

Libby Asbestos OU3 Natural Resource Damages  
**FREQUENTLY ASKED QUESTIONS**

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# Natural Resource Damages and Restoration

## What are natural resource damages?

Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) EPA can compel responsible parties to perform cleanup of certain contaminated sites. Cleanup under Superfund must be protective of human health and the environment; cleanup does not address past injuries to the environment, nor does it necessarily return the site to what it was before the contamination occurred. Natural resource damage provisions within Superfund (and under equivalent state law) are designed to fill that gap and make the public whole for past natural resource injuries and injuries remaining after the Superfund cleanup is complete.

Natural resources in Montana are held in trust for the public and the Governor of Montana is the trustee. The Trustee is able to recover funds (“damages”) from the responsible party for the injuries to natural resources resulting from the release of hazardous substances. The natural resource damages recovered by the Trustee must be used to restore the injured resources, ideally to their “baseline” conditions (the conditions they would have been in if the contamination had not occurred). If that is not possible, the damages can be used to replace or acquire the equivalent of the injured resources.

## What/where is OU3?

The Libby Asbestos Superfund site has eight operable units (OUs). OUs address geographic areas, specific problems, or specific media where cleanup must occur. Libby OU3 is the property in and around the mine owned by W.R. Grace and any area impacted by the release of hazardous substances from the mine property. The exact boundary of OU3 will be defined in the Feasibility Study, which W.R. Grace is currently preparing with oversight from EPA and DEQ. Generally, the area includes the mine site itself, the Kootenai River, Rainy Creek, Rainy Creek Road, and forested areas around the mine site that are contaminated. The State obtained the natural resource damages for the injuries to natural resources in or relating to OU3.

## What can natural resource damages be spent on?

As required by the settlement, the money 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” as long as they are allowed under state and federal Superfund law. In other words, the money must be used to restore the natural resources that were injured by the operations at the Libby vermiculite mine. The intent is to restore the injured resources to their “baseline” conditions – or the conditions they would have been in had the hazardous substances never been released. The natural resource damages are also intended to compensate the public for the lost use of the natural resources. If it’s not possible to restore the resources to this state, which it often is not, the money can be used to replace the resources. Examples of replacement actions include funding conservation easements that protect similar resources and allow public access or restoring fish habitat in tributaries to the river to improve the overall fishery.

Natural resource damages **cannot** be spent on the following:

- **Cleanup at OU3**, which remains the responsibility of W.R. Grace with oversight from EPA in consultation with DEQ. Cleanup at other operable units is being conducted by EPA and DEQ pursuant to different settlements.
- **Any future operation and maintenance obligations under Superfund.**
- **Compensation to private individuals or entities.** The State’s settlement was not based on and did not address or impact any private claims, such as private property claims or private human health claims related to the mine site. The natural resource damage provisions in federal law do not provide for the recovery of damages sustained by private individuals or entities; they only provide for damages for injuries to public natural resources and services. Hence, the State’s claim only addressed public natural resources and use of the funds for private losses would not be permissible. The State can, however, fund work on private land if the principal result of such work would be to replace or restore injured resources or lost services. For example, working on private property to conduct river restoration (such as: channel reconstruction) would benefit the natural resource (the river and the fisheries) and would be allowed with the settlement funds.

#### What are some of the related “support” costs that the \$18.5 million can be spent on?

“Support” costs include payment of past costs used to fund DEQ and NRDP during the mediation (e.g., funds borrowed from a previous DEQ \$5 million settlement account and legal fees). The legal fees were for an outside counsel that supported the State throughout negotiation of the entire agreement, including providing expertise for the financial assurance portions of the settlement. The legal fees consisted of a reduced hourly fee (which was primarily paid by W.R. Grace through a separate \$1.5 million of reimbursement of the mediation costs) and 10% of the natural resource damage settlement received. This legal fee structure was approved by the State’s Legal Services Review Committee in order to reduce the costs to the existing DEQ settlement account that would have resulted from paying a higher hourly rate.

Future “support” costs will include NRDP’s costs to work with the community and local governments, develop projects and restoration planning documents.

#### What are the injured resources?

NRDP used the data collected during the Superfund process to evaluate the nature of injuries to state natural resources and lost services relating to OU3. These findings are described in Exhibit E to the Settlement Agreement, which can be accessed on NRDP’s website (<https://dojmt.gov/wp-content/uploads/Libby-Asbestos-Settlement-Agreement-rs.pdf>). To summarize, elevated contaminant concentrations were found in surface water (Fleetwood Creek, Fleetwood Pond, Carney Creek, and lower Rainy Creek), seep water, groundwater, sediment pore water, and sediments. Contamination was mostly due to asbestos, with non-asbestos contaminants also found in surface water, groundwater, and sediments. The release of these hazardous substances resulted in the injuries listed below.

