To address these injured resources, NRDP is looking for projects that fall into one or more of the following three restoration categories:

- Aquatic/Riparian Habitat;
- Terrestrial Habitat; and
- Recreation.

The 2023 Settlement Agreement provides damages for injury to natural resources in and related to Libby OU3, but this does not mean that all restoration actions must occur within the former mine site. In order to comply with the 2023 Settlement Agreement and avoid any potential interference with the cleanup operations, NRDP will not be performing restoration within OU3 until the final remedy is known or complete (unless the restoration is done in coordination with the remedy and with the approval of EPA and Grace).

In the interim, NRDP will consider “replacement” (similar to “offsite” projects for mitigation) projects for early restoration, or projects that are within Lincoln County, but outside of OU3, that can replace some of the injured resources or service losses or compensate the public for those losses until the resources are restored. For example, NRDP would consider projects that improve fishing access in the Kootenai River watershed, or projects that improve habitat for aquatic or terrestrial wildlife populations and the services these resources provide that were injured by the hazardous substances in or relating to OU3.

4. Initial Funding Available for Early Restoration Projects

The State of Montana received the first installment of the natural resource damage funds (\$5 million) in October 2023. A portion of this will be used to repay past costs and attorney fees (estimated to be about \$2.5 million). The second installment of approximately \$2 million is due to the State in April 2024. In summary, the State will have approximately \$4.5 million of natural resource damages available next spring. The Trustee will allocate a portion of this to early restoration in the Interim Restoration Plan.

After receiving early restoration project proposals, NRDP will evaluate the proposals according to the eligibility requirements and evaluation criteria discussed in this document. The amount to be spent on early restoration will depend on the estimated costs of projects received that closely align with the criteria outlined in this scoping document. NRDP will then make a funding recommendation to the Trustee.

It is anticipated that approximately \$2-4 million will be allocated for early restoration beginning in 2024, with the remainder of the funding reserved for the final restoration plan. However, the Trustee may decide to allocate funding differently between early restoration and final restoration. The Trustee has the sole authority over the use of NRD funds.

Once approved by the Trustee, the Interim Restoration Plan will provide the process for how future installment payments will be allocated for early restoration or reserved for after the remedy has been selected. When developing the recommendations for the Trustee, NRDP will evaluate all restoration action proposals projects received from the community and stakeholders and whether there are significant projects that align with the evaluation criteria and address the injured resources and may take longer to develop for implementation.

5. Project Eligibility Requirements

All early restoration projects must comply with legal requirements for the use of these funds. The use of NRD funds is restricted by State and Federal Superfund laws to restore, replace, rehabilitate, or acquire the equivalent of the injured resources and their services. Also, the 2023 Settlement Agreement requires that natural resource damages from the settlement must be used “solely to restore, replace, rehabilitate, or acquire the equivalent of injured natural resources and services in or related to OU3 or the Lincoln County area, and support therefor, including costs for State restoration plan development and implementation, and administrative, program, legal, technical, and all other related costs, to the extent lawful under CERCLA or CECRA[.]” (2023 Settlement Agreement at 19)

Specifically, proposed early restoration projects must meet the following eligibility criteria:

- 1) Project restores, replaces, rehabilitates, or acquires the equivalent of the injured resources and services in or related to OU3.
- 2) Project is located within Lincoln County.
- 3) Project is time-critical and able to be implemented within 24 months of Trustee approval of funding. Applicants for early restoration proposals must demonstrate that their proposals merit an expedited funding decision ahead of completion of the final Restoration Plan.
- 4) Project will not impact remedial actions within OU3 or have the potential to be impacted by future remedial actions. The Settlement Agreement states that the design and construction of restoration projects within OU3 “may not begin until EPA has certified completion of all remedial action construction in OU3, except for projects that the State, EPA, and a Grace Party agree to integrate with remedial action.” Until the cleanup actions are defined, NRDP will not implement any restoration projects that could interfere with or be impacted by remedial actions that may occur in the OU3 area.
- 5) Project can be completed with the funding available.

