

**THE REGULATIONS GOVERNING  
SOIL DISPLACEMENT AND  
DISPOSAL IN THE EAST HELENA  
SUPERFUND AREA IN LEWIS AND  
CLARK COUNTY, MONTANA.**

**2024**

**Lewis and Clark Public Health**

Lead Education and Assistance Program  
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## **1.1 TITLE**

These regulations will be known and cited as: THE REGULATIONS GOVERNING SOIL DISPLACEMENT AND DISPOSAL IN THE EAST HELENA SUPERFUND AREA IN LEWIS AND CLARK COUNTY, MONTANA.

## **1.2 AUTHORITY**

The Lewis and Clark City-County Board of Health promulgates these regulations under the authority of Section 50-2-116(2) (c) (v), Montana Code Annotated (MCA).

## **1.3 FINDINGS**

The Lewis and Clark City-County Board of Health finds that:

- (1) The United States Environmental Protection Agency (EPA) has identified and designated the City of East Helena and the surrounding area as a Superfund site and in 1984 placed the site on the EPA's National Priorities List for clean-up and remediation under the Comprehensive Environmental Response, Compensation, and Liability Act); and
- (2) The East Helena Superfund Site, Operable Unit No. 2, Residential Soils and Undeveloped Lands: Final Record of Decision (ROD), September 2009, identifies institutional controls that have been selected and approved by the EPA; and
- (3) The lead smelter, formerly owned by ASARCO, was the primary source of lead and arsenic soil contamination; and
- (4) East Helena and the surrounding area, as shown on the Administrative Boundary map attached to these regulations as Attachment A, contains lead and arsenic contaminated soils; and
- (5) Regulation of soil displacement within the Administrative Boundary is necessary to prevent lead and arsenic contamination of uncontaminated areas, prevent recontamination of remediated areas, and prevent potential health risks to humans; and
- (6) These regulations are necessary to protect public health and to control environmental lead and arsenic contamination within the Administrative Boundary.

## 1.4 DEFINITIONS

**ADMINISTRATIVE BOUNDARY** means the boundary area identified in Attachment A.

**BOARD** means the Lewis and Clark City-County Board of Health.

**CLEANED UP** means a property has been remediated to acceptable levels of contamination using EPA approved remediation methods which may be either in-situ treatments, such as deep tilling, or removal and replacement of contaminated soils.

**COMMERCIAL PROPERTY OR SITES** means property or sites having profit as a chief aim, excluding daycares, schools, and agricultural property.

**CONTAMINATED SOIL** means soil containing lead and/or arsenic in excess of background concentrations, identified in the “Remedial Investigation of Soils, Vegetation and Livestock for East Helena Site (Asarco), East Helena, MT”; EPA Work Assignment No. 68-8L30.0 May 1987.

**CUBIC YARD** means a volume of soil equal to a cube one yard long on each side, which is approximately the size of an average desk or washing machine.

**ENVIRONMENTAL SERVICES DIVISION** means a component of Lewis and Clark Public Health.

**EPA** means the United States Environmental Protection Agency.

**ESD** means the 2024 Explanation of Significant Difference which modified the 2009 EPA Record of Decision for the East Helena Superfund Site Operable Unit 2 by changing the residential soil-lead cleanup level to 400 mg/kg.

**LEAP** means the Lead Education and Assistance Program of the Environmental Services Division of Lewis and Clark Public Health.

**LETTER OF EXEMPTION** means a letter sent to property owners whose property does not have lead concentrations above 400 mg/kg, which releases the owner from having to obtain a soils displacement permit when disturbing more than 1 cubic yard of soil.

**MG/KG** means milligram per kilogram and is approximately equivalent to parts per million (ppm).

**QUALIFIED RESIDENTIAL YARD** means a yard that was in existence prior to the release of the EPA's current CERCLA remedy decision (until if/when any future decision, further updating the cleanup for the Site is issued) with lead concentrations at or above 400 mg/kg, or an arsenic average concentration at or above 100 mg/kg .

**PERMIT** means the written authorization from the Lead Education and Assistance Program to disturb soil within the Administrative Boundary.

**PERSON** means any individual, corporation, company, association, society, firm, partnership, Joint Stock Company or any branch of state, federal or local government; or any other entity that owns rents, or leases property subject to this regulation.