Natural resources injured:

- Surface water, seeps, groundwater,
- Sediment and sediment pore water,
- Small, large, and aquatic-dependent mammals,
- Birds,

- Fish,
- Reptiles
- Amphibians,
- Aquatic and terrestrial invertebrates,
- Aquatic and terrestrial plants, and
- Wetland and upland habitats.

Natural resource service losses:

- Habitat services for biological resources,
- Fishing, particularly recreational fishing below the ordinary high-water mark,
- Drinking water supply,
- Non-consumptive uses such as wildlife viewing, photography, outdoor recreation activities below the ordinary high-water mark,
- Primary and secondary contact recreational activities (swimming and boating) below the ordinary high-water mark, and
- Option and existence values.

### What kind of projects are you looking for?

Any projects that restore, rehabilitate, replace, or acquire the equivalent of the injured resources, and meet project eligibility criteria, will be considered. In general, NRDP is looking for projects that fall into at least one of the following restoration categories:

- Aquatic/riparian habitat,
- Terrestrial habitat, and
- Recreation.

Below are some generic project examples for each category:

Restoration Category	Example Restoration Project Types
Aquatic/Riparian Habitat	<ul style="list-style-type: none"> <li>• Add meander bends or realign straightened portions of stream channels</li> <li>• Create variable pool-riffle-run habitat</li> <li>• Install woody debris structures</li> <li>• Reduce erosion and sediment input to streams</li> <li>• Improve fish passage and reduce fish entrainment</li> <li>• Streambank stabilization</li> <li>• Floodplain restoration</li> <li>• Stream channel reconstruction</li> <li>• Floodplain wetland construction</li> <li>• Seeding, mulching, revegetation, planting</li> </ul>
Terrestrial Habitat	<ul style="list-style-type: none"> <li>• Revegetate disturbed/barren areas;</li> <li>• Remove non-native plants;</li> <li>• Protect existing terrestrial habitat through conservation easements from future degradation;</li> <li>• Install wildlife-friendly fencing</li> </ul>
Recreation	<ul style="list-style-type: none"> <li>• Develop a new fishing or other recreational access site</li> <li>• Improve an existing fishing or other recreational access site</li> </ul>

	<ul style="list-style-type: none"> <li>• Enhance public access to natural resources through conservations easements</li> </ul>
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Natural resource damages cannot be spent on cleanup activities at the Libby Asbestos site. Those actions must be performed by W.R. Grace for OU3, and EPA and DEQ settlements for the other operable units. These funds cannot be used for any future DEQ cost-share or operation and maintenance obligations under Superfund.

The following types of projects may be eligible for funding:

- *Education* – education projects are eligible for funding if they specifically pertain to the injury that was the subject of the Libby OU3 claim. Restoration funds cannot replace normal school funding.
- *Cultural or historical resource preservation* – these projects will be evaluated on a project-specific basis. Cultural and historical resources were not natural resources covered in the State’s claim for OU3. Therefore, in most cases, such activities would not meet the legal threshold for restoration funding. However, natural resource damages may be used for the identification, preservation, or protection of cultural and historic resources when those activities relate specifically to the restoration or replacement of injured natural resources. Restoration funds may be able to be used (1) to identify tribal cultural resources or tribal religious sites that are within a restoration project area and to coordinate with the State and Tribes to develop measures to protect these resources or sites; and (2) to identify historical and archeological sites that may be negatively impacted by restoration activities. Given the complexity of this determination, we recommend you consult the NRDP before applying for Restoration Funds for any activities related to cultural or historical resources.
- *Weed control* – natural resource damages may be used for weed control activities that are either necessitated by or targeted to approved restoration activities. Broader weed control projects may or may not be eligible for funding, depending on how likely they are to succeed and the magnitude of benefits they would provide to the injured resources. Restoration funds cannot be used to replace already-established funding mechanisms to control noxious weeds.

Economic development projects are not eligible for funding. Natural resource damages must be used to restore or replace the natural resources injured by OU3. If a project’s primary purpose is to stimulate economic development, it will not meet the legal threshold for funding.

Project proposals will be evaluated on a case-by-case basis according to eligibility and selection criteria.

#### Do projects need to be “shovel-ready”?

No – natural resource damages can be used for project development (e.g., feasibility studies or design) and for implementation. However, the feasibility studies or design must be ready to begin and implement in the next year or two. The Trustee will consider both types of projects for early restoration funding. Please note that funding a planning project does not constitute approval of the full project implementation.

