



A REPORT  
TO THE  
MONTANA  
LEGISLATURE

PERFORMANCE AUDIT

# *Program and Policy Issues Impacting State Superfund Operations*

*Department of  
Environmental Quality*

JUNE 2008

LEGISLATIVE AUDIT  
DIVISION

08P-05

**LEGISLATIVE AUDIT  
COMMITTEE**

**REPRESENTATIVES**

BILL BECK  
BILL GLASER  
BETSY HANDS  
HAL JACOBSON, VICE CHAIR  
JOHN SINRUD  
BILL WILSON

**SENATORS**

JOE BALYEAT, CHAIR  
GREG BARKUS  
STEVE GALLUS  
DAVE LEWIS  
LYNDA MOSS  
MITCH TROPILA

**AUDIT STAFF**

**PERFORMANCE**

LISA BLANFORD  
KENT RICE  
WILL SOLLER

**FINANCIAL-COMPLIANCE**

PAUL O'LOUGHLIN

FRAUD HOTLINE  
HELP ELIMINATE FRAUD,  
WASTE, AND ABUSE IN  
STATE GOVERNMENT. CALL  
THE FRAUD HOTLINE AT:

(STATEWIDE)  
1-800-222-4446  
(IN HELENA)  
444-4446

**PERFORMANCE AUDITS**

Performance audits conducted by the Legislative Audit Division are designed to assess state government operations. From the audit work, a determination is made as to whether agencies and programs are accomplishing their purposes, and whether they can do so with greater efficiency and economy. The audit work is conducted in accordance with audit standards set forth by the United States Government Accountability Office.

Members of the performance audit staff hold degrees in disciplines appropriate to the audit process. Areas of expertise include business and public administration, mathematics, statistics, economics, finance, political science, english, criminal justice, computer science, education, and biology.

Performance audits are performed at the request of the Legislative Audit Committee which is a bicameral and bipartisan standing committee of the Montana Legislature. The committee consists of six members of the Senate and six members of the House of Representatives.

Direct comments or inquiries to:  
Legislative Audit Division  
Room 160, State Capitol  
PO Box 201705  
Helena MT 59620-1705  
(406) 444-3122

Reports can be found in electronic format at:  
<http://leg.mt.gov/audit.htm>

# LEGISLATIVE AUDIT DIVISION

Scott A. Seecat, Legislative Auditor  
Tori Hunthausen,  
Chief Deputy Legislative Auditor



Deputy Legislative Auditors  
James Gillett  
Angie Grove

June 2008

The Legislative Audit Committee  
of the Montana State Legislature:

This is our performance audit of the State Superfund Program managed by the Remediation Division at the Department of Environmental Quality. This report provides the Legislature information about state superfund operations. This report presents program and policy issues impacting state superfund operations and includes recommendations for improving operations. A written response from the Department of Environmental Quality is included at the end of the report.

We wish to express our appreciation to Department of Environmental Quality officials and staff for their cooperation and assistance throughout the audit.

Respectfully submitted,

*/s/ Scott A. Seecat*

Scott A. Seecat  
Legislative Auditor

## TABLE OF CONTENTS

Figures and Tables .....	iii
Appointed and Administrative Officials .....	iv
Report Summary .....	S-1
<b>CHAPTER I – INTRODUCTION .....</b>	<b>1</b>
Introduction .....	1
Audit Objectives .....	1
Audit Scope and Methodologies.....	2
Management Memorandum .....	2
Potential Areas for Future Performance Audit Work.....	3
Report Contents.....	3
<b>CHAPTER II – BACKGROUND.....</b>	<b>5</b>
Introduction .....	5
State Superfund .....	5
Montana State Superfund Sites .....	6
State Superfund Program Resources.....	6
State Superfund Staff.....	7
Major Steps of the Superfund Process .....	7
<b>CHAPTER III – MANAGEMENT CONTROLS .....</b>	<b>9</b>
Introduction .....	9
Division Management Controls.....	9
Department Long-Term Cleanup Strategy Appears Unplanned.....	10
Management Best Practices Suggest Three Key Steps .....	11
<b>CHAPTER IV – COST RECOVERY CONTROLS .....</b>	<b>13</b>
Introduction .....	13
Appropriate Reimbursement Payments From Orphan Share Fund .....	13
CECRA Cost Recovery Efforts and Controls .....	13
Department Increased Amount of Recovered Costs .....	13
Cost Recovery Controls in Place .....	14
Department Could Further Improve CECRA Cost Recovery Efforts .....	14
Refine Billing Practices .....	15
Compile Data Needed to Analyze Account Status for CECRA Projects .....	16
Evaluate Receivables and Take Appropriate Follow-up Action.....	17
Pursue Collection of Remedial Action Costs Incurred by the State.....	19
Management Control Over Cost Recovery.....	20
<b>CHAPTER V – SUPERFUND POLICY ISSUES .....</b>	<b>23</b>
Introduction .....	23
Funding State Superfund Operations .....	23
Superfund Program Funded via Environmental Quality Protection Fund .....	24
Legislative Intent and Department Statutory Responsibilities .....	24
Funding Not Sufficient to Fully Exercise Statutory Authority .....	24

Other States Have Long-Term Fund Sources.....	27
Substantiated Environmental Law Institute’s Funding Data .....	28
Department Unable to Remediate Highly Contaminated Sites .....	28
Statutory Funding Does Not Align with CECRA Responsibilities.....	29
Long-Term Funding Solution Needed.....	30
Conflicting Mandates of CECRA and Funding Provided.....	31
Controlled Allocation of Liability Act (CALA) .....	31
Superfund Facilities Using CALA to Date .....	32
Montana’s Process Is Unique.....	33
Montana’s Alternative Allocation Standard Impacts Department Focus.....	34
Orphan Share State Special Revenue Account .....	34
Historical Expenditures From Orphan Share Fund.....	34
Orphan Share Funds Accessed by Few .....	34
Few Orphan Sites Currently Addressed .....	35
Montana Differs in Providing Funds for Cleanup .....	36
CALA in Review .....	36
Responsible Parties May Still Seek Apportionment of Liability .....	37
Outstanding Stipulated Agreements .....	37
Redirect Orphan Share Fund to Better Align with CECRA .....	37
<b>CHAPTER VI – VOLUNTARY CLEANUP PROGRAMS.....</b>	<b>39</b>
Introduction.....	39
Voluntary Cleanup in Other States .....	39
Montana’s Voluntary Cleanup Program.....	40
VCRA Offers Several Incentives.....	40
Program Encourages Voluntary Cleanup .....	41
Participation Leads to Property Redevelopment .....	42
Improving the VCRA Process.....	43
Challenging Approval Process Results in Time Delays .....	43
Lack of A Clear Process Causes Problems .....	43
Options to Improve Submission and Approval Process.....	44
Additional Application Strategies Will Further Define the Submission and Approval Process .....	44
Funding State Oversight Costs Associated With Voluntary Cleanup Programs .....	45
Department Is Not Reimbursed for Oversight Costs.....	45
Department is Funding a Portion of Cleanup Costs .....	45
Statutory Requirements Contribute to Funding Problems .....	46
Other States Require Prepayment of Costs and Cease Work for NonPayment....	46
<b>APPENDIX A.....</b>	<b>A-1</b>
Montana State Superfund Sites as of March 24, 2008 .....	A-1
<b>APPENDIX B.....</b>	<b>B-1</b>
Major Steps of the Superfund Process .....	B-1
Facility Listing and Ranking .....	B-1
State Superfund Cleanup Process.....	B-1
<b>DEPARTMENT RESPONSE .....</b>	<b>C-1</b>
Department of Environmental Quality .....	C-3

# FIGURES AND TABLES

## Figures

Figure 1 Montana’s VCRA Sites Active and Closed ..... 42

## Tables

Table 1 CECRA Priority List ..... 6

Table 2 Costs Recovered and Percent of State Superfund Expenses Cost Recovered..... 14

Table 3 EQPF Revenues and Expenditures..... 25

Table 4 CALA Facilities - 1997 to Date ..... 33

Table 5 Orphan Share State Special Revenue Account Ending Fund Balance and Revenues.... 35

Table 6 VCRA Incentives ..... 41

## APPOINTED AND ADMINISTRATIVE OFFICIALS

### **Department of Environmental Quality**

Richard Opper, Director

Tom Livers, Deputy Director

John North, Chief Legal Counsel

Cynthia Brooks, Attorney

Sandi Olsen, Administrator, Remediation Division

Mike Trombetta, Chief, Hazardous Waste Site Cleanup Bureau

Denise Martin, Supervisor, Site Response Section

## REPORT SUMMARY

### Program and Policy Issues Impacting State Superfund Operations

Realigning statutory responsibilities and funding mechanisms would assist the Department of Environmental Quality in meeting its statutory mandates for remediating state superfund sites.

#### Introduction

Montana's state superfund program was created in 1985 for the purpose of addressing sites contaminated with hazardous or deleterious substances which were not being addressed by federal superfund activities.

<b><u>State Superfund Priority List</u></b> <b><u>As of March 24, 2008</u></b>		
<b>Facility Priority Ranking</b>	<b>Threat Level</b>	<b>Number of Facilities</b>
Maximum	Immediate	6
High	Significant	51
Medium	Potential	75
Low	Minimal	53
Operation and Maintenance	Not Applicable	1
Referred to Other Program	Not Applicable	18
No Further Action	Not Applicable	5
<b>Total</b>		<b>209</b>
<b>Source: Compiled by the Legislative Audit Division from department records.</b>		

The Department of Environmental Quality is responsible for overseeing investigation and cleanup activities at state superfund sites. There are 209 state superfund sites with 57 ranked as maximum or high priority.

#### Audit Findings

Analysis of state superfund operations shows a disconnect between funding and statutory obligations. Current funding allows the department to address only those state superfund sites where responsible parties are willing,

available and financially able to do remediation work and reimburse the department for oversight costs. There is a current funding source earmarked for a select group of responsible parties which is accessed by few. Redirecting this funding source would afford the department the opportunities to begin remediating those sites with unwilling or nonviable responsible parties – some of which are maximum and high priority sites and present potential harm to the public health and welfare of Montana citizens.

Analysis showed the department could improve long-term planning in order to strategically address cleanup needed at the state's superfund sites. The department could also improve its process for recovering state oversight costs from responsible parties. Lastly, the department could improve the submission and approval process of its voluntary cleanup program.



## **Audit Recommendations**

Audit recommendations address the need for improving controls over general program operations, policy issues impacting program success, and procedural changes to improve remediation planning. Audit recommendations relate to:

- ◆ Implementing long-term planning and establishing additional priorities.
- ◆ Improving controls over department efforts to recover costs it incurs in overseeing remediation.
- ◆ Addressing funding issues and conflicting statutory mandates by redirecting underutilized financial resources.
- ◆ Refocusing department efforts from allocating liability to enforcement and cleanup.
- ◆ Adopting additional application process strategies to improve voluntary cleanup program operations and funding.

Some of these recommendations involve seeking legislative changes to address funding issues and provide enhanced capabilities to manage remediation work.

# Chapter I – Introduction

## Introduction

The Legislative Audit Committee received three individual requests for performance audit work at the Department of Environmental Quality (department) relating to the department's environmental cleanup activities. Those requests were as follows:

- ♦ *The Montana House of Representatives* requested a performance audit of the department's cleanup activities, including timeliness, efficiency of the processes, management oversight and guidance, and options for providing services more effectively.
- ♦ *The Environmental Quality Council* requested a performance audit of the state superfund process as a result of its work on House Joint Resolution 34 (2005 session). The Council requested the audit focus on identifying and removing bottlenecks, assessing and updating the Comprehensive Environmental Cleanup and Responsibility Act (CECRA) database, and evaluating the procurement process for consulting services.
- ♦ *The Legislative Fiscal Division* requested a performance audit of the department's orphan share program to determine if there are statutes or policies which inhibit program participation and subsequently, site remediation.

As a result of these requests, the Legislative Audit Committee prioritized a performance audit of the department's cleanup activities. The department's cleanup activities include overseeing investigation and cleanup activities at state superfund sites; performing the role of lead agency at some federal superfund sites; reclaiming abandoned mine lands; implementing corrective actions at sites with leaking underground storage tanks; and overseeing groundwater remediation at sites where agricultural and industrial chemical spills have caused groundwater contamination. Through audit assessment work, we concluded a performance audit of the department's cleanup activities was warranted and advisable and focused our efforts on the state superfund program.

Montana's state superfund program was created in 1985 for the purpose of addressing sites contaminated with hazardous or deleterious substances which were not being addressed by federal superfund activities. There are three acts constituting Montana's state superfund law, all of which are encoded in Title 75, Chapter 10, Part 7, MCA, CECRA, Voluntary Cleanup and Redevelopment Act (VCRA), and Controlled Allocation of Liability Act (CALA). State superfund activities are conducted within the Site Response Section of the department's Remediation Division.

## Audit Objectives

We developed five objectives for examining state superfund cleanup processes.

1. Review management controls to determine if they effectively guide program operations.

2. Assess whether cost recovery controls are in place to ensure the department recovers state costs related to state superfund site activities and makes appropriate reimbursement payments from the orphan share fund.
3. Examine sufficiency of financial resources available to support state superfund activities.
4. Examine CALA statutes and department policies to determine if alternatives exist which could increase participation.
5. Examine VCRA legislative incentives to determine if they encourage voluntary cleanup and if additional incentives could be used.

## **Audit Scope and Methodologies**

Audit scope focused on the department's state superfund process, including activities conducted under the three legislative acts: CECRA, VCRA, and CALA. To accomplish our audit objectives, we completed the following methodologies:

- ◆ Reviewed laws, rules, and policies relative to state superfund cleanup activities.
- ◆ Examined portions of program records including cleanup plans, correspondence, and database information for fiscal years 2006 to date.
- ◆ Interviewed department management and program, fiscal, and legal staff.
- ◆ Observed program operations and visited state superfund sites.
- ◆ Reviewed department cost recovery and reimbursement policies.
- ◆ Reviewed and tested department financial transactions.
- ◆ Examined superfund financial resources and funding options.
- ◆ Interviewed other involved parties, such as persons liable for cleanup.
- ◆ Reviewed other states' superfund cleanup laws, processes, and funding mechanisms and interviewed program staff.
- ◆ Reviewed The Environmental Protection Agency's (EPA) research and policies.
- ◆ Interviewed staff from the EPA.
- ◆ Reviewed the Environmental Law Institute's, An Analysis of State Superfund Programs: 50-State Study, 2001 Update.
- ◆ Assessed department management processes.

## **Management Memorandum**

We issued a management memorandum to the department that addresses the need to better delineate several aspects of the process followed under CALA. Our review of CALA-related documentation and interviews with department staff and involved parties shows the process needs further definition. Pursuant to section 75-10-702, MCA, the

department could develop administrative rules for demonstrating and assessing undue financial hardship; outlining process initiation and respective roles; and providing general rationale for allocating a percentage of liability to each party during pre-allocation negotiations. In addition, the department may want to consider amending statute to require the use of an impartial mediator to facilitate discussions during pre-allocation negotiations.

### **Potential Areas for Future Performance Audit Work**

Specifically excluded from this audit were issues related to state superfund staff recruitment and retention, the database utilized by the department to track state superfund facilities, and procurement practices for retaining contractors and consultants. However, these issues merit attention for future audit work including:

- ◆ **Staff Recruitment and Retention.** Recruiting and retaining staff has been problematic for several years. Department management is aware of the issue and has been working to resolve it, yet it remains a problem for the state superfund program. Throughout audit work, concerns over the ability of the department to recruit and retain program staff to manage state superfund facilities were a common theme. Future audit work could examine the strategies used by the department to recruit and retain staff, including an analysis of staff salaries relative to market-based pay.
- ◆ **State Superfund Database.** The department uses a database to record and track information relative to state superfund facilities. The database is currently in the midst of being updated. Future audit work could examine the utility of the database as a decision-making tool for management to track project progress relative to milestones and site remediation.
- ◆ **Procurement Practices for Consultants.** Due to the large amount of work associated with state superfund cleanups, the use of consultants represents a potential resource for the department to leverage for its cleanup activities. The use of consultants already represents significant program expenditures at \$1.4 million in fiscal year 2007. Future audit work could evaluate the procurement process and subsequent effectiveness of utilizing consultants to perform technical support functions at state superfund facilities.

### **Report Contents**

The remainder of this report includes a background chapter followed by chapters detailing our findings, conclusions and recommendations. The department cooperated and responded favorably to our audit findings and recommendations. Department management indicated willingness to implement audit recommendations and seek recommended legislative changes. The department's response to the audit is located near the end of this report.



## Chapter II – Background

### **Introduction**

The term “superfund” refers to a state (or federal) government’s program to cleanup uncontrolled and abandoned hazardous waste sites. It is also commonly the name of the fund established to allow the government to cleanup such sites and to compel responsible parties to perform cleanups or reimburse the government for government-lead cleanups. Superfund sites generally represent sites of historical waste contamination where disposal activities have caused the contamination of air, surface water, groundwater, sediments, and/or soils with hazardous or deleterious substances. In Montana, the Department of Environmental Quality (department) is solely responsible for the state’s superfund program and activities. This chapter provides background information on the state superfund law and program activities. While state superfund statute utilizes the term potentially liable persons for individuals or entities responsible for cleanup activities, throughout this report we use the term responsible parties.

### **State Superfund**

In 1985, the Montana Legislature passed the Environmental Quality Protection Fund Act (Act), sections 75-10-701 through 704, MCA. This Act created a legal mechanism for the department to investigate and clean up, or require liable persons to investigate and clean up, hazardous or deleterious substances in Montana. The 1985 Act also established the Environmental Quality Protection Fund (EQPF) pursuant to section 75-10-704, MCA. Primary revenue sources are cost recovery, a portion of Resource Indemnity Trust interest, and a portion of Resource Indemnity and Groundwater Assessment Tax.

The 1989 Montana Legislature significantly amended the Act, changing its name to the Montana Comprehensive Environmental Cleanup and Responsibility Act (CECRA), also known as the state superfund program. CECRA was established pursuant to sections 75-10-705 through 728, MCA. The Act was initially patterned after federal superfund law. In 1995, the legislature further amended the Act to include the Voluntary Cleanup and Redevelopment Act (VCRA), sections 75-10-730 through 738, MCA, which was developed to permit and encourage voluntary cleanup of facilities where releases or threatened releases of hazardous or deleterious substances exist. In 1997, the legislature added the Controlled Allocation of Liability Act (CALA), sections 75-10-742 through 751, MCA, which provides a process for the apportionment of liability at CECRA facilities and establishes the Orphan Share State Special Revenue Account, commonly referred to as the orphan share fund. The purpose of the fund is to reimburse responsible parties for the portion of cleanup costs attributable to entities no longer in existence or not financially viable. Primary revenue sources are oil and gas production taxes and a portion of Resource Indemnity Trust collections.