**PROJECT** means a plan or proposal resulting in or requiring the displacement of more than one cubic yard of soil.

**RCRA** means the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901, et seq.

**RELOCATION** means the movement of any volume of soil from one location to another location.

**REPOSITORY** means an EPA-approved location for the disposition of contaminated soils.

**REPRESENTATIVE** means a person that is authorized to act as an official delegate or agent for another person.

**RESIDENTIAL YARD** means an area of land immediately adjacent to a house.

**ROD** means the 2009 EPA Record of Decision for the East Helena Superfund Site Operable Unit 2.

**SOIL DISPLACEMENT** means the relocation of one cubic yard or more of soil. Soil displacement does not include tilling if no excess soil is removed from the area.

**SOIL SAMPLING** means the collection and analysis of surface soil samples taken either as part of the Superfund clean-up action or taken in response to meeting conditions of this permit process.

**TILLING** means to prepare land for the raising of crops as by plowing or harrowing, or to cultivate or dig with a rototiller.

**UNDEVELOPED LANDS** means an area of land that lacks infrastructure, services and buildings.

## **1.5 SCOPE**

- (1) These regulations apply only to parcels of land lying within the Administrative Boundary of Lewis and Clark County.

- (2) These regulations apply to all persons engaging in soil displacement in excess of one cubic yard within the Administrative Boundary exclusive of tilling when no soil is removed from the parcel.
- (3) These regulations apply to all land use types, including but not limited to residential, commercial, recreational, right-of-ways, and industrial.
- (4) These regulations do not apply to parcels where the undisturbed native, average soil lead levels are less than 400 mg/kg or to properties in which soils have been cleaned to less than 400 mg/kg spatially and in depth.
- (5) In accordance with Section 9621(e) of Title 42 of the United States Code, nothing contained in this section or these regulations shall require or be construed to require the obtaining of a permit by any agency, employee, or contractor of the United States, the State, or the Montana Environmental Custodial Trust (MECT) for activities conducted entirely within the Administrative Boundary and carried out in compliance with the provisions of the Comprehensive Environmental
- (6) These regulations do not apply to sampled properties where lead concentrations are below 400 mg/kg and the average arsenic concentration is less than 100 mg/kg.

## **SECTION 2.0 PERMIT PROCEDURES AND REQUIREMENTS**

### **2.1 PROHIBITED ACTIVITY**

No person shall displace soil within the Administrative Boundary without first complying with the permit procedures and requirements as provided in this section.

### **2.2 APPLICATION PROCESS FOR PERMIT**

- (1) Application for a permit to displace soil within the Administrative Boundary is made by completing a permit application available at the LEAP office, Room 201, East Helena City Hall, 306 East Main Street, East Helena, MT 59635 or online at [LewisAndClarkHealth.org](http://LewisAndClarkHealth.org).
- (2) The applicant must submit all information required by these regulations before the LEAP staff must begin review of the application.
- (3) The applicant is required to submit information including, but not limited to:
  - a. Name and address of property owner
  - b. Name and address of applicant, if different than the property owner.

- c. Address and legal description of location of proposed activity
  - d. Description of the proposed activity
  - e. Depth of any proposed excavation
  - f. Volume of soil to be excavated or displaced
  - g. Describe proposed method for controlling contaminated dust.
  - h. Describe proposed method for handling contaminated soil.
  - i. Location of final disposal site.
  - j. Source of replacement soil.
  - k. Name of contractor or other representative, if applicable.
- (4) Upon receipt of a complete application, LEAP staff must schedule an appointment within 5 working days to finalize the project plan. During the appointment, LEAP staff will develop a project timeline with the applicant or his/her representative. The project timeline will include:
- a. Start date
  - b. Proposed end date
  - c. Proposed date and time of final inspection
- (5) Prior to permit approval, LEAP must review existing soil sampling and clean-up information for the site, if any exists.
- (6) For undeveloped lands that have no sampling records, the applicant will refer to the current Soil Sampling Quality Assurance Project Plan and may contact the EPA for additional information.
- (7) The person doing the work must complete training for certification as described in Section 3.
- (8) Upon applicant's compliance with the requirements of this Section, LEAP must issue a permit in writing and the applicant or his/her representative must comply with the terms of the permit.
- (9) Permits are valid for 2 years after date of issue. If work is not completed within 2 years, a new permit must be obtained.
- (10) All permits issued by LEAP must be in compliance with the conditions set forth in the 2009 Record of Decision and must meet the clean-up criteria for the land use identified in Table 2.2.
- (11) Emergency actions may be conducted by an applicant or their representative without a permit. The emergency action taken must be reported to LEAP as soon as possible and by the next business day at the latest. Emergencies may include water or sewer line leaks, natural gas line leaks, hazardous waste spills and other urgent events.