6. Preliminary Projects

NRDP is soliciting project ideas for consideration according to necessary criteria, including those criteria outlined in CERCLA and the associated natural resource damage regulations. CERCLA criteria are provided in 43 C.F.R. § 11.82(d) and described in Attachment B. Briefly, CERCLA requires the following criteria be evaluated:

- Technical Feasibility;
- Relationship of Expected Costs to Expected Benefits;
- Cost-effectiveness;

- Results of Response Actions;
- Adverse Environmental Impacts;
- Recovery Period and Potential for Natural Recovery;
- Human Health and Safety; and
- Federal, State, and Tribal Policies, Rules, and Laws.

In addition, projects will have to undergo evaluation according to the Montana Environmental Policy Act (MEPA) and NRDP policy criteria (refer to Attachment B for more information).

NRDP has met with numerous stakeholders and resource managers familiar with the natural resources within Libby OU3 and solicited project ideas. The following is a preliminary list of projects identified for each restoration action category.

- Aquatic/Riparian Habitat
 - Develop and manage native redband trout broodstock;
 - Install a fish screen on an existing diversion on Parmenter Creek to prevent fish entrainment and evaluate feasibility of improving ditch efficiency to increase summer base flows;
 - Riparian vegetation restoration, streambank stabilization, and aquatic habitat improvement on Wolf Creek;
 - Evaluate feasibility and cost of restoration projects on the Fisher River;
 - Stream restoration on straightened portion of Libby Creek; and
 - Streambank stabilization and channel reconstruction on Lake Creek.
- Terrestrial Habitat
 - Protect terrestrial habitat through conservation easement;
 - Restore native shrubland vegetation; and
 - Promote heterogeneous forest habitat by creating openings in the forest canopy.
- Recreation
 - Develop, acquire, or improve a Fishing Access Site on the Kootenai River;
 - Terrestrial conservation easements would also include a public recreational access component; and
 - Develop a Kootenai River Recreation Management Plan and Kootenai River Water Trail.

7. How You Can Participate

NRDP welcomes the following participation from the public in this scoping process:

- Attend a meeting to hear more about the proposed restoration plan. The meeting will be held at:
 - 6:00 PM on Thursday, November 2, 2023
 - Ponderosa Room, Libby City Hall
 - 952 E Spruce
 - Libby, MT 59923

There will also be a remote option to attend the meeting via Microsoft Teams. See below for the virtual meeting information.

Join on your computer, mobile app or room device

[Click here to join the meeting](#)

Meeting ID: 268 978 645 945

Passcode: DYmy9Q

[Download Teams](#) | [Join on the web](#)

Join with a video conferencing device

[291818717@t.plcm.vc](tel:291818717@t.plcm.vc)

Video Conference ID: 117 811 406 9

[Alternate VTC instructions](#)

Or call in (audio only)

[+1 406-318-5487,,633350759#](tel:+14063185487,633350759#) United States, Billings

Phone Conference ID: 633 350 759#

[Find a local number](#) | [Reset PIN](#)

NRDP will make reasonable accommodations for persons with disabilities who wish to participate in this public meeting. For questions about accessibility or to request accommodations, please call Meranda Flugge at 406-444-0229 or email at meranda.flugge@mt.gov as soon as possible but no later than 3:00 PM Tuesday October 31, 2023.

- Submit an abstract for a restoration project idea. See the attached Early Restoration Concept Abstract Submittal Form (Attachment A).
- Submit your concerns about impacts to the human environment, including cumulative and secondary impacts, from the implementation of the restoration projects. See the attached Guidance for Project Ideas Submittal (Attachment B) for information on project evaluation criteria under CERCLA, MEPA, and NRDP policy.
- Submit feedback on preliminary project ideas listed in Section 6.

Attachment A
LIBBY ASBESTOS OU3 EARLY RESTORATION CONCEPT ABSTRACT FORM

The State of Montana, through the Natural Resource Damage Program (NRDP) is soliciting early restoration project concepts for potential inclusion in the Libby Asbestos Operable Unit 3 (OU3) Interim Restoration Plan. The plan will be released for public comment, and the Trustee will make a final decision on early restoration actions.