The Remediation Division is responsible for overseeing investigation and cleanup activities at state superfund sites. State superfund activities are all conducted within the division's Site Response Section (SRS) of the Hazardous Waste Site Cleanup Bureau. The primary focus of SRS is to facilitate investigation and cleanup of releases of unregulated hazardous substances.

In Montana, the majority of releases occurred at sites where mining, smelting, wood treating, railroad fueling and maintenance, petroleum refining, landfilling, and chemical manufacturing/storage activities were conducted. Historical activities at these sites caused contamination of air, surface water, groundwater, and sediments.

### **Montana State Superfund Sites**

Currently, there are 209 facilities on the department's CECRA priority list (Table 1). A facility includes the entire area of contamination and may include multiple sources. Department records show staff are assigned to three of six sites designated as maximum priority facilities (50 percent) and twenty-three of fifty-one (45 percent) high priority facilities. One of the maximum priority sites is currently being addressed by the Environment Protection Agency. Staff are also assigned to four medium and two low priority facilities. Program workload on state superfund sites is addressed in Chapter III.

**Table 1**  
**CECRA Priority List**  
**As of March 24, 2008**

<b>Facility Priority Ranking</b>	<b>Threat Level</b>	<b>Number of Facilities</b>
Maximum	Immediate	6
High	Significant	51
Medium	Potential	75
Low	Minimal	53
Operation and Maintenance	Not Applicable	1
Referred to Program other than State Superfund	Not Applicable	18
No Further Action	Not Applicable	5
<b>Total</b>		<b>209</b>

**Source: Compiled by the Legislative Audit Division from department records.**

For a complete list of Montana's state superfund sites, refer to Appendix A.

### **State Superfund Program Resources**

The financial resource provided by the legislature and utilized by the department to fund state superfund activities is the EQPF. This fund can be used only to fund remediation

activities relating to the release of a hazardous or deleterious substance. Key funding sources for the fund include cost recovery from responsible parties, penalties recovered pursuant to the EQPF Act, a portion of interest from the Resource Indemnity Trust, and a portion of the Resource Indemnity and Groundwater Assessment Tax. The fund balance at fiscal year end 2007 was \$611,000.

Responsible parties are statutorily required to pay for remediation costs including the department's related costs. However, any costs the department expends on review and oversight are initially paid for by the department out of the EQPF and subsequently recovered. Thus, the EQPF is considered a revolving fund as it is designed to provide the department resources to initiate work and recovered costs are deposited into the fund. If a responsible party is uncooperative, the department may initiate enforcement actions in order to cleanup the site. The department may utilize the EQPF to pay for investigation and cleanup if no viable party can be identified, and if funds are available.

### **State Superfund Staff**

SRS consists of professional staff with knowledge and skills in fields including environmental engineering, geology, hydrogeology, chemistry, biology, soil science, risk assessment, data management, cartography, and public relations. There are 14 authorized FTE within SRS for state superfund operations. In addition, two attorneys provide program support.

### **Major Steps of the Superfund Process**

Major steps of the superfund process are described in Appendix B of this report.





## Chapter III – Management Controls

### **Introduction**

Management controls are the organization, policies, and procedures used to reasonably ensure:

- ◆ Programs achieve intended results.
- ◆ Resources are used consistent with agency mission.
- ◆ Programs and resources are protected from waste, fraud, and mismanagement.
- ◆ Laws and regulations are followed.
- ◆ Reliable and timely information is obtained, maintained, reported, and used for decision-making.

One of our audit objectives was to review management controls to determine if they effectively guide program operations. In order to address this objective, we discussed program controls with department management and staff, reviewed related documents, and examined superfund records. We also reviewed records and reports from the Environmental Protection Agency and a sample of other states' superfund programs to obtain information on program management controls to compare and contrast to the Department of Environmental Quality (department). This chapter discusses our evaluation of state superfund management controls.

### **Division Management Controls**

The state superfund program appears to have little management guidance for staff to develop and implement a work plan of action. There are goals and objectives from the Remediation Division, but it is unclear how these are measured to track and document work progress. The supervisor for the Site Response Section (SRS) is actively involved in the daily work of the section, but appears to receive little guidance from department management on how to set work priorities, measure project impact, or adjust program operations to deliver services more effectively. The SRS supervisor develops an annual work plan with input from program staff, for which department management provides approval only. While it should be noted there are many variables for a site such as evolving site information and the cooperation of responsible parties, there are no proposed timelines or project milestones to gauge the progress of a specific site against any sort of expectations.

The House Joint Resolution (HJR) 34 study (2005 Session) examined the effectiveness of the state superfund process and issued a report in November 2006. The study identified concerns and issued specific findings and recommendations for improving superfund

operations. Several recommendations involved management controls. Department management has not formulated any implementation plan for the study. The SRS supervisor has not been given any direction or indication of how to respond to the study's findings and recommendations. The department's plan of action to address the report's final recommendations is unknown.

## **Department Long-Term Cleanup Strategy Appears Unplanned**

As a result of this lack of guidance, staff do not appear to have a clear set of long-term workload priorities, nor does the department establish clear long-term workload priorities for performing cleanup work. SRS staff appears to set their own work plan. As a result, section priorities may not correlate with department priorities.

As outlined in sections 75-10-702(1)(b) and 75-10-704, MCA, and ARM 17.55.111(1), the department is required to develop a system for prioritizing and ranking sites for remedial action. Neither statute nor administrative rules outline how the department should utilize these rankings in its decision-making process. According to department staff, sites are ranked for remedial action based on potential risks to public health and the environment. Subsequently, site investigation and cleanup activities focus primarily on sites which have a maximum or high priority rank. Based on the remediation database, there are 209 CECRA priority sites, with six maximum priority sites and fifty-one high priority sites. Of the six maximum priority sites, staff are "actively working" three sites (50 percent). One of the maximum priority sites is correctly being addressed by the Environmental Protection Agency. Of the high priority sites, staff are actively working twenty-three sites (45 percent). Staff are also actively working four medium and two low priority sites. "Actively working" is defined as the assignment of a project officer at a minimum. Table 1 on page six summarizes CECRA priority sites.

Additionally, in the context of the department's voluntary cleanup program, staff appear to respond to work reactively rather than proactively. For example, staff report they are essentially forced to cease work at enforcement-based and higher priority sites when they receive a voluntary cleanup plan, due to statutory review timelines. This often disrupts work on enforcement-based and higher priority sites. Voluntary cleanup plans generally represent lower priority sites. Consequently, work at higher priority or enforcement-based sites is put on hold. Department management do not provide any direction as to how to keep work moving forward on higher priority and enforcement-based sites, while responding to incoming voluntary cleanup plans.

Addressing low and medium priority sites while maximum and high priority sites go unaddressed may be a correct remediation approach. However, a lack of formalized

planning creates the impression there is no overall strategy on how to keep work moving forward on enforcement-based sites while responding to voluntary cleanup plans. The department should actively plan the most effective and efficient way to utilize its resources. While there is an annual work plan, there does not appear to be a long-term plan outlining where the remediation division is, where they would like to be, what is realistic, and the resources needed to achieve site remediation. This absence of long-term planning creates an environment where it is unknown how the department tasks priorities for site cleanup.

---

**CONCLUSION**

*Management controls could be improved to more efficiently guide program operations.*

---

## **Management Best Practices Suggest Three Key Steps**

Beyond the Remediation Division's goals and objectives and annual work plan, the state superfund program does not actively set long-term work priorities or measure progress. According to a recent report from the Government Accountability Office on Government Performance and Results, organizations which successfully implement management reform have three key steps in common:

1. Define clear missions and desired outcomes.
2. Measure performance to gauge progress.
3. Use performance information as a basis for decision-making.

These key steps are the essence of best practices. In order to pursue meaningful management reforms, department management should become actively involved in establishing program priorities and measuring impact. Priorities and objectives should have clear targets for specific action, with quantified, time-based statements of desired outcomes or accomplishments. Priorities and objectives should also be realistic and attainable.

Other states' superfund programs undertake evaluation of program priorities. In response to limited resources, Oregon's Department of Environmental Quality evaluated the priority of work it performs for the Environmental Cleanup Program. Oregon's department convened an Environmental Cleanup Work Group to provide input about program priorities and prepare a final report with recommended priorities for the program. Among other things, the group reviewed the cleanup program's strategic plan. Oregon's department identified a core program of services to support its highest priority activities - emergency response, site assessment, voluntary and independent

cleanup, property redevelopment, orphan site cleanup, and enforcement activities. After establishing program priorities, Oregon's department began aligning its resources with established priorities. Through a prioritization scheme, Oregon's environmental agency tries to provide oversight for the highest priority environmental sites and sites with a time-sensitive nature, such as those involved in a real estate transaction.

As previously noted, the HJR 34 study issued several recommendations involving management controls, such as a four-year plan of action, a biennial progress report, site timetables with specific milestones, and establishing and adhering to document review deadlines. These management control recommendations have merit. The department should examine and prioritize these recommendations for implementation. The department may determine not all recommendations will be implemented. In addition to prioritizing HJR 34 recommendations, department management should establish long-term priorities for state superfund operations in accordance with best management practices.

---

***RECOMMENDATION #1***

*We recommend the Department of Environmental Quality:*

- A. *Establish priorities and develop a plan of action to address House Joint Resolution 34 study recommendations.*
  - B. *Set long-term priorities and provide ongoing guidance for the Comprehensive Environmental Cleanup and Responsibility Act program.*
-

## Chapter IV – Cost Recovery Controls

### **Introduction**

One of our audit objectives was to assess whether cost recovery controls are in place to ensure the department recovers state costs related to state superfund site activities and makes appropriate reimbursement payments from the orphan share fund. In order to address this objective we reviewed statutes, Administrative Rules of Montana, Montana Operations Manual (MOM), and Department of Environmental Quality (department) policy. We discussed processes and controls with department staff, reviewed department records, and tested a sample of items and transactions from fiscal years 2005 through 2008. We also reviewed a department internal audit and discussed related findings with department management and staff. This chapter discusses department cost recovery controls and results of our audit testing.

### **Appropriate Reimbursement Payments From Orphan Share Fund**

During the audit, we identified and tested controls to ensure appropriate reimbursement payments are made from the orphan share fund. There were limited transactions to test as only one payment to a responsible party has been made in recent years. Audit work found the payment (reimbursement) made was appropriate, supporting documentation existed, and the department appeared to be in compliance with state law and department policy governing orphan share fund payments. Reimbursement provisions are specified in section 75-10-743, MCA.

### **CECRA Cost Recovery Efforts and Controls**

State superfund statutes (75-10-715(2)(a), MCA) require responsible parties to reimburse the department for all remedial action costs the state incurs. Cost recovery is a critical funding component to state superfund operations contributing 91 percent of funds deposited into the Environmental Quality Protection Fund (EQPF). Since cost recovery is a key funding component to state superfund operations, we examined cost recovery controls over the Comprehensive Environmental Cleanup and Responsibility Act (CECRA) cost recovery process.

### **Department Increased Amount of Recovered Costs**

In recent years, the department increased its efforts to recover state costs from responsible parties. This was necessitated partially due to diminishing revenues from non-cost recovery sources. Table 2 illustrates costs recovered and portions of program expenses that are cost recovered. During fiscal year 2005, the department recovered nearly \$484,000 in state costs. This amount increased to over \$2.6 million during fiscal

year 2007. Part of this increase is attributable to the fact additional remediation work is being performed which increases program expenses and consequently reimbursement of state costs. However, part is attributable to additional cost recovery efforts by the department including better accounting of costs incurred such as indirect costs, changing from billing on a quarterly basis to a monthly basis, and initiating legal action to recover unpaid costs.

**Table 2**  
**Costs Recovered and Percent of State Superfund Expenses Cost Recovered**

<b>Fiscal Year</b>	<b>Amount of Costs Recovered</b>	<b>Percent of Expenses Cost Recovered</b>
2005	\$483,565	65%
2006	\$936,645	78%
2007*	\$2,629,669	97%

\*May be subject to change.

**Source: Compiled by the Legislative Audit Division from SABHRS.**

## **Cost Recovery Controls in Place**

The EQPF is the revolving fund for financing state superfund activities and all recovered costs are to be deposited into this fund. Audit testing revealed that overall, the department has cost recovery controls in place and operating to ensure expenditures charged against the EQPF are documented, supported, approved, and properly recorded on SABHRS.

---

### **CONCLUSION**

*Overall, the department has cost recovery controls in place and operating to ensure only properly supported expenditures are charged against EQPF.*

---

## **Department Could Further Improve CECRA Cost Recovery Efforts**

The department could improve cost recovery controls and further enhance its capabilities to recover the state's costs incurred in carrying out its state superfund duties. This can be accomplished by refining billing practices, collecting additional data, evaluating receivables, and taking appropriate follow-up action including pursuing collection of remedial action costs incurred by the state. In addition, the department should ensure its Financial Services Office is the primary division responsible for enacting accounts receivable policy and making certain procedures are followed in order to strengthen the department's receivables function.

---

**CONCLUSION**

*Cost recovery controls could be improved in order to ensure the department recovers the state's costs related to state superfund site activities.*

---

The following sections discuss areas where the department's cost recovery controls related to CECRA cost recovery could be improved.

### **Refine Billing Practices**

The Montana Operations Manual (MOM) chapter 2-1190.0 requires agencies to have policies in place to ensure timely billing of receivables to help lower the number of uncollectible receivables recorded on the accounting system. Department staff established policies for processing receivables for the CECRA cost recovery process; including paying for consultant services and recovering the state's remediation costs from liable parties. This policy requires authorization by a project manager prior to paying invoices for consultant services used by the department. The department also sends bills to liable parties in order to recover the state's remediation costs. As the department incurs costs for remediation services, policy specifies liable parties will be invoiced the month following the department's payment for those services. Department supervisory staff review invoices to ensure policy is adhered to and billed costs are supported.

We examined department documentation and found billing practices could be improved. Ten percent (1 of 10) of consultant invoices we reviewed did not have documented project manager approval prior to processing for payment. In addition, 39 percent (5 of 13) of items selected for review were not billed in a timely manner; the month following payment of invoices. Untimely billed expenses totaled nearly \$622,000. As a result, the division is not complying with MOM chapter 2-1190.0 and department policy. This creates delays in reimbursements to the department, impacts cash flow, and results in lost interest earnings to the EQPF.

According to department staff, nondocumented project manager approval was an oversight and the error was not found during the supervisory review process. In regard to timely billing, division staff commented they occasionally run into problems ensuring invoices are prepared and sent in a timely manner. Staff indicated untimely billing is generally attributable to excess workloads, staff responsible for preparing invoices on extended leave, and lack of staff cross-trained on invoice preparation. In addition, there was a vacant position within the division's fiscal office at the time of our audit, but this position has recently been filled.



**RECOMMENDATION #2**

*We recommend the Department of Environmental Quality:*

- A. *Conduct supervisory review of invoice packets to ensure staff adheres to department cost recovery policy requiring authorization by a project manager prior to paying invoices.*
  - B. *Train additional department staff to assist with monthly invoicing of liable parties to ensure timely billing.*
- 

## **Compile Data Needed to Analyze Account Status for CECRA Projects**

State accounting policy pursuant to MOM chapter 2-1190.0 requires agencies to periodically evaluate receivables. In addition, the department's fiscal policies require staff to maintain an accounts receivable spreadsheet that can be used by the programs/work units throughout the year. Up-to-date records provide the foundation for effective review and analysis. Of the 209 CECRA sites, there are 39 sites which the department is actively billing responsible parties. However, the department also incurs costs on many of the "nonactive billing" sites. The department created a spreadsheet used in part to track expenses incurred and revenues recovered on individual sites, including those not actively billed. This spreadsheet contains data on 239 sites including sites for which the department either billed responsible parties but did not recover all costs, or for which responsible parties have never been billed. The spreadsheet also contains some indication of whether cost recovery is ongoing, possible, or not expected. The data on this spreadsheet has not been updated since February 2006.

Since the department's records are not current, this impedes staff's ability to assess cost recovery status, evaluate receivables, and determine actions needed to resolve unreimbursed expenses. Total expenses recorded from fiscal year 1990 through February 2006 were nearly \$12.4 million. In addition, the department is not in compliance with MOM relative to receivables, nor the department's fiscal policies.

According to staff, the spreadsheet has not been updated in years because no one is assigned responsibility. The department needs to update this data to allow staff to generally evaluate receivables. Staff needs to be able to assess which sites have incurred expenses, whether the department's expenses have been recovered, and the reasons why costs have not been recovered. As a result of our audit work, the department is taking steps to update the spreadsheet.

---

**RECOMMENDATION #3**

*We recommend the Department of Environmental Quality assign responsibility to compile and maintain current data necessary to analyze account status for all Comprehensive Environmental Cleanup and Responsibility Act projects.*

---

## **Evaluate Receivables and Take Appropriate Follow-up Action**

MOM chapter 2-1190.0, addresses collection of all the state's receivables and provides, "Receivable and allowance balances should be periodically reviewed and adjusted. When an agency has made all reasonable attempts and cannot collect a valid accounts receivable, it must transfer the account to Department of Revenue or an outside collection agency. If the agency, the Department of Revenue, or the outside collection agency deems the account to be uncollectible, it should be written off. Receivables and their related allowance should not permanently sit idle on the accounting system." In addition, Title 17, Chapter 4, Part 1, MCA, addresses debt collection services provided by Department of Revenue including collection of money due to a state agency.

The department is not addressing CECRA cost recovery-related receivables as prescribed in state accounting policy. Audit work revealed the department is not aging the debt in order to evaluate receivables, transfer unpaid accounts to other agencies/entities, or write off uncollectible accounts. SABHRS outstanding accounts receivable data for the EQPF reveals the outstanding balance is steadily increasing. As of calendar year-end 2007, the receivable balance was over \$1 million, with 34 percent at least a year old. Based on SABHRS data, we determined the age of receivables at calendar year-end 2007 were as follows:

- ◆ \$50,385 greater than 5 years
- ◆ \$297,224 between 1 and 5 years
- ◆ \$470,008 between 90 days and 1 year
- ◆ \$192,388 less than 90 days

In addition, the amount of unpaid accounts one year or older also increased over the past year from \$308,075 at calendar year-end 2006 to \$347,609 at calendar year-end 2007. Some receivables date back to the early 1990's and many have never had payment activity. The department has not transferred any uncollectible accounts to Department

of Revenue and uncollectible accounts have not been written off.