## Where can projects be located?

The natural resource damages were recovered for injuries resulting from OU3, but that does not necessarily mean that all restoration must occur within OU3. Projects must comply with the following two location-specific criteria:

1. Projects must be located within Lincoln County to comply with the Settlement Agreement and
2. Restoration projects must relate to the injured resources or lost services. Primary restoration projects would address the resources within OU3 that were injured by the releases of hazardous substances. However, the settlement agreement stipulates that restoration cannot be completed within OU3 until the cleanup is complete, unless done in coordination with EPA and W.R. Grace. Because the cleanup plan is still being developed, no restoration will occur within OU3 at this time without coordinating with EPA and W.R. Grace. Generally, the Trustee will consider projects outside of the mine site and forested areas (even if still within OU3) that can restore or replace some of the injured resources or service losses and compensate the public for those losses until the resources are restored. The Trustee may also consider replacement projects; these projects are similar to “off-site” projects for mitigation funds. They must still address the injured resources, but they do not need to occur within the contaminated area. Some examples of restoration/replacement projects are:
  - Aquatic habitat improvement at locations within the Kootenai River watershed in order to benefit fish populations that were injured by the operations at the mine site;
  - Developing or improving a fishing access site to compensate the public for lost recreational fishing opportunities along the Kootenai or in the Rainy Creek watershed;
  - Funding a conservation easement for land that provides similar natural resources and habitat to replace the natural resource services injured at OU3, like habitat services and wildlife viewing.

NRDP will work with project partners, resource managers, and the community to ensure that projects are located in areas that sufficiently address the injured resources. Each project will be evaluated for how well it restores, rehabilitates, replaces, or acquires the equivalent of the injured resources. If you have a project idea but are unsure about whether it would meet these criteria, please reach out to Sydney Stewart, the NRDP project manager ([sydney.stewart@mt.gov](mailto:sydney.stewart@mt.gov)).

## Can projects be on private property?

NRDP has worked with private landowners in the past to implement projects that benefit injured resources. For example, NRDP may work with a water user to install a fish screen on their irrigation diversion so that fewer fish become entrained in the irrigation ditch. NRDP has also worked with private landowners who wish to put conservation easements on their property. This typically also involves some degree of public access to the property, such as hunting access through the block management program.

Projects with private landowners that meet eligibility requirements can only be done with the permission and cooperation of the landowner and will be evaluated on a case-by-case basis for how well they address the injured resources and compensate the public for lost use. See additional FAQs for more detail about the eligibility criteria.

## How are projects implemented? Who is eligible to receive funding?

NRDP has flexibility in how projects are carried out but must follow Montana procurement requirements. Anyone can submit a project proposal, but the lead entity must be a governmental entity (local, state, federal, or tribal). NRDP can provide funding to lead entities, who in turn can procure project partners, contractors, and consultants to complete the work as needed. For restoration actions that meet the criteria but there is not another governmental agency involved, NRDP can serve as the project manager and procure contractors to complete the work.

## What is the selection/evaluation criteria for proposed projects?

Projects that meet eligibility requirements will be evaluated according to legal and policy criteria. These requirements and evaluation criteria are summarized below and described in more detail in the scoping memo. The criteria are also described elsewhere in these FAQs and are summarized here for completeness.

Early restoration project eligibility requirements:

- 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 merits funding as an “early” restoration project in order to begin addressing the injured resource now, rather than allowing the loss to continue. Project can be implemented within 24 months of Trustee approval of funding. (Note that an otherwise eligible project that cannot be implemented in the next 24 months may be proposed in the future for inclusion in the final restoration plan.)
- 4) Project will not impact remedial actions within OU3 or have potential to be impacted by future remedial actions.
- 5) Project can be completed with the funding available.

Legal evaluation criteria:

- Technical feasibility – project employs well-known and accepted technologies and has a high likelihood of success.
- Relationship of expected costs to expected benefits – project costs are commensurate with project benefits.
- Cost-effectiveness – project accomplishes its goal in the least costly way possible.
- Results of any actual or planned response actions – project does not conflict with remedy or will not be undone by remedial actions.
- Adverse environmental impacts – whether and to what degree the project will result in adverse environmental impacts.
- Recovery period and potential for natural recovery – merits of the project in light of whether the resource is able to recover naturally.
- Human health and safety – potential for the project to have adverse impacts on human health.
- Consistency and compliance with Federal, State, and Tribal policies, rules, and laws – project is consistent with applicable policies.

Policy evaluation criteria:

- Normal government function – project is not an action that a governmental agency would normally be responsible for or would receive funding for in the normal course of events.
- Price – land, easements, water rights, or other property interests are being offered at or below fair market value.
- Location – project is within Lincoln County but outside of OU3 (or outside of the mine site and forested areas and coordinated with EPA and W.R. Grace) and adequately addresses the injured resources related to OU3.

### Is match funding required?

At this time, match funding is not required. The restoration project's cost or need exceeds the settlement so match funding is always encouraged and projects that can demonstrate support from multiple entities and additional funding sources may rank higher when proposals are evaluated. At least 25% match funding has been required for recreational projects on some other sites; the Trustee will make the final decision as to whether to require match funding now or in the future.

### How much money is available for early restoration?

The State will receive \$18.5 million in natural resource damages over the course of 10 years. W.R. Grace paid the first installment (\$5 million) to the State in October 2023. There will be additional installments of \$1.5 million each, plus 4.19% interest, due in April of each year for nine years. NRDP anticipates that the Interim Restoration Plan will be finalized in spring or summer of 2024, so the State will have received the first two payments, totaling approximately \$7 million. A portion of these funds (~\$2.5 million) will be used to repay past costs and legal fees associated with the settlement negotiations. The Trustee will determine how much of the \$4.5 million remaining will be allocated to early restoration in spring 2024.

A portion of the \$4.5 million will be allocated to early restoration and the remaining portion will be reserved for the final restoration plan, which will be developed once the cleanup plan for OU3 has been determined. Any funds reserved for the final restoration plan will be kept in an investment account with the State to accrue interest until the final restoration plan is developed.

The Governor, as the natural resource trustee for the State, has sole authority over use of natural resource damages. The Governor will choose how much to allocate to early restoration, depending on proposals received that meet the criteria outlined in the settlement agreement and how much to reserve for the final restoration plan.

### What is the timeline for receiving funding?

Project proposals are due by November 20, 2023. After considering public input, NRDP will draft the Interim Restoration Plan, which will include proposed early restoration projects. The Interim Restoration Plan will also go out for a 30-day public comment period. After considering public comment on the draft plan, NRDP will finalize the Interim Restoration Plan for consideration and approval by the Trustee.

NRDP anticipates that this process could be completed by the spring or summer of 2024, at which time funding would be available for selected early restoration projects.



## Who makes the final decision on how the restoration funds can be spent?

Because the Governor is the trustee, as defined under Superfund law, he is the only one who can make this decision, following input from NRDP and public comment.

## The Settlement Agreement

The natural resource damage funds are provided through a settlement agreement between W.R. Grace and the State of Montana, entered by the bankruptcy court in March 2023. The Settlement Agreement can be accessed at NRDP's website, along with other materials such as fact sheets and response to public comments: <https://dojmt.gov/lands/sites/libby-asbestos/>

Below are some questions that arose during the public comment period and public meeting about the settlement.

### What is included in the Settlement Agreement?

The Settlement Agreement is a result of W.R. Grace's bankruptcy, which was filed in 2001. A 2008 Settlement Agreement resolved DEQ's claim for remedial actions and associated operations and maintenance at the rest of the Superfund site, except [OU3](#). The 2023 Settlement Agreement resolved the State's Superfund bankruptcy claim for OU3. In general, the Settlement Agreement does the following:

- Addresses financial risk and potential future liability related to the Kootenai Development Impoundment Dam (KDID) and its spillway (NRDP does not have any involvement in this portion of the settlement),
- Provides financial assurance for the KDID and spillway (NRDP does not have any involvement in this portion of the settlement),
- Funds natural resource restoration work, and
- Reimburses the State for most costs associated with the mediation.

The Settlement Agreement includes the following payments from W.R. Grace to the State:

- \$18.5 million in natural resource damages, plus interest, over ten years, with the first \$5 million paid in October 2023. This includes penalties if W.R. Grace does not make the payments on time.
- Non-NRDP portion of the settlement: \$6.2 million in financial assurance (trusts and bonds) to ensure funding is available for components and maintenance of the KDID whenever it is needed over the next 100 years, regardless of whether W.R. Grace remains a viable company. By maturity, the trusts are expected to be worth up to \$300 million.
  - If W.R. Grace fails to meet its obligations for the KDID, and the State follows the steps outlined in Section 5 of the Settlement Agreement, the trusts and/or bond will be released to the State.
- \$1.5 million to repay DEQ and NRDP's costs associated with the settlement negotiations.

In return, W.R. Grace received the following resolutions:

- The remainder of DEQ's bankruptcy claim is resolved and W.R. Grace can fully exit bankruptcy.
- The State agrees not to sue for additional remedial (cleanup) costs unless there is an additional release after the Settlement Agreement is entered.

- The State agrees not to bring any additional natural resource damage claims against W.R. Grace at the Site, unless there is a catastrophic event resulting in a new release (e.g., if the KDID fails and significant new contamination occurs, the State can pursue a new natural resource damage claim).

If W.R. Grace sues the State, the State reserves all rights, claims, counterclaims, and defenses.

### What is not addressed in the Settlement Agreement?

The Settlement Agreement only relates to DEQ and NRDP's claims for OU3, as outlined above.

The Settlement Agreement does not settle or compromise any individual people's claims, such as private property claims or human health claims.

The Settlement Agreement does not affect W.R. Grace's obligations to continue to perform the cleanup of OU3. W.R. Grace must continue to perform the cleanup under Superfund law with oversight from EPA and DEQ.

It does not affect, replace, or limit the State's authority to regulate the KDID through the Dam Safety Act under the authority of DNRC.

The agreement not to sue does not apply in the event of a catastrophic failure of the KDID or its spillway. If such a failure were to occur, the State could bring new claims against W.R. Grace.

The settlement does not affect other claims made by the State of Montana during the bankruptcy.

### How does this settlement relate to the Kootenai Development Impoundment Dam (KDID)?

The KDID is regulated by DNRC under the Dam Safety Act, and it is W.R. Grace's responsibility to maintain it. These roles and obligations are not affected by the Settlement Agreement. Questions about regulation of the KDID or its spillway should be directed to DNRC's Dam Safety Program at (406) 444-6613.

NRDP does not have any role in the portion of the settlement that relates to the KDID financial assurance. The KDID financial assurance includes: \$6.2 million in financial assurance (trusts and bonds) to ensure funding is available for components and maintenance of the KDID whenever it is needed over the next 100 years, regardless of whether W.R. Grace remains a viable company. By maturity, the trusts are expected to be worth up to \$300 million. If W.R. Grace fails to meet its obligations for the KDID, and the State follows the steps outlined in the Settlement Agreement, the trusts and/or bond will be released to the State.

### How does this settlement relate to forest fires or asbestos release following a fire event?

Any unacceptable risk associated with forest fires (e.g., risks to wildland firefighters during mop-up) within OU3 must be addressed by the Superfund remedy. The Settlement Agreement does not affect W.R. Grace's obligations to perform and pay for work under Superfund that may be required by EPA and DEQ or the U.S. Forest Service. Questions about risks or remedial actions related to forest fires should be directed to Pam Baltz with the U.S. Forest Service at 406-293-7773.

### How does this settlement relate to cleanup of OU3?

This Settlement Agreement does not affect W.R. Grace's obligations to clean up the site pursuant to Superfund, with oversight from EPA and DEQ and the U.S. Forest Service. Under this oversight, W.R. Grace is currently conducting the feasibility study to evaluate cleanup options for the site. EPA

anticipates a Record of Decision, which selects the remedy, in 2026. More information about the cleanup can be found at EPA’s website:

<https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=0801744>

Questions about the cleanup should be directed to EPA or DEQ or the U.S. Forest Service, above.

Contacts can be found on EPA’s website:

<https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.contacts&id=0801744>

The natural resource damage funds received by the State in this Settlement Agreement cannot be spent on the Superfund cleanup. The funds also cannot be spent on restoration actions within OU3 until remedial action construction is complete, unless done in coordination with W.R. Grace and EPA. NRDP will coordinate with W.R. Grace and EPA when pursuing early restoration outside of the mine site and forested areas (but within OU3), while also pursuing early restoration actions outside of OU3.

## More Information

More information on natural resource damages for Libby Asbestos OU3 can be found on the Libby Asbestos page of our website: <https://dojmt.gov/lands/sites/libby-asbestos/>

The Settlement Agreement is available in the “Links, Documents, & Reports” section of this page.



Exhibit E of the Settlement Agreement contains information about the injury to State resources in or relating to OU3, example restoration projects, and criteria NRDP uses to select projects. It can be accessed on NRDP’s Libby website:

<https://dojmt.gov/wp-content/uploads/Exhibit-E-NRD-report-1.pdf>



This meeting is listed on NRDP’s Notices of Public Comment web page. Meeting materials can be found here, including:

- The memorandum prepared for the scoping period, which, has instructions for submitting project abstracts and more information on project eligibility requirements and selection criteria.
- Fact sheet
- Frequently Asked Questions

<https://dojmt.gov/lands/nrdp-public-notice/notices-of-public-comment/>