For early restoration project concepts to be considered, submit a project abstract to NRDP that covers the basic information indicated below **no later than 11:59 PM on November 20, 2023**. Since proposals are being requested as abstracts, submittals should not be more than four pages. For additional information, call or e-mail NRDP (see contact information below).

Your Name and Contact Information: Provide mailing address, phone number, and e-mail contact information.

Project Purpose and Benefits: Indicate why the project is being proposed. Include the expected goals, objectives, and outcome of the project. Address the following:

- How will the project restore, replace, rehabilitate, or acquire the equivalent of the natural resources injured or services lost due to the operations at Libby OU3?
- How will the project benefit the public's use and enjoyment of those resources?

Project Location: Provide a short description of the project location, along with a project map.

Project Description: Describe the components of the project and how it will be implemented. Also indicate any suggested lead entity (must be the State or a governmental entity) and project partners for implementing the project. Indicate what progress, if any, has been accomplished to date on the project.

Project Schedule: Indicate the timeframe needed to complete the project and any specific completion deadlines that would apply.

General Cost Information: Provide an estimate of total project costs. If possible, provide a categorical breakdown of the costs for the following categories: salaries/benefits; contracted services; supplies and materials; travel and communication; equipment; or other (specify). Indicate committed or anticipated matching funds.

Send Information **no later than 11:59 PM on November 20, 2023**, to:

Natural Resource Damage Program

1720 9th Ave

P.O. Box 201425

Helena, MT 59620-1425

Phone: (406) 444-0205

E-mail: nrdp@mt.gov

Please put "Libby Asbestos OU3 Early Restoration Scoping" in the subject line.

Attachment B
GUIDANCE FOR PROJECT IDEA SUBMITTALS

Under CERCLA, natural resource damage (NRD) settlement funds can only be spent to restore, replace, rehabilitate, or acquire the equivalent of injured natural resources or compensate for the lost use of injured natural resources. In addition, natural resource trustees must complete a restoration plan and consider public input before NRD settlement funds can be spent (42 U.S.C. § 9611(i)). The restoration plan must specify how funds will be spent and include an evaluation of various restoration alternatives according to criteria specified in NRD regulations (43 C.F.R. § 11.81). Projects must also comply with the MEPA (§ 75-1-102, MCA, *et seq.*) and CECRA. Criteria for evaluating projects under CERCLA, CECRA, and MEPA are described below. In addition, NRDP will evaluate projects according to policy criteria.

Evaluation of Alternatives Under CERCLA

Possible alternatives to return injured resources to their baseline are required to be considered and may “reflect varying rates of recovery, combinations of management actions, and needs for resource replacements[.]” (43 C.F.R. § 11.82(c)). NRD legal criteria are provided in assessment regulations under CERCLA and are to be used when evaluating restoration options (43 C.F.R. § 11.82(d)). In applying these criteria to evaluate proposed restoration projects, the criteria will be evaluated qualitatively rather than quantitatively. The importance of each criterion as applied to individual alternatives will vary depending upon the nature of the alternatives. The legal criteria to be used are:

Technical Feasibility: This criterion evaluates the degree to which an early restoration action employs well-known and accepted technologies and the likelihood that the action will achieve its objectives. (43 C.F.R. § 11.14 (qq)). Actions that are technologically infeasible will be rejected. However, actions that are innovative or that have some element of uncertainty as to their results may be approved. Different actions will use different methodologies with varying degrees of feasibility. Accordingly, the application of this criterion will focus on an evaluation of an action’s relative technological feasibility.

Relationship of Expected Costs to Expected Benefits: This criterion examines whether an action’s costs are commensurate with the benefits provided. In doing so, the costs associated with a restoration action, including costs other than those needed simply to implement the action, and the benefits that would result from an action, will be determined. Application of this criterion is not a straight cost-benefit analysis, nor does it establish a cost-benefit ratio that is by definition unacceptable. Quantifying the benefits of a project will sometimes require collection of additional data or information and additional analysis.