As a result, a significant receivables balance has accrued when compared to the total amount recovered annually for the department's CECRA operations. These receivables represent cash outlays from EQPF without reimbursement, which contributes to a negative cash flow situation and also results in lost interest to the EQPF.

Staff were unaware of state accounting policy. In addition, while the division has cost recovery policies, they have not been updated in some time. Staff are currently working on updating division policies that pertain to evaluating EQPF outstanding accounts receivable; however, they have been in draft format for over a year and have not been finalized. In addition, staff concerns about affecting the strength of the department's legal standing when pursuing cost recovery also creates hesitancy to address receivables. Legal staff prefer to keep options open. To some extent, staff prefers to leave receivables unaddressed in the event it ultimately becomes viable to pursue collection, and as a result, staff has not addressed receivables. It appears department management has had limited involvement in these discussions and there is no policy or process in place to include department management in the review and assessment of receivables.

The department should finalize policies for evaluating EQPF outstanding accounts receivable and ensure policies are implemented and followed by staff. This should include developing criteria for when accounts should be transferred to other agencies/entities and when accounts should be written off as uncollectible. In addition, thresholds should be established to define when to include department management in receivable assessment and decision-making as these are department accounts receivables, not division accounts receivable.

---

#### **RECOMMENDATION #4**

*We recommend the Department of Environmental Quality:*

- A. *Finalize and ensure implementation of policy for evaluating accounts receivable and addressing uncollectible accounts.*
  - B. *Evaluate Environmental Quality Protection Fund accounts receivable to determine viability of accounts and take appropriate action including transferring accounts to other agencies/entities and writing off uncollectible accounts as bad debt.*
  - C. *Establish thresholds to define when department management should be involved in accounts receivable assessment and decision-making.*
-

## **Pursue Collection of Remedial Action Costs Incurred by the State**

CECRA stipulates, “If the state’s remedial action costs and penalties are not paid by the liable person to the department within 60 days after receipt of notice that the costs and penalties are due, the department shall bring an action in the name of the state to recover the amount owed plus reasonable legal expenses” (75-10-722(3), MCA). Statutes also authorize the department to bring action to recover remedial action costs and incurred interest and seek a declaratory judgment on liability (75-10-722(5), MCA). CECRA liability statutory provisions found in section 75-10-715(4), MCA, states in part, “The department may initiate civil proceedings in district court to recover remedial action costs....”

The department is not bringing actions against all responsible parties to recover costs as required by law and has rarely pursued cost recovery through legal actions. According to staff, the department has pursued legal action to recover costs for six or seven superfund sites since the program’s inception in 1989. There are several other impacts resulting from delaying legal pursuit of receivables. Allowing unpaid debt to exist for extended periods of time impacts cash flow within the EQPF, results in lost interest to this fund, and ultimately impacts department operations by not providing needed funds. In addition, not all nonpaying responsible parties are treated equally as the department files legal action against some but not others. By not having defined thresholds as to when to pursue legal action and consistently applying these thresholds, the department may be setting precedence.

Staff indicates it is not always cost beneficial to pursue legal actions, especially when dollar amounts owed are smaller. This is a valid point and cost versus benefit of pursuing legal actions should be considered as part of these decisions. However, there is no established policy addressing when the department should pursue legal action to collect unpaid debt. This issue was identified by the department in February 2007 including the need to establish dollar thresholds for accounts to be pursued by department legal staff. Staff is currently working to address this by drafting policy. However, policy has yet to be finalized.

In addition, statutory provisions appear to compound the issue. Staff asserts the following statutory provisions make it difficult for the department to pursue recovery of the state’s costs involved with CECRA sites:

- ◆ Statute currently requires initial action brought for costs incurred under CECRA must be commenced within six years after initiation of physical onsite construction of the final permanent remedy, section 75-10-722(6), MCA.
- ◆ Statute does not clearly provide for the inclusion of costs in unilateral orders issued by the department. A unilateral order is an enforcement tool issued by

the department to order immediate action to correct violations. It is issued without negotiation of responsible parties.

- ◆ Section 75-10-715(2), MCA, provides a person identified is liable for all remedial action costs incurred by the state. However, section 75-10-722(2), MCA, provides the department may require a liable person to pay the state's remedial action costs. (Emphasis added)
- ◆ Statutes do not provide the authority to include payment of remedial action costs in administrative orders issued by the department. An administrative order is issued by the department upon consent of involved parties.

The department's ability to pursue collection of state remedial action costs on CECRA sites should be addressed. Statutes provide persons identified as liable under CECRA are responsible for remedial action costs incurred by the state. However, some of the items previously discussed impede the department's ability to aggressively pursue collection of unpaid costs. These issues must be addressed in order to resolve the increasing amount of dollars owed the state.

---

#### **RECOMMENDATION #5**

*We recommend the Department of Environmental Quality:*

- A. *Finalize policy for bringing legal action against potential liable parties for nonpayment of the department's remedial action costs to include defined thresholds for pursuing action.*
  - B. *Identify changes needed in statutes to enhance the department's ability to recover remedial action costs and seek statutory changes to resolve issues.*
- 

## **Management Control Over Cost Recovery**

The department conducted an internal audit examining the cost recovery processes for the EQPF and other department funds. The internal audit identified a number of issues related to cost recovery and issued an internal report in February 2007. It has been over one year since the report was issued and yet our audit work revealed many of the same problems continue to exist, at least relative to EQPF cost recovery.

It appears there is a common underlying basis relating to problems identified with the department's CECRA cost recovery efforts. The management of receivables and decisions made regarding collections, bad debt writeoffs, and billing to seek recovery, is mostly performed within the Remediation Division and appears to be done autonomously from the Financial Services Office with little to no collaboration and input. The depart-

ment's internal auditor noted a similar concern stating management's lack of policy and process to review and assess receivables is aggravated by the "fragmented" receivables systems and processes within the department. Department management should take this opportunity to either centralize receivable functions within its Financial Services Office or ensure the Financial Services Office takes the lead in making sure appropriate policy is enacted and monitoring of operations occurs to ensure policy is followed.

---

***RECOMMENDATION #6***

*We recommend the Department of Environmental Quality ensure the Financial Services Office is the primary entity responsible for enacting accounts receivable policy and ensuring procedures are followed.*

---



## Chapter V – Superfund Policy Issues

### **Introduction**

This chapter presents policy issues impacting the state superfund program and operations. The first portion of the chapter presents our findings and conclusions related to funding state superfund operations. The chapter includes a discussion of the Department of Environmental Quality's (department) statutory obligations under state superfund law and funds provided to meet those obligations. The second portion of the chapter presents our findings and recommendations related to a part of state superfund operations which deals with liability of entities responsible for hazardous wastes at state superfund sites. Statutory liability provisions are contained within two portions of state superfund law. This chapter discusses the provisions found within the Controlled Allocation of Liability Act (CALA).

### **Funding State Superfund Operations**

Over the course of the past several years, the department has had difficulties funding portions of its state superfund operations that enable it to conduct initial investigations at hazardous sites, identify potentially responsible parties, and take action in order to ensure hazards from superfund sites are mitigated and sites remediated. The legislature has had to provide small transfers from other funds in order to maintain positive cash flow. In addition, the department sought and received one-time-only (OTO) appropriations from the legislature to fund specific state superfund remediation projects during the 2005 and 2007 regular legislative sessions.

The Environmental Quality Council (EQC) examined the state's superfund process in response to House Joint Resolution 34. As part of the study and report issued November 2006, EQC noted concerns with sufficiency of funding. The Council commented, "The state is authorized to spend state money to cleanup state (CECRA) sites only after determining no responsible parties are able or willing to fund investigation and cleanup. However, there are not sufficient funds to exercise this authority."

Due to the financial aspects of the state's superfund program, one of our audit objectives was to examine sufficiency of financial resources available to support state superfund activities. In order to address this objective we examined statutory funding provisions and reviewed legislative actions and appropriations for the three most recent regular legislative sessions. We examined department financial records and information maintained on SABHRS. We discussed superfund program funding with legislative and department staff. In addition, we compared and contrasted funding mechanisms for other states' superfund programs to Montana's. The following sections discuss operations funding and results of our audit work.



## **Superfund Program Funded via Environmental Quality Protection Fund**

Funding for the state's superfund operations is provided via the Environmental Quality Protection Fund (EQPF), a revolving fund in which all remedial action costs and penalties recovered pursuant to liability provisions under the Comprehensive Environmental Cleanup and Responsibility Act (CECRA) are deposited. In addition, a portion of Resource Indemnity Trust (RIT) fund interest money and proceeds from the Resource Indemnity and Ground Water Assessment Tax (RIGWAT) are deposited into this fund. During fiscal year 2007, 91 percent of revenues deposited into the EQPF were from recovering the department's remedial action costs, and the remaining 9 percent was from RIT interest, investment earnings, and OTO legislative transfers. EQPF is intended to provide a funding mechanism for the department to meet its statutory obligations under Title 75, Chapter 10, Part 7, MCA.

### **Legislative Intent and Department Statutory Responsibilities**

The legislature enacted CECRA to protect the public health and welfare against the dangers arising from releases of hazardous substances and provided an intent statement regarding funding. Section 75-10-706, MCA, states the legislative intent and purposes of CECRA including, "Provide for funding to study, plan, and undertake the rehabilitation, removal, and cleanup of sites within the state at which no voluntary action has been taken."

In addition, section 75-10-711, MCA, provides the department may take remedial action whenever none of the persons liable or potentially liable will properly and expeditiously perform appropriate remedial action. This part also authorizes the department to draw upon the fund (EQPF) to take action whenever it is unable to determine the identity of liable persons, or the persons determined liable have been requested by the department to take appropriate remedial action but are unable or unwilling to take action in a timely manner.

### **Funding Not Sufficient to Fully Exercise Statutory Authority**

Funding provided through the EQPF provides operating resources necessary to support some but not all of the department's CECRA responsibilities. As long as the department works on state superfund sites where it can recover costs, separate funding sources are not as critical. These types of superfund sites include those where the responsible parties have either volunteered to remediate the site; or where the department has initiated remedial action with a financially viable and cooperative responsible party or initiated enforcement-based action with a financially viable responsible party.

However, not all state superfund sites involve responsible parties that are able and willing to conduct or pay for site remediation. These superfund sites often involve situations of historical contamination where the responsible parties no longer exist, are involved in bankruptcy proceedings, do not have financial resources needed to remediate, or have initiated legal proceedings to delay remediation. For these types of sites, the department is not able to recover all of its costs as cost recovery is difficult or unlikely, should it take enforcement action to remediate the site. Recognizing this fact, the legislature provided some long-term funding sources to enable the department to meet its statutory obligations under CECRA including portions of RIT interest and RIGWAT proceeds.

For those superfund sites where the department cannot recover its costs, it has limited ability to conduct any remediation activities due to limited funding. During fiscal year 2007, revenues derived from sources other than cost recovery totaled \$275,000. The following table depicts EQPF funding sources and expenditures for the most recent three fiscal years.

	Fiscal Year 2005	Fiscal Year 2006	Fiscal Year 2007
<b><u>Long-Term Funding</u></b>			
RIT Interest	\$210,894	\$58,550	\$151,221
Interest and STIP Earnings	\$0	\$5,958	\$15,885
Cost Recovery	\$483,565	\$936,645	\$2,629,669
<b><u>Short-Term Funding</u></b>			
OTO Legislative Transfers In	\$100,000	\$200,000	\$100,000
Civil Penalties	\$0	\$0	\$7,565
<b><u>Miscellaneous Revenues</u></b>			
	\$19,192	\$29,042	\$253
<b>Total Revenues</b>	<b>\$813,651</b>	<b>\$1,230,195</b>	<b>\$2,904,593</b>
<b>Total Expenditures (1)</b>	<b>\$743,946</b>	<b>\$1,193,850</b>	<b>\$2,710,030</b>
(1) The increase in total expenditures is mostly attributable to remediation work at a specific state superfund site for which a special appropriation was provided and costs are being recovered.			
<b>Source: Compiled by the Legislative Audit Division from SABHRS.</b>			

As illustrated in Table 3, proceeds from RIT have declined since fiscal year 2005. In addition, EQPF interest earnings provide minimal revenue. Cost recovery clearly

provides the majority of long-term funding. Lastly, the fund balance, or carryover funds from previous years, does not provide a significant source of funds. The fund balance has averaged around \$639,000 during the past three fiscal years, fluctuating from \$415,000 to \$889,000.

In recent years, the legislature provided additional funding sources to EQPF. The legislature provided short-term funding (OTO) by appropriating \$400,000 over three fiscal years via transfers from other sources to the EQPF. Beginning in fiscal year 2008, a portion of RIGWAT proceeds will be deposited into the EQPF which will provide an additional long-term funding source of approximately \$300,000 annually.

The department also sought additional funds during the most recent two legislative sessions to enable them to begin remedial actions on high priority state superfund sites with unwilling and unable responsible parties. The department and Governor's Office requested and received the following legislative appropriations:

- ◆ For the 2007 biennium, funds from the Orphan Share State Special Revenue Account were provided to fund remediation activities. This included \$1.25 million (OTO) to conduct a remedial investigation and feasibility study at the KRY facility in Kalispell. The legislative also authorized \$0.25 million (OTO) for contracted services to support cost recovery litigation at multiple sites.
- ◆ For the 2009 biennium, \$2 million General Fund (OTO) was appropriated to fund remediation at the Upper Blackfoot Mining Complex. In addition, a statutory appropriation of \$2 million from the Orphan Share State Special Revenue Account (OTO) to the EQPF was authorized to provide up-front cash for state superfund activities at the Burlington Northern Livingston site. The later fund source will provide rollover funds in the future as it is cost recoverable.

The additional funds appropriated for the 2007 and 2009 biennia were OTO funds. While both the legislature and department have taken actions to secure additional funds for the EQPF, actions provided mainly short-term funding solutions and there is not currently a permanent long-term source of revenue which provides funds needed to allow the department to remediate sites with unable and unwilling responsible parties. The department cannot fully meet its statutory obligations under CECRA, Title 75, Chapter 10, Part 7, MCA, including:

- ◆ Investigate, negotiate, and take legal action, as appropriate, to identify liable persons, to obtain the participation and financial contribution of liable persons for the remedial action, to achieve remedial action based on potential effects on human health and the environment (75-10-704(3), MCA).
- ◆ Take remedial action whenever there has been a release or a substantial threat of a release that may present an imminent and substantial endangerment to the public health, welfare or safety or the environment; and none of the persons who are liable or potentially liable, and who have been given the opportunity

by letter to properly and expeditiously perform appropriate remedial action, will properly and expeditiously perform the appropriate remedial action (75-10-711(1), MCA).

- ◆ Undertake remedial action necessary and appropriate to identify the existence, nature, origin, and extent of the release and the extent and imminence of the danger to the public health, safety, or welfare or the environment (75-10-711(2), MCA).

In order to meet its statutory obligations, the department is authorized to draw upon the EQPF to take remedial actions pursuant to section 75-10-711(3), MCA. There are not sufficient funds to exercise this authority.

---

### **CONCLUSION**

*Funding is sufficient to support department remedial activities at state superfund sites where costs can be recovered. Currently, there is no permanent long-term source of funds to assure the department meets its statutory obligations under Title 75, Chapter 10, Part 7, MCA, and to assure the department complies with statutes that authorize it to draw upon the EQPF to remediate state CECRA sites after determining no responsible parties are able or willing to fund investigation and cleanup.*

---

## **Other States Have Long-Term Fund Sources**

The Environmental Law Institute (ELI) is an independent research and education organization that examines environmental law, policy, and management. Based on its research of other states, ELI found a state must be able to pay for its activities in cleaning up sites and a readily available source of money is therefore an essential element of a state's program. A fund separated from the operating funds of the environmental agency and continuing from year-to-year without the need for annual appropriations or other legislative action allows the agency to avoid disruptions to cleanup. A fund allows a state to investigate, plan, design, and conduct emergency response and remedial actions at sites where immediate action is required or where responsible parties are unavailable, unable, or unwilling to conduct or pay for remedial actions. Some of these costs can be recovered through later actions against responsible parties that initially did not pay. But money spent at sites where no responsible parties can be found or where parties are not financially viable cannot be recovered and must be from other sources.

ELI's research of other states found a fund also allows a state to control the pace of cleanups; if responsible parties do not agree to conduct the cleanup, the state will be able to use its own funds to cleanup the site without delay. Having enough money available to pay for cleanup activities when they become necessary allows a state to maintain

control over the timing of cleanups. To be most effective, a fund needs to be large enough to cover contingencies including potentially paying for the entire cost of one or more site cleanups. A fund allows a state to control which sites and risks it responds to and how and when that response occurs. Based on ELI's research of other states superfund programs, it found completing a remedial action at a single site is likely to cost more than \$1.21 million (2008 data adjusted for inflation). Thus, for many states, particularly those with multiple sites needing permanent remedies, a fund of more than \$1.21 million would be needed to preserve the option of conducting state-funded remedial action at a site. Having less than this amount restricts a state's response capability.

## Substantiated Environmental Law Institute's Funding Data

We conducted audit work to substantiate data compiled by ELI related to other states' funding. This included a review of other states' statutes, regulations, and other documents. Our review of other states' statutory funding mechanisms confirms other states have established long-term fund sources to provide a means to remediate sites with unavailable, unwilling, or unable responsible parties. Resources provide states the ability to conduct site assessments to identify contaminants, assess risks to human health and the environment, identify responsible parties, and begin enforcement activities.

---

### **CONCLUSION**

*Other states established long-term fund sources to allow state authorities to investigate and conduct remedial actions at sites where responsible parties are unavailable, unable, or unwilling to conduct or pay for remedial actions.*

---

## Department Unable to Remediate Highly Contaminated Sites

There are highly contaminated sites where the department either has not performed a complete investigation to identify responsible parties, where through investigation has been unable to identify responsible parties, or where parties are unable or unwilling to conduct or pay for remediation. These state superfund sites pose or may pose immediate or significant threat to human health and the environment and the department lacks financial resources to undertake remedial actions. The lack of financial resources restricts the department's ability to investigate, identify, and notify responsible parties; conduct site investigation to determine full nature and extent of contamination; perform risk assessment and feasibility studies to evaluate cleanup options; select a preferred cleanup option; and implement cleanup. Some specific examples of such sites include:

- ♦ **Billings PCE site.** The site involves a 140-acre solvent plume in the groundwater beneath more than 400 homes. Listed as a high priority site, documentation

shows the department does not have resources to begin remedial actions. As a result, the department requested the EPA address the site. Estimated cost to remediate this site is \$7 million.

- ◆ **Burlington Northern Fueling Facility Helena.** Multiple contaminants in the groundwater and soils which have migrated to residential neighborhoods. Listed as a high priority site, documentation reveals the department does not have resources to require the responsible parties to begin to remediate the site. Estimated costs to remediate are not available for this site.
- ◆ **Bitterroot Valley Sanitary Landfill.** An inactive landfill with lab wastes disposed of in a pit and chemicals have leached into groundwater residential wells. Listed as a maximum priority site. Department staff state no remedial action is currently underway due to lack of staff. Estimated cost to finish remediating this site is \$956,000.
- ◆ **KRY Facility Kalispell.** This site involves three facilities located close to the Stillwater River and nearby residential areas. Two of the facilities are listed as high priority and the third as medium priority. Groundwater contamination from each of the facilities is commingled in the shallow aquifer. Estimated cost of the proposed cleanup remedy is \$28.5 million. Documentation shows the department has limited resources to remediate this site without relying on responsible parties.

The department can essentially only address those CECRA sites where there are responsible parties willing to do the work and are financially solvent so they can pay for remediation work and reimburse the department its costs. In reality, there are few of these types of CECRA sites. Because of this, the superfund sites the department is working to remediate do not correlate with the hazard ranking and corresponding threat to human health and the environment since the department lacks funding to initiate action. Refer to Appendix A for a complete list of state superfund sites including hazard rankings.

## **Statutory Funding Does Not Align with CECRA Responsibilities**

The statutory funding structure for EQPF does not align with responsibilities placed on the department under CECRA. Statutory funding provided pursuant to section 75-10-704, MCA, relies on cost recovery and does not provide other effective long-term funding sources. Long-term funding includes portions of RIT interest and RIGWAT proceeds and both funding sources combined may amount to \$350,000 to \$450,000 annually during the current biennium. The other statutory revenue sources deposited into the EQPF per section 75-10-704, MCA, including penalties, forfeited financial assurance, natural resource damages, funds from settlements, and funds provided, donated or granted from private parties to remediate a specific release provide little to no revenue to the EQPF.

Responsibilities placed on the department under CECRA provide the department may take remedial action whenever none of the persons liable or potentially liable will properly and expeditiously perform appropriate remedial action. This part also authorizes the department to draw upon the fund (EQPF) to take action whenever it is unable to determine the identity of liable persons or the persons determined liable have been requested by the department to take appropriate remedial action but are unable or unwilling to take action in a timely manner. While current long-term funding provides \$350,000 to \$450,000 annually, audit work shows the minimum amount needed to remediate a single site is at least \$1.21 million for basic remediation at a less complex site. However, as examples on the previous page illustrate, costs can be substantially higher.

### **Long-Term Funding Solution Needed**

There is a need for an effective long-term funding solution to ensure the department meets its statutory obligations under CECRA. There are other possible funding sources which would provide for a long-term funding solution. In comparing Montana to other states' superfund programs, funding sources in addition to cost recovery and appropriations were identified.

In 21 states, fees on the generation, transport, treatment, or disposal of hazardous waste, hazardous substances, or solid waste provide greater than 20 percent of revenues for cleanup funds. Fees are assessed on industries or businesses that produce wastes which commonly contribute to hazardous sites such as petroleum products, wood treatment, dry cleaning, and solid waste disposal. These fees are commonly referred to as hazardous waste fees. State legislatures can attach limits on the collection and use of hazardous waste fees. Iowa and Kentucky both suspend fee collection if the cleanup fund balance exceeds \$6 million and resume collection if the fund balance falls below \$3 million. The Tennessee legislature set restrictions on fee collections requiring annual adjustments to fees to maintain a fund balance of \$3 to \$5 million in unobligated funds. Taxes are another significant source of revenue (providing greater than 20 percent of fund revenues) for cleanup funds in 15 states. States impose a tax on hazardous wastes or substances that is similar in nature to the fees charged for hazardous waste activities.

Revenue bonds provide significant funding for states and can provide larger amounts of money than other funding methods. Bonds provide an influx of up-front funds. For example, Oregon's legislature recently authorized the sale of \$4.5 million in long-term bonds for site remediation. The Ohio legislature authorized and voters approved the sale of \$200 million in bonds for the Clean Ohio Revitalization Fund. New Jersey has historically relied extensively on bond sales to fund superfund cleanup activities within that state. Bonds are a significant source of funds, contributing greater than 20 percent of funding sources, in ten states. Bond debt service is financed from a variety of sources including hazardous substance fees and waste end taxes.

Another possible funding source is the state's Orphan Share State Special Revenue Account. During recent legislative sessions, the legislature authorized appropriations from the orphan share fund to finance the department's remediation activities at specific superfund sites. The legislature could permanently redirect the fund principal and revenue sources from the Orphan Share State Special Revenue Account to the EQPF to provide an additional source of revenue for the department to use in environmental remediation efforts. Not only could the funds be utilized to conduct remedial investigation (early investigation work), but also used to take action on true orphan sites without an identifiable or responsible party. The orphan share fund, including revenue sources and fund balance, is discussed in greater detail later in this chapter.

## **Conflicting Mandates of CECRA and Funding Provided**

As long as no other long-term funding sources are provided for the EQPF, the department will be limited to remediating primarily those sites where the department can recover its costs and recover them quickly. The department currently has limited ability to remediate state superfund sites with unavailable, unwilling, or unable responsible parties – which are state superfund sites the department has statutory obligation to address. Funding provided via the EQPF is not sufficient to allow the department to meet its statutory obligations under CECRA; funding does not align with statutory responsibilities. There is a need to clarify the conflicting mandates of the obligations placed on the department under CECRA and lack of mandates for funding.

---

### **CONCLUSION**

*Current funding mechanisms do not align with the statutory obligations and responsibilities required of the department under the Comprehensive Environmental Cleanup and Responsibility Act. If funding and statutory obligations were re-aligned, the department would be able to address higher priority state superfund sites which are not currently being addressed. Additional resources would provide the department the ability to conduct site assessments to identify contaminants, assess risks to human health and the environment, identify responsible parties, and begin enforcement and cleanup activities.*

---

The next section of this chapter discusses the Controlled Allocation of Liability Act (CALA) and funds associated with the act, the Orphan Share State Special Revenue Account. The section presents an examination of the purpose of and need for CALA and funds provided through this act.

## **Controlled Allocation of Liability Act (CALA)**

Most hazardous substance cleanup sites have more than one potentially responsible party. These may include site owners and operators, the generators of the hazardous



substances, the transporters of the hazardous substances, and various disposers. As part of these cleanups, state law addresses liability of the various parties who contributed to the presence and release of a hazardous substance.

The cornerstone of federal and states' superfund law is the standard of liability which holds that each company or individual that contributed in any way to the presence or release of hazardous substances is held responsible for the entire liability. The majority of states patterned their laws after the federal superfund liability standard. Some states also offer an alternative to this liability standard – referred to as proportional liability. Montana, like many other states, patterned its environmental liability standards after federal superfund law. However, Montana also created an alternative. CALA is Montana's proportional liability alternative. The 1997 Montana Legislature added CALA to CECRA, the state superfund law.

CALA is a process that allows responsible parties to petition to allocate portions of liability as an alternative to the liability standard included in CECRA. CALA was designed to provide an alternative to litigation that involves negotiations to allocate liability among responsible parties involved at facilities requiring cleanup, including bankrupt or responsible parties which no longer exist. Cleanup of these facilities must occur concurrently with the CALA process. Since superfund sites typically involve historical contamination, liable parties can include entities that are bankrupt or defunct and not affiliated with any viable person by stock ownership. The share of cleanup costs for which these bankrupt or defunct persons are responsible is the orphan share. The resource used to pay for the orphan's share is the Orphan Share State Special Revenue Account, commonly referred to as the orphan share fund. The department represents the interests of the orphan share throughout the CALA process. In 2007, CALA was amended to allow state agencies access to the orphan share fund.

One of our objectives was to examine the CALA statute and related policies to determine if alternatives exist which could increase participation. In order to address our objective, we reviewed CALA legislation and related policies; reviewed federal environmental liability laws and contacted legal staff from the Environmental Protection Agency (EPA); interviewed program staff and parties responsible for cleanup activities; reviewed department records; and researched liability standards in other states. The following sections discuss CALA and present our findings and recommendation. We also address the request from the Legislative Fiscal Division to determine if there are statutes or policies which inhibit program participation and subsequently site remediation.

## **Superfund Facilities Using CALA to Date**

In the 11 years since inception of the legislation, the department has worked with four superfund facilities under the provisions of CALA. Three facilities to date have

completed the allocation process under CALA, with one currently in the good faith investigation stage of the process. A fifth party also petitioned the process, but withdrew. The following table illustrates current and past CALA facilities including allocation data.

**Table 4**  
**CALA Facilities - 1997 to Date**

Facility	Type	Lead Responsible Party	Petition Date	Orphan Share	Actual/Estimated Orphan Share Amount
Corbin Flats, Corbin	Mining	Montana Tunnels Mining, Inc.	Sept. 1997	57%	\$ 1.5 million (actual)
S&W Sawmill, Darby	Wood Treating	International Paper	Nov. 1998	39%	\$15.6 million (estimated)
CMC Asbestos, Bozeman	Mining/Salvage Yard	City of Bozeman	July 2003	79%	\$2.1 million (estimated)
Joslyn Street Tailings, Helena	Mining	TBD	Nov. 2005	TBD	TBD

TBD - to be determined.

**Source:** Compiled by the Legislative Audit Division from department records.

## Montana's Process Is Unique

Including Montana, there are 11 states which offer proportional liability. While other states offer proportional liability, those we contacted indicated the process is not used or is informal rather than a statutory process. Other states do not provide a structured opportunity for parties to sit down and negotiate an allocation percentage, nor do any other states offer funding to responsible parties as a part of an alternative liability standard. For example, in Texas, while there is an opportunity for an apportionment of liability such as Montana, staff indicate it is a standard never used, due to the fact it requires the release of each contaminant to be managed separately under a remediation plan in order to be considered. Essentially, if multiple contaminants exist, each contaminate found on site needs to be addressed individually and distinctly as part of a remediation plan. Additionally, the federal government does not offer an alternative and abdicates responsibility to responsible parties to work out percentages among themselves.

---

### **CONCLUSION**

*The majority of states do not have provisions for proportional liability similar to CALA.*

---

## **Montana's Alternative Allocation Standard Impacts Department Focus**

In Montana, the inclusion of CALA within CECRA has redirected some of the focus of the department from enforcement and cleanup, to involvement in allocating liability between responsible parties. The benefit of the allocation standard used by the majority of other states and the federal government is that it allows a government to initiate and focus on cleanup of superfund sites. It places the burden of allocating costs on the private parties responsible for the contamination. While the government identifies all parties responsible for contamination, it does not have to determine percent of liability of each party. In contrast, the CALA proportional liability standard requires the department to participate in allocating percent of liability among the responsible parties, concurrently with cleanup. CALA places the state in the context of a negotiation process where it should not be involved as an environmental regulatory agency.

## **Orphan Share State Special Revenue Account**

In addition to allocating liability among parties liable for cleanup of CECRA sites, CALA also established a fund per section 75-10-743, MCA, to pay for the portion of cleanup costs attributable to parties that are not financially viable – the orphan's share. The legislature allocated funds from the Resource Indemnity Trust and from Oil and Natural Gas Production Taxes. In the absence of a demonstrated hardship, claims for orphan share reimbursement may not be submitted until the cleanup is complete, per section 75-10-743(4), MCA. This ensures that facilities are fully remediated before reimbursement.

## **Historical Expenditures From Orphan Share Fund**

To date, there have been limited reimbursements from the orphan share fund. In 2003, \$1.5 million was paid to Montana Tunnels Mining Incorporated for the Corbin Flats facility south of Helena. In 2007, a payment for approximately \$12,000 was made to the City of Bozeman for the CMC Asbestos facility. Additionally, an accrual of approximately \$2 million was established at the end of fiscal year 2007 for the CMC Asbestos facility, in anticipation of reimbursing remediation costs to the city in fiscal year 2008. Both lead responsible parties associated with these facilities successfully demonstrated undue financial hardship and qualified for early reimbursement. There has been no reimbursement to S&W Sawmill as there is no financial hardship and remediation is not complete.

## **Orphan Share Funds Accessed by Few**

The orphan share funds provided through CALA have only been accessed by a select group of applicants. This is mainly due to the fact that there must be a lead responsible

party designated and this responsible party is responsible for all remediation costs up-front, including those attributable to other responsible parties involved at the facility and the orphan's share. The lead responsible party may attempt to recover costs from other responsible parties through legal action. Thus, the lead responsible party generally must have significant financial resources to fund the cleanup. Since the fund only benefits a few, a significant fund balance has accrued. At fiscal year end 2007, the balance of the orphan share fund was about \$8.7 million. As a result of this growing fund balance, the legislature has re-appropriated fund balance from the orphan share fund for other purposes. The following table illustrates ending fund balance and revenues for the orphan share fund.

	<b>Fiscal Year 2005</b>	<b>Fiscal Year 2006</b>	<b>Fiscal Year 2007</b>
<b>Ending Fund Balance</b>	\$7,272,870	\$8,752,280	\$8,669,175
<b>Revenue Sources</b>			
STIP Earnings	\$114,053	\$273,301	\$383,920
Combined Oil & Gas Taxes	\$2,074,670	\$3,030,412	\$3,150,057
Resource Indemnity Trust Collections	\$441,681	\$451,162	\$495,228
<b>Total Revenue</b>	<b>\$2,630,404</b>	<b>\$3,754,875</b>	<b>\$4,029,205</b>

**Source: Compiled by the Legislative Audit Division from SABHRS.**

## **Few Orphan Sites Currently Addressed**

Currently, orphan sites which are not included as part of a facility petitioned under the CALA process are not addressed. The fund is only available as an inducement to encourage responsible parties to accept a percentage of responsibility for a specific facility cleanup and subsequently reimburse them for their efforts. Due to a lack of department resources, these other orphan sites generally remain unaddressed. Since cleanups typically involve historical contamination, CECRA sites generally involve some portion attributable to an orphan. These sites represent potential harm to the public health and welfare of Montana citizens. Department staff indicate they attempt to identify other funding resources to address these orphan sites, such as EPA grant funds.

## Montana Differs in Providing Funds for Cleanup

Based on reviews of a sample of other states, most states use their environmental remediation funds for orphan site cleanup, depending on available funds. No other states offer state funds to responsible parties as inducement to an alternative allocation process.

Oregon is the only state which established a separate orphan site account to address orphan sites. However, Oregon's program is not part of a proportional liability standard. Rather, it is a program funded through a special assessment on solid waste disposal and the sale of long-term bonds. Oregon's Orphan Site Program addresses sites where the parties responsible for the contamination are unknown, unable, or unwilling to pay for needed remedial actions. Oregon's Department of Environmental Quality is responsible for site remediation using funds provided via the Orphan Site Account. Responsible parties do not receive the orphan share funds.

---

### **CONCLUSION**

*Montana is the only state to offer state funds to responsible parties as an inducement to proportional liability.*

---

## CALA in Review

A review of the alternative liability standard provided by CALA highlights a process which is unique, diverts department focus, and benefits few. Audit work of liability standards utilized by the federal government and other states reveals there are no existing alternatives which are likely to increase participation in Montana. Audit work shows the following key points to consider about CALA and the orphan share fund:

- ◆ Including Montana, 11 states offer a proportional liability standard alternative.
- ◆ To date, only three facilities completed the allocation process; one is currently in the early stages of the process.
- ◆ Only Montana provides funds to responsible parties for cleanup as part of an alternative liability standard.
- ◆ Due to resources needed to initiate the process, the orphan share fund only benefits a select few.
- ◆ As a result of limited expenditures, a significant balance has accrued in the orphan share fund and the legislature has re-appropriated the fund balance from the orphan share fund for other purposes.

Our audit objective was to examine CALA statute and related policies to determine if alternatives exist which could increase participation. Audit work shows there is no

opportunity to increase participation because the program is directed at a select few. Based on the analysis, we believe the legislature could consider redirecting the orphan share fund to align with CECRA.

## **Responsible Parties May Still Seek Apportionment of Liability**

Redirecting the orphan share to align with CECRA will not affect the ability of responsible parties to reach a settlement for liability. A responsible party will still be able to pursue proportional liability and allocate shares of liability through an administrative settlement, a judicially approved settlement, or private party agreements and suits. Cleanup will occur with the department not directly involved in the apportionment of liability between parties. Rather, the department's efforts will be more directly focused on remediation efforts.

## **Outstanding Stipulated Agreements**

As a result of the CALA negotiation process, parties enter into a stipulated agreement. A stipulated agreement is a contract between responsible parties outlining percentages of liability for a site needing environmental remediation. While the department represents the liability attributable to nonviable responsible parties, namely the orphan's share, the department is not a signatory to the stipulated agreement.

There are currently two stipulated agreements in place, one for the S&W Sawmill facility in Darby and a second for the CMC Asbestos facility in Bozeman. The department expects remediation at the CMC Asbestos facility to be nearly completed in calendar year 2008. These agreements most likely do not represent an outstanding liability for the state; section 75-10-743(3), MCA, indicates the state is not liable should the orphan share fund not contain sufficient money to reimburse claims. Likewise, the stipulated agreements do not provide any financial assurances on the part of the state. However, since all parties negotiated and entered into these agreements in good faith, it may be in the best interest of the state to develop a way to honor these existing agreements.

## **Redirect Orphan Share Fund to Better Align with CECRA**

The basic tenet of the liability standard within CECRA is to allow a state to focus its efforts on remediation. The establishment of CALA has partially diverted the department from cleanup activities to allocating liability between responsible parties. Redirecting the resources of the orphan share fund to the EQPF to align with CECRA provisions would provide the department with additional funds, enable the department to further leverage its resources to more effectively address environmental cleanup efforts, and begin remediation of superfund sites with higher priority rankings that are not currently addressed.

Since CECRA cleanups typically involve historical contamination, there is generally a portion of each facility attributable to responsible parties which no longer exist – an orphan share. Additionally, responsible parties may include entities or individuals which are bankrupt or do not have the financial resources needed to perform cleanup activities. Redirecting orphan share funds into the EQPF would allow the department to use these funds to address orphan sites without any viable party. Based on current estimates, redirecting orphan share funds would result in additional revenues of approximately \$2.8 million annually, after honoring existing agreements and the Zortman-Landusky water treatment trust fund. If unaddressed, these type of sites continue to present potential harm to the public health and welfare of Montana citizens.

---

**RECOMMENDATION #7**

*We recommend the Department of Environmental Quality seek legislation to redirect the Orphan Share State Special Revenue Account into the Environmental Quality Protection Fund to align with the Comprehensive Environmental Cleanup and Responsibility Act.*

---

## Chapter VI – Voluntary Cleanup Programs

### Introduction

This chapter discusses policy issues related to the voluntary cleanup of hazardous waste sites in the state. The Montana Comprehensive Environmental Cleanup and Responsibility Act (CECRA) was amended in 1995 to include the Voluntary Cleanup and Redevelopment Act (VCRA). VCRA was enacted to permit and encourage voluntary cleanup of hazardous substances. Voluntary cleanup programs are state programs that encourage private parties to conduct cleanup of contaminated properties in the absence of state enforcement measures. They typically involve less contaminated sites such as low or medium priority sites that can be cleaned up within a limited timeframe. In order to attract participants, voluntary programs generally offer incentives, such as liability relief and an expedited cleanup process.

One of our objectives was to examine VCRA legislative incentives to determine if they encourage voluntary cleanup and if additional incentives could be used. In order to address our objective, we reviewed statutes and department policies; interviewed department staff and program applicants; examined department records; researched voluntary cleanup programs in other states; and reviewed research by the federal government regarding voluntary cleanup programs. This chapter discusses the voluntary cleanup program, presents findings related to program incentives, and presents recommendations for improving the process and resolving funding issues.

### Voluntary Cleanup in Other States

Forty-seven states offer voluntary cleanup programs. There are a number of elements common to many state voluntary cleanup programs. Most states provide some type of incentive for participation in their programs in an effort to overcome deterrents to performing voluntary cleanups such as potential liability, and cleanup costs. The most

**Forty-seven states, including Montana, offer voluntary cleanup programs.**

common incentives are some form of liability relief, expedited and efficient cleanup oversight processes, and financial incentives such as low-interest loans, grants, and tax credits.

Of these incentives the most widely employed are liability relief mechanisms. When a state provides liability relief, typically, it provides this protection contingent upon state approval of the cleanup and limits the protection to only the contamination addressed by the cleanup activities, excluding unknown, preexisting contamination, or new releases of hazardous substances. Common methods of liability relief include a covenant not to sue, a no further action letter, or a state-issued letter of completion.



In addition to liability relief, another common incentive reported by states is expedited and/or efficient cleanup oversight processes that include clear end points and deadlines for agencies and applicants. Another incentive increasingly employed by states is the use of financial assistance for the voluntary remediation of sites. Financial assistance incentives offered by states include low interest loans, grants, and tax credits.

### **Montana's Voluntary Cleanup Program**

VCRA created and formalized a voluntary cleanup process for the state, specifying application and cleanup plan requirements, review criteria and timeframes, and a closure process. VCRA requirements are outlined in sections 75-10-731 through 75-10-738, MCA. VCRA was developed to permit and encourage voluntary cleanup of facilities where releases or threatened releases of hazardous or deleterious substances exist. VCRA provides interested persons with a method of determining what the cleanup responsibilities will be for reuse/redevelopment of existing facilities.

Any entity, such as facility owners, operators, or prospective purchasers, may submit a Voluntary Cleanup Plan (VCP) to the Department of Environmental Quality (department) for review and approval. Cleanup can occur on an entire facility or a portion of a facility. The plan must include an environmental assessment, a remediation proposal, and the written consent of current owners of the facility or property. Cleanup must be completed within 60 months of VCP approval.

### **VCRA Offers Several Incentives**

The Act offers several incentives to parties voluntarily performing facility cleanup. Any entity can apply and liability protection is provided. The following table illustrates VCRA incentives.

**Table 6**  
**VCRA Incentives**

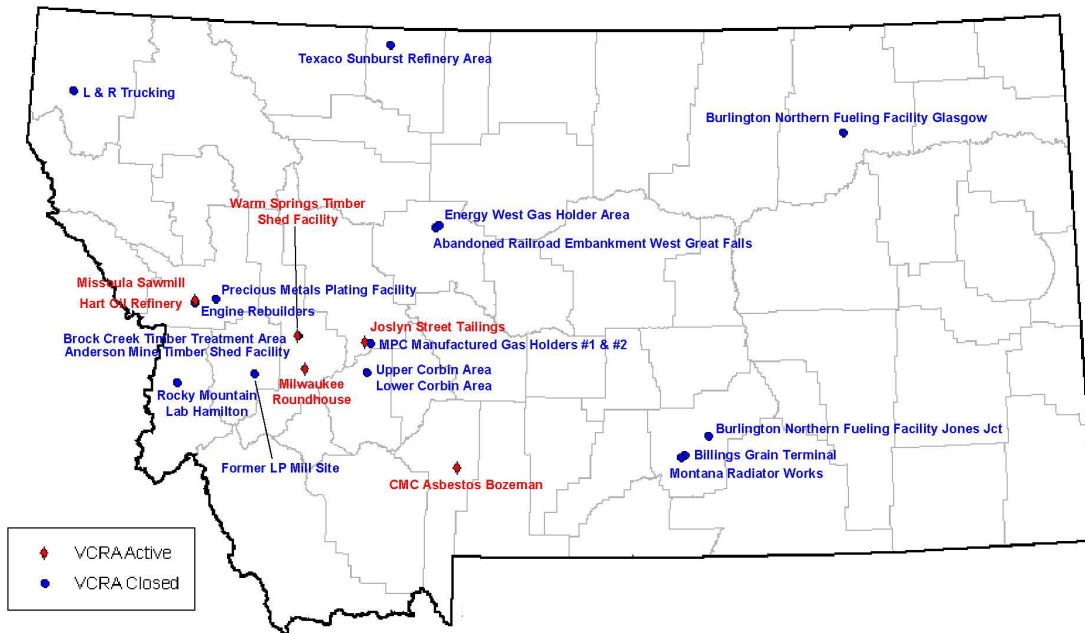
<b>Incentive</b>
<p><b><i>Expedited Process</i></b> Process includes specific time limits for overall approval of a cleanup plan and subsequent remedial action.</p>
<p><b><i>Minimized Administrative Process and Costs</i></b> Aside from review and oversight of the plan (which are cost recoverable), applicants are directly responsible for all remediation costs.</p>
<p><b><i>Property Redevelopment</i></b> Participation in the process legitimizes both the process used and results of remediation actions, assuring any interested buyer or property developer the property is clean and without cleanup liability.</p>
<p><b><i>Liability Immunity (Section 75-10-736(13), MCA)</i></b> If not otherwise liable for a facility cleanup, a person undertaking cleanup action within the context of an approved voluntary cleanup plan may not become a liable person under CECRA.</p>
<p><b><i>Enforcement Stay (Section 75-10-737, MCA)</i></b> The department cannot take enforcement action against the party conducting an approved voluntary cleanup for work addressed in that plan.</p>
<p><b><i>Closure Letter (Section 75-10-738(4), MCA)</i></b> After completion of remediation, the department issues a "letter of completion" if the applicant has met all requirements. The letter legitimizes the cleanup.</p>
<p><b><i>Remediation Flexibility</i></b> While still held to the same cleanup standards as CECRA, VCRA allows an applicant to propose a cleanup remedy that works for them before the department gets involved under the auspices of CECRA.</p>
<p><b><i>Single Medium Cleanup</i></b> A cleanup may only address a single portion of a site, i.e., soil or water. This may present a more realistic/manageable opportunity for an applicant to initiate the process.</p>

**Source:** Compiled by the Legislative Audit Division.

## Program Encourages Voluntary Cleanup

Since 1995, the department has received 43 VCP's at 41 facilities, including mining, manufactured gas, wood treating, dry cleaning, salvage, pesticide, fueling, refining, metal plating, defense, and automotive repair facilities. Since the Act allows for cleanup to occur on an entire facility or a portion of a facility, there may be multiple VCPs proposed at a single facility. According to the department database, 26 VCPs have been approved and 17 sites received closure letters. There are six sites currently active. The following figure illustrates active and closed sites, i.e., sites which received a closure letter.

**Figure 1**  
**Montana's VCRA Sites Active and Closed**



Source: Compiled by Legislative Audit Division from department records.

## Participation Leads to Property Redevelopment

The VCRA program has restored some unused or underused sites to productive use. Since the cleanups are self-initiated, applicants can identify potentially valuable pieces of contaminated property for cleanup and target them for redevelopment. The reduced costs and time for cleanup make the voluntary cleanup and redevelopment of some contaminated sites a viable investment option and allow opportunity for urban redevelopment. Examples of successful redevelopment projects include the following:

- ◆ The City of Bozeman purchased 14 acres of land from the Chicago Milwaukee Corporation. Located at the east end of downtown Bozeman, the land was an inactive ore-loading depot. A recycling and salvage business also operated at the location. Soils were contaminated with asbestos and heavy metals. The City submitted a VCP in 2001 and site remediation work was completed in 2003. The City subsequently constructed and opened a new public library on the site in 2007.
- ◆ The Missoula Sawmill site is an inactive, 45-acre sawmill. It is located on the south bank of the Clark Fork River on Missoula's west side. An old oil refinery is also adjacent to the sawmill. Ground water and soils at the location are contaminated with petroleum hydrocarbons and other contaminants. In 2005, the department received a VCP which was ultimately approved in 2007. Once remediation is completed, the facility will be the location for urban redevelopment and renewal in Missoula.

---

**CONCLUSION**

*Current VCRA incentives encourage voluntary cleanup, often leading to property redevelopment. Montana does not offer financial incentives to participants, as some states do.*

---

## **Improving the VCRA Process**

During our review of the VCRA process, we noted that while the program encourages voluntary cleanup, both department staff and applicants characterize the submission and approval process as challenging. Interviews with department staff indicate the process diverts staff time and resources away from enforcement-based cleanups, the review of a VCP taking priority due to statutory timelines. Staff generally characterize application submissions as substandard, thus requiring multiple revisions. Conversely, applicants generally describe an overly detailed review process focusing on subjective items; they also question the appropriateness of cleanup standards utilized and the overall regulatory culture of the department.

## **Challenging Approval Process Results in Time Delays**

Voluntary cleanup plans often go through multiple revisions from department staff, generally adding years to the time frame before actual cleanup is started at a site. For example, one site's initial voluntary cleanup plan was submitted in August 2005 and not approved until July 2007; three revisions were requested after the initial submission. Factors such as an overly detailed review process, disagreements regarding cleanup levels, and perceptions of an adversarial regulatory culture were noted. An applicant indicated that while some review comments were substantive, others focused on issues of style and grammar. As a result of this back and forth between the department and applicants, there are time delays which add years to the submission and approval process.

## **Lack of A Clear Process Causes Problems**

While sections 75-10-733 through 75-10-734, MCA, outline VCP application and cleanup requirements, the department's role in reviewing and approving a VCP is not clearly defined. As a result, department staff may focus on subjective items rather than required application components. Beyond statute, there is limited guidance for department staff for the review and approval process. As a result of this limited guidance, applicants may not clearly understand the basis used by the department for the review and approval process. While the approval and oversight of a VCP is still a regulatory role,

the department also needs to remain aware of the fact that unlike enforcement-based cleanups applicants step forward voluntarily to cleanup sites. Conversely, while VCRA represents a voluntary process, applicants need to understand cleanup requirements are no less stringent and applicable cleanup standards must be met. VCRA does not employ a formal enforcement mechanism.

## Options to Improve Submission and Approval Process

Section 75-10-731(2)(a), MCA, states one of the purposes of VCRA is to “encourage and facilitate prompt cleanup activities.” While VCRA has successfully encouraged voluntary cleanup through the use of legislative incentives, audit work reveals this intent is not being fully met, specifically when the submission and approval process is considered. A review of five other states’ voluntary cleanup programs, and discussions with department staff offer several options which could be adopted in an effort to improve the VCRA application submission and approval process.

- ♦ ***More Manageable Submission and Approval Process:*** Currently, a VCRA voluntary cleanup plan is one large, comprehensive package. Consideration of a phased approach which breaks the plan down into discrete portions for both submission and review could provide for a more manageable process. For example, a plan could be broken down into three phases, with phase one focusing on site history, phase two on site assessment, and phase three on a remediation proposal.
- ♦ ***Additional Communication:*** An opportunity for structured communication such as periodic workshops could provide meaningful information and perspective for the department and applicants. For example, quarterly meetings focusing on technical remediation requirements and expectations could prevent misunderstandings and provide an opportunity for both the department and applicants to better understand the rationale behind decision-making.
- ♦ ***Additional Applicant and Staff Review Guidance:*** Additional application and review tools could aid applicants in more comprehensively addressing application expectations and the department in maintaining focus when reviewing applications. For example, checklists could be developed for applicants to ensure application completeness and as a review guidance tool adopted for staff to ensure focus on critical application content.

## Additional Application Strategies Will Further Define the Submission and Approval Process

Adopting these application strategies would provide opportunities to improve the process and use of department resources, clearly relay department expectations to applicants and their environmental consultants, and ensure focus of department staff in their review of VCPs. Implementing these strategies should encourage additional applicants and reduce time delays in the plan submission and approval process.

---

**RECOMMENDATION #8**

*We recommend the Department of Environmental Quality adopt additional Voluntary Cleanup and Redevelopment Act application strategies, such as a phased review process, consultant workshops, applicant checklists, and a staff review guidance tool to improve the voluntary application submission and approval process.*

---

## **Funding State Oversight Costs Associated With Voluntary Cleanup Programs**

Funding for the costs states incur in overseeing voluntary cleanup programs comes from a variety of sources, and approaches to funding vary. In addition to federal or state funds, states typically require participants to reimburse the state for voluntary cleanup oversight costs, either in the form of an upfront prepayment for a portion of the state's costs or on the basis of actual costs, or a combination of both. The majority of states require some form of prepayment. Montana's voluntary cleanup program differs from other states in that there is no prepayment of state costs. Rather, the program relies on applicants reimbursing the department for costs incurred with review and oversight.

### **Department Is Not Reimbursed for Oversight Costs**

Statutes clearly require applicants to reimburse the department for any remedial action costs the state incurs in the review and oversight of a VCP (75-10-733(3), MCA). During our review of the department's financial records, we found instances where the department incurred costs for the review and oversight of VCPs, but the involved applicants have either not reimbursed or not timely-reimbursed the department for its costs. Several of these sites involve large dollar amounts with balances past due since at least fiscal year 1996. We were unable to determine exact time frames as data is not readily available. As of February 2008, the outstanding balances for a sample of such sites include:

- ◆ Site 1 - \$9,414
- ◆ Site 2 - \$62,628
- ◆ Site 3 - \$6,851

### **Department is Funding a Portion of Cleanup Costs**

Applicants that do not reimburse the department for its costs are not in compliance with section 75-10-733(3), MCA. Since the department incurs the costs and then seeks

reimbursement from applicants, nonreimbursement results in the department partially funding cleanup costs. This leads to accounts receivable and ultimately, impacts operations funding for the state superfund program.

## **Statutory Requirements Contribute to Funding Problems**

Current statutes give the department limited recourse to address nonreimbursement. Statutes provide the department the ability to not issue a closure letter until the applicant has reimbursed the department. Statutes do not provide the department with the authority to require upfront payment of department costs. In addition, although applicants are past due reimbursing the department for its costs, staff believe they must continue review and oversight work in order to comply with statutory timelines. Thus, the department continues to incur costs for sites where cost reimbursement may not occur. Statutes do not provide the department the ability to cease work or rescind department approval of the voluntary cleanup plan for nonpayment of department costs.

## **Other States Require Prepayment of Costs and Cease Work for NonPayment**

Nearly all states with voluntary cleanup programs seek reimbursement in the form of cost recovery from voluntary program participants. However, a majority of states require applicants to prepay at least a portion of the state agencies' costs at the time a VCP is first submitted. For example, Oregon requires a \$5,000 application deposit as part of cost recovery. In addition, our interviews with representatives from other states indicate it is common practice for agencies to cease work if an applicant does not fulfill their obligations, including reimbursing the state for review and oversight costs.

Since the majority of states with voluntary cleanup programs require applicants prepay a portion of costs at the time a VCP is initially submitted, the department should consider seeking legislation to give it the authority to require a prepayment. The department also needs the capability to cease work on VCPs due to nonpayment. These both would require legislative changes.

---

### **RECOMMENDATION #9**

*We recommend the Department of Environmental Quality seek legislation to:*

- A. *Require applicants to prepay a portion of the department's remedial costs to be submitted along with the voluntary cleanup plan.*
  - B. *Allow the department to cease work on and rescind approval of a voluntary cleanup plan due to nonpayment of remedial action costs incurred by the state.*
-

## APPENDIX A

### Montana State Superfund Sites as of March 24, 2008

Facility	County	City/Locale	Rank
Tungsten Mill Tailings	Beaverhead	Glen	High
Red Rock Lakes National Wildlife Refuge	Beaverhead	Lakeview	Medium
Hirschy Corrals	Beaverhead	Wisdom	Medium
Big Hole Post Plant	Beaverhead	Argenta	Medium
Beaverhead National Forest Elkhorn Mine & Mill	Beaverhead	Wise River	REF
Thorium City Waste Dump	Beaverhead	Grant	REF
Old Crow Agency Dump	Big Horn	Crow Agency	Medium
Busby CCC Camp	Big Horn	Busby	Low
Old Agency Landfill	Blaine	Fort Belknap Agency	High
Diamond Asphalt Co	Blaine	Chinook	Medium
Townsend Post & Pole	Broadwater	Townsend	Medium
Kenison Pole Plant	Broadwater	Townsend	Low
Luther Wood Treating Facility	Carbon	Luther	Medium
Burlington Northern Derailment Site Bridger	Carbon	Bridger	Medium
Sannes Farm	Carbon	Silesia	REF
Burlington Northern Fueling Facility Great Falls	Cascade	Great Falls	High
Anaconda Minerals Company Great Falls	Cascade	Black Eagle	High
Great Falls International Airport MTANG	Cascade	Great Falls	High
West Bootlegger Barrel Site	Cascade	Black Eagle	High
Carpenter & Snow Creek Mining Complex	Cascade	Neihart	High
Chandelle Lane Barrel Site	Cascade	Black Eagle	High
Third Street NW Groundwater Site	Cascade	Great Falls	Medium
Energy West Gas Manufacturing Plant	Cascade	Great Falls	Medium
Western Byproducts	Cascade	Great Falls	Medium
Great Falls City Landfill 25th Ave	Cascade	Black Eagle	Medium
Great Falls Refinery Phillips Petroleum	Cascade	Black Eagle	REF
Malmstrom Air Force Base	Cascade	Great Falls	REF
Bootlegger Trail Site	Cascade	Black Eagle	NFA
Bureau Land Management Steamboat Point	Chouteau	Loma	Low
Miles City Railyard	Custer	Miles City	High
Miles City Livestock Center	Custer	Miles City	Medium
Miles City Oil Refinery	Custer	Miles City	Medium
Ft Keogh Livestock & Range Research Lab	Custer	Miles City	Low
Burlington Northern Fueling Facility Glendive	Dawson	Glendive	High
Dowell Schlumberger Inc	Dawson	Glendive	Medium
Georgetown Railroad	Deer Lodge	Georgetown	High
Berg Post And Pole	Fergus	Lewistown	High
Continental Oil Refinery Lewistown	Fergus	Lewistown	Medium



Facility	County	City/Locales	Rank
Arro Oil Refinery	Fergus	Lewistown	Medium
Strunk Mining	Fergus	Lewistown	Medium
Charles M Russell Refuge	Fergus	Turkey Joe Landing	Low
Central Post and Treating Co	Fergus	Lewistown	Low
Reliance Refining Co	Flathead	Kalispell	High
PacifiCorp Transformer Yard	Flathead	Bigfork	High
Burlington Northern Fueling Facility Whitefish	Flathead	Whitefish	High
Kalispell Pole and Timber	Flathead	Kalispell	High
Beaver Wood Products Inc	Flathead	Columbia Falls	High
Creston Post and Pole Yard	Flathead	Creston	High
Kalispell Landfill Willow Glen Road	Flathead	Kalispell	Medium
Somers Marina	Flathead	Somers	Medium
Yale Oil Corp Kalispell	Flathead	Kalispell	Medium
Burlington Northern Fueling Facility Essex	Flathead	Essex	Medium
Hungry Horse Dam Townsite	Flathead	Hungry Horse	Medium
Kalispell City Landfill Cemetery Road	Flathead	Kalispell	Medium
Larrys Post And Treating Co	Flathead	Columbia Falls	Medium
North American Oil Refinery	Flathead	Kalispell	Low
Burlington Northern Somers Plant	Flathead	Somers	Low
Anaconda Aluminum Co Columbia Falls	Flathead	Columbia Falls	REF
Burlington Northern Derailment Site Whitefish	Flathead	Whitefish	REF
Flathead Mines	Flathead	Niarada	REF
Bozeman Solvent Site	Gallatin	Bozeman	Maximum
Diamond P Ranch	Gallatin	West Yellowstone	High
Pine Tree Timber	Gallatin	Belgrade	High
CMC Asbestos Bozeman	Gallatin	Bozeman	Medium
Davis Post Yard	Gallatin	Willow Creek	Medium
Developmental Technology	Gallatin	Bozeman	Low
Ideal Basic Industry Plant Site Area	Gallatin	Trident	Low
Mercer Post Plant	Gallatin	Bozeman	Low
Bozeman Old City Landfill	Gallatin	Bozeman	Low
Summit Dana Ltd	Gallatin	Bozeman	Low
Karst Asbestos Mine	Gallatin	Gallatin Gateway	REF
Jet Fuel Refinery	Garfield	Mosby	High
Carter Oil Refinery	Glacier	Cut Bank	High
Tucson Hebrew Academy Cut Bank AFB	Glacier	Del Bonita	High
Tank Hill	Glacier	Cut Bank	High
Blackfeet Pencil Factory	Glacier	Browning	Low
Poisoned Oats Disposal	Glacier	Browning	Low
Chevron USA Inc Browning Bulk Hoyt Dist	Glacier	Browning	Low
Blackfeet Post and Pole	Glacier	Browning	Low
Union Oil Cut Bank Refinery	Glacier	Cut Bank	REF

Facility	County	City/Locales	Rank
Granite Timber Co	Granite	Philipsburg	High
Sluice Gulch Leaking Mine Adit	Granite	Philipsburg	REF
Burlington Northern Fueling Facility Havre	Hill	Havre	Maximum
Burlington Northern Krezelak Pond	Hill	Havre	Medium
Burlington Northern Racetrack Pond	Hill	Havre	Medium
West Second Street Havre	Hill	Havre	Medium
Rocky Boy Post & Pole	Hill	Rocky Boy	Medium
Havre Refinery	Hill	Havre	Low
Basin Mining Site	Jefferson	Basin	High
Boulder River Railroad	Jefferson	Boulder	Low
Corbin Flats	Jefferson	Jefferson City	OM
Lewis & Clark National Forest	Judith Basin	Hughesville	High
Midway Store Dump	Lake	Ravalli	Medium
Old Community Dump	Lake	Ronan	Medium
Old Charlo Dump	Lake	Charlo	Low
Old Arlee Dump	Lake	Arlee	Low
Joslyn Street Tailings	Lewis and Clark	Helena	High
Burlington Northern Fueling Facility Helena	Lewis and Clark	Helena	High
MDOT Maintenance Facility Helena	Lewis and Clark	Helena	High
Tenmile Creek	Lewis and Clark	Helena	High
Upper Blackfoot Mining Complex	Lewis and Clark	Lincoln	High
Montana Power Co Manufactured Gas Plant	Lewis and Clark	Helena	Medium
Helena Regional Airport	Lewis and Clark	Helena	Medium
Alice Creek Post and Pole	Lewis and Clark	Lincoln	Medium
Safety Kleen	Lewis and Clark	Helena	Low
Goldsil Mining Co	Lewis and Clark	Marysville	REF
Haywire Mill	Lincoln	Yaak	Medium
Old Libby Airport Pole Treating Facility	Lincoln	Libby	NFA
Bohrmans Exxon	Madison	Ennis	Medium
Valley Garden Vat	Madison	Ennis	Low
Pony Mill	Madison	Pony	REF
Railroad Tie Treating Yard	Meagher	White Sulphur Springs	Medium
Iron Mountain Mill	Mineral	Superior	Maximum
Milwaukee Road Haugan	Mineral	Haugan	High
Saint Regis Battery Site	Mineral	Saint Regis	Low
Alberton Roundhouse	Mineral	Alberton	Low
Marble Creek Post Yard	Mineral	Superior	Low
Missoula White Pine Sash Co	Missoula	Missoula	High
Hart Oil Refinery	Missoula	Missoula	High
Burlington Northern Fueling Facility Missoula	Missoula	Missoula	High
Missoula Sawmill	Missoula	Missoula	High
Fort Missoula OMS 2	Missoula	Missoula	Medium

Facility	County	City/Locale	Rank
Old Stickney Dump	Missoula	Missoula	Medium
Missoula Vocational Tech Center	Missoula	Missoula	Medium
J & N Post and Pole	Missoula	Evandro	Medium
Real Log Homes Manufacturing Site	Missoula	Missoula	Medium
All American Bumper & Plating	Missoula	Missoula	Low
AJ's Laundry and Linen	Missoula	Missoula	NFA
Montana Rail Link 1930 South Avenue West Facility	Missoula	Missoula	NFA
West Front Battery Site	Missoula	Missoula	NFA
Roundup Landfill	Musselshell	Roundup	Low
Burlington Northern Livingston Shop Complex	Park	Livingston	Maximum
New World Mine	Park	Cooke City	High
Mission Wye	Park	Livingston	High
Yellowstone Bridge Asbestos	Park	Livingston	Low
Strongs Post Yard	Park	Livingston	Low
Jardine Arsenic Tailings	Park	Jardine	REF
McLaren Mill Tailings	Park	Cooke City	REF
Weowna Oil Refinery	Petroleum	Winnett	Low
Malta Airport	Phillips	Malta	Medium
Kings Creek	Phillips	Hays	REF
Conrad Refining Co	Pondera	Conrad	Medium
Fisher Flats Dump	Pondera	Valier	Low
Midwest Refining Co	Pondera	Conrad	Low
Belle Creek Barrel Site	Powder River	Belle Creek	Low
Milwaukee Roundhouse	Powell	Deer Lodge	High
Rocky Mountain Phosphate	Powell	Garrison	High
Bitterroot Valley Sanitary Landfill	Ravalli	Victor	Maximum
S & W Sawmill	Ravalli	Darby	High
Bass Creek Post and Pole	Ravalli	Stevensville	Low
Perry Gas Plant	Richland	Sidney	Medium
Rau Disposal Pit	Richland	Sidney	Medium
McCulloch Purchase Station	Richland	Fairview	Low
A & S Industries	Roosevelt	Poplar	High
Wolf Point Refinery Kenco Refinery	Roosevelt	Wolf Point	High
Tule Creek Gas Plant Crystal Oil	Roosevelt	Poplar	Medium
Moe Chevrolet	Roosevelt	Poplar	Medium
Old Poplar Landfill	Roosevelt	Poplar	Medium
Burlington Northern Derailment Site Bainville	Roosevelt	Bainville	Low
Saint Labre Plastic Factory	Rosebud	Ashland	Medium
Old Lame Deer Dump	Rosebud	Lame Deer	Medium
Flathead Post and Pole	Sanders	Agency	Medium
Agency Dump	Sanders	Agency	Medium
Dixon Perma Dump	Sanders	Dixon	Medium

Facility	County	City/Locale	Rank
Musters Post Yard	Sanders	Thompson Falls	Medium
Thompson Falls Reservoir	Sanders	Thompson Falls	Low
Bonneville Power Administration Hot Springs	Sanders	Hot Springs	Low
Revais Creek Mine	Sanders	Dixon	REF
Rhodia Maiden Rock Mine	Silver Bow	Melrose	High
Butte Manufactured Gas Plant	Silver Bow	Butte	High
Montana Power Co Storage Yard	Silver Bow	Butte	Medium
Butana Speedway	Silver Bow	Butte	Medium
Burlington Northern Fueling Facility Butte	Silver Bow	Butte	Medium
Russell Oil Co Butte	Silver Bow	Butte	Low
Laurel Oil & Refining Co	Silver Bow	Butte	Low
Roundup Refining Co	Silver Bow	Butte	Low
Stauffer Chemical Co	Silver Bow	Ramsay	REF
Big West Oil Refinery	Toole	Kevin	High
Texaco Sunburst Works Refinery	Toole	Sunburst	Low
Burlington Northern Fueling Facility Shelby	Toole	Shelby	Low
Petroleum Refining Co	Toole	Shelby	Low
Treasure State Refining Co	Toole	Shelby	Low
Western Area Power Administration Substation	Toole	Shelby	Low
Opheim Asbestos	Valley	Opheim	Medium
Fort Peck Project	Valley	Fort Peck	Medium
Glasgow Air Force Base	Valley	Glasgow	Medium
Oswego Landfill	Valley	Oswego	Low
Harlowton Milwaukee Roundhouse	Wheatland	Harlowton	Medium
Lockwood Solvent Site	Yellowstone	Billings	Maximum
Yale Oil of South Dakota	Yellowstone	Billings	High
Billings PCE Groundwater	Yellowstone	Billings	High
Burlington Northern Fueling Facility Laurel	Yellowstone	Laurel	High
Comet Oil Co	Yellowstone	Billings	High
West Billings Solvent Site	Yellowstone	Billings	Medium
Burlington Northern Fueling Facility Billings	Yellowstone	Billings	Medium
Empire Sand & Gravel Co Inc Billings	Yellowstone	Billings	Medium
Lohof Gravel Pit	Yellowstone	Billings	Medium
Pacific Hide & Fur Billings 4th Ave	Yellowstone	Billings	Medium
Pacific Hide & Fur Billings Minnesota Ave	Yellowstone	Billings	Medium
Coffman Lumber & Treatment Co	Yellowstone	Billings	Medium
Prairie View Recreational Park	Yellowstone	Billings	Medium
Montana Sulphur and Chemical Co	Yellowstone	Billings	Medium
Scott Feed Lot	Yellowstone	Billings	Medium
Union Tank Car Co	Yellowstone	Laurel	Medium
General Electric Co	Yellowstone	Billings	Low
Russell Oil Co Billings	Yellowstone	Billings	Low

Facility	County	City/Locale	Rank
Big Horn Oil & Refining Co	Yellowstone	Billings	Low
Department of Army AMSA 5	Yellowstone	Billings	Low
Pierce Packing Plant	Yellowstone	Billings	Low
OM=Operation and Maintenance			
REF=Referred to Another Program			
NFA=No Further Action			
<b>Source: Compiled by the Legislative Audit Division from department records.</b>			

## APPENDIX B

### Major Steps of the Superfund Process

Once government officials become aware of a site, an investigation is initiated. Either the Environmental Protection Agency (EPA) or the Department of Environmental Quality (department) leads the investigation. The process follows the same general steps for both state and federal sites. Investigation of a superfund site is complex, thorough and detailed. This is because a hazardous substance can have significant actual and potential effects on public health and the environment and cleanup can be costly. A superfund investigation must also be legally defensible if the parties responsible for paying cleanup costs or others decide to challenge findings in court. The following sections provide a general overview of the process.

### **Facility Listing and Ranking**

Hazardous substance sites are ranked to determine whether the EPA or department will lead the cleanup and to assess relative risks. For sites with the potential to be federal superfund sites, government staff score the site using EPA's hazard ranking system, based on information from the preliminary assessment and site inspection. Scores range from 0 to 100. Sites achieving a score of 28.5 or higher are eligible to be placed on the national priority list. However, these sites could potentially be addressed by the state. Sites scoring below 28.5 are referred to the state's Comprehensive Environmental Cleanup and Responsible Act (CECRA) program if further investigation and cleanup is deemed necessary.

In compliance with section 75-10-704(3), MCA, and ARM 17.55.111, the department prioritizes facilities based on the potential risk posed by the facility to public health, safety or welfare, or the environment. The department develops and maintains a CECRA Priority List. CECRA defines "facility" as all areas where a hazardous or deleterious substance has been deposited, stored, disposed of, placed, or otherwise come to be located. Using a facility ranking methodology, the department ranks CECRA facilities as maximum, high, medium, or low, depending upon the potential threat to public health and the environment. Maximum represents a facility which exhibits the most risk to human health and the environment. During this ranking process, facilities may also be referred to another department program if appropriate. Additionally, a facility may be determined as no further action needed if all cleanup criteria have been met at the site.

### **State Superfund Cleanup Process**

For each state superfund site, there is a series of actions and activities that occur as part of the department's oversight role in ensuring site remediation. These steps occur after a site has been placed on the CECRA priority list and fall into five general phases. Work is performed by department staff and its consultants, and responsible parties and their consultants. Phases and typical timeframes follow.

### **Phase 1: Identify and Notify, Year 1**

- ◆ Research to identify and notify potentially liable persons and provide parties an opportunity to conduct proper and expeditious remedial actions.

### **Phase 2: Three-Step Investigation, Years 2-6**

- ◆ Remedial investigation to identify the magnitude, extent and nature of contamination.
- ◆ Risk assessment to evaluate threats posed to human health and environment. Allows for the development of site-specific cleanup levels and assesses exposure pathways for each contaminant.
- ◆ Feasibility study to identify and evaluate various options for cleaning up the site.

### **Phase 3: Determine Final Cleanup, Years 7-8**

- ◆ Proposed plan which presents the preferred cleanup option for the site and is published for public comment.
- ◆ Record of decision, the legal document specifying the option to be used for cleanup.

### **Phase 4: Implement Final Cleanup, Years 9-12**

- ◆ Remedial design is a prepared design to properly implement the Record of Decision. The department and responsible parties typically negotiate a consent decree. At this point, a complete engineering design and project is bid.
- ◆ Remedial action to implement the design and cleanup the site.
- ◆ Operation and maintenance for the ongoing oversight and evaluation of a site after cleanup. Not all sites require operation and maintenance.

### **Phase 5: No Further Action/Delisting, Year 12+**

- ◆ Once the department determines all cleanup criteria is met at a site, a no further action letter is issued and the site may be delisted if appropriate.





DEPARTMENT OF  
ENVIRONMENTAL  
QUALITY

DEPARTMENT RESPONSE



# Montana Department of ENVIRONMENTAL QUALITY

Brian Schweitzer, Governor

P.O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • www.deq.mt.gov

June 6, 2008

Scott A. Seacat, Legislative Auditor  
Legislative Audit Division  
State Capitol  
Helena, Montana 59620-1705

RECEIVED

JUN 06 2008

LEGISLATIVE AUDIT DIV.

**Re: Program and Policy Issues Impacting State Superfund Operations  
Legislative Audit Division Report No. 08P-05 Dated June 2008**

Dear Mr. Seacat:

By this letter, I am transmitting the department's formal response to recommendations presented in the Legislative Audit Division Report No. 08P-05 "Program and Policy Issues Impacting State Superfund Operations." The department agrees fully with seven of the nine recommendations and agrees in part with the other two. The enclosed responses present the department's position, contemplated corrective action, and anticipated timeframe for implementing each recommendation. Implementation has begun and/or been completed on five of the recommendations and planned for the others.

I will be available for the June 20 meeting of the Legislative Audit Committee, and will appropriate staff from my office and the Permitting and Compliance Division. We will inform your office of those department staff attending for all audit presentations related to the department.

I was yet again impressed with the caliber of your staff, particularly with their competence and professionalism. The audit was thorough and fair, and it will help us as we move forward with improvements to the program.

Sincerely,

Tom Livers  
Deputy Director

- c: Richard H. Opper, DEQ Director
- Sandi Olsen, Remediation Division Administrator
- Mike Trombetta, Hazardous Waste Cleanup Bureau Chief
- Denise Martin, Site Response Section Supervisor

### III. MANAGEMENT CONTROLS

#### Recommendation #1

We recommend the Department of Environmental Quality:

- A. Establish priorities and develop a plan of action to address House Joint Resolution 34 study recommendations.
- B. Set long-term priorities and provide ongoing guidance for the Comprehensive Environmental Cleanup and Responsibility Act program.

A. The department concurs in part with this recommendation. The department agrees with some of the recommendations from the HJR34 report, but believes others need more discussion. We would welcome the opportunity to discuss further the latter recommendations. We will incorporate recommendations from the HJR34 study along with recommendations from this audit into an action plan, to be developed in early fiscal year 2009.

B. The department concurs. This recommendation speaks to the overall management of the state superfund program. Contamination sites have been prioritized according to administrative rule (ARM 17.55.105 and 17.55.111) and those priorities are periodically updated. However, the report concludes that program guidance from upper management could be more clear and direct. This appears to be an accurate conclusion. The department will organize at least two meetings per year in which the DEQ Director and/or Deputy Director, the Division Administrator, the Bureau Chief and state superfund program staff establish and/or review long-term priorities, goals and funding for addressing clean up at contaminated sites. This step will be implemented early in Fiscal Year 2009.

### IV. COST RECOVERY CONTROLS

#### Recommendation #2

We recommend the Department of Environmental Quality:

- A. Conduct supervisory review of invoice packets to ensure staff adheres to department cost recovery policy requiring authorization by a project officer prior to paying invoices.
- B. Train additional department staff to assist with monthly invoicing of liable parties to ensure timely billing.

A. We concur. The invoice review checklist has been modified to incorporate this step.

C. We concur. Cross training is underway with new staff, following successful recruitment for the vacant FTE.

**Recommendation # 3**

**We recommend the Department of Environmental Quality assign responsibility to compile and maintain current data necessary to analyze account status for all Comprehensive Environmental Cleanup and Responsibility Act projects.**

The department concurs and has assigned these responsibilities to appropriate staff. Within the department's Office of Financial Services, the budget analyst assigned to the Remediation Division will compile and maintain data annually. Remediation Division financial and program management staff will analyze the data annually and take appropriate actions based on the analysis. Please see the attached CECRA Cost Recovery Procedures (dated April 17, 2008), including Appendix A.

**Recommendation # 4**

**We recommend that the Department of Environmental Quality:**

- A. Finalize and ensure implementation of policy for evaluating accounts receivable and addressing uncollectible accounts.**
- B. Evaluate Environmental Quality Protection Fund accounts receivable to determine viability of accounts and take appropriate action including transferring accounts to other agencies/entities and writing off uncollectible accounts as bad debt.**
- C. Establish thresholds to define when department management should be involved in accounts receivable assessment and decision-making.**

A. We concur. This policy has been adopted, effective April 17, 2008, and will be updated as policy gaps or new issues are identified.

B. We concur. This action is underway and should be completed by July 23, 2008 (FYE 2008).

C. We concur. Department management will be involved in an annual review of accounts receivable and provide decision-making guidance, including dollar thresholds (see Section J(2) in the attached CECRA Cost Recovery Procedures) and cost-benefit analysis, regarding transfer to another department/entity assessment and bad debt.

**Recommendation # 5**

**We recommend the Department of Environmental Quality:**

- A. Finalize policy for bringing legal action against potentially liable parties for nonpayment of the department's remedial action costs to include defined thresholds for pursuing action.**
- B. Identify changes needed in statutes to enhance the department's ability to recover remedial action costs and seek statutory changes to resolve issues.**

A. We concur and have finalized the policy (see Section J(2) in the attached CECRA Cost Recovery Procedures, dated April 17, 2008.)

- B. We concur. The department has submitted a placeholder in the Executive Planning Process to accommodate changes resulting from this audit that require statutory change.

**Recommendation #6:**

**We recommend the Department of Environmental Quality ensure the Financial Services Office is the primary entity responsible for enacting accounts receivable policy and ensuring procedures are followed.**

The department concurs that the Financial Services Office will take the lead in ensuring appropriate accounts receivable policy is enacted and implementation is monitored. In addition, the department is developing a consolidated receivable system pursuant to last session's DP1001, internally known as the RAR project. This project will implement the accounts receivable, billing and associated collection components of the state's SABHRS system to streamline and standardize processes.

**V. SUPERFUND POLICY ISSUES**

**Recommendation # 7:**

**We recommend the Department of Environmental Quality seek legislation to redirect the Orphan Share State Special Revenue Account into the Environmental Quality Protection Fund to align with the Comprehensive Environmental Cleanup and Responsibility Act.**

The department concurs with the need for additional financial resources in the EQPF and thus CECRA. The Orphan Share account may be a good source of additional funding, although honoring existing agreements within Orphan Share may limit the ability to do this in the immediate future. The department would welcome the opportunity to work with the legislature to consider the benefits and consequences of this option.

**VI. VCRA**

**Recommendation # 8**

**We recommend the Department of Environmental Quality adopt additional Voluntary Cleanup and Redevelopment Act application strategies, such as a phased review process, consultant workshops, applicant checklists, and a staff review guidance tool to improve the voluntary application submission and approval process.**

The department concurs. We will recruit the VCRA coordinator position during the summer and will implement appropriate strategies to improve the process within the fiscal year.

**Recommendation #9**

**We recommend the Department of Environmental Quality seek legislation to:**

- A. Require applicants to prepay a portion of the department's remedial costs to be submitted with the voluntary cleanup plan.**
- B. Allow the department to cease work on and rescind approval of a voluntary cleanup plan due to nonpayment of remedial action costs incurred by the state.**

We concur. A legislative proposal has been submitted to allow the department to cease work and require full payment prior to receiving approval. This will be amended to also propose the department establish a fee through rulemaking to be submitted with the voluntary cleanup plan.

# CECRA COST RECOVERY PROCEDURE

## Remediation Division

Invoicing and Interest Charges

Adopted April 17, 2008

Affected Divisions: REM FSU, REM SRS, and OFS

Effective Date: July 1, 2001, as revised, April 2008

### A. PURPOSE OF THIS PROCEDURE

The purpose of this procedure is to set out guidelines for implementing SB 378 amendments to CECRA, as approved in the 2001 Legislature, as well as other guidelines laid out in the Montana Operations Manual (MOM) and the Comprehensive Environmental Cleanup and Responsibility Act (CERCA) statutes (75-10-701 *et seq.*, MCA). CECRA amendments from SB378 authorize the department to collect interest for unpaid cost recovery invoices. This procedure supplements previous agreements between the Department of Environmental Quality's Office of Financial Services (OFS – formerly Centralized Services Division (CSD)) and the department's Remediation Division (REM) regarding cost recovery. (DEQ 2001 REM-OFS Guide to Cost Recovery Billing)

Any changes in invoicing procedures (DEQ 2007) must be jointly reviewed by OFS and REM and properly recorded in procedural documents and distributed to those parties involved with this procedure.

### DEFINITIONS

1. 106 Reports – Monthly financial summaries based on organizational units.
2. BSR – Budget Status Reports, prepared as requested by OFS and prepared monthly for REM when FSU is fully staffed.
3. CALA – Controlled Allocation of Liability Act §75-10-742, MCA, *et seq.*
4. Close of Billing Period – The close of the billing period is the end of the month. OFS receives 106s on the 1<sup>st</sup> of the month or the first working day thereafter. REM will receive 106s from OFS through internal mail by the 2<sup>nd</sup>, and billing will commence.
5. CECRA – Comprehensive Environmental Cleanup and Responsibility Act: §75-10-701, MCA *et seq.* This statute includes numerous definitions which may be assistance in applying these procedures.
6. CECRA sites – a listing of locations, maintained in accordance with statutory and regulatory direction, of contaminated facilities that may be cleaned up under the authority of the CECRA statutes.
7. CSD – Centralized Services Division, predecessor to OFS
8. DA – Division Administrator
9. EQPF – Environmental Quality Protection Fund (02162) state special revenue account
10. FSU – Fiscal Services Unit of Remediation Division
11. FYE – fiscal year end
12. MCA – Montana Code Annotated
13. MOMs – Montana Operations Manual – infamous as a repository for financial and personnel regulations published by the Department of Administration.
14. Notice – The opportunity, by letter, given to persons who are liable or potentially liable under §75-10-715(1) to properly and expeditiously perform the appropriate remedial action (§75-10-711 (1)(b)). Often referred to as “noticing.”
15. OFS – the department's Office of Financial Services
16. Org, or Org unit, or OU - organizational number assigned for the purposes of tracking expenditures attributable to individual CECRA facilities.
17. PLPs – Potentially Liable Person
18. Program – Site Response Section's CECRA activities
19. REM – Remediation Division
20. RIT – Resource Indemnity Tax
21. SB103 – Senate Bill 103 from the 2003 Legislative Session – authorized loans to EQPF (02162)

- and the Hazardous Waste CERCLA (02070) accounts for the 2003 biennium
22. SB143 – Senate Bill 143 from the 2005 Legislative Session - authorized loans for one more biennium. See SB103.
  23. SB378 – Senate Bill 378 from the 2001 Legislative Session authorized the department to collect interest on unpaid invoices
  24. SRS – Site Response Section within the Hazardous Waste Site Cleanup Bureau of Remediation Division
  25. VCRA – Voluntary Cleanup and Redevelopment Act at §75-10-730, MCA, *et seq*, which applies to a subset of CECRA sites

## **B. WHEN TO COST RECOVER**

It is the Division's policy, as concurred with by the Department's Office of Financial Services (OFS), to invoice all noticed potentially liable persons (PLPs) (See Section C) monthly, thus ensuring compliance with MOM 2-1190.00. Initial notices will be sent in the first billing cycle following noticing, and monthly, thereafter, except as provided by other criteria in this policy. Any lag in monthly billing must be brought to the attention of the appropriate supervisors and the division administrator.

All billable goods and services will be accumulated on a monthly basis and invoices rendered as follows. The close of the billing period will be the end of the month. OFS will deadhead 106 reports immediately to REM. In the absence of an automated billing system, it is the division goal to complete and distribute the approximately 40 invoices that currently must be prepared by the 15th of the month. Thus, FSU will organize its billing to be completed monthly. Exceptions are outlined in Section G of this document and include Fiscal Year End exceptions.

Invoices will be prepared for the same facility at approximately the same time each month (i.e. in the same billing period within 1 or 2 days, each month). When the IT tools and/or staffing are available to support faster processes, the REM will complete billing by the 10th of the month, consistent with OFS procedures.

## **C. WHO TO INVOICE**

Invoices are sent to noticed PLPs, pursuant to § 75-10-711(1)(b), associated with CECRA and VCRA facilities where cleanup is being actively administered by the program. Program priorities are a function of statutory guidance. Under the VCRA section of the CECRA statutes, the legislature has established timeframes for department reviews of VCRA activities in order to encourage PLPs and others to voluntarily come forward to cleanup contaminated sites. These process/ review timeframes do not occur in CECRA itself. Also under CECRA there are no process timeframe requirements placed on the PLP, due in part to the wide range in variability of site characteristics and contaminants.

Workload priorities non-VCRA sites are based on the priority ranking of the site, the resources available to complete noticing and proceed with administration of cleanup activities and, when provided, supplemental guidance from the Legislature.

### **1. Pre – Invoicing**

At the request of the SRS program, an organizational unit is assigned to a facility by FSU/OFS when the program initiates work at the facility. The program is notified by FSU of the org unit and its effective date. Expenses attributable to a facility prior to identification and noticing of PLPs shall be expended against a site-specific org for future retrieval purposes. To ensure that information is not lost through time and changes in state accounting software and processes, FSU shall prepare at least an annual invoice or other site-specific report for these org units that captures and documents all past costs / expenditures to date in order to ensure costs are tracked for future recovery. A copy of this report shall be maintained in both FSU and program files. Interest is not attributable to costs incurred prior to noticing PLPs.



OFS will maintain a spreadsheet showing both active and inactive org units that are not yet subject to the invoicing process. (Appendix A). This spreadsheet is to be reviewed and updated at fiscal year end to determine whether there has been a change in facility or PLP status and to determine whether any follow-up action is needed.

## 2. Initial Invoicing

Potentially Liable Persons (PLPs) under CECRA (§ 75-10-711, MCA) are identified by REM's Site Response Section (SRS) for each CECRA facility. This information is given to REM's Fiscal Services Unit (FSU) at the time of noticing by providing FSU a copy of the notice letter with a cover memo explaining what organizational (org) units FSU has assigned that will be associated with the PLP(s) and the site, so that future invoices can be generated. FSU will notify the program, the assigned staff, and PLPLs of changes in org units that may occur through time.

When there is more than one PLP, each PLP gets invoiced the total amount owed. This would include all billable costs plus any interest. Each PLP is jointly and severally liable for the full amount. DEQ does not recognize any private agreements among the PLPs.

If double or excess payments are made, the excess will be treated as a credit on the subsequent invoice.

When a settlement agreement is reached with DEQ, a Controlled Allocation of Liability Act (§ 75-10-742, MCA, (CALA) allocation is completed, or a court has determined percent of liability, there is an apportioning of the costs. When costs are apportioned, the invoice shall display the amount owed to the department that is the responsibility of the party being invoiced.

## 3. Change in Invoicing

Parties to be invoiced for a facility may change from time to time. Examples include companies acquired by another firm, deceased PLPs with estates (for which we submit a claim), bankruptcies, or (as in the case of CALA and possibly some future sites) additional PLPs may be noticed at a later date. When this occurs, SRS will provide an email to FSU notifying FSU of the needed change. When the parties change, the bills are still sent in full to each PLP (the new company, the estate, and to any additionally noticed PLPs, etc.), as noted above. If a question arises on a particular project, FSU will consult with the SRS supervisor.

## D. WHAT TO INVOICE

Each PLP shall be invoiced the full amount charged to an org unit. In addition, overhead charges will be assessed to each invoice to account for expenditures such as rent, etc as outlined in the Division's 2007 *EQPF Calculation for Overhead Rates* procedure that was negotiated with OFS in December 2006. See Appendix B.

When interest accrues on an unpaid invoice the interest is also fully charged to each PLP (see "who to bill," above). Even if one PLP has paid a portion of the invoice, the PLP remains liable for the remaining balance and the interest on the unpaid balance, unless as noted above, there has been a DEQ settlement, a CALA allocation or a court decision allocating liability. In the case of a settlement, allocation, or court decision each liable party gets invoiced interest only on what it owes.

Interest will be recorded as a part of each invoice, calculated as follows:

$$\begin{aligned} & \text{(Remedial Action Costs (without interest) from prior billing periods * 10\% * \%of the year it is owed for)} \\ & = \text{Amount of Interest Owed} \end{aligned}$$

The percent of the year is determined by calculating the number of days between the due date and the payment date and dividing by 365. Section § 25-9-205, MCA, adopted under SB378 details the method

of calculation, specifically prohibiting compounding of interest. Therefore, invoices which remain unpaid for prolonged periods may include several interest calculations because the timeframe for each unpaid quarterly invoice will vary.

See also Appendix D for multiple PLP invoicing and interest.

## E. PREPARING INVOICES

Formatting of invoices has been established by FSU in consultation with OFS, consistent with the other requirements of this procedure. See Appendix C - Guide to Cost Recovery Billing. This format details the account activity and the balance owing. By July 31, 2008, all three financial specialist in FSU will be capable of assisting with or completing billing at any time for any CECRA site.

Within 5 to 10 days of receipt of the month-end 106 reports, FSU will prepare invoices. Invoices will be proofed using the FSU Checklist - Appendix D. Then the program manager will review and sign the invoices, using the SRS Checklist (Appendix D).

All invoices will include the following language:

*This invoice does not reflect or release the invoiced party of any liability for interest on amounts unpaid or past due as of September 30, 2001, under the pre-judgment interest statutes or other authority.*

For those sites where liability has been apportioned to multiple parties, the invoice will detail the total amount due for the site and a cover letter will identify the cost, in both percent and absolute dollars, owed by the individual PLP being invoiced.

## F. DUE DATES

FSU selects a "date due" for the invoice that reflects due dates as established under SB 378 (§75-10-722(3), MCA), or within the time period set out in specific Orders or Settlement Agreements (See Attached List – Appendix E. Typically, invoices will be due within 60 days. Longer periods are allowed under CECRA under certain conditions. However, this procedure is intended to preclude the occurrence of those conditions. See also Mailing Invoices, Section H. FSU will maintain a spreadsheet for tracking due dates and will provide a link to the program manager and legal staff so that all three programs can track due dates.

## G. EXCEPTIONS TO MONTHLY INVOICING

Deviation from the requirements of MOM 2-1190.00 are allowed under certain settlement conditions, contract or rule. Those exceptions under this policy are as follows

### Fiscal-Year-End Exceptions

1. June invoices will not be billed until the fiscal year end is closed out, typically about July 25<sup>th</sup>. June revenue will be accrued for the financial statements.
2. July and August 106s will be a combined billing. The rationale for this is that typically, the July report is minimal because of the lag in posting due to fiscal year end activities.
3. Exceptions will be made for all July bills where contracted services expenditures exceed \$50,000 for the month of July. In this circumstance, a July invoice will be sent to the appropriate PLPs the first week of August.

### Quarterly Exceptions

4. The Department of Defense will continue to be billed quarterly, pursuant to the Memorandum of Agreement between DOD and the Department (See annual agreement – identified in Appendix F-

- 1).
5. Under the USFS agreement for the New World Site, invoicing will occur quarterly and the abandoned mine section supervisor will be responsible for reviewing invoices and implementing applicable agreement procedures. (see annual agreement Appendix F-2)
6. Under the USFS agreement for the Libby Snowshoe Site, invoicing will occur quarterly and the abandoned mine section supervisor will be responsible for reviewing invoices and implementing applicable agreement procedures. (see annual agreement Appendix F-3)

#### **Other Exceptions**

7. When the amount owed is less than \$50 (including overhead) in any given month, invoicing may be delayed until the end of the quarter. These delays will be tracked monthly as a part of invoice preparation.

The amount of \$50 is based on the current estimates that generating an invoice costs the department approximately \$30, depending on the complexity, number of PLPs etc. Some invoices are up to 1-inch thick and may be distributed to 6 or more PLPs.

8. Invoicing will not occur for expenditures on sites where PLPs have not been noticed. However, expenditures will be logged to a designated organizational unit so that when PLPs are identified and noticed, they can be invoiced. See Section C and Appendix A
9. Invoicing will occur no less than quarterly for PLPs with a demonstrated record of failure to pay. (See Section J). A "demonstrated record of failure to pay" for the purposes of this procedure is defined as 6 or more consecutive unpaid invoices and failure to respond to inquiries about payments from the project officer. When an invoice is not paid in a timely fashion, the project officer shall contact the PLP regarding unpaid invoices to determine if there are any outstanding issues or invoice questions to be addressed and shall document that contact to the program manager. If the invoice remains unpaid, and no issues are identified that need to be resolved, the project officer shall contact the PLP monthly for at least 6 months. In addition, at the end of the 6-month period, the program manager shall request that legal staff send legal notice to the PLP. This notice shall be copied to the program and the FSU.

#### **H. MAILING INVOICES**

Invoices are sent by certified mail, return receipt requested.

If certified mail is unclaimed or refused and there are multiple PLPs, the date of receipt will be considered (for purposes of determining when payments are due) to be the latest day any PLP accepted receipt of the invoice. For those projects where no PLP accepts a certified mailing, the invoice will be re-mailed, uncertified, and the date of receipt will be presumed to be 5 working days later. This presumption gives the PLP the benefit of 2 days beyond the 3-day mail rule recognized in both state and federal Rules of Civil Procedure (Rule 6(e), Montana Rules of Civil Procedure and Rule 6(e) Federal Rules of Civil Procedure).

Under strict, joint and several liability, any noticed PLP is liable for all department costs at that site, under CECRA, regardless of whether they pick up their bills or not.