## **2.3 INSPECTIONS**

- (1) Upon completion of the project, the applicant or the applicant's representative must notify the LEAP staff that the project is ready for a final inspection to determine compliance with these regulations.
- (2) Upon notification of project completion, LEAP will perform a final site inspection within 5 working days.
- (3) The final inspection LEAP staff will:
  - a. verify that work was conducted within the area described on the permit; and
  - b. verify that excess soils generated by the project are properly capped or have been removed to an approved repository; and
  - c. photograph the project site to document that the permit requirements were met; and
  - d. verify that the work has been completed in compliance with the permit requirements by signing and dating the permit.
- (4) Upon final inspection and approval of the project, LEAP staff must file the permit and documentation of project completion in the LEAP office. Summary information must be entered into the Soils Database by LEAP and will become part of the permanent site record. The permit will be the official record of compliance with the 2009 ROD and will be maintained on file for public review.

## **2.4 PERMIT FEES**

No fees will be charged either to obtain a permit or to participate in the training or certification program held by the Lead Education and Assistance Program (LEAP) of the Lewis and Clark Public Health.

## **2.5 CONTROL OF EXCESS SOIL DISPOSAL AND REPLACEMENT SOIL STANDARDS**

- (1) All excess soils removed from any property within the Administrative Boundary that is determined by LEAP to be contaminated must be transported by the applicant or the applicant's representative to one of the EPA approved repositories identified on the permit.
- (2) Excess soil from residential areas may be reused only on the property of origin if

applicant demonstrates that lead concentrations are less than 400 milligrams per kilogram (mg/kg) and arsenic levels are below 100 mg/kg. Non-residential properties may reuse excess soil on the property of origin if clean-up criteria listed in Table 2.2 can be met.

- (3) Soil brought in for replacement or backfill will meet the replacement requirements listed in Table 2-1. Source of soil must be approved by LEAP prior to use.

TABLE 2-1 REPLACEMENT SOIL REQUIREMENTS

Parameter	Requirements
Lead	≤ 50 mg/kg
Arsenic	≤45 mg/kg

**2.6 CLEAN-UP ACTION LEVEL**

- (1) Soils from qualified residential yards and vacant lots meet the threshold and qualify for cleanup under the CERCLA statute (until a possible future CERCLA decision document is issued by EPA, at which point, these levels could be updated) if the yard is found to have:
  - a. A soil lead concentration greater than 400 milligrams/kilogram (mg/kg); or
  - b. An average yard arsenic concentration of greater than 100 mg/kg
- (2) Clean-up criteria for all land uses are listed in Table 2-2

Table 2-2 East Helena Superfund Site Operable Unit 2 Clean-up Criteria

Land Use	Frequency of use	Clean-up Criteria	
		Lead	Arsenic
Existing Residential and Public Use	Frequent or daily	Yard average greater than 400 mg/kg	Yard average greater than 100 mg/kg
Proposed Residential and Public Use	Frequent or daily	Greater than 400 mg/kg	Greater than 100 mg/kg
Roads, Alleys, and Railroad Rights-of-Way (ROWs)	Adjacent to occupied residential or public use	Greater than 400 mg/kg	Greater than 100 mg/kg
	Adjacent to Recreational or Industrial/Commercial	See Land Use	See Land Use



Drainages, Floodplains, and Irrigation Ditches	Adjacent to occupied residential or public use	Greater than 400 mg/kg	Greater than 100 mg/kg
	Adjacent to Recreational or Industrial/Commercial	See Land Use	See Land Use
Recreational Land	Infrequent	Greater than 3,245 mg/kg	Greater than 794 mg/kg
Industrial and or Commercial	Frequent or daily	Greater than 1,482 mg/kg	Greater than 572 mg/kg
Agricultural and/or Undeveloped Land	Infrequent	Greater than 3,245 mg/kg	Greater than 794 mg/kg
	Frequent or Actively Managed	Greater than 1,482 mg/kg	Greater than 572 mg/kg

Note: mg/kg = parts per million = milligrams per kilogram (mg/kg)

## **SECTION 3.0 CERTIFICATION PROGRAM**

### **3.1 CERTIFICATION**

- (1) Certification means that a person has demonstrated knowledge of these regulations and is able to undertake projects in compliance with these regulations.
- (2) Certification is free.
- (3) Applicants, applicant's representatives, contractors, construction workers, and property owners may obtain certification from LEAP. Certification is a privilege extended to an applicant, contractor, construction worker, and property owner, and is not a right.
- (4) Application for certification must be in writing and must contain the name, address, and phone number of the individual and other information deemed necessary by LEAP.
- (5) To become certified, an individual must attend and satisfactorily complete the LEAP's certification program:
  - (a) Training will be provided by LEAP on an appointment basis, as needed.
  - (b) Training includes, but is not limited to the following topics:
    - Reducing or eliminating exposure to lead from soil during excavation.
    - Information about personal protective clothing.
    - Requirements for covering loads of soils prior to hauling to reduce blowing dust.