Cost-effectiveness: This criterion evaluates whether a particular restoration action accomplishes its goal in the least costly way possible. As outlined in the natural resource damage regulations, cost-effectiveness means that when two or more activities provide the same or a similar level of benefits, the least costly activity providing that level of benefits will be selected (43 C.F.R. § 11.14(j)). To apply this criterion in a meaningful fashion, all of the benefits restoration action would produce must be considered, not just cost; otherwise the focus would be too narrow. Take the example of a restoration action that would fully restore a given resource in a short period of time compared to another restoration action that would restore the same resource at less cost but over a longer period of time. Considering only that the second action is less expensive than the first action ignores the benefits resulting from a relatively shorter recovery period. In this example, since an accelerated recovery time is a benefit, it would need to be factored into a determination of cost-effectiveness.

Results of Response Actions: This criterion considers the results or anticipated results of response actions, actual or planned, underway or planned in OU3 after selection of the final remedy by EPA. Evaluation of this criterion requires assessment of response actions at an adequate level of detail in order to make projections as to their effects on natural resources and services. Because the final remedy for OU3 has not yet been selected, NRDP will need to evaluate the location of the proposed project in relation to EPA's identified areas for potential future response actions. This criterion will be considered when the comprehensive restoration plan is written, after the final remedy has been selected.

Adverse Environmental Impacts: This criterion weighs whether, and to what degree, a restoration action will result in adverse human or physical environmental impacts. Specifically, NRDP will evaluate significant adverse impacts that could arise from the restoration action, short term or long term, direct or indirect, including those that involve resources that are not the focus of the project. To do so, the dynamics of a restoration action and how that action will interact with the environment must be understood.

Recovery Period and Potential for Natural Recovery: This criterion evaluates the merits of a restoration action in light of whether the resource is able to recover naturally (i.e., without human intervention) and, if a resource can recover naturally, how long that will take. Given that the final response action at OU3 has not been determined, NRDP will consider the recovery period following response actions to evaluate potential restoration projects in OU3. (The term "recovery" refers to the time it will take an injured natural resource to recover to its "baseline," i.e., pre-injury condition.)

Human Health and Safety: This criterion evaluates the potential for a restoration action to have adverse effects on human health and safety. Such a review will be undertaken not only to judge a particular action but also to determine if protective measures should be added to the restoration action to ensure safety.

Federal, State, and Tribal Policies, Rules, and Laws: This criterion considers the degree to which a restoration action is consistent with applicable policies of the State of Montana and applicable policies of the federal government and Tribes (to the extent the State is aware of those policies and believes them to be applicable and meritorious). In addition, a restoration action must be implemented in compliance with applicable laws and rules, including the settlement agreement.

Evaluation of Alternatives Under MEPA

Restoration actions undertaken in the State of Montana must comply with MEPA (§ 75-1-102, MCA, *et seq.*). MEPAs require an analysis of the direct, indirect, and cumulative impacts of each alternative and appropriate mitigations. Restoration alternatives should consider direct and indirect impacts on the following:

- Natural resources;
- Construction, sound, and air pollution;
- Threatened and endangered species and Montana species of concern;
- Water quality and sediment;
- Visual resources;
- Archaeological and cultural resources;
- Economic, historic, land use, and transportation resources;
- Regulatory restrictions;

- Climate change; and
- Cumulative impacts.

Policy Criteria

In addition to the legal criteria, NRDP will use the following policy criteria when considering prospective early restoration projects:

Normal government function: This criterion evaluates whether a restoration action involves activities for which a governmental agency would normally be responsible or that would receive funding in the normal course of events and would be implemented if recovered natural resource damages were not available. Settlement funds may be used to augment funds available to government agencies, if such cost sharing would result in the implementation of a restoration action that would not otherwise occur through normal government function. Based strictly on this criterion, a project involving activities that would fall within normal government responsibilities may be ranked lower than a restoration action that does not fall within this category.

Price: The State will evaluate whether the land, easements, water rights, or other property interests proposed to be acquired are being offered for sale at or below fair market value. Consideration of this criterion will likely require the State to conduct its own appraisal of the property. If the appraisal process for an acquisition was not subject to initial State review and approval, the State will, at a minimum, conduct a review appraisal and may conduct a full appraisal.

Location: Early restoration actions must be within Lincoln County but outside of OU3.