When invoices are refused or unclaimed, the PLP will be mailed both a certified and uncertified letter that indicates it is being referred to legal staff for further action. Concurrently, the PLP/site is to be added to the program's prioritized cost recovery list (Appendix G) for further legal action and quarterly invoices will continue to be sent to the PLP. The project officer shall also make contact as described in sections G.9. and J. Additional notice is not necessary if invoices continue to be refused or unclaimed, See Section J

for further action.

## **I. PAYMENT OF INVOICES**

Invoices must be paid consistent with the schedule lined out in 75-10-722(3), MCA (SB 378). Thus if bills are not sent monthly, except as outlined in Section G, above, the FSU must track the payment cycle to ensure that payment deadlines are properly adhered to (see Appendix H). Parties may not pay on installment unless the following circumstances exist:

- The department has entered into or the court has established a payment schedule allowing for installments.
- A new/changed PLP has entered the picture and makes such a proposal. Such proposals will be evaluated site-specifically by the program manager, division administrator, the FSU supervisor and legal staff. Under an installment plan, a PLP is still responsible for interest on any unpaid balance. Any decision must be distributed in writing to the project and billing files, the DA and the OFS.

### **1. Booking Payments**

See updated procedure in Appendix C.

### **2. Interest on Late Payments**

If invoices are paid late, interest on the amount unpaid on the due date will be charged as described above (see also Appendix C). This charge will be reflected on the next invoice. Decisions regarding waivers of interest will be made in consultation with division administrator, program manager and legal staff at the time of settlement and closeout of the project.

If parties refuse to pay interest, but pay the invoice, future invoices should continue to reflect the time period for which that interest was owed and the amount of that interest. Interest is not assessed on unpaid interest. At the time of final settlement and project closeout, any residual interest issues will be assessed on a site-specific basis.

### **3. Calculating Interest**

Interest calculations will start 30 or 60 days after the date the PLP received the invoice (see Section H) or as required in specific agreements (Appendix H). The payment due date for interest calculations for refused and unclaimed invoices will be calculated for the period beginning the 6<sup>th</sup> business day after mailing. Thus, FSU must track the date of mailing for the purposes of interest calculation on unclaimed and refused invoices.

### **4. Overpayments**

Overpayments and unresolved payments occasionally occur. They are reflected as credits on the next invoice. If an overpayment still exists at FYE, the overpayment will be booked as deferred revenue. When resolution occurs, it will be backed out of deferred revenue and booked to the appropriate account or refunded.

When funds are received, they will be credited to the appropriate PLP and deposited in EQPF (§ 75-10-704, MCA). Interest will be recorded separately, coded as 538006 and also deposited in EQPF. The open item would still be 1203- Accounts Receivable External (see Appendix I). The statute requires interest as well as reimbursements to be deposited in EQPF (§ 75-10-704(4)(a) and (6)(g), MCA).

Starting no later than August 1, 2007, when less than full payment is received, payment is applied to the

principle owed. Interest owed will be identified as a separate open item. At fiscal year end, FSU and OFS will age the accounts receivable and deferred revenue per MOMs 2-1700.

### **5. Overpayment of Overhead – Transition Years**

When program activity is ramping up or ramping down it is likely that there will be an overpayment or underpayment of overhead. The process for calculating overhead will not be changed.

When overpayment occurs, FSU will establish the overpayment amount after all the year end (December) charges have been posted. On prorated basis, a credit will be given to each PLP invoiced during the calendar year. This will most likely be reflected in the February invoices. It is expected that the ramp up may result in a second year of over-collections. If this occurs, again, a credit will be given at the end of the year. The process for establishing overhead will not be changed.

When underpayment occurs, the shortfall will be reflected as an increase in the next year's overhead rate. If a major site goes to completion during a ramp down, this procedure will be revisited to ensure no inequities occur as a result of the ramp down and the overhead process that is used.

### **J. COLLECTIONS of UNPAID INVOICES/ Identification of Outstanding Receivables and Follow-up Actions (i.e. dunning rendered) to be Taken for Outstanding Receivables.**

When a new receivable account is established and the PLP is noticed (75-10-711, MCA) and billed and the account is unpaid, the REM will do the following:

#### **1. Initial Follow-up**

FSU will maintain an ongoing spreadsheet of revenue collections in G:\REM\Financial Resources\xxx. Project officers will check the spreadsheet monthly and immediately report any overdue/unpaid invoices to the program manager. SRS will contact the PLP in writing and by phone to determine why the account is unpaid and will forward that information to FSU in the form of a copy of the phone log or correspondence received. See also Section G.9.

If the invoice is unpaid because of a PLP's questions about charges or process, SRS shall immediately schedule a meeting with the PLP to resolve the question and keep invoicing and payments on track.

If it is unlikely the PLP will reimburse department costs absent a court action, FSU will continue its active collection efforts by invoicing the PLP monthly and assessing interest charges and SRS will inform legal staff and the division administrator of the issue in question. After 6 consecutive invoices remain unpaid, FSU will revert to a passive reminder consisting of no less than quarterly invoicing with additional interest accruing.

The Division will not follow-up on unpaid invoices with phone calls every 15 days. The rationale for this is that these expenditures are generated on projects that last for years and collection must be predicated by court action. The frequency of contact has not been shown to be a factor in when a potentially liable party reimburses department costs. Those PLPs who do not reimburse the department promptly are typically waiting for a court determination regarding their liability. Such a determination is made when the department takes legal action.

#### **2. Action Thresholds**

When invoices are unpaid and are subject to penalty conditions in an Order, decree or agreement, the penalties and sanctions necessary to render dunning to the PLP shall be implemented utilizing the procedure under that agreement, order or decree). (Appendix E)

The SRS will refer invoices unpaid for more than one year and in the amount of \$100,000 or more for both principle and interest to Legal staff for collection. Based on evaluation of the circumstances, a

recommendation will be made to the division administrator, copied to the chief financial officer, on the need to proceed with litigation and will include the estimated financial impact. These referrals to collect from noticed PLPs will be prioritized (Appendix G) based on outstanding liability to the Environmental Quality Protection Fund (EQPF) and based on need to pursue cost recovery at sites for other reasons.

When SRS has referred sites to legal staff for other (non-cost-recovery) enforcement actions before the above thresholds are met, then cost recovery will be included in the legal action when it is practical.

Legal staff will notice PLPs about the need to reimburse department costs and will actively work with the PLPs attorney to achieve reimbursement. Should this process fail, Department legal staff will engage outside counsel, with concurrence from the AG's office, to seek cost recovery through litigation.

### **3. Settlement Agreements, Consent Decrees and Orders**

Settlement Agreements that include financial provisions must be reviewed by FSU as soon as the draft language is available to ensure timely input and to minimize the potential to inadvertently create new, complicated, financial management burdens for FSU, OFS and OIT. It is recognized that these documents may not be available until the end and that turn around times may be short. Such information is always confidential until after agreements, etc are signed.

When Settlement is reached or court action is ordered, REM Legal and SRS will notify FSU and OFS of the fiscal implications of the outcome as soon as it is known and will provide the information necessary to ensure any incoming funds are properly processed. REM Legal and SRS highlight any financial actions being triggered by these legal/program actions. FSU will forward a copy of the final agreement or order to the OFS for its files and update Appendix E.

### **4. Interest**

Interest may be waived as part of settlements. When this occurs, the program will write a memo to FSU and the Division administrator with a request that this debt be written off. The FSU and DA will forward the request to the OFS. OFS will then write off the open item pursuant to MOM 2-1100 or 2-1700

See also Appendix D for invoicing and interest related to multiple PLPs

### **5. EPP-Litigation Expenses**

Each biennium, as a part of the executive planning process, SRS and the FSU will recommend the need for a decision package for contracted services to fund litigation for cost recovery.

### **6. Third-Party Collections**

Typically, third-party-collection efforts will not be utilized because liability issues must first be resolved in court. The department's debt collections contract is used only when there is a clear responsibility to pay. If a PLP is delinquent with reimbursement under VCRA, the merits of going forward through the debt collections contract will be evaluated. Routinely there is a 30% charge and if this is necessary, the cost of this service may increase to 50% or more of the amount we seek to recover.

### **7. No Further Action**

No Further Action (NFA) letters and Delisting will not occur at those sites with outstanding debt when there is statutory or regulatory authority.

## **K. FINAL INVOICING**

When remedial action is complete and operating and maintenance costs for a site have been accounted

for and institutional controls have been put in place with any associated long-term funding, and the site is delisted, the program manager notifies the FSU that a final invoice needs to be sent to the PLP. The FSU will notify staff not to use the org and will change task profiles as appropriate and necessary. FSU will then make sure all charges have been posted. Once all charges have been posted, FSU shall close the org to further charges. At this point, FSU needs to charge the time to prepare the invoice to core (453701).

**L. WRITING OFF ACCOUNTS**

Funds may be determined to be uncollected as a result of settlement negotiations, when site lead is transferred to another agency and the amount owed is minimal, when it is determined that the PLP has no resources, when the cost to collect exceeds the amount owed or other applicable situations are encountered. When these situations are encountered, the program will prepare a memo to the FSU and division administrator, copied to legal staff, recommending the amount owed be determined uncollectible, providing supporting rationale and requesting the amount to be written off pursuant to MOM 2-1100. With the concurrence of the DA, the FSU will forward the request to the OFS for action.

Pursuant to MOM 2-1180.00, FSU will implement OFS recommendations regarding the recording of uncollectible accounts. In addition, monthly Budget Status Reports (BSRs) will capture this information in the format recommended by OFS.

Funds to be written off, pursuant to court or settlement agreements are to be recorded in accordance with OFS procedure after consultation with legal staff. Copies of these actions will be retained in program files.

**L. FISCAL YEAR END REVIEW/ REVIEW OF THIS PROCEDURE**

REM in consultation with OFS must review this procedure biennially to determine whether any updates are needed. In addition the following actions are needed annually:

- Deferred Revenue should be recorded in accordance with MOM 2-1150.00 and 2-8140.00.
- Update List of sites not billed (Appendix A).
- Update other lists in appendices
- Update procedure based on any changes in statute during the previous legislative session
- Update policy and procedure in response to audit needs.
- After the FYE, FSU and OFS will download SABHRS “journal line detail” for the FYE for the EQPF fund for future retrieval purposes. This will ensure access to future archived reports.
- Identify additional follow-up actions

**M. REFERENCES**

MOM 2-0110.10 -- Record interest revenue separately from cost recovery revenue

MOM 2-1150.00 -- Deferred revenue

MOM 2-1180.00 -- Allowance for uncollectible accounts

MOM 2-1190.00 -- Collection of receivables  
MOM 2-8140.00 -- Revenue recognition

Rule 6(e), Montana Rules of Civil Procedure  
Rule 6(e) Federal Rules of Civil Procedure

DEQ FYE Policy 2.8.5  
25-9-205, MCA [Interest Rates]

75-10-701, *et seq*, MCA Comprehensive Environmental Cleanup and Responsibility Act (CERCA)  
75-10-704(9), MCA  
75-10-711, MCA – [Notice to PLPs]  
75-10-722, MCA - Payment of state costs and penalties.  
75-10-742, *et seq*, MCA, Controlled Allocation of Liability Act (CALA)

The following legislation has guided the current statutory language cited above:

2001 - SB378 – 75-10-722, MCA – Payment of State Costs and Penalties  
2003 – SB103 (loan to HWC and EQPF)  
2005 – SB143 (loan to HWC and EQPF)  
2007 – HB 116 (eliminated loan repayment provisions; added RIGWA funding)

This updated procedure has been adopted subsequent to consultation with the Director's Office and OFS, to be implemented March 1, 2008.

---

Sandra Olsen, Administrator  
Remediation Division

---

Date

Copy: OFS: Dean Rude, Linda Atkins, Terry Lazure, David Hamer  
HWSCB/SRS: Mike Trombetta, Denise Martin  
FSU: Virginia Wooley, Mary Talley, Catherine Redfern  
Legal: John North, Bill Kirley, Cindy Brooks, Katherine Hasque-Hausrath; Kirsten Bowers



**APPENDICES**

Appendix A – Culbertson/Doig/Anthony Spreadsheet referenced on page 2

Appendix B - DEQ. 2007. EQPF Calculation for Overhead Rate – see page 3  
Updated Overhead Calculation procedures (Appendix B) were been submitted to OFS in December 2006 and approved for implementation January 2007.

Appendix C - DEQ 2001 Guide to Cost Recovery Billing. TO BE UPDATED WITH NEW OVERHEAD RATE PROCEDURE during CY 2008 – page 3

Appendix D – Multiple PLPs and FSU/SRS Checklist – page 3

Appendix E – List of original Orders, decrees and settlements forwarded to OFS pursuant the department’s record management procedures (Copies are maintained in REM) – page 4. This is a website link.

Appendix F – Required Quarterly Invoicing

- F1....DOD MOU
- F2... USFS/New World MOU
- F3...USFS/Snowshoe

Appendix G – Prioritized Cost Recovery List of “Further Legal Action Pending”

Appendix H - DEQ. 2008. List of Sites Identifying Applicable Payment Cycle (30 days or 60 days or agreement-specific) TO BE PREPARED – page 5

Appendix I - KAREN TO PREPARE – Example or procedures for accounts receivable open items  
With Email to Julie Feldman from David Hamer May24,2007 and response.

## APPENDIX A – Link to Culbertson/Doig/Anthony Spreadsheet

G:\REM\FinancialResources\CostRcvry\Spfnd\EQPF Worksheets\EQPF\_08.xls

## APPENDIX B – EQPF Calculation for Overhead Rates

G:\  
\\DEQMETCLSTR3\MIRRORTEST\DEQCLUSTER\_UNITSHR\REM\FinancialResources\CostRcvry\Spfnd\Rem  
 ediation Div Overhead Rate\2008 Calendar Year\Calculations\20080110 Overhead Calculation No PYE.xls

## APPENDIX C - 2001 Guide to Cost Recovery Billing

http://G:\REM\FinancialResources\CostRcry\Spfnd\Invoicing Procedures

The file names are:

GUIDE\_TO\_CR BILLING.doc  
 Examples A-B-E.doc  
 Examples D-F-G-H.xls

## APPENDIX D – Multiple Parties and FSU and SRS Checklists for Invoice Review

### INVOICING AND INTEREST FOR MULTIPLE PARTIES:

When multiple PLPs and org units exist for a site (and possibly multiple settlement agreements and consent decrees), the following procedures apply:

The org units are in place to track costs and prepare cost recovery invoices. All costs in these all org units are collectively and cumulatively, facility-wide costs.

When costs are incurred, they are allocated to the individual org units as follows:

1. For personnel and other direct costs (contracted services) for something related to only one PLP but not all, those costs are charged directly to the org unit utilized for tracking the PLP-site-specific costs. An example would be DEQ's contracted services cost of reviewing the BNSF ozonation system report at KRY.
2. For personnel and other direct costs that are incurred that apply to the Site as a whole, or are otherwise related to the site comprehensively, the costs are split evenly between the two org units.

These costs are cost recovered as follows:

1. All liable parties with ongoing financial obligations are invoiced in total for incurred costs in all org units and are invoiced as such.
2. Where specific allocations have been negotiated and recorded in settlement agreements and consent decrees, each PLP shall receive a cover sheet summarizing their responsibility for the total bill as modified by the agreement.

In the case of the KRY site, the settlement agreements with Exxon, Klingler Lumber, Montana Mokko, and KPT Company do not provide for ongoing payment of bills but the agreements, as well as those with Swank and DNRC, provide other rights to the department for access, site use and/or other purposes. Exxon and Klingler Lumber are to be removed as recipients of the cost recovery invoices as their settlement agreements are final. If the Court

approves the agreements with Klingler Lumber and Montana Mokko, they will need to be removed as recipients of the cost recovery invoices.

Cost recovery is conducted in accordance with the department's CECRA Cost Recovery Procedures. Interest and penalties are accrued on unpaid invoices in accordance with cost recovery procedures as modified by the terms of specific agreements. Typically the agreements address only interest on past costs and stipulated penalties for future unpaid costs. Interest to an individual PLP would be assessed only against the portion the PLP owes, not against the whole.

## FSU CHECKLIST

### EQPF COST RECOVERY INVOICE REVIEW

#### FISCAL SERVICES UNIT

Invoices are reviewed for the following items prior to being taken to the SRS Section Supervisor for final review and approval:

- Verify that the Org Unit Number listed matches the Site Name and the attached SABHRS 106 Report.
- Verify that the costs entered for costs incurred matches the total from the SABHRS 106 Report(s).
- Verify the math calculations throughout the invoice.
- Verify that the Open Item Number and Invoice Numbers are correct throughout the invoice.
- Verify that the Account Codes are correct and that all amounts entered match the detail from the upper portion of the invoice.
- Check that the billing period listed on the invoice is correct.
- Review the Interest Calculation if there is one. Be sure the amount transferred to the invoice matches the calculation.
- Check the Program Year and Budget Year as entered. Accruals and PYE payments can mean that multiple lines are needed.
- Enter information into Excel spreadsheet while reviewing the invoice so the SRS Section Supervisor will be able to refer to it for questions.





W-5

**SRS CHECKLIST**

- (1) that the SABHRS report appear to be valid for the org,
- (2) that certain staff worked on the site,
- (3) that invoices are going to the correct people (i.e. changes in company project people, etc.),
- (4) that interest has been appropriately included, and
- (5) that appropriate supporting documentation is included (copies of cover pages for any consulting invoices, etc)
- (6) that the payment due date is correct, based on statute or legally binding documents / agreements.

**APPENDIX E - Website link to List of Orders, Decrees and Settlements**

Denise

**APPENDIX F – Agreements That Require Quarterly Billing**

TO DO: VIRGINIA Insert electronic links

F1....DOD MOU

F2... USFS/New World MOU

F3...USFS/Snowshoe

**APPENDIX G – Prioritized List of Cost Recovery Actions**

See Program Manager and Senior CECRA Legal Counsel. (DENISE TO SHARE HARD COPY)

**APPENDIX H – Site Specific Payment Cycles**

MARY TO PREPARE – page 5

**APPENDIX I – Example**

KAREN TO PREPARE

**NOT PART OF POLICY:****FOLLOW-UP ACTIONS**

1. **Save this document to G or H drive**
2. Revise Delisting rules in May 2009 (CHECK DATE) to make No Further Action (NFA) letters and Delisting at those sites with outstanding debt dependent on full payment of outstanding invoices.
3. Pursue statutory change to require 30-day payment
4. When OFS develops a leave pool, these invoices will also include leave pool billing. That procedure will be appended when it is developed.

**Ongoing NEEDS**

Investigate with IT how to prep invoice form on a PDF file or a word file with an embedded Excel field and still get labels easily. See also DP1001.

I:\REM\2007CECRAInvoice&Interest.rtf