- Methods and best management practices for dust control at construction sites.
  - Proper cleaning of equipment before leaving a construction site.
  - Acceptable disposal or reuse of excess soils.
- (6) Certification will depend upon completion of training.
  - (7) Certification is valid for two years.
  - (8) Certification is a prerequisite for any excavation of soil in excess of one cubic yard for properties that have lead concentrations above 400 mg/kg or have not been sampled.
  - (9) Any person may attend training and become certified.

## **SECTION 4.0 VIOLATIONS AND ENFORCEMENT**

### **4.1 VIOLATIONS**

- (1) Failure to have a permit.
- (2) Failure to post the permit at the site.
- (3) Failure to comply with the permit requirements.
- (4) Failure to allow access by Health Department representatives will invalidate the permit and/or other written record of compliance with these regulations which are necessary to document that all work was completed in compliance with the 2009 ROD.

### **4.2 PENALTIES FOR VIOLATIONS**

Violations of any of the provisions of these regulations are a misdemeanor and are punishable as provided for in Section 50-2-124, Montana Code Annotated.

### **4.3 INJUNCTIONS**

The County Attorney may commence an action to restrain and enjoin acts in violation of these regulations. Violation of any such injunction is subject to punishment by the issuing court.

## **SECTION 5.0 ACCESS, APPEAL AND SEVERABILITY**

### **5.1 ACCESS RIGHTS**

- (1) Health Department representatives are authorized and directed to make such inspections as are necessary to determine compliance with these regulations.
- (2) It is the responsibility of the owner, occupant, or contractor of a property to give Health Department representatives free access to the property at reasonable times for the purpose of making such inspections as are necessary for determining compliance with these regulations.
- (3) No person may interfere with representatives of the Health Department in the discharge of their duty.

### **5.2 APPEAL**

- (1) If a permit is denied or the department determines the permit requirements have not been met, the applicant or his/her representative may appeal the denial to the Board.
- (2) A written request for an appeal must be submitted to the Environmental Services Division Administrator at least 10 days prior to the next regularly scheduled board meeting or the appeal hearing. The request must include:
  - (a) A description of the proposed activity
  - (b) The boundaries and location of the proposed activity; and
  - (c) A summary of the reason for the appeal
- (3) Board Chair, in consultation with the Environmental Services Division Administrator and the Health Officer will determine whether the appeal will be heard by the Board or its designated hearing officer.
- (4) The Board or its designated hearing officer will hear the applicant's appeal and the permit requirements at a regularly scheduled board meeting or a specially scheduled appeal hearing, whichever occurs first.

- (5) The Board or its designated hearing officer must provide a decision in writing to the property owner or his/her representative within 10 working days after the hearing.
- (6) Decisions of the Board or the designated hearing officer may be appealed to District Court.

### **5.3 SEVERABILITY**

In the event that any section, subsection, or other portion of these regulations is for any reason held invalid or unconstitutional, such section, subsection, or portion will be considered a separate provision of these regulations and such holding will not affect the validity of the remaining portions of these regulations which will remain in full force and effect.

## **SECTION 6.0. REVISION, REPEALER AND EFFECTIVE DATE**

### **6.1 REVISION**

Revisions to these regulations may be made by the Board as needed to ensure proper administration and to allow for improved mitigation measures or procedures for protecting the previously conducted clean-up activities. The Board must hold a public hearing before any revision to these regulations.

### **6.2 REPEALER**

All previous rules, regulations, resolutions and ordinances as adopted by the Lewis and Clark City-County Board of Health governing soil disturbances within the Administrative Boundary are hereby repealed.

### **6.3 EFFECTIVE DATE**

These regulations must be in full force and effect

on the 1st day of August, 2020.

These regulations will be reviewed and evaluated by the Lewis and Clark City-County Board of Health at least two years from the effective date, and every two years thereafter.

Lewis and Clark City-County Board of Health



7/29/2024

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Brie MacLaurin, Chair  
Lewis and Clark City-County Board of Health

Date

*Drenda Niemann*

7/30/2024

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Drenda Niemann, Health Officer  
Lewis and Clark Public Health

